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10 **IN THE UNITED STATES DISTRICT COURT**
11 **FOR THE DISTRICT OF ARIZONA**

12 NORTHWEST MINING ASSOCIATION,)
 13) Case No.
 14 Plaintiff,)
 15 v.) **COMPLAINT FOR DECLARATORY**
) **AND INJUNCTIVE RELIEF**
 16 KENNETH L. SALAZAR, Secretary,)
 17 Department of the Interior; UNITED)
 18 STATES BUREAU OF LAND)
 19 MANAGEMENT; THOMAS J.)
 20 VILSACK, Secretary, Department of)
 21 Agriculture; and UNITED STATES)
 22 FOREST SERVICE,)
 Defendants.)

23 Plaintiff, Northwest Mining Association (“NWMA”), by and through its attorneys,
24 hereby file this Complaint for Declaratory and Injunctive Relief against the above-named
25 Defendants. NWMA seeks judicial review of Defendants’ actions in withdrawing over 1
26 million acres of federal lands in northern Arizona.

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3 **JURISDICTION AND VENUE**

4 1. This Court has jurisdiction, pursuant to 28 U.S.C. § 1331, because the
5 matter in controversy arises under the Constitution and laws of the United States,
6 including but not limited to: (a) the Federal Land Policy Management Act (“FLPMA”),
7 43 U.S.C. § 1701 *et seq.*; (b) the National Forest Management Act (“NFMA”), 16 U.S.C.
8 § 1600 *et seq.*; (c) the General Mining Law of 1872 (“Mining Law”), 30 U.S.C. § 22 *et*
9 *seq.*; (d) the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4331 *et seq.*; (e)
10 the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 *et seq.*; and (f) Article I,
11 Section 7 of the Constitution.

12 2. This Court can grant declaratory and injunctive relief and hold unlawful
13 and set aside agency action under 28 U.S.C. § 2201, 28 U.S.C. § 2202, and the APA, 5
14 U.S.C. § 706, for violations of FLPMA, NFMA, NEPA, and the U.S. Constitution.

15 3. Venue rests properly in this Court, pursuant to 28 U.S.C. § 1391(e),
16 because a “substantial part of property that is the subject of the action is situated” within
17 this judicial district.

18 **PARTIES**

19 4. Plaintiff Northwest Mining Association (“NWMA”) is a non-partisan,
20 membership, trade association incorporated under the laws of the State of Washington,
21 with its principal place of business in Spokane, Washington.

22 5. NWMA’s purpose is to support and advance the mining related interests of
23 its approximately 2,300 members; to represent and inform its members on technical,
24 legislative, and regulatory issues; to provide for the dissemination of educational material
25 related to mining; and to foster and promote economic opportunity and environmentally
26 responsible mining.

27 6. In support of its mission to advance the mining related interests of its
28 members, NWMA is committed to principles that embody the protection of human
health, the natural environment, and a prosperous economy.

1 7. Several of NWMA members are actively engaged in exploration and/or
2 development programs designed to explore for, discover, and produce the high-grade
3 uranium collapse breccia pipe deposits located in northern Arizona. These deposits
4 contain a significant percentage of the domestic uranium resources. These deposits are
5 also enriched with Rare Earth Elements (“REEs”) and Energy Critical Elements
6 (“ECEs”).

7 8. In furtherance thereof, these members have properly located and currently
8 maintain hundreds of unpatented mining claims on and near the Arizona Strip. Virtually
9 all of these claims are located within the over 1 million acres of federal lands withdrawn
10 by Defendants. But for the withdrawal, NWMA’s members would seek to locate
11 additional claims on the withdrawn lands. Accordingly, NWMA and its members have
12 suffered injury in fact and are adversely affected and/or aggrieved by Defendants’
13 withdrawal.

14 9. Defendant Kenneth L. Salazar is the Secretary, Department of the Interior,
15 and is responsible for administering, *inter alia*, Section 204 of FLPMA, 43 U.S.C. §
16 1714, and the public lands managed by the Bureau of Land Management (“BLM”).
17 Defendant Salazar signed the Record of Decision (“ROD”) and resulting Public Land
18 Order (“PLO”) 7787, which withdrew approximately 1,006,545 acres of federal lands
19 from location and entry under the Mining Law. Defendant Salazar is sued in his official
20 capacity.

21 10. Defendant BLM is the federal administrative agency within the Department
22 of the Interior responsible for managing the public lands, under the supervision of
23 Defendant Salazar. Defendant BLM prepared the underlying NEPA documents upon
24 which Defendant Salazar’s ROD and PLO 7787 were purportedly based.

25 11. Defendant Thomas J. Vilsack is the Secretary, Department of Agriculture,
26 and is responsible for administering the National Forest System lands, including the
27 National Forest lands affected by PLO 7787. Defendant Vilsack is sued in his official
28 capacity.

1 enterprise in (1) the development of economically sound and stable
2 domestic mining, minerals, metal and mineral reclamation industries, (2)
3 the orderly and economic development of domestic mineral resources,
4 reserves, and reclamation of metals and minerals to help assure satisfaction
of industrial, security and environmental needs

5 For the purpose of this section “minerals” shall include all minerals and
6 mineral fuels including oil, gas, coal, oil shale and *uranium*.

7 It shall be the responsibility of the Secretary of the Interior to carry out this
8 policy when exercising his authority under such programs as may be
authorized by law other than this section.

9 30 U.S.C. § 21a (emphasis added).

10 **C. FLPMA.**

11 17. In 1964, Congress established the Public Land Law Review Commission
12 (“PLLRC”) to study and to make recommendations regarding the management of
13 federal lands. 78 Stat. 982-985 (1964). After six years of study and analysis, the
14 PLLRC submitted its report to Congress in 1970. The PLLRC determined, *inter alia*,
15 that: (1) “virtually all” of the public domain had been withdrawn; (2) it was difficult
16 to determine “the extent of existing Executive withdrawals and the degree to which
17 withdrawals overlap each other;” and (3) there were inadequate records to show the
18 purposes of the withdrawals and the permissible public uses of those withdrawn
19 lands. Public Land Law Review Commission, *One Third of the Nation’s Land*, 52
20 (1970). Consequently, the PLLRC recommended that Congress set standards that
21 would expressly govern the actions of the Executive Branch in making withdrawals.
22 *One Third of the Nation’s Land*, at 54-55. Six years later, Congress acted on the
23 PLLRC’s recommendation when it passed FLPMA.

24 18. In Section 102(a)(4) of FLPMA, Congress declared that it was the policy of
25 the United States that “Congress exercise its constitutional authority to withdraw or
26 otherwise designate or dedicate Federal lands for specific purposes and that Congress
27 delineate the extent to which the Executive may withdraw lands without legislation.” 43
28 U.S.C. § 1701(a)(4).

1 19. Accordingly, in Section 704(a) of FLPMA, Congress expressly repealed 29
2 withdrawal statutes, overruled *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915),
3 and revoked any and all implied power that the Executive Branch may have had to
4 withdrawal public lands. PL 94–579, § 704 (Oct. 21, 1976), 90 Stat 2743, 2792.
5 Although Congress delegated to the Secretary of the Interior power to “make, modify,
6 extend, or revoke withdrawals[,]” that power may only be exercised “in accordance with
7 the provisions and limitations of [Section 204 of FLPMA].” 43 U.S.C. § 1714(a)
8 (emphasis added).

9 20. Section 204(d) allows the Secretary to withdraw less than 5,000 acres on
10 his own motion and without Congressional oversight.

11 21. Withdrawals of 5,000 acres or more may only be made for 20 years and
12 upon making such a withdrawal, the “Secretary shall notify both Houses of Congress of
13 such a withdrawal.” 43 U.S.C. § 1714(c)(1). Moreover, the “withdrawal shall terminate
14 and become ineffective at the end of ninety days . . . , if the Congress has adopted a
15 concurrent resolution stating that such House does not approve the withdrawal.” 43
16 U.S.C. § 1714(c)(1).

17 22. In addition, for withdrawals of 5,000 acres or more, the Secretary must
18 provide Congress with a comprehensive report on the withdrawal that explains, *inter alia*,
19 why the withdrawal is necessary, the mineral potential of the area, and the economic
20 impact of the withdrawal. 43 U.S.C. § 1714(c)(2).

21 23. With respect to “lands under the administration of any department or
22 agency other than the Department of the Interior, the Secretary shall make, modify, and
23 revoke withdrawals only with the consent of the head of the department or agency
24 concerned.” 43 U.S.C.A. § 1714(i).

25 24. FLPMA also requires that “[t]he Secretary . . . manage the public lands
26 under principles of multiple use and sustained yield, in accordance with land use plans
27 developed by him” 43 U.S.C. § 1732(a).

28 25. “Multiple use” is defined as:

1 The management of the public lands and their various resource values so
2 that they are utilized in the combination that will best meet the present and
3 future needs of the American people; making the most judicious use of the
4 land for some or all of these resources or related services over areas large
5 enough to provide sufficient latitude for periodic adjustments in use to
6 conform to changing needs and conditions; the use of some land for less
7 than all of the resources; a combination of balanced and diverse resource
8 uses that takes into account the long-term needs of future generations for
9 renewable and nonrenewable resources, including, but not limited to,
10 recreation, range, timber, *minerals*, watershed, wildlife and fish, and natural
11 scenic, scientific and historical values; and harmonious and coordinated
12 management of the various resources without permanent impairment of the
13 productivity of the land and the quality of the environment with
14 consideration being given to the relative values of the resources and not
15 necessarily to the combination of uses that will give the greatest economic
16 return or the greatest unit output.

17 43 U.S.C. § 1702(c) (emphasis added).

18 26. In passing FLPMA, Congress also continued the policy of the MMPA by
19 requiring public lands to be managed “in a manner which recognizes the Nation’s need
20 for domestic sources of *minerals*, food, timber, and fiber from the public lands including
21 implementation of the [MMPA] as it pertains to the public lands” 43 U.S.C. §
22 1701(a)(12) (emphasis added).

23 **D. NFMA.**

24 27. It is the responsibility of the Secretary of Agriculture and the Forest Service
25 to carry out the provisions of NFMA. 16 U.S.C. § 1613.

26 28. NFMA requires the Forest Service to develop and maintain “land and
27 resource management plans for units of the National Forest System” (“forest plans”). 16
28 U.S.C. § 1604(a).

29 After a forest plan is developed, “all subsequent agency action . . . must
30 comply with NFMA and the governing forest plan.” *Ecology Ctr. v. Castaneda*, 574 F.3d
31 652, 656 (9th Cir. 2009); *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 962
32 (9th Cir. 2002).

1 **E. NEPA.**

2 30. The purpose of NEPA is to “promote efforts which will prevent or
3 eliminate damage to the environment and biosphere and stimulate the health and welfare
4 of man.” 42 U.S.C. § 4321. NEPA does not mandate a particular result and does not
5 require an agency to select the environmentally preferred alternative. *Robertson v.*
6 *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Instead, NEPA sets forth the
7 procedural requirements an agency must follow to ensure that it has considered the
8 environmental impacts of the proposed activity and has informed itself and the public of
9 that information. *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983).

10 31. NEPA also established, in the Executive Office of the President, a Council
11 on Environmental Quality (“CEQ”). 42 U.S.C. § 4342. The CEQ has promulgated
12 regulations for the implementation of NEPA. 40 C.F.R. §§ 1500–1508.

13 32. As reflected in the CEQ regulations, a primary purpose of NEPA is to
14 provide the public and decision makers with “high quality” information and “accurate
15 scientific analysis” before agency action is taken. 40 C.F.R. § 1500.1(b). These
16 requirements are “essential to implementing NEPA.” *Id.*

17 33. To fulfill its purposes, NEPA requires federal agencies to prepare an
18 Environmental Impact Statement (“EIS”) for every major Federal action significantly
19 affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C).

20 34. Federal agencies must comply with NEPA “to the fullest extent possible.”
21 42 U.S.C. § 4332.

22 **F. The APA.**

23 35. The APA provides that “[a]gency action made reviewable by statute and
24 final agency action for which there is no other adequate remedy in a court are subject to
25 judicial review.” 5 U.S.C. § 702.

26 36. The APA also provides that “[a] person suffering legal wrong because of
27 agency action, or adversely affected or aggrieved by agency action within the meaning of
28 a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702.

1 37. The APA also mandates that the reviewing court “shall decide all relevant
2 questions of law, interpret constitutional and statutory provisions, and determine the
3 meaning or applicability of the terms of an agency action” and “hold unlawful and set
4 aside agency action, findings, and conclusions” found to be, *inter alia*:

5 a. Arbitrary, capricious, an abuse of discretion, or otherwise not in
6 accordance with law;

7 b. Contrary to constitutional right, power, privilege, or immunity;

8 c. In excess of statutory jurisdiction, authority, or limitations, or short
9 of statutory right; and

10 d. Without observance of procedure required by law.

11 5 U.S.C. § 706.

12 **FACTUAL BACKGROUND**

13 38. In the 1984 Arizona Wilderness Act, Congress, *inter alia*, designated over
14 250,000 acres of federal land on or near the Arizona Strip in northern Arizona as
15 wilderness and released about 600,000 acres of land in the same area for multiple use,
16 including uranium mining. Pub. L. 98–406, Title III, 98 Stat 1485 (August 28, 1984).
17 This portion of the Act was the result of historic compromise between environmental
18 groups, uranium mining interests, the livestock industry, and others. *See, e.g., The*
19 *Northern Arizona Mining Continuity Act of 2011: Hearing on H.R. 3155 Before the H.*
20 *Subcomm. on National Parks, Forests and Public Lands* (November 3, 2011) (Statement
21 of Sen. John McCain), *available at*
22 <http://naturalresources.house.gov/UploadedFiles/McCainOpening11.03.11.pdf>.

23 39. On July 21, 2009, Defendant Salazar proposed to withdraw from location
24 and entry under the Mining Law approximately 633,547 acres of public lands and
25 360,002 acres of National Forest System lands on and near the Arizona Strip for up to 20
26 years. 74 Fed. Reg. 35,887–88 (July 21, 2009). A substantial portion of these lands were
27 made available for multiple uses, including mining, under the compromise that resulted in
28 the 1984 Arizona Wilderness Act. The stated purpose of this proposed withdrawal was to

1 “protect the Grand Canyon watershed from adverse effects of locatable hardrock mineral
2 exploration and mining.” *Id.* at 35,887.

3 40. On that same date, Defendant Salazar segregated the above-described lands
4 from location and entry under Mining Law for up to two years to allow time for the
5 completion of a NEPA process, including the preparation of an EIS to determine whether
6 or not to proceed with the withdrawal. *Id.* at 35,888.

7 41. In September 2010, the BLM completed a Mineral Potential Report for the
8 proposed withdrawal. Although the BLM concluded that the mineral potential for
9 uranium was high, it largely ignored both REEs and ECEs.

10 42. On February 18, 2011, Defendant BLM issued the *Northern Arizona*
11 *Proposed Withdrawal Draft Environmental Impact Statement* (February 2011)
12 (hereinafter “DEIS”). The DEIS included four alternatives. Alternative A, the No Action
13 Alternative, would not withdraw any lands from location and entry under the Mining
14 Law. Alternative B, the Proposed Action, would withdraw lands according to Defendant
15 Salazar’s July 21, 2009, proposal (*i.e.*, over 1,000,000 acres). Alternative C would
16 withdraw 652,986 acres, whereas Alternative D would withdraw 300,681 acres. DEIS at
17 ES-6 to ES-7.

18 43. In Chapter 4 of the DEIS, the environmental consequences of the four
19 alternatives were analyzed. DEIS at 4-1 to Chapter 4-269. The BLM concluded that,
20 under the No Action Alternative most resources would suffer no to little impact, and any
21 impacts would be short in duration. DEIS at 2-33 to 2-45. Granted, the anticipated
22 impacts under the No Action Alternative were greater than those under the alternatives
23 considered. However, the impacts were not significant and actions could be taken to
24 minimize any impacts that would occur. *See, e.g.*, DEIS at 4-18 to 4-19.

25 44. Defendant BLM originally allowed public comments on the DEIS for 45
26 days but, after receiving many requests for extension of time, extended the public
27 comment period to 75 days.
28

1 45. NWMA and other mining interests submitted extensive comments on the
2 DEIS.

3 46. These commenters explained, *inter alia*, that the DEIS demonstrated that
4 uranium mining is not an environmental threat to the Grand Canyon or the Colorado
5 River watershed. This was especially true considering that existing state and federal
6 laws would adequately protect the resources even if the lands were not withdrawn.

7 47. These commenters also explained that the extent of the uranium resources
8 and the economic impact associated with a withdrawal were grossly underestimated.

9 48. These commenters also explained the costly and unnecessary delays that
10 claimants would have to endure in obtaining an approved plan of operations if the lands
11 were withdrawn.

12 49. On June 27, 2011, Defendant Salazar published notice of a 6-month
13 “emergency withdrawal” under Section 204(e) of FLPMA. 76 Fed. Reg. 37,826 (June
14 27, 27, 2011). This withdrawal covered the same approximately 1 million acres of
15 federal lands previously segregated from location and entry under the Mining Law. The
16 stated basis for this emergency withdrawal was that “an emergency situation exists and
17 that extraordinary measures must be taken to preserve values that would otherwise be
18 lost.” *Id.* This stated basis was truly extraordinary considering that the NEPA process to
19 determine whether or not to proceed with a 20-year withdrawal had not been completed.
20 Thus, the real basis for the emergency withdrawal was that the BLM had not completed
21 the NEPA process.

22 50. On October 26, 2011, Defendant BLM issued the *Northern Arizona*
23 *Proposed Withdrawal Final Environmental Impact Statement* (October 2011) (hereinafter
24 “FEIS”). The Preferred Alternative in the FEIS involved withdrawing the federal
25 locatable mineral estate underlying approximately 626,678 acres of public lands, 355,874
26 acres of National Forest lands, 4,204 acres of state lands, and 19,789 acres of private
27 lands, subject to valid existing rights. FEIS at 2–13.
28

1 (a) First, “the USGS report (SIR 2010-5025) included in the EIS
2 acknowledged uncertainty due to limited data” with respect to water resources.
3 ROD at 9. Thus, in Defendant Salazar’s mind, “[a] twenty-year withdrawal will
4 allow for additional data to be gathered and more thorough investigation” to be
5 done. ROD at 9.

6 (b) Second, “it is likely that the potential impacts to tribal resources
7 could not be mitigated. Any mining within the sacred and traditional places of
8 tribal peoples may degrade the values of those lands to the tribes that use them.”
9 *Id.*

10 (c) Third, development of the uranium resource will continue even if all
11 of the lands in the proposal are withdrawn. *Id.*

12 (d). Finally, “the set of circumstances and the unique resources located in
13 this area support a cautious and careful approach.” *Id.*

14 58. None of these stated factors are supported by the record. Neither the
15 record, nor these stated factors (alone or in combination), support the decision to
16 withdraw over 1 million acres from location and entry under the Mining Law. For
17 example:

18 (a) Under the No Action Alternative, the likelihood of adverse affects
19 on water resources was not significantly greater than under the Preferred
20 Alternative. FEIS at 4-73 to 4-74.

21 (b) Under the No Action Alternative, the implementation of mitigation
22 measures according to current state and federal laws would reduce adverse
23 impacts to cultural resources. *Id.* at 4-214. In addition, continued uranium mining
24 and exploration would have no cumulative impacts on cultural resources. *Id.* at 4-
25 215 to 4-216.

26 (c) The Preferred Alternative will substantially hinder continued mineral
27 exploration and development in the area. It will not only prevent the location of
28

1 new claims in the area, but the withdrawal also slows and/or prevents the
2 development of valid existing rights. In fact, the ROD acknowledges that

3 On withdrawn lands, neither the BLM nor the USFS will process a new
4 notice or plan of operations until the surface managing agency conducts a
5 mineral examination and determines that the mining claims on which the
6 surface disturbance would occur were valid as of the date the lands were
7 segregated or withdrawn. Determining the validity of a mining claim is a
8 complex and time-consuming legal, geological, and economic evaluation
9 that is done on a claim-by-claim basis.

10 ROD at 6-7.

11 (d) Under the No Action Alternative, the likelihood of adverse affects
12 on other resources was not significantly greater than under the Preferred
13 Alternative. FEIS at 2-35 to 2-48.

14 59. Because none of Defendant Salazar's stated factors for the withdrawal are
15 supported by the record, the ROD and PLO are arbitrary, capricious, an abuse of
16 discretion, and/or otherwise not in accordance with law.

17 60. Because neither the record, nor Defendant Salazar's stated factors (alone or
18 in combination), support the withdrawal, the ROD and PLO are arbitrary, capricious, an
19 abuse of discretion, and/or otherwise not in accordance with law.

20 61. The ROD and PLO 7787 fail to recognize "the Nation's need for domestic
21 sources of minerals . . . from the public lands," while adding zero to minimal protection
22 to other resources. 43 U.S.C. § 1701(a)(8) & (a)(12).

23 62. Therefore, by signing the ROD and PLO 7787, the Secretary failed to
24 manage public lands "under principles of multiple use and sustained yield," and, thereby,
25 violated FLPMA.

26 63. Accordingly, this Court must hold unlawful and set aside the ROD and
27 PLO 7787. 5 U.S.C. § 706(2).
28

SECOND CLAIM FOR RELIEF
(Violation of NFMA and NEPA)

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3 64. Plaintiff incorporates the allegations in the preceding paragraphs as if fully
4 set forth here.

5 65. PLO 7787 withdraws 355,874 acres of lands within Kaibab National Forest
6 from location and entry under the Mining Law. ROD at 1.

7 66. Defendant Vilsack and/or Defendant Forest Service purportedly consented
8 to the withdrawal of lands administered by the Forest. *Id.* at 1, 12.

9 67. This consent is major Federal action significantly affecting the quality of
10 the human environment. 42 U.S.C. § 4332(2)(C).

11 68. Neither Defendant Vilsack nor Defendant Forest Service prepared an EIS
12 or otherwise complied with NEPA before consenting to the withdrawal.

13 69. The existing Kaibab National Forest Forest Plan allows for prospecting,
14 exploration, and development of mineral resources on the lands withdrawn by PLO 7787.

15 70. The Notice of Availability of the ROD indicated that the Kaibab National
16 Forest Plan would be retroactively amended to be consistent with the withdrawal. 77
17 Fed. Reg. at 2,317.

18 71. The Forest Service only has the authority to “change the legal
19 consequences of completed acts . . . if Congress conveys such authority in an express
20 statutory grant.” *Friends of Southeast’s Future v. Morrison*, 153 F.3d 1059, 1070 (9th
21 Cir. 1998) (citing *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988)).
22 NFMA does not authorize the Forest Service to retroactively amend its Forest Plans to
23 comply with a withdrawal. *See id.*; *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161,
24 1189 (9th Cir. 2011) (Opinion of Judge Reinhardt).

25 72. Defendant Vilsack and/or Defendant Forest Service could not lawfully
26 consent to the withdrawal before first amending the Kaibab National Forest Plan in
27 accordance with NFMA and NEPA.

1 concentrations near six previously-mined sites to inform a reasoned choice, and the EIS
2 used reasonable conservative assumptions to estimate impacts as a method of addressing
3 such unknowns.” ROD at 10 n.1. Defendant Salazar failed to recognize that these six
4 sites were mined when there was little, if any, regulation of mining activities. Indeed, the
5 BLM’s mining regulations were in their infancy and Arizona had not yet developed
6 significant mining regulations when several of the sites were mined. Moreover, this
7 admitted uncertainty upon which Defendant Salazar so heavily relied casts serious doubt
8 on the legitimacy of the stated basis for the emergency withdrawal.

9 81. Instead of obtaining information that would remove uncertainties,
10 Defendant BLM purportedly used “conservative assumptions” regarding “impacts,”
11 leading to specious conclusions in the FEIS that “potential impacts range up to moderate
12 to major even though the probability of such impacts might be low or unknown.” FEIS at
13 5-252 to 5-253.

14 82. Information that would remove the uncertainties in the FEIS is essential to
15 making a reasoned choice among alternatives because FLPMA requires that federal lands
16 be managed under principles of multiple use and sustained yield. 43 U.S.C. § 1732(a). A
17 reasonable decision cannot be made about what alternative strikes a proper balance unless
18 and until Defendant BLM acquires additional and necessary information that removes the
19 uncertainty about what environmental consequences, if any, will result from continued
20 mining.

21 83. The overall costs of obtaining information that would remove the
22 uncertainties are not exorbitant and the USGS Report cited in the FEIS made suggestions
23 on how uncertainty could be eliminated. U.S. Geological Survey, *Hydrological,*
24 *Geological, and Biological Site Characterization of Breccia Pipe Uranium Deposits in*
25 *Northern Arizona* 130 (hereinafter “USGS report”), available at
26 <http://pubs.usgs.gov/sir/2010/5025/>.

27 84. The FEIS also indicated that there was incomplete or unavailable
28 information on the potential impacts to air quality and climate, fish and wildlife,

1 soundscapes, and cultural resources as a result of continued mining and exploration.
2 FEIS at 4-6. The FEIS and the ROD make no statement about whether this information
3 is important or essential to making a reasoned choice among the alternatives, with one
4 exception: the FEIS remarkably provides that “sufficient information is available to
5 analyze potential effects on cultural resources types,” although “survey coverage of the
6 proposed withdrawal parcels ranges from less than 3% for the East Parcel, 5% for the
7 North Parcel, and 23% for the South Parcel.” *Id.* at 4-214.

8 85. Therefore, Defendant BLM failed to include information in the FEIS that
9 was important and/or essential to making a reasoned choice among the alternatives, as
10 required by NEPA and the CEQ regulations.

11 86. Therefore, the FEIS is necessarily arbitrary, capricious, an abuse of
12 discretion, and/or otherwise not in accordance with law.

13 87. Accordingly, this Court must hold unlawful and set aside the FEIS, and the
14 ROD and PLO 7787, which were based upon the flawed FEIS.

15 **FOURTH CLAIM FOR RELIEF**
16 (Violation of NEPA)
17 (Failure to Address Material Public Comments)

18 88. Plaintiff incorporates the allegations in the preceding paragraphs as if fully
19 set forth here.

20 89. An agency preparing a final environmental impact statement shall assess
21 and consider comments both individually and collectively, and shall respond by: (1)
22 modifying alternatives including the proposed action; (2) developing and evaluating
23 alternatives not previously given serious consideration by the agency; (3) supplementing,
24 improving, or modifying its analyses; (4) making factual corrections; or (5) explaining
25 why the comments do not warrant further agency response, citing the sources, authorities,
26 or reasons which support the agency’s position and, if appropriate, indicating those
27 circumstances which would trigger agency reappraisal or further response. 40 C.F.R. §
28 1503.4.

1 90. Furthermore, agencies are “obliged to provide a meaningful reference to all
2 responsible opposing viewpoints concerning the agency’s proposed decision . . . there
3 must be good faith, reasoned analysis in response.” *State of Cal. v. Block*, 690 F.2d 753,
4 773 (9th Cir. 1982) (internal quotations and citations omitted).

5 91. Knowledgeable commenters criticized the method used in the FEIS that
6 estimated the mineral resources in the withdrawal area. *See* FEIS at 5-169 to 5-172.
7 These commenters argued that the DEIS severely underestimated the amount of uranium,
8 REEs, and ECEs in the withdrawal area and, as a result, incorrectly assessed the
9 economic impact of a withdrawal. *Id.*

10 92. Defendant BLM dismissed these comments by stating:

11 The USGS Report is a peer-reviewed publication that provided the estimated
12 uranium endowment for the proposed withdrawal area. While some commenters
13 have presented alternate or supplemental approaches to assessing the uranium
14 endowment from that provided by USGS, these alternate approaches have not
15 been developed or peer reviewed to the extent that they can replace or supersede
16 the USGS endowment assessment presented in SIR 2010-5025. As with many
17 scientific fields, new information is constantly being collected which leads to new
18 or refined conclusions. However, at present, the USGS Report contains the best
19 credible information available regarding the uranium endowment estimate and was
20 therefore used as the basis for the reasonably foreseeable development scenarios in
21 the EIS.

22 FEIS at 5-170

23 93. Defendant BLM made the above statement despite the fact that it
24 acknowledged, elsewhere in the FEIS, that “[t]he best available data are not always peer-
25 reviewed as sometimes peer-reviewed literature is not available for specific topics” and
26 that “[t]here is no requirement to distinguish between peer-reviewed and non-peer
27 reviewed sources.” FEIS at 5-161.

28 94. The comments on the best method for assessing the mineral resources were
based on current data, and provided a more reliable assessment than the method used in
the DEIS.

1 95. Defendant BLM gave no explanation, other than lack of peer review, why
2 the method used in the USGS Report for determining the mineral resources was more
3 reliable than the methods proposed by knowledgeable commenters.

4 96. The lack of peer review is not an adequate and reasonable explanation for
5 rejecting data for consideration. *See* FEIS at 5-161 (“[t]here is no requirement to
6 distinguish between peer-reviewed and non-peer reviewed sources.”).

7 97. Knowledgeable commenters also noted the inadequacy of the methodology
8 in the DEIS with regards to potential impacts to land, water, and air resources.

9 98. In response to these comments, Defendant BLM did not defend its
10 methodology on scientific or technical grounds; instead, it made statements such as
11 “sufficient data are not available . . . therefore, conservative assumptions were made in an
12 attempt to account for this uncertainty.” FEIS at 5-259.

13 99. The Arizona Department of Environmental Quality (“ADEQ”) criticized
14 the DEIS for not giving “full consideration to modern uranium mining technology or
15 ADEQ issued permits that require environmental controls, financial assurance, and
16 reclamation,” which would “ensure that new and reactivated mining claims can be safely
17 worked.” Arizona Department of Environmental Quality comments at 1, *available at*
18 [http://www.blm.gov/pgdata/etc/medialib/blm/az/pdfs/withdraw/deis/comments/w-](http://www.blm.gov/pgdata/etc/medialib/blm/az/pdfs/withdraw/deis/comments/w-attach.Par.29230.File.pdf/05-04-11_JSmit_AZDEQ.pdf)
19 [attach.Par.29230.File.pdf/05-04-11_JSmit_AZDEQ.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/az/pdfs/withdraw/deis/comments/w-attach.Par.29230.File.pdf/05-04-11_JSmit_AZDEQ.pdf). Defendant BLM failed to
20 address this comment. *See* FEIS at 5-308 to 5-311 (responding to other ADEQ
21 comments).

22 100. Knowledgeable commenters also explained that current laws and
23 regulations were sufficient to manage this area in accordance with the principles of
24 multiple use and sustained yield. Defendant BLM responded, without explanation, that
25 “the purpose and need for the action . . . is not altered by the fact these regulatory
26 controls are in place.” *See, e.g.,* FEIS at 5-120.

27 101. NWMA made similar comments about the adequacy of current laws and
28 regulations in protecting the Grand Canyon, to which Defendant BLM responded that

1 “The DEIS . . . acknowledges the existing regulations and their effectiveness.” FEIS at
2 5-127. Defendant BLM failed to explain if the existence and effectiveness of these
3 regulations were taken into account when assessing potential environmental impact as a
4 result of continued uranium mining.

5 102. Defendant BLM’s responses to comments on the methodology used to
6 determine mineral resources , methodology used to determine potential environmental
7 impacts, and the role of the current regulatory scheme did not contain good faith,
8 reasoned analysis.

9 103. Thus, Defendant BLM, violated NEPA and the CEQ regulations. *E.g.*, 40
10 C.F.R. § 1503.4.

11 104. Therefore, the FEIS is necessarily arbitrary, capricious, an abuse of
12 discretion, and/or otherwise not in accordance with law.

13 105. Accordingly, this Court must hold unlawful and set aside the FEIS, and the
14 ROD and PLO 7787, which were based upon the flawed FEIS.

15 **FIFTH CLAIM FOR RELIEF**
16 (Violation of NEPA)
17 (Range of Alternatives)

18 106. Plaintiff incorporates the allegations in the preceding paragraphs as if fully
19 set forth here.

20 107. Analyzing different alternatives “is the heart of the environmental impact
21 statement.” 40 C.F.R. § 1502.14. NEPA requires agencies to “study, develop, and
22 describe appropriate alternatives to recommended courses of action in any proposal
23 which involves unresolved conflicts concerning alternative uses of available resources.”
24 42 U.S.C. § 4332(2)(E).

25 108. “The existence of reasonable but unexamined alternatives renders an EIS
26 inadequate.” *Friends of Southeast’s Future*, 153 F.3d at 1065.

27 109. In the DEIS and FEIS, the Defendant BLM purportedly analyze four
28 different alternatives.

1 118. Defendant Salazar proposed the withdrawal to prevent environmental harm,
2 but when the FEIS showed a lack of environmental harm, he ignored that information and
3 proceeded with the withdrawal.

4 119. Although Defendant BLM received numerous public comments on the
5 DEIS, the FEIS was not significantly changed. The ROD provides that “[n]one of the
6 comments resulted in a substantial alteration to the Proposed Action and, to the extent
7 any of them relied on new information, that information was not sufficient to show that
8 the Proposed Action would affect the quality of the human environment to a significant
9 extent not already considered.” ROD at 20.

10 120. As noted above, prior to the completion of the NEPA process, Defendant
11 Salazar effectuated a 6-month emergency withdrawal. As proven by both the DEIS and
12 the subsequent FEIS, there was no emergency. Instead, the emergency withdrawal was a
13 delay tactic to keep the area withdrawn until the NEPA process was completed to justify
14 the predetermined decision to withdraw the area.

15 121. The ROD acknowledged that “The potential impacts estimated in the EIS
16 due to the uncertainties of subsurface water movement, radionuclide migration, and
17 biological toxicological pathways result in low probability of impacts, but potential high
18 risk.” ROD at 9. Despite this low probability of serious impact, Defendant Salazar
19 argued that “A twenty-year withdrawal will allow for additional data to be gathered and
20 more thorough investigation of groundwater flow paths, travel times, and radionuclide
21 contributions from mining as recommended by USGS.” ROD at 9.

22 122. The rationale that a twenty-year withdrawal would allow for additional data
23 to be gathered was first raised in the ROD. The FEIS provided that “The need for the
24 proposed action is to respond to a concern that recent increase in the number and extent
25 of mining claims in the area could, if more are developed, have adverse effects on
26 resources within the human environment.”

1 132. The legislative veto provision in FLPMA constitutes an exercise of
2 legislative power because it alters the legal rights, duties, and relations of those interested
3 in locating a mining claim on federal lands.

4 133. The legislative veto provision in 43 U.S.C. § 1714(c)(1) violates the
5 Presentment Clause. U.S. Const. art. I. § 7, cl. 2.

6 134. A court cannot sever an unconstitutional provision from the remaining
7 provisions if “it is evident that the Legislature would not have enacted those provisions
8 which are within its power, independently of that which is not.” *Champlin Refining Co.*
9 *v. Corporation Comm’n*, 286 U.S. 210, 234 (1932).

10 135. FLPMA contains a severability clause which states, “If any provision of
11 this Act or the application thereof is held invalid, the remainder of the Act and the
12 application thereof shall not be affected thereby.” PL 94–579, § 707 (Oct. 21, 1976), 90
13 Stat 2743, 2792-94.

14 136. Although a severability clause creates a presumption of severability, it is
15 not dispositive. *See Chadha*, 462 U.S. at 932–33 (Analyzing legislative history to
16 support presumption of severability that arose from the severability clause).

17 137. The legislative history indicates that the legislative veto was an essential
18 aspect of FLPMA § 204(c). *See* Committee on Energy and Natural Resources United
19 States Senate, *Legislative History of the Federal Land Policy and Management Act of*
20 *1976 (Public Law 94-579)* (1978).

21 138. The plain language of FLPMA reflects that the legislative veto provision
22 was essential to FLPMA § 204(c), as it grants the Secretary of the Interior withdrawal
23 authority “only in accordance with the provisions and limitations of this section.” 43
24 U.S.C. §1714.

25 139. “[I]t is clear that Congress intended with the passage of FLPMA to reassert
26 control over the use of federal lands.” *Mountain States Legal Found. v. Andrus*, 499 F.
27 Supp. 383, 395 (D. Wyo. 1980).

1 140. Because FLPMA was passed with the goal to reassert Congressional
 2 control over the use of federal lands, the legislative veto was written into § 204(c) in
 3 order to achieve this goal. Thus, it was an essential part of the legislation because
 4 Congress would not have granted the Secretary authority to make withdrawals exceeding
 5 5,000 acres without the legislative veto provision.

6 141. Therefore, the legislative veto provision in Section 204(c) cannot be
 7 severed from the remaining provisions therein, this Court must declare Section 204(c) in
 8 its entirety unconstitutional.

9 142. Furthermore, with the passage of FLPMA, Congress removed the
 10 President's implied authority to make withdrawals and reservations. PL 94-579, § 704
 11 (Oct. 21, 1976), 90 Stat 2743, 2792-94. As a result, after severance, Section 204 only
 12 authorizes the Secretary to make withdrawals aggregating less than 5,000 acres. 43
 13 U.S.C. §1714(d).

14 143. Thus, Defendant Salazar had no authority to withdraw over 1,000,000
 15 acres.

16 144. Therefore, the ROD and PLO 7787 are necessarily arbitrary, capricious, an
 17 abuse of discretion, and/or otherwise not in accordance with law.

18 145. Accordingly, this Court must hold unlawful and set aside the ROD and
 19 PLO 7787.

PRAYER FOR RELIEF

20 WHEREFORE, NWMA respectfully request that this Court:

21 1. Declare Defendant Salazar's and Defendant BLM's actions in effectuating
 22 the withdrawal were arbitrary, capricious, an abuse of discretion, or otherwise not in
 23 accordance with law because, *inter alia*, the actions were taken in violation of FLPMA
 24 and NEPA.
 25

26 2. Hold unlawful and set aside the FEIS, the ROD, and PLO 7787.

27 3. Declare Defendant Vilsack's and/or Defendant Forest Service's actions in
 28 purportedly consenting to the withdrawal were arbitrary, capricious, an abuse of

1 discretion, or otherwise not in accordance with law because, *inter alia*, the actions were
2 taken in violation of the NFMA and NEPA.

3 4. Hold unlawful and set aside those portions of PLO 7787 that withdraw
4 Forest Service lands from location and entry under the Mining Law.

5 5. Declare 43 U.S.C. § 1714(c) unconstitutional as a violation of the
6 Presentment Clause of Article I, Section 7 of the Constitution and sever that subsection
7 from FLPMA.

8 6. Declare Defendant Salazar's actions in issuing PLO 7778: (a) arbitrary,
9 capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary
10 to constitutional right, power, privilege, or immunity; (c) in excess of statutory
11 jurisdiction, authority, or limitations, or short of statutory right; and/or (d) without
12 observance of procedure required by law.

13 7. Hold unlawful and set aside PLO 7787

14 8. Award NWMA its costs and attorneys' fees in accordance with law,
15 including the Equal Access to Justice Act, 28 U.S.C. § 2412; and,

16 9. Award NWMA such further relief as this Court deems just and equitable.

17 DATED this 6th day of March 2012.

18 Respectfully Submitted,

19 /s/ Steven J. Lechner

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