Appeal No. 09-15230

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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; and GREAT BASIN RESOURCE WATCH,

Appellants,

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES BUREAU OF LAND MANAGEMENT; GERALD M. SMITH, District Manager, Battle Mountain Field Office,

Appellees,

and

BARRICK CORTEZ INC.,

Appellee-Intervenor.

PRELIMINARY INJUNCTION APPEAL FROM
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

BRIEF OF APPELLEE-INTERVENOR BARRICK CORTEZ INC.

FRANCIS M. WIKSTROM
MICHAEL L. LARSEN
MICHAEL R. McCARTHY
JEFFREY J. DROUBAY
PARSONS BEHLE & LATIMER
One Utah Center
201 South Main Street, Suite 1800
P.O. Box 45898
Salt Lake City, UT 84145-0898
Telephone: (801) 532-1234
Facsimile: (801) 536-6111
E-mail: FWikstrom@parsonsbehle.com
MLarsen@parsonsbehle.com
MMcCarthy@parsonsbehle.com
JDroubay@parsonsbehle.com
ECF@parsonsbehle.com

JIM B. BUTLER
PARSONS BEHLE & LATIMER
50 West Liberty Street, Suite 750
Reno, NV 89501
Telephone: (775) 323-1601
Facsimile: (775) 348-7250
E-mail: JButler@parsonsbehle.com

Attorneys for Appellee-Intervenor Barrick Cortez Inc.

CORPORATE DISCLOSURE STATEMENT

BARRICK CORTEZ INC., a Delaware corporation, is manager and owner of 60% of Cortez Joint Venture, d/b/a Cortez Gold Mines. BARRICK GOLD U.S. INC., a California corporation, owns 100% of BARRICK CORTEZ INC. BARRICK NORTH AMERICA HOLDING CORPORATION, a Nevada corporation, owns 100% of BARRICK GOLD U.S. INC. BARRICK GOLD CORPORATION, an Ontario corporation, owns 100% of BARRICK NORTH AMERICA HOLDING CORPORATION. BARRICK GOLD FINANCE INC., a Delaware corporation, owns 40% of Cortez Joint Venture, d/b/a Cortez Gold Mines. BARRICK GOLD EXPLORATION INC., a Delaware corporation, owns 100% of BARRICK GOLD FINANCE INC. ABX FINANCECO INC., a Delaware corporation, owns 100% of BARRICK GOLD EXPLORATION INC. BARRICK GOLD CORPORATION, an Ontario corporation, owns 100% of ABX FINANCECO INC.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

FEDERAL RULES AND REGULATIONS

JURISDICTIONAL STATEMENT

Jurisdiction of the District Court

Appellee-Intervenor agrees that the district court had jurisdiction under 28 U.S.C. § 1331.

Jurisdiction of the Court of Appeals

Appellee-Intervenor agrees that this Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

Finality of the Order and Timeliness of the Appeal

The order denying the preliminary injunction was issued orally on January 26, 2009. A further written order was entered on February 3, 2009. These orders disposed of those issues that were ripe for determination, including a number of pending motions. Appellee-Intervenor agrees that the appeal was timely filed.

STATEMENT OF ISSUES PRESENTED

1. The district court applied the four-part preliminary injunction test from *Winter v. Natural Resources Defense Council*, 555 U.S.___, 129 S. Ct. 365 (2008). Was this the correct legal standard?

2. The district court found that Appellants had failed to establish all of the four *Winter* elements that are required to obtain a preliminary injunction. Did the district court abuse its discretion?

STATEMENT OF THE CASE

After more than three years of investigation and study and the issuance of a Final EIS ("FEIS"), the Bureau of Land Management issued a Record of Decision ("ROD") on November 12, 2008, authorizing Barrick Cortez Inc. ("Cortez") to proceed with the Cortez Hills Expansion Project ("the Project"), a gold mining operation in northern Nevada. By the time the ROD issued, Cortez had already invested many millions of dollars in the exploration, engineering, design, and permitting process, and had secured contractors and purchased materials and equipment to construct and operate the mine and related facilities. When the ROD issued, Cortez began work on the Project.

Appellants moved for temporary injunctive relief on November 24, 2008, nearly two weeks after Cortez began work at the mine site.[1] A TRO hearing was held on December 1, 2008. At the urging of the district court, the parties stipulated to an order allowing certain work on the Project to proceed while other work was halted until the district court could hold a hearing on Appellants' motion for a preliminary injunction.

A four-day preliminary injunction hearing commenced on January 20, 2009. The district court heard live testimony and oral arguments and considered

[1] Appellants did not seek an injunction against underground mining and associated dewatering and ore shipments under an existing exploration permit that applies to the Project area.

submissions by the parties. In open court on January 26, 2009, the district court read into the record its detailed ruling denying a preliminary injunction ("Jan. 26 Order"). ER 1-21. The trial judge advised the parties that he would more fully address certain issues in a written order.[2] On February 3, 2009, the district court issued a written order ("Feb. 3 Order") to "clarify and explain in greater detail" some of its prior rulings. ER 22-53.

After the district court's denial of the preliminary injunction on January 26, 2009, Cortez immediately resumed construction of the mine pit and all other work contemplated by the Project plan. Appellants appealed and sought an injunction pending appeal in the district court and also in this Court. The district court denied the motion for injunction pending appeal on February 11, 2009. ER 56-58. This Court denied the motion on February 18, 2009. Docket #18.

In the proceedings below, Appellants' claimed violations of the National Environmental Policy Act ("NEPA"), the Federal Land Policy and Management Act ("FLPMA"), and the Religious Freedom Restoration Act ("RFRA"). Appellants do not appeal the district court's findings with respect to RFRA. Accordingly, they concede for purposes of this appeal the finding that they are

[2] A number of substantive and evidentiary motions and issues were pending before the district court at the time of the evidentiary hearing on the motion for preliminary injunction. The district court's oral and subsequent written rulings together constitute the disposition of those issues that were ripe for determination.

not likely to prevail on their claim that approval of the Project would constitute a substantial burden on their exercise of religion.

STATEMENT OF FACTS[3]

A. Brief Description of the Cortez Hills Expansion Project

When Cortez proposed the Project, BLM determined that it constituted a major federal action and required an environmental impact statement ("EIS") under NEPA. ER 226 (ROD at 2). BLM also determined that the Project was subject to the provisions of FLPMA. *Id*. On December 2, 2005, BLM published a Notice of Intent to prepare an EIS in the Federal Register. ER 224 (ROD at i). In December 2005, BLM held the first of several public meetings in Crescent Valley and Battle Mountain, Nevada, to receive public comment on the scope of the environmental analysis. *Id*.

BLM spent the next two years evaluating the Project and preparing a Draft EIS. The Draft EIS included an assessment of the existing environment and an evaluation of the Project's impacts in the following areas: (1) geology and minerals, (2) water resources and geochemistry, (2) soils and reclamation, (3) vegetation resources, (4) wildlife resources, (5) special status wildlife species, (6)

---

[3] Circuit Rule 28-2.8 requires that "[e]very assertion in briefs regarding matters in the record shall be supported by a reference to the location, if any, in the excerpts of record where the matter is to be found." Appellants' Brief fails in this regard as it contains numerous sweeping factual assertions that contain no support in the record.

fisheries resources, (7) range resources, (8) paleontology, (9) cultural resources; (10) Native American traditional values, (11) air quality, (12) land use and access, (13) recreation and wilderness, (14) social and economic values, (15) environmental justice, (16) visual resources, (17) noise, and (18) hazardous materials and solid waste. *See generally* Barrick Cortez Inc.'s Supplemental Excerpts of Record ("CSER") 2-20 (FEIS Executive Summary at ES-1 to ES-19).

In particular, in addressing Native American traditional values, BLM engaged in extensive consultation with local Native American tribes and groups to identify impacts upon Native American resources and values. *See* CSER 96-114 (FEIS at 3.9-3 to 3.9-21 and Table 3.9-1). As a result, the Draft EIS and FEIS extensively analyze the Project's potential impacts on Native American interests.

In its evaluation, BLM considered numerous alternatives for the Project, including a "No Action" alternative. *See* CSER 27-87 (FEIS at 2-70 to 2-130). Four alternatives were analyzed in detail in the Draft EIS. *Id*.

On October 5, 2007, after two years of gathering public input and analyzing the Project's impacts, BLM published the Draft EIS for public review and comment. ER 250 (ROD at 26). During the public comment period, BLM held additional public meetings in Crescent Valley and Battle Mountain to receive input on the Draft EIS from those in the area. *Id*. Over the next year, BLM

evaluated hundreds of comments that it received during the comment period. BLM included these comments and responses in Appendix F of the FEIS and made substantive changes in the text of the FEIS to reflect input from the public and other agencies.

As a consequence of the public review of the Draft EIS, BLM developed and evaluated a fifth alternative known as the "Revised Cortez Pit Design Alternative." BLM ultimately adopted that alternative. *See* ER 224 and 231 (ROD at i, 7); CSER 20 (FEIS at ES-19). The new alternative limited the size of the pit to better accommodate the boundaries of the "property of religious and cultural importance" ("PCRI") located east of the pit. CSER 48 (FEIS at 2-91).

BLM published the FEIS on October 3, 2008. ER 250 (ROD at 26). Following publication of the FEIS, BLM received additional comments. *Id*. BLM issued its Record of Decision on November 12, 2008. As part of the ROD, BLM "considered and addressed these comments and determined that they did not identify or present any significant new information or changed circumstances that would warrant additional NEPA analysis." ER 251 (ROD at 27).

The end product of BLM's analysis and the permitting process was a FEIS that the district court characterized as follows: "[T]he Court would, first of all, have to say that the [FEIS], in the Court's view and based on the environmental cases of which the Court has studied and seen and in some cases been involved

with, this was a very thorough environmental impact statement." ER 13. The district court continued:

> It is very clear that [the FEIS] represents thousands and thousands of hours of expertise and work product, either directly by BLM officials and representatives and also by their providers, the third-party contractors who provided various analysis and expertise with regard to the natural resources, with regard to the religious practices and spiritual significance of portions of this particular project, and all of the analysis that went into the environmental impact statement.
>
> It frankly was very thorough, and the Court is satisfied that there certainly was what the law requires in an environmental case, and that is a hard look by the Bureau of Land Management at all of the issues which pertain to a … project such as this one.

Id. Accordingly, the district court found that BLM's analysis satisfied both FLPMA and NEPA. *Id.* at 13-14, 45-51.

B. The History of Mt. Tenabo Is Dominated By Mining

The FEIS noted Mt. Tenabo's extensive mining history, which dates back nearly 150 years. Government's Supplemental Excerpts of Record ("Govt SER") 16-17, 87, 104 (FEIS at 2-1, 2-2, 3.8-8, 3.9-23). Mining has been the dominant activity on and around Mt. Tenabo for the last 145 years. CSER 142-145, 147. Silver was discovered in 1863 and mined extensively until the 1930s. *Id.* at 144-185, 189-197. During this time, 20-30 miles of underground workings were constructed, four mills were built and operated, a railroad was built and operated,

and more than four distinct townsites grew up containing as many as 500 residents. *Id.* at 145-150, 152-53, 157, 160-163, 165-171, 177-178, 182-185, 189, 191-192. The pediment area and lower slopes of Mt. Tenabo were essentially deforested to provide fuel to operate the mills and construction materials. *Id.* at 172-177. The Mt. Tenabo area was a prolific silver producer; in 1928, the mining district that included Mt. Tenabo was the largest silver producer in the United States. *Id.* at 196-197.

Beginning in 1960, the area shifted from silver to gold exploration and production. CSER 195-196. Three open pit mines were constructed near the base of Mt. Tenabo, along with ore processing and milling facilities, heap leach pads, and tailings dams. *Id.* at 194-197. In the 1980s, several open pit gold mines and waste dumps were constructed near the summit of Mt. Tenabo and on its eastern flank, and a haul road was constructed that traversed the mountain on three sides. *Id.* at 197-198, 201-206. Large mining haul trucks ran on the haul road every 20 minutes, 24 hours a day. *Id.* at 204. Prior to 1981, in the late 1990s, and in the early part of this century, extensive exploration was done in the area of the Project. *Id.* at 198-199, 206, 320-323, 456; *see also* CSER 435 at ¶ 2. The area where the current pit is being constructed was crisscrossed with an extensive network of roads and drill pads. *Id.*

Prior to the time that the Project was announced, there was minimal evidence of any Western Shoshone presence in the area of Mt. Tenabo and no evidence of religious usage. CSER 156-57, 206-211. Historical evidence shows no conflicts or confrontations between the Western Shoshone and the mining industry, in contrast with other mining districts in Nevada. *Id.* at 211. Bill Wilson, the person responsible for staking most of the modern mining claims, testified that he and his brother worked in the Project area on a daily basis during the 1960s and 1970s and into the 1980s. *Id.* at 339, 342-346. They lived in a trailer they parked near Shoshone Wells and piped the entire spring-flow from Shoshone Wells into their trailer. *Id.* at 339-341. During this time they never observed any religious activity around Mt. Tenabo. *Id.* at 346-347. Nor did anyone question their use of the water from Shoshone Wells, which Appellants now claim is "sacred." *Id.* at 341.

Appellants assert without citation to the record, "The Mountain, including its slopes, is currently being used, as it has for centuries, by Western Shoshone people for prayer, fasting, purification ceremonies, and other religious practices." App. Br. at 8, 17. In fact, there is no competent evidence in the record to support this assertion. The historical claim is based on non-specific, hearsay

generalizations contained in a few unsworn declarations submitted to the BLM.[4] As for current uses of the Project site for religious purposes, no witness has identified any particular place within the Project area where he or she is required to conduct any particular spiritual exercise.

C. Cortez's Investment in the Project

As of the date of the January preliminary injunction hearing in the district court, Cortez had spent $380 million for exploration and capital expenditures related to the Project. CSER 349-350, 358. Cortez plans on spending approximately $290 million, or an average of $640,000 per day, over the next fifteen months to construct the Project. CSER 350. These expenditures will flow directly into the economy and create hundreds of jobs. *Id.* at 350-352. The Project also will involve 50 contractors employing approximately 300 people. *Id.* at 351-352. Cortez has directly hired, or will hire, approximately 250 people, including about 25 Western Shoshone to work at the Project. *Id.* at 350-352. Additionally, as Cortez's nearby Pipeline Mine exhausts its ore body and closes

[4] Although the district court considered these declarations because they are part of the administrative record, they clearly did not receive much weight. ER 16-17. The district court did not abuse its discretion when it refused to give much weight to these declarations. None of them are sworn, and they thus fail to meet even the most basic requirements for admissibility under the Federal Rules of Evidence. Moreover, they contain sweeping generalizations with no foundation and contain hearsay and hearsay within hearsay. For these reasons, the district court was correct to give these declarations, as well as the ethnographic report, discussed *infra* at pp. 42-43, little weight.

during the next few years, many of its 660 employees will transition to the Cortez Hills Mine. *Id.* at 361-362. The Project will generate tens of millions of dollars in tax revenue for the State of Nevada and local government entities, including school districts, hospitals, and counties. *Id.* at 395, 400-408, 412.

D. Impacts of Delaying the Project

As the district court found, the public interest favors having the Project proceed without delay. ER 52, 58. Indeed, the district court noted that there were "certainly huge implications for the public at a time of severe economic difficulties throughout the nation, not just in the State of Nevada." ER 4. The district court stated:

> Obviously there is a huge public interest involved here which directly concerns the economy and the financial implications to many Western Shoshones as well as other interested parties. I have to say that I was awestruck by the monetary implications of this mining operation.

Id. at 15. Dr. John Dobra, an economics professor at the University of Nevada Reno, testified that a one year delay would result in an unrecoverable loss of approximately $60 million to the local and state economies. CSER 391-392, 395. This economic loss would result solely from delay and would be lost even if the Project eventually went forward at a later date. *Id.* at 395-396. Dr. Dobra's testimony was unchallenged.

Michael Alastuey, an expert with nearly 40 years experience in state and local government fiscal affairs, testified that the State of Nevada and local government entities would lose tens of millions of dollars of tax revenue at a time of dire need—when the state is facing multi-billion dollar budget deficits. CSER 397-403. He testified that Nevada would lose approximately $14-31 million in tax revenues if the Project were to be delayed between six months and one year, and Lander County would bear the brunt of this loss. *Id.* at 402-403. The lost tax revenue would come at a time when revenue shortfalls are forcing drastic cuts in public services, such as public education and health care. *Id.* at 404-408. He testified that lost public services could not be made up if the Project were to be delayed, even if it later proceeded, noting, by example:

> A starving person needs food today, not the promise of a meal in a year or a week or whatever. You have to gain the revenue at the time that it is needed. No amount of speculation as to … future revenue solves Nevada's problems today.

Id. at 412-413.

Additionally, the unchallenged, proffered testimony from the Executive Director for Lander County, Gene Etcheverry, explained how a delay of the Project would mean that tax revenues would not be available to fund urgently needed public health and safety projects, and public works, maintenance, and improvement projects. CSER 388-391.

If the Project were to be delayed, most if not all of the contractors' 300 employees would lose their jobs. Ames Construction is one of the contractors currently working on the Project. CSER 364-365. Ames has three separate contracts for the Project that total $34 million in value, and these contracts represent Ames' most significant work in northern Nevada. *Id.* at 365-366. If the Project were to be delayed, Ames will be forced to lay off approximately 90 people, including six Western Shoshone, and forego hiring another 30-40 people it will hire if the Project continues. *Id.* at 367-368. With the economy in poor condition and the construction market in northern Nevada extremely slow, there is little likelihood of these people finding other work. *Id.* at 368-369.

Another contractor, High Mark Construction, has or will have 60-70 people working on the Project under three contracts and there is little or no other work available. CSER 371-372, 376-377. Delay would force High Mark to lay off employees and forego hiring. *Id.* at 377. Each month of delay would cost High Mark $330,000. *Id.* at 376. A delay as short as 45 days could force High Mark to liquidate all of its equipment and cease operation completely.[5] *Id.* at 372, 377.

[5] Evidence from five other contractors was similar: A delay of this Project would cause significant job losses and possible business failures. CSER 301-303, 380-387. Mary Lou McAlexander, a Western Shoshone business owner, testified that her business, ML Enterprises, will not survive if the Project does not go forward. *Id.* at 301-303.

A delay would mean that Cortez would also be forced to lay off people. Dan Banghart, Cortez Hills Project Manager, testified that it is critical that the Project go forward for two reasons. First, immediate development of the open pit is essential to keep the Pipeline Mill[6] operating and its more than 100 employees working. CSER 352-354. This mill will run out of mill ore in approximately 15 months, and, if the Cortez Hills open pit is not producing mill ore by then, Cortez will need to shut down the mill and lay off the mill employees. *Id*. Mr. Banghart testified it will take approximately 15 months of construction and excavation before the Cortez Hills open pit will begin producing mill ore to adequately meet the mill's needs. *Id.* at 354. Second, immediate development of the open pit is needed so that many of the 660 Pipeline Mine employees can stay employed by transitioning to the Cortez Hills mine as the Pipeline Mine winds down and closes. *Id.* at 361-362.

In addition, Mr. Banghart testified that Cortez would lose hundreds of thousands of dollars per day if the Project were to be delayed. CSER 356. Like the unrecoverable loss to the overall economy, this loss to Cortez is also unrecoverable because it is also based on the time value of money. *Id.*; *see also id.* at 395-396. Thus, this loss results solely from delay, and Cortez will still

[6] The Pipeline Mill is located approximately 12 miles from the Project and will process the "mill ore" mined at the Project.

suffer this loss of hundreds of thousands of dollars per day even if the Project eventually goes forward. Further, Cortez has invested more than $380 million thus far in the Project, *id.* at 349-350, 358, and any delay jeopardizes Cortez's return on this massive investment.

Moreover, many Western Shoshone believe mining in general, and this Project in particular, are beneficial to the communities in which they live and work. CSER 214, 219-220, 223-234. Dianna Buckner, who at the time was Chairperson of the Ely Shoshone Tribe, testified that not only is mining spiritually compatible with Western Shoshone religious beliefs and practices, but that mining is beneficial because it allows Western Shoshone to provide and care for their families. *Id.* at 214, 219-220. The first time that Ms. Buckner became aware that a few people were claiming that Mt. Tenabo had some religious significance was when this Project was proposed. *Id.* at 218. Felix Ike, who served in tribal leadership for 27 years, including as chairman of Appellant Te-Moak Tribe, similarly testified that the Project would not impact his ability to exercise his Western Shoshone religious beliefs. CSER 223-234. Like Ms. Buckner, Mr. Ike first became aware that a few people were claiming that Mt. Tenabo had some religious significance at the time this Project was proposed. *Id.* at 231-232; *see also id.* at 237-347 (Jerry Millet, Chairman of Duckwater Shoshone Tribe, testifying that mining is compatible with Western Shoshone

religious beliefs and that mining provides economic opportunities for Western Shoshone); *see also id.* at 296-297, 300-305 (Mary Lou McAlexander, a Western Shoshone and owner of ML Enterprises, a mining services company, testifying that the Project would not impact her ability to exercise her Western Shoshone religious beliefs, and would provide economic opportunities for Western Shoshone); *see also id.* at 252-253, 257-258 (Brian Mason, a Western Shoshone and former reclamation supervisor for Cortez, testifying that mining is compatible with Western Shoshone religious beliefs).

SUMMARY OF THE ARGUMENT

The United States Supreme Court recently clarified the legal standard for preliminary injunctions in *Winter v. Natural Resources Defense Council*, 555 U.S.___, 129 S. Ct. 365 (2008). Each of the four elements—likelihood of success on the merits, irreparable harm, balance of harms, and public interest—must be established by a party seeking a preliminary injunction. The "sliding scale" test urged by Appellants is no longer applicable. The *Winter* standard was correctly applied by the district court and it did not abuse its discretion by finding that Appellants failed to establish all of the elements.

Review of an order denying a preliminary injunction is limited and deferential. If the district court applied the appropriate legal standard, this Court will not reverse simply because it would have come to a different outcome. The

abuse of discretion standard gives even greater deference on those issues where the district court was reviewing an agency action under the Administrative Procedures Act since the district court was itself applying an "arbitrary and capricious—abuse of discretion" standard to the agency decision.

Likelihood of Success—FLPMA Claims

The district court did not abuse its discretion when it ruled that Appellants were not likely to prevail on the merits of their FLPMA claims. First, BLM correctly understood and applied its authority and responsibility to prevent "unnecessary or undue degradation" to public lands under FLPMA. That term is defined in the regulations and was appropriately applied in the FEIS. Appellant's argument is based on a single sentence quoted out of context.

Second, the district court did not abuse its discretion in finding Appellants were unlikely to prevail on their claim that the Project would result in unnecessary or undue degradation of any sacred site. Notwithstanding some generalized and non-specific claims that certain individuals engaged in religious practices "in the Project area," BLM had contrary evidence that the area had been extensively explored and mined for almost 150 years. Archaeological studies of the area found no evidence of religious uses. Most importantly, BLM noted that religious uses would not be prevented because Western Shoshone would continue to have access to the parts of Mt. Tenabo they considered most significant.

Third, the district court did not abuse its discretion in finding Appellants were unlikely to prevail on their claim that the Project would result in unnecessary or undue degradation of any water resources. Appellants argue that the springs or seeps in the Project area will be affected or eliminated. But the FEIS makes it clear that, while the groundwater levels will be lowered as a result of mine dewatering, the effect on springs and seeps cannot be predicted. This is because it is not known whether these springs/seeps are fed by the regional groundwater table or by other more localized sources. They will be monitored and if they are affected by dewatering, BLM's decision requires mitigation. In addition, the water quality of the ultimate pit lake will be similar to the existing ground water. Finally, much of the water removed via the dewatering process will be infiltrated back into the aquifer.

Fourth, the district court did not abuse its discretion in finding Appellants were unlikely to prevail on their claim that the Project would result in unnecessary or undue degradation of scenic resources. BLM's decision was in accordance with the applicable land use plan for this area so a departure from visual resource management objectives is not a violation of FLPMA.

Likelihood of Success—NEPA Claims

The district court did not abuse its discretion in finding Appellants were unlikely to prevail on their NEPA claims. The district court found that the FEIS

was a "very thorough environmental impact statement" and that the BLM took the requisite "hard look" at the environmental issues. Appellants' NEPA criticisms amount to little more than unpersuasive "flyspecking" that are insufficient to invalidate the BLM's decision to approve the Project.

First, the FEIS concluded that the Project would meet air quality requirements based on standard air quality modeling of potential sources of emissions. The modeling method for $PM_{2.5}$ and PM_{10} was consistent with EPA guidelines. Although Appellants disagree with the EPA guidance and conclusions, the district court did not abuse its discretion in finding that Appellants were unlikely to prevail on the merits of this contention.

Second, the district court did not abuse its discretion by finding that Appellants were unlikely to prevail on a claim that the BLM violated NEPA by failing to analyze the air quality impacts from transporting ore from the Project to a different facility. The district court was presented with evidence to show that the FEIS provides, in the cumulative impacts section, the very mercury emissions analysis claimed to be missing. In addition, the district court was informed that the impact of the ore transport process was the subject of a separate Draft EIS prepared by BLM for the facility that will treat the ore.

Third, BLM's plan for mitigating impacts to ground and surface waters, as found by the district court, had been sufficiently evaluated. The plan, which

called for monitoring, followed by preparation of site specific mitigation measures, if necessary, is consistent with applicable Ninth Circuit precedent.

Irreparable Harm

While the district court acknowledged that the Project will ultimately impact the environment, it did not hold that such harm was irreparable or imminent so as to support issuance of a preliminary injunction. Evidence before the district court demonstrated that environmental impacts to the area during the prosecution of the case could be remediated, that continued unrestricted access to unaffected areas of Mt. Tenabo for religious or other purposes deflected claims of irreparable harm, and that claimed future impacts to water and air were not immediate.

Public Interest

The district court did not abuse its discretion by following the admonition of the Supreme Court that it should "pay particular regard for the public consequences" when faced with a request for injunctive relief. The district court correctly exercised its discretion by finding that the extensive evidence of the Project's immediate widespread positive economic impact on hundreds of mine employees, numerous contractors and hundreds of their employees, state tax revenues, county government, local communities and supportive Western Shoshone tribes and individuals outweighed the Appellants' argument that a

delay was without negative public impact. Similarly, it was not an abuse of discretion to reject the notion that merely because this was a mine, or that because certain environmental groups or individuals oppose mining, public interest automatically leans in favor of the opponents. The district court's finding on this issue alone warrants denial of the injunction.

Balance of Harms

On the one hand, the district court was presented with direct and uncontroverted testimony that a delay in proceeding with the Project would result in the loss of hundreds of jobs, failures of businesses, financial harm to state and local governments, harm to a hospital, school districts and other public entities, further depression of the northern Nevada economy, harm to Western Shoshone communities, and millions of dollars in losses to Cortez for which Appellants are unwilling or unable to post a bond. In contrast, Appellants contend that they will be harmed because they will not be able to exercise their religion in areas under construction. However, the district court found, based on uncontroverted testimony, that vast areas of Mt. Tenabo offer unrestricted access to Appellants and the public for religious or cultural activities, and that Western Shoshone consider all of their ancestral lands as sacred and suitable for exercise of religion. The district court further found that the primary activity in the Project area for the past 145 years has been mining. Thus, in balancing the harms in favor of

allowing the Project to proceed without delay, the district court did not abuse its discretion.

ARGUMENT

I. THE DISTRICT COURT APPLIED THE CORRECT PRELIMINARY INJUNCTION STANDARD

In *Winter v. Natural Resources Defense Council*, 555 U.S.___, 129 S. Ct. 365 (2008), the United States Supreme Court clarified the standard for a preliminary injunction. The Court first recognized that a preliminary injunction is "an extraordinary remedy, never awarded as of right." *Id*. at 376. Because it is an extraordinary remedy, the Supreme Court held that a party seeking a preliminary injunction must establish each of the following four elements: "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 374; *see also American Trucking Ass'ns, Inc. v. City of Los Angeles*, 2009 WL 723993 *4-*5 (9th Cir., Mar. 20, 2009). In both its oral and written decisions denying Appellants' Motion for Preliminary Injunction, the district court correctly articulated and applied the standard set forth in *Winter*. *See* ER 5-6, 26. As discussed below, the district court correctly found that Appellants had not established all four of these elements, and that their motion for a preliminary injunction failed.

Appellants urge a sliding scale approach that the Supreme Court rejected in *Winter*. *See Winter*, 129 S.Ct. at 375-76. Appellants argue that a preliminary injunction may be obtained on a showing of a "possibility" of irreparable harm if there is a showing of a "strong" likelihood of success on the merits. App. Br. at 13-14. Appellants ignore *Winter*'s rejection of the sliding scale, a rejection recently recognized by this Court in *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 2009 WL 723993 (9th Cir., Mar. 20, 2009). 2009 WL 723993 at *4-*5 & n.10 ("In *Winter*, the Court reversed one of our decisions, which, it determined, upheld a grant of a preliminary injunction by use of a standard that was much too lenient."). In *American Trucking,* this Court clearly stated that "[t]o the extent that our cases have suggested a lesser standard, they are no longer controlling, or even viable[]", and then cited *Lands Council v. Martin*, 479 F.3d 636 (9th Cir. 2007), as an example of the pre-*Winter* standard that is no longer good law. *Id.* at *5, n.10. The now-rejected standard from *Lands Council v. Martin* is nearly identical to the standard urged by Appellants. *Compare Lands Council v. Martin*, 479 F.3d at 639, *with Save our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005) *and Kootenai Tribe v. Veneman*, 313 F.3d 1094, 1124 (9th Cir. 2002). In sum, a petitioner must establish each of the four preliminary injunction elements to be entitled to such relief. The district court did not abuse its discretion when it found that Appellants failed to meet their burden.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND THAT APPELLANTS WERE UNLIKELY TO PREVAIL ON THE MERITS OF THEIR CLAIMS

The district court acted well within its discretion when it found that Appellants were not likely to prevail on their claim that BLM's approval of the Project was arbitrary and capricious.

A. Standard of Review

In addressing preliminary injunction appeals, this Court has held,

> A district court's decision regarding preliminary injunctive relief is subject to "limited and deferential" review. … Thus, we review the denial of a preliminary injunction for abuse of discretion. … ***A district court abuses its discretion in denying a request for a preliminary injunction if it "base[s] its decision on an erroneous legal standard or clearly erroneous findings of fact."*** ... Under this standard, "[a]s long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result. …

The Lands Council v. McNair, 537 F.3d 981, 986-87 (9th Cir. 2008) (internal citations omitted) (emphasis added); *see also Rucker v. Davis*, 237 F.3d 1113, 1118 (9th Cir. 2001) (*en banc*), (*rev'd on other grounds*) 535 U.S. 125, ("We typically will not reach the merits of a case when reviewing a preliminary injunction. …. By this we mean we will not second guess [the district court].") (internal citations omitted).

Moreover, to overturn the district court's finding that Appellants are unlikely to succeed on their FLPMA and NEPA claims, Appellants must clear an even higher hurdle. This is because the abuse of discretion standard is applied on top of the district court's abuse of discretion review of the agency action. As this Court stated in *McNair*:

> [A]lthough we review the district court's denial of Lands Council's request for a preliminary injunction for abuse of discretion, our review of the district court's determination as to whether Lands Council was likely to prevail on the merits of its NEPA and NFMA claims necessarily incorporates the APA's arbitrary and capricious standard [whether the agency decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"].

537 F.3d at 987. In other words, Appellants must overcome a standard of review that incorporates deference upon deference.

B. Appellants Failed To Prove That They Were Likely To Prevail On Their FLPMA Claim

Appellants claim that BLM violated FLPMA in four ways. First, they contend that BLM improperly interpreted its authority under FLPMA. Second, they assert that the BLM's approval of the project will cause unnecessary or undue degradation to Native American cultural and religious resources. Third, they claim the Project will result in the unnecessary or undue degradation of water resources. Finally, they argue the BLM's approval of the Project will unduly degrade visual resources. The district court acted well within its

discretion when it found that Appellants were unlikely to succeed on any of these arguments.

1. BLM Properly Interpreted and Applied Its Authority Under FLPMA.

Pointing to BLM's response to a comment from Appellant Great Basin Resource Watch, Appellants claim that BLM misinterpreted its own authority. App. Br. at 25-27. Appellants have taken BLM's statement out of context. The statement upon which Appellants rely was one sentence in a six paragraph response to a comment (made by Appellant Great Basin Resource Watch) that the project would result in "unnecessary or undue degradation." Just prior to the sentence quoted by Appellants, BLM was discussing historic properties. BLM explained that "the NHPA does not prohibit effects to historic properties after the BLM has considered the effect of an undertaking on such resources. The commenter's implication that the unnecessary or undue degradation standard requires permanent preservation of cultural resources is not consistent with the NHPA." Govt SER 168-69 (FEIS Appx. F1 at 36-37). Next, BLM explained that for those historic properties subject to NHPA, the unnecessary or undue degradation standard does not provide greater protection. *Id.* This is an accurate and unremarkable statement. Further, it has nothing to do with BLM's application of the "unnecessary or undue degradation" requirement in the broader context of other resources, including public lands and waters claimed to be sacred

by Appellants. In the immediately preceding paragraph, BLM explained the broader application of the standard:

> In assessing compliance with the unnecessary or undue degradation standard, BLM looks at the law, the regulations and agency guidance. The federal district court decision referred to in the comment, *Mineral Policy Center v. Norton*, 292 F. Supp. 2d 30 (D.D.C. 2003) affirmed the regulations, including the definition of 'unnecessary or undue degradation' adopted in those regulations. Subsequent to the decision, BLM instruction memoranda have been updated to include the court's direction on this issue.

Govt SER 168 (FEIS Appx. F1 at 36).

In many other places in the FEIS and ROD, BLM acknowledges its authority and obligation under FLPMA. For example, in the FEIS Section on Native American Traditional Values, BLM explains that "in addition to NRHP [National Register of Historic Places] eligibility, some places of cultural and religious importance must be evaluated to determine if they should be considered under other federal laws, regulations, directives, or policies. These include, but are not limited to, the Native American Graves Protection and Repatriation Act (NAGPRA) of 1990, American Indian Religious Freedom Act (AIRFA) of 1978, Archaeological Resources Protection Act (ARPA) of 1979, and Executive Order

13007 of 1996."[7] Govt SER 93 (FEIS at 3.9-2). Thus, Appellants characterization of the record is incomplete and inaccurate. BLM did not have an overly restrictive view of its authority or obligation under FLPMA and it applied that standard appropriately to the Project.

2. BLM's Decision Will Not Result in Unnecessary or Undue Degradation of Any "Sacred Site."

BLM's application of the appropriate standard is apparent when evaluating Appellants' claim that the project will cause undue degradation of the "Mt. Tenabo Sacred Site."[8] BLM considered the specific allegations made by Appellants (including the declarations submitted with the comments on the Draft

---

[7] Appellants quote the 2000 preamble to BLM's mining regulations (43 C.F.R. subpart 3809) and state that it "specifically recognizes the binding nature of E.O. 13007 as applied to BLM under FLPMA's UUD standard." App. Br. at 29. But they fail to point out that the 2000 regulations were substantially revised and replaced in 2001. 66 Fed. Reg. 54833-62 (Oct. 30, 2001). As a result, the quoted preamble is no longer in effect. Moreover, the Executive Order is not an independently enforceable law, as Appellants acknowledge, and it applies only to "sacred sites" that are "specific, discrete, narrowly delineated location[s] on Federal land . . . ." Exec. Order 13007, "Indian Sacred Sites" (May 24, 1996), 61 Fed. Reg. 26771.

[8] There is nothing designated in the record as the "Mt. Tenabo Sacred Site." This is a construct created by Appellants for purposes of this litigation. The FEIS evaluates potential environmental impacts to the entire area, including areas previously identified by Western Shoshone as particularly important for cultural or religious reasons and identified by BLM as "properties of cultural and religious importance." *See, e.g.* Govt SER 102 (FEIS at 3.9-21). The district court found that Appellants would continue to have access to areas "identified as religiously significant." *See* ER 11, 43. Faced with that finding, Appellants now seek to broaden the area characterized as "sacred."

EIS) and concluded that the Project would "not result in significant disruption or elimination of Native American religious practices or unnecessary or undue degradation." Govt SER 179 (FEIS Appx. F1 at 123). BLM explained its rationale for reaching that conclusion. First, the area has been subject to intensive mineral exploration and development since the 1860s.[9] *See* Govt SER 87 (FEIS at 3.8-8) (exploration and mining [have] dominated the history of the project vicinity from the mid-19th Century to the present day"); Govt SER 104 (FEIS at 3.9-23) (Mt. Tenabo has been the object of exploration and mining since 1862); Govt SER 180 (FEIS Appx. F1 at 124) ("some of the areas the comment identifies as spiritual areas (Cortez Hills Pit and related facilities) currently include mining exploration roads and exploration drill sites, as well has historic mining features that have accumulated for over 130 years."); Govt SER 182 (FEIS Appx. F1 at 126) ("The Cortez Complex [adjacent to Mt. Tenabo] has been in operation since 1968.").

Second, ethnographic and archaeological studies did not identify any specific religious sites within the Project area. *See* Govt SER 182 (FEIS Appx. F1 at 126) ("Based on the results of ethnographic studies and BLM's consultation, coordination and communication with the tribes, as well as

[9] The district court found the evidence of historical mining activity in the region particularly persuasive. ER 7-10.

observations of public (including Native American) use levels in the area, there is no evidence that the areas of proposed disturbance are the site of religious practices."); Govt SER 178 (FEIS Appx. F1 at 122) ("Based on the consultation and ethnographic studies conducted to date, the 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 177 (FEIS Appex. F1 at 121) (Many of the cultural practices identified in the ethnographic studies for the study area are historical practices that are not continued in the present day."). In addition, detailed archaeological studies of the entire Project area identified no evidence of religious use of the area. *See* Govt SER 89-90 (FEIS at 3.8-10 to 3.8-11). Appellants rely on excerpts from a single ethnographic report to support their claims, App. Br. at 17-20, but it was not arbitrary or capricious of the BLM to conclude that the non-specific, generalized, hearsay statements in that study should not outweigh all other available evidence.

Third, access to sites identified as important for cultural and religious reasons would be continued under the Project as approved by BLM. Govt SER 105 (FEIS at 3.9-24) (access to Mt. Tenabo, Horse Canyon, Shoshone Wells and other area would be maintained). The district court concurred in that finding. ER 11 ("the mining operation will allow access to all of those areas for purposes of any usage, and that certainly includes the spiritual and religious practices of the

Western Shoshone."); *see also id.* at 43 ("[T]he evidence demonstrates that Plaintiffs will continue to have access to the areas identified as religiously significant….").

Finally, in consultation with a tribally-designated Working Group, BLM identified and implemented mitigating measures. *See* Govt SER 94-98 (FEIS at 3.9-3 to 3.9-7) (discussion of consultation and Working Group); Govt SER 106 (FEIS at 3.9-25) (identification of "action item list" of mitigation measures); Govt SER 111-113 (FEIS at 3.9-71 to 3.9-73) (discussion of mitigation measures adopted by BLM).

Appellants ask this Court to ignore BLM's analysis and conclusions and to rely, instead, upon declarations of a few individual members of Appellant organizations. App. Br. at 18-19, 30. BLM weighed these declarations and found them inconsistent with other evidence in the record, which shows extensive mining activity and little or no religious use of the area. *See supra* at pp. 7-10. The district court considered these same declarations and weighed them against BLM's analysis in the FEIS. ER 16-17, 45-49. BLM's conclusion that the project would not cause unnecessary or undue degradation is supported by evidence in the administrative record, and the district court did not abuse its discretion in concluding that Appellants were unlikely to succeed on the merits of their FLPMA claims. ER 12-14, 45-49.

3. BLM's Decision Will Not Result in Unnecessary or Undue Degradation of Water Resources.

Contrary to Appellants' assertion, the FEIS does not predict that any seeps or springs will suffer the loss or complete elimination of their flows. *See* App. Br. at 22, 34-36. In numerous places, the FEIS explains that potential impacts depend on site-specific hydrologic conditions and will occur only if, and where, surface waters are hydrologically linked to the deep aquifer that is being dewatered to allow mining. For example, in the paragraph immediately following the language quoted by Appellants on page 22 of their brief, the FEIS explains,

> The actual impacts to individual seeps, springs, or stream reaches would depend on the source of groundwater that sustains the perennial flow (perched or hydraulically isolated aquifer versus regional groundwater system) and the actual extent of mine-induced drawdown that occurs in the area. The interconnection (or lack of interconnection) between the perennial surface waters and deeper groundwater sources is controlled in large part by the specific hydrogeologic conditions that occur at each site. Considering the complexity of the hydrogeologic conditions in the region and the inherent uncertainty in numerical modeling predictions relative to the exact areal extent of a predicted drawdown area, it is not possible to conclusively identify specific springs and seeps that would or would not be impacted by future mine-induced groundwater drawdown.

Govt SER 60 (FEIS at 3.2-57).[10] These *potential* impacts are further subject to the mitigation measures discussed *infra* at pp. 37-39.

With regard to the predicted water quality of the pit lake, Appellants fail to disclose that it is similar to the existing groundwater quality, i.e., that the existing groundwater fails to meet the drinking water standard for arsenic. Govt SER 52 (FEIS at 3.2-27, Table 3.2-5). Appellants also fail to disclose that the FEIS includes an ecological risk assessment of predicted pit lake water quality which concluded that the pit lake water quality would pose no threat to terrestrial or aquatic life. Govt SER 80-83 (FEIS at 3.5-38 to 3.5-41).

4. BLM's Decision Will Not Result in Unnecessary or Undue Degradation of Scenic Resources.

Appellants argue that the Project will result in unnecessary or undue degradation of scenic resources. App. Br. at 37-38. The applicable Resource Management Plan identified this area as having the "highest and best use for mineral production." Govt SER 13 (FEIS at 1-5). Where compliance with visual

[10] BLM's analysis as described above and as applied to Shoshone Wells was addressed specifically at the preliminary injunction hearing. George Fennemore testified that the proposed dewatering operation will target deep groundwater, and that it is unknown whether "there a connection between this water table [referring to deep groundwater in an illustration] and the water table feeding the seepage spring at [Shoshone Wells]." CSER 326-328. Mr. Fennemore further testified that due to this uncertainty, the approach adopted in the FEIS was to monitor groundwater drawdown, changes in the flow at the seep, and then to mitigate if necessary. *Id*. at 327-328.

resource management objectives conflicts with the specific resource allocation decision in the applicable land use plan, the agency is directed to follow the land use plan and temporary or site-specific departures from the VRM objectives is *not* unnecessary or undue degradation. *Southern Utah Wilderness Alliance et al.*, 144 IBLA 70, 83-84, 87 (1998) (where VRM analysis was "muddled" and in conflict with the Resource Management Plan objectives, the agency should give "full force and effect" to the management resource allocation decisions).

C. The District Court Did Not Abuse Its Discretion By Finding Appellants Failed To Prove They Were Likely To Prevail On Their Claim That BLM Arbitrarily and Capriciously Failed To Comply With NEPA

As noted in the Statement of Facts above, the district court found that the FEIS was a "very thorough environmental impact statement," and that BLM took a requisite "hard look" at environmental issues associated with the Cortez Hills mining Project. ER 12-14, 49-51. The adequacy of BLM's analysis is demonstrated by the Appellants' challenges to it, which amount to little more than nit-picking. This Court has expressly disavowed "flyspeck" review of NEPA documents, instead requiring that a district court "make a 'pragmatic judgment whether the EIS's form, content and preparation foster both informed decision-making and informed public participation.'" *Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988). Yet, Appellants ask this Court to engage in the sort of "flyspecking" that the Court's prior jurisprudence

prohibits. As explained below, even if Appellants' criticisms of the FEIS were well-founded (which they are not), those criticisms would be insufficient to invalidate the FEIS or BLM's decision to approve the Project.

1. The FEIS Properly Evaluated Air Quality Impacts.

Appellants claim that BLM failed to properly analyze potential $PM_{2.5}$ air emissions and, as a result, BLM's conclusion that the Project will comply with applicable air quality requirements is "arbitrary and capricious [and] not supported by sufficient evidence." App. Br. at 40-43. The district court fully considered this argument and rejected it, and Appellants' characterization of the FEIS and BLM's analysis is incorrect. ER 50-51. The FEIS concluded that the Project would meet air quality requirements based on standard air quality modeling of potential sources of emissions and concluded that "results from modeling the various mine sources show that maximum concentrations of regulated pollutants would not exceed Nevada [Ambient Air Quality Standards or National Ambient Air Quality Standards] . . . . The project would comply with existing air quality standards in Nevada." Govt SER 128 (FEIS at 3.10-15). In comments on the Draft EIS, Appellant Great Basin Resource Watch stated that "it is also the case that $PM_{2.5}$ was not modeled for near-field impacts in the Draft EIS, which needs to be studied." Govt SER 172 (FEIS Appx. F1 at 53) (comment # 001-050). But specific modeling of $PM_{2.5}$ impacts is not required. BLM and

its contractor relied on EPA guidance which allows PM_{10} monitoring and modeling to be used as a "surrogate" for $PM_{2.5}$ analysis. *See* CSER 422-431. In addition, in response to the comment, BLM offered a quantitative analysis based on the estimate that $PM_{2.5}$ emissions in this context (mine sources) were approximately 15% of PM_{10} emissions. Applying that ratio, BLM explained that anticipated $PM_{2.5}$ emissions would be from one-third to less than one-half of applicable ambient air quality standards. Govt SER 173 (FEIS Appx. F1 at 54). Appellants do not like these answers, but provide nothing to suggest that BLM's conclusion was wrong. The EPA guidance document was before the district court when it concluded that Appellants were not likely to succeed on the merits of their claim. *See* CSER 422-431.

Appellants now claim an informational infirmity in the FEIS because BLM explained its analysis in response to a comment. App. Br. at 43. But Appellants' reliance on *Pacific Coast Federation of Fishermen's Associations v. National Marine Fisheries Services*, 482 F. Supp. 2d 1248, 1255 (W.D. Wash. 2007), citing *Center for Biological Diversity v. Forest Service*, 349 F.3d 1157, 1169 (9th Cir. 2003) is misplaced. In *Pacific Coast Federation*, the court found an EIS insufficient when "dissenting views of responsible scientists" were not disclosed

in the body of the EIS but only in responses to comments.[11] 482 F. Supp. 2d at 1254-55. Here Appellants offer no responsible dissenting scientific views of the applicable EPA guidance. The EPA guidance explains how BLM reached its conclusion in the FEIS and it was entirely appropriate for BLM to reference that guidance in response to a comment. Of necessity, detailed technical reports issued in support of this (or any) EIS must rely on dozens of agency guidance documents for technical support. A rule that required an agency to disclose and discuss in the EIS every source of technical guidance for every assumption underlying such analysis would be unworkable.

2. The FEIS Properly Evaluated Impacts From Off-site Ore Processing.

Appellants also claim that BLM failed to analyze the air quality impacts from the sale of ore from the site to be processed at a different facility 70 miles away. App. Br. at 44-46. The district court correctly found no merit in this claim. First, Appellants' assertion is simply wrong. Appellants claim that "the public has never had an opportunity to review the $PM_{2.5}$ and mercury emissions" from this off-site processing. App. Br. at 45. But as to mercury emissions, the cumulative impacts analysis section of the FEIS provides exactly the analysis that

[11] Not only were the dissenting views omitted from the EIS text, but the court found they were "misrepresented" in the comment response. *Pacific Coast Federation*, 482 F. Supp. 2d at 1254.

Appellants claim is missing. The FEIS includes a figure that "provides the modeled mercury deposition contributions from mercury emissions from all Nevada gold mines to each watershed in Nevada." Govt SER 132, 134 (FEIS at 3.10-19 and Figure 3.10-3). In addition, the district court was aware that the impacts associated with the operation of the Goldstrike facility (where the ore would be sold and processed) were the subject of a separate Draft EIS prepared by BLM to consider an expansion and extension of operations at that mine.[12] CSER 419-420. The Draft EIS for that project was released for public review in August, 2008 and one of the Appellants, Great Basin Resource Watch, provided comments on that Draft EIS, including the air quality sections. *Id*. Clearly these impacts have not evaded environmental review.[13]

---

[12] The Goldstrike Draft EIS is a public document and may be found at: http://www.blm.gov/nv/st/en/fo/elko_field_office/blm_information/nepa/betze_pit_expansion.html.

[13] Appellants' legal reasoning on this point is also wrong. NEPA does not require that an agency track the sale of products to evaluate potential environmental impacts. Instead, this Court has directed agencies to apply a rule of reason when determining where to draw the line for purposes of NEPA analysis of such indirect effects. Specifically, agencies should not analogize indirect effects to "ripples following the casting of a stone," because that would require "the entire pool [] be considered each time a substance heavier than a hair lands upon its surface." *Sylvester v. U.S. Army Corps of Eng'rs*, 884 F.2d 394, 400 (9th Cir. 1989).

3. The EIS Adequately Evaluated Mitigation Measures for Potential Impacts to Ground and Surface Waters.

Appellants argue that BLM did not adequately evaluate the mitigation measures adopted for ground and surface waters. App. Br. at 46-48. That argument is both factually and legally wrong. First, Appellants' characterization of the mitigation measure as requiring only monitoring is not correct. The mitigation measure describes a staged process for monitoring and evaluating impacts and for developing appropriate site-specific plans when, and if, such plans are necessary. If monitoring discloses reductions in flow that are likely the result of mine-induced drawdown, then the operator is directed to prepare a detailed, site-specific mitigation plan to enhance or replace the impacted perennial water resources. Govt SER 75 (FEIS at 3.2-111). The FEIS then identifies the kind of measures that would be taken to restore or replace surface water flow. Development and implementation of a mitigation plan is mandatory ***if*** such impacts occur.[14]

In *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468 (9th Cir. 2000), this Court approved exactly the type of mitigation measures that were adopted by

---

[14] Mitigation of spring flow, if necessary, will not be particularly difficult. The spring of concern to Appellants, Shoshone Wells (also referred to in the FEIS as the "Mapped Cortez Spring"), is a minor spring that flows at a rate of less than two gallons per minute. CSER 324-325; CSER 432-433; CSER 117-119 (FEIS App. B at B-1) ("Flows absent or too small to measure").

BLM here, i.e., the EIS and the agency's decision were upheld, even though "the mitigating measures are described in general terms and rely on general processes, not on specific substantive requirements." 236 F.3d at 477. The mitigation measures approved by this Court in *Okanogan Highlands* were provided to the district court below so that it could perform a side-by-side comparison with the mitigation measures challenged by Appellants. *See* CSER 421. The district court's approval of monitoring and future development of site-specific measures was appropriate because, as in *Okanogan Highlands*, "the exact environmental problems that will have to be mitigated are not yet known . . . ." 236 F.3d at 476-77.[15] As explained above, dewatering of the deep aquifer may not ever impact surface seeps or springs, but the decision approved by BLM does assure that if such impacts occur, they will be identified and mitigated.[16]

---

[15] Appellants have attempted to distinguish *Okanogan Highlands* by arguing that the Court there relied on additional studies outside of the EIS. CSER 416. But the Court in *Okanogan Highlands* quoted the district court's conclusion that "in finding that the Forest Service provided an adequate discussion of mitigation measures . . . today's decision is based solely on the discussion of mitigation measures provided in the FEIS and ROD." *Okanogan Highlands*, 236 F.3d at 472. There is no meaningful distinction between the evaluation of mitigation measures in *Okanogan Highlands* and this case.

[16] Appellants also claim that "any eventual mitigation plan will not be subject to any public review under NEPA." App. Br. at 47. That is not correct. Future BLM approval of the implementation of mitigation measures which might affect the environment will be fully subject to NEPA.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT APPELLANTS FAILED TO DEMONSTRATE THEY WOULD BE IRREPARABLY HARMED

In its moving papers and at the preliminary injunction hearing, Appellants failed to put on any evidence of immediate irreparable harm to justify a preliminary injunction. Instead, they focused on the Project's ultimate environmental consequences and jumped to the illogical conclusion that those consequences justified a preliminary injunction. In their opening Brief, Appellants repeat the same arguments. Because Appellants failed to put on any evidence of immediate irreparable harm that they would suffer before the district court could decide the case on the merits, the Court should affirm the district court's denial of their motion for preliminary injunction.

A. The Applicable Standard of Review Is Abuse of Discretion

As discussed *supra*, Section II.A, the standard of review of a district court's denial of a preliminary injunction is limited and deferential, and the Court should overturn the district court's decision only if the district court abused its discretion. *See The Lands Council*, 537 F.3d at 986-87. Additionally, the district court's factual findings should not be overturned unless they are "clearly erroneous." *Id*. This Court has stated:

> Unfortunately, many lawyers who come before us do not fully appreciate the height of the hurdle they must clear when attempting to convince us that a fact found by the trial court was clearly erroneous . . . .

> To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must, as one member of this court recently stated during oral argument, strike us as wrong with the force of a five-week old, unrefrigerated dead fish.

Fisher v. Roe, 263 F.3d 906, 912 (9th Cir. 2002) *rev'd on other grounds*, 346 F.3d 1204, (quoting *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir.1988)).

B. The District Court Did Not Abuse Its Discretion

The district court accepted (but did not find) that the Project will irreparably harm the environment: "The court does not question that the implementation of the Project will irreparably harm the environment." ER 52 (Feb. 3 Order at 31). It is true that the ultimate pit will be a permanent alteration of the landscape. But the evidence before the district court and this Court is that the work being done during the anticipated pendency of this lawsuit is not irreparable. The landscape could be reclaimed. CSER 435-436 at ¶¶ 5-6. Indeed, assuming *arguendo* the occurrence of all of the harms that Appellants repeatedly cite in their brief ("2000 foot pit," "polluted pit lake," "16 billion gallons of water," "permanent loss of seeps and springs," "off-site treatment of ore"), none of these harms will occur before the district court could decide the case on the merits. *See, e.g.,* CSER 22-24, 90-95 (FEIS at Table 2-4, 2-26 to 2-27, 3.2-20 to 3.2-24, Table 3.2-9) (dewatering occurs over many years and, it

should be noted, most of the water will be returned to the local aquifer); *see also* CSER 461-462 at ¶ 2, Exh. 6A (showing status of Project in its early stages, as of February 13, 2009).

The district court did not find, contrary to Appellants' assertions, that the Project will cause irreparable harm to "the Mt. Tenabo sacred site," or to "Western Shoshone religious practices" or "religious uses," or to "the Tribes" or "the Tribes' interests." Rather, the district court found that the most significant areas of Mt. Tenabo would be unaffected by the Project. ER 10-11, 43. The unaffected areas on and around the mountain, including the top of the mountain, the White Cliffs, Horse Canyon, Mill Canyon and Shoshone Wells, are the parts considered most culturally significant by the Western Shoshone. *Id*. Plaintiffs will have unrestricted access to these areas. *Id*. The district court also found that many Western Shoshone were in favor of the Project. ER 52. There was also uncontroverted evidence before the district court that the Western Shoshone consider all of the land, mountains, and water in their ancestral lands to be sacred and that they can worship anywhere within those lands. ER 10; *see also* CSER 137-139.

To support their argument of irreparable harm, Appellants emphasize one of several ethnographic reports compiled for the region, generally referred to as the "Rucks report." App. Br. at 17-20. Cortez objected to the Rucks report as

hearsay and under Fed. R. Evid. 702. CSER 122. Indeed, some of the hearsay references were attributed to anonymous sources. *See e.g.* ER 99, 108 (Rucks report 25, 36 (examples of citations to anonymous sources)). Cortez offered evidence from its own expert, Dr. Lynne Sebastian, that the Rucks report did not measure up to the critical rigor that one would expect from such a report. CSER 285-287, 292-293. Although it did not exclude the Rucks report, the district court recognized in its oral ruling that "defendants were never given an opportunity to cross-examine some of the statements and findings which were contained in the Rucks report and also that Ms. Rucks was not offered or presented as an expert witness." ER 16 (Jan. 26 Order). In light of these deficiencies, the district court did not abuse its discretion in the manner it weighed the Rucks report against live testimony and other evidence regarding religious activity on Mt. Tenabo. ER 17.[17]

Moreover, there is no presumption of irreparable injury merely because Appellants assert environmental harms. *Winter*, 129 S. Ct. at 376-78, 382

[17] The Rucks report was deemed by the BLM during the permitting process, and later by the district court, to be a factor, but not the dispositive factor, to be considered when evaluating Native American activity in the area of Mt. Tenabo. ER 16 (Jan. 26 Order). Significantly, the Rucks report was not the only source of ethnographic information available to BLM. In addition to considering it, the BLM also conducted numerous and extensive Native American consultations, considered other ethnographies and reports, and considered a wide range of information as part of its study and analysis. CSER 96-114 (FEIS at 3.9-3 to 3.9-21).

(reversing grant of a preliminary injunction despite allegations of NEPA violations and environmental harm); *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 544-45 (1987) (reversing lower court's determination that irreparable injury is presumed when an agency fails to evaluate environmental impacts thoroughly); *Bering Straits Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938 (9th Cir. 2008) (affirming denial of preliminary injunction in case alleging NEPA violations in approval of gold mine). Thus, Appellants cannot rest on claims of environmental harm to establish irreparable harm.

For all of these reasons, the district court acted within its discretion in finding that Appellants failed to demonstrate immediate irreparable harm warranting the imposition of a preliminary injunction.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE PUBLIC INTEREST DOES NOT FAVOR AN INJUNCTION

The applicable standard of review is abuse of discretion. *See, supra*, Section III.A.

A. A Preliminary Injunction Is Not in the Public Interest.

In *Winter*, the Supreme Court stated, "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 129 S. Ct. at 376.

The Supreme Court went on to reverse the district court's granting of a preliminary injunction primarily because the injunction was not in the public interest. Contrary to Appellants' assertions, economic harm to the public cannot be discounted. The Ninth Circuit recently held *en banc* that employment and economic considerations must be considered when a court evaluates the public interest in or against injunctive relief. *The Land's Council v. McNair*, 537 F.3d at 1005 ("[T]he Project will . . . aid[] the struggling local economy and prevent[] job loss.").

At the preliminary injunction hearing, Cortez presented extensive evidence demonstrating that the public interest was best served if the Project proceeded without delay. Indeed, the district court noted that there were "huge implications to the public at a time of severe economic difficulties . . . ." *See supra* at p. 11. The district court further stated: "[T]here is a huge public interest involved here which directly concerns the economy and the financial implications to many Western Shoshones as well as other interested parties. I have to say that I was awestruck by the monetary implications of this mining operation." *Id.* Cortez's development expenditures of $290 million will pay salaries to hundreds of employees, including about 30 Western Shoshone individuals, and will include payments to numerous suppliers of goods and services. *See supra* at p. 10.

Testimony from economic and fiscal experts detailed the irreparable financial harm that would occur from delay. A one-year delay of the Project would result in an unrecoverable, time-value-of-money loss to state and local economies of approximately $60 million, which would be suffered even if the Project were delayed but eventually went forward. *See supra* at p. 11. Even a six month delay would result in tax losses to state and local government entities in the tens of millions of dollars. *Id.* at 11-12. This harm is exacerbated by the fact that these tax dollars would not be available when they are needed most given the economic situation in Nevada. *Id.*

Numerous contractors testified that even a short delay of a few weeks will cause layoffs of approximately 90-200 people, and at least two contractors would see their business fail. *See supra* at pp. 12-13. Accordingly, weighing the public interest reveals that the State of Nevada, local communities and government entities, and contractors and their employees would favor the Project proceeding without delay.

Additionally, many Western Shoshone believe mining in general, and this Project in particular, are beneficial to the communities in which they live and work. *See supra* at pp. 15-16. Western Shoshone witnesses, including to chairpersons of several tribes, testified that not only is mining spiritually compatible with Western Shoshone religious beliefs and practices, but that

mining is very beneficial because it allows Western Shoshone to provide for their families. *Id.*

In the face of this evidence, Appellants rely on three arguments to support their contention that the district court abused its discretion by finding that the public interest did not favor an injunction. First they cite language from *Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers,* 472 F.3d 1097 (9th Cir. 2006), to the effect that there is no reason to believe that a delay in construction activities would reduce significantly any future economic benefit from the mine. App. Br. at 49. While that may have been the evidence in the *Southeast Alaska* case, it was not the evidence before the district court in this case. As noted above, the undisputed evidence is that the public, contractors and their employees, and state and local governments would suffer significant losses solely from delay.

Second, Appellants argue that the public interest in favor of a preliminary injunction is particularly acute when faced with violations of environmental laws. Their argument, of course, begs the question that Appellants lost below, namely, that they were likely to succeed on the merits of their environmental claims. It also ignores the evidence that the "ultimate" environmental consequences cited

by Appellants would not occur before the case could be heard on the merits.[18] *See, e.g.,* Govt SER 54 (FEIS at Table 3.2-9) (evidencing that dewatering occurs over many years); *see also* CSER 461-462 at ¶ 2, Exh. 6A (showing status of project in its early stages, as of February 13, 2009). Further, the evidence in the record demonstrates that all work that will be done in the near term could be restored to its current condition if required. CSER 435-436 at ¶¶ 5-6.

Finally, Appellants point to "11,570 people from around the world" who signed an Oxfam petition, 2,600 direct "form" letters submitted to the BLM, and 165 postcards voicing opposition to the mine. While public opinion (at least U.S. public opinion) may have some relevance, it was not an abuse of discretion for the district court to conclude that petitions and form letters do not overcome the overwhelming evidence of direct consequences that would be suffered by Nevada citizens if an injunction were to issue.

B. Appellants' Failure To Establish That the Public Interest Favors An Injunction Is Fatal.

Appellants' failure to establish that an injunction is in the public interest is dispositive of their request for an injunction. In *Winter*, the plaintiff sought a

---

[18] The district court stated at the conclusion of its January 26, 2009 oral decision denying the preliminary injunction that it would "attempt to accommodate any particularly strong scheduling needs … and will make its best efforts to see this case move along as quickly as it can move along." ER 20. Notwithstanding that offer, Appellants have not sought an expedited trial or hearing on the merits.

preliminary injunction to stop the Navy's use of MFA sonar in waters off the coast of Southern California. 129 S. Ct. 365. In overturning the preliminary injunction issued by the district court, the United States Supreme Court noted, "in exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter,* 129 S.Ct. at 376-377 (quoting *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 312 (1982)). The Court then proceeded to weigh the interests of the public and the Navy in using MFA sonar in training exercises against the possible ecological, scientific and recreational interests that the plaintiffs asserted. The Court concluded, "even if plaintiffs have shown irreparable injury from the Navy's training exercises, any such injury is outweighed by the public interest." *Id.* at 376. Thus, in *Winter*, the public interest against an injunction was dispositive, and the Supreme Court overturned the injunction based upon this factor alone.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT APPELLANTS FAILED TO ESTABLISH THAT THE BALANCE OF HARMS FAVORED AN INJUNCTION

The applicable standard of review is abuse of discretion. *See, supra*, Section III.A.

The uncontested evidence before the district court was that Cortez, its employees, contractors and their employees, the State of Nevada, and local

communities and government entities would stand to lose enormously from an injunction. ER 52, 58. A preliminary injunction would mean that hundreds of jobs would be lost at a time of severe unemployment. *See supra* at pp. 12-14. Delay would also mean harm to public entities, state and local governments, a hospital, and school districts in the form of lost tax revenues at a time when their budgets are already being slashed. *See supra* at pp. 11-12. Delay would also mean lost Western Shoshone jobs and harm to Western Shoshone communities, *see supra* at pp. 15-16. This is evidence that the Appellants ignore. Moreover, Cortez has invested more than $380 million thus far, and continues to spend, on average, an additional $640,000 each day, to move this project forward. *See supra* at p. 10. As detailed above, these expenditures flow directly into the economy in the form of salaries, purchase of materials and services, and taxes. *Id*. These public benefits would be lost if the Project is delayed.

The uncontroverted testimony also established that Cortez will lose millions of dollars in the event of a delay due to the time-value of money. *See supra* at p. 14. While normally a monetary loss is not considered irreparable, the fact that Appellants seek a bond waiver means that Cortez could never recover delay-induced losses.

In response to the evidence of immediate, and devastating effects that would flow from Project delay, Appellants have broadly overstated the harms

they will suffer. At the preliminary injunction hearing, Appellants offered testimony from only three witnesses, none of whom are individual parties to this action. Appellants also relied, over objection, upon a handful of declarations, most not in compliance with 28 U.S.C. § 1746, that contained no specific averments as to places, dates, or types of religious uses of Mt. Tenabo. These declarations also contained substantial hearsay and hearsay on hearsay.

Conversely, Cortez offered testimony from five Western Shoshone witnesses, including several tribal leaders, who said that Mt. Tenabo has no special significance for all Western Shoshone people, and that the Project would benefit their respective tribes. *See supra* at pp. 15-16. Cortez also offered expert testimony regarding historic uses of the area and the cultural and religious practices of the Western Shoshone. *See supra* at pp. 7-10, 29, 43-44; *see also* CSER 263-282. The district court received evidence that no books on Western Shoshone history and culture have any mention of Mt. Tenabo as a sacred area. CSER 125, 128-133, 268-274. To the contrary, there was evidence that the Western Shoshone consider all of nature, including all mountains and all water, to be sacred and that they can worship anywhere on their ancestral lands. CSER 137-139. Finally, the evidence was that Appellants would continue to have unrestricted access to the portions of the Mt. Tenabo area considered to be culturally significant—the top of the mountain and the White Cliffs, Horse

Canyon, Mill Canyon, and Shoshone Wells. ER 10-11; 43; CSER 308-319; Govt SER 105.

In balancing the harms, the district court was also presented with evidence demonstrating that Mt. Tenabo, including the adjacent Project area, has been the locus of extensive mining, milling, deforestation, and exploration for more than 145 years. *See supra* at pp. 7-10; *see also* ER 7-10; Govt SER 87, 104, 179-82 (FEIS at 3.8-8, 3.9-23); *id.* at 179-182 (FEIS Appx. F1 at 123-26); CSER 435 at ¶ 2; CSER 461-462 at ¶ 2, Exh. 6A.

Finally, the Project is in its early stages. None of the ultimate environmental consequences emphasized by Appellants will occur in the near term, such as the 2000 foot deep pit, the pit lake, the disposal of 1.2 billion tons of mine waste, the shipping of ore from the open pit for off-site treatment, or the "removal" of approximately 16 billion gallons of water. *See, e.g.,* Govt SER 54 (dewatering occurs over many years); *see also* CSER 461-462 at ¶ 2, Exh. 6A (showing status of project in its early stages, as of February 13, 2009). Obviously, with a mine life of around 10 years, the open pit and waste rock piles are not fully constructed in the first year. Indeed, the evidence in the record demonstrates that all work that will be done in the near term could be restored to its current condition if required. CSER 435-436 at ¶¶ 5-6. Thus, there will be no irreparable harm during the pendency of this lawsuit.

Based on all the evidence before the district court, rather than the limited portions cited in Appellants' Brief, it was not an abuse of discretion for the district court to conclude that the balance of harms did not favor a preliminary injunction. As with each of the other elements, failure to establish this element is alone sufficient to deny the preliminary injunction.

CONCLUSION

For the foregoing reasons, Cortez respectfully urges the Court to affirm the ruling below.

STATEMENT OF RELATED CASES

There are no related cases.

DATED this 3rd day of April, 2009.

By: /s/ Francis M. Wikstrom

Francis M. Wikstrom
Michael L. Larsen
Michael R. McCarthy
Jeffrey J. Droubay
PARSONS BEHLE & LATIMER
201 South Main Street, Suite 1800
Salt Lake City, UT 84111
Telephone: (801) 532-1234
Facsimile: (801) 536-6111
FWikstrom@parsonsbehle.com
MLarsen@parsonsbehle.com
MMcCarthy@parsonsbehle.com
JDroubay@parsonsbehle.com
ECF@parsonsbehle.com

Jim B. Butler
PARSONS BEHLE & LATIMER
50 West Liberty Street, Suite 750
Reno, NV 89501
Telephone: (775) 323-1601
Facsimile: (775) 348-7250
E-mail: JButler@parsonsbehle.com

Attorneys for Barrick Cortez Inc.

CERTIFICATE OF COMPLIANCE WITH FRAP 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 09-15230

I certify that pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the foregoing Brief is proportionately spaced, has typeface of 14 points or more and contains 12,972 words.

/s/ Michael R. McCarthy

Date: April 3, 2009

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2009, I electronically filed the foregoing 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 the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that on April 3, 2009, I served a copy of Appellee-Intervenor Barrick Cortez Inc.'s Supplemental Excerpts of Record on each of the following parties by overnight delivery:

Sambhav N. Sankar
United States Department of Justice
PHB Mail Room 2121
601 D Street NW
Washington, D.C. 20004
(202) 514-5442

Roger Flynn
Western Mining Action Project
440 Main Street, #2
Lyons, CO 80540
(303) 823-5738_

/s/Michael R. McCarthy