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# ARIZONA’S “ZOMBIE” URANIUM MINES: LAX REGULATIONS THREATEN LOS ANGELES TAP WATER

DAVID IANNELLA\*

**Abstract:** In *Center for Biological Diversity v. Salazar*, the U.S. Court of Appeals for the Ninth Circuit held that the Bureau of Land Management (BLM) was not required to approve a new plan of operations before allowing a uranium mine to resume production after nearly two decades of cessation. The court reasoned that the reopening of an abandoned mine did not constitute the requisite major federal action required to trigger an environmental analysis under the National Environmental Policy Act (NEPA). This Comment argues that although the Ninth Circuit correctly affirmed that the BLM complied with NEPA, the ruling exposes an environmentally dangerous loophole that requires statutory revisions. The court’s holding essentially permits mining operators to restart production at mines dormant for decades without undertaking any new environmental reviews. The determination of whether a mine poses a significant threat to the environment is based upon an assessment that could potentially date back several decades.

## INTRODUCTION

If you are one of the almost four million people living in Los Angeles, the glass of tap water that you sip before bed likely originates from the Colorado River.<sup>1</sup> Not only does the Colorado River provide water to those in California, but it also hydrates one in twelve Americans, or nearly twenty-seven million people.<sup>2</sup> Perhaps surprisingly, the edges of the Colorado River are lined by some of the most uranium-rich deposits in the nation.<sup>3</sup> The location of the uranium ore along the Colorado presents a complex dichotomy.<sup>4</sup> Uranium is a mineral that could solve the nation’s dependency on

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\* Staff Writer, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2013–2014.

<sup>1</sup> See Abraham Lustgarten & David Hasemyer, *Colorado River May Face Fight of Its Life*, SAN DIEGO UNION-TRIBUNE (Dec. 21, 2008), <http://www.utsandiego.com/news/2008/dec/21/1n21colorado211057-colorado-river-may-face-fight-1>, available at <http://perma.cc/TK5U-WTV5> (discussing the reliance of several states, including California, on the Colorado River for tap water).

<sup>2</sup> See *id.*

<sup>3</sup> Laurel Morales, *Tribes, Enviros Fight Uranium Mining Near Grand Canyon*, KPBS (June 3, 2013), <http://www.kpbs.org/news/2013/jun/03/tribes-enviros-fight-uranium-mining-grand-canyon>, available at <http://perma.cc/4YH7-FABC>.

<sup>4</sup> See Lustgarten & Hasemyer, *supra* note 1.

foreign oil, but it is toxic and could threaten the major water supply of the Southwestern United States.<sup>5</sup>

While uranium mines have sprinkled the lands around the Grand Canyon for decades, higher ore prices in the global markets have drawn many operators back to the mines that they abandoned years ago.<sup>6</sup> Since the 1950s, when the first boom of hopeful prospectors trekked to the American Southwest to strike it rich, fluctuations in the economic feasibility of maintaining a uranium mine drove many operators off their once-active claims.<sup>7</sup> A slew of mines that ceased production due to a drop in demand, colloquially referred to as “zombie mines,” have recently been resurrected and are again conducting operations.<sup>8</sup> Restarting production at inactive mines has not only brought machinery and pollutants back to the Grand Canyon region, but it has also initiated a host of lawsuits aimed at protecting federal public lands.<sup>9</sup>

Denison Corporation’s Arizona 1 Mine (“Arizona 1”), located six-and-one-half miles north of Grand Canyon National Park in Mohave County, Arizona, is one example of a uranium mine facing legal challenges.<sup>10</sup> After a period of about fourteen years of inactivity, the mine’s operators stated their intention to resume operations in 2007.<sup>11</sup> Two years later, the mine reopened under a plan of operations and an environmental assessment ap-

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<sup>5</sup> See *id.* The U.S. Geological Survey has expressed its position that uranium mining near the Grand Canyon might result in radioactive materials seeping into groundwater that flows into the Colorado River. Opening Brief for Appellants at 8, *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085 (9th Cir. 2013) (No. 11-17843).

<sup>6</sup> See U.S. ENERGY INFO. ADMIN., 2012 URANIUM MARKETING ANNUAL REPORT 1 (2013), available at <http://www.eia.gov/uranium/marketing/pdf/2012umar.pdf> and <http://perma.cc/V4U7-6MLG>; Morales, *supra* note 3.

<sup>7</sup> See Brett T. Bunkall, *The Uranium Mining and Milling Industry in Utah*, 26 J. LAND RESOURCES & ENVTL. L. 375, 375–76 (2006); *Uranium Mining Overview*, WORLD NUCLEAR ASS’N, <http://www.world-nuclear.org/info/Nuclear-Fuel-Cycle/Mining-of-Uranium/Uranium-Mining-Overview/> (last visited Nov. 15, 2013), available at <http://perma.cc/6KX4-YFL7> (discussing a decline in the number of U.S. uranium mines as well as a recent resurgence because of higher uranium prices).

<sup>8</sup> See, e.g., Mary Shinn, *Appeals Court Upholds Reopening of Uranium Mine Near Grand Canyon*, ARIZ. CAPITOL TIMES (Feb. 5, 2013), <http://azcapitoltimes.com/news/2013/02/05/appeals-court-upholds-reopening-of-uranium-mine-near-grand-canyon/#ixzz2hk3vyXvz>, available at <http://perma.cc/8L28-6K9H>. A wildlands campaign director at the Center for Biological Diversity expressed concern that “[t]hey are basically zombie mines that will live perpetually without ever being subject to new environmental reviews.” *Id.*

<sup>9</sup> See, e.g., Opening Brief for Appellants, *supra* note 5, at 9 (discussing the harmful effects of uranium mining around the Grand Canyon); *Ctr. for Biological Diversity*, 706 F.3d at 1088. Abandoned mines themselves pose an environmental hazard. See S. REP. NO. 109-351, at 1 (2006) (“It is estimated that there are as many as 500,000 abandoned hardrock mines throughout the United States . . . . The former U.S. Bureau of Mines estimated that 12,000 stream miles and 180,000 acres of lakes in the West have been impacted by acid mine drainage.”).

<sup>10</sup> See *Ctr. for Biological Diversity*, 706 F.3d at 1088.

<sup>11</sup> *Id.* at 1089.

proved by the Bureau of Land Management (BLM),<sup>12</sup> which was regulated by environmental policy nearly two decades old.<sup>13</sup> Consequently, the Center for Biological Diversity sought a preliminary injunction to prevent Denison Corporation (“Denison”) from operating under the original 1988 plan of operations.<sup>14</sup> The U.S. District Court for the District of Arizona rejected the plaintiff’s request for an injunction, giving Denison the green light to extract ore from its Canyon-side mine.<sup>15</sup>

By allowing Arizona 1 to resume operations in 2009, the BLM refused to consider potential environmental impacts under present-day standards.<sup>16</sup> Instead, the agency held Denison to the same standards that governed the mining industry back in the 1980s.<sup>17</sup> No new environmental assessment was required, nor was one prepared.<sup>18</sup> While Denison and other mining operators were pleased by the U.S. Court of Appeals for the Ninth Circuit’s finding in *Center for Biological Diversity v. Salazar* that approval of a new plan was not required before production could recommence at the decades dormant mine, the ruling will most likely cause problems for those in Los Angeles who continue to consume tap water originating from the adjacently located Colorado River.<sup>19</sup> This Comment argues that although the Ninth Circuit correctly affirmed that the Secretary of the Interior and the BLM complied with the National Environmental Policy Act (NEPA), the Federal Land Policy and Management Act (FLPMA), and the BLM’s own regulations, the court’s ruling exposes a dangerous environmental loophole that requires statutory revisions.<sup>20</sup>

## I. FACTS AND PROCEDURAL HISTORY

In 1988, Energy Fuels Nuclear (“Energy Fuels”) sought approval from the BLM to mine uranium from the Arizona 1 claim and submitted a proposed plan of operations to the agency prior to developing the Mohave County site.<sup>21</sup> After reviewing Energy Fuels’ plan, the BLM prepared a de-

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<sup>12</sup> See generally *The Bureau of Land Management: Who We Are, What We Do*, BUREAU OF LAND MGMT., [http://www.blm.gov/wo/st/en/info/About\\_BLM.html](http://www.blm.gov/wo/st/en/info/About_BLM.html) (last visited Nov. 15, 2013), available at <http://perma.cc/A8D9-BFYF> (detailing Congress’s founding of the agency to manage federal public lands).

<sup>13</sup> See *Ctr. for Biological Diversity*, 706 F.3d at 1089.

<sup>14</sup> See Complaint for Declaratory and Injunctive Relief at 2, 28–29, *Ctr. for Biological Diversity v. Salazar*, 791 F. Supp. 2d 687 (D. Ariz. 2011) (No. 09CV08207) (requesting that the court vacate and set aside approval by the BLM to allow operations at the Arizona 1 mine to continue).

<sup>15</sup> See *Ctr. for Biological Diversity*, 706 F.3d at 1089.

<sup>16</sup> See *id.* at 1095.

<sup>17</sup> See Shinn, *supra* note 8.

<sup>18</sup> See *Ctr. for Biological Diversity*, 706 F.3d at 1095.

<sup>19</sup> See Shinn, *supra* note 8; Lustgarten & Hasemyer, *supra* note 1.

<sup>20</sup> See Shinn, *supra* note 8.

<sup>21</sup> *Ctr. for Biological Diversity*, 706 F.3d at 1088.

tailed public statement, commonly known as an environmental assessment (EA), pursuant to NEPA to assess the mine’s potential effects on the environment.<sup>22</sup> Ultimately, the BLM approved the Arizona 1 mine under FLPMA, concluding the mine would not cause “undue or unnecessary degradation of public lands” or “significantly affect the quality of the human environment.”<sup>23</sup> Energy Fuels’ plan also contained an interim plan in the event of an unanticipated shutdown at the mine.<sup>24</sup>

After BLM’s approval, Energy Fuels began developing Arizona 1, but eventually halted operations in 1992 after a drastic drop in uranium prices coupled with ongoing bankruptcy proceedings.<sup>25</sup> Consequently, Energy Fuels placed the mine on “standby and interim management status” as outlined in the 1988 BLM-approved plan.<sup>26</sup> With Arizona 1 still inoperable in 1997, International Uranium Corporation acquired ownership of the mine.<sup>27</sup> Ten years later in 2007, International Uranium Corporation merged with Denison.<sup>28</sup> At the time of the merger, production at the mine remained on hold.<sup>29</sup>

Throughout the period of inactivity at Arizona 1, the mine was managed under the 1988 plan of operations and the interim plan found therein.<sup>30</sup> Pursuant to the BLM’s own regulations,<sup>31</sup> the agency conducted inspections at Arizona 1 while the mine was inactive.<sup>32</sup> Eventually, in 2007, economic prospects for the mining industry brightened as the price of uranium increased.<sup>33</sup> As a result, Denison sought Aquifer Protection and Air Quality Control permits from the State of Arizona in preparation to reopen Arizona

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<sup>22</sup> See Federal Appellees’ Response Brief at 11–12, *Ctr. for Biological Diversity*, 706 F.3d 1085 (No. 11-17843). The BLM considered the mine’s potential impact to “air, surface water, and groundwater, as well as the potential radiogenic impacts of mining operations, ore stockpiles, and ore transport.” *Id.* at 12–13 (internal citations omitted).

<sup>23</sup> *Ctr. for Biological Diversity*, 706 F.3d at 1088, 1091–92. See generally 43 U.S.C. § 1732(b) (2006) (requiring the Secretary of the Interior to take any action necessary to prevent unnecessary or undue degradation of federal lands).

<sup>24</sup> *Ctr. for Biological Diversity*, 706 F.3d at 1088.

<sup>25</sup> Plaintiffs’ Response to Motion to Intervene at 3, *Ctr. for Biological Diversity*, 791 F. Supp. 2d 687 (No. 3:09-cv-08207-DGC).

<sup>26</sup> *Ctr. for Biological Diversity*, 706 F.3d at 1088.

<sup>27</sup> *Id.*

<sup>28</sup> See *id.*

<sup>29</sup> See *id.*

<sup>30</sup> *Id.*

<sup>31</sup> See, e.g., 43 C.F.R. § 3809 (2012) (discussing the duties of the BLM to prevent the unnecessary or undue degradation of public lands).

<sup>32</sup> *Ctr. for Biological Diversity*, 706 F.3d at 1088.

<sup>33</sup> See U.S. ENERGY INFO. ADMIN., *supra* note 6, at 3. The weighted-average price of uranium purchased by owners and operators of U.S. civilian nuclear power reactors increased from approximately \$10 per pound of triuranium octoxide in 2002 to in excess of \$40 per pound in 2007. See *id.*

1.<sup>34</sup> Denison also increased its financial guarantee with the BLM and the Arizona Department of Environmental Quality.<sup>35</sup>

Two years later in November 2009, Denison continued to conduct final preparations to reopen Arizona 1.<sup>36</sup> In anticipation of the mine's reopening, the Center for Biological Diversity, Grand Canyon Trust, Sierra Club, Kaibab Band of Paiute Indians, and the Havasupai Tribe filed a complaint in the U.S. District Court for the District of Arizona alleging that Energy Fuels' 1988 plan of operations had become ineffective due to the mine's extended period of inactivity.<sup>37</sup> Despite the pending litigation, Arizona 1 was conducting operations by the end of the year.<sup>38</sup> In an effort to prevent further operation at Arizona 1, the plaintiffs moved for a preliminary injunction.<sup>39</sup>

The district court denied the plaintiffs' motion for a preliminary injunction and issued an order of summary judgment in favor of the defendants, ruling that the BLM fulfilled its duties when it approved the 1988 plan.<sup>40</sup> The district court held that the plaintiffs had standing to maintain their claims under NEPA, but the agency's decision to allow Arizona 1 to reopen under the 1988 plan was not arbitrary and capricious.<sup>41</sup> The court also held that a new or supplemental EIS was not required because neither BLM's mere monitoring of the mine while it was inactive nor the agency's decision to increase the reclamation bond amount constituted "major federal actions" under NEPA.<sup>42</sup> Lastly, the court held that BLM's decision to apply a categorical exclusion under NEPA for the issuance of a gravel permit, which was necessary to maintain an access road at the mine, was arbitrary and capricious.<sup>43</sup> The court remanded the gravel permit issue to the BLM and required the agency to provide a more complete explanation of the categorical exclusion determination.<sup>44</sup>

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<sup>34</sup> *Ctr. for Biological Diversity*, 706 F.3d at 1089.

<sup>35</sup> *Id.* at 1089, 1096.

<sup>36</sup> *Id.* at 1089.

<sup>37</sup> See Complaint for Declaratory and Injunctive Relief, *supra* note 14, at 2–3 (claiming that the plan of operations at the Arizona 1 mine "expired by its own terms" and is therefore no longer in effect). In contending that the mine's extended period of dormancy has rendered the 1988 plan of operations ineffective, the plaintiffs relied on 43 C.F.R. § 3809.423, which states that a plan remains in effect "as long as . . . [a mining operator is] conducting operations." See Plaintiffs' Response to Motion to Intervene, *supra* note 25, at 3–4.

<sup>38</sup> *Ctr. for Biological Diversity*, 706 F.3d at 1089.

<sup>39</sup> *Id.*

<sup>40</sup> *Ctr. for Biological Diversity*, 791 F. Supp. 2d at 705.

<sup>41</sup> *Id.* at 696.

<sup>42</sup> See *id.* at 697.

<sup>43</sup> *Id.* at 702.

<sup>44</sup> *Id.* at 703.

A short time later, the BLM delivered a more adequate explanation for the categorical exclusion.<sup>45</sup> The court found that the agency’s explanation was not arbitrary and capricious.<sup>46</sup> As a result, the district court granted summary judgment on this issue in favor of the defendants.<sup>47</sup>

Unhappy with the district court’s ruling, the plaintiffs appealed to the Ninth Circuit.<sup>48</sup> The plaintiffs first argued that the BLM was required to approve a new plan of operations due to the extended shutdown at Arizona 1.<sup>49</sup> Next, they claimed the issuance of the gravel permit, the obtainment of a new air quality control permit, and the approval of an updated reclamation bond constituted “major federal action” triggering a new EIS under NEPA.<sup>50</sup> Finally, the plaintiffs asserted that the categorical exclusion for the issuance of the gravel permit was arbitrary and capricious.<sup>51</sup> The Ninth Circuit rejected each of the plaintiffs’ arguments and affirmed the lower court’s ruling.<sup>52</sup>

## II. LEGAL BACKGROUND

The National Environmental Policy Act (NEPA) balances the nation’s interest in the environment with the social and economic needs of the country by mandating that federal policies, laws, and regulations be administered in accordance with the Act.<sup>53</sup> Under NEPA, courts must ensure that federal agencies have taken a “hard look” at the environmental consequences of proposed “major federal actions significantly affecting the quality of the human environment.”<sup>54</sup> By taking a “hard look,” federal agencies are required to accompany proposed actions with an environmental impact statement (EIS), a detailed public statement that considers possible environmental harms and alternatives to the proposed action.<sup>55</sup> While an EIS is required

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<sup>45</sup> Order, *Ctr. for Biological Diversity*, 791 F. Supp. 2d 687 (No. CV–09–8207–PCT–DGC), 2011 WL 2550392, at \*1 (order from district court judge dated June 27, 2011).

<sup>46</sup> Order, *Ctr. for Biological Diversity*, 791 F. Supp. 2d 687 (No. 09–08207–PHX–DGC), 2011 WL 4709874, at \*4 (order from district court judge dated Oct. 7, 2011).

<sup>47</sup> *Id.*

<sup>48</sup> *Ctr. for Biological Diversity*, 706 F.3d at 1090.

<sup>49</sup> *Id.* at 1091.

<sup>50</sup> *Id.* at 1095.

<sup>51</sup> See Federal Appellees’ Response Brief, *supra* note 22, at 57.

<sup>52</sup> *Ctr. for Biological Diversity*, 706 F.3d at 1099.

<sup>53</sup> See 42 U.S.C. § 4332(1) (2006); see also William Griffin, Comment, *NEPA and the Roan Plateau: Forcing the Bureau of Land Management to Take a Hard Look*, 40 B.C. ENVTL. AFF. L. REV. 553, 558 (2013) (explaining that in enacting NEPA, Congress recognized humanity’s significant effect on the environment).

<sup>54</sup> *E.g.*, *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998).

<sup>55</sup> See 42 U.S.C. § 4332(C); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). An environmental impact statement must include “(1) the environmental impact of the proposed action, (2) any adverse environmental effects which cannot be avoided should the proposal be implement-

before a project may commence, supplementation is sometimes required throughout the course of a project.<sup>56</sup> Approval of specific projects might constitute “major federal action” under NEPA if the project has effects that may be major.<sup>57</sup> NEPA regulations state that an EIS or a supplemental assessment is required if “the agency makes substantial changes in the proposed action” or “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action” arise.<sup>58</sup>

While NEPA requires federal agencies to consider environmental impacts in their planning and decision-making, the Federal Land Policy and Management Act (FLPMA) protects “the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values” by “prevent[ing] the unnecessary or undue degradation (“UUD”) of public lands.”<sup>59</sup> FLPMA governs how the Bureau of Land Management (BLM) manages federal lands.<sup>60</sup> Pursuant to FLPMA, the BLM is required to review mining operations on federal lands.<sup>61</sup> The agency must approve a mine’s plan of operations and prepare an EIS to ensure that the mining project will not cause any UUD.<sup>62</sup> FLPMA gives the Secretary of the Interior (“Secretary”) authority to determine whether mining would result in UUD<sup>63</sup> and establishes liability should the Secretary fail to prevent UUD of public lands.<sup>64</sup>

Under the Administrative Procedure Act (APA), courts review the actions of federal agencies, including their duty to prepare EISs, to determine whether their conduct is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>65</sup> In applying the “arbitrary and capricious” standard of review under the APA, courts are “exceedingly defer-

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ed, (3) alternatives to the proposed action, (4) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and (5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.” 42 U.S.C. § 4332(C)(i)–(v).

<sup>56</sup> See 40 C.F.R. §§ 1502.5, 1502.9(C)(1)(i)–(ii) (2013).

<sup>57</sup> See *id.* § 1508.18.

<sup>58</sup> *Id.* § 1502.9(C)(1)(i)–(ii).

<sup>59</sup> 43 U.S.C. §§ 1701(a)(8), 1732(b) (2006). In overseeing mining operations, the agency balances the nation’s interest in mining minerals against the need to protect ecological, environmental, and water resources. See *id.* § 1701(a)(8), (12).

<sup>60</sup> See *id.* § 1732(b).

<sup>61</sup> See *id.*

<sup>62</sup> See 42 U.S.C. § 4332(C) (2006) (requiring an EIS), 43 C.F.R. § 3809.11(a) (2013) (requiring a mine to gain approval from the BLM before conducting operations that are “greater than casual use”).

<sup>63</sup> See 43 U.S.C. § 1701(a)(5).

<sup>64</sup> See *Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30, 42 (D.D.C. 2003) (holding that the Secretary of the Interior not only has the authority under FLPMA to object to an environmentally harmful mining operation, but also the obligation to do so).

<sup>65</sup> See 5 U.S.C. § 706(2)(a) (2012).

ential” to the agency in conducting their analysis.<sup>66</sup> The court presumes agency action to be valid if a “reasonable basis exist[s] for its decision.”<sup>67</sup> When reviewing an agency’s actions, courts are limited to the administrative record of that particular agency.<sup>68</sup>

Pursuant to BLM’s regulations under FLPMA (the “§ 3809 regulations”),<sup>69</sup> mining operators must submit a plan of operations to the BLM prior to developing a claim.<sup>70</sup> Each plan of operations must include a “description of the equipment, devices, or practices” proposed to be used during operations, including “maps of the project area,” “preliminary or conceptual designs,” “interim management,” “plans for monitoring,” “a schedule of anticipated periods of temporary closure,” and “other information if necessary to ensure [] operations will comply with [the regulations].”<sup>71</sup> Mining cannot commence before the BLM approves the plan and the operator obtains a financial guarantee.<sup>72</sup> Moreover, the BLM cannot approve a plan unless the plan complies with NEPA and FLPMA by determining that the mining operation will not cause detrimental impacts to the environment or natural resources.<sup>73</sup>

The § 3809 regulations also stipulate that each BLM-approved plan of operations contains an interim management plan,<sup>74</sup> which must be administered during periods of temporary cessation of mining activities.<sup>75</sup> If a mine stops conducting operations for any period of time, it must follow the approved interim management plan.<sup>76</sup> After five years of inactivity at a site, the BLM will review a mine’s operations and determine whether it should direct reclamation proceedings or allow the mine to continue operating under its interim plan.<sup>77</sup> The BLM may also decide to require a modification to a plan of operations where new concerns of UUD arise.<sup>78</sup> A plan of operations becomes ineffective if mining operations stop<sup>79</sup> or if the BLM sus-

<sup>66</sup> *E.g.*, *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 541 (11th Cir. 1996).

<sup>67</sup> *See* *Wash. State Farm Bureau v. Marshall*, 625 F.2d 296, 302 (9th Cir. 1980).

<sup>68</sup> *See* *St. Joseph’s Hosp. Health Ctr. v. Blue Cross of Cent. N.Y.*, 489 F. Supp. 1052, 1062–63 (N.D.N.Y. 1979).

<sup>69</sup> *See* 43 C.F.R. § 3809.01 (2013).

<sup>70</sup> *See id.* § 3809.11(a) (requiring an operator to submit a plan of operations before commencing a project “greater than casual use”).

<sup>71</sup> *Id.* § 3809.401(b)(2)–(5), (c)(1)–(2).

<sup>72</sup> *See id.* § 3809.412.

<sup>73</sup> *Id.* §§ 3809.411(a)(3)(ii), 3809.415.

<sup>74</sup> *Id.* § 3809.401(b)(5).

<sup>75</sup> *Id.* § 3809.424(a)(1) (2013).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* § 3809.424(a)(3)–(4).

<sup>78</sup> *Id.* § 3809.431(b).

<sup>79</sup> *See id.* § 3809.423 (stating the a plan of operations remains effective as long as an operator is conducting operations). The term “operations” as used in the regulation refers to:

pendes or revokes a mining project.<sup>80</sup> When a cessation of mining activities occurs, the Secretary has the authority to require reclamation of an abandoned site.<sup>81</sup> In the event of a stoppage, suspension, or revocation, the mine's operator must submit a new plan of operations for BLM approval<sup>82</sup> and a new EIS must be approved by the agency if recommencing operations would constitute "major federal action" pursuant to NEPA.<sup>83</sup>

Prior to the enactment of the current § 3809 regulations in January 2001, the regulations were promulgated in the Federal Register ("the promulgated regulations"), where public comments, proposals, changes to the rules, and the final version of the rules were published.<sup>84</sup> The promulgated regulations considered several alternatives to the current regulations.<sup>85</sup> One commenter suggested the BLM establish a fixed term after which a plan of operations would need to be reviewed, but the agency could not decide on a set duration due to the wide range in the size and types of mining operations.<sup>86</sup> The BLM also considered suggestions to allow mining operations to remain inactive for a time period of three to ten years before terminating a plan of operations.<sup>87</sup> Ultimately, these proposals were rejected and not included in the § 3809 regulations that currently govern the BLM.<sup>88</sup>

The § 3809 regulations do not require a plan of operations to be terminated after five years, only that the BLM reviews the suspended mining

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all functions, work, facilities, and activities on public lands in connection with prospecting, exploration, discovery and assessment work, development, extraction, and processing of mineral deposits locatable under the mining laws; reclamation of disturbed areas; and all other reasonably incident uses, whether on a mining claim or not, including the construction of roads, transmission lines, pipelines, and other means of access across public lands for support facilities.

*Id.* § 3809.5.

<sup>80</sup> *See id.* § 3809.423; *see also* Mining Claims Under the General Mining Laws; Surface Management, 65 Fed. Reg. 69,998, 70,054 (Nov. 21, 2000) (suggesting that an approved plan of operation retains financial value both to a mine's current operator and a future operator despite the event of an ownership transfer).

<sup>81</sup> *See* 43 C.F.R. § 3809.424(a)(4) (2013). Factors of abandonment include leaving "inoperable or non-mining related equipment in the project area." *Id.* § 3809.336(a). Abandonment can also occur if operators "remove equipment and facilities from the project area other than for purposes of completing reclamation according to your reclamation plan, do not maintain the project area, discharge local workers, or there is no sign of activity in the project area over time." *Id.*

<sup>82</sup> *See id.* § 3809.424.

<sup>83</sup> *See* 40 C.F.R. § 1502.3 (2013).

<sup>84</sup> *See* Mining Claims Under the General Mining Laws; Surface Management, 65 Fed. Reg. at 69,998.

<sup>85</sup> *See id.*

<sup>86</sup> *See id.* at 70,053.

<sup>87</sup> *Id.* at 70,054.

<sup>88</sup> *See id.* at 70,054–55.

project to determine if it should conduct reclamation proceedings.<sup>89</sup> A mine’s plan of operations “cannot be allowed to remain inactive and unreclaimed indefinitely.”<sup>90</sup>

### III. ANALYSIS

In *Center for Biological Diversity v. Salazar*, the U.S. Court of Appeals for the Ninth Circuit affirmed the lower court’s ruling that the Secretary of the Interior (“Secretary”) and the Bureau of Land Management (BLM) did not violate the National Environmental Policy Act (NEPA), the Federal Land Policy and Management Act (FLPMA), or BLM’s own regulations.<sup>91</sup> The court held that the BLM was not required to approve a new plan of operations before Denison Corporation resumed production at the Arizona 1 Mine (“Arizona 1”) after a seventeen-year period of cessation.<sup>92</sup> The court rejected the plaintiffs’ argument that the 1988 plan became ineffective after mining operations stopped in 1992.<sup>93</sup> Relying on the regulations that govern the BLM under FLPMA (the “§ 3809 regulations”), the court explained that Arizona 1 was operating under its interim plan during the temporary closure,<sup>94</sup> and a new plan of operations was not required when the mine resumed operations under its originally approved plan.<sup>95</sup> The court reasoned that an approved plan carries a financial value and the transferability of an approved plan of operations should be protected in the event of a temporary closure.<sup>96</sup>

Next, the court held that a supplemental environmental impact statement (EIS) was not required under NEPA after the mining operator sought to obtain a gravel permit, air quality control permit, and updated reclamation bond.<sup>97</sup> NEPA requires federal agencies to submit an EIS before taking “major federal action that significantly affects the quality of the human environment.”<sup>98</sup> The court, however, was not persuaded by the plaintiffs’ ar-

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<sup>89</sup> 43 C.F.R. § 3809.424(a)(3) (2013). The BLM has indicated that “five years is a reasonable amount of time to allow most operators to maintain standby conditions.” Mining Claims Under the General Mining Laws; Surface Management, 65 Fed. Reg. at 70,054.

<sup>90</sup> Mining Claims Under the General Mining Laws; Surface Management, 65 Fed. Reg. at 70,054.

<sup>91</sup> *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1088 (9th Cir. 2013).

<sup>92</sup> *See id.* at 1092.

<sup>93</sup> *See id.* at 1092–93.

<sup>94</sup> *Id.* at 1092.

<sup>95</sup> *Id.* at 1092–93.

<sup>96</sup> *See id.* at 1093; Mining Claims Under the General Mining Laws; Surface Management, 65 Fed. Reg. 69,998, 70,054 (Nov. 21, 2000) (noting that the BLM recognizes that changes in ownership at a mine are expected and the financial value of an approved plan should be protected during ownership transfers).

<sup>97</sup> *Ctr. for Biological Diversity*, 706 F.3d at 1096.

<sup>98</sup> 42 U.S.C. § 4332 (2)(C) (2006).

gument that obtainment of updated permits and bond constituted the requisite action that would trigger a supplemental EIS under NEPA.<sup>99</sup> The court reasoned that because Arizona 1's plan of operations was approved in 1988, there was no major federal action still pending.<sup>100</sup>

Finally, after further explanation from the BLM for its decision, the court held that BLM's invoking of the categorical exclusion from NEPA's EIS requirement for the issuance of the gravel permit was not arbitrary and capricious.<sup>101</sup> The court rejected the plaintiffs' argument that the BLM granted the operators of Arizona 1 a free gravel source that would be used by the mine for a commercial purpose.<sup>102</sup> It reasoned an agency is permitted to issue free use permits as long as it can show that the permit will not solely be used for a commercial or industrial purpose.<sup>103</sup> The court reasoned that although Arizona 1 might benefit from the free use permit, members of the public would also benefit from the use of the public road, which provides a link to the region's recreational and cultural sites.<sup>104</sup>

Regardless of the environmental harms exposed by the decision, the Ninth Circuit came to the correct legal conclusion in *Center for Biological Diversity v. Salazar*.<sup>105</sup> In reviewing the actions of the BLM, the court properly provided the agency with deference under the Administrative Procedure Act (APA).<sup>106</sup> The court rejected the plaintiffs' interpretation of the § 3809 regulations, which the plaintiffs argued requires an operator to submit a new plan of operations for BLM approval when production resumes after a temporary cessation.<sup>107</sup> Instead, the court accepted the agency's interpretation that the original plan remained effective, and it ruled that this interpretation was not "arbitrary, capricious or otherwise not in accordance with the law."<sup>108</sup>

When the BLM approved Arizona 1's original plan of operations in 1988 and then prepared an EIS based on that plan, it complied with its du-

<sup>99</sup> *Ctr. for Biological Diversity*, 706 F.3d at 1095–96.

<sup>100</sup> *See id.*

<sup>101</sup> *Id.* at 1099.

<sup>102</sup> *Id.*

<sup>103</sup> *See id.* at 1098–99. "BLM may issue free use permits to a government entity without limitation as to the number of permits or . . . the value of the mineral materials to be extracted or removed, provided that the government entity shows that it will not use these materials for commercial or industrial purposes." 43 C.F.R. § 3604.12(a) (2013).

<sup>104</sup> *Ctr. for Biological Diversity*, 706 F.3d at 1099.

<sup>105</sup> *See id.*

<sup>106</sup> *See id.* at 1095, 1099; *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 541 (11th Cir. 1996) (indicating that appellate courts should be "exceedingly deferential" to administrative agencies in their decision-making processes).

<sup>107</sup> *Ctr. for Biological Diversity*, 706 F.3d at 1092.

<sup>108</sup> *See* 5 U.S.C. § 706(2)(a) (2012); *Ctr. for Biological Diversity*, 706 F.3d at 1094.

ties under FLPMA.<sup>109</sup> The BLM took into account whether any “unnecessary or undue degradation” (UUD) would occur at the Arizona 1 mining project and concluded that such UUD was unlikely.<sup>110</sup> Under the regulations, the Secretary is required to determine whether mining would cause UUD when a plan is submitted, not once activities resume after a temporary stoppage.<sup>111</sup>

Moreover, the BLM did carefully examine the environmental impacts at Arizona 1 in 1988.<sup>112</sup> Denison’s predecessor submitted the plan of operations prior to conducting mining operations.<sup>113</sup> Consequently, the BLM examined the environmental impacts of the Arizona 1 project and then prepared an EIS before the operator commenced production at the mine.<sup>114</sup> While the mine was temporarily shut down, the BLM continued to monitor the site and ensured that it complied with the approved interim management plan.<sup>115</sup> When operations resumed at Arizona 1, the BLM did not take any “major federal action,” since the mining site was still governed by the previously approved 1988 plan.<sup>116</sup> The BLM properly complied with the § 3809 regulations.<sup>117</sup>

Despite the legal validity of the Ninth Circuit’s decision in *Center for Biological Diversity v. Salazar*, the ruling exposes significant environmental loopholes in the § 3809 regulations for temporarily closed operations looking to resume production.<sup>118</sup> In the promulgated regulations, the BLM considered addressing the issue of permanently ceasing operations rather than allowing a mine to enter a lengthy standby and interim period.<sup>119</sup> The BLM should consider amending the § 3809 regulations.<sup>120</sup>

One recommendation in the promulgated regulations proposed closing a mine after a designated period of inactivity.<sup>121</sup> In determining whether an amendment to the § 3809 regulations should be adopted, one must consider

<sup>109</sup> See 43 C.F.R. § 3809.01 (2013).

<sup>110</sup> See *Ctr. for Biological Diversity*, 706 F.3d at 1088.

<sup>111</sup> See 43 C.F.R. §§ 3809.11(a), 3809.423; see also *Ctr. for Biological Diversity*, 706 F.3d at 1095 (noting that there was no “major federal action” still pending when operations at Arizona 1 were ready to resume).

<sup>112</sup> See *Ctr. for Biological Diversity*, 706 F.3d at 1088.

<sup>113</sup> *Id.*

<sup>114</sup> See *id.*

<sup>115</sup> See *id.*

<sup>116</sup> See *id.* at 1095.

<sup>117</sup> See *id.*; 43 C.F.R. § 3809.01 (2013).

<sup>118</sup> See Morales, *supra* note 3.

<sup>119</sup> See COMM. ON HARDROCK MINING ON FED. LANDS, HARDROCK MINING ON FEDERAL LANDS 102 (1999).

<sup>120</sup> See Mining Claims Under the General Mining Laws; Surface Management, 65 Fed. Reg. at 70,053.

<sup>121</sup> See COMM. ON HARDROCK MINING ON FED. LANDS, *supra* note 119, at 102.

Congress's purpose of enacting FLPMA.<sup>122</sup> Congress passed FLPMA for the purpose of preventing environmental harm to federal lands.<sup>123</sup> It is essential that federal lands are managed pursuant to regulations that are consistent with Congress's original intent.<sup>124</sup> The agency could accomplish this pursuit by revisiting the comments published in the promulgated regulations.<sup>125</sup>

As suggested in the promulgated regulations, the § 3809 regulations could be amended so that after a certain period of inactivity at a site, the BLM would be required to begin reclamation.<sup>126</sup> The agency would notify an operator that the mining operation would be deemed ready for closure, and the operator would have the opportunity to apply for an extension if there is a compelling reason to delay the closure.<sup>127</sup> Currently, the BLM reviews inactive mining operations after a period of five years of inactivity.<sup>128</sup> However in many instances, field officials are only able to conduct exterior inspections.<sup>129</sup> Mine operators are able to maintain otherwise inactive mines with only a minimal amount of activity.<sup>130</sup> Ultimately, the BLM should reconsider proposed changes to the § 3809 regulations so that future harm to the environment can be prevented by shutting down abandoned mines such that reopening them will potentially require an EIS pursuant to NEPA.<sup>131</sup>

## CONCLUSION

The susceptibility of the mining industry to economic fluctuations will likely result in miners continuing to abandon their claims during periods of low demand and returning, perhaps decades later, to resume operations during the next uranium boom. With little enforcement power to prohibit miners from returning to once-abandoned claims under current mining regulations, the Bureau of Land Management must address regulatory issues that would make federal lands less susceptible to unnecessary or undue degrada-

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<sup>122</sup> See 43 U.S.C. § 1701(11) (2006) ("The Congress declares that it is the policy of the United States that . . . regulations and plans for the protection of public land areas of critical environmental concern be promptly developed.").

<sup>123</sup> *Id.*

<sup>124</sup> See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (indicating that the intent of Congress is paramount in an agency's construction of its regulations pursuant to a statute).

<sup>125</sup> Mining Claims Under the General Mining Laws; Surface Management, 65 Fed. Reg. at 70,054.

<sup>126</sup> *See id.*

<sup>127</sup> *See id.* at 70,054–55.

<sup>128</sup> See 43 C.F.R. §3809.424(a)(3) (2013).

<sup>129</sup> *Ctr. for Biological Diversity*, 706 F.3d at 1088.

<sup>130</sup> *See id.*

<sup>131</sup> See 42 U.S.C. § 4332(c) (2006) (requiring federal agencies to prepare an EIS for proposed major federal actions that would significantly affect the environment).

tion. Courts and lawmakers must not forget the original intention of the National Environmental Policy Act and the Federal Land Policy and Management Act and cannot continue to be persuaded by the economically motivated mining industry. A failure to impose amended legislation is likely to make those drinking tap water from the Colorado River a little sick to their stomachs.

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