IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. : 09-15230

SOUTH FORK BAND COUNCIL OF WESTERN SHOSHONE OF NEVADA,
TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS OF NEVADA,
TIMBISHA SHOSHONE TRIBE,
WESTERN SHOSHONE DEFENSE PROJECT,
GREAT BASIN RESOURCE WATCH,

Appellants,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,

Appellees,

AND

BARRICK CORTEZ, INC.,

Defendant-Intervenor-Appellees,

APPELLANTS' REPLY BRIEF

Roger Flynn
Jeffrey C. Parsons
WESTERN MINING ACTION PROJECT
P.O. Box 349
440 Main Street, #2
Lyons, CO 80540
Phone (303) 823-5738
Fax (303) 823-5732
wmap@igc.org

Counsel for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES v

STANDARDS FOR PRELIMINARY RELIEF 1

I. THE TRIBES ARE LIKELY TO SUCCEED ON THE MERITS 2

A. BLM Violated the Federal Land Policy and Management Act (FLPMA) 2

1. BLM's Erroneous Interpretation of Its Duty to Prevent Undue Degradation 2

2. BLM's Inconsistent and Contradictory Interpretation of FLPMA Does Not Deserve Deference 6

3. BLM Failed to Prevent UUD to the Mt. Tenabo Sacred Site 9

4. The Dewatering of Mt. Tenabo Causes UUD 18

5. *Undue Degradation of Scenic Resources* 21

B. BLM Violated the National Environmental Policy Act (NEPA) .. 22

1. Failure to Analyze All Air Emissions 22

a. Failure to analyze baseline levels and $PM_{2.5}$ emissions 22

b. Failure to analyze impacts from off-site processing and transportation of refractory ore 25

2. Lack of Mitigation Analysis 26

II. THE PROJECT CAUSES IMMEDIATE AND IRREPARABLE HARM 29

III. BARRICK'S RUSH TO BEGIN CONSTRUCTION DOES NOT OVERRIDE THE NEED FOR AN INJUNCTION............. 30

CONCLUSION... 32

TABLE OF AUTHORITIES

Federal Caselaw

American Trucking Assns. v. City of Los Angeles,
2009 WL 723993 (9th Cir. 2009) 1, 2, 6

Atchinson v. Wichita Board of Trade,
412 U.S. 800 (1973) 8

Camp v. Pitts,
411 U.S. 138 (1973) 23

Earth Island Institute v. U.S. Forest Service,
442 F. 3d 1147 (9th Cir. 2006).. 6, 23

Garcia v. Lawn,
805 F.2d 1400 (9th Cir. 1986) 32

Great Basin Mine Watch v. Hankins,
456 F.3d 955 (9th Cir. 2006)... 25

Greater Yellowstone Coalition v. Timchak,
2009 WL 971474 (9th Cir. 2009) 1, 30

Greater Yellowstone Coalition v. Timchak,
2008 WL 5101754 (D. Idaho 2008) 31

High Sierra Hikers v. Blackwell,
390 F.3d 630 (9th Cir. 2004) 9

High Sierra Hikers v. Weingardt,
521 F.Supp. 2d 1065 (N.D. Cal. 2007) 28

Idaho Sporting Congress v. Thomas,
137 F.3d 1146 (9th Cir. 1998)... 23, 27

Jones v. SEC,
298 U.S. 1 (1936) 32

Kern v. BLM,
284 F.3d 1062 (9th Cir. 2002) 19, 25

Kootenai Tribe v. Veneman,
313 F.3d 1094 (9th Cir. 2002).. 14

Mineral Policy Center v. Norton,
292 F.Supp.2d 30 (D.D.C. 2003).. 3, 4

Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto Ins. Co.,
463 U.S. 29 (1983) 18

Mount Royal Joint Venture v. Kempthorne,
477 F.3d 745 (D. C. Cir. 2007) 9

Mt. Graham Red Squirrel v. Madigan,
954 F.2d 1441 (9th Cir. 1992) 8

Nat'l Parks & Conservation Ass'n v. Babbitt,
241 F.3d 722 (9th Cir.2001) 23, 28

Neighbors of Cuddy Mountain v. U.S. Forest Service,
137 F.3d 1372 (9th Cir. 1998) 28

Norfolk Southern Railway Company v. Shanklin,
529 U.S. 344 (2000) 8

Okanogan Highlands Alliance v. Williams,
236 F.3d 468 (9th Cir. 2000) 27, 28

People of Saipan v. U.S. Dept. of Interior,
502 F.2d 90 (9th Cir. 1974).. 32

People of State of Cal. v. F.C.C.,
905 F.2d 1217 (9th Cir. 1990) 18

Porter v. Lee,
328 U.S. 246 (1946) 32

Portland Audubon Society v. Lujan,
795 F. Supp. 1489 (D. Or. 1992),
aff'd, PAS v. Babbitt, 998 F.2d 705 (9th Cir. 1993) 30

Robertson v. Methow Valley Citizens Council,
490 U.S. 332 (1989) 23, 27, 28

Rocky Mountain Oil and Gas Ass'n. v. Watt,
696 F.2d 734 (10th Cir. 1982) 3

San Luis Obispo Mothers for Peace v. NRC,
449 F.3d 1016 (9th Cir. 2006) 10

Save Our Sonoran, Inc. v. Flowers,
408 F.3d 1113 (9th Cir. 2005) 30

Securities and Exchange Commission v. Chenery Corp.,
318 U.S. 80 (1943) 6

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 8

Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers,
472 F.3d 1097 (9th Cir. 2006) 30

Te-Moak Tribe et al v. Dept. of Interior,
No. 07-16336 (9th Cir. decision pending) 17

U.S. v. Mead,
533 U.S. 218 (2001) 8

Winter v. NRDC,
129 S.Ct. 365, ___ U.S. ____ (2008) 1

Wyoming Sawmills, Inc. v. U.S. Forest Service,
383 F.3d 1241 (10th Cir. 2004) 17

Federal Statutes

Federal Land Policy Management Act of 1976 (“FLPMA”),
43 U.S.C. § 1701 *et seq.* .... *passim*

National Environmental Policy Act (“NEPA”),
42 U.S.C. §§ 4321 *et seq.* .... *passim*

Religious Freedom Restoration Act,
42 U.S.C. §§ 2000bb - 2000bb-4 (“RFRA”) 14

43 U.S.C. § 1732(b) (“UUD” standard).. *passim*

Federal Regulatory Material

40 C.F.R. § 1502.24 23

43 C.F.R. § 3809.420(a)(4) 6, 17, 20

Executive Order 13007, “Indian Sacred Sites”
61 Fed. Reg. 26771 (May 29, 1996) 14, 17

70 Fed. Reg. 65984, 65992 (Nov. 1, 2005) 23, 24

72 Fed. Reg. 20586 (April 25, 2007) 24

Appellants, South Fork Band Council of Western Shoshone of Nevada, et al. (the "Tribes"), submit this consolidated reply to the response briefs filed by the Bureau of Land Management ("BLM") and Barrick/Cortez ("Barrick").

STANDARDS FOR PRELIMINARY RELIEF

Regarding the "sliding scale" for preliminary relief, the recent Winter v. NRDC decision did not overturn the accepted rule that, when faced with certain irreparable harm and a likelihood of success on the merits, the other factors regarding preliminary relief may be weighed less. Opening Br. 14. The Ninth Circuit recently rejected a mining company's and BLM's argument that Winter eliminated the sliding scale which "this Court has consistently applied." Greater Yellowstone Coalition v. Timchak, 2009 WL971474, at *1 (9th Cir. 2009). This Court applied the sliding scale in issuing a stay of an expansion of a large mining operation on public land based on "serious questions" regarding the merits and the district court's limited consideration of irreparable harm to the environment. Id. at 4.

"Winter did not reject the sliding scale approach we employ in the alternative." Id at *1, n.1 (citing dissent in Winter which stated: "This Court has never rejected that formulation, and I do not believe it does so today." Winter, 129 S.Ct. 365, 392 (2008)). Timchak noted that Winter involved the situation where irreparable harm was only a "possibility" – a far cry from the certain, permanent, and immediate harm from the Cortez Hills Project. The decision in American Trucking Assns. v. City of Los Angeles,

2009 WL723993, at *4-5 (9th Cir. 2009), did not eliminate the sliding scale. Barrick 23. Rather, like Winter, American Trucking simply noted that the mere "possibility" of irreparable harm was not sufficient to obtain preliminary relief.

I. THE TRIBES ARE LIKELY TO SUCCEED ON THE MERITS

A. BLM Violated the Federal Land Policy and Management Act (FLPMA)

1. BLM's Erroneous Interpretation of Its Duty to Prevent Undue Degradation

BLM asserts that the Tribes are arguing that FLPMA "converts the procedural requirements of the NHPA [National Historic Preservation Act] into a substantive obligation to protect all historic properties." BLM 22. BLM also argues that, under the Tribes' view of FLPMA, BLM must "prohibit all mining that might conflict with religious practices." BLM 24, 19.

However, the Tribes have never argued that BLM must prevent all impairment from mining or that an individual's religious beliefs always override mining interests. Rather, in **this** specific location, due to **this** Project's extreme damage to public lands and waters, and the irreplaceable cultural, religious, and environmental values that will be either eliminated or destroyed, a proper application of BLM's duty to "prevent unnecessary or undue degradation" ("UUD") warranted denial of Barrick's mine plan. This does not mean that other, less destructive mines, would cause UUD.

BLM cannot avoid the agency's and the district court's erroneous position that the UUD standard is largely a "temporary" restraint on mining while BLM conducted its purely-procedural reviews. Opening Br. 25-26. BLM even highlights the district court's

reliance on BLM's procedural "evaluation" of the impacts to the Mt. Tenabo Sacred Site as satisfying the UUD standard. BLM 23.

BLM also argues that the UUD standard is merely one that implements BLM's "multiple use" policy which seeks to balance competing uses of public land. BLM 19-20. However, this policy cannot be asserted as a constraint on BLM's paramount mandate to "prevent undue degradation" from mining operations. BLM's case, Rocky Mountain Oil and Gas Ass'n. v. Watt, 696 F.2d 734 (10th Cir. 1982), had nothing to do with hardrock mining and dealt with BLM's authority to designate and manage wilderness study areas. Indeed, the court specifically noted that the "UUD standard" was not part of BLM's multiple use policy and represented an independent "management standard." Id. at 739.

Despite the separate and independent mandate from Congress to prevent UUD, BLM argues that UUD would **only** be found if a mining project would violate some other environmental law (such as clean air standards) or if operations were not "reasonably incident to mining." BLM 20. That argument – that BLM must approve mining unless some **other** environmental standard would be violated – eviscerates the UUD standard on public land. This approach was rejected in Mineral Policy Center v. Norton, 292 F.Supp.2d 30, 42 (D.D.C. 2003)("MPC") – the only case to squarely review the relationship between the UUD standard and mining. In MPC, the court specifically rejected the Interior Department's position that "BLM could *not* disapprove of an otherwise allowable mining operation merely because such an operation would

cause 'substantial irreparable harm' to the public lands." Id. (emphasis in original). Rather, BLM has "the obligation – to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public land." Id.

BLM repeatedly stated to the MPC court that BLM "will prevent all UUD, including UUD occasioning irreparable harm to scientific, cultural, or environmental resource values.'" Id., *quoting* the Interior Dept.'s brief. In defending its mining regulations to the MPC court, BLM stated:

> Interior decided that the existing laws and regulatory powers expressly incorporated into the 2001 rule's UUD performance and other standards, … **and Interior's enhanced case-by-case control over specific mining activities**, also reinstated in the 2001 rule, would prevent unnecessary of undue degradation and "irreparable harm to significant scientific, cultural, or environmental resource values."

DOI Consolidated Motion for Summary Judgment [in MPC], at 17 (emphasis added). Tribes Supplemental Excerpts of Record (TSER) 41.

In the Final EIS accompanying its revised mining regulations, BLM determined that, regarding its commitment to prevent "irreparable harm to significant scientific, cultural, or environmental resource values," it would regulate mining so that "operations would not be allowed where significant resources would incur substantial irreparable harm that could not be mitigated." TSER 2. BLM further stated that the UUD standard would be applied to protect "disturbance of American Indian sacred sites." Id. In its MPC briefs, the agency further committed to "protect unidentified 'American Indian

sacred sites,' including those near an unidentified 'waste dump,' from being harmed by UUD." TSER 54.

BLM's duty to prevent UUD, as expressed to the MPC court, is especially critical in cases where other federal laws may not fully protect those resources – such as cultural resources. BLM reiterated that its UUD authority is the "mechanism[] for protecting valuable resources and sensitive areas that are not governed by specific laws." DOI Consolidated Statement of Material Facts and Statement of Issues, at 9, ¶20 (the UUD standard protects "cultural values … springs, seeps, and ephemeral streams that are not otherwise protected by specific laws"). TSER 11. BLM repeated this strong view of its UUD authority throughout that pleading. *See* ¶ 24, at 14 (recognizing its duty under the UUD standard to protect cultural and environmental resources that would not be protected by other laws). TSER 16. *See also* ¶¶ 25, 30-35. TSER 16-17, 19-22.

In an about face, BLM now asserts that the UUD duty is merely a tool to balance various resources uses or is merely a "temporary" procedural tool – leaving no substantive authority to protect Mt. Tenabo's lands and waters and Western Shoshone religious uses. BLM cannot have it both ways – arguing to this Court that BLM has no substantive duty to protect sacred lands under FLPMA, the Executive Order on Sacred Sites (*see* BLM 26), and other requirements, yet at the same time contending to another federal court that it is committed to protecting these resources under its substantive UUD mandate.

BLM's mining regulations further require Barrick to "take mitigation measures specified by BLM to protect public lands." 43 CFR § 3809.420(a)(4). Neither BLM nor Barrick mention this duty. There is no doubt that the lands and waters of Mt. Tenabo will not be protected. Although the ROD and FEIS contain some mitigation measures, these measures are not sufficient to "protect public lands." There is no mitigation at all for the damage to the Mt. Tenabo Sacred site, such as from the permanent open pit and waste dumps, and the "mitigation" plan for the dewatering of the aquifer is merely a monitoring plan. Instead of complying with its own mandates, BLM illegally acted as if the requirements do not apply.

2. *BLM's Inconsistent and Contradictory Interpretation of FLPMA Does Not Deserve Deference*

BLM's inconsistent and contradictory manipulation of the statutory scheme deserves no deference from this Court, and is clear grounds for vacating BLM's decisions. "An order may not stand if the agency has misconceived the law." Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80, 94 (1943). In considering the denial of preliminary relief, this Court "review[s] the district court's … interpretation and construction of a federal statute de novo." American Trucking, 2009 WL 723993 at *4. A district court's denial of a PI Motion should be reversed if it was based "on an erroneous legal standard." Earth Island Institute v. U.S. Forest Service, 442 F. 3d 1147, 1156 (9th Cir. 2006). BLM/Barrick argue that BLM's UUD determination should be given "deference," highlighting the "thorough" nature of the

FEIS and supporting studies, implying that the agency conducted a full review prior to making its UUD determination. That, however, is not the case.

First, as detailed above, BLM's legal position in this case regarding its minimalistic interpretation of its UUD authority (and the one accepted by the district court) contradicts its stated position to other federal courts. Secondly, the record contains internal BLM documents showing that BLM made its UUD determination long before its reviews were completed, and long before it even submitted the Draft EIS for public review. As part of its publication of the Notice of Availability of the Draft EIS in the Federal Register, BLM described the Project and its review by the agency.

> Does this notice relate to an administration policy or priority: … BLM is responsible for ensuring that proposed mining operations prevent undue or unnecessary degradation of public lands. The proposed amendment to the Pipeline/South Pipeline PoO for the Cortez Hills Expansion Project would be in compliance with this policy.

"BLM Federal Register Notice Briefing Paper." TSER 70. Thus, BLM concluded, prior to even seeing any of the comments on the Draft EIS, that the Project would "prevent UUD." BLM's statement begs the question: How could BLM determine that the Project would not cause UUD prior to receiving public comment on the Draft EIS and completing its review?

This is especially troubling given BLM's positions regarding the Project's impacts to Western Shoshone religious uses at the site. BLM's fundamental position, that there would be no UUD to Mt. Tenabo because there are no current Western Shoshone religious uses that would be affected, was made **prior** to seeing the

overwhelming evidence submitted by the Tribes as part of public comment on the Draft EIS. These Declarations and formal Tribal statements specifically contradict BLM's "no Western Shoshone uses" conclusion. It appears that BLM's FLPMA and NEPA public review process was merely to justify a decision already made.

Further, the error and inconsistency of BLM's interpretation of its UUD authority is shown by the practice of this BLM office. BLM Battle Mountain Field Office Director Gerald Smith, the agency decisionmaker who signed the FEIS and ROD, was revealing in his testimony during the PI hearing. When asked about his office's regulation of mining during his over 13 years as Director, Mr. Smith admitted that in reviewing over 150 mineral operations, BLM **never** denied a single one. TSER 166-67.

Taken together, BLM's extremely truncated interpretation of its authority to protect public lands and waters under FLPMA contradicts and is inconsistent with its previous positions. Such agency action is not entitled to deference. *See* Norfolk Southern Railway Company v. Shanklin, 529 U.S. 344, 356 (2000) (no deference when agency contradicts its previous interpretation); Atchinson v. Wichita Board of Trade, 412 U.S. 800, 808 (1973)(agency that modifies previous position "has the duty to explain its departure from prior norms."); Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1457 (9th Cir. 1992) (court should not rely on, or defer to, "fluctuating" agency interpretations); U.S. v. Mead, 533 U.S. 218, 228 (2001), citing Skidmore v. Swift & Co., 323 U.S. 134, 139-140 (1944) (inconsistency is a strong indication of unpersuasiveness).

Further, because the ROD and FEIS represent informal agency action, instead of formal adjudication or rulemaking, the agency's decision is not entitled deference. High Sierra Hikers v. Blackwell, 390 F.3d 630, 638-39 (9th Cir. 2004)(informal agency action, such as project approvals, do not deserve deference, only "respect," and only when the agency's interpretation of the statute is persuasive). *See also*, Mount Royal Joint Venture v. Kempthorne, 477 F.3d 745, 753 (D. C. Cir. 2007)("if the agency enunciates its interpretation through informal action that lacks the force of law, we accept the agency's interpretation only if it is persuasive."). BLM's shifting, inconsistent, and improperly narrow interpretation of its UUD authority is certainly not "persuasive" and does not deserve deference from this Court.

3. BLM Failed to Prevent UUD to the Mt. Tenabo Sacred Site

In addition to fundamentally misinterpreting its duties to prevent UUD, BLM ignores the evidence in the record showing the extensive damage to Western Shoshone uses of the Project site. BLM's decisions were based on its position that: "BLM knows of no Western Shoshone uses that would be prevented or uses or resources that would be destroyed by the proposed project." Govt.SER 178; BLM 22. "[T]he agency did not conclude that the Western Shoshone use the project site for religious activities." Govt.SER 177; BLM 23. The FEIS further stated that:

> Because Western Shoshone consultants have not disclosed the number of people who visit the mountain for spiritual or religious use and the frequency **and specific locations** of their visits to the area are unknown, the level of this impact cannot be quantified.

ER 140; BLM 26-27. BLM made this conclusion, except for the inclusion of the phrase "and specific locations" (which was added to the Final EIS in bold print), **prior to issuance of the Draft EIS** – pre-determining BLM's eventual position on impacts to Mt. Tenabo long before BLM solicited public comment.

Further, the fact that BLM could not "quantify" the extent of religious uses does not mean that there are no Western Shoshone uses at the site. Although it may be difficult to ascertain the extent of private religious practices – due to the individual nature of Western Shoshone religious exercise – this does not mean that BLM can simply ignore its duty to prevent UUD. *See* San Luis Obispo Mothers for Peace v. NRC, 449 F.3d 1016, 1032 (9th Cir. 2006)("No provision of NEPA, or any other authority cited by the [agency], allows the [agency] to eliminate a possible environmental consequence from analysis by labeling the risk as "unquantifiable.").

In any case, BLM's conclusory statement that no Western Shoshone uses would be affected ignores the overwhelming evidence that the Project site on Mt. Tenabo **is** used, as it has for centuries, for religious practices, **is** an important part of Western Shoshone religion, and that these land and water resources **will be** destroyed by the Project.

First, the FEIS stated that religious "practices do continue," including "solitary prayer and similar practices" at the "piñon-juniper stands at the base of Mount Tenabo" – the Project site. ER 164. Further, the Ethnographic Report found that "there are

individuals who choose to remain anonymous who continue to access the mountain for power, inspiration, and healing, and continue to collect medicine plants and minerals for personal use." ER 110. BLM also ignored the fact that in 2001 the Te-Moak Tribe identified the site area (including a map) as a "Traditional Cultural Property" ("TCP") due to its ongoing religious significance. ER 109.[1]

Secondly, BLM ignores the evidence submitted during the public comment periods. The formal Resolution of the Te-Moak Tribe stated in no uncertain terms that the Project site has long been used by Tribal members for religious practices. ER 116-17. To reiterate this, Te-Moak Tribal Chairman Davis Gonzales stated, in his October 14, 2008 letter to BLM: "As we have previously notified BLM, this mining project represents a significant threat to Western Shoshone cultural, religious, and spiritual resources and uses at the proposed mine site." TSER 100.[2] BLM/Barrick also ignore the formal comments submitted by other Tribal governments – all attesting to the spiritual significance of the Project site on Mt. Tenabo. Opening Br. 31-33.

In addition, and in direct contradiction of Barrick's assertions that Mt. Tenabo has only recently been used by Western Shoshone for religious purposes, Barrick 9, the

---

[1] Barrick attempts to avoid the significance of the Ethnographic Report. Barrick 43-44. However, BLM decisionmaker Gerald Smith acknowledged at the PI hearing that BLM considered the Report credible and the Report was relied upon by BLM in issuing the ROD and FEIS. TSER 168-69.

[2] In that letter, the Tribe requested additional time (above the minimal 30 days) to review all of the new information in the FEIS, especially regarding BLM's conclusions about Western Shoshone uses of the site. BLM denied that request and instead promptly issued the ROD.

Elko Band Council Chairperson specifically noted that the Mountain is still used as "our ancestors used for generations to practice our traditional and spiritual ways of life." ER 158.

Barrick's submittal of a few statements from other Western Shoshone saying that Mt. Tenabo does not hold any unique religious significance to them is very misleading. Barrick 15-16. These individuals are not members of the Te-Moak Tribe or its Bands that use the area (*e.g.*, Felix Ike, a Barrick witness, is no longer an enrolled member of the Te-Moak Tribe). According to the FEIS, "Since the Te-Moak Tribe is the closest tribe to the study area … most of the interest in the project area has come from this tribe and its bands." ER 164.

In any event, the fact that some individual Western Shoshone do not use the site for religious practices does not contradict the overwhelming evidence in the record of the unique place Mt. Tenabo holds in Western Shoshone religion and the longstanding religious uses of the Project site. Further, Barrick's own witnesses testified that they did not speak for any other Western Shoshone. CSER 222 (testimony of Dianna Buckner); CSER 248-49 (testimony of Jerry Millet). Indeed, Mr. Millet, Chairman of the Duckwater Tribe, agreed that to other Western Shoshone, although not to himself, the "Mt. Tenabo area [has] a significant and well-established religious and cultural value to the Western Shoshone people." CSER 243 (lines 17-23).

In a further attempt to belittle the importance of protecting Mt. Tenabo's irreplaceable resources, BLM/Barrick argue that previous mining in the area somehow

means that Mt. Tenabo has lost its status as a Sacred Site or that BLM's land protection duties are somehow less applicable. However, this contradicts the record and ignores the statements from Tribal governments. First, all of the previous activity around Mt. Tenabo, with the possible exception of some of the old "Cortez" facilities located where Mt. Tenabo begins to rise from Crescent Valley, was much smaller in scale. Nothing compares to the Project's wholesale alteration of the environment from the 6,700 acres of mine pits, waste dumps, cyanide-leaching pile, and other permanent facilities.

BLM/Barrick avoid the plain truth of what this Project will do to Mt. Tenabo and Western Shoshone religious practice. As one religious practitioner stated to BLM:

> Traditional Western Shoshone religious practitioners such as myself have suffered greatly from all of the mining in our homeland. Despite all this mining, the spirits residing in Mt. Tenabo, and our communion with them, have so far survived. I fear that the Project will irreparably damage them. I know for a fact that the Project will prevent myself from conducting these ceremonies that are a central part of my religion and worldview.

Declaration of Darlene Graham. ER 182-83. Another stated:

> [T]he proposed Cortez Hills Project is something that we have not faced before – a gold mine located within the very heart of one of the Western Shoshone's most sacred places. It represents a central force in Western Shoshone religious beliefs and worldview. Many of our spirit beings reside on Mt. Tenabo and the Mountain has been recognized as such for as long as our memory. … BLM proposes to "mitigate" the damage the mine will cause to our religion. That is impossible. The only way to protect our ability to pray and conduct ceremonies on the Mountain is to reject further development on the slopes of the Mountain. … I understand that significant mining has occurred down in Crescent Valley and even at the old Cortez site. Although this represents destructive intrusion into the area, it pales in comparison to the proposed new and massive pit, and the dewatering of Mt. Tenabo caused by the new pit.

Declaration of Delbert Holly. ER 184-85. *See also* ER 141-191 (other Western Shoshone Declarations); ER 116-17 (Te-Moak Resolution); ER 155-59 (Tribal comment letters). This evidence in the record directly refutes BLM's position that the Project will have no adverse impacts to Mt. Tenabo or to Western Shoshone religious practices.[3]

BLM/Barrick's position also contradicts the finding of the district court which found that the Project "will spiritually desecrate a sacred mountain and decrease the spiritual fulfilment [sic] they get from practicing their religion on the mountain." ER 19 (lines 12-15). "[T]he court recognizes that Plaintiffs view Mt. Tenabo as a sacred site significant to the exercise of their religion." ER 41 (lines 13-15).[4]

BLM attempts to avoid its duties under FLPMA and the "Sacred Sites" Executive Order ("E.O."), by arguing that there is nothing in the record attesting to Mt. Tenabo as a Sacred Site and that Tribal members would have access to other areas around Mt. Tenabo to conduct religious ceremonies. BLM 26. At the outset, this ignores the direct

---

[3] Barrick's assertion that the identification of Mt. Tenabo as a Sacred Site "is a construct created by Appellants for purposes of this litigation," Barrick 28, n. 8, is contradicted by the record and underscores the company's disregard for, and misunderstanding of, Western Shoshone religious traditions.

[4] The district court's discussion of the severe impacts to Mt. Tenabo and Western Shoshone religious uses was primarily focused on the Tribes' claim under the Religious Freedom Restoration Act ("RFRA"), which, according to the court, only limits BLM's actions when they "coerce" religious practitioners to violate their religious beliefs. ER 41-43. This test is very different from BLM's duty under FLPMA and the Sacred Sites E.O. to protect public land and the physical integrity of Mt. Tenabo, regardless of any coercive effect on religious beliefs.

statements in the record from the federally-recognized Tribal governments in the area, as confirmed by the Ethnographic Report, specifically recognizing the Project site on Mt. Tenabo as a Sacred Site. Second, BLM misses the point of the E.O., which requires BLM to "avoid adversely affecting the physical integrity of such sacred sites." Opening Br. 27-30. The fact that Western Shoshone could access other areas does not somehow negate BLM's duty to prevent UUD to Mt. Tenabo.

Regarding access to the Project site, BLM again ignores the record, which shows that Western Shoshone **will** be blocked from accessing their current religious use sites on the Mountain. The "proposed disturbance areas would be removed from public access … for the life of the project, as would an undetermined amount of additional acreage that would be fenced off for public safety purposes." FEIS at 3.12-5. ER 144.

Barrick's Project permit manager, George Fennemore, acknowledged that access to the areas at the base of the White Cliffs on the Mountain would be blocked and that Barrick will "prevent people from … entering the active working area." TSER 161. The FEIS shows that the mine pit will excavate into Mt. Tenabo directly up the base of the White Cliffs. Govt.SER 37. Further, Brian Mason, a Western Shoshone employee of Barrick, acknowledged that the Project may prevent other Western Shoshone from worshipping at the site. CSER 258, lines 9-14.

This area, at the base of the White Cliffs, is the "Pediment" area that is "part of the Mountain" and is currently used for religious practices. Ethnographic Report at 39.

ER 111. In addition, the unrebutted testimony at the PI hearing shows the use of these areas within the now off-limits Project site for religious practices.

Joyce McDade, a traditional Western Shoshone religious practitioner, discussed the significance of Mt. Tenabo to her religious beliefs and that the "power of the creator" was located "right there at the base of the white cliff." TSER 151. She discussed how she prayed at the base of the White Cliffs for healing and communication with the creator. TSER 150-53, 157-58. She further supported the conclusion of the Ethnographic Report that the spiritual significance of Mt. Tenabo was not limited to the top, and that the base of the White Cliffs is part of "our spiritual sacred holy land." TSER 152.

Shawn Collins, another traditional Western Shoshone religious practitioner, and himself a life-long third-generation miner, testified how the Pediment area is part of the spiritual focus of Mt. Tenabo and of his and his family's religious practices on the Mountain. TSER 125-26. Mr. Collins further testified as to the unique religious significance of Mt. Tenabo to Western Shoshone from that area. TSER 117-20.

Ted Howard, the Cultural Resources Director for the Shoshone Piute Tribes, also testified as to the importance of Mt. Tenabo to Western Shoshone religious tradition. TSER 136-44. Mr. Howard testified that in his 15 to 20 visits to the Mountain, he prays "below the cliffs" "where the mines are proposing to build." TSER 140.

Regarding access to other areas, BLM/Barrick ignore BLM's recent approval of Barrick's large-scale mining exploration operations in these areas (*e.g.*, Horse Canyon

and the top of Mt. Tenabo). The Te-Moak Tribe's challenge to that project was argued before the Ninth Circuit on January 15, 2009. Te-Moak Tribe et al v. Dept. of Interior, No. 07-16336 (decision pending). Thus, it is disingenuous for BLM/Barrick to imply that Western Shoshone can simply "pray somewhere else" yet fail to mention that these very same areas are currently being impacted from Barrick's operations.

BLM also argues that the Sacred Sites E.O. is essentially meaningless in ascertaining BLM's compliance with FLPMA and its duty to protect public land. BLM 26, n. 4. However, BLM ignores the leading decision regarding the E.O. which specifies that the E.O. "orders Federal agencies to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and avoid adversely affecting the physical integrity of such sacred sites." Wyoming Sawmills v. U.S. Forest Service, 383 F.3d 1241, 1245 (10th Cir. 2004). Also, BLM/Barrick fail to refute BLM's statement in the record that Sacred Sites are protected by "FLPMA [and] … Executive Order 13007." Opening Br. 30; ER 115.

Lastly, BLM argues that its duty to protect Sacred Sites does not even apply to mining operations proposed on lands claimed under federal mining law. BLM 26, n. 4. There is no support for such a sweeping assertion. In fact, as discussed above, this further underscores BLM's self-imposed evisceration of its authority over mining and its duty to "prevent undue degradation" under FLPMA and to "protect public lands" under its regulations at 43 CFR § 3809.420(a)(4).

Overall, BLM cannot "offer[] an explanation for its decision that runs counter to the evidence before the agency." Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983). "[W]e must satisfy ourselves that the agency examined the relevant data and articulated a satisfactory explanation for its action based upon the record." People of State of Cal. v. F.C.C., 905 F.2d 1217, 1230 (9th Cir. 1990). BLM has failed these fundamental requirements.

4. The Dewatering of Mt. Tenabo Causes UUD

BLM has not shown that it will prevent UUD to the waters of Mt. Tenabo. In addition to the basic irreplaceable value of clean water in a desert that must be protected as a core public-lands resource, the waters of Mt. Tenabo hold unique and significant religious importance. Opening Br. 35-36. *See* PI hearing testimony of Shawn Collins TSER 120-23 (discussing how if dewatering begins "the spirits on the mountain would leave." TSER 121); Ted Howard, Tribal Cultural Resources Director (discussing the spiritual significance of Mt. Tenabo's waters). TSER 139.

BLM/Barrick argue that it is not absolutely certain that these waters will be affected by the dewatering, and that Barrick's monitoring plan will fully "mitigate" and prevent these losses in any event. BLM 29-30; Barrick 32-33, 39. BLM/Barrick stress that BLM only predicted the "potential" impacts to waters. However, no other evidence is provided. The agency cannot argue that its FEIS is supported by the best technical data (as required by NEPA), and that the FEIS forms the basis for its "no UUD"

position, but then when faced with an argument that the predicted impacts constitute severe environmental harm, claim that its own predictions are somehow unreliable.

This sort of "Catch-22" would essentially eliminate judicial review, as agencies could always argue that any such predictions would be immune from review. "Reasonable forecasting and speculation is ... implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry,' " Kern v. BLM, 284 F.3d 1062, 1072 (9th Cir. 2002).

BLM/Barrick argue that because the prediction models only showed groundwater drawdown due to the Project's pumping, this somehow means these springs will not be affected. This belies the direct evidence in the record that the "Cortez Hills Spring Group" on Mt. Tenabo will be eliminated and will not recover for at least 100 years. *See* Geomega Groundwater Report, at Table 6-15 (seeps and springs on Mt. Tenabo would not recover). ER 119. In contrast, the springs would **all** recover under the No-action alternative. *Compare* Geomega Report Tables 6-15 and 6-16. ER 119-120.[5]

Further, BLM/Barrick's assertion that there is no connection between the drawdown of the aquifer and the springs is contradicted by the record. The FEIS:

[5] BLM's statement that the groundwater losses will only occur "immediately after dewatering," BLM 28, is erroneous and highlights BLM's failure to protect these waters. The FEIS shows that, even after 100 years, the drawdown levels will still be over 410 feet. Govt.SER 65.

> assumed that all of the perennial springs located … in the Cortez Pit area and within the drawdown area could be interconnected to the regional bedrock groundwater system, and therefore potentially could be impacted.

ER 132. The loss of the 15 springs on/near Mt. Tenabo is "irreversible" and "irretrievable." FEIS Table 3.19-1. ER 152.

Regarding BLM/Barrick's argument that they will monitor these losses and only later fully "mitigate" all losses, this plan violates BLM's duty to require Barrick to "take mitigation measures … to protect public lands." 43 CFR § 3809.420(a)(4). BLM also argues that "the most reasonable way to prevent UUD" to ground and surface waters is to allow Barrick to simply monitor for the loss of these waters. BLM 29. Yet a plan to allow the dewatering and only **then** develop a plan to "mitigate" these losses does not "prevent" degradation – by definition it allows it to happen.

Barrick's Project permit manager, George Fennemore, testified that there is no mitigation plan at all, just a plan to monitor the groundwater depletion.

> Q. You discussed the monitoring plan for the predicted drawdown of the -- of the water in the area. Does that monitoring plan contain any specific plans to actually replace the water that has been submitted, or will the replacement water plan be submitted later after the drawdown starts to be monitored?
> A. The monitoring plan is solely a monitoring plan. Any mitigation measures will require another -- another plan.
> Q. And that plan has yet to be submitted to the BLM, the mitigation plan?
> A. A list of potential -- I mean, a menu of potential measures has been submitted, but no specific plan has been submitted.

TSER 162.

Lastly, regarding the violation of the water quality standard for arsenic in the Cortez Hills pit lake, the fact that the standard is for drinking water does not excuse the

permanent pollution of local waters – especially in light of the sacred nature of these waters. BLM 30. *See also* Govt.SER 81 (FEIS discussing additional concerns with selenium and mercury contamination). Further, Barrick's attempt to downplay the pollution by arguing that the "existing ground water fails to meet the drinking water standard for arsenic, " Barrick 33, is very misleading as the FEIS Table it relies on refers to water data miles away in Crescent Valley and did not sample the water on Mt. Tenabo. Govt.SER 52.

5. *Undue Degradation of Scenic Resources*

Regarding the violation of the agency's Visual Resource Management ("VRM") duties, BLM relies on an agency Manual (which does not have any force of law) to argue that its VRM standards are merely "inventory" standards, not "management" standards. BLM 31-34. However, BLM never refutes its own statement in the FEIS that: "The BLM is responsible for identifying and protecting scenic values on public lands under several provisions of FLPMA and NEPA." ER 146. These "scenic values" are precisely the ones which BLM has "identified" but will not "protect."

BLM cannot avoid its own recognition that the Project would not "meet the standards of VRM Class III objectives" near Shoshone Wells, ER 148-49, and "would not comply with the Class II objective" in Cortez Canyon. Now, BLM argues that there really are no "standards" and that there is nothing to "comply" with at the site. Such obfuscation and inconsistency cannot be used to support the FEIS and ROD.

B. BLM Violated the National Environmental Policy Act (NEPA)

1. *Failure to Analyze All Air Emissions*

a. *Failure to analyze baseline levels and $PM_{2.5}$ emissions.*

BLM/Barrick argue that BLM fully analyzed the Project's baseline levels and emissions of $PM_{2.5}$ fine particulate pollution. BLM 35-38; Barrick 35-37. However, in response to comments on the Draft EIS, BLM merely included in the FEIS, for the first time, the $PM_{2.5}$ standard and stated that the Project would comply with the standards. BLM never modeled for $PM_{2.5}$ and no technical or evidentiary support for this conclusion is contained in the FEIS or the record. The only mention of purported compliance with $PM_{2.5}$ standards is contained in the FEIS' response to comments where BLM simply states that $PM_{2.5}$ emissions will be 15% of PM_{10} emissions. ER 162. Outside of a one sentence cite to a general EPA website, no supporting information, and no analysis, is provided to support this claim. Id. Even this cite, "USEPA 2007," merely refers the reader to a general EPA air quality webpage that says nothing about the alleged 15% ratio.[6] Thus, BLM's attempt to fix the shortcomings of the FEIS is misleading and confusing.

Faced with no support in the record, BLM relies on documents that were only first produced to the district court or this Court: (1) an outdated 1997 "Interim" memo from an EPA employee, the "Seitz Memo," saying that there were "technical difficulties

---

[6] The FEIS' list of references describes "EPA 2007" as the following website: http://epa.gov/air/criteria.html. FEIS at 6-26. TSER 97. That webpage is at TSER 179-80.

in modeling $PM_{2.5}$" in 1997 and thus interim use of PM_{10} as a "surrogate" for $PM_{2.5}$ was appropriate. Govt.SER 217-219; (2) a 2005 EPA Memorandum relying on the Seitz Memo. Govt.SER 220-224; and (3) an EPA research paper. Govt.SER 225-239. **None** of these documents are in the administrative record.

BLM cannot rely on new documents, submitted for the first time to the court, as grounds for defending its actions. The "focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. 138, 142 (1973). Any reliance on such new information to fix the errors of the FEIS also violates NEPA's public participation mandates. *See* NPCA v. Babbitt, 241 F.3d 722, 732-33 (9th Cir. 2001). *See also* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

BLM's failure to base its conclusions on evidence **in the record** is the hallmark of an arbitrary and capricious decision. NEPA requires BLM, in both its Draft and Final EIS, to disclose its methodologies and the underlying hard data from which BLM derived its opinion. Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1150-51 (9th Cir. 1998). "Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements." Earth Island, 442 F.3d at 1159-60, *quoting* 40 CFR §1502.24.

In comments on the Draft EIS, the Tribes highlighted the scientific evidence regarding the importance of analyzing $PM_{2.5}$ emissions and how $PM_{2.5}$ emissions are different from PM_{10} emissions. Govt.SER 189-90, *citing* 70 Fed. Reg. 65984, 65992

(Nov. 1, 2005) ($PM_{2.5}$ and PM_{10} "are generally associated with distinctly different source types and formation processes"); 72 Fed. Reg. 20586, 20599 (April 25, 2007) ("PM[$_{2.5}$] also differs from PM[$_{10}$] in terms of atmospheric dispersion characteristics, chemical composition, and contribution from regional transport").

Notably, the "Seitz Memo" (and the 2005 EPA Memo relying on it) have been superseded by new EPA rules. EPA is no longer accepting the use of PM_{10} as a surrogate for $PM_{2.5}$. The preamble to the EPA's Final $PM_{2.5}$ rule states:

> [T]he EPA will no longer accept the use of PM_{10} emissions information as a surrogate for $PM_{2.5}$ emissions information given that both pollutants are regulated by a National Ambient Air Quality Standard and therefore are considered regulated air pollutants.

72 Fed. Reg. at 20660.[7] *See also* 70 Fed. Reg. at 66043 (EPA acknowledging that previous technical concerns with $PM_{2.5}$ have been addressed).

BLM argues that this new information is merely its "proffer of further information." BLM 37. However, based on the lack of **any** information on $PM_{2.5}$ in the Draft EIS (the only document available for public comment), and the sparse mention of $PM_{2.5}$ in the FEIS, such a post-hoc "proffer" does not cure the fundamental failure of the FEIS to review emissions and baseline levels for $PM_{2.5}$. In addition to this NEPA inadequacy, BLM cannot reasonably have concluded, **based on the record**, that the

[7] BLM attempts to avoid the new EPA rule by arguing that the voiding of the "surrogate" method only applies to "nonattainment" air quality areas. BLM 36, n. 7. However, the issue is whether the outdated "surrogate" method is still valid as a scientific process. The EPA has now stated that it is not. The current "attainment" status has nothing do with this.

Project will comply with all air quality standards, as required by FLPMA and BLM's regulations. Opening Br. 41.

b. Failure to analyze impacts from off-site processing and transportation of refractory ore

Neither BLM nor Barrick point to any analysis of the $PM_{2.5}$, mercury and other pollutant emissions from the transport and processing of the 5 million tons of refractory ore off-site. Such analysis is required under NEPA, as held by Great Basin Mine Watch v. Hankins, 456 F.3d 955, 972-974 (9th Cir. 2006). Indeed, BLM/Barrick never mention Great Basin.

Instead, BLM refers to a state permitting process for the other mine that will process the ore (Barrick's Goldstrike mine). BLM 39. However, that state permit never underwent any NEPA process and thus cannot be used as a substitute for federal-agency NEPA review. "[T]iering to a document that has not itself been subject to NEPA review is not permitted, for it circumvents the purpose of NEPA." Kern, 284 F.3d at 1073. In addition, unlike the federal government, Nevada does not analyze $PM_{2.5}$ in its permitting process. FEIS at 3.10-10 ("Nevada has yet to adopt the new $PM_{2.5}$ standards."). Govt.SER 123.

Barrick never argues that BLM analyzed emissions of $PM_{2.5}$ or other pollutants from this processing and transportation, and merely cites to a general state-wide listing of mercury emissions. Barrick 38. For all of the other pollutants, Barrick cites a draft document for the Goldstrike mine. However, this draft document (let alone any final

document) was never considered by BLM and is not part of the administrative record. Barrick's reliance on post-hoc, extra record materials cannot stand. In any event, that document merely analyzes the impacts from expanding the mine pit at Goldstrike and fails to discuss the transport of the Cortez Hills Project's ore (and fails to analyze $PM_{2.5}$ emissions).

Contrary to BLM/Barrick, the Tribes are not "flyspecking" the FEIS. Rather, the Tribes have focused on emissions of serious and harmful air pollutants. Both the law and the science show the importance of a full review of these impacts – a review that BLM failed to do.

2. <u>Lack of Mitigation Analysis</u>

Regarding the lack of an adequate mitigation analysis, BLM/Barrick argue that BLM can rely on monitoring plans as a substitute for the required "reasonably complete" mitigation analysis and "analytical data" required by NEPA. BLM 39-44. BLM claims that it will later mitigate for the loss of any flows in streams, springs and other surface and ground waters. BLM 40-41. However, this so-called "mitigation" is just a plan to initially monitor the impact from the dewatering. ER 135-137. Monitoring is not proper mitigation. Monitoring, even if done properly, will only determine the extent of the impact from dewatering – it will not prevent the loss or damage to these waters. BLM/Barrick argue that the mere submittal of a monitoring plan satisfies NEPA's mandate that "mitigation [must] be discussed in sufficient detail to ensure that

environmental consequences have been fairly evaluated." Robertson, 490 U.S. at 352.

The Tribes are not arguing that all mitigation plans must be finalized in the FEIS. Rather, "the proposed mitigation measures must be developed to a reasonable degree. A perfunctory description, or 'mere listing' of mitigation measures, without supporting analytical data" violates NEPA. NPCA, 241 F.3d at 734, *quoting* Idaho Sporting Congress, 137 F.3d at 1151. Here, as quoted above, Barrick's permit manager George Fennemore testified that "a list of potential -- I mean, a menu of potential measures has been submitted, but no specific plan has been submitted." TSER 162.

BLM/Barrick rely heavily on Okanogan Highlands Alliance v. Williams, 236 F.3d 468 (9th Cir. 2000). There, the Forest Service had submitted detailed computer models of each mitigation measure, and their effectiveness – computer models that were subject to full public review. That is a far cry from the lack of **any** groundwater plan here. The Ninth Circuit has recognized the unique facts of that case:

> There is a paucity of analytic data to support the [agency's] conclusion that the mitigation measures would be adequate in light of the potential environmental harms. By contrast, in Okanogan, the Forest Service conducted computer modeling to predict the quality and quantity of environmental effects, discussed the monitoring measures to be put in place, ranked the probable efficacy of the different measures, detailed steps to achieve compliance should the measures fail, and identified the environmental standards by which mitigation success could be measured.

NPCA, 241 F.3d at 734.[8] *See also* High Sierra Hikers v. Weingardt, 521 F.Supp. 2d 1065, 1086-87 (N.D. Cal. 2007)(discussing Okanogan's "extensive" analysis).

BLM/Barrick also argue that a mitigation plan is not needed because the full extent of groundwater depletion is not yet known. Similar to NPCA, this situation is decidedly different from Okanogan, as there the public was able to comment on the conceptual mitigation plans. Here, all of this analysis is pushed to the future. In Okanogan, the Court based its approval of the mitigation plan on the fact that the "adverse effects are uncertain." 236 F.3d at 477. Here, BLM cannot ignore its own evidence that over 16.35 billion gallons will be removed from Mt. Tenabo and that at least 15 springs will not recover.

In Robertson, the Court upheld the lack of a finalized mitigation plan because the "on-site effects of the development will be minimal and will be easily mitigated." 490 U.S. at 357. This is a far cry from here, where there is no disputing the significant adverse impacts from the Project.

Although BLM discusses the differences between this case and Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372 (9th Cir. 1998), BLM never explains how it meets the Ninth Circuit's requirement that the FEIS fully analyze the "effectiveness" of mitigation measures. Id. at 1380-81. The FEIS' review of the

---

[8] Contrary to BLM/Barrick, the fact that NPCA and other cases involved a smaller Environmental Assessment, rather than an EIS, is a distinction without a difference. These cases hold that merely submitting a monitoring plan, without any substantive mitigation component, violates NEPA's mitigation duties and does not actually reduce any environmental impacts.

effectiveness of the future water mitigation plan is circular and minimalistic: "Effectiveness: Feasibility and success of mitigation would depend on site-specific conditions and details of the mitigation plan." ER 137. In Okanogan, the agency had conducted extensive analysis of the effectiveness of the various mitigation measures. Here, none exists. BLM's plan to simply "monitor" the drawdown and elimination of surface and ground waters, and then figure out a way to avoid these losses in the first place is the type of "impact first, develop a plan later" approach rejected by the Ninth Circuit.

II. THE PROJECT CAUSES IMMEDIATE AND IRREPARABLE HARM

BLM does not argue that the Project will not cause immediate and irreparable harm. Barrick, however, argues that the ongoing blasting, excavation, clear-cutting of trees and other heavy construction will not cause **any** irreparable harm. Barrick 42-43. Barrick argues that because it conceivably could in the future "reclaim" these areas, then the impacts from blasting and clear-cutting are not irreparable. Outside of a self-serving statement from a Barrick employee, there is no evidence that these areas can be reclaimed.

Barrick downplays the district court's statement that the Project will "irreparably harm the environment." ER 52. Barrick's claim that there is no irreparable harm from the blasting, clear-cutting and Project construction is illogical. In Barrick's view, clear-cutting a forest is not "irreparable" since the trees might grow back some day. That is

not the law. The Ninth Circuit regularly issues or upholds preliminary injunctions against development, reasoning that "once the desert is disturbed it can never be restored." Save Our Sonoran v. Flowers, 408 F.3d 1113, 1124 (9th Cir. 2005). *See also* Southeast Alaska Cons. Council v. U.S. Army Corps of Engineers, 472 F.3d 1097, 1100 (9th Cir. 2006)(irreparable harm from mining project due to "destroying trees and other vegetation"); Timchak, 2009 WL971474 at *1 (potential irreparable harm from mining project's road construction, timber harvest, and soil removal). At a minimum, "timber cutting causes irreparable damage." Portland Audubon Society v. Lujan, 795 F. Supp. 1489, 1509 (D. Or. 1992), *aff'd*, PAS v. Babbitt, 998 F.2d 705 (9th Cir. 1993). Like these cases, without injunctive relief, the lands, waters, and religious and cultural resources in the path of the Project's mine pits, waste dumps, roads and other facilities will be permanently harmed.

III. BARRICK'S RUSH TO BEGIN CONSTRUCTION DOES NOT OVERRIDE THE NEED FOR AN INJUNCTION

Regarding the public interest and balance of hardships, under Barrick's view, economic harm necessarily outweighs permanent harm to environmental and cultural/religious resources. That is not the law. Opening Br. 14-16. Indeed, the Ninth Circuit recently vacated the denial of a preliminary injunction against the expansion of an existing and very large mining operation on public land involving the same type of economic harm asserted by Barrick. Timchak, 2009 WL971474. Like this case, the district court in Timchak relied upon the mining company's evidence that any stay

would result in layoffs and lost wages for hundreds of employees, significant disruption of the local economy, and "the large shortfall in tax revenues and substantial economic repercussions" to Southern Idaho. Greater Yellowstone Coalition v. Timchak, 2008 WL 5101754, at *16 (D. Idaho, 2008).

In addition, Barrick's claim of an economic disaster if a stay is issued is harm of its own making. Barrick knew the Project would be challenged yet proceeded to take this risk anyway. "We expect that the ROD may be appealed by project opponents." Barrick's Third Quarter Report (Oct. 30, 2008), at 15. TSER 103.[9] Nevertheless, Barrick rushed the Project forward, committed its financial resources, and promised local employment. Indeed, as confirmed by Barrick's contractors at the PI hearing, the contracts and employment promises by Barrick were made **before** the Project was even approved. *See, e.g.*, CSER 377-380 (contractor testimony).

Despite this, and despite the fact that litigation commenced as soon as possible, Barrick continued to hire more workers – and threatened layoffs if the Project was enjoined. Barrick 2 (admitting that even prior to the ROD, it "had secured contractors and purchased materials and equipment to construct the mine.").

Thus, all of the economic hardship that may occur if an injunction is issued is harm of Barrick's own making. "[A]fter a defendant has been notified of the pendency

[9] Barrick's other financial Report shows that the approximately 8 million ounces of gold to be mined by the Project is a very small percentage of Barrick's corporate gold reserves of 124.6 million ounces (i.e., roughly 6%). Fourth Quarter and Year End Report, Feb. 21, 2008. TSER 101. This Report also noted that Barrick's Adjusted Net Income for 2007 was $1.73 billion. Id.

of a suit seeking an injunction against him, even though a temporary injunction be not granted, he acts at his peril and subject to the power of the court to restore the status, wholly irrespective of the merits as they may be ultimately decided . . ..” Jones v. SEC, 298 U.S. 1, 17 (1936). *See also* Porter v. Lee, 328 U.S. 246, 251 (1946)(same); Garcia v. Lawn, 805 F.2d 1400, 1402-03 (9th Cir. 1986) (when defendant takes action after denial of preliminary injunction the court has the power to restore the status quo by undoing defendant’s actions); People of Saipan v. U.S. Dept. of Interior, 502 F.2d 90, 100 (9th Cir. 1974) (no equities to developer by proceeding with project during litigation). Although the Tribes certainly understand the concerns of the local economy and Barrick’s contractors, the fact that Barrick took a calculated financial risk in the face of this lawsuit works against Barrick, not the Tribes.

CONCLUSION

The Tribes respectfully request that this Court issue a preliminary injunction prohibiting the Project’s operations on Mt. Tenabo.

Respectfully submitted this 17th day of April, 2009.

/s/ Roger Flynn

____

Roger Flynn
Jeffrey C. Parsons
WESTERN MINING ACTION PROJECT
P.O. Box 349
440 Main Street, #2
Lyons, CO 80540

Phone (303) 823-5738
Fax (303) 823-5732
wmap@igc.org

CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32 (a)(7)(C) AND CIRCUIT RULE 32-1

I certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the above reply brief is:

Proportionately spaced, has a typeface of 14 points or more and contains 8,374 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words) with an allowance, via Motion submitted on April 8, 2009 by Appellants pursuant to Circuit Rule 28-4, for an additional 1,400 words when responding to multiple response briefs).

/s/ Roger Flynn 4-17-09

____

Roger Flynn Date

CERTIFICATE OF SERVICE

I certify that the following parties were served with a copy of the Appellants' Supplemental Excerpts of Record by placing it for delivery via U.S. Mail, postage prepaid, this 17th day of April, 2009.

Sambhav N. Sankar
U.S. Department of Justice
Envt. & Natural Resources Div.
P.O. Box 23795 (L'Enfant Station)
Washington, DC 20026

Francis Wikstrom
Michael Larson
Parsons Behle & Latimer
201 South Main St., Suite 1800
Salt Lake City, UT 84111

/s/ Roger Flynn

____

Roger Flynn

CERTIFICATE OF SERVICE OF ELECTRONIC FILING OF BRIEF

I also certify that on April 17, 2009, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all of participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Roger Flynn

____

Roger Flynn

CERTIFICATE FOR BRIEF IN PAPER FORMAT

I, Roger Flynn, certify that this brief is identical to the version submitted electronically on April 17, 2009, pursuant to Rule 6(c) of the Administrative Order Regarding Electronic Filing in All Ninth Circuit Cases.

Dated this 20th day of April, 2009,

/s/ Roger Flynn

____

Roger Flynn