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' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, Appellants, South Fork Band Council of Western Shoshone of Nevada ("South Fork Band"), the Te-Moak Tribe of Western Shoshone Indians of Nevada ("Te-Moak Tribe"), the Timbisha Shoshone Tribe ("Timbisha Tribe"), the Western Shoshone Defense Project ("WSDP"), and Great

Basin Resource Watch (“GBRW”) have no parent companies, no subsidiaries or subordinate companies, and no affiliate companies that have issued shares to the public.

STATEMENT OF JURISDICTION

Jurisdiction of the District Court

Appellants, South Fork Band Council of Western Shoshone of Nevada ("South Fork Band"), the Te-Moak Tribe of Western Shoshone Indians of Nevada ("Te-Moak Tribe"), the Timbisha Shoshone Tribe ("Timbisha Tribe"), the Western Shoshone Defense Project ("WSDP"), and Great Basin Resource Watch ("GBRW")(collectively, "the Tribes") challenge the federal Bureau of Land Management ("BLM's") approvals of Barrick Cortez Inc.'s ("Barrick") Cortez Hills Project, a large open pit, cyanide-leach gold mine on Mt. Tenabo, a mountain sacred to many Western Shoshone Indians and the Tribes. In this appeal, the Tribes challenge the decision of the district court to deny the Tribes' Motion for Preliminary Injunction ("PI Motion"). The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because the action arose under the laws of the United States including: the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702-706, the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, the Federal Land Policy Management Act of 1976 ("FLPMA"), 43 U.S.C. § 1701 *et seq.*, and their implementing regulations.[1]

[1] The Tribes' Complaint and Motion for PI had also included a claim under the Religious Freedom Restoration Act 42 U.S.C. §§ 2000bb - 2000bb-4 ("RFRA"), a claim under FLPMA regarding the lack of protection for federal reserved water rights, and additional claims under NEPA. In order to reduce the issues before this Court in this Appeal, the Tribes do not raise their RFRA, water rights, and

Jurisdiction of the Court of Appeals

This appeal is taken from the district court's Order denying the Tribes' PI Motion. Excerpt of Record ("ER") 22-53. This Court has jurisdiction to review the district court's Order under 28 U.S.C. § 1292.

Finality of Judgment and Timeliness of Appeal

The district court issued its written Order denying the Tribes' PI Motion on February 3, 2009 ("Order"). ER 22-53. A previous oral order denying the PI Motion was issued on January 26, 2009. Transcript of oral order, ER 1-21. The Tribes' Notice of Appeal was filed on February 6, 2009. ER 54-55. Pursuant to Fed. R. App. P. 4(a)(1)(B), this Appeal is timely.

STATEMENT OF ISSUES

1. Whether the Tribes satisfy the requirements for a Preliminary Injunction in this case. Namely, (1) whether the Cortez Hills Project (or Mine) will cause irreparable harm to the environment, Western Shoshone religious practices on Mt. Tenabo, and the Tribes; (2) whether the Tribes have a likelihood of success on the merits; (3) whether the public interest favors an injunction, and (4) whether the balance of hardships favors the Tribes.

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additional NEPA claims in this Motion. However, the Tribes reserve the right to continue to assert these claims on the merits.

2. Regarding the Tribes' likelihood of success on the merits: (1) whether BLM violated its duty under FLPMA to "prevent unnecessary or undue degradation" to public lands by approving the Cortez Hills Project's massive and permanent damage to the lands, waters, and cultural and religious resources of the Mt. Tenabo Sacred Site; (2) whether BLM violated NEPA by failing to analyze the Project's air pollution emissions of $PM_{2.5}$, a harmful Criteria Air Pollutant; (3) whether BLM violated NEPA by failing to analyze the environmental impacts from the off-site transportation and processing of 5 million tons of refractory ore; and (4) whether BLM violated NEPA's mitigation requirements by allowing Barrick to simply monitor for the depletion of groundwater caused by the Project instead of actually analyzing appropriate mitigation measures.

3. Whether the district court erred in denying the Tribes' PI Motion.

STATEMENT OF THE CASE

The Tribes challenge BLM's approvals of the Cortez Hills Project, a large open pit, cyanide-leach gold mine on Mt. Tenabo, a mountain sacred to many Western Shoshone Indians and the Tribes. This appeal challenges the decision of the district court to deny the Tribes' PI Motion. The Tribes request this Court to issue a PI staying further ground disturbance and construction of the Project.

Injury to the Tribes' interests and the environment will be immediate and irreparable. BLM's Final Environmental Impact Statement ("FEIS") containing

BLM's review of the Project, was issued in September, 2008. *See* ER 123-219 (Excerpts of FEIS). BLM issued its Record of Decision ("ROD") approving the Cortez Hills Project on November 12, 2008. ER 220-257. On November 20, 2008, the Tribes filed their Complaint challenging the ROD and FEIS. On November 24, the Tribes filed their Motion for Temporary Restraining Order ("TRO") and Preliminary Injunction ("PI"). The district court initially considered the Tribes' Motion for a TRO on December 1, 2009, during a telephonic hearing. The district court directed the parties to reach an agreement allowing some minor operations to begin while the court considered the Tribes' PI Motion. The parties entered into a Joint Stipulation which was approved by the district court on December 23, 2008, which prevented major Project operations such as the blasting of the mine pit. The district court held a hearing on the Tribes' Motion for PI on January 20-23, 2009. On January 26, 2009, the district court issued its oral ruling denying the PI Motion. ER 1-21. Upon the issuance of that oral ruling, Barrick began full Project construction, including the excavation and blasting of the mine pit and construction of the other Project facilities. The district court issued its written Order on February 3, 2009. ER 22-53.

On February 3, 2009, the Tribes filed a Motion for Stay Pending Appeal with the district court. On February 6, 2009, the Tribes filed this Appeal, as well as an Emergency Motion seeking a halt in Project construction. On February 11,

2009, the district court denied the Tribes' Motion for Stay Pending Appeal. ER 56-58. After expedited briefing, this Court issued an Order denying the Tribes' Emergency Motion on February 18, 2009. Ninth Circuit Docket Entry # 6812914.

STATEMENT OF FACTS

This case involves BLM's approval of one of the country's largest open pit, cyanide heap-leach gold mines, the Cortez Hills Project, proposed by Barrick Gold Corp., the world's largest gold mining company, headquartered in Toronto, Canada. The Project site includes the slopes of Mt. Tenabo, a mountain that is sacred to many Western Shoshone and is currently used (as it has been for centuries) for religious and cultural purposes by Western Shoshone people, including members of the Tribes.

The Mine would blast and excavate a new massive open pit on Mt. Tenabo covering over 830 acres to a depth of over 2,000 feet, dump over 1.5 billion tons of mine waste in several new waste disposal facilities, construct new processing facilities (including a cyanide heap-leaching facility), expand existing mine pits, dig a new underground mine, construct numerous support facilities and miles of new roads and transmission lines, and build and operate a 12-mile ore-hauling conveyor system. The Project would also involve an extensive groundwater pumping system to remove approximately 16.35 billion gallons of water from Mt.

Tenabo (in order to keep the open pit and mine workings dry during mining) and associated water pipelines that will transport the water away from Mt. Tenabo.

The Project will permanently alter the physical integrity of Mt. Tenabo and will involve approximately 6,692 acres of new surface disturbance within the 57,058-acre Project boundary. A total of approximately 112 million tons of heap leach ore, 53 million tons of mill-grade ore, 5 million tons of refractory ore, and over 1.5 billion tons of waste rock will be mined, processed, or dumped. The construction and operation of the Project will last approximately 13 years. *See* district court Order at 2-3 (describing Project operations). ER 23-24.

Western Shoshone religious and cultural uses of the Mine site will be either permanently eliminated or significantly diminished. Religious, cultural, and other uses on lands outside the permit boundary will also be severely and adversely affected by the Mine. The Project's irreparable impacts to Western Shoshone religious uses, and to public lands and waters in general, have begun.

Notably, under existing BLM approvals of Barrick's other operations in the region, and regardless of the challenged Cortez Hills Project, Barrick will be able to continue mining and processing through 2017. FEIS at 3.13.23. ER 145. The requested stay would only apply to new operations approved in the ROD. Further, the Tribes do not seek to enjoin those portions of the Cortez Hills Project that

would not disturb Mt. Tenabo, thus allowing Cortez to go forward with its planned expansion of its facilities approximately 8 miles away from Mt. Tenabo.

The Project has received world-wide attention. The BLM received over 18,000 comments from individuals and groups around the world strongly opposing the Project. A number of other Native American tribal governments submitted formal governmental resolutions and statements of opposition to the Project – all based on the irreparable damage to the Mt. Tenabo Sacred Site caused by the Project.

SUMMARY OF ARGUMENT

The Tribes satisfy the requirements for a Preliminary Injunction. The Project's permanent and irreparable harms to the environment, the Mt. Tenabo Sacred Site, and the Tribes, cannot reasonably be disputed. Blasting of the 2,000-foot deep open pit on Mt. Tenabo has already begun. Clear-cutting, bulldozing, ground stripping, facilities construction, and disturbance of the remainder of the Project's over 6,600 acres have also commenced. Further, in order to keep the mine pits dry during mining, BLM authorized Barrick to dewater the aquifer around-the-clock for over 10 years, ultimately removing 16.35 **billion** gallons from the Mountain. The Project's massive pumping of groundwater is predicted to lower the groundwater table over 1,000 feet – causing the permanent loss of surface waters and springs/seeps. In addition, the lake that will eventually form in

the Cortez Hills Mine Pit after mining ceases is predicted to be polluted. This not only results in significant and permanent environmental damage, it severely degrades Western Shoshone religious interests in the purity of the water on Mt. Tenabo.

Mt. Tenabo is a place of unique and significant religious importance to many Western Shoshone people. 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. According to the district court: "The court does not question the sincerity of Plaintiffs' religious beliefs. In particular, the court recognizes that Plaintiffs view Mt. Tenabo as a sacred site significant to the exercise of their religion." Order at 20, lines 13-15. ER 41. As the district court found, the Project "will spiritually desecrate a sacred mountain and decrease the spiritual fulfilment [sic] they [Tribal members] get from practicing their religion on the mountain." Transcript of PI Order, at 19, lines 12-15. ER 19. These religious uses, as well as the physical and spiritual integrity of Mt. Tenabo's lands and water, will be, and are now being, either destroyed or permanently damaged by the Project.

Regarding the merits, BLM violated its fundamental and substantive duty under FLPMA to "prevent unnecessary or undue degradation" of public land resources – the "UUD" standard. Despite this clear mandate from FLPMA and its

regulations, as well as caselaw requiring BLM to protect public lands and waters, BLM here fundamentally misinterpreted and misapplied its UUD authority. The agency stated that the UUD standard was only a "temporary" restraint on mining while BLM conducted its purely-procedural consultation with affected Tribes and Indian groups. The district court agreed with BLM's position, repeatedly and incorrectly equating BLM's procedural duties to evaluate impacts with its substantive duty to protect public land resources from UUD.

BLM's failure to prevent UUD is further demonstrated by its failure to comply with Executive Order 13007, protecting "Indian Sacred Sites." That Presidential Order requires BLM to "(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites." The extreme damage to Mt. Tenabo and the Tribe's religious practices violates these mandates.

Similarly, regarding the Project's dewatering of Mt. Tenabo and the removal of 16.35 billion gallons of water from the area, the district court, again, relied on BLM's "analysis" of impacts to area waters as enough to satisfy the UUD standard. The court further relied on BLM's "monitoring and mitigation" plan to supposedly protect these waters. Yet, this plan is not a mitigation or protection plan at all and will merely monitor the predicted drawdown of the aquifer. Any plan to actually replace or repair the loss or damage to these waters would only be

submitted at some undetermined time in the future based on the monitoring results and will not be subject to public review under NEPA. The Ninth Circuit has ruled that the mere submittal of a monitoring plan does not mitigate or prevent impacts.

In addition to the undue degradation to the Mt. Tenabo Sacred Site and irreplaceable groundwater, the Project will violate BLM's duties to protect scenic values on public land. According to the FEIS: "The BLM is responsible for identifying and protecting scenic values on public lands under several provisions of FLPMA and NEPA." Despite this, and despite BLM's admission that its Visual Resource Management standards for the area would be violated, BLM argues, incorrectly, that it has prevented UUD to these resources.

Regarding NEPA, the FEIS failed to fully analyze the air pollution emissions from the Project, especially that of $PM_{2.5}$ (particulate matter), which is a very harmful Criteria Air Pollutant under the federal Clean Air Act. FLPMA and its implementing regulations prohibit BLM from approving any mining plan that may violate environmental standards and requirements, such as the Clean Air Act standards and requirements for $PM_{2.5}$.

By failing to fully analyze $PM_{2.5}$ baseline levels and emissions, BLM's conclusion that the Project complies with all air quality standards and requirements is arbitrary and capricious, not supported by sufficient evidence, and fails to meet its NEPA (and FLPMA) duties. The FEIS admits that BLM did not model or

predict the emissions of $PM_{2.5}$ from the Project. The only mention of purported compliance with $PM_{2.5}$ standards is contained in the FEIS' response to comments where BLM simply assumes that $PM_{2.5}$ emissions will be 15% of PM_{10} emissions (PM_{10} is also a Clean Air Act Criteria Pollutant). Outside of a one sentence mention of a general EPA website, no supporting information, and no analysis, is provided to support this claim.

In addition, apart from the mine site impacts, the FEIS contains no analysis of the environmental impacts, particularly $PM_{2.5}$ and mercury air pollution emissions, from the off-site processing of 5 million tons of refractory ore. This refractory ore would be sold to an off-site processing facility; yet there is no discussion of the environmental impacts of this processing and transportation.

BLM also violated NEPA's mandate that mitigation measures be fully reviewed in the FEIS, not in the future. BLM's "mitigation" analysis for ground and surface waters is just a plan to initially monitor the already-predicted impacts from the dewatering on these waters. Simple monitoring (even if successful and there is no assurance that it will be) is not proper mitigation. Monitoring will only determine the extent of the impact from dewatering – it will not prevent the loss or damage to these waters. BLM's plan to only monitor the expected drawdown and elimination of surface waters is the type of "impact first, develop a plan later" approach to mitigation rejected by the Ninth Circuit.

Regarding the public interest and the balance of hardships, the public interest weighs in favor of preventing irreparable environmental and cultural harm until the case has been fully reviewed on the merits. The public interest in favor of a PI is especially acute when there are violations of federal environmental and public land laws. The Project has received unprecedented world-wide opposition.

BLM's interests in this Motion are negligible and are not sufficient to outweigh the interests of the Tribes and the public in preventing irreparable environmental harm. It is also well established that Barrick's monetary injury is not normally considered irreparable.

The economic hardship to Barrick and the local economy that would occur if the Project was temporarily enjoined is due to Barrick's calculated financial decision to begin and continue construction when it knew the Project was under challenge. Barrick first proposed this Project in 2001, subsequently withdrew the proposal, and then resubmitted it in 2005. The fact that Barrick now wants to commence operations on public land as fast as possible does not justify denying injunctive relief. The district court, in a scant few sentences, found that, due to the economic benefits from the Project, the Tribes did not establish that the balance of hardships tipped in their favor or that the public interest favored the injunction.

Although the Tribes are certainly mindful of the economic benefits from the Project, these interests do not override BLM's duties to comply with federal law, nor this Court's authority to prevent irreparable harm.

STANDARD OF REVIEW

A district court's denial of a PI Motion should be reversed if it was based "on an erroneous legal standard or clearly erroneous findings of fact." Earth Island Institute v. U.S. Forest Service, 442 F. 3d 1147, 1156 (9th Cir. 2006). "When the district court is alleged to have relied on an erroneous legal premise, we review the underlying issues of law *de novo*." Harris v. Board of Supervisors, Los Angeles County, 366 F. 3d 754, 760 (9th Cir. 2004). In this case, the district court denied the Tribes' requested preliminary injunctive relief, finding that the Tribes did not have a likelihood of success on the merits. Thus, the district court's legal conclusions that formed the basis for its denial of the Tribes' PI Motion are subject to *de novo* review.

"A plaintiff seeking a preliminary injunction must establish 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." Winter v. NRDC, 129 S.Ct. 365, 374, ___ U.S. ____ (Nov. 12, 2008). The Ninth Circuit has adopted a "sliding scale" for the purposes of preliminary relief, "in which the required degree of irreparable harm

increases as the probability of success decreases." Save Our Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1120 (9th Cir. 2005).

> If plaintiffs had demonstrated a strong likelihood of success on the merits, then plaintiffs would have needed only to make a minimal showing of harm to justify the preliminary injunction. *See* Idaho Sporting Congress v. Alexander, 222 F.3d 562, 565 (9th Cir. 2000)(the stronger the probability of success on the merits, the less burden is placed on the plaintiffs to demonstrate irreparable harm).

Kootenai Tribe v. Veneman, 313 F.3d 1094, 1124 (9th Cir. 2002). The less the likelihood of success on the merits, the more plaintiffs must show that "the balance of hardships tips decidedly in their favor." Id.

Here, there is no question that the Project will result in irreparable harm to the environment and Mt. Tenabo. The district court stated that: "The court does not question that the implementation of the Project will irreparably harm the environment." Order at 31, lines 9-10. ER 52.

The Supreme Court has recognized that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often . . . irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." Amoco Prod. Co. v. Vill. of Gambell, Alaska, 480 U.S. 531, 545 (1987). In issuing a preliminary injunction against approval of a large mining project, the Ninth Circuit recently held that:

> Ongoing harm to the environment constitutes irreparable harm warranting an injunction. *See* Amoco Prod. Co., 480 U.S. 531, 545 (1987). When a project "'may significantly degrade some human environmental factor,' injunctive relief is appropriate." Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 737 (9th Cir.2001) (quoting Alaska Wilderness Recreation & Tourism Ass'n v.Morrison, 67 F.3d 723, 732 (9th Cir.1995)).

Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers, 472 F.3d 1097, 1100 (9th Cir. 2006) *cert. granted on the merits* 128 S.Ct. 2995 (2008). *See also,* Save Our Sonoran, 408 F.3d at 1124-25 (9th Cir. 2005)(upholding a preliminary injunction, reasoning that "once the desert is disturbed it can never be restored."). The Ninth Circuit has repeatedly enjoined operations causing environmental harm, especially when the harm is coupled with the agency's failure to comply with the environmental review requirements in NEPA. *See* Save Our Sonoran, 408 F.3d at 1121; Earth Island Inst. v. U.S. Forest Service, 351 F.3d 1291, 1307-09 (9th Cir. 2003); City of Tenakee Springs v. Clough, 915 F.2d 1308 (9th Cir. 1990); Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1230 (9th Cir. 1988).

Regarding this Court's review of BLM's legal positions, a court will overturn BLM's decisions if they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1211 (9th Cir. 1998) (quoting the APA, 5 U.S.C. § 706(2)(A)). The agency's decisions must be "fully informed and well-considered." Save the Yaak Committee v. Block, 840 F.2d 714, 717 (9th Cir.1988).

The court "need not forgive a 'clear error of judgment.'" Blue Mountains, 161 F.3d at 1208. "An agency's action is arbitrary and capricious if the agency fails to consider an important aspect of the problem, if the agency offers an explanation that is contrary to the evidence, … or if the agency's decision is contrary to the governing law. 5 U.S.C. § 706(2)." Lands Council v. Powell, 395 F.3d 1019, 1026 (9th Cir. 2005).

ARGUMENT

I. THE CORTEZ HILLS PROJECT WILL RESULT IN IMMEDIATE AND IRREPARABLE HARM

BLM's approval of the Project authorizes Barrick to begin immediate construction. Blasting, tree-cutting, ground stripping, and facilities construction has already begun. The district court correctly found that "the Project will irreparably harm the environment." Order at 31, lines 9-10. ER 52.

The portion of the Project known as the Cortez Hills Complex, which would constitute the vast majority of the acreage affected by the overall Project, would be located on the slopes of Mt. Tenabo. The major new facilities of the Cortez Hills Complex include: (1) the Cortez Hills Pit, covering 835 acres, blasting into the slopes of Mt. Tenabo to a depth of approximately 2,000 feet; (2) the Canyon Waste Rock dump, covering 1,504 acres; (3) the South Waste Rock dump, covering 170 acres; (4) the Grass Valley Cyanide Heap Leach processing facility covering 328

acres; (5) the Grass Valley Borrow Pit area covering 605 acres; and (6) Ancillary facilities covering 750 acres. FEIS at 2-92 to -93. ER 128-29.

A. The Mt. Tenabo Sacred Site

Mt. Tenabo is a place of unique and significant religious importance to many Western Shoshone Tribes and people. The Mountain, including its slopes (e.g., the Pediment and Grass Valley areas) is currently being used, as it has for centuries, by Western Shoshone people for prayer, fasting, purification ceremonies, and other religious practices. The Project "will spiritually desecrate a sacred mountain and decrease the spiritual fulfilment [sic] they [the Tribes] get from practicing their religion on the mountain." Transcript of oral PI Order, at 19, lines 12-15. ER 19. "[T]he court recognizes that Plaintiffs view Mt. Tenabo as a sacred site significant to the exercise of their religion." Order at 20, lines 13-14. ER 41.

Scientific studies and other analyses prepared by or for BLM or Barrick, show the importance of Mt. Tenabo to Western Shoshone religion. For example, the Ethnographic Report prepared for the Pediment Project (the previous name for what eventually became the Cortez Hills Project) states that:

> The mountain [Mt. Tenabo] was identified with specific stories and as a place for prayer, healing, and inspiration, as part of a network of mountain peaks and an underground waterway that concentrates and emanates *puha*, the animating power of the universe fundamental to all life, and visible and invisible reality.

Rucks, An Ethnographic Study Completed for the Cortez Gold Mines Pediment Project, January 2004, at 37-38 ("Ethnographic Report")(emphasis in original). ER 109-110. As one traditional Western Shoshone stated in her Declaration submitted to BLM:

> Mt. Tenabo plays a key role in our creation stories and continues today to be a source of spiritual renewal and power. … Only non-Indians would consider only the top of the Mountain to be a 'sacred site.' The spiritual significance of Mt. Tenabo is not just the 'site' at the top of the Mountain. The spirits reside throughout the Mountain and can reach us as we pray on its slopes as well as its top. The Cortez Hills mine pit and dumps are proposed in the same area as we use for our prayer ceremonies.

Declaration of Carlene Burton, FEIS at Vol. III, at 144. ER 170. Another Declaration submitted to BLM stated:

> I use Mt. Tenabo, the site of the proposed Project, especially the Cortez Hills mine pit and related dumps, ground water pumping and dumps, to practice my religion. In particular, I travel to the Mountain to pray and conduct sacred sweat ceremonies and to gather sacred food and medicinal plants. When Western Shoshone consider "Mt. Tenabo" as a unique sacred landscape, they mean the entire Mountain, not just the top and cliff-face declared a cultural site by the BLM. I and others use the slopes of the Mountain to conduct these prayer and other religious ceremonies. Sacred prayer areas such as Shoshone Wells and other locations within and adjacent to the Project's disturbed lands will be irrevocably damaged by the construction of the Project, especially the new mine pit and related facilities.
>
> Mt. Tenabo is the source of our creation stories and is a central part of our spiritual world view. Although all life, water, and land is sacred to Western Shoshone, Mt. Tenabo is a unique landscape. It holds the Puha, or life force, of the Creator. We pray to the Mountain for renewal, which comes from Mt. Tenabo's special place in Western Shoshone religion.
>
> This is due to many things, including the resting place of many of our ancestors. The spirits of these beings still reside within the Mountain and

> beings we draw power and sustenance. The Mountain is a pathway for the Puha, which has been utilized by Western Shoshone travelers for countless years.
>
> Due to Mt. Tenabo's spiritual importance in the lives of traditional Western Shoshone, the proposed mining is completely incompatible with the continuation of my, and others, religious practices. It will be impossible for me and others to pray and conduct ceremonies on the Mountain in view of, and hearing, the proposed operations. Could one pray at an alter while the Church was being destroyed?

Declaration of Sandy Dann. FEIS at Vol. III, at 152-53. ER 178-79.

WSDP's comments to BLM on the Draft EIS included numerous additional Declarations submitted as further evidence of the uniqueness of Mt. Tenabo and the destruction of the religious practices of Western Shoshone people. *See* Declarations of Carrie Dann, Kathleen Holly, Barbara Ridley, Chet Stevens, Elizabeth Dann, Darlene Graham, Delbert Holly, Frank Dann, and Katherine Blossom. ER 167-191.

The Ethnographic Report recognized that the entire Mt. Tenabo, including the flatter "Pediment" area along the base of the mountain which will be partially covered by the facilities in the Cortez Hills Complex, as well as the water contained in the Mountain, has immense spiritual importance for Western Shoshone:

> Mt. Tenabo is one of a system of three mountains in the *pasiatekkaa* homeland, connected by *puha*. As described by Rucks (2000), it is also considered a traditional locus of power and source of life, and figures in creation stories and world renewal. As the tallest mountain in the area – the most likely to capture snow and generate water to grow pinyon and nourish

> life – it is literally a life-giver. Water is to earth what blood is to the body, and these subterranean waterways are likened to the earth's arteries and veins.

Ethnographic Report, at 22-23 (emphasis in original). ER 96-97. The Report continued:

> Mt. Tenabo is a locus of stories about the creation of the *Newe* [Western Shoshone name for the people], and of several cycles of cataclysm and world renewal, told only in winter. … In the beginning, when the earth was covered in water, Mt. Tenabo was one of the peaks that remained above water.

Id. at 24. ER 98.

B. The Project's Irreparable Impacts to the Environmental and Religious Resources of Mt. Tenabo

The Project will severely degrade, or outright eliminate, the irreplaceable human and natural resources of Mt. Tenabo. At a minimum, current religious uses at the Project site will be impossible to continue due to the blasting and excavation of the mine pits (especially the Cortez Hills Pit), cyanide heap-leach processing facility, multiple waste dumps, borrow pit area, and the network of roads, pipelines and support facilities. In addition to the impossibility of conducting religious practices in these immediate areas, Western Shoshone will be prohibited from accessing their traditional religious use areas within the Project boundary due to the perimeter fence that will be constructed around the mine and processing facility. *See, e.g.*, FEIS at 3.12-5 (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."). ER 144.

In addition to the elimination of the religious use areas in the Project boundary, the Project's visual and noise impacts would severely degrade and prevent the practice of Western Shoshone traditional religion in the area. *See generally* Western Shoshone Declarations. ER 167-191. As shown by the Declarations, the Project would also prevent the gathering of medicinal and food plants at the Project site used by Western Shoshone for religious ceremonies. *See, e.g.*, Declaration of Elizabeth Dann, FEIS Vol. III at 151. ER 177. The Project's facilities and construction will also eliminate these plants at the site. These impacts are in addition to the loss of over 6,000 acres of wildlife habitat and piñon pine harvesting (a traditional cultural practice by Western Shoshone).

In order to keep the mine pits dry during mining, BLM also authorized Barrick to dewater the aquifer around-the-clock for over 10 years. The total amount of water taken from Mt. Tenabo is staggering. "The total estimated volume of additional groundwater extracted during pit dewatering over the life of the mine is 50,200 acre-feet." FEIS at 3.19-2 (Table 3.19-1). ER 152. With one acre-foot equal to 325,851 gallons, this means that over 16.35 **billion** gallons of water will be removed from the Mountain. Although the full extent of the impacts from dewatering will be felt over time, once this water is pumped from Mt.

Tenabo, the irreparable injury to the environment and the uses of these waters will begin immediately.

The Project's massive pumping of groundwater is predicted to lower the groundwater over 1,000 feet – causing the permanent loss of surface waters and springs/seeps. The FEIS predicts that at least 15 springs or seeps, and at least one perennial stream, will suffer the loss or complete elimination of their flows. FEIS at 3.2-57. ER 132.

> Potential impacts to these springs could range from reductions in flow to elimination of all flow. … 15 … springs occur within areas that are predicted to experience long-term drawdown that is not expected to fully recover within 100 years (Table 3.2-12). As a result, any flow reduction or elimination that occurs is likely to persist beyond this period.

Id.

Also as shown by the Declarations, the dewatering of Mt. Tenabo, and the loss of sacred springs/seeps and streams caused by the groundwater pumping, severely degrades and prevents the exercise of Western Shoshone traditional religion. ER 167-191. BLM acknowledged that: "Water is the keystone of Western Shoshone religion because power (Puha), with its affinity for life, is strongly attracted to water." FEIS at 3.9-61. ER 142.

In addition, the lake that will be created in the Cortez Hills Mine Pit after mining ceases is predicted to be polluted – severely impacting the environment and Western Shoshone religious interests in the purity of the water on Mt. Tenabo.

"The Cortez Hills Pit lake is predicted to have overall higher constituent concentrations due to the evapoconcentration; arsenic is … predicted to exceed Nevada water quality standards." Table 2-19, FEIS at 2-124. ER 130.

Each of these impacts will cause irreparable and severe harm to the environment and the Tribes. Individually and collectively, such harms are clear grounds for the issuance of a preliminary injunction.

II. THE TRIBES ARE LIKELY TO SUCCEED ON THE MERITS

A. BLM Violated FLPMA

1. BLM's Duty to Prevent Undue Degradation of Public Lands from Mining Operations

FLPMA requires that the BLM "shall … take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b). This is known as the "UUD" standard. As the leading FLPMA and mining federal court decision states, this duty to "prevent undue degradation" is "the heart of FLPMA [that] amends and supercedes the Mining Law." Mineral Policy Center v. Norton, 292 F.Supp.2d 30, 42 (D.D.C. 2003).

In Mineral Policy Center, the court interpreted the legality of the Interior Department's revised hardrock mining regulations, found at 43 CFR subpart 3809. The court disagreed with an October, 2001 Interior Department Solicitor Opinion which had held 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." 292 F.Supp. 2d at 41-42 (emphasis added). Plaintiffs had argued that FLPMA **did** require the protection of public lands from substantial irreparable harm.

> After careful consideration, the court agrees with plaintiffs' view. The court finds that the Solicitor misconstrued the clear mandate of FLPMA. **FLPMA, by its plain terms, vests the Secretary of the Interior [and BLM] with the authority – and indeed 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. at 42 (emphasis added). The court did not strike down the revised regulations, however, because of Interior's statements that "the 2001 Regulations 'will prevent all UUD, including UUD occasioning irreparable harm to scientific, cultural, or environmental resource values.'" Id., *quoting* Interior's brief. The court was further persuaded by "Interior's argu[ment] that it will protect the public lands from any UUD by exercising case-by-case discretion to protect the environment through the process of … rejecting individual mining plans of operations." Id. BLM cannot approve a mining plan of operations that would cause "unnecessary or undue degradation." 43 C.F.R. § 3809.411(d)(3)(iii). BLM's mining regulations further require that all operations "must take mitigation measures specified by BLM to protect public lands." 43 CFR § 3809.420(a)(4). Together, these mandates represent a nondiscretionary duty on BLM to protect public lands from the types of severe harms caused by the Cortez Hills Project.

2. *BLM's Extremely Limited View of Its Authority Over the Cortez Hills Project Contradicts FLPMA, Its Own Previous Positions, and Federal Caselaw*

Despite clear mandates from FLPMA and its regulations, as well as caselaw, requiring BLM to protect public lands and waters, BLM here fundamentally misinterpreted and misapplied its UUD authority. The agency stated that the UUD standard was only a "temporary" restraint on mining while BLM conducted its purely-procedural consultation with affected Tribes and Indian groups. Indeed, BLM believed that the UUD standard did not provide **any** substantive protection above the procedural mechanisms of the National Historic Preservation Act ("NHPA"):

> The purpose of the unnecessary or undue degradation standard is to **temporarily** protect potential historic properties to allow compliance with Section 106 of the NHPA. **The unnecessary or undue degradation standard does not provide greater protection for historic properties than the NHPA.**

FEIS Vol. III at 37(emphasis added). ER 161. However, the NHPA, unlike FLPMA, is only a **procedural** statute that has no substantive requirements to protect sacred sites. *See* Pit River Tribe v. U.S. Forest Service, 469 F.3d 768, 787 (9th Cir. 2006).

The district court agreed with BLM's position, repeatedly substituting BLM's procedural duties to evaluate impacts for its substantive duty to protect public land resources from UUD. For instance, in finding that BLM prevented

UUD to "Native American traditional values and culture," the district court based its decision on the fact that "BLM went to great lengths to **evaluate** potential impact" to these public resources. Order at 26, line 16 (emphasis added). ER 47. However, merely conducting a **procedural** "evaluation" of the Project's impacts does not comply with BLM's **substantive** UUD responsibilities to protect public land.

Similarly, regarding the Project's dewatering of Mt. Tenabo and the removal of 16.35 billion gallons of water from the area, the district court, again, relied on BLM's "extensive analysis" of impacts to area waters. Order at 27, lines 2-3. ER 48. The court further relied on BLM's "monitoring and mitigation" plan to supposedly protect these waters. Id. Yet, this plan is not a mitigation or protection plan at all and will merely monitor the predicted drawdown of the aquifer. Any plan to actually replace or repair the loss or damage to these waters would only be submitted at some undetermined time in the future based on the monitoring results and will not be subject to public review under NEPA. FEIS at 3.2-111 (Mitigation Measure WR1b). ER 137.

The Ninth Circuit has ruled that the mere submittal of a monitoring plan does not mitigate or prevent impacts. "Monitoring may serve to confirm the appropriateness of a mitigation measure, but that does not make it an adequate

mitigation measure in itself." Alaska Wilderness League v. Kempthorne, 548 F.3d 815, 827-828 (9th Cir. 2008).

Thus, overall, BLM's truncated view of its FLPMA authorities to deny proposed mining operations that may cause UUD fatally flaws its eventual decision to approve the Project.

3. *The Project Causes Undue Degradation of the Mt. Tenabo Sacred Site*

The Project's impacts to Mt. Tenabo and its environs, including the severe degradation of, and the prevention of, the ability of Western Shoshone to exercise and practice their religion (including the loss of sacred waters caused by the dewatering), constitute UUD under FLPMA. This violation is especially egregious based on BLM's failure to comply with the Presidential Executive Order specifically promulgated to protect Native American religious and cultural resources. *See* Exec. Order 13007, "Indian Sacred Sites" (May 24, 1996), 61 Fed. Reg. 26771 (agencies are to "(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.").[2] (The E.O. is attached at the conclusion of this brief).

[2] As defined by the Executive Order, "Sacred site means any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion." In this case, the Te-Moak Tribe, the Elko

BLM's failure also contravenes its trust obligations to Native Americans. BLM is charged with "moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards. The trust responsibility restrains governmental action that affects Indians and therefore is an important source of protection for Indian rights." Seminole Nation v. U.S., 316 U.S. 286, 297 (1942).

As detailed herein, the record shows that the Project will result in severe and permanent reductions and eliminations of the religious uses of public land by Western Shoshone. Native American sacred sites such as Mt. Tenabo are recognized as critical public land resources protected by FLPMA. Although the Presidential Executive Order on Sacred Sites is not an independently-enforceable law, it clearly recognizes the federal government's priority to protect sacred sites on public land. "Because of the unique status of Native American societies in North American history, protecting Native American shrines and other culturally-important sites has historical value for the nation as a whole." Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969, 976 (9th Cir. 2004).

Federal courts have expressly recognized the need to protect sacred sites

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Band Council (of Western Shoshone), and the South Fork Band Council, all submitted formal tribal resolutions or comments to BLM detailing the sacred nature of Mt. Tenabo. ER 116-17 (Te-Moak Resolution), ER 158-59 (Elko Band comment in FEIS), ER 155-57 (South Fork Band comments in FEIS).

under the Executive Order ("E.O.") as part of the government's public land management authorities:

> Executive Order no. 13007 signed by President Clinton, May 24, 1996, 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, Inc. v. U.S. Forest Service, 383 F.3d 1241, 1245 (10th Cir. 2004). The preamble to BLM's mining regulations (43 C.F.R. subpart 3809) specifically recognizes the binding nature of E.O. 13007 as applied to BLM under FLMPA's UUD standard:

> In these regulations, BLM has decided that it will approve plans of operations … if the requirements of subpart 3809 are satisfied and other considerations that attach to a Federal decision, such as Executive Order 13007 on Indian Sacred Sites, are also met.

65 Fed.Reg. 69998, 70032 (Nov. 21, 2000).

The district court correctly cited this requirement to protect sacred sites as part of BLM's UUD responsibilities. Order at 27, n. 9. ER 48. However, it determined that BLM complied with the E.O. based solely on the fact that the Project would not be directly situated on the extreme top of Mt. Tenabo and the sheer "White Cliffs" immediately below the summit. Id. Here, the court again confuses BLM's procedural duties with the agency's substantive mandates to protect sacred sites.

For example, Mt. Tenabo's "top" and "White Cliffs" are areas that BLM

determined were eligible for listing on the National Register of Historic Places under the NHPA. FLPMA, however, protects all critical cultural resources, not just those covered by the procedural mechanism of the NHPA. "Those [sites/properties] that do not meet the eligibility standard are not subject to compliance with Section 106 of the National Historic Preservation Act. This does not mean that they are without protection, only that the NHPA is not the correct legal tool for protecting them." BLM Handbook H-8120-1, "*Guidelines for Conducting Tribal Consultation*" at II-2 (attached at the conclusion of this brief). "[M]itigation responsibilities required by various federal mandates remain in effect for both eligible and ineligible properties. Those mandates include … the Federal Land Policy and Management Act .., and Executive Order 13007." BLM 2004 NHPA Eligibility determination, at 14. ER 115.

The Ethnographic Report and other evidence in the record (including the Declarations by Western Shoshone submitted to BLM) demonstrate the irreparable harm that will occur to religious practices and Mt. Tenabo's lands and waters. The fact that the top of Mt. Tenabo and other areas would not be directly physically disturbed does not mean that the lands and waters of Mt. Tenabo would be protected from irreparable harm. Thus, simply because the extreme top of Mt. Tenabo will not be mined does not mean that BLM has complied with its duty to

"avoid adversely affecting the physical integrity" of the Mt. Tenabo Sacred Site under the E.O.

The Ethnographic Report recognized that the entire Mountain and Pediment area, not just the top, was part of a Native American "Traditional Cultural Property." "Contemporary people returning to the pediment area are also, in effect, returning to Mt. Tenabo. Particularly when viewed from a distance, as from the camp at Shoshone Wells, the pediment is seen as part of the same landform. The pediment area is part of the mountain…." Ethnographic Report at 39. ER 111. "Nearly all [Western Shoshone] field trip participants expressed opinions that there must be other burials on the pediment that would be disturbed or destroyed by mining development." Id., Management Summary at 2. ER 93. BLM recognized that: "[Western Shoshone] people spoke of the whole mountain area (Tenabo) as being a traditional cultural property, along with 'all the canyons and waters which flow from it.'" FEIS at 3.9-36. ER 141.

Three separate Western Shoshone governments submitted comments and formal resolutions to BLM opposing the Project due to the irreparable and devastating impacts to Mt. Tenabo's unique religious significance. The Te-Moak Tribe stated:

> [T]he land identified in the Cortez Expansion Project is within Western Shoshone ancestral lands and within the Treaty Territory. The area identified includes Mt. Tenabo, the surrounding area and parts of Crescent Valley – all of which are well known to have cultural and spiritual

> significance to Western Shoshone, including burial sites, spiritual areas, springs and other water resources, food and medicinal plants. … [A]ny new or additional mining or exploration in the area identified in the Cortez Expansion proposal would cause irreparable harm to our culture and spirituality.

Te-Moak Tribal Resolution 06-TM-02 (Feb. 1, 2006). ER 116-17.

In comments on the Draft EIS, the South Fork Band Council further explained its opposition to the Project based on the irreparable impacts to the continued use of the Project site by its members. "The area of Tenabo, in particular is well known by BLM and Barrick to hold significant spiritual and religious importance to the Shoshone people." Letter from Larson Bill, Vice-Chairman, South Fork Band Council, to BLM, December, 2007, at FEIS Vol. III p. 28. ER 155. "The South Fork Band … opposes this project … due to concerns about the destructiveness that this expansion will have towards Native American Culture and the water quality with the proposed area." Letter from Emiliano McLane, South Fork Band Environmental Coordinator, to BLM, December, 2007, at FEIS Vol. III p. 29. ER 156.

The Elko Band Council was even more direct:

> Because of the … irreparable harm to our culture and religion/spirituality, and due to the amount of water that will be wasted and/or polluted, we must oppose the Cortez Hills Mine Expansion Project. … As stated in the [EIS] our religion is an important way of life that we continue to this day: it is well known that Mt. Tenabo is an area of religious importance to Shoshone people who pray there. Excessive noise, the lack of or the impurity of medicinal plants or water will have a negative effect on religious/spiritual ceremonies that take place on or near the mountain. The EIS states that

> cultural, traditional, spiritual and religious impacts *could* occur, when in fact we know impacts will occur. Another major impact is the amount of water that will be wasted and made impure. As stated in the EIS, twenty-two (22) to twenty-eight (28) springs and at least one stream will be dried up completely. As acknowledged in the EIS water is an important part of our religion that involves all life including plants and animals.

Letter from Lynette Piffero, Chairperson, Elko Band Council, December, 2007, at FEIS Vol. III p. 31-32 (emphasis in original). ER 158-59.

Despite the evidence in the record highlighting the spiritual importance of Mt. Tenabo's lands and waters that will be destroyed by the Project, BLM stated that: "The EIS did not conclude that the Western Shoshone use the project site for religious activities or that the site is a central part of Western Shoshone religious practices." FEIS Vol. III at 121. ER 164. Thus, BLM based its FEIS and ROD on its conclusion that, despite all the evidence submitted by the Western Shoshone, as well as the other evidence in the record attesting to the significance of Mt. Tenabo to Western Shoshone religion and to the elimination of current Western Shoshone religious practices at the site: "BLM knows of no Western Shoshone uses that would be prevented or uses or resources that would be destroyed by the proposed project." Id. at 122. ER 165.

BLM's conclusion is not based on sufficient evidence, contradicts the record, and is arbitrary and capricious. Further, BLM's conclusion that, despite the Project's severe and permanent damage to Western Shoshone religious uses and to

the Mt. Tenabo Sacred Site, it has nonetheless "prevented undue degradation" is without merit and cannot stand.

4. *The Project Causes Undue Degradation of Surface and Ground Waters*

In addition to the permanent damage to the physical integrity of Mt. Tenabo itself, the Project's massive pumping of groundwater (to keep the mine workings dry during operation) is predicted to lower the groundwater table over 1,000 feet – causing the permanent loss of surface waters and springs/seeps. The FEIS predicts that at least 15 springs or seeps, and at least one perennial stream, will suffer the loss or complete elimination of their flows. FEIS at 3.2-57. ER 132. The groundwater table on Mt. Tenabo is predicted to drop over 1,200 feet due to the dewatering. FEIS at 3.2-86 (Figure 3.2-19). ER 134.

For example, the "Mapped Cortez Spring," labeled 26.47.01.41, is the Cortez Spring known as the "Shoshone Wells spring." FEIS at 3.2-9. ER 131. The predicted drawdown for this spring is 255 feet, and the spring is not predicted to recover. *See* Geomega's August 15, 2007 Groundwater Flow Modeling Report, at Table 6-15, indicating the expected impacts to the seeps and springs. ER 119. Additionally, the four other "Cortez canyon springs" are predicted to be drawn down even further, with drops of 288, 291, 335, and 357 feet. Id. These springs are not expected to recover due to the Project's dewatering, although they would

all recover under the No-action alternative. *Compare* Geomega Report Tables 6-15 and 6-16. ER 119-20.

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. "Water is the keystone of Western Shoshone religion because power (Puha), with its affinity for life, is strongly attracted to water." FEIS at 3.9-61. ER 142. As the Ethnographic Report found regarding Mt. Tenabo's waters: "Water is to earth what blood is to the body, and these subterranean waterways are likened to the earth's arteries and veins." Ethnographic Report at 22-23. ER 96-97. As one declarant stated:

> Any reduction in the flow of these springs represents a severe intrusion into Western Shoshone and my religious beliefs. Water is the source of all life and the power of life flows through water. The water flowing underneath the Mt. Tenabo area is especially important to maintaining the balance and power of life I value as a central tenet of my religious beliefs as a Western Shoshone. Using the water from Mt. Tenabo is considered a sacrament. The elimination of the sacred springs prevents this sacrament.

Declaration of Carrie Dann, FEIS Vol. III at 148. ER 174. "The waters and springs of the Mountain contain the life energy of the world, as concentrated on Mt. Tenabo, and are sacred to myself and other traditional Western Shoshone." Declaration of Delbert Holly, Id. at 158-59. ER 184-85.

Despite these predicted losses, BLM maintains that they will monitor these losses and then fully "mitigate" and prevent any losses. However, this plan

violates BLM's duty to require Barrick to "take mitigation measures specified by BLM to protect public lands." 43 CFR § 3809.420(a)(4). A close look at this plan shows that Barrick and BLM will take action only long after the losses have happened. This "mitigation plan" is merely a plan for Barrick to study the extent of the groundwater loss. *See* FEIS at 3.2-109 to 3.2.111. ER 135-37. Under their much-touted "Mitigation Measure WR1b," even after water loss was detected, Barrick and the agencies would only then determine "if mitigation is required." FEIS at 3.2-111. ER 137. Thus, only years after water losses began would Barrick consider developing a plan to replace lost waters, and even then there is no discussion as to how such imported waters prevent the damage and loss of the unique, and sacred, waters of Mt. Tenabo. Id.[3]

In addition, the lake that will be created in the Cortez Hills Mine Pit after mining ceases is predicted to be polluted – severely impacting the environment and Western Shoshone religious interests in the purity of the water on Mt. Tenabo. *See* FEIS at 2-124 (predicting arsenic contamination). ER 130; Western Shoshone Declarations in FEIS (discussing spiritual importance of Mt. Tenabo's waters). ER 167-191. BLM fails to propose or analyze any mitigation at all for this pollution.

[3] This failure to provide and analyze a proper mitigation plan also violates NEPA, as discussed below.

5. *The Project Causes Undue Degradation of Scenic Resources*

In addition to the undue degradation to the Mt. Tenabo Sacred Site and irreplaceable groundwater, the Project will violate BLM's duties to protect scenic values on public land. "The BLM is responsible for identifying and protecting scenic values on public lands under several provisions of FLPMA and NEPA." FEIS at 3.15-1. ER 146. "Current VRM [Visual Resource Management] classifications are the result of a visual inventory and adoption of the Shoshone-Eureka Resource Management Plan (RMP) for the area." FEIS Vol. III at 135. ER 166.

BLM's Class III VRM area covers large portions of the Project. Figure 3.15-1, FEIS at 3.15-3. ER 147. BLM's Class III VRM Objectives require that:

> The objective of this class is to partially retain the existing character of the landscape. The level of change to the characteristic landscape should be moderate. Management activities may attract attention, but should not dominate the view of the casual observer. Changes should repeat the basic elements found in the predominant natural features of the characteristic landscape.

Table 3.15-1, FEIS at 3.15-1. ER 146.

BLM admits that "[t]he project would not comply with the Class III objective in Cortez Canyon during active mining because the color contrast and landform contrast would be too strong." FEIS at 3.15-10. ER 149. These and other visual impacts, and violations of the VRM requirements, constitute a severe visual intrusion into Western Shoshone religious/ceremonial sites (including Shoshone

Wells and the slopes and top of Mt. Tenabo). "The Shoshone Wells location would be surrounded on three sides by project facilities at close range. … It is unlikely that the Proposed Action would meet the standards of VRM Class III objectives." FEIS 3.15-9 to 10. ER 148-49. The FEIS also found that the Project would conflict with the Class III requirements regarding the view from the top of Mt. Tenabo, which is used by Western Shoshone for religious practices:

> the proposed facilities at the foot of the mountain and in Crescent Valley would tend to dominate the viewer's attention. While this would be acceptable in most of the area because VRM Class IV rating permits major modification of the landscape, it would conflict with the objective of the Class III area, which requires that the existing, natural character of the landscape be "partially retained."

FEIS at 3.15-10. ER 149.

Thus, the FEIS acknowledges that the Project would violate BLM's VRM requirements and other visual resource protections, in violation of FLPMA's duty to prevent UUD to these important resources. Despite these admittions, however, the district court simply stated that "Plaintiffs have not demonstrated that BLM failed to satisfy its VRM obligations in violation of FLPMA." Order at 27, lines 13-14. ER 48. No support was given for this conclusion and no evidence was shown to override BLM's admitted violations of its FLPMA duties.

B. BLM Violated NEPA

NEPA "prevent[s] or eliminate[s] damage to the environment and biosphere by focusing government and public attention on the environmental effects of proposed agency action." Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989). It requires the federal agency to ensure "that the agency will inform the public that it has indeed considered environmental concerns in its decision making process." Baltimore Gas and Electric Company v. NRDC, 462 U.S. 87, 97 (1983). NEPA requires that the BLM take a "hard look" at the environmental impacts of a proposed action. Blue Mountains Biodiversity Project, 161 F.3d at 1211 (9th Cir. 1998).

NEPA's analysis and disclosure goals are two-fold: (1) to insure that the agency has carefully and fully contemplated the environmental effects of its action, and (2) "to insure that the public has sufficient information to challenge the agency." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989); Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1151 (9th Cir. 1998). By focusing the agency's attention on the environmental consequences of its proposed action, NEPA "ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." Robertson, 490 U.S. at 349. "NEPA procedures must ensure that environmental information is available to public officials and citizens before

decisions are made and before actions are taken." 40 CFR § 1500.1(b). BLM must consider all direct, indirect, and cumulative environmental impacts of the proposed action. 40 CFR §§ 1502.16; 1508.8; 1508.25(c).

This review must be supported by detailed data and analysis – unsupported conclusions violate NEPA. Idaho Sporting Congress, 137 F.3d at 1150. "Unsubstantiated determinations or claims lacking in specificity can be fatal for an [environmental study] …. Such documents must not only reflect the agency's thoughtful and probing reflection of the possible impacts associated with the proposed project, but also provide the reviewing court with the necessary factual specificity to conduct its review." Committee to Preserve Boomer Lake Park v. Dept. of Transportation, 4 F.3d 1543, 1553 (10th Cir. 1993).

1. *The FEIS Failed to Fully Analyze the Project's Harmful Air Emissions*

In addition to the Project's severe impacts to the lands, waters, and the religious uses and physical integrity of the Mt. Tenabo Sacred Site, the Project will result in other significant impacts to the environment. These impacts include the potential violation of air quality standards. For these and other issues, the FEIS failed to fully analyze the direct, indirect, and cumulative impacts to environmental, cultural/religious, and other resources.

Despite the Tribes' specific concerns raised in their comments to BLM, the FEIS failed to fully analyze the amount of air emissions from the Project, especially that of $PM_{2.5}$, which is a very harmful Criteria Air Pollutant under the federal Clean Air Act. *See* EPA $PM_{2.5}$ Rule, 72 Fed. Reg. 20586 (April 25, 2007).

FLPMA and its implementing regulations prohibit BLM from approving any mining plan that may violate environmental standards and requirements, such as the Clean Air Act standards and requirements for $PM_{2.5}$. 43 CFR § 3809.420(b). *See also*, FLPMA §202(c)(8), 43 U.S.C. § 1712(c)(8) (requiring BLM in land use plans to "provide for compliance with applicable pollution control laws, including State and Federal air . . . pollution standards or implementation plans"). Pursuant to BLM regulations and FLPMA, BLM must comply with land use plans, including the requirement in the land use plan that all activities comply with air quality standards and requirements. 43 CFR § 3809.420(b)(4). Under NEPA, BLM must also analyze whether the alternatives will meet federal and state air quality standards. *See* 40 CFR §1508.27 (10) (requiring that the agency evaluate "[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment").

$PM_{2.5}$ emissions, also known as "fine particle" emissions, can cause serious health impacts. According to the U.S. EPA:

> Fine particles and precursor pollutants are emitted by … burning or combustion-related activities. Health effects that have been associated with

> exposure to $PM_{2.5}$ include premature death, aggravation of heart and lung disease, and asthma attacks. Those particularly sensitive to $PM_{2.5}$ exposure include older adults, people with heart and lung disease, and children.

72 Fed. Reg. 20586 (April 25, 2007). *See also* EPA $PM_{2.5}$ NAAQS Implementation Webpage, http://www.epa.gov/ttn/naaqs/pm/pm25_index.html. ER 121-22; Vermont Dept. of Environmental Conservation, "Fine Particles, the Microscopic Menace." ER 59-65.

By failing to fully analyze $PM_{2.5}$ baseline levels and emissions, BLM's conclusion that the Project complies with all air quality standards and requirements is arbitrary and capricious, not supported by sufficient evidence, and fails to meet its NEPA (and FLPMA) duties. The FEIS admits that BLM did not model or predict the emissions of $PM_{2.5}$ from the Project. "Modeling was not performed for the criteria pollutants $PM_{2.5}$, lead, or O_3." FEIS at 3.10-11. ER 143.

Instead, the FEIS simply listed the applicable air quality standard for $PM_{2.5}$ and stated that the Project would comply with the limit. 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 (PM_{10} is also a Clean Air Act Criteria Pollutant). FEIS Vol. III at 54. 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.

Further, even if this insertion of this 15% figure in the response to comments section in the FEIS satisfied BLM's duty to fully analyze these emissions with sufficient evidentiary support (which it does not), BLM failed to afford the public an opportunity to comment on $PM_{2.5}$ emissions prior to the finalization of the FEIS, as there was little to no mention of these emissions (nor the 15% figure) in the Draft EIS.

BLM cannot ignore an issue in the Draft EIS and then pretend to analyze it by inserting a mention of the issue in its response to comments in an appendix to the Final EIS.

> Relegation [of technical discussion] to the comment and response section of the appendix was improper under NEPA. Friends of the Earth v. Hall, 693 F.Supp. at 934. Disclosures and discussions must be in the body of the FEIS itself. Center for Biological Diversity v. Forest Service, 349 F.3d 1157, 1169 (9th Cir. 2003). Furthermore, within that body of the EIS, the agency must not only recite dissenting opinions, it must "analyze," "respond to" and "discuss" them. Id. at 1168.

Pacific Coast Federation v. Nat. Marine Fisheries, 482 F.Supp.2d 1248, 1255 (W.D. Wash. 2007). Thus, even if there was any support in the record for BLM's "15% ratio," which there is not, hiding it in the response to comments section of the FEIS appendix violates NEPA.

In addition to the lack of analysis of the $PM_{2.5}$ emissions from the Project, the FEIS is devoid of any analysis of baseline (current) levels of this harmful pollutant. "[W]ithout establishing ... baseline conditions ... there is simply no way

to determine what effect [an action] will have on the environment, and consequently, no way to comply with NEPA." Half Moon Bay Fisherman's Mark't Ass'n v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988).

Overall, BLM's refusal to analyze the Project's emissions of a very harmful air pollutant fundamentally flaws its NEPA analysis and cannot stand.

2. *Failure to Analyze Impacts from Off-site Ore Processing*

Apart from the mine site impacts, the FEIS contains no analysis of the environmental impacts, particularly $PM_{2.5}$ and mercury air pollution emissions, associated with the off-site processing of the approximately 5 million tons of refractory ore. The severe human health risks from exposure to $PM_{2.5}$ are detailed above. The health effects from mercury exposure are even more troubling. As the Federal Agency for Toxic Substances and Disease Registry has stated:

> The nervous system is very sensitive to all forms of mercury. Methylmercury and metallic mercury vapors are more harmful than other forms, because more mercury in these forms reaches the brain. Exposure to high levels of metallic, inorganic, or organic mercury can permanently damage the brain, kidneys, and developing fetus. Effects on brain functioning may result in irritability, shyness, tremors, changes in vision or hearing, and memory problems. Short-term exposure to high levels of metallic mercury vapors may cause effects including lung damage, nausea, vomiting, diarrhea, increases in blood pressure or heart rate, skin rashes, and eye irritation.

Federal Agency for Toxic Substances and Disease Registry, Mercury Fact Sheet, at 1-2. ER 66-67. *See also*, EPA Region 9 Draft Mercury Mass Balance and

Emissions Factor Estimates for Gold Ore Processing Facilities, 2001, at 1 (summarizing how mercury is emitted from gold ore processing). ER 70.

The Project's refractory ore "would be sold to an off-site processing facility." FEIS at ES-1. ER 126. This "off-site processing facility" would be the Barrick Goldstrike facility (approximately 50 miles away as the crow flies, with additional distance via local roads); yet there is no discussion of the environmental impacts of this processing and transportation. FEIS at 2-34. ER 127.

The reason given for failing to analyze the full impacts from this off-site processing is that the annual shipping rate of ore to the Goldstrike facility from Barrick's current operations in Crescent Valley is predicted to remain the same under the new Project. Id. However, the fact that the shipping rate may remain the same does not mean that the full impacts from this processing have been analyzed. The FEIS is devoid of any analysis of these impacts.

Even if BLM could rely on its previous environmental reviews of the Goldstrike facility, those documents were completed years ago and do not contain the required analysis of all the impacts from that processing, including $PM_{2.5}$ and mercury emissions – nor an analysis of the approximately 10 years of additional transportation and processing caused by the new Project.

Accordingly, the public has never had an opportunity to review the $PM_{2.5}$ and mercury emissions from the transportation and processing of the refractory

ore, as well as the $PM_{2.5}$ baseline levels and emissions from activities within the Project site. The Ninth Circuit has recently rejected BLM's similar attempts to ignore the impacts from the processing or dumping of mine materials at other mines in the region. In Great Basin Mine Watch v. Hankins, 456 F.3d 955, 972-974 (9th Cir. 2006), the Court voided two BLM EIS's in part due to the agency's failure to review the cumulative impacts from off-site disposal of mine materials at a nearby mine. A similar holding is warranted here.

3. *Lack of Proper Mitigation Analysis*

NEPA also requires that mitigation measures be fully reviewed in the FEIS, not in the future. "[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects." Robertson, 490 U.S. at 353.

BLM claims that it will fully mitigate for the loss of any flows in springs, seeps, and other surface and ground waters. *See* FEIS at 3.2-109 to 113. ER 135-139. However, much of this so-called "mitigation" is just a plan to initially monitor the impact from the dewatering on area surface and groundwater. FEIS at 3.2-111. ER 137.

Monitoring (even if successful and there is no assurance that it will be) 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. As the Ninth Circuit recently held, monitoring prior to actual mitigation of impacts merely "serve[s] to confirm the appropriateness of a mitigation measure, but that does not make it an adequate mitigation measure in itself." Alaska Wilderness League v. Kempthorne**,** 548 F.3d 815, 828 (9th Cir. 2008).

Any plan to actually replace or repair the loss or damage to these waters would only be submitted at some undetermined time in the future based on the monitoring results (and even then only after further "evaluation" by BLM). FEIS at 3.2-111 (Mitigation Measure WR1b). ER 137. No such plan has yet been submitted to BLM or to the public for review. Further, there is no assurance that the eventual mitigation plan will be subject to public review under NEPA. Id.

Further, BLM and Barrick's "mitigation plan" for surface and groundwater losses and damage (including to sacred springs and seeps) is not supported by an analysis of the effectiveness of these vague mitigation measures, nor is there any analysis of the environmental impacts of these so-called mitigation measures. For example, the as-yet-undetermined mitigation plan could involve a new set of pumps, wells and pipelines – all of which have never been reviewed or subject to

public review and all of which could entail significant environmental impacts in and of themselves. FEIS at 3.2-111. ER 137.

This approach was rejected by the Ninth Circuit in Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1380-81 (9th Cir. 1998)("The Forest Service's broad generalizations and vague references to mitigation measures … do not constitute the detail as to mitigation measures that would be undertaken, and their effectiveness, that the Forest Service is required to provide."). BLM's review of the effectiveness of the critical Mitigation Measure WR1b is contained in the following circular and minimal statement: "Effectiveness: Feasibility and success of mitigation would depend on site-specific conditions and details of the mitigation plan." FEIS at 3.2-111. ER 137.

NEPA regulations define "mitigation" as a way to avoid, minimize, rectify, or compensate for the impact of a potentially harmful action. 40 CFR §§1508.20(a)-(e). BLM's plan to simply "monitor" the drawdown and elimination of surface waters and springs/seeps, and then figure out a way to avoid these losses is the type of "impact first, develop a plan later" approach rejected by the Ninth Circuit. *See* Alaska Wilderness League, 548 F.3d at 827-828.

III. THE BALANCE OF HARDSHIPS AND THE PUBLIC INTEREST FAVOR THE TRIBES

A. The Public Interest Weighs in Favor of a Preliminary Injunction

The public interest weighs heavily in favor of preventing irreparable environmental and cultural harm until the federal court has fully reviewed the merits. As the Ninth Circuit has stated in the mining context:

> The public interest strongly favors preventing environmental harm. Although the public has an economic interest in the mine, there is no reason to believe that the delay in construction activities caused by the court's injunction will reduce significantly any future economic benefit that may result from the mine's operation.

Southeast Alaska Conservation Council, 472 F.3d at 1101. The public interest in favor of a preliminary injunction is especially acute when faced with violations of environmental laws. *See* Save Our Sonoran, 408 F.3d 1113; Earth Island Inst., 351 F.3d 1291; Bob Marshall Alliance v. Hodel, 852 F.2d 1223 (9th Cir. 1988); National Parks Conservation Assoc. v. Babbitt, 241 F.3d 722 (9th Cir. 2001); Northern Alaska Envtl. Ctr. v. Hodel, 803 F.2d 466 (9th Cir. 1986).

The Project has received unprecedented world-wide opposition. In one petition alone, 11,570 people from around the world voiced their opposition to the Project – specifically stating that the Project should be denied because the "the proposed Cortez Hills Expansion Project will irreparably harm the Mt. Tenabo area which is of significant and well-established religious and cultural value to the Western Shoshone people. The mine would irretrievably destroy traditional

Shoshone uses in the area and irreplaceably damage water resources which are not only sacred to the Shoshone, but also critical in times of drought." FEIS Vol. III at p. 117. ER 163.

BLM also received over 2,600 direct letters opposing the Project. FEIS Vol. III at F3.1-1 to F3.1-26 (listing names of individuals submitting comment letters directly to BLM or as part of GBRW's comment submittal). ER 193-218. Over 165 individuals submitted additional postcards to BLM stating their opposition to the Project. FEIS Vol. III at F3.3-1 (listing names of postcard submitters). ER 219. The postcard stated that the Project "will irretrievably destroy Shoshone religious and cultural uses in the area." FEIS Vol. III at 473. ER 192.

Overall, because the Tribes seek to enforce federal laws designed to protect religious practices, the environment and public health, and because the injunction would prevent further irreparable and permanent harm until the case is resolved, the injunction would serve the interests of the public.

The district court, in a scant few sentences, found that, due to the economic benefits from the Project, the Tribes did not establish that the balance of hardships tipped in their favor or that the public interest favored the injunction. Order at 31. ER 52. The court relied on The Lands Council v. McNair, 537 F.3d 981, 1003 (9th Cir. 2008). Order at 31. ER 52. However, that decision specifically noted that the timber removal operations in that case would have beneficial environmental

impacts. "The overall objectives of the project are to begin restoring forest health and wildlife habitat, improv[e] water quality and overall aquatic habitat by reducing sediment and the risk of sediment reaching streams, and provid[e] recreation opportunities that meet the varied desires of the public and the agency while reducing negative effects to the ecosystem." Id. at 985. That is a far cry from this Project's massive and detrimental impacts to public land, with no associated environmental benefit at all.

Although the Tribes are certainly mindful of the economic benefits from the Project, these interests do not override BLM's duties to comply with federal law, nor this Court's authority to prevent irreparable harm.

B. The Interests of BLM and Barrick Are Not Sufficient to Override the Interests of the Tribes and the Public

BLM's interests in this Appeal are negligible and are not sufficient to outweigh the interests of the Tribes and the public in preventing irreparable environmental harm. *See* American Motorcyclist Ass'n v. Watt, 714 F.2d 962, 966 (9th Cir. 1983) (district court had "properly determined that the harm to Inyo [County]'s planning processes was not comparable to the harm enjoining the Plan would cause to the [environment] and the public interest"). Any harm to Barrick's financial position is also not considered irreparable.

> "(T)he temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury ... The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and

> energy necessarily expended ... are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." Sampson v. Murray, supra, 415 U.S. 61, 90 (1974).

Los Angeles Memorial Coliseum Commission v. NFL, 634 F.2d 1197, 1202 (9th Cir. 1980).

Thus, where there is a threat of irreparable environmental harm, "more than pecuniary harm must be demonstrated" in order to avoid a preliminary injunction, even though miners faced a "real financial hardship." Northern Alaska, 803 F.2d at 471. *See also* National Parks, 241 F.3d at 738 ("loss of anticipated revenues ... does not outweigh the potential irreparable damage to the environment").

In addition, regardless of this injunction, Barrick will continue to operate its previously-approved Pipeline Complex in Crescent Valley, as well as the Underground Cortez Exploration Project. "Under [the no-action] alternative, mining and ore processing would continue at the Pipeline Complex through 2014; on-going ore processing and closure and reclamation would continue through 2017. … The Underground Cortez Exploration Project would continue through 2011 at its current employment level (55 to 65 workers)." FEIS at 3.13-23. ER 145.

Notably, the Tribes do not request that Barrick be enjoined from construction and operation of its expansion to the existing Pipeline Complex – the "North Gap Pit Expansion" located across Crescent Valley from Mt. Tenabo.

Although approval of this Expansion was in the ROD and as such is illegal, due to its location away from any impacts to Mt. Tenabo, the Tribes do not include this facility and related operations in this Appeal.

This Project has been under review in one form or another for over seven years. Thus, the additional delay while the court reviews the merits will be far shorter than Barrick itself took to submit and then revise its own plans. Barrick originally submitted its first proposal for what was then known as the Pediment Project in January 2001. BLM issued its "Notice of Intent to Prepare an EIS to Analyze the Proposed Pediment Plan of Operations," on May 13, 2002. 67 Fed.Reg. 32058-59 (May 13, 2002). Barrick subsequently revised its plans and BLM issued a new Notice of Intent to prepare an EIS in late 2005. 70 Fed. Reg. 72308 (Dec. 2, 2005).

The fact that Barrick rushed its construction schedule, despite knowing full well that the Project would be challenged, does not justify denying injunctive relief. "It has long been established that where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined the court may by mandatory injunction restore the status quo." Porter v. Lee, 328 U.S. 246, 251 (1946). Similarly, a company's accelerated construction schedule does not mean that an injunction should not issue to halt further damage. People of Saipan v. U.S. Dept. of Interior, 502 F.2d 90, 100 (9th Cir. 1974) (rejecting defendants' argument

that "it has acquired some equities by proceeding with the construction of its hotel while its right to do so is being litigated"). The Ninth Circuit recently enjoined mining operations, despite the claimed economic harms by the mining company and despite the fact that the project had already commenced. Southeast Alaska Conservation Council, 472 F.3d 1097. *See also* West v. U.S. Dept. of Transp., 206 F.3d 920, 929 (9th Cir. 2000) (injunction based on NEPA violation even though the challenged interchange had been built).

IV. BOND WAIVER

Under Rule 65(c) of the Federal Rules of Civil Procedure, in order to obtain a preliminary injunction, a plaintiff must generally post a bond "in such sum as the court deems proper." However, the "court has discretion to dispense with the security requirement, or to request a mere nominal security, where requiring security would effectively deny access to judicial review." California ex rel. Van de Kamp v. Tahoe Regional Planning Agency, 766 F.2d 1319, 1325 (9th Cir. 1985), *amended on other grounds* 775 F.2d 998 (1985). *See also* Barahona-Gomez v. Reno, 167 F.3d 1228, 1237 (9th Cir. 1999); and Friends of the Earth v. Brinegar, 518 F.2d 322, 323 (9th Cir. 1975). In cases in which the plaintiffs are public interest organizations or entities seeking a preliminary injunction to protect the environment, courts routinely waive the bond requirement or impose a nominal

bond. *See*, *e.g.*, California ex rel. Van de Kamp, 766 F.2d at 1325-26; Friends of the Earth, 518 F.2d at 323.

Here, the Tribes are either small, nonprofit organizations (WSDP and GBRW) or small Indian tribes with little financial resources. A requirement of a more than nominal bond would prevent the Tribes from vindicating their rights and frustrate legitimate judicial review.

CONCLUSION

Based on the foregoing, the Tribes respectfully request that this Court issue a preliminary injunction prohibiting any activities authorized pursuant to the ROD or FEIS on Mt. Tenabo.

Respectfully submitted this 6th day of March, 2009.

/s/ Roger Flynn

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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 attached opening brief is:

Proportionately spaced, has a typeface of 14 points or more and contains 13,094 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).

/s/ Roger Flynn 3-6-09

Roger Flynn Date

CERTIFICATE OF SERVICE

I certify that the following parties were served with a copy of the Appellants' Excerpts of Record by placing it for delivery via overnight Federal Express this 6th day of March, 2009.

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CERTIFICATE OF SERVICE OF ELECTRONIC FILING OF BRIEF

I also certify that on March 6, 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

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellants state that there are no related cases pending in this Court.