Consolidated Case Nos. 14-17350, 14-17351, 14-17352 & 14-17354

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL MINING ASSOCIATION,

Plaintiff/Appellant,

v.

S.M.R. JEWELL, U.S. Secretary of the Interior, et al.,

Defendants/Appellees,

GRAND CANYON TRUST, et al.,

Intervenors-Defendants/Appellees.

On Appeal from the United States District Court for the District of Arizona,
the Honorable David G. Campbell, Presiding

BRIEF OF THE PAIUTE INDIAN TRIBE OF UTAH, HUALAPAI TRIBE OF THE HUALAPAI RESERVATION, KAIBAB BAND OF PAIUTE INDIANS, SAN JUAN SOUTHERN PAIUTE TRIBE, NORTHWESTERN BAND OF THE SHOSHONE NATION, MORNING STAR INSTITUTE, AND THE NATIONAL CONGRESS OF AMERICAN INDIANS AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(c)(1) and 26.1, Amici Curiae Paiute Indian Tribe of Utah, San Juan Southern Paiute Tribe, Kaibab Band of Paiute Indians, Hualapai Tribe of the Hualapai Reservation, and Northwestern Band of the Shoshone Nation are federally recognized Indian tribes that have no parent corporations, subsidiaries, or affiliates that have issued shares to the public. Amici Curiae Morning Star Institute and National Congress of American Indians are nonprofit organizations that have no parent corporations, subsidiaries, or affiliates that have issued shares to the public.

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STATEMENT OF INTEREST, IDENTITY, AND AUTHORITY OF AMICI CURIAE[1]

This case concerns a decision by the Secretary of the Interior to protect one million acres of public land around the Grand Canyon, in part to protect Native American resources. The Paiute Indian Tribe of Utah ("PITU"), San Juan Southern Paiute Tribe ("San Juan"), Kaibab Band of Paiute Indians ("Kaibab"), Hualapai Tribe of the Hualapai Reservation ("Hualapai"), and Northwestern Band of the Shoshone Nation are federally recognized Indian tribes. Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 80 Fed. Reg. 1,942, 1,944-46 (Jan. 14, 2015). PITU, San Juan, and Kaibab are descendants of the Southern Paiute who traditionally occupied the Northern Arizona Withdrawal ("Withdrawal") area. AEMA-ER 175;[2] DOI-SER

[1] Pursuant to Fed. R. App. P. 29(c)(5), no counsel for a party authored this brief in whole or in part, and no party or a party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] We use the following abbreviations to refer to prior filings referenced herein:
Amici-SER (our own Supplemental Excerpts of Record (Aug. 21, 2015));
AEMA (Opening Brief of American Exploration & Mining Ass'n (Apr. 10, 2015));
AEMA-ER (AEMA's Excerpts of Record);
DOI (Answering Brief of Appellee Secretary Jewell (Aug. 19, 2015);
DOI-SER (Secretary Jewell's Supplemental Excerpts of Record);
NMA (Opening Brief of National Mining Association (Apr. 10, 2015));
NMA-ER (NMA's Excerpts of Record);
Metamin (Opening Brief of Metamin Enterprises USA, Inc. *et al*. (Apr. 10, 2015));
Metamin-ER (Metamin's Excerpts of Record);
States (Brief of the States Utah, Arizona *et al.*, Amici Curiae (Apr. 17, 2015)); and

194-200; Amici-SER 8-11. The Southern Paiute consider the Grand Canyon, the Arizona Strip, the Kaibab National Forest, and other parts of the region integral to their culture. *See* DOI-SER 194. The Grand Canyon is likewise integral to Hualapai culture. DOI-SER 195. As a result, PITU, Kaibab, and Hualapai participated in government-to-government consultation on the proposed withdrawal beginning in August 2009, and the government recognized that San Juan has an interest in the area covered by the withdrawal due to its historical ties to the area. AEMA-ER 184; DOI-SER 194-200, 407-09. Hualapai and Kaibab were cooperating agencies as defined by the Council on Environmental Quality regulations (40 C.F.R. § 1508.5 (2014)) in the preparation of the Environmental Impact Statement ("EIS"), and also submitted written comments. DOI-SER 160-61; Amici-SER 16. The Northwestern Band of the Shoshone Nation recognizes the need to preserve, restore, and recover traditional cultural practices and the importance of the United States' ability to accommodate these practices. The Tribes in this lawsuit and across the nation have an interest in the outcome of this matter.

The Morning Star Institute is a non-profit Indian rights organization devoted to Native Peoples' traditional and cultural advocacy, arts promotion, and research. Founded in 1984, Morning Star is a leader in the areas of Native

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Yount (Appellant's Informal Brief of Gregory Yount (Apr. 10, 2015)).

Peoples' religious freedom, cultural property rights, and sacred lands protection and has an interest in protecting native culture, including within the Withdrawal area.

The National Congress of American Indians ("NCAI") is the oldest and largest national organization that represents and advocates for the interests of Native Americans. NCAI's membership is comprised of over two hundred tribal governments and countless individual tribal citizens. NCAI has a long standing interest in matters relating to Indian cultural and religious issues. During congressional hearings, NCAI offered extensive testimony in support of the American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (2012). NCAI has made, and will continue to make, protection of Native religious freedom a top priority.

In the United States, there are 567 federally recognized tribes. With the vast geographic, linguistic, and cultural diversity that exists among tribes, it is impossible to refer to Native American religion or culture in the singular context. Native spirituality and traditions vastly differ from tribe to tribe, but the one thing that all tribes have in common is their continuous struggle to protect their religious and cultural freedom from detrimental government action. This includes denial of access to sacred lands, prohibitions on the use or possession of sacred objects, restrictions on ceremonial practices, or physical harm to sacred sites.

Native Americans have struggled for decades to have access to religiously and culturally significant sites and landscapes for traditional practices and uses. These include ceremonial dances, gatherings, pilgrimages, subsistence gathering of plants or other natural resources, and the use of springs and trails, among other things. Sacred landscapes across the nation that are integral to the exercise of Native cultures and religions are being destroyed or are under threat by development, pollution, recreation, vandalism, or other public and private actions. Many Native religions require the protection of the physical integrity of these sacred places as well as espouse fundamental spiritual duties of care and protection. These duties are part of many Native traditional religions and, therefore, are an integral part of the lives of many tribal people. They are indispensable and irreplaceable.

Native Americans, including the Southern Paiute and Hualapai, have important archeological sites, landforms, geographic features, hunting and gathering areas, trails, mineral collecting areas, springs, cultural sites, sacred sites, and historic sites all throughout the Withdrawal area. *See* DOI-SER 193-203. Within the Withdrawal area, there are at least 2,535 *known* archaeological sites, and likely many more. DOI-SER 188. That is just the archaeological sites, and does not include the trails, hunting and gathering areas, mineral collecting areas, and other important landscapes. To the Southern Paiute and Hualapai, these

cultural resources are sacred and bound together – they have traditional stories and songs that talk about these areas and their importance to the people. DOI-SER 194, 620-21, 626-27; *J. Subcomm. Oversight Field Hearing on "Cmty. Impacts of Proposed Uranium Mining near Grand Canyon Nat'l Park" Before the Subcomm. on Nat'l Parks, Forests, and Pub. Lands and the Subcomm. on Energy and Mineral Res. of the H. Comm. on Natural Res.*, 110th Cong. (Mar. 28, 2008) http://naturalresources.house.gov/uploadedfiles/vaughntestimony03.28.08.pdf.

For instance, the Southern Paiutes historically had a system of trails throughout this region that still exists today in and around Grand Canyon National Park. DOI-SER 630. Specialists moved along the trails carrying messages, goods, and services to the Paiutes. DOI-SER 630-31. A knotted string, called tapitcapi (literally "the knotted") was sent out via a runner to other Paiute people to inform them of events. *Id*. These runners traveled along trails specifically created by Southern Paiute people. *Id.* The trails were complex because they passed from water source to water source across rugged terrain. *Id.* In order to remember the trail routes, the runners would know a song that told the way. *Id.* The trail songs described the path to be followed as well as encouraged the runner by recounting stories of beings that traveled or established the same trail. *Id.* Perhaps the least known but most important trail is that traversed by Paiute people to the afterlife where the deceased move along this trail beginning in the south,

near the origin mountain, and ending in the north, in the Grand Canyon in response to songs sung by Paiute people. *Id.* These trails are indicative of the cultural importance of this area to the Paiute. *Id.*

Furthermore, the Grand Canyon itself was formed by a Hualapai Warrior in Hualapai creation stories. *J. Subcomm. Oversight Field Hearing on "Cmty. Impacts of Proposed Uranium Mining near Grand Canyon Nat'l Park"*, 110th Cong. (Mar. 28, 2008). The Withdrawal land is sacred to the Hualapai who are concerned that the proliferation of mining activity near the Grand Canyon may affect the water that flows underground and at places like Havasu Falls, and may compromise traditional and cultural sites that are important to the Hualapai. *Id.*

The Tribes in this area are aware of the harm that can be caused by uranium mining, and do not want this traditional land that is integral to their cultures to end up like portions of the Navajo reservation, *see* Dan Frosch, *Amid Toxic Waste, a Navajo Village Could Lose Its Land,* N.Y. Times, (Feb. 19, 2014), http://www.nytimes.com/2014/02/20/us/nestled-amid-toxic-waste-a-navajo-village-faces-losing-its-land-forever.html?_r=1, or like the recent mine spill in the Animas River in Colorado. Bruce Finley, *Animas River: EPA's Colorado Mine Disaster Plume Flows West Toward Grand Canyon*, (Aug. 8, 2015), http://www.denverpost.com/news/ci_28608746/animas-river:-epas-colorado-mine-disaster-plume-flows-west-toward-grand-canyon.

Counsel for Amici has consulted with counsel for all parties to this consolidated appeal and none oppose the filing of this brief. Therefore, Amici file this amicus brief pursuant to Fed. R. App. P. 29 and 9th Cir. R. 29 without a motion for leave to file.

ARGUMENT

I. Introduction.

United States policy recognizes the historical persecution of Native American cultures and religions and seeks to protect and preserve these diverse cultural and religious practices. The ability of an agency to withdraw lands from mining to protect Native American resources, as was done in the present case, is essential to implementing this policy of protecting and preserving Native American culture. This fits well within the Secretary's lawful authority under the Federal Land Policy and Management Act ("FLPMA") to withdraw federal lands from new uranium mining claims. It also fits well within the bounds of the Establishment Clause and its requirement of accommodation of religion, and is rightly recognized as a secular and public purpose to protect Native American cultural and religious practices. This brief addresses the Secretary of the Interior's protection of Native American cultural and religious practices, among other secular protections, from interference by new mining claims through a FLPMA withdrawal. Many of the arguments made by Appellants, if accepted, would produce an inflexible standard preventing the United States from accommodating tribal religious beliefs or protecting tribal cultures. Such an outcome would damage cultures and religious practices throughout the nation. The district court rightly rejected contrary arguments and upheld the Withdrawal, which represents a best practice of federal

agency consideration, consultation, and decision-making. This Court should do the same.

II. The District Court Correctly Held That the Withdrawal Was Within the Secretary of the Interior's Authority, Was for Valid Secular and Public Purposes, and Easily Passes Muster Under the Establishment Clause.

A. FLPMA and Federal Policy That Protects Native American Resources Provide Ample Authority for the Secretary's Decision to Withdraw Lands For the Purpose of, Among Other Things, Protecting Native American Cultural Resources.

The Secretary has broad authority and discretion to "make, modify, extend, or revoke withdrawals" under FLPMA. 43 U.S.C. § 1714(a) (2012); 43 C.F.R. § 2300.0-3 (2014); *Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745, 756 (D.C. Cir. 2007) ("Congress delegated to the Secretary considerable withdrawal authority"). In relevant part, the "term 'withdrawal' means withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program . . . ." 43 U.S.C. § 1702(j) (2012); *see also* 43 C.F.R. § 2300.0-5(h) (2014). The only limitation on the Secretary's authority to make a withdrawal is that it must be "in accordance with the provisions and limitations of [43 U.S.C. § 1714]." 43 U.S.C. § 1714(a). FLPMA does not define what "other public values" means. This makes sense because Congress gave the Secretary

broad discretion to determine the "other public values" that should be maintained.[3] 43 U.S.C. §§ 1702(j), 1714; *see Mount Royal*, 477 F.3d at 756.

The Native Americans that traditionally lived in the Withdrawal area are part of the general public and value this area immensely for many reasons, and the Secretary rightly considered those values. Several Native American communities, including PITU, Hualapai, Kaibab, and San Juan are located near the Withdrawal area, so their values were properly given consideration. FLPMA's purpose to manage public lands "in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values[,]" also easily encompasses protecting traditional use areas. 43 U.S.C. § 1701(a)(8) (2012). The district court properly rejected Appellants' attempts to add requirements to FLPMA that do not exist in the law and which would defeat FLPMA's purposes. *Yount v. Salazar*, No. 3:11-cv-08171-DGC, 2014 WL 4904423, at *26 (D. Ariz. Sept. 30, 2014) ("At least two of the listed values—historical and archeological—apply to the tribal interests addressed in the FEIS and ROD. Far from exceeding statutory authority, these values fall squarely within the FLPMA.").

[3] As the U.S. pointed out, "multiple use" also provides ample authority and discretion to the Secretary to manage the lands here. DOI 62-63.

Federal law and policy, and this Court, recognize that preserving and maintaining Native American culture, religion, history, identity, and other values is of public value to the nation. *See* DOI-SER 193-94 (FEIS outlining federal laws that apply);[4] *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 975 (9th Cir. 2004) ("It is clear from Cholla's complaint that defendants' actions have the secular purpose of carrying out state construction projects in a manner that does not harm a site of religious, historical, and cultural importance to several Native American groups and the nation as a whole."). For example, the American Indian Religious Freedom Act of 1978 ("AIRFA") states that it is the policy of the United States to:

> protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise [their] traditional religions . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

42 U.S.C. § 1996; *see also* 25 U.S.C. § 3051(7) (2012) (one purpose of this chapter is "to strengthen support for the policy of the United States of protecting and preserving the traditional, cultural, and ceremonial rites and practices of Indian

[4] Contrary to Appellants' and the Amici States' assertions, the FEIS does not conclude that existing law and regulation were sufficient or fully adequate to protect Native American resources. Metamin 48; AEMA 39; States 13, 18. Appellants and the States conflate a segment of the FEIS's discussion on mitigation in the Cultural Resources Sections 3.11 and 4.11 with an overview of laws in the American Indian Resources Sections 3.12 and 4.12. DOI-SER 186, 193, 326, 333; *see also* DOI 67-68. These statutes and regulations actually mandate that the federal government consider and accommodate Native American religious practices, and support the Withdrawal.

tribes, in accordance [AIRFA].”). This policy was expanded on by Executive Order 13007, which directs federal land managing agencies to accommodate access to and use of Indian sacred sites as identified by an Indian tribe, and to avoid adversely affecting the physical integrity of those sites. Exec. Order No. 13007, 61 Fed. Reg. 26,771 (May 24, 1996). The Withdrawal carried out this policy by highlighting Native American values in the American Indian Resources section of the FEIS and by protecting Native American values and sacred landscapes. DOI-SER 193-203.

In addition, the United States has endorsed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which provides at Article 25:

> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, art. 25, U.N. Doc. A/RES/61/295 (Sept. 13, 2007); *see also Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, U.S. Dep’t of State, 13, http://www.state.gov/documents/organization/184099.pdf (last visited Aug. 17, 2015) (“The many facets of Native American cultures – including their religions, languages, traditions and arts – need to be protected, as reflected in multiple

provisions of the Declaration."). The Withdrawal meets the requirements of AIRFA and Executive Order 13007 and is in harmony with Article 25 of the UNDRIP.

Appellants and the States manufacture several limits on the Secretary's discretion that do not exist. They cite cases that rejected Free Exercise, Religious Freedom Restoration Act ("RFRA"), and Administrative Procedure Act ("APA") challenges to agency actions that *did not protect* Native American resources, to assert that there is a limit on agency discretion *to protect* Native American resources. *See* Metamin 49-51; States 13-15; *see also* Yount 8 ("If the tribes had sued in Federal Court to obtain this result, it would have been denied . . ."). That conclusion simply does not follow because those cases dealt with different legal principles and different factual scenarios. It is a *non sequitur*, as the Withdrawal is based on Secretary's discretionary authority found in FLPMA, not a mandated protection from a Free Exercise, RFRA, or APA challenge.

Additionally, Appellants and the States incorrectly base their contentions on the idea that the decision to protect Native American resources was solely due to a general undefined belief that any mining would wound the earth and desecrate traditional lands. Metamin 21, 47, 49; Yount 6-8, 17; States 6, 13, 16, 18. Contrary to Appellants assertions, the Administrative Record is replete with detailed, defined, and well-documented Native American resources that the

Withdrawal protects from mining damage. These include sites, springs, trails, and subsistence areas, among other things. The Record of Decision ("ROD") recognizes the entire area as the traditional homeland and use area for seven tribes who historically used, and continue to use, all or portions of the withdrawal area for traditional tribal purposes. AEMA-ER 175.

For example, the FEIS explains:

> Mineral exploration and development activity could affect the integrity of religiously and culturally significant sites and landscapes and could disrupt traditional practices and uses. Such practices include ceremonial activities, gathering of plants or other natural resources, and use of springs and trails. Tribes have expressed concerns about potential disturbance and contamination of culturally important resources.

Amici-SER 4. The FEIS's Executive Summary on Environmental Consequences summarizes the impacts of continued mining on American Indian Resources found in its detailed analysis: "*Alternative A* [no Withdrawal] would have a major long-term direct impact on resources on all three parcels including disturbance to a Traditional Cultural Property or Place, minor short-term visual and auditory (indirect) impacts, and major long-term visual impacts from power lines." DOI-SER 125. The FEIS describes these impacts in detail in sections dedicated to American Indian and other resources and an Ethnographic Study and Cultural Resources Overview analyzes them as well. *See* DOI-SER 193-203, 333-41,

Amici-SER 17, 31.[5] Contrary to Appellants' assertions, the Secretary did not make assumptions about the withdrawal and its effect on Native American cultural resources; the Secretary relied on the input received from the Tribes impacted by activities within the Withdrawal area and the facts set forth in the record.

Contrary to the States' contentions, withdrawals such as the one at issue here are not without precedent and the district court's decision is not new resource-restrictive precedent with potentially immense economic impact throughout the western United States. States 4, 13-14. The States disregard the many similar previous withdrawals that have not led to the catastrophic results they now predict. There have been numerous large-tract withdrawals under FLPMA in the western United States that considered the protection of Native American resources as part of their justification. *See, e.g.*, Public Land Order No. 7737; Withdrawal of Public Lands, 24 Areas of Critical Environmental Concern, Clark and Nye Counties; NV, 74 Fed. Reg. 56,657 (Nov. 2, 2009) (944,343 acres withdrawal "to protect desert tortoise habitat, archaeological and cultural resources, and special wildlife and riparian values on 24 Areas of Critical Environmental Concern located in Clark

[5] Additionally, the FEIS's Description of Relevant Issues for Detailed Analysis describes disturbance of historic and prehistoric sites and effect on Traditional Cultural Property ("TCPs") in the Cultural Resources Section, which is also analyzed in detail throughout the FEIS. DOI-SER 186-93, 326-33; Amici-SER 3. This extensive consideration belies AEMA's claim that the "impacts to cultural and other resources were justifications added at the last minute." AEMA 39 n.13.

and Nye Counties, Nevada."); Public Land Order No. 7480; Withdrawal of National Forest System Lands in the Rocky Mountain Front; Montana, 66 Fed. Reg. 6,657 (Jan. 22, 2001) (405,000 acre withdrawal "to preserve the traditional cultural uses by Native Americans, threatened and endangered species, and the outstanding scenic values and roadless character."). Despite their similarities to the current Withdrawal, these two withdrawals did not cause catastrophe and neither the States, or any other entity, challenged their legality.

Furthermore, the Withdrawal absolutely does not give Native Americans "veto" power over otherwise lawful activities, as Yount and the States argue. Yount 21-22; States 16. Instead, the Interior Department properly sought input from the public, including tribes, and appropriately considered and relied upon that input in determining the proper course of action as required by law.[6] Exec. Order No. 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000) (Consultation and Coordination With Indian Tribal Governments).

Finally, the States' attempt to distinguish *Access Fund*, *Cholla Ready Mix*, and *Mount Royal* is perplexing. *See* States 16-18 (citing *Access Fund v. U.S. Dep't of Agric.*, 499 F.3d 1036 (9th Cir. 2007); *Cholla Ready Mix*, 382 F.3d 969; *Mount Royal*, 477 F.3d 745). The distinguishing factor the States point to is that this case "involves no specific or discrete sites with a detailed history of cultural and

[6] If tribes had a veto, they would prevent all mining in the Withdrawal area.

religious significance[.]" States 18. The record belies this assertion. DOI-SER 187-88, 194, 333; Amici-SER 30; *see also* note 14 *infra*. Even assuming that distinction was correct, it has no legal impact because there is no requirement under FLPMA that withdrawals be limited to specific or discrete sites.

Every federal land management decision of this nature should be based on a unique set of facts and data, reviewed by the relevant agency after notice and public input. The review should lead to an appropriate and well-reasoned decision, after the processes set out in applicable administrative, environmental, and cultural resource protection laws have been followed. In the Withdrawal, the Secretary followed the applicable laws, reviewed facts, scientific reports, and data, and reached an appropriate and well-reasoned decision. During this process, the Secretary identified many public values and purposes for the withdrawal, including maintaining traditional use areas and Native American cultural resources. *See* AEMA-ER 173-76; DOI-SER 152-57. The Secretary's decision to withdraw the lands in the Withdrawal area is supported by the record and the district court correctly upheld the Secretary's determination.

B. The Withdrawal Fits Well Within the Bounds of the Establishment Clause.

1. As A General Principle, Accommodation of Religion Has Long Been Recognized as Not Only Permissible, But Often Required.

The Constitution does not "require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984); *see Trunk v. City of San Diego*, 629 F.3d 1099, 1106 (9th Cir. 2011). In other words, "the government may (and sometimes must) accommodate religious practices and [] it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987). "The limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself." *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970) (citations omitted). It is clear that "there is room for play in the joints between the Clauses, some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (citations omitted). The Supreme Court in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, a case involving a Free Exercise challenge by an Indian organization and individual Native Americans to a Forest Service decision, specifically recognized this distinction:

> Nothing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen. The Government's rights to the use of its own land, for example, need not

> and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents.

485 U.S. 439, 453-54 (1988) (citations omitted).[7] Accommodations such as the Withdrawal, fit squarely within this policy and are well within the parameters of what courts have found permissible.[8]

2. The Withdrawal Easily Passes The *Lemon* Test Used By This Court To Decide Establishment Clause Cases.

This Court typically applies the *Lemon* test to determine whether governmental actions violate the Establishment Clause. *See, e.g.*, *Barnes-Wallace v. City of San Diego*, 704 F.3d 1067, 1082-83 (9th Cir. 2013); *Card v. City of Everett*, 520 F.3d 1009, 1013-16 (9th Cir. 2008). Under *Lemon*, an action will be

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[7] Yount misquotes the Court's holding in *Lyng*. Yount states: "The Court also recognized that to find for the Plaintiffs would create 'a religious preserve for a single group in violation of the *establishment clause*.'" Yount 9-10 (citing *Lyng*, 485 U.S. at 445). The Supreme Court recognized no such thing. The Supreme Court was actually describing this Court's rejection of the government's religious preserve argument as substantially overstated. *Lyng*, 485 U.S. at 445 (quoting *Nw. Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 694 (9th Cir. 1986)) ("The majority concluded that the Government had failed to demonstrate a compelling interest in the completion of the road, and that it could have abandoned the road without thereby creating 'a religious preserve for a single group in violation of the establishment clause.'"). Yount's assertions are misplaced.

[8] As this Court has held, accommodation of Native American religions to relieve burdens is a legitimate, secular purpose. *Cholla Ready Mix, Inc.*, 382 F.3d at 975; *see also Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp. 2d 1448, 1455 (D. Wyo. 1998) *aff'd*, 175 F.3d 814 (10th Cir. 1999) (removing barriers to religious worship occasioned by public ownership of is in the nature of accommodation, not promotion, and consequently is a legitimate secular purpose). In addition to the secular accommodation to remove burdens, there are many secular Native American resources that are being protected with the withdrawal.

found Constitutional under the Establishment Clause if it: 1) has a secular purpose; 2) does not have a principal or primary effect of advancing or inhibiting religion; and 3) does not foster excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). As the Department of the Interior points out, the district court properly applied the *Lemon* test in determining the constitutionality of the Withdrawal. DOI 115-20. The district court properly applied this Circuit's controlling precedent of *Access Fund* and *Cholla Ready Mix*, which upheld government protections of tribal cultural resources and beliefs against Establishment Clause challenges. *Yount v. Salazar*, 2014 WL 4904423, at *26-27 (citations omitted). These cases require the rejection of Yount's Establishment Clause challenge.[9]

[9] The Withdrawal is valid under the other Establishment Clause principles as well. Similar to the second and third prongs of the *Lemon* test, the Supreme Court has also phrased the Establishment Clause inquiry as an "endorsement" test to see if a reasonable observer would feel that the government was endorsing religion by taking the action under review. *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (adopting endorsement formulation). Along with the *Lemon* test, the district court held the Withdrawal easily passes the Endorsement test. *Yount v. Salazar*, 2014 WL 4904423, at *26. The Withdrawal, which limits mining in the area for a variety of secular reasons, cannot be fairly perceived as an endorsement of Native American religious practices. In the district court, Yount made references to the coercion test. The Withdrawal easily passes muster under the coercion test because it does not force anyone to participate in religious activities and it is secular. Yount does not reference the coercion test on appeal, and therefore we do not address that test. *Clark v. Arnold*, 769 F.3d 711, 731 (9th Cir. 2014) ("We review only issues which are argued specifically and distinctly in a party's opening brief.") (quoting *Greenwood v. F.A.A.*, 28 F.3d 971, 977 (9th Cir. 1994)).

3. Even if This Court Applies The Test Set Out by the Supreme Court in *Cutter*, the Withdrawal Passes Muster.

While the *Lemon* test remains the benchmark to gauge whether religious accommodations pass muster under the Establishment Clause, this Court has recognized that the Supreme Court has not been consistent in its jurisprudence. *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1017 (9th Cir. 2010) (quoting *Access Fund*, 499 F.3d at 1042); *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1054 n.8 (9th Cir. 2007) (citing *Cutter*, 544 U.S. at 727 n. 1 (Thomas, J., concurring)). In 2005, the Supreme Court in *Cutter* applied a somewhat different test to the question of accommodation of religion. 544 U.S. at 718 n.6. There, the Court was faced with the question of whether the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), which prohibits substantial burdens on prisoners' religious rights without a compelling interest, was a constitutional accommodation. *Id.* at 712-13, 715. The Court held that it was constitutional because it did three things. *Id.* at 720. First, the accommodation alleviated "government created burdens on private religious exercise." *Id.* (citing *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 705 (1994)). Second, the government took adequate account of the burdens the requested accommodation may impose on non-beneficiaries. *Id.* (citing *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985)). Finally, the accommodation was administered

neutrally among different faiths. *Id.* The Withdrawal is a constitutional accommodation under the *Cutter* criteria.

a. The Federal Government Has Placed Many Burdens on Tribal Religious and Cultural Practices and the Withdrawal Alleviates Some of Those Burdens.

The federal government has long placed many burdens on tribal religious and cultural practices through explicit policies to assimilate tribes, as well as through the acquisition of traditional and historical tribal lands. The "past federal policy was to assimilate Native Americans into [mainstream non-Indian] culture, in part by deliberately suppressing, and even destroying, traditional tribal religions and culture in the 19th and early 20th centuries." *Bear Lodge Multiple Use Ass'n v. Babbit*, 175 F.3d 814, 817 (10th Cir. 1999); *see* Kristen A. Carpenter, *Limiting Principles and Empowering Practices in American Indian Religious Freedoms*, 45 Conn. L. Rev. 387, 408 (2012). "By the late 19th Century federal attempts to replace traditional Indian religions with Christianity grew violent. In 1890 for example, the United States Calvary [sic] shot and killed 300 unarmed Sioux men, women and children en route to an Indian religious ceremony called the Ghost Dance . . . ." *Bear Lodge Multiple Use Ass'n*, 175 F.3d at 817. Indeed, the government administered Indian trust funds to pay Christian denominations to educate the Indians in Christianity. *Rueben Quick Bear v. Leupp*, 210 U.S. 50 (1908). In addition to these overt policies, the government's acquisition of Native

American lands made it difficult for Native Americans to practice their religions at sacred places. *See, e.g.*, *Lyng*, 485 U.S. at 451 (upholding construction of a road through a sacred site even if it would "virtually destroy the . . . Indians' ability to practice their religion.").

The Native Americans that historically lived within the Withdrawal area have been directly impacted by these federal policies. Christian and government boarding schools were set up throughout Northern Arizona to civilize or indoctrinate the Native Americans into Christianity. *E.g.*, Annual Report of Comm'r of Indian Affairs, Report of Agents in Arizona 2-3, 5, 8 (1882), *available at* http://digicoll.library.wisc.edu/cgi-bin/History/History-idx?id=History.AnnRep82. While the Tribes in Northern Arizona never ceded ownership of the Withdrawal lands, the Indian Claims Commission held that the Tribes' title had been lost or their property had been taken by the federal government in the nineteenth century. *See, e.g.*, *Southern Paiute Nation v. United States*, 14 Ind. Cl. Comm. 618, 619-21 (1965). The FEIS details this history. *See* Amici-SER 6-14. As a result of this history, the Forest Service and BLM now assert authority over the Withdrawal lands. The adoption and application of the Mining Law of 1872 to the withdrawal lands, among the other federal policies and practices outlined above, burdened the religious and cultural practices of the Native Americans in this area. *See* DOI-SER 333-41, 487-88; *Havasupai Tribe v.*

United States, 752 F. Supp. 1471, 1496 (D. Ariz. 1990) (discussing religious burdens caused by mining), *aff'd sub nom. Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991).[10]

The Withdrawal alleviates some of these federally-created burdens, although not completely. The Withdrawal will prevent new hard rock mining claims, thus accommodating Native American religious and cultural practices to some extent. The Withdrawal, however, still allows such mining to go forward if there is a valid existing right, and does not address leasable minerals at all. AEMA-ER 230. Because some mining will still likely occur, the Native American practitioners will still be burdened in the exercise of their religion, but to a more defined extent because there are a finite number of mines that might be developed during the withdrawal period. DOI-SER 455-58. The Ninth Circuit has recognized that when a "government action challenged under the Establishment Clause explicitly violates some of the core tenets of the religion it allegedly favors, such action will

[10] Despite claiming that cases such as *Lyng*, *Havasupai Tribe*, and *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008), prohibit the withdrawal, Appellants and the States also assert that Native American interests have been, and will be adequately protected by a number of federal laws and regulations, thus making the Withdrawal illegal. Metamin 48; Yount 6-7; States 13, 18. Ignoring the fact that Withdrawal's legality does not rest on whether or not other laws protect Native American resources, it defies logic for Appellants and the States on one hand to cite to cases where tribal cultural resources and sites were destroyed but on the other hand to claim that existing laws adequately protect such resources without the Withdrawal.

typically be considered permissible accommodation rather than impermissible endorsement." *Access Fund*, 499 F.3d at 1045. The Withdrawal is a permissible accommodation that alleviates some of the historic government-created burdens to Native American religious and cultural practices.

b. The Withdrawal Took Adequate Account of the Burdens Imposed on Non-Beneficiaries.

When an accommodation to religion is made, the government must "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries[.]" *Cutter*, 544 U.S. at 720. An accommodation may be upheld, however, even if secular individuals or groups are burdened so long as the accommodation uses a rational classification to further a legitimate end. *See, e.g.*, *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338-39 (1987).

In *Cutter*, the Court assumed that RLUIPA would not be applied in an unbalanced way, and that the burdens on prison security would be appropriately balanced. 544 U.S. at 722. In accordance with this approach, the Secretary appropriately weighed the burdens on mining, the environment, cultural and historical resources, and recreation, among others. DOI-SER 109-27. The main interest affected by the Withdrawal is the ability to locate future mining claims under the Mining Law and the indirect benefits those future claims may bring. The Secretary took proper account of the burdens on mining by exhaustively analyzing

them and determining that other public values warrant slowing the pace of mining to that of the 1980s. AEMA-ER 175-76; DOI-SER 16-17, 109-27.

The impacts to mining here will not be nearly as severe as burdens the Supreme Court has recognized as permissible. For example, in *Amos*, the Court upheld an exemption to Title VII of the Civil Rights Act of 1964 for religious organizations even though it could result in employment discrimination against non-practitioners of a religious organization's faith. 483 U.S. at 338-39. Further, the Supreme Court in *Gillette v. United States* "upheld a military draft exemption, even though the burden on those without religious objection to war (the increased chance of being drafted and forced to risk one's life in battle) was substantial." *Kiryas Joel*, 512 U.S. at 725 (Kennedy, J. concurring) (citing *Gillette v. United States*, 401 U.S. 437 (1971)). The burdens here do not compare.

In extreme cases, the Supreme Court has held that an accommodation that gives an absolute right to religious practitioners over others can create too great of a burden on non-beneficiaries. In *Caldor*, the government relieved a burden that was placed on religious practitioners by private industry by arming "Sabbath observers with an absolute and unqualified right not to work on whatever day they designate[d] as their Sabbath." 472 U.S. at 709. The Supreme Court held that the burden imposed on private industry by an absolute and unqualified right was extreme and struck it down. *Id.* at 710-11. Here, the federal government has not

delegated authority to Native American tribes to determine when, where, and to what extent a withdrawal under FLPMA will be made. The Secretary retains authority to make these determinations and has not given an "absolute and unqualified" right to Native Americans. If Native Americans did have the absolute right in this instance, they would prohibit all forms of mining in the Withdrawal area, regardless of valid existing rights. DOI-SER 335. That is not what the Withdrawal does, and it is certainly not a "veto" for Native Americans as Yount and the States assert. Yount 21-22; States 16. Rather, this is a land management decision that protects water, wildlife, visual resources and many other values in addition to Native American resources.[11]

The Secretary, through the FEIS, properly weighed all the interests and burdens before going forward with the Withdrawal, and the burden of complying

[11] No court has ruled that a religious accommodation violates the Establishment Clause simply because it limits some uses of government property or because it restricts public access to, or activities on, public property. Rather, in numerous contexts, courts have upheld such limits. *See, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112-14 (2001) (public school facilities may be used for religious purposes); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394-95 (1993) (same); *Van Zandt v. Thompson*, 839 F.2d 1215, 1216 (7th Cir. 1988) ("prayer room" in state capitol building); *Hawley v. City of Cleveland*, 24 F.3d 814 (6th Cir. 1994) (Catholic Diocese chapel in Cleveland Hopkins International Airport). In these cases, the government's designation of public property for religious uses imposed limitations on other incompatible uses. Yet, as these cases make clear, limiting some uses of government property does not in itself render a government accommodation unconstitutional.

with the law is well within the scope of burdens the Supreme Court has found permissible.

c. The Withdrawal is Administered Neutrally Among Different Faiths.

As in *Cutter*, the accommodation here is administered neutrally. 544 U.S. at 720. An "absolute rule of neutrality" is not required, because doing so would evince hostility toward religion, and that is forbidden. *Trunk*, 629 F.3d at 1106. Neutrality "'is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation' by the First Amendment." *Id.* (quoting *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844 at 876 (2005)). The fact that an accommodation facilitates the practice of religion does not render it unconstitutional. *Amos*, 483 U.S. at 334-37; *Hobbie*, 480 U.S. at 144-45. Nor does the fact that an accommodation may single out a particular religion, for that shows nothing more than the uniqueness of that group's situation. *Kiryas Joel*, 512 U.S. at 726 (Kennedy, J., concurring). After all, "[m]ost accommodations cover particular religious practices." *Id.*

The federal government recognized long ago that "[e]ach Indian tribe has had its own religion and its own code of ethics . . . ." Inst. for Gov't Research, *The Problem of Indian Administration* 845 (1928), *available at* http://www.narf.org/nill/documents/merriam/x_meriam_chapter14_missionary.pdf. The FEIS recognizes that different tribes have different beliefs about the

Withdrawal area and the Grand Canyon, and each was treated equally. DOI-SER 193-203, 333-41. Thus, there is no neutrality issue here.

Additionally, the Withdrawal was established under a general law – FLPMA's withdrawal provision, 43 U.S.C. § 1714 – and not a specific statute passed to specifically benefit any one tribe. The Withdrawal does not single out a particular religion or religious sect for special treatment. The accommodation applies to many different Native American beliefs and any other religious practitioners that want to access the Withdrawal area. Thus, the statute here is markedly different from that in *Kiryas Joel*, where the Supreme Court struck down a law that carved out a separate school district to serve exclusively a community of Satmar Hasidim Jews. 512 U.S. at 690. There, the law "single[d] out a particular religious sect for special treatment[.]" *Id.* at 706. One of the main neutrality problems with the statute in *Kiryas Joel*, which is not at issue here, was that the religious community "did not receive its new governmental authority simply as one of many communities eligible for equal treatment under a general law[.]" *Id.* at 703. Here, the Secretary has applied FLPMA, a general law, in a manner consistent with the Constitution.

Similar to the Forest Service's decision in *Access Fund*, the Withdrawal does not reflect that the Secretary favors "tribal religion[s] over other religions or that [the United States] would not protect sites of historical, cultural, and religious

importance to other groups[.]" 499 F.3d at 1045 (quoting *Cholla Ready Mix*, 382 F.3d at 976). Contrary to Yount's assertions, nothing in the record indicates that the United States disapproves of Yount's or other non-Indian religious choices or practices. The Withdrawal simply reduces burdens on Indian religious, traditional, and cultural exercise occasioned by the government's ownership and management of the land, and does this in a neutral way by accommodating many different uses and religious and cultural beliefs.

Even if the Court were to find that the Withdrawal is not entirely neutral, courts have long held that the government can single out and protect Native American religious practices without violating the Establishment Clause because such protection is rationally related to Congress' unique obligation toward the Indians. *See Rupert v. U.S. Fish & Wildlife Serv.*, 957 F.2d 32, 34-36 (1st Cir. 1992) (per curiam) (rejecting an Establishment Clause challenge to a federal law prohibiting possession of eagle feathers, except for Indian tribes' religious use due to the semisovereign and constitutionally recognized status of Indians justifying special treatment on their behalf when rationally related to the Government's unique obligation); *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1216-17 (5th Cir. 1991) (holding a ban on peyote use except by Native American religious organizations rationally related to the legitimate governmental objective of preserving Native American culture and fundamental to the federal

government's trust relationship with tribal Native Americans). This alone defeats Appellants claims that the Withdrawal is unconstitutional.

In conclusion, the Withdrawal relieves government burdens placed on religion, takes adequate account of the burdens it imposes, and is applied in a neutral manner. Thus, under *Cutter*, the Withdrawal is constitutional.

4. Protections Under FLPMA Do Not Have to Be Based on Discrete National Register of Historic Places Eligible Sites to Insulate Them From Establishment Clause Attacks.

Yount repeats his rejected assertion, with no new support, that a "federal action may protect American Indian religious beliefs and traditions, but only when these religious beliefs are tied to a specific site that also has historical and cultural significance making it eligible for listing under the NHPA." Yount 9, 33-34. Yount claims the reason this Court rejected the Establishment Clause challenges in *Access Fund* and *Cholla Ready Mix* was "because the particular areas involved ***were*** a particular discrete religious site." Yount 10. Additionally, the States assert the Secretary can only protect specific or discrete sites in order to have a proper secular purpose. States 17-18. These claims are without merit because the underlying premise is wrong.

Notwithstanding the many eligible sites in the Withdrawal area, National Register of Historic Places ("NRHP") eligibility or determinations are not condition precedents for FLPMA withdrawals or for accommodations under the

Establishment Clause. The cases Yount cites upheld protections to specific sites under other authorities, not withdrawals under FLPMA. Yount 9.[12] The district court correctly held that "FLPMA authorizes DOI to consider historical and archeological values without regard to whether they concern NHPA sites." *Yount v. Salazar*, 2014 WL 4904423, at *27. Likewise, nothing in *Access Fund* or *Cholla Ready Mix* remotely suggests that the Establishment Clause only allows protections to specific sites eligible for listing under the National Historic Preservation Act ("NHPA").[13] *Access Fund*, 499 F.3d 1036; *Cholla Ready Mix*,

[12] Yount cites to *Access Fund*, which involved a Forest Service Management Plan specifically developed to protect a site recently determined to be a TCP and archaeological site, and *Cholla Ready Mix*, which involved a state policy against using materials mined from a culturally sensitive site in state highway construction projects. *Access Fund*, 499 F.3d at 1040; *Cholla Ready Mix*, 382 F.3d at 972.

[13] Yount and the States improperly attempt to minimize the resources that are protected by the Withdrawal through a selective reading of the ROD and FEIS. Yount 13; States 18; *see also* AEMA 40 n.14. While the ROD and FEIS found one National Register of Historic Places ("NRHP") eligible TCP located within the South Parcel, it also stated that many places within the proposed withdrawal area may have qualities that would render them eligible for the NRHP as TCPs. DOI-SER 194, 333. "Although these places and areas have not been through the formal nomination process as TCPs, they are no less important to American Indians and their cultures and must be considered when evaluating the impacts of an undertaking." DOI-SER 333. Appellants ignore the FEIS's finding of 447 sites within the Withdrawal area that have been determined eligible for the NRHP, 12 presently listed sites, and 1,880 unevaluated sites. DOI-SER 187; Amici-SER 30. Appellants also ignore that only 23%, 5.3%, and 2.5% of the South, North, and East Parcels respectively have been systematically surveyed, and ignore the FEIS's conclusion that "it would be relatively safe to predict a doubling of archaeological sites in the South Parcel. Perhaps as few as 10% of the expected sites have been identified in the North and East parcels." DOI-SER 188.

382 F.3d 969; *Yount v. Salazar*, 2014 WL 4904423, at *27 ("neither case holds that this is a requirement").

Yount's assertion that only specific sites can be protected is completely undermined by the District of Columbia Circuit's decision in *Mount Royal Joint Venture v. Kempthorne*. 477 F.3d 745. *Mount Royal* involved an Establishment Clause challenge to a large-tract withdrawal under FLPMA where the United States protected 19,685 acres for religious, cultural, and other reasons. *Id.* at 750. The withdrawal there did not involve a specific discrete site eligible for NRHP listing, and had, similar to this case, several secular purposes. Among the many purposes for the withdrawal were: the protection of areas of traditional spiritual importance to Native Americans, of aquifers that provide potable water to local residents, of potential habitat for reintroduction of endangered peregrine falcons, and of seasonally important elk and deer habitat. *Id.* In *Mount Royal*, the district court granted summary judgment to the Department of the Interior, concluding the withdrawal passes all three prongs of the *Lemon* test and that "[p]laintiffs' arguments to the contrary border on the frivolous." Order Granting Defendants' Motion For Summary Judgement at 19, *Mount Royal Joint Venture v. Babbitt*, No. 1:99-cv-02728 (D.D.C. Aug 26, 2005), *aff'd sub nom. Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745 (D.C. Cir. 2007).

On appeal, plaintiffs in *Mount Royal* made arguments nearly identical to

those brought by Yount and the States: that secular purposes were illusory and a sham, and that there is only one specific site in the entire area that may be of "significance" to Native Americans, citing to a Free Exercise challenge case (*Lyng*), and claiming the withdrawal gives Native Americans veto power over public land management decisions. Appellants' Corrected Opening Brief at 34-36, 41-45, *Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745 (D.C. Cir. 2007) (No. 05-5379), 2006 WL 479622, at *34-36, 41-45. The D.C. Circuit rejected these arguments, and affirmed the district court's decision, stating:

> The Secretary enunciated several secular purposes for withdrawing the Hills, including protection of aquifers and the environment. Furthermore, PLO 7254 does not primarily affect religious interests; on the contrary, it protects all non-mineral resources in the Hills. Finally, the land order does not foster excessive government entanglement with religion because it neither regulates religious practices nor increases Native American influence over management of the Hills.

Mount Royal, 477 F.3d at 758 (citation omitted). Yount attempts to distinguish the case by arguing "the secular purposes identified in the FEIS are inadequate because the studies cited are contradicted by other findings in the FEIS[.]" Yount 12. Yount's distinction is factually incorrect, as the secular purposes identified in the Withdrawal FEIS, including the protection of Native American and cultural resources, are well supported by the record. *See* section II.A. *supra*; DOI 51-80; *Yount v. Salazar*, 2014 WL 4904423, at *17 (BLM "examined the available science, solicited and considered comments both internally and from the public,

and ultimately concluded that the uncertainties, coupled with even a low potential for major adverse effects, warranted a level of precaution that justified the Withdrawal."). Furthermore, this erroneous distinction says nothing about the fact that the *Mount Royal* withdrawal clearly protected more than NRHP eligible discrete sites without violating the Establishment Clause.

Based on FLPMA, the Establishment Clause, and well-established precedent, there is no discrete NRHP eligible site requirement needed to insulate withdrawals under FLPMA from Establishment Clause attacks.

CONCLUSION

The district court's decision upholding the Withdrawal should be affirmed. The Secretary did not act arbitrarily or capriciously when he adopted the Withdrawal, relying, in part, on the cultural and religious significance of those lands. The Secretary properly considered the effect of continued and expanded uranium mining within the Withdrawal area on Native American cultural resources. Furthermore, the Secretary's withdrawal of lands for the purpose of, inter alia, protecting Native American cultural resources is not a violation of the Establishment Clause of the United States Constitution.

Respectfully submitted, August 21, 2015

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,978 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii),

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word version: 14.07153.5000 (32-bit) with size 14 Times New Roman font.

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CERTIFICATE OF SERVICE

On August 21, 2015, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the electronic case filing system, which will serve electronic notice of the filing on all registered users of that system. A copy was also served on the following by U.S. mail, first-class postage prepaid:

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ADDENDUM

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOUNT ROYAL JOINT VENTURE
and PETE & MAXINE WOODS,

Plaintiffs,

v. 1:99cv02728 (PLF)

BRUCE BABBITT, Secretary,
U.S. Department of the Interior, et al.,

Defendants

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The plaintiffs, Mount Royal Joint Venture and Pete and Maxine Woods (collectively, "Plaintiffs"), are challenging a series of decisions by the Bureau of Land Management ("BLM") to withdraw from location and entry under the mining laws approximately 19,685 acres of public mineral estate in the Sweet Grass Hills and surrounding areas in Montana. Before the court at this time are the parties' cross-motions for summary judgment and the responses in opposition thereto. Docs. 38, 41, 42, 45, 49. The parties have been notified that the motions would be taken under advisement as of a date certain.

I. THE EVIDENCE

Sweet Grass Hills (the "Hills") is an area of plains and volcanic buttes (predominantly the East, Middle, and West Buttes) located near the Canadian border in

northern Toole and Liberty Counties, Montana. Of the 68,605 acres in the Hills, the United States owns 19,765 acres of subsurface estate and 7,731 acres of surface estate. The remainder is owned either by the state or by private individuals/groups.

In the latter part of the nineteenth century, the Hills were part of an Indian Reservation inhabited by such tribes as the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow. By Act of Congress on May 1, 1988, the tribes ceded the Indian Reservation to the United States without reserving any rights, and all lands within the Hills were subsequently opened to mineral entry under the General Mining Law of 1872 ("Mining Law"). 30 U.S.C. §§ 21-54. The discovery of gold, silver, copper, lead, iron, marble, and coal soon after led to the location of numerous patented and unpatented mining claims in the area.

Pete Woods ("Woods") has lived in Liberty County, Montana, all his life. In or around 1939, his father, Edgar Woods, located several mining claims in the East Butte Mining District in Liberty County. These claims were maintained and mined by Edgar Woods until he died in 1973. In or around 1978, Woods restaked some of his father's claims, then maintained and mined these claims until they lapsed in the early 1990s when Congress amended the mining law.

Mount Royal Joint Venture ("MRJV") is a joint venture, organized under the laws of Minnesota and comprised of King Mining Company, Jennifer Mining Company, and North Central Mineral Ventures. Beginning in 1983, MRJV located numerous federal mining claims in the Hills. In 1985, MRJV and Santa Fe Pacific Mining Company ("Sante Fe") entered into a joint venture to undertake exploration on East and Middle

Buttes.

During the course of its exploration of the Hills, MRJV discovered a large gold deposit on East Butte, commonly known as the "Tootsie Creek Deposit." On October 7, 1985, Santa Fe filed a Plan of Operations ("1985 Plan of Operations") with BLM to further delineate the Tootsie Creek Deposit. BLM approved the 1985 Plan of Operations on June 30, 1986. The Blackfeet thereafter appealed BLM's approval decision to the Interior Board of Land Appeals ("IBLA"), arguing, *inter alia*, that approval of the 1985 Plan of Operations violated the National Historic Preservation Act, as amended, 16 U.S.C. §§ 470-470x-6, and the American Indian Religious Freedom Act, 42 U.S.C. § 1996. The IBLA rejected the Blackfeet's arguments and affirmed BLM's decision to approve the 1985 Plan of Operations.

Around the end of 1987, after much exploration, soil sampling, drilling, and road building on East Butte, Sante Fe relinquished its interest in the joint venture. In early 1988, MRJV formed a new joint venture with Cominco American Resources, Inc. ("Cominco"). Cominco soon after filed an amendment to the 1985 Plan of Operations, which was approved by BLM on June 20, 1989. The Original Chippewa Cree appealed BLM's decision on the amended plan to the IBLA, but the appeal was ultimately dismissed as moot after the exploration allowed under the amendment was completed. As Sante Fe did in 1987, Cominco withdrew from the joint venture in late 1989, after drilling and constructing additional road-trenches in the Tootsie Creek area. In 1991, MRJV entered into yet another joint venture, called the Royal East Joint Venture, this time with Manhattan Minerals (USA), Ltd. ("Manhattan Minerals").

Effective in January of 1992, the Hills area was designated an Area of Critical Environmental Concern ("ACEC") in the West HiLine Resource Management Plan ("RMP").[1] See A.R. 1.A.3. The main goal of the ACEC designation was "to protect high value potential habitat for reintroduction of endangered peregrine falcons; protect areas of traditional religious importance to Native Americans; and protect seasonally important elk and deer habitat." Id. at p.4. Despite the ACEC designation, the RMP left the Hills open to exploration and mineral development.

In 1992, soon after the Hills area was designated an ACEC, MRJV and Manhattan Minerals filed a Plan of Operations ("1992 Plan of Operations"), proposing further delineation of the Tootsie Creek Deposit that had been previously explored by the Santa Fe and Cominco joint ventures. Following an environmental assessment of the area, BLM decided to withhold approval of the MRJV/Manhattan proposal until an environmental impact statement ("EIS") could be completed. A draft EIS was released to the public in January 1993.

In its draft EIS, BLM analyzed the potential impacts of the 1992 Plan of Operations with regard to allegations that the area was of religious importance to Native Americans and that aquifers in the area supplied potable water to local residents. Based upon its analysis, BLM proposed three alternatives for action, one of which would permit approval of the 1992 Plan of Operations, one of which would permit approval of

[1] The RMP sets out BLM's management plans and goals for the long term management of 626,098 surface acres and 1,328,014 subsurface acres owned by the United States.

the 1992 Plan of Operations with modifications, and one of which would result in the denial of MRJV/Manhattan's proposed exploration plan. As its preferred alternative, BLM recommended approval of the 1992 Plan of Operations.

In meetings held during March, 1993, the public was allowed to comment on the draft EIS. Based on concerns that were voiced in those meetings, BLM determined that it might not be feasible to protect the resources for which the Hills ACEC was designated if--and while--mining continued to be allowed in the area. BLM accordingly decided to revisit its land use plan--the West HiLine RMP--with regard to the Hills.

To protect the Hills area while it studied and possibly amended the RMP, BLM filed a petition with the Assistant Secretary, Department of the Interior ("DOI"), seeking to file an application to withdraw virtually the entire federal mineral estate from locatable mineral entry in the three buttes of the Sweet Grass Hills. On July 28, 1993, the Assistant Secretary approved BLM's petition to file an application to withdraw 19,684.74 acres of public mineral estate in the Hills from mineral entry and location for 20 years. On August 3, 1993, BLM published notice in the *Federal Register* regarding its application to withdraw the federal locatable mineral estate in the Hills. The notice provided that the purpose of the proposed withdrawal was "to protect high value potential habitat for reintroduction of endangered peregrine falcons, areas of traditional religious importance to Native Americans, aquifers that currently provide the only potable water in the area, and seasonally important elk and deer habitat." A.R. 1.A.20 at p.2. The notice also provided that, for a period of two years from the date of publication, the lands would be segregated from further mineral entry and location. Id.

On August 9, 1993, BLM notified MRJV and Manhattan Minerals that their proposed project area had been segregated from mineral entry for two years and that the processing of their proposed exploration plan (the 1992 Plan of Operations) had been suspended until the long-term management of the Hills could be reevaluated in a plan amendment to the West HiLine RMP.

On August 26, 1993, BLM published notice in the *Federal Register* of its intent to prepare both an amendment to the West HiLine RMP and an associated EIS. The notice explained that an amendment was necessary because "[a] withdrawal of these lands [the Hills] is not in conformance with the record of decisions for the West HiLine Resource Management Plan (RMP) (1988 and 1992)." A.R. 1.B.23.

On or about September 15, 1993, Manhattan Minerals withdrew from the joint venture with MRJV because of BLM's failure to approve the 1992 Plan of Operations. In late September, 1993, MRJV relinquished approximately 100 unpatented mining claims on all three buttes--also because of BLM's failure to approve the 1992 Plan of Operations--but retained the 14 mining claims that represented the core of the Tootsie Creek Deposit.[2] MRJV also retained its private mineral leases and fee lands on East Butte.

On February 8, 1995, BLM released a draft amendment to the RMP/EIS that presented a preferred alternative and three other alternatives for locatable mineral

[2] BLM thereafter initiated a validity examination as to these 14 claims to determine whether such claims met the test of "discovery" under the mining laws. BLM determined that eight of the 14 original claims were valid.

development within the Hills. Of the four alternatives presented in the draft, BLM recommended a 20-year withdrawal of the federal locatable mineral estate within the ACEC (6,328 mineral acres) from mineral entry and location. A.R. IV.K.1 at p.8. Under BLM's recommended alternative, the remaining 13,015 acres of federal locatable mineral estate in the Hills would remain open to mineral entry and location. Public meetings on the draft amendment were scheduled for various times and locations in late February and March, 1995, and written comments were accepted up to and including May 18, 1995.

On February 17, 1995, notice was again published in the *Federal Register* of BLM's intent to amend the West HiLine RMP, the amendment this time to recommend the withdrawal of 19,764.74 acres of federal mineral estate from locatable mineral entry in the Hills. A.R. IV.M.10. On or about May 11, 1995, consistent with the February notice, BLM issued a second draft amendment to the RMP/EIS, this one presenting only two of the four alternatives presented earlier: (1) Alternative A, which would leave the Hills open to locatable mineral entry; and (2) Alternative B, which "would withdraw the Federal minerals in the Sweet Grass Hills study area (19,685 acres) from locatable mineral entry for 20 years." A.R. IV.M.29 at p.5. Although no public meetings on the May draft were announced, the public was informed that the draft amendment could be protested pursuant to 43 C.F.R. § 1610.5-2.

On July 19, 1995, then United States Representative Pat Williams ("Williams") of Montana proposed legislation to protect the Hills by withdrawing the entire federal locatable mineral estate from the area. BLM thereafter petitioned to file another

application to withdraw the Hills--this time for the purpose of aiding legislation--from location and entry under the mining laws. The Assistant Secretary approved the petition, and notice of the approval to file an application was published in the *Federal Register* on July 28, 1995. Effective on the publication date, the Hills area was once again segregated from mining for a period of up to two years while the application for the proposed withdrawal in aid of legislation was being processed.

On or about August 3 and 4, 1995, after the first segregation period (the "1993 Segregation") expired and the new segregation period (the "1995 Segregation") began, MRJV located six new mining claims adjacent to its 14 original mining claims on East Butte. These six new claims were identified as Jennifer #1, Jennifer #2, Patricia #5, Patricia #6, Patricia #12, and Patricia #13. MRJV recorded these claims with the county recorder, filed proof of the six claims with BLM, and paid the necessary fees.

On or about September 15, 1995, also after the 1993 Segregation expired and the 1995 Segregation began, Pete and Maxine Woods (collectively "Woodses") located a mining claim--identified as Chrome #1--on East Butte. The land within Chrome #1 had been subjected to earlier mining locations by the Woods family dating back to 1939. The Woodses filed proof of the Chrome #1 claim and paid the necessary fees on or about November 8, 1995.

On or about October 4, 1995, BLM issued a decision in which it declared MRJV's six new claims null and void *ab initio* because the claims were located on lands segregated from mineral entry and location under the 1995 Segregation. In similar fashion, BLM issued a decision on November 30, 1995, declaring the Woodses'

Chrome #1 claim null and void *ab initio* for the same reason. MRJV and the Woodses appealed BLM's decisions to the IBLA. The appeals were consolidated.

On or about June 11, 1998, the IBLA affirmed BLM's decisions regarding the mining claims purportedly located by MRJV and the Woodses in August and September of 1995. The IBLA determined that the 1995 Segregation was valid because the proposed withdrawal noticed on July 28, 1995, was not identical to the earlier withdrawal noticed on August 3, 1993. Because the Woodses and MRJV located mining claims on withdrawn land during a valid segregation period, the IBLA found that BLM properly declared those claims void *ab initio*.

In May of 1996, BLM issued its EIS and final amendment to the West HiLine RMP. Four management alternatives were considered in the final RMP Amendment/EIS: (1) Alternative A (Current Management Alternative), under which present management direction and policies would be continued; (2) Alternative B (Maximum Resource Protection Alternative), the environmentally preferred alternative under which (a) federal minerals in the entire study area (19,765 acres) would be withdrawn from locatable mineral entry; (b) BLM would pursue relinquishment of any valid claims through purchase, exchange, condemnation, or conservation easements from private sources; (c) the entire surface area (7,717 acres) would be closed to motorized vehicles with no exceptions; and (d) the entire study area (21,409 acres) would be closed to future oil and gas leasing; (3) Alternative C, the Preferred Alternative, under which BLM would (a) withdraw the entire federal locatable mineral estate in the Hills from mineral entry and location for 20 years; (b) close the Hills ACEC

to off-road vehicles; and (c) apply a no surface occupancy stipulation to new oil and gas leases within the ACEC; (4) Alternative D (Resource Protection Alternative), under which resource protection in the Sweet Grass Hills ACEC would be emphasized. On June 14, 1996, MRJV filed a protest to the final RMP amendment/EIS. That protest was denied by BLM on January 8, 1997.

On January 30, 1997, BLM issued its Record of Decision ("ROD") on the final amendment/EIS, in which it recommended that the Secretary withdraw the entire federal locatable mineral estate in the Hills from mineral entry and location for 20 years, consistent with the Preferred Alternative. On March 31, 1997, consistent with the ROD, the Assistant Secretary withdrew the entire federal locatable mineral estate in the Hills from mineral entry and location for 20 years, while at the same time leaving the area open to "surface entry" and "mineral leasing."

II. THE LAW

A. THE GENERAL MINING LAW OF 1872

The United States government has long encouraged its citizens to discover and develop certain minerals on public lands. Indeed, under the General Mining Law of 1872, 30 U.S.C. § 22 *et seq*. (the "General Mining Law"), Congress provided that, with certain exceptions, an individual who locates a mining claim on federal lands has the right to exclusive possession of the land for mining purposes and--consistent with that right--may extract and sell any minerals he finds there without paying a royalty to the United States. 30 U.S.C. § 26. That law is still in effect today.

The validity of a mining claim under the General Mining Law depends on the

discovery of a valuable mineral deposit. Cole v. Ralph, 252 U.S. 286, 294, 40 S. Ct. 321, 64 L. Ed. 567 (1920); see also United States v. Coleman, 390 U.S. 599, 602, 88 S. Ct. 1327, 20 L. Ed. 2d 170 (1968) (explaining that, in order to qualify as "valuable mineral deposits" under 30 U.S.C. § 22, "the discovered deposits must be of such a character that 'a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine'") (quoting Castle v. Womble, 19 L.D. 455, 457 (1894)). After making a valuable mineral discovery, a claimant may hold the claim so long as a valuable mineral deposit continues to exist and he performs $100 worth of assessment work each year,[3] makes the necessary filings,[4] and pays the necessary annual fees.[5] If he performs certain additional conditions, a claimant may patent the claim for a nominal sum and thereby obtain further rights over the land and minerals. 43 U.S.C. § 29.

B. THE FEDERAL LAND AND POLICY MANAGEMENT ACT OF 1976

Since 1976, BLM's management of public lands has been governed by the Federal Land and Policy Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1701-84. In enacting FLPMA, Congress declared it to be the policy of the United States that public lands be managed "on the basis of multiple use and sustained yield." 43 U.S.C. § 1701(a)(7); see also Lujan v. National Wildlife Federation, 497 U.S. 871, 877, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990) (stating that FLPMA "established a policy in favor of

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[3] 43 U.S.C. § 28.

[4] 43 U.S.C. § 1744.

[5] 43 C.F.R. § 3830.21.

retaining public lands for multiple use management").

For purposes of FLPMA, "sustained yield" is defined to mean "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use." 43 U.S.C. § 1702(h). "Multiple use" is defined to mean:

> [T]he management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the lands for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some lands for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long term needs of future generations for renewable and non-renewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the lands and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

43 U.S.C. § 1702(c).

In carrying out its responsibility to manage the public lands "on the basis of multiple use and sustained yield," BLM has "the enormously complicated task of striking a balance among the many competing uses to which land can be put, 'including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values.'" Norton v. Southern Utah

Wilderness Alliance, 542 U.S. 55, 124 S. Ct. 2373, 2376, 159 L. Ed. 2d 137 (2004) (quoting 43 U.S.C. § 1702(c)). In reaching this balance, BLM must "prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values (including, but not limited to, outdoor recreation and scenic values)," 43 U.S.C. § 1711(a), and must "develop, maintain, and, when appropriate, revise land use plans." 43 U.S.C. § 1712(a). These "land use plans"--commonly called Resource Management Plans ("RMPs")--govern all aspects of public land management.

Through FLPMA, 43 U.S.C. § 1714, Congress gave the Secretary of the Interior (the "Secretary") broad authority to withdraw public lands from the operation of the general land and mineral disposal laws, including the General Mining Law. Nat'l Wildlife Fed'n v. Burford, 835 F.2d 305, 308 (1987). FLPMA defines "withdrawal" as "withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program." 43 U.S.C. § 1702(j).

The Secretary must publish a notice in the Federal Register within 30 days of receipt of an application for withdrawal. 43 U.S.C. § 1714(b)(1). The notice must state that an application for withdrawal has been submitted for filing, and it must describe the extent to which the land is to be segregated--i.e., temporarily removed from disposition under the general land laws--while the application is being considered by the Secretary. Id. Segregation is automatically effected upon publication of the notice, id., and no new claims may be located while the land is segregated. Sagebrush Rebellion, Inc. v.

Hodel, 790 F.2d 760, 765 (9th Cir. 1986) (explaining that "[t]he segregative effect of the notice precludes adverse parties from establishing new rights in the area prior to the actual withdrawal"). Segregation terminates when the Secretary either rejects the withdrawal application or withdraws the lands. Id. If the Secretary fails to act on the application before the expiration of two years from the date of the notice, the segregative period automatically terminates at the end of that two-year period. Id.

The procedure for withdrawal of a land parcel of more than 5000 acres is set out in 43 U.S.C. § 1714(c). When such a withdrawal is made, "[t]he Secretary shall notify both Houses of Congress...no later than its effective date." 43 U.S.C. § 1714(c)(1). With the notice, the Secretary must furnish Congress with a detailed report addressing the 12 points set out in 43 U.S.C. § 1714(c)(2). A withdrawal is limited to a term of not more than 20 years, and Congress may override a withdrawal if, within 90 days of notice, either House adopts a concurrent resolution stating disapproval of the withdrawal. 43 U.S.C. § 1714(c)(1). A withdrawal "shall terminate and become ineffective" upon adoption of such a resolution. Id.

C. THE ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, provides that a court shall set aside an agency's decision only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard of review is highly deferential, and the court is "not empowered to substitute its judgment for that of the agency." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). An agency's factual findings are conclusive if supported by substantial

evidence, and an agency's interpretation of its own regulations is entitled to substantial deference and will be upheld unless plainly erroneous or inconsistent with the regulatory text. 5 U.S.C. § 706(2)(E); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

III. THE ARGUMENT/ANALYSIS

A. STANDING

1. The National Environmental Policy Act

Among other things, Plaintiffs allege the following in their complaint:

> The Final West HiLine Amendment/EIS was...prepared in violation of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, because the BLM, *inter alia*: (a) went through the NEPA process merely to rationalize a decision that had already been made; (b) failed to consult with other agencies within the Department of Interior that have technical and scientific knowledge regarding mineral development; and (c) failed to consider a reasonable range of alternatives.

Compl. at ¶ 85.

Defendants contend that Plaintiffs lack standing to bring a claim under NEPA. Plaintiffs do not address this contention other than to note that "Defendants' NEPA argument is irrelevant" because Plaintiffs merely "cited NEPA as additional support for the proposition that Defendants violated FLPMA by making the decision to withdrawal [sic] the Sweet Grass Hills Area prior to considering any of the facts." Doc. 45 at 19 n.13.

Given that Plaintiffs alleged a violation of NEPA in their complaint, and given their lack of meaningful opposition to Defendants' standing argument, the court finds that

Defendants are entitled to summary judgment to the extent--if any--that Plaintiffs' complaint may be construed as alleging a claim under NEPA.

2. First Segregation Period

Defendants also contend that Plaintiffs lack standing to challenge the first segregation period begun in 1993. Because Plaintiffs have stipulated that they are not seeking to set aside the 1993 withdrawal petition and resulting segregation period, doc. 13 at 4, Defendants' argument in this regard is moot.

B. THE 20-YEAR WITHDRAWAL

On March 31, 1997, BLM withdrew--subject to valid, existing rights--the entire federal locatable mineral estate in the Hills from mineral entry and location for 20 years. Plaintiffs maintain that there was no valid basis for the withdrawal and that, therefore, the withdrawal was arbitrary and capricious.

An agency's decision may be called arbitrary and capricious if and only if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 2867, 77 L. Ed. 2d 443 (1983); see also Southwest Ctr. for Biological Diversity v. United States Forest Serv., 100 F.3d 1443, 1448 (9th Cir. 1996).

Here, the record establishes that BLM studied and carefully balanced the competing uses to which the Hills can be put, taking into account such relevant factors

as wildlife, watershed, recreation, minerals, oil and gas, and cultural and historical values. In the process, BLM received input from the public, government agencies, congressional staffs, tribal councils, county commissioners, the State Historic Preservation Office, the Advisory Council on Historic Preservation, and the United States Fish and Wildlife Service. Based on the various inputs, BLM determined that withdrawal was needed to protect such resources as "areas of traditional spiritual importance to Native Americans, aquifers that provide potable water to local residents, potential habitat for reintroduction of endangered peregrine falcons, and seasonally important elk and deer habitat." A.R. IV.L.10 at p.4. In its final amendment/EIS, BLM explained--at length--the need for withdrawal, the various alternatives for withdrawal, the expected environmental, social, and economic consequences of implementing the various withdrawal alternatives, and the process used for gathering the input that helped define the concerns and issues that went into "the enormously complicated task of striking a balance among the many competing uses to which [the Hills] can be put." Norton, 124 S. Ct. at 2376.

While Plaintiffs concede that BLM went through the "motions" of complying with FLPMA's "multiple use" principles when it prepared the final amendment/EIS, they nonetheless argue that BLM's withdrawal decision was "predetermined." Among other things, they point to a task force's 1993 recommendation to BLM's Director to "[s]eek permanent withdrawal of the Sweet Grass Hills from mineral entry and suspend processing of the [1992] Plan of Operations until the BLM verifies claim status." A.R. I.A.5 at p.2. Relying on this early recommendation, along with other indications that

BLM favored withdrawal from at least the time when MRJV and Manhattan Minerals filed their 1992 Plan of Operations, Plaintiffs assert that BLM "never considered leaving the Area open to mineral entry and location" and, thus, its withdrawal decision could not have been "the product of reasoned decision-making." Doc. 38 at 40-41.

That BLM may have been urged in 1992 and/or 1993, by multiple parties (including a United States Congressman, Native Americans, a 1993 task force, and some of its own employees), to seek withdrawal of the Hills from mineral entry and location does not mean that the withdrawal decision reached in 1996 at the conclusion of the EIS/RMP amendment process was necessarily arbitrary and capricious. Indeed, the court finds no evidence to suggest that BLM based its withdrawal decision on inappropriate factors, failed to consider some important aspect regarding management of the Hills, or offered either an unsupported or implausible explanation for its decision. Absent such evidence, the court is unpersuaded by Plaintiffs' argument that BLM's 20-years withdrawal decision was arbitrary and capricious.

The court is also unpersuaded by Plaintiffs' argument that the BLM violated the Establishment Clause when it withdrew the entire federal locatable mineral estate in the Hills from mineral entry and location for 20 years. The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. Under the three-pronged test established in Lemon v. Kurtzman, 403 U.S. 602, 612, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), government action violates the Establishment Clause if (1) it has no secular purpose; (2) its principal or primary effect is to advance religion; and (3) it fosters an excessive governmental entanglement with

religion. Plaintiffs have fallen far short of demonstrating that BLM's withdrawal action fails the Lemon test. Indeed, the record evidence clearly reveals that (1) BLM's withdrawal action has several secular purposes; (2) the principal or primary effect of the withdrawal is not to advance religion; and (3) the withdrawal in no way fosters an excessive governmental entanglement with religion. Plaintiffs' arguments to the contrary border on the frivolous.

C. THE 1995 SEGREGATION

Plaintiffs contend that the IBLA's decision--affirming BLM's decision to declare the 1995 mining claims of MRJV and the Woodses null and void *ab initio*--was unlawful and must be set aside. According to Plaintiffs, the 1995 Segregation was invalid under FLPMA and its implementing regulations, giving BLM no basis for holding the 1995 mining claims of MRJV and the Woodses null and void.

The IBLA has *de novo* review authority over BLM decisions. IMC Kalium Carlsbad, Inc. v. Bd. of Land Appeals, 206 F.3d 1003, 1009 (10th Cir. 2000); see also Nat'l Wildlife Fed'n, 145 I.B.L.A. 348, 362 (1998) (stating that "when a timely appeal subjects a BLM decision to this Board's jurisdiction, our review authority is de novo in scope because it is our delegated responsibility to decide for the Department 'as fully and finally as might the Secretary' appeals regarding use and disposition of the public lands and their resources") (quoting 43 C.F.R. § 4.1). Because the IBLA--not BLM--issues DOI's final and binding decisions as to the use and disposition of the public lands and their resources, this court applies the deferential standard of review to the decisions of the IBLA, not of BLM. Pennaco Energy, Inc. v. U.S. Dep't of Interior, 377 F.3d 1147,

1156 n. 5 (10th Cir. 2004); IMC Kalium Carlsbad, 206 F.3d at 1009. The court *examines* BLM's decision, but it is only the IBLA's decision that is subject to reversal if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

In its appeal to the IBLA, Plaintiffs argued that BLM's second withdrawal petition constituted an unlawful attempt to extend the 1993 Segregation beyond the two-year time limit allowed by statute and, thus, violated the statutory procedures established by FLPMA. While conceding that the stated purposes of the two withdrawal petitions were different, Plaintiffs argued that (1) the objective behind the two segregation periods was identical despite different stated purposes; (2) BLM had no authority under FLPMA to seek withdrawal "in aid of legislation," which was the stated purpose of the second segregation period; and (3) BLM violated FLPMA's notice requirements when it filed its withdrawal application after notice was filed in the *Federal Register* that BLM's petition to file an application for withdrawal had been approved by the Secretary.

The IBLA rejected, without any discussion, Plaintiffs' argument that BLM violated FLPMA's notice requirements, and Plaintiffs have not renewed that argument here. The IBLA also rejected, with very little discussion, Plaintiffs' argument that BLM had no authority to seek a temporary withdrawal "in aid of legislation." Referring in a footnote to a memorandum written by DOI's Associate Solicitor, the IBLA seemed to take it as a given that "in aid of legislation" is an appropriate purpose for a proposed withdrawal under FLPMA. The Associate Solicitor explained in the memorandum noted by the IBLA:

> Temporary (i.e., protective) withdrawals that are made administratively to preserve public lands in federal ownership while withdrawal legislation is pending before the Congress are said to be "withdrawals in aid of legislation." Temporary withdrawals serving this purpose are well established in the law....
>
> In FLPMA, Congress gave to the Secretary of the Interior the authority to make temporary withdrawals in aid of legislation. As to a tract of less than 5,000 acres, the Secretary can make a withdrawal "for a period of not more than five years to preserve such tract for a specific use then under consideration by the Congress." 43 U.S.C. § 1714(d)(3). The statute does not contain a similar provision relative to tracts of 5,000 or more acres, but there is nothing in the statute to prevent the Secretary from exercising his general withdrawal authority under 43 U.S.C. § 1714(a) to provide comparable, if not broader, protection for the larger tracts.

A.R. III.A.17, Ex. D at 7 (citations omitted).

According to BLM, DOI has interpreted FLPMA as permitting the Secretary to exercise her authority to make temporary withdrawals in aid of legislation for land parcels in excess of 5,000 acres. The IBLA has endorsed that interpretation. Because Congress was silent with respect to this specific issue, this court must accept the agency's interpretation if that interpretation is based on a permissible construction of the statute. Chevron U.S.A., Inc. v. Nat'l Resources Defense Council, Inc., 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Because this court concludes that BLM's interpretation *is* a permissible construction of FLPMA, the court finds no basis for concluding that the IBLA's rejection of Plaintiffs' "in aid of legislation" argument was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

The IBLA found it unnecessary to address the question as to whether, at the end

of a two-year segregation period, the Secretary is authorized to renew that segregation period by publishing a new notice of a proposed withdrawal. The IBLA said it was unnecessary to address that question because the Secretary in this case did not attempt to merely renew, in 1995, the segregation period begun in 1993, that--instead--she sought a segregation period to begin in 1995 for reasons that were not at issue in 1993. Based on the differences in the stated reasons for the two segregation periods, the IBLA determined that the second segregation period was valid. In the words of the IBLA:

> The statute and regulations do not prohibit proposing a new withdrawal covering substantially the same lands, but evidencing a different stated purpose than an earlier proposal. In this case, BLM published the August 3, 1993, proposed withdrawal to protect the unique resources within the Sweet Grass Hills ACEC. Two years later the Assistant Secretary recommended the July 28, 1995, withdrawal proposal that, among other things, was in aid of recently introduced Congressional legislation designed to protect the same resources.
>
> The August 3, 1993 proposed withdrawal...envisioned a 20-year Secretarial withdrawal pursuant to 43 U.S.C. § 1714(c) (1994). The July 28, 1995, 2-year proposed withdrawal was intended to preserve the status quo pending congressional action on proposed legislation. Although Mount Royal and the Woodses discount these differences, we find them sufficient to justify giving the July 28, 1995, notice of proposed withdrawal segregative effect pursuant to 43 U.S.C. § 1714(b)(1).

Doc. 38, Ex. 9 at 5. Because Plaintiffs located their 1995 claims on lands that were--at the time of location--properly segregated from entry and location under the mining laws, the IBLA concluded that BLM "properly declared those claims null and void ab initio."

Id. Again, this court finds no basis for concluding that the IBLA's decision in this regard was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Plaintiffs make an additional argument before this court that they did not make to the IBLA: namely, they contend that BLM is prohibited from petitioning for a withdrawal when such withdrawal does not conform to the approved land use plan. In support of their contention, Plaintiffs cite 43 U.S.C. § 1732(a) (providing that "[t]he Secretary shall manage the public lands...in accordance with the land use plans developed by him under section 1712 of this title") and 43 C.F.R. § 1610.5-3(a) (providing that "[a]ll future resource management authorizations and actions, as well as budget or other action proposals to higher levels in the Bureau of Land Management and Department...shall conform to the approved plan"). Relying on these provisions, and noting the parties' agreement that BLM's 1995 petition to withdraw the entire federal locatable mineral estate in the Hills from mineral entry and location did not conform to the West HiLine RMP, which--at the time--provided that the such mineral estate was open to mineral entry and location, Plaintiffs argue that BLM was precluded from filing--and the Secretary from approving--an application for withdrawal of lands that was inconsistent with the land use plan then in effect.

As a general rule, when reviewing agency decisions, courts will not consider questions that were neither presented to nor passed on by the agency. See Hinson v. National Transp. Safety Bd., 57 F.3d 1144, 1149 (D.C. Cir. 1995) (explaining that it is an established principle of administrative law that "in most circumstances a reviewing court

should not adjudicate issues not raised in the administrative proceeding below, so that the agency has an opportunity to consider and resolve the objections prior to judicial review, and the reviewing court has the benefit of a full record"); Salt Lake Cmty. Action Program v. Shalala, 11 F.3d 1084, 1088 (D.C. Cir. 1993) (stating that "[w]e start from the well-settled premise that objections to agency proceedings must be presented to the agency 'in order to raise issues reviewable by the courts' "). The Supreme Court recently confirmed that a requirement of "administrative issue exhaustion" is the "general rule." Sims v. Apfel, 530 U.S. 103, 109, 120 S. Ct. 2080, 147 L. Ed. 2d 80 (2000).

Here, Plaintiffs, through counsel, pursued an administrative appeal to the IBLA in which they were given every opportunity to present all relevant arguments in support of their position. Although they filed comprehensive briefs with the IBLA, they failed to argue that BLM was prohibited from petitioning to file an application for withdrawal when the proposed withdrawal did not conform to the approved land use plan. Plaintiffs thus failed to give the IBLA an opportunity to consider and resolve their argument before they sought judicial review, depriving this court--in turn--of the benefit of the IBLA's analysis on an important legal issue raised here. The IBLA, moreover, can hardly be said to have abused its discretion in failing to consider a contention that Plaintiffs did not argue before it.

Inasmuch as Plaintiffs failed to raise their land use plan argument before the IBLA, and inasmuch as this court has not found the IBLA's decision to be otherwise arbitrary, capricious, an abuse of discretion, or not in accordance with the law, the court

finds no basis for overturning the IBLA's decision regarding Plaintiffs' 1995 mining claims.

IV. CONCLUSION

Having found that Defendants are entitled to summary judgment as a matter of law, it is ORDERED:

1. Defendants' motion for summary judgment (doc. 41) is GRANTED.

2. Plaintiffs' motion for summary judgment (doc. 38) is DENIED.

3. The clerk shall enter summary judgment in favor of Defendants and against Plaintiffs.

4. The Clerk shall tax costs against Plaintiffs.

DONE AND ORDERED this 26th day of August, 2005.

/s William Stafford
WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
(Sitting by Designation)

Consolidated Case Nos. 14-17350, 14-17351, 14-17352 & 14-17354

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL MINING ASSOCIATION,

Plaintiff/Appellant,

v.

S.M.R. JEWELL, U.S. Secretary of the Interior, et al.,

Defendants/Appellees,

GRAND CANYON TRUST, et al.,

Intervenors-Defendants/Appellees.

On Appeal from the United States District Court for the District of Arizona,
the Honorable David G. Campbell, Presiding

SUPPLEMENTAL EXCERPTS OF RECORD OF THE PAIUTE INDIAN TRIBE OF UTAH, HUALAPAI TRIBE OF THE HUALAPAI RESERVATION, KAIBAB BAND OF PAIUTE INDIANS, SAN JUAN SOUTHERN PAIUTE TRIBE, NORTHWESTERN BAND OF THE SHOSHONE NATION, MORNING STAR INSTITUTE, AND THE NATIONAL CONGRESS OF AMERICAN INDIANS AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES

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Index to Amici's Supplemental Excerpts of Record

The public was afforded several methods for providing comments during the scoping period:

- Comments could be recorded on comment forms at the scoping meetings. Comment forms were provided to all meeting attendees and were also available throughout the meeting room, where attendees could write and submit comments during the meeting.
- Emailed comments could be sent to a dedicated email address: azasminerals@blm.gov.
- Individual letters and comment forms could be mailed via U.S. Postal Service to Bureau of Land Management, Mineral Withdrawal EIS, 345 East Riverside Drive, St. George, UT 84790.

During the scoping process, a number of issues were identified by the public, by BLM, and by cooperating agency managers and resource specialists. The Resource Advisory Council provided recommendations on issues and alternatives to consider.

What Is an Issue?

Issues are usually expressed in terms of actual or perceived effects, risks, or hazards that a particular land or resource use may have on other lands or resources that are used or valued for other purposes.

One purpose of scoping is to provide an opportunity for members of the public to learn about the proposed withdrawal and to share any concerns or comments they may have. Input from the scoping process is then used to identify issues and concerns to be considered in the EIS. In addition, the scoping process helps identify potential alternatives to the Proposed Action as well as issues that are not considered significant and that can therefore be eliminated from detailed analysis in the EIS. The list of stakeholders and other interested parties is also updated and generally expanded during the scoping process.

The BLM received a total of 83,525 individual comment submittals during the public scoping period from 90 countries. Approximately 97% of these submittals consisted of 15 different form letters; other submittals included emails, BLM-furnished comment forms, and letters and faxes. Comments obtained during the scoping period were used to define the relevant (i.e., significant) issues that would be addressed in the EIS, as well as to assist in development of the alternatives. Scoping comments were analyzed and placed in one of two categories: 1) issues identified for analysis in the EIS (see Section 1.5.2); and 2) issues eliminated from detailed analysis because they are beyond the scope of the EIS (see Section 1.5.3).

1.5.2 Issues for Analysis

Substantive issues and concerns expressed during the agency and public scoping period were grouped by topic in the following categories:

- Air quality/climate
- American Indian resources
- Cultural resources
- Wilderness
- Mineral resources
- Public health and safety
- Recreation
- Social conditions
- Economic conditions
- Soil resources
- Soundscapes
- Special status species
- Vegetation resources
- Visual resources
- Water resources
- Fish and wildlife resources

Issue statements were then developed that describe the relevant issues identified during scoping to be analyzed in the EIS. The issues are described below in Table 1.5-1 and follow the general organization of EIS Chapters 3 and 4. Issues include those raised by agencies, the general public, interest groups and

businesses, and the Resource Advisory Council. The issues represent topics for analysis, not conclusions regarding environmental effects.

Table 1.5-1. Description of Relevant Issues for Detailed Analysis

Resource Category/ Issue	Description of Relevant Issue
Air Quality and Climate	
Release of particulates	The release of particulates (dust) from exploration drilling operations, mining, and ore hauling traffic and other vehicles on unpaved roads could have an effect on the regional air quality. This could occur in combination with pre-existing emissions from coal plants, cities, traffic, and other sources of regional air pollution to create a cumulative regional effect on air quality.
Increase in regional haze	Increase in regional haze emissions from all exploration and development activity and equipment could contribute to the regional haze affecting air quality in the study area, as well as affect overall scenic quality.
Geology and Mineral Resources	
Change in underground geological conditions	Mining of uranium deposits would alter conditions underground, which could allow uranium and other minerals to be mobilized, entering the groundwater system. It has also been suggested that mining uranium deposits could remove a potential source of long-term contamination.
Availability of mineral resources	Providing a domestic source of mineral resources is one of the legitimate uses of public lands. Restrictions or closures individually and cumulatively decrease this ability, and substantial energy potential would be unavailable if the proposed withdrawal is put into effect.
Depletion of uranium resources	Mining these uranium deposits in the near future will deplete domestic resources that may be needed later for energy production or national security purposes.
Water Resources	
Dewatering of shallow perched aquifers	Mining of some uranium deposits would penetrate near-surface aquifers and could dewater them. The resulting water loss could affect nearby springs or shallow water developments.
Surface runoff from active or reclaimed mines	Surface runoff from active or reclaimed mine sites could contain elevated uranium and other metals, which would affect downstream water quality.
Contamination of deep regional aquifers by metals leached from mined ore deposits	Mining of uranium ore deposits could change the flow of groundwater and increase the leaching of metals into the deep groundwater aquifers (e.g., Redwall Limestone). This leaching could occur both during mining and after mine closure and could affect downgradient water quality. There are scientific uncertainties associated with understanding the hydrogeology and connections between groundwater and surface water systems, as well as how potential contamination in those systems would travel. The potential to contaminate water in the Grand Canyon region, including seeps and springs, thereby impacting water quality and biotic communities at discharge points, is an issue.
Contamination or loss of the Tusayan municipal water supply	The potential for the Tusayan municipal water supply to be affected by nearby uranium exploration or development activity is an issue.
Contamination of municipal water supplies derived from the Colorado River	The potential for elevated uranium and other metals, in either surface water or groundwater, to enter the Colorado River and contaminate the major downstream municipalities' primary source of drinking water in several western states is an issue.
Soil Resources	
Disturbance of soil resources	Soil resources in the area are valuable and could be difficult to re-establish once disturbed by exploration and development.
Loss of soil productivity	Erosion on disturbed or reclaimed lands could result in long-term loss of soil productivity, creating potential short-term, long-term, and cumulative environmental impacts on soils and overall watershed function.

Table 1.5-1. Description of Relevant Issues for Detailed Analysis (Continued)

Resource Category/ Issue	Description of Relevant Issue
Vegetation Resources	
Disturbance of vegetation	Vegetation in the area could be difficult to re-establish once disturbed by exploration and development. Riparian vegetation could be affected by changes in groundwater conditions.
Vegetation productivity	Erosion on disturbed or reclaimed lands could result in long-term loss of soil cover and vegetation productivity.
Special status species (Vegetation)	The potential short-term, long-term, and cumulative environmental impacts of uranium exploration and development on threatened, endangered, proposed, candidate, and sensitive species and their critical habitat are an issue. For vegetation species, these are usually direct impacts tied to surface disturbance; for species that rely on groundwater in the area, springs and seeps are significant.
Fish and Wildlife Resources	
Wildlife habitat	Issues associated with wildlife habitat include fragmentation of habitat by construction of new roads and transportation of uranium ore, noise from exploration or development activities that disrupts wildlife, wildlife disturbed by visual instructions such as moving vehicles or equipment, and loss of habitat from surface disturbance or introduction of invasive species. Uranium mining could affect groundwater resources through groundwater contamination or depletion at springs, caves, seeps, and creeks; this in turn could affect species associated with these areas. Aboveground deposits on soils, plants, and surface water can expose a variety of biota to chemical and radiation exposure.
Wildlife populations	The potential loss of critical wildlife winter range and the potential for activity to occur in critical calving or fawning areas or to disrupt nesting habitat, etc., are an issue.
Wildlife mortality	The increase in vehicle traffic associated with increased uranium exploration and development or increased recreational use on new roads could cause increased vehicle/wildlife accidents and associated wildlife mortality.
Special status species (wildlife)	The potential short-term, long-term, and cumulative environmental impacts of uranium exploration and development on threatened, endangered, proposed, candidate, and sensitive species and their critical habitat are an issue. For wildlife, these issues are usually indirect impacts associated with disturbance of habitat, loss of habitat, and contamination of habitat (including aquatic habitat), such as effects on area springs and seeps, increased noise, and increased traffic.
Visual Resources	
Changes in regional visual quality	Exploration and development activity would release pollutants, which could increase regional haze (see Air Quality issue) and result in changes in visibility that could affect the scenic quality of the region.
Visual intrusion to Park visitors	Exploration and development activity may be visible to Park visitors, either from key observation points within the Park or from areas in the backcountry of the Park. This could detract from visitors' experiences.
Visual intrusion to public outside the Park	Exploration and development activity may be visible to the public, either from key observation points or from areas in the backcountry. This could detract from visitors' experiences. The potential short-term, long-term, and cumulative impacts from mineral exploration and development activities on the area's visual quality and recreation use patterns are an issue. There could be a conflict between mineral exploration and development activities and Visual Resource Management classes.
Soundscape	
Noise disruption from exploration or development activity	Noise from exploration and development activity could disrupt the solitude of visitors to the area, including visitors to the Park. The areas subject to noise effects and the intensity of sound from these activities need to be evaluated.
Cultural Resources	
Disturbance of historic and prehistoric sites	Surface disturbance associated with exploration or development activity could expose and cause damage to archaeological sites. Visual and atmospheric changes could adversely affect the integrity of site settings and cultural landscapes. It may not be possible to mitigate all adverse effects through scientific data recovery.
Effect on TCPs	Surface disturbance associated with exploration or development activity could disrupt the setting or integrity of TCPs such as the Red Butte area on the Tusayan Ranger District or other TCPs located in or near the parcels.

Table 1.5-1. Description of Relevant Issues for Detailed Analysis (Continued)

Resource Category/ Issue	Description of Relevant Issue
American Indian Resources	
Disturbance of traditional cultural practices and uses	Mineral exploration and development activity could affect the integrity of religiously and culturally significant sites and landscapes and could disrupt traditional practices and uses. Such practices include ceremonial activities, gathering of plants or other natural resources, and use of springs and trails. Tribes have expressed concerns about potential disturbance and contamination of culturally important resources.
Protection of tribal trust resources or assets	Tribal trust resources and assets are property, or property rights or interests, actually owned by a tribe. These may include property or rights located on- or off-reservation. As a trustee for the tribes, the federal government has the responsibility to preserve and protect tribal trust resources and assets from loss or degradation. One trust resource issue is the potential contamination of Havasupai Springs and the economic impact of reduced tourism for the Havasupai Tribe if the springs were to be contaminated.
Wilderness	
Wilderness Areas	Designated wilderness is already withdrawn. However, mining adjacent to Wilderness Areas could affect the wilderness characteristics of these lands, including lands managed as wilderness in Grand Canyon National Park.
Recreation	
Roads and access	Development of roads for mineral exploration and development could both facilitate access for some recreation users and provide too much public access in areas currently used for more primitive recreation. Uranium exploration and development in the area may create conflicts between tourism and mining-associated development and traffic.
Primitive recreation opportunity	Changes in amount of mineral exploration and development activity would change visual and auditory conditions, which in turn could affect primitive recreation opportunities in the area. The potential for water contamination and impacts to area seeps and springs, as well as recreation users, including river runners, backpackers, and hikers in the Park, is an issue.
Social Conditions	
Population trends	There could be changes in population levels associated with decreased mineral exploration and development activity under a withdrawal. Likewise, the continued mineral development in the absence of a withdrawal could involve local population increases, as additional workers are required. Increases in population increase the demands on local infrastructure such as schools, roads, and emergency services. Decreases in populations, while decreasing the demand for such services, can also reduce revenue available to support services.
Road condition, maintenance, and safety	The total number of ore truck trips that would be required for mineral exploration and development activity would affect the region's resources. The use of road systems to service mine operations requires increased maintenance of the transportation infrastructure. This includes use for ore transport and employee access. Mineral exploration and development activity could provide funding from property and use taxes for maintenance needs. Decreases in activity mean less maintenance along with less potential revenue. The increased traffic volumes, roadway use conflicts between haul trucks, local residents, and visitors to the region, and highway safety concerns are an issue.
Public health effects	The transportation of uranium ore between mines and the mill raises questions about potential public exposure to uranium-bearing dust or ore in the event of an accident and release during ore transport. There are concerns about the potential short-term, long-term, and cumulative environmental impacts of uranium exploration and development activity, including toxic waste hazards, on human health. Potential human health impacts that could accompany mining and any resulting accumulation of uranium in water, soils, and airborne particulate matter in the Grand Canyon region and in the Colorado River and its tributaries are an issue.
Environmental justice	The 1994 EO (12898) on environmental justice requires federal agencies to address environmental justice when implementing their respective programs. Environmental justice is the equitable distribution of project benefits and risks with respect to low-income populations and minority populations. In the case of uranium mining, it is the distribution of the project benefits, primarily economic, compared with the distribution of the project impacts such as pollution or risk of pollution, that is the issue.

Table 1.5-1. Description of Relevant Issues for Detailed Analysis (Continued)

Resource Category/ Issue	Description of Relevant Issue
Economic Conditions	
Energy resources available	The withdrawal could lead to increased reliance on energy sources other than nuclear, such as additional mining elsewhere, imports of uranium from foreign sources, or production from equivalent amounts of other sources like coal, petroleum, natural gas, wind power, or solar.
Effects on economic activity from tourism	Tourism represents a large component of the economic activity for many communities in the region and for the state. The manner and degree to which continued mining could change the nature and quality of the natural resources that attract tourism are an issue. Specifically, the potential for uranium exploration, development, and haulage to disrupt visitor experiences could impact the regional tourist economy. The regional tourism economy is connected to the Grand Canyon in terms of jobs, annual revenues, and tax revenues across different tourism sectors.
Economic activity from mineral development	Mineral resources and the benefits associated with mineral extraction would be foregone or potentially foregone should the proposed withdrawal go into effect. Mineral exploration and development activity represents a large component of the economic activity for many communities in the region. The manner and degree of the proposed withdrawal could directly affect the economic activity in the area, particularly in smaller communities.

1.5.3 Issues Eliminated from Detailed Analysis

Issues beyond the scope of the EIS include issues not directly related to decisions to be made regarding the proposed withdrawal and issues that are not relevant to the purpose of and need for action. Also, issues more properly considered at a different level of analysis or by a different entity have been eliminated from detailed analysis.

The following issues have been eliminated from detailed analysis because they are beyond the scope of the EIS:

- Revision of the Mining Law.
  - Revision of the Mining Law of 1872 is out of the scope of the decision to be made in this EIS; any changes to the law would require Congressional action.
- The assertion that mining companies have been allowed to exploit public lands without giving the American people a fair return for their use (i.e., charging a royalty on mine production).
  - Charging or changing royalties on mineral production is out of the scope of the decision to be made in this EIS; any change to royalties and taxes would require Congressional action.
- Illegal activities such as poaching, vandalism, and unauthorized collection of cultural artifacts, or unauthorized OHV travel; these are law enforcement issues.
  - Illegal activities, as mentioned, are law enforcement issues and not relevant to the decision to be made in this EIS. This EIS studies the impact of withdrawing lands from the Mining Law and illegal activities that may occur within the proposed withdrawal area are not considered as an impact in that action.
- Acid deposition or acid rain from power generation and its effects on flora or fauna.
  - This EIS studies the impacts of withdrawing lands from the Mining Law. Acid deposition of acid rain from power generation is unrelated to the impacts of withdrawal and the decision to be made.

River tribes—traded with the Cohonina, Prescott, and Cerbat peoples in the region during the Formative period.

The Kayenta tradition developed east of the Cohonina, in the region north and east of the Little Colorado River, west of the Chuska Mountains on the Arizona–New Mexico border, and south of the San Juan River. The Kayenta tradition developed out of local Archaic culture and was one of the direct antecedents of modern Hopi culture. Maize was being grown in the Kayenta region by 1000 B.C. (Gilpin 1994; Smiley 1994). The Kayenta people made Tusayan Gray Ware, Tusayan White Ware, and Tsegi Orange Ware (Colton and Hargrave 1937; Hays-Gilpin and Van Hartesveldt 1998; Mills et al. 1993).

The Virgin Branch tradition centered on the confluence of the Virgin and Colorado rivers and extending east across much of the Arizona Strip (the portion of Arizona north of the Grand Canyon). The Virgin tradition probably developed out of local Archaic culture beginning as early as 300 B.C. and continued until ca. A.D. 1200 (Forest Service 1996:14). Much of their gray ware and white ware pottery was similar to Puebloan pottery of the Kayenta tradition or was imported from the Kayenta area (to the east and north of the confluence of the Little Colorado and Colorado rivers). The Virgin Branch made Moapa Gray Ware and Moapa White Ware using olivine temper from the Mount Trumbull area (Bungart 1994a:102; Lyneis 1992, 1995; Samples 1992; Seymour 1997, 2000, 2001, 2004).

As mentioned above in the discussion of Bighorn Cave, the Lower Colorado River tribes practiced farming on the floodplain of the Lower Colorado River, living in temporary villages on the floodplain during the winter, moving to the highlands when the river flooded in the spring, planting crops in the river bottom after the spring floods, living in the uplands while the crops matured, and returning to the river to harvest crops and set up their winter residences. The Lower Colorado River tribes produced Lower Colorado River Buff Ware pottery, which comprises five types (Seymour 1997; Waters 1982).

I.4 PROTOHISTORIC AND HISTORIC AMERICAN INDIANS

I.4.1 Hualapai, Havasupai, and Yavapai

The period from A.D. 1300 to the permanent colonization of the area by Euro-Americans (ca. A.D. 1850) is designated the Protohistoric period. Pai (Hualapai and Havasupai) and Paiute use of the Grand Canyon region, which began after ca. A.D. 1300 (Euler 1958:65–66), was a hunting-and-gathering adaptation supplemented by agriculture (Ahlstrom et al. 1993:82). Although some locations were occupied year after year, dwellings were impermanent wickiups that were rebuilt each year. As mentioned above, the Pai manufactured Tizon Brown Ware; they also made a distinctive triangular projectile point with two notches on each side (Bungart 1994b:64, Figure 4r–t). Euler (1958) excavated 10 sites ranging in date from A.D. 500 to the early twentieth century. Euler's archaeological excavations traced the transition from to prehistory to history among the Hualapai (Euler 1958).

At Bighorn Cave (Geib and Keller 2002), the Late Prehistoric–Protohistoric period (cal. A.D. 1300–1700) was represented by one pit and one roasting pit, along with flaked stone, pottery, and perishables. Among the flaked stone was a Desert Side-notched projectile point. The 14 sherds of Tizon Brown Ware included seven sherds of Cerbat Brown and seven sherds of Aquarius Brown. A Jeddito Black-on-yellow sherd, collected by looters, dates to this occupation and demonstrates trade relations with the Hopi pueblos more than 200 miles to the east. A crude split-twig figurine was also directly dated to this time and was interpreted as an imitation of Archaic figurines.

The Hualapai, Havasupai, and Yavapai languages are a group of related Upland Yuman languages (Kendall 1983). The Hualapai lived in an area bounded by the Colorado River on the north, the Bill

Williams and Santa Maria rivers on the south, the Coconino Plateau on the east, and the Black Mountains on the west (McGuire 1983). The Hualapai were divided into 13 to 14 bands, which were then divided into three larger groups (Dobyns and Euler 1976:16–18). They mixed gardening with hunting and gathered wild plants. Throughout the year, they exploited various resources as they became available. For example, agave would be available in the late spring; in the summer, saguaro fruit would be harvested from Big Sandy Valley and grasses from upland valleys; and in the fall, pinyon nuts would be gathered from the Hualapai Mountains and mesquite from the various canyons (Kroeber 1935; Martin 1985). In addition, during the summer they lived in villages along major streams (such as Matawidita Canyon and Big Sandy Valley) and raised corn, beans, squash, and pumpkins in irrigated fields (Dobyns 1956, 1974a; Euler 1958; Kroeber 1935; McGregor 1935; Spier 1928). The amount of farming versus hunting and gathering may not have been consistent across all the Hualapai and would have varied, depending on how much arable land was within the territories of each group of Hualapai (Martin 1985).

The Hualapai were driven from much of their homeland as a result of conflict with the U.S. Army during 1866–1869, after which they were placed on various reservations, culminating in their current reservation on the south side of the Grand Canyon, which was established in 1883 (McGuire 1983:27). One small (ca. 60-acre) outlying reservation is located on the upper Big Sandy River, just below the confluence of Knight and Trout creeks.

The Hualapai refer to the springs at Grand Canyon West Ranch as *Tanyika Ha'a* (Grass Springs). They held a Ghost Dance at Tanyika Ha'a in 1889 (Dobyns and Euler 1967; Simonis 1998, 2001; Stoffle et al. 2000). Ghost Dances were also held on the plateau near South Parcel by the Hualapai and the Havasupai. The Ghost Dance was a revitalization movement that began among the Paiute and swept through the American Indian tribal communities of the western United States during the late nineteenth century (recently, the movement has been experiencing a rejuvenation, as well). *Wevoka* (the Prophet), who founded the religion, was present at the 1889 Ghost Dance at Tanyika Ha'a.

During the Protohistoric period, the Havasupai's traditional territory stretched from the Grand Canyon south to Bill Williams Mountain and from the Aubrey Cliffs to east of the Kaibab National Forest (Schwartz 1983). Like the Hualapai, there are several theories of the origins of the Havasupai. Schwartz (1955, 1956) posited that they were the descendents of the Formative period Cohonina. Others theorize that both the Hualapai and the Havasupai are the descendents of the Formative Period Cerbat peoples (Euler 1958). During the Protohistoric period, the Havasupai and the Hualapai were then a single tribe; the Havasupai were a band of the larger Pai group that later split off as a result of historical circumstances (Dobyns and Euler 1970; Euler 1958; Kroeber 1935; Stewart 1966). Like the Hualapai, they relied on farming within canyons as well as hunting and gathering on the plateau (Martin 1985; Schwartz 1983).

Early Spanish explorers and later European explorers had some contact with the Havasupai (Dobyns and Euler 1970; Schwartz 1983); however, was not until the nineteenth century that they began to feel real pressure from settlers and miners. In the late nineteenth century, ranchers began to demand more land for cattle grazing in the area used by the Havasupai. In addition, the copper deposits in Havasu Canyon were attracting the attention of miners (Schwartz 1983). Under pressure from the ranchers and miners, the U.S. government established a reservation within Havasu Canyon in 1880; a school and a Bureau of Indian Affairs agency office were established in 1895. The government encouraged the Havasupai to remain in the Canyon year-round and abandon their use of the plateau (Hirst 2006; Schwartz 1983). Although the Havasupai had all but abandoned their traditional hunting and gathering territory by the 1940s, in the 1970s they fought to re-establish territory outside Havasu Canyon. The Havasupai fought for their right to include plateau lands in their reservation and won an expansion of their reservation in 1975 (Hirst 2006).

The Yavapai were one of the primary users of northwest-central Arizona during what is referred to as the Protohistoric period (A.D. 1500–1820). They relied predominantly on hunting and gathering but also practiced some floodwater farming (Braatz 2003; Gilpin and Phillips 1999:66). By the end of the

sixteenth century, the Spaniards had made a couple of brief forays into Yavapai territory (Braatz 2003:34–35). By the eighteenth century, the Western Apache had formed a cooperative relationship with the Yavapai and were residing in the Prescott area (Gilpin and Phillips 1999). Fur trappers exploring the Verde Valley in the early 1800s reported that both groups were in the valley (Motsinger et al. 2000). The Apache and Yavapai traded with one another, often collaborating in raids against common enemies, particularly the Pima and Maricopa. Intermarriage sometimes occurred between Apache and Yavapai. When confined to the White Mountain Reservation, intermarriage of these two groups was common (Braatz 2003). The genetic studies mentioned above support these historic accounts about intermarriage between the Yavapai and Apache (Malhi et al. 2003).

By the nineteenth century, the Yavapai themselves comprised four subgroups: Tolkepayas, Yavapés, Wipukepas, and Kwevképayas. The Yavapés occupied the Prescott area. Each subgroup was composed of a number of small bands that varied in size throughout the year. Size was dependent on the availability of resources, such as water, plants, and animals. Although every band made its own alliances, the Tolkepayas, Yavapés, and Kwevképayas all shared a common enemy in the Pima and Maricopa during this century (Braatz 2003). However, years earlier, they had had a civil relationship with these two groups. The Kwevképayas and the Apache were strong allies. The northern Tolkepaya, northern Yavapés, and Wipukepas all shared a common enemy in the Havasupai. Yavapai consultants reported that, not unlike what had happened with the Pima/Maricopa relationship, the Havasupai, Hualapai, and Yavapai had been close friends until an argument over a child's game created enmity between the Yavapai and the Havasupai and Hualapai (Braatz 2003). As mentioned above, the Tolkepaya and the Quechans in the Colorado River valley enjoyed a relationship of mutual benefit.

I.4.2 Southern Paiute

During the seventeenth century, Spain colonized most of western North America, expanding as far north as present-day California, Arizona, New Mexico, and Texas. Eager to exploit the resources of the new territory, trappers, miners, and missionaries entered these lands and met the inhabitants. Of the many who came to the new world, very few explored the area known as the Arizona Strip, preferring the moderate climate of Santa Fe or the ocean access afforded by California. Those who did pass through the Arizona Strip encountered a people living a subsistence lifestyle in bands of 10 to 50 people (Knack 2001:20).

At contact, the Southern Paiute existed as a dispersed band of kinship-based groups moving seasonally along the landscape. While they subsisted mainly from hunting and gathering, there is ethnographic evidence of small-scale agriculture of squash and corn along riverbanks (Knack 2001:15). Groups would maintain resource areas and use what was locally available to them. There is no ethnographic or written evidence of conflict or warfare among the Paiute or their neighbors prior to contact (Knack 2001:15). Consultants assert that the Paiute would share resources in times of environmental stress and would join other bands until the conditions improved (Knack 2001:15).

The arrival of Europeans had many negative effects for the Kaibab Paiute. Most evident is the loss of life as a result of diseases brought to the New World by the Spanish. The lack of immunity and effective medicines left the Paiute defenseless against the diseases that decimated their population (Fairley 1989b:160). The Spanish had further impacts on the culture through the encouragement of the slave trade, which put the Paiute on the defensive against the neighboring Ute tribe and the more distant Navajo. Normally a peaceful people, the Paiute were not able to adequately defend themselves against the raiding parties. The passage of the Spanish Trail through their homeland made the Paiute a convenient target for the caravans of traders traveling between New Mexico and Arizona. The caravans also brought with them large herds of sheep and horses. The intensive use by livestock despoiled the area around major springs. As a result of these impacts, it was observed that by the early 1800s, some traditional resource areas had been abandoned by the Paiute (Fairley 1989b:160).

The end of the Mexican–American war in 1848 brought a flood of new immigrants to the Southwest from the East. Between 1852 and 1864, Mormon settlers moved into the Arizona Strip region and developed mission communities in the Paiute homelands. The Mormons had established settlements at Short Creek, Pipe Springs, Moccasin Creek, and at Beaver Creek Dam by 1866 (Fairley 1989b:165). Initially, the Paiute welcomed the Mormons, as they hoped that the Mormons would provide a buffer between them and the hostile Ute. However, the peaceful coexistence did not last long, as Mormon cattle ranching destroyed Paiute gathering lands, and they were reduced to begging or stealing cattle to survive.

The interactions with the Mormons initiated cultural changes in the Paiute community. Many converted to the religion in order to obtain goods and gain a share of the Mormons' resources. Those who did not convert formed chiefdoms, a new concept for the traditionally loosely banded group, to facilitate negations with the settlers (Stoffle and Evans 1978:18). Almost all Kaibab Paiute people adopted a new material culture that reflected the lifeways of the settlers. Glass, iron, and steel replaced traditional weaponry materials, and guns became commonplace. Pottery and baskets were replaced by iron and brass containers. Breechcloths and apron skirts traditionally worn by the Paiute were replaced by clothing cast off by the Mormons (McKoy 2000:23).

The U.S. government was made aware of the deteriorating conditions in the Arizona Strip by John Wesley Powell, who made contact with the Southern Paiute during his expedition down the Colorado River in 1869 (Fairley 1989b:176). He was distressed by the condition in which he found the Paiute and propositioned the U.S. Special Indian Agent in 1872 for assistance on their behalf. Powell's notes state, "The Kaibabits are camped three miles from me . . . and I find them in a truly suffering condition. They have exchanged their ornaments and clothing for food and do not have enough" (Fairley 1989b:183). The results of investigations on behalf of the U.S. government were to place the Paiute on the Moapa Reservation created in 1873 in Nevada. The Kaibab Paiute refused to go and faced even more dire straits as a result. By 1880, Jacob Hamblin, a Mormon explorer, sent a note to John Wesley Powell regarding the Kaibab Paiute in which he described them as "destitute" and noted how ranching had destroyed the fertile landscape on which they once thrived (Fairley 1989b:184).

The creation of National Parks and Reserves in the Arizona Strip increased the stress on the Paiute by denying them access to traditional hunting and collecting areas (McKoy 2000:66). The area around Buckskin Mountain was declared a National Reserve in 1893 (McKoy 2000:66). Special Agent James A. Brown noted that "formerly the Buckskin Mountain afforded excellent hunting ground, but since that has been made a forest reserve the Indians have been shut off . . . . Deer are very plentiful on the Buckskin Mountain, and before it was made a reserve these Indians obtained most of their living from that source" (Brown [1903], cited in McKoy 2000:66). This occurred again in 1906, when President Roosevelt declared the Grand Canyon a National Reserve.

Conditions for the Kaibab Paiute remained dire until 1907, when they received a 12 × 18–mile tract of land at Moccasin and Pipe springs from the federal government (Fontana 1998:40). Prior to the official decree, the Paiute had received a small parcel of land and some water rights outside the settlement of Moccasin from the local Mormon community. In 1904, when a special agent to the Kaibab from the government visited the area, he found they had irrigation ditches along Moccasin Springs that supported small-scale agriculture and provided them with a meager means of subsistence (McKoy 2000:51).

The reservation lands provided the Paiute with a means of survival, even if it meant the end of traditional lifeways. At the time, there were about 80 Paiutes in the Kanab area who moved onto the reservation. The federal government set up irrigation pipes, provided cattle, and supplied a school building to the new residents. By 1914, Henry W. Dietz, Superintendent of Irrigation, notes that the Paiute were engaging in dry and irrigation ditch agriculture and cultivating corn and alfalfa (McKoy 2000:77). They were also moderately successful in cattle ranching.

As the region developed, the boundaries of the reservation became a topic of contention. Demands for access to resources and land by the settlers often put the Paiute on the losing end of government deals. In 1913, the General Land Office decided to exclude the town of Fredonia from the limits of the reservation at the request of the townspeople. Extracting it from the reservation allowed the people in the town to make claim to the land for themselves (McKoy 2000:76). The creation of public water reserves within ¼ mile of Canaan Reservoir, Two Mile Spring, and Pipe Spring in 1915–1916 further diminished the Kaibab Paiutes' acreage (McKoy 2000:78). In 1917, the Kaibab Paiute were permanently assigned 120,413 acres in Northern Arizona by President Woodrow Wilson.

In 1923, the National Park Service (NPS) created Pipe Spring National Monument. The Director of the NPS, Stephen Mather, wanted a roadway that would connect Zion National Park with Grand Canyon National Park. Mather envisioned tourists using Pipe Spring as a rest stop on their way between the two large parks (McKoy 2000:94). The ownership of the land and water at Pipe Spring was under dispute, as a local man claimed his family had rights prior to the establishment of the Paiute Reservation there. Maher took advantage of the murky legal situation to rush the establishment of the Monument into legislation. He was able to obtain 40 acres for the National Monument with little regard to the Kaibab Paiute, as "the Indians have no special need for the land," according to Commissioner Charles Burke of the Office of Indian Affairs (McKoy 2000:105). In 1924, the sale of land was completed, despite objections by Dr. Edgar Farrow, the government agent to the Kaibab Paiute at that time, who contested the government's right to obtain the land and water rights from the reservation (McKoy 2000:137). Disputes over water rights would continue well into the 1930s, as the Paiute, NPS employees, and cattle ranchers fought for the right to use Pipe Spring.

The enforcement of Paiute water rights to one-third of the Pipe Spring flow made agriculture a difficult endeavor. A drought that lasted through the 1920s and 1930s, coupled with the Great Depression, made life even more difficult for the Paiute. There was no work outside the reservation as there previously had been. While they did own cattle, their success was minimal and often fraught with land and water conflicts with outside cattle ranchers (McKoy 2000:192).

Outside industries offered the Kaibab Paiute a chance to make an income when their land was not producing. Women sold buckskin and baskets to the tourists passing through Pipe Spring National Monument and took jobs working as maids in hotels. When Hollywood needed backdrops for their Western films, the Kaibab rented land to them and worked as extras on the set. Others took jobs working for the Civilian Conservation Corps (CCC).

The trend of leaving the reservation to look for work continued into the World War II (WWII) era, which saw a migration of Paiute to major cities. Few Paiutes enlisted in the military, but many worked in support service jobs. Most would return to the reservation, eventually feeling that their homeland was the Arizona Strip (Knack 2001:243).

Post-WWII, the federal government instituted many policies that profoundly affected American Indians living on reservations. The Indians Claims Commission Act of 1946 allowed tribes to sue for reparations as sovereign entities for loss of land, unfulfilled treaty obligations, and other claims against the federal government. By 1951, five bands of Southern Paiute tribes, including the Kaibab, filed suit against the federal government for loss of traditional land as a result of unlawful seizure and malfeasance (Knack 2001:246). The amalgamated tribes were successful in their lawsuit and received an $8.25-million settlement in 1964 (Knack 2001:248).

The Kaibab Paiute, in order to join in the lawsuit, had to create a leadership position to represent them in legal matters. As a result, in 1951, they created their first tribal council under the provisions of the Wheeler-Howard Act (1934), which is more informally known as the Indian Reorganization Act. The Act encouraged the creation of a constitution that would have to be approved by the federal government.

In 1965, the Secretary of the Interior approved the Kaibab Paiutes' constitution, thereby making them eligible for federal funding and providing the tribe with a structure for self-government.

I.4.3 Navajo

According to archaeologists and historians, the Navajo, or Diné, are latecomers, compared with other groups in the Southwest; however, according to Navajo culture history they have been here since they first emerged into this world. This disparity of opinion has made specifying when the Navajo arrived difficult; the following account discusses the opinion of archaeologists and historians and does not represent the only version of how the Navajo came to the Southwest. Arriving in the Four Corners region sometime between the fourteenth and sixteenth centuries, the Navajo speak an Athapaskan language that is closely related to populations in western Canada (Correll 1976; Haines 2003; Haskell 1987; Jett and Spencer 1981; Reed and Reed 1996). Debate is centered on the time frame and actual route taken, but most consider the evidence to suggest that the migration started as early as A.D. 1000. Archaeological evidence suggests that they arrived as early as A.D. 1500 (Brugge 1983; Wilcox 1981) and were highly mobile hunters and gatherers. With the intrusion into the region by the Spanish in the subsequent two centuries, the Navajo acquired sheep, cattle, and horses. Some postulate that the Navajo adopted farming after the Puebloan revolt (Haines 2003); however, early Spanish accounts describe the Apaches de Nabajó as a semi-nomadic people who practiced limited agriculture (Brugge 1983). Regardless, by the late 1600s, warfare with the Spanish had forced the Puebloan people to seek refuge with the Navajo, creating a blending of cultures (Brugge 1983).

Warfare with the Utes had forced the Navajo to retreat farther into eastern Arizona by the end of the 1700s, and warfare with the Spanish flared up in the late 1700s, when the Navajo forced out Spanish settlers (Brugge 1983). After the Mexican independence in 1821, many Navajo were captured by slave traders as guns became more available to the traders. Conflicts between the New Mexicans and the Navajo increased into the 1830s and 1840s. With the Treaty of Guadalupe Hidalgo in 1848, the United States acquired California and much of what is now known as the Southwest from Mexico at the end of the Mexican-American War. Soon after, U.S. troops entered Navajo territory.

The Navajos had several violent conflicts with U.S. troops in the following years. These conflicts, the lack of protection from slave raiders, and land pressures created distrust between the Navajo and the U.S. government (Roessel 1983). In 1860, the Navajo attacked and almost captured Fort Defiance; this led to a call for action against the Navajo. In 1863, the U.S. military, headed by General James Carleton and Colonel "Kit" Carson, began a campaign to deport the Navajo to Fort Summer in New Mexico. The subsequent "Long Walk" resulted in the death of hundreds of Navajo during this forced march. As many as 8,500 Navajos were held at Fort Sumner until 1868 (Roessel 1983). Once they were released, they returned to the Four Corners area but found it greatly reduced in size. Only about 10% of the traditional use area was available. Through the late 1800 and 1900s the Navajo manage to acquire more of the land, but it was still less than the area they had originally occupied. When the railroad cut through their lands, they built trading posts to capitalize on tourism and the increasing demand for Navajo weaving and silverwork in the late 1800s and early 1900s.

Unlike other Indian tribes across the United States, the Navajo increased their population significantly during this period. To support these many more people, herds of sheep increased in size and numbers, and by the 1930s, erosion problems were severe. In response, the federal government ordered mandatory sheep reductions between 1935 and 1940 (Kelley 1986). The numbers of stock were reduced by one-third. New Deal jobs provided jobs for the livestock-less Navajo.

The Navajo did not officially become U.S. citizens until 1924 and could not be drafted, so they did not fight in great numbers during WWI. During WWII, however, many Navajo signed up to fight for their

country after the attack on Pearl Harbor. The best known Navajo soldiers were the "Code Talkers:" U.S. Marines who used the Navajo language as a basis for sending messages (Oswalt 2006:367).

Wage jobs increased until the late 1940s, and the end of WWII brought on a recession. Federal and mining jobs filled some of the gaps, but because of ever-increasing populations, unemployment has continued to be a problem.

Traditionally, the Navajo maintained at least two seasonally occupied camps. Occupied in either the summer or winter, they were composed of at least one permanent structure and several temporary ones. Families would move between the camps, focusing on agriculture, collecting, and/or herding sheep. Depending on the resource focus, camps would be composed of various structures. According to Cleeland et al. (1992) and Haines (2003), temporary camps were the most common types of sites on the Coconino Plateau.

Prior to the Historic period, the Navajo manufactured basketry and gray to black utility ware ceramics for use cooking, collecting, and storing. These items were no longer in use during the Historic period, when metal and glass containers became available. Following the introduction of sheep in the seventeenth and eighteenth centuries, the Navajo became skilled weavers. Besides the usefulness of having Navajo blankets and rugs around the camp, their talents became highly sought after for the tourist trade. Jewelry manufacture became commonplace during the early twentieth century, and the Navajo became expert silversmiths.

According to Haines (2003), there is some debate about the earliest occupation of the Coconino Plateau. Dendrochronological samples used by the Indian Claims Commission in the 1960s suggest that timbers used in Navajo construction dated to as early as the late 1700s. Euler (1974), however, discounts these early dates, suggesting there was a problem with old wood. He believed that the Navajo first began to appear in small number in the 1860s but were not well established until the 1890s. More recently, other scholars have reviewed the evidence and have come to the conclusion that in fact Navajo settlement was established in the 1700s (Roberts et al. 1995). In any event, some Navajo families made their way onto the plateau in the 1860s as a result of the conflict with the U.S. military and to avoid capture and relocation to Ft. Sumner. By the 1890s, some Navajo had become established along the eastern edge of the Grand Canyon and Coconino Plateau (Euler 1974). Once the Grand Canyon Forest Reserve was established in 1893, the government evicted the Navajo from that area and prohibited sheep grazing in the plateau. As a result of conflicts with Euro-American ranchers over water and lands, the boundary of the reservation was extended twice to alleviate this problem. The first time was in 1900 to the Little Colorado; it was extended again in 1930 to its present boundary along the edges of Grand Canyon National Park and Kaibab National Forest.

Beyond grazing activities, the Navajo seasonally frequented the plateau for pine nut harvests (Cleeland et al. 1992). Early collection of these nuts was probably restricted to consumption by family members. More recently, however, they have been collected for sale to others as a source of income.

I.4.4 Hopi

The area of the villages at Hopi has been continually occupied for at least 1,000 years. Beginning in the late thirteenth and early fourteenth century, people moving into the Pueblo area (including New Mexico) had established several large towns on Antelope Mesa, although it is unclear whether these towns were Hopi (Brew 1979). By the time the Spanish arrived in the sixteenth century, many of these towns had been abandoned and most Hopi settlement could be found on Black Mesa; those pueblos on Antelope Mesa that were not abandoned were Hopi as well. The Hopi were primarily agriculturalist; cultivating corn, beans, and squash on the lands surrounding their mesa. While they were primarily dry farming

maize and beans, they did also practice flood agriculture and irrigation farming (Brew 1979). After the initial sporadic contact of Spanish explorers in the sixteenth century, Spanish missionaries established churches at several pueblo communities in New Mexico and Arizona, including the Hopi pueblo of Awatovi (Brew 1979; Clemmer 1995:29). The missionaries were initially successful at Awatovi; they converted many Hopi after the miraculous healing of a blind boy by a cross. Missions established at Oraibi and Shongopavi were less successful; however, the presence of the Spanish brought new material goods such as axes, saws, cloth, and sheet tin to the Hopi towns (Brew 1979). Most of the Hopi continued to resist conversion to Christianity. This resistance to conversion and Spanish influence in general led them to participate in the Pueblo Revolt of 1680 (Clemmer 1995:30; Rushforth and Upham 1992:104). The Hopi destroyed the churches and killed the five Spanish priests in their villages (Brew 1979). The Hopi remained relatively isolated after the revolt; although there were several attempts to conquer the Hopi, the Spanish never re-established themselves at Hopi (James 1974:59–70).

After Mexican independence, the Navajo increased their raiding activities on the Hopi, taking livestock and selling it to dealers to the east (James 1974:71–72). The Navajo even managed to drive off or kill most of the inhabitants of Oraibi in 1837. Other tribes and Mexicans also conducted raids on the Hopi for food, livestock, and slaves (James 1974:72).

The U.S. took control of the Southwest after the Mexican-American War. After 1850, the Hopi began to feel pressure from the influx of new settlers, primarily in the form of smallpox epidemics that greatly reduced the Hopi population (Dockstader 1979). Navajo raiding on the Hopi and droughts were also having an impact on Hopi life (Clemmer 1995:36). As a result, the Hopi helped the U.S. government as Army volunteers to capture and move the Navajo out of Pueblo territory (James 1974:80–81). In the 1870s, new missionaries from the Moravian, Mormon, and Baptist churches established churches in or near Hopi towns (Bailey 1948:349; Clemmer 1995; Dockstader 1979). Not long after, white settlers began to encroach on Hopi lands. Several towns were established by Mormons, and the Atlantic and Pacific Railroad (A&PRR) was built south of Black Mesa (James 1974:100). It was recommended that a reservation be established to stop the encroachment.

The Hopi reservation was established in 1882 on 2.45 million acres; however, this was done without consulting the Hopi, and little was done to enforce the boundaries once they were established (James 1974:101). The U.S. government increased its presence at Hopi with schools and Bureau of Indian Affairs offices. Factionalism between those opposed to the outside influence and those in favor of it eventually led to a split in the tribe at Oraibi in 1910 (Clemmer 1995:110; Dockstader 1979; Rushforth and Upham 1992:127–129; Titiev 1944:110). During the beginning of the twentieth century, more changes led to the decline in population at some towns and the establishment of new towns. Navajo encroachment on Hopi land was leading to tensions between the Hopi and Navajo. In the 1930s, the Hopi reservation was effectively limited to 750,000 acres surrounding their villages when grazing districts were created out of the Hopi and Navajo reservations (Clemmer 1979, 1995:167). Settlements in the case have increased the current Hopi reservation to 1.5 million acres; however, the dispute over land and resources rights between the Hopi and Navajo is still underway today.

Hopi economic development after WWII has included oil, gas, and mineral exploration, as well as tourism (Clemmer 1979). Although several factions within the Hopi Tribe have opposed it, strip mining for coal has become the primary income for the tribe. Currently, the Navajo Generating Station is the sole buyer of coal from Black Mesa.

I.4.5 Zuni

In the beginning of the Protohistoric period, pueblos in other areas were abandoned in favor of new settlements in the area of modern Zuni occupation, although the exact timing of when these new pueblos

were founded is still being debated (Kintigh 1985, 2007; Mills 2002). Like the Hopi, the Zuni were primarily agriculturalists, growing maize, beans, squash, and other domesticates. In the sixteenth century, the Zuni's initial contact with Spanish entradas looking for the legendary Seven Cities of Gold was violent and exploitative (Woodbury 1979). Spanish explorers intent on finding riches in the Southwest often embarked on their journeys with insufficient supplies. Upon reaching pueblo settlements in what is today New Mexico, they would demand food and clothing from the pueblos; if these supplies were not forthcoming, there would be violence (Knaut 1995). In the seventeenth century, Spanish attention turned to conversion of the Indians to Christianity, and several missions were established in Zuni towns (Knaut 1995; Woodbury 1979). The presence of the priests in the towns was not universally welcomed; the first mission was built in 1632, but the priest was killed by the Zuni not long after (Woodbury 1979). In the following years, tensions between the Spanish and the Zuni continued to build. Like most of other pueblos in the area, the Zuni participated in the Pueblo Revolt of 1680 (Hackett 1942; Knaut 1995; Woodbury 1979). After the Pueblo Revolt of 1680, many Zunis fled to defensive positions fearing that the Spanish would attack in retaliation. When they returned, they only occupied the town of Zuni and did not return to the five other towns. With a few exceptions, outside contact with the Zuni was minimal until the mid-1800s. Many Zuni began establishing "summer villages" away from Zuni near cultivable lands; Zuni would live in these villages during the summer and would go back to Zuni in the winter (Woodbury 1979). Some efforts were made to re-establish missions at Zuni after the revolt, but these were unsuccessful.

During Mexican control of the Southwest, little contact occurred between the Mexicans and the Zuni (Eggan and Pandey 1979). Like the Hopi, Navajo raids impacted the Zuni during this time. After the United States acquired the Southwest in 1848, contact between the Zuni and Euro-Americans increased with the arrival of travelers moving west in search of gold, settlers moving into the area, missionaries, and anthropologists. In the 1860s, a few towns with Spanish-speaking inhabitants began to appear near Zuni territory, and by 1881 the railroad had opened up access to the area to whites (Eggan and Pandey 1979; Woodbury 1979). Like other groups in the Southwest, smallpox epidemics greatly reduced their numbers in the nineteenth century (Eggan and Pandey 1979). Internal conflicts involving witchcraft accusations at Zuni led the Bureau of Indian Affairs to send in soldiers in the early 1900s (Eggan and Pandey 1979). Traditional ceremonialism remained important to Zuni culture, and efforts to establish Christian churches were met with resistance (Eggan and Pandey 1979; Trotter 1955). A Catholic mission was successfully established in 1922, but its presence split the Zuni into pro- and anti-Catholic groups. This division solidified into political parties over the years; however, few Zuni actually converted to Christianity.

Over time, the Zuni added to their original 1689 Spanish land grant of approximately 17,000 acres; the Zuni reservation today totals about 450,000 acres (Eggan and Pandey 1979; Pueblo of Zuni 2010). In the early 1900s, the Black Rock Dam and new irrigation systems were constructed for Zuni farmers (Pueblo of Zuni 2011). Silver jewelry manufacture became increasingly important after 1925, and by WWII, the sale of jewelry created the majority of Zuni income (Pueblo of Zuni 2011). After WWII, the Zuni expanded their support of silver jewelry manufacture, for which the Zuni are now known (Eggan and Pandey 1979).

I.4.6 Historic Period Euro-Americans

Euro-American knowledge of the region from the Grand Canyon south to the Mogollon Rim and Bill Williams River and from the San Francisco Peaks west to the Colorado River dates to the sixteenth century, when Spanish explorers traveled the area, searching for gold. Subsequently, additional Spanish explorers, American fur trappers, and U.S. military expeditions and surveyors investigated the area. In the late nineteenth century, the region became a major transcontinental transportation corridor and was soon colonized by miners and ranchers.

Summary of Substantive Comments with Implications to Revisions for FEIS

What follows is a summary of the most significant/substantive comments by category in order of the volume of comments, along with the expected disposition of those comments and implications for changes, if any, in the Final EIS.

NEPA comments: There were a number of general NEPA comments and some alleged specific NEPA procedural violations (such as "failure" to identify the preferred alternative in the DEIS). While many will require responses and clarification, there don't appear to be any that would warrant major changes.

Water comments: A number of comments stated that we overestimated impacts. A number stated that we underestimated impacts and that we should have analyzed a worst case scenario. A number of comments requested a long-term, comprehensive water quality monitoring program to address some of the uncertainties of impacts and evaluate changes over time. Clarification of the limitations of current information will be addressed in the Final EIS as needed.

Conclusion: Detailed responses are needed and some clarifications in the FEIS, but no major changes will be needed.

Economic comments: We received a diversity of comments around this issue, including some that called the entire analysis flawed. Comments included questions regarding flawed analysis in over estimating or underestimating economic impacts. Further review of the economic sections and comments by an independent, external reviewer will be conducted. This will result in a more accurate description of the economic situation which could result in changes to the economic profile as well as the analysis. For example:

3rd party for economics

- Re-run the IMPLAN modeling at a finer scale to refine community level information and impacts. This will split Coconino County into community level information (e.g., Fredonia as compared to Flagstaff).
- Revisit the price of uranium and breccia pipe estimates as it relates to the economic assessment
- Improve the discussion of transportation related impacts (spills, accidents, etc)

Conclusion: At this time we do not anticipate major changes to the summary conclusions.

RFD comments: We received several comments that question the assumptions and methodology contained in the RFD, including questions about the price of uranium and the quantity of developable breccia pipes in the withdrawal area. This will require verification, clarification and further discussion; however, we do not anticipate major changes to the RFD. If the assumptions for the quantity of developable breccia pipes changes this will change the numbers of mines, etc. that the analysis was based upon.

Conclusion: We believe that verification of USGS and other information will support the existing RFD in which case no significant changes would be anticipated. Any revisions to the RFD could significantly change the analysis, requiring more time for completion and issuance of the FEIS and ROD.

Cultural comments: We received a number of comments on cultural resources. These primarily require technical clarifications and will not result in any major changes.

Tribal Comments: We received comments from 5 of the 7 Tribes with whom we have been actively consulting.

> **Havasupai Tribe:** They questioned the establishment of alternative boundaries and consideration of Traditional Cultural Properties and cultural resources in relation to other resources of concern.
>
> **Hopi Tribe:** They voiced their concern about mining impacts to all resources and human health.
>
> **Hualapai Tribe:** They included extensive technical comments on cultural resources and questions and concerns about public health and safety. They want to ensure that the evaluation recognizes the role of tribal governments and sovereignty in managing resources within the reservation. Their concerns included health and safety, toxicity, and water quantity and quality both in regards to sacredness of water and potential impacts to water-related recreation activities of the Tribe. Under any alternative, they request mitigation and monitoring plans for any mining activity. They also requested consideration of a programmatic agreement under Section 106 of the NHPA.
>
> **Kaibab Band of Paiute Indians:** They voiced their concern about mining impacts to all resources and human health. They requested transfer of the North and East Parcels to BIA for eventual transition to trust status for the tribe.
>
> **Navajo Nation:** They included technical comments on cultural resources and questions and concerns about public health and safety. They want to ensure that the evaluation recognizes the role of tribal governments and sovereignty in managing resources within the reservation. Under any alternative they request mitigation and monitoring plans for any mining activity, and emergency planning and technical support for any impacts that may occur to Navajo Nation lands.

Conclusion: The issues described above are expected to result in clarifications but no major changes.

Class I Cultural Resources Overview for the Northern Arizona Proposed Withdrawal on the Bureau of Land Management Arizona Strip District and the Kaibab National Forest, Arizona

Prepared for

Bureau of Land Management
Arizona Strip District Office

Prepared by

SWCA Environmental Consultants

December 2010 (Revised February 2011)

CLASS I CULTURAL RESOURCES OVERVIEW FOR THE NORTHERN ARIZONA PROPOSED WITHDRAWAL ON THE BUREAU OF LAND MANAGEMENT ARIZONA STRIP DISTRICT AND THE KAIBAB NATIONAL FOREST, ARIZONA

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ABSTRACT

On July 21, 2009, the Secretary of the Interior proposed to withdraw, subject to valid existing rights, approximately 626,354 acres of Bureau of Land Management (BLM)-managed public lands on the Arizona Strip District and 360,349 acres of National Forest System lands on the Kaibab National Forest for 20 years from mineral location and entry under the Mining Law of 1872 [30 United States Code 22 *et seq.*]. The proposed withdrawal applies to federal mineral estate, including lands that underlie non-federal surfaces. It would not apply to non-federal mineral estate. The purpose of the withdrawal, if determined to be appropriate, would be to protect the Grand Canyon watershed from adverse effects of locatable mineral exploration and mining (BLM 2009a).

The BLM is the lead agency, working in cooperation with the U.S. Forest Service, U.S. Fish and Wildlife Service, U.S. Geological Survey, National Park Service, and other state, local, and tribal agencies to prepare an environmental impact statement (EIS) that will be used to support a final decision on the proposed withdrawal. The EIS will disclose the potential impacts of the Proposed Action on the human environment and natural and cultural resources, as well as specifying which measures would be appropriate for mitigating or reducing those impacts.

The EIS will analyze four alternatives: Alternatives A through D. Alternative A is the No Action Alternative; under Alternative A, no lands would be withdrawn from location and claims entry. Alternative B is the Proposed Action; under the Proposed Action, 1,010,776 acres of federal mineral estate would be withdrawn from location and entry for 20 years. Under Alternative C, Partial Withdrawal, 652,986 acres would be withdrawn for 20 years, and under Alternative D, again Partial Withdrawal, 300,681 acres would be withdrawn for 20 years.

This document provides information on cultural resources that are situated within the proposed withdrawal area as defined by Alternative B. For the purposes of this project, the proposed withdrawal area is considered the area of potential effect; however, in some instances (i.e., American Indian concerns), the area of potential effect will be expanded to include resources outside the proposed withdrawal area. This information will be used in the EIS to analyze the potential impacts of the Proposed Action on these resources. Archival and literature research has been completed to determine which resources have been identified to date, their status for listing in the National Register of Historic Places, and their cultural and chronological affiliation. From analysis of the data, this report also provides recommendations regarding the likely sensitivity of areas that have not undergone systematic study. These predictive models will assist the agencies in the analysis of effects on cultural resources based on probability of occurrence.

Table 5-35. Sites by Proximity to Water

Distance from Water	Number of sites
0–250 m	510
250–500 m	289
500–1,000 m	210
1,000–1,500 m	25
1,500–2,000 m	1

Extent of Archaeological Inventories

This parcel has the most surveyed area of the three parcels, with roughly 75,828 acres surveyed (Figure 5-26); however, site density in the surveyed areas is the lowest of the three parcels. Overall site density is 0.02 site per surveyed acre, or 14.7 sites per surveyed square mile.

NATIONAL REGISTER OF HISTORIC PLACES ELIGIBILITY

The NHPA requires that federal agencies consider the effects of their actions and authorizations on historic properties that are eligible for listing in the NRHP. The term "historic property" covers buildings, structures, sites, objects, and districts generally 50 years of age or older and meeting NRHP criteria for evaluation [36 Code of Federal Regulations 60.4], which state, in part, as follows:

> The quality of significance in American history, architecture, archaeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, materials, workmanship, feeling, and association, and
>
> Criterion A. that are associated with events that have made a significant contribution to the broad patterns of our history; or
>
> Criterion B. that are associated with the lives of persons significant in our past; or
>
> Criterion C. that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
>
> Criterion D. that have yielded, or may be likely to yield, information important in prehistory or history.

While Historic period sites may be determined NRHP eligible under virtually any of these criteria, prehistoric archaeological sites are almost always evaluated with respect to Criterion D. In other words, to be considered NRHP eligible, a prehistoric site must have yielded, or have the potential to yield, important information about some aspect of prehistory or history, including events, processes, institutions, design, construction, settlement, migration, ideals, beliefs, lifeways, and other facets of the development or maintenance of cultural systems. Any consideration of a property's eligibility under Criterion D must address 1) whether the property has information to contribute to our understanding of history or prehistory; and 2) whether that information is important.

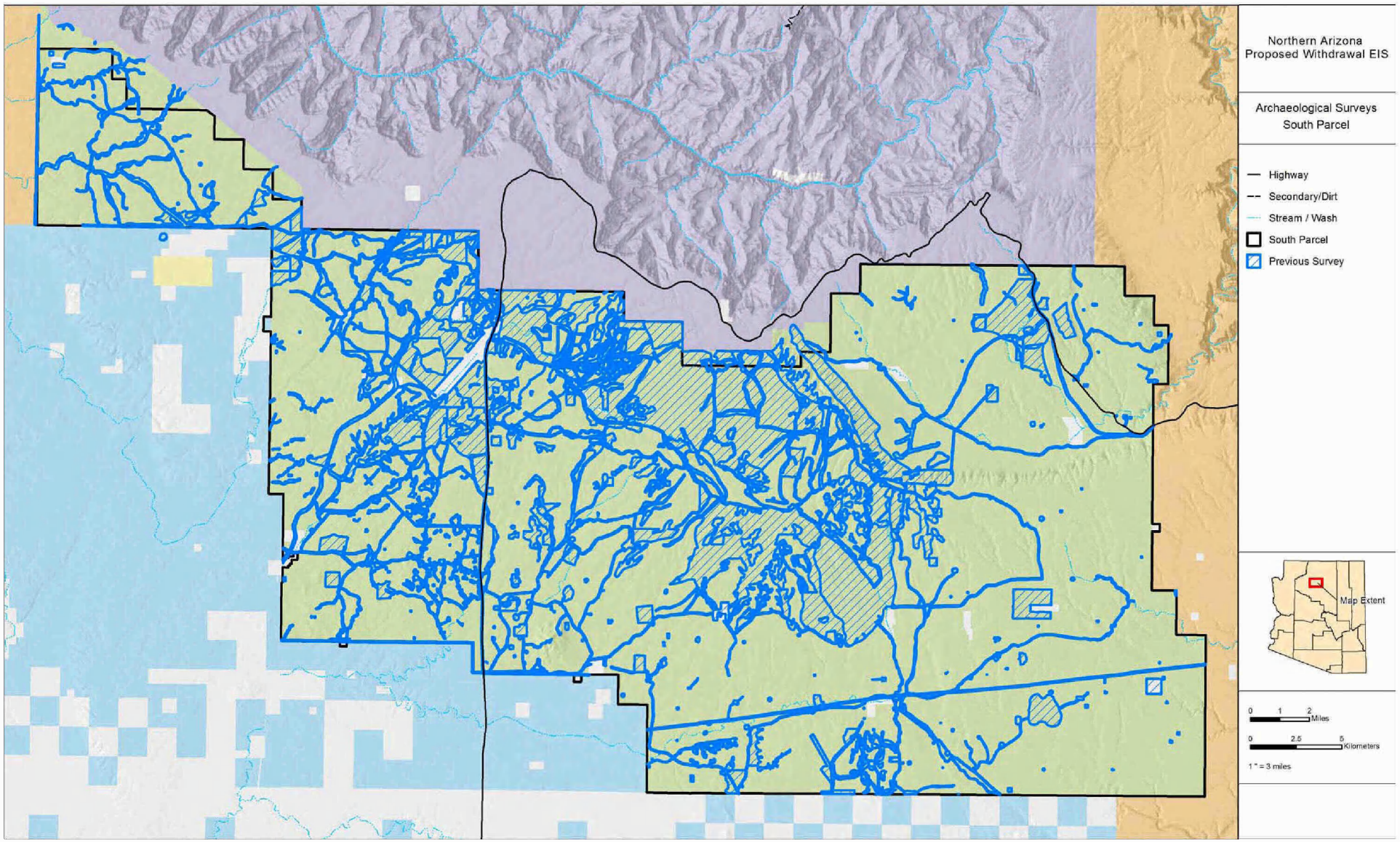

Figure 5-26. Map of inventoried areas in the South Parcel.

An eligible property must also be at least 50 years old (with a few special exceptions) and retain a certain amount of physical integrity. Historic properties may also include places of traditional cultural importance that are determined eligible for the NRHP as TCPs.

All three of the proposed withdrawal parcels include numerous properties eligible for the NRHP; some of these properties have been determined eligible for the NRHP, while the rest have been recommended eligible for the NRHP. Eleven sites in the Kaibab National Forest have been formally listed in the NRHP.

Table 5-36 provides information about the number of sites by parcel and their NRHP eligibility status.

Table 5-36. National Register of Historic Places Status of Archaeological Sites and Historic-Age Properties by Parcel

	North Parcel	East Parcel	South Parcel	Total
Listed	–	1	11	**12**
Eligible	133	60	268	**461**
Ineligible	102	7	92	**201**
Unevaluated	508	103	1,370	**1,981**
Total	**743**	**171**	**1741**	**2,655**

HISTORIC BUILT ENVIRONMENT: PRELIMINARY IDENTIFICATION OF PROPERTIES

A list of Historic-age NRHP-listed, NRHP-eligible, and potentially NRHP-eligible properties within the three proposed withdrawal parcels can be found in Appendix B. The following discussion includes primarily Euro-American properties, some of which may have also been included in the archaeological sites discussion; American Indian Historic-age sites are found only in the archaeological sites description.

Methodology and Sources

The project historian examined USGS quadrangles covering the three proposed withdrawal parcels, each for evidence of historic properties through features and labels on the maps. Databases from federal and state agencies also were reviewed for properties surveyed and evaluated for their NRHP eligibility. Aerial photographs, from available Google Earth mapping and other sources, were reviewed for corroboration between USGS quadrangles and known historic-property surveys. NRHP listings of properties within the three withdrawal parcels were reviewed through online databases and State Historic Preservation Office files, maps, and photographs. Keyword online searches for other suspected properties, such as historic trails and tourism communities, revealed additional information from websites for federal and state agencies, along with recreation groups.

Property Type Groups

Eighteenth- through Twentieth-Century Trails with Springs

- The Dominguez-Escalante Expedition Trail of 1776—which for the first time mapped and described present northern Arizona, plus parts of New Mexico, Colorado, and Utah—passed through the North and East parcels. The current U.S. 89A and County Road 109 generally follow much of this 1776 route.

Interim Report

Ethnographic Resources in the Grand Canyon Region

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1. RESEARCH OBJECTIVES

The objective of this project is to compile an inventory of known ethnographic resources in the Grand Canyon National Park and surrounding region. These ethnographic resources link Native Americans to the Grand Canyon region in the past, present, and future. The places, landscapes, and natural resources that constitute ethnographic resources have been used by Indian tribes for centuries to nurture and sustain their unique cultural lifeways. These ethnographic resources continue to be used in religious pilgrimages and cultural activities that are integral to the continued existence of Indian tribes. Damage to the physical and spiritual integrity of these ethnographic resources will endanger the cultural survival of the tribes they are associated with. As one Southern Paiute elder explained to us during preparation of this report, "If these sites are destroyed, we will no longer culturally exist as a people, they are culturally relevant to our existence."

The project is divided into two phases. Phase 1, summarized in this report, was to compile an inventory of known ethnographic resources using information available in published literature and technical reports archived at the Grand Canyon Research and Monitoring Center. Phase 2 of the project will entail consultation between the National Park Service and Indian tribes to determine if there are additional ethnographic resources that the tribes would like entered into the database to enhance the management of these cultural resources.

Ethnographic resources are a category of cultural resources recognized by the National Park Service because they are important to peoples traditionally associated with lands incorporated into National Parks. Ethnographic resources include objects, places, sites, structures, landscapes, and natural resources that are traditionally imbued with cultural meaning and value by the groups with which they are associated. As such, ethnographic resources are important to a people's sense of purpose or way of life. This gives ethnographic resources a special importance that distinguishes them from other park resources enjoyed by the public. The National Park Service strives to identify and manage ethnographic resources using the viewpoint of associated peoples (http://www.nps.gov/history/ethnography/parks/resources/index.htm).

Many ethnographic resources are traditional cultural properties eligible for the National Register of Historic Places as significant districts, sites, or objects (National Park Service 2006:157). Traditional cultural properties are significant because they are associated with the cultural practices or beliefs of a living community that are (1) rooted in that community's history, and (2) important in maintaining the continuing cultural identity of the community (Parker and King 1990).

People traditionally associated with national parks use ethnographic resources to retain and transmit cultural beliefs, traditions, and history. These traditionally associated peoples differ as a group from other park visitors in that they assign significance to ethnographic resources using their own sense of purpose, community existence, and development as culturally distinct peoples. While ethnographic resources have historic attributes that are of important to specific groups, they may not be directly associated with the reason a park was established, or be appropriate for interpretation to the general public. With respect to the Grand Canyon National

Park, the National Park Service recognizes that ethnographic resources located outside the park provide cultural context and meaning for the resources located within the park. It is thus important to document ethnographic resources in the Grand Canyon region so that these cultural resources can be managed as integral components of tribal cultural landscapes.

2. STUDY AREA

The geographical focus of Phase 1 research was the Grand Canyon National Park and the surrounding region (Figure 1). This area includes three proposed Mining Withdrawal Areas adjacent to the Grand Canyon National Park. The North Parcel Withdrawal Area lies on the Kanab Plateau, west of Kanab Canyon. The East Parcel Withdrawal Area is situated in House Rock Valley, west of the Colorado River. The South Kaibab Withdrawal Area is located near the south rim of the Grand Canyon on the Kaibab National Forest.

The National Park Service is interested in the ethnographic resources within and near the Withdrawal Areas because they provide a regional context for understanding the cultural resources located within the Grand Canyon National Park. Data about ethnographic resources in the Phase I study area are pertinent to an environmental impact study currently being prepared jointly by the Bureau of Land Management, National Park Service, U.S. Forest Service, U.S. Fish and Wildlife Service, and other agencies to investigate withdrawing these areas from future mineral exploration and mining activities. This withdrawal would result in limiting future development within these areas.

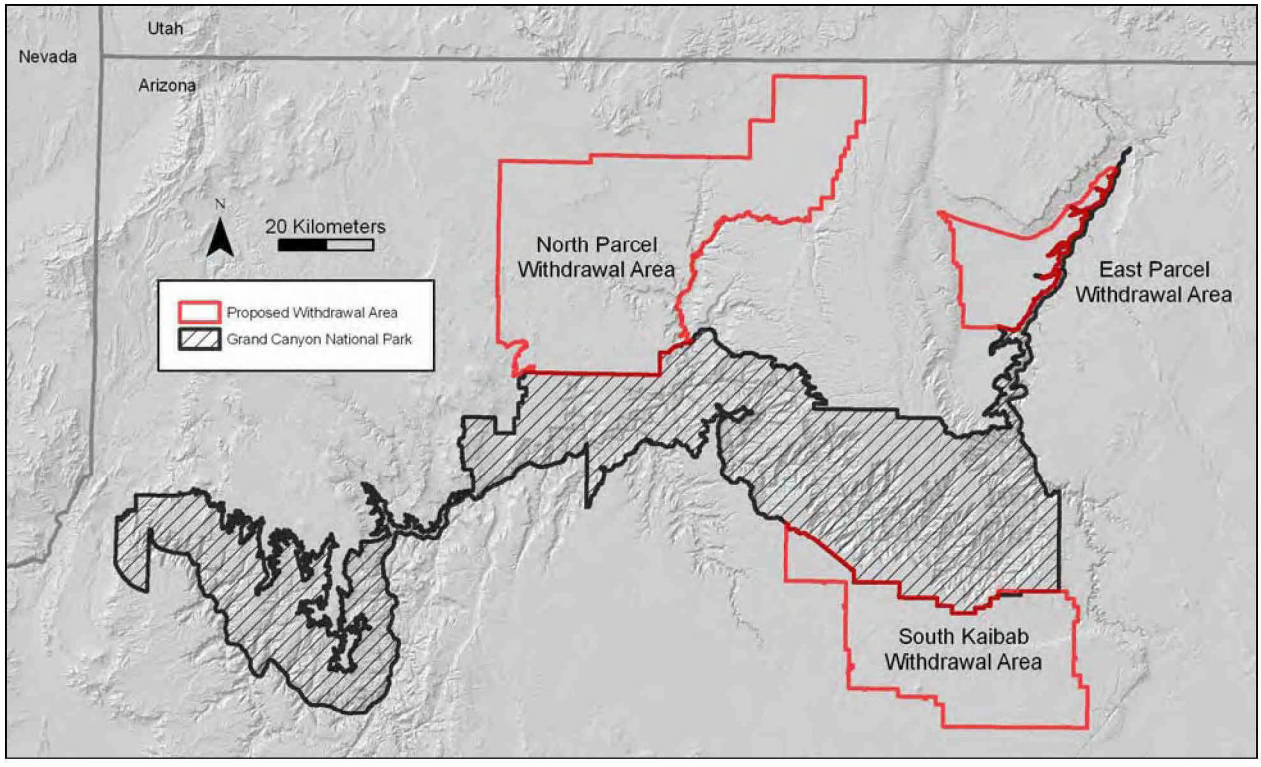

Figure 1. Proposed Withdrawal Areas identified by the National Park Service.

3. ETHNOGRAPHIC RESOURCES INVENTORY DATABASE

A database and GIS project provide an Ethnographic Resources Inventory (ERI) for the Grand Canyon National Park and surrounding region. This database includes information about known sites, structures, objects, landscapes, and natural resources that have cultural meaning and value to peoples traditionally associated with the Grand Canyon National Park. This report provides an interim presentation of data and is subject to revision based on future consultation with Indian tribes. It is anticipated that tribes have knowledge of additional ethnographic resources within the Grand Canyon National Park and the surrounding region. The inventory presented in this report should thus be interpreted as representing the minimal number of ethnographic resources in the study area. It is probable that the actual number of ethnographic resources in the study area is substantially larger than that summarized in this report.

The database was created using three relational tables in Microsoft Access 2007. A table for Locational Information is linked in a one-to-many relationship to a table containing Cultural Information, with the Ethnographic Resource Number used as a primary key (Table 1). The table for Cultural Information contains records pertaining to each tribe associated with a specific ethnographic resource (Table 2). A third table includes the bibliographic citations referenced in the Cultural Information table (Table 3). Fields that have yet to be populated with data (e.g., other site number and NPS determined condition) are not used in this interim report.

Table 1
Data Fields for Locational Information Table

Field Name	*Data Type*	*Description*
ID	AutoNumber	Control number for records
Ethnographic Resource Number	Number	Primary key; unique ERI number
Other Site Number	Text	Other site designation or number
Name on Map	Text	Name on USGS map
Common Name (NPS)	Text	Common name for resource used by NPS
Biotic Community	Text	Biotic community defined by Brown and Lowe (1980)
Hydrologic Unit	Text	Hydrologic Unit Code (HUC) of associated watershed
Hydrologic Unit Name	Text	Hydrologic Unit Name from USGS
Land Ownership	Text	BLM, USFS, NPS, tribal, state, or private ownership
North Parcel Withdrawal Area	Yes/No	Ethnographic resource is located within this parcel
East Parcel Withdrawal Area	Yes/No	Ethnographic resource is located within this parcel
South Kaibab Withdrawal Area	Yes/No	Ethnographic resource is located within this parcel
Grand Canyon National Park	Yes/No	Ethnographic resource is located within GRCA
Feature Class Type	Text	Entered in GIS as point, line, or polygon
NPS Determined Condition	Text	Condition of resource determined by NPS

Table 2
Data Fields for Cultural Information Table

Field Name	*Data Type*	*Description*
ID	AutoNumber	Control number for records
Ethnographic Resource Number	Number	Foreign key, unique ERI number linked to location
Tribe	Text	Name of tribe associated with resource
Tribal Place Name	Text	Tribal names used to refer to resource
Ethnographic Resource Category	Text	Landscape, place, object, natural resource, or trail
Other Ethnographic Resource	Text	ERI numbers for associated resources
Sacred Site	Yes/No	Resource is a sacred site
Oral Tradition Association	Yes/No	Resource is associated with an oral tradition
References	Text	Bibliographic citation documenting resource
Description	Memo	Short narrative description of resource

Table 3
Data Fields for References Table

Field Name	*Data Type*	*Description*
ID	AutoNumber	Control number for records
Author	Text	Name of authors of publication
Date	Text	Date of publication
Reference	Memo	Bibliographic citation of publication

4. ETHNOGRAPHIC RESOURCES INVENTORY GIS PROJECT

The GIS project was prepared using ArcGIS 9.3.1. Ethnographic resources identified in the Access database were mapped using points, lines, and polygons to display their geographical location. Spatial data are organized within a Microsoft Access geodatabase (ethnographic_resources.mdb) that contains six feature datasets organized by tribe, each of which includes one to six feature classes. These feature classes encompass the points, lines, and polygons used to map the various ethnographic resource categories, including places, landscapes, natural resources, and paths. Table 4 summarizes the organization and file names for the feature datasets in the geodatabase. The project coordinate system for all feature datasets is North American Datum 1983 (NAD_1983_UTM_Zone_12N). The geographic coordinate system is GCS_North_American_1983.

Additional spatial data used in the GIS project were obtained from a number of state and federal sources. These include a national elevation dataset (NED) at 1/3 arc second obtained from the Arizona Regional Image Archive (http://ariadata.arid.arizona.edu/browse/dem_ned.asp), a land ownership dataset obtained from the National Map Seamless Server (http://seamless.usgs.gov/); digital topographic maps (DRG) obtained from the Arizona Regional Image Archive (http://aria.arizona.edu/); and Hydrologic Unit Codes (HUC) and associated spatial data obtained from the Arizona Land Resource Information System (http://www.land.state.az.us/alris/data.html).