

Joro Walker, Utah Bar # 6676
Charles R. Dubuc, Utah Bar # 12079
Western Resource Advocates
150 South 600 East, Suite 2AB
Salt Lake City, Utah 84102
Tel: 801-487-9911
jwalker@westernresources.org, rdubuc@westernresources.org

Eric Jantz, (pro hac vice application pending)
New Mexico Environmental Law Center
1405 Luisa St., Suite 5
Santa Fe, New Mexico 87505
Tel: 505-989-9022; Fax: 505-989-3769
ejantz@nmelec.org

Roger Flynn (pro hac vice application pending)
Western Mining Action Project
P.O. Box 349
440 Main St., #2
Lyons, Colorado 80540
Tel: 303-823-5738; Fax: 303-823-5732
wmap@igc.org

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

URANIUM WATCH, RED ROCK FORESTS and)
LIVING RIVERS,)

Plaintiffs,)

vs.)

UNITED STATES FOREST SERVICE, an)
agency in the U.S. Department of Agriculture;)
and PAMELA BROWN, in her official)
capacity as Forest Supervisor for the)
Manti-La Sal National Forest, ,)

Defendants.)

Case No. 2:10-cv-00721

Honorable Samuel Alba

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

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I. INTRODUCTION

Pursuant to Fed. R. Civ. P. 65, Plaintiffs Uranium Watch, Living Rivers and Center for Water Advocacy file this Memorandum in support of their Motion for Temporary Restraining Order/Preliminary Injunction (“TRO/PI”). Plaintiffs request this Court to stay ground disturbance and construction of the Uranium Exploration Project and Radon Vent Hole Project that will soon commence on federal public land in southeast Utah. The two Projects are proposed by Denison Mines Corporation (USA) (“Denison”) and were approved by the Defendant U.S. Forest Service via its Decision Memo (“DM”) signed by Forest Supervisor Pamela Brown on April 14, 2010. To preserve the *status quo* and to prevent further harm to Plaintiffs and the environment, Plaintiffs respectfully request a temporary restraining order and preliminary injunction pending full review of the merits of the case.

II. STATEMENT OF ISSUES AND FACTS

The Forest Service’s Decision Memo authorizes Denison to conduct exploratory drilling for uranium, as well as construct vent holes to release hazardous radon gas from existing Denison mining operations, on federal public lands within the Moab/Monticello Ranger District of the Manti-La Sal National Forest, approximately three miles east of the town of La Sal, Utah. DM at 3, attached hereto as Exhibit 1. The Forest Service approved, via the Decision Memo, the Plan of Operations (“PoO”) proposed by Denison to conduct two projects on public lands: (1) the Uranium Exploration Project, in which Denison would, among other activities, drill 16 uranium exploration drill holes, construct or upgrade over a mile of road on public lands, and dig numerous waste pits and related facilities associated with the drilling and exploration; and (2) the Radon Vent Hole Installation Project, in which Denison would construct over ¾-miles of new

access roads across public lands, and drill two six-foot diameter holes on public land to vent hazardous radon gas from an existing mining project operated by Denison. DM at 3-5. Radon is a very harmful air pollutant, and has been classified by the federal Environmental Protection Agency (“EPA”) as a hazardous air pollutant under the federal Clean Air Act. 42 U.S.C. § 7412(b)(1). The vent holes will be constructed to permanently, or for many years (the agency has not informed the public of the duration of the radon gas emissions), discharge radon gas from the mine workings associated with the Pandora Mine. In addition to the venting, the Decision Memo authorizes Denison to dump the waste rock produced from the 6-foot diameter vent hole shafts on either public land at the surface, or underground in the Pandora Mine (the agency has not informed the public where the waste rock will be dumped). The Decision Memo contains no analysis of the radiological or other characteristics of this potentially toxic mine waste on public land.

In this case, the Exploration Project and the Radon Vent Hole Project are part of Denison’s Pandora Mine and its expansion. As stated in the Decision Memo, “These activities are in support of mining operations at the Pandora Mine with surface facilities located on Bureau of Land Management (“BLM”) land. . . . Vent holes are needed to move air through the mine to provide fresh air to miners.” Id. at 3. The Decision Memo further states, “These vent holes are necessary to provide adequate ventilation as the mining moves further from the surface facilities.” Id. at 5.

The Pandora Mine is an active uranium mining operation owned and operated by Denison located on adjacent BLM land and underneath the Forest Service land covered by the Projects approved in the challenged Decision Memo. Denison has already requested BLM

approval to expand the Pandora Mine towards and under the Forest Service lands covered by the challenged Decision Memo. December 2009 Denison Plan of Operation Amendment (“POA”) at 1-4 – 1-6, the relevant portion of which is attached hereto as Exhibit 2. Thus, the new vent holes are directly related and connected to the Pandora Mine and its expansion and are needed to vent radon to allow expansion and operation of Denison’s underground workings associated with the Pandora Mine.

The Decision Memo, at 7, further details the connection between the Pandora Mine and the two challenged projects:

The need for uranium exploration and vent holes in relation to underground mining continues to exist. The vent holes will help provide adequate ventilation for the miners and meet Mine Safety and Health Administration requirements. The exploration holes will allow for the company to determine if economical reserves are present within the mine area while minimizing the effect on the environment.

As summarized by the Decision Memo, at 3, the Pandora Mine is currently operating on adjacent BLM lands:

The Pandora Mine, located on BLM lands, was operated by Atlas Minerals in the 1970’s and 1980’s. The mine was acquired by Energy Fuels Nuclear, Inc. and its affiliates in 1994, and the assets of Energy Fuels Nuclear and its affiliates were purchased by International Uranium (USA) Corporation and its affiliates in 1997. In December of 2006, International Uranium (USA) Corporation changed its name to Denison Mines (USA) Corp. Denison Mines began rehabilitation and ore production in 2007, and is the current operator of these facilities.

The Pandora Mine is part of regional complex of mines owned by Denison which supply uranium ore to Denison’s nearby White Mesa uranium mill near Blanding. Denison’s current

webpage describes the relationship between the Pandora Mine and Denison's other local uranium mines. A copy of that webpage is attached hereto as Exhibit 3.¹

In addition to ongoing uranium operations at the Pandora/La Sal sites, in December 2009, Denison submitted a Plan of Operations Amendment (POA) to expand the La Sal Mines Complex (Beaver Shaft, La Sal, Snowball, and Pandora Mines) to the BLM (with copy to the Forest Service), as well as the Utah Division of Oil, Gas, and Mining. (Relevant portions attached as Exhibit 2). The mining operations in the La Sal Complex were originally approved by BLM in the early 1980s. This POA seeks approval for the expansion of these existing La Sal Complex operations, especially underground mining and related surface facilities, and specifically discusses Denison's proposed uranium exploration and radon venting projects on BLM and Forest Service land (including the Projects approved in the Decision Memo). Because the majority of surface disturbance will be on BLM land, the POA was submitted to BLM. BLM has not yet approved this POA and has yet to complete even a draft NEPA document for public review.

According to Denison, the expansion of the Pandora/La Sal Complex is proposed to occur in three phases, lasting from 2010 to 2030. POA at 1-4 to 1-6. Phase 1 alone will result in 75 acres of disturbance, composed of 24 radon vent holes and a network of "up to approximately 200 exploration holes per year for a period of four years." POA at 1-4. Phase 2 will cover 74 acres, and would involve another 23 radon vent holes and "up to approximately 200 exploration holes per year for a period of five years." POA at 1-5. Phase 3 will result in 12 new radon vent

¹ The "Deer Creek Complex" depicted in the diagram in Exhibit 3 is described in the accompanying text as the "La Sal complex, which includes the La Sal, Beaver and Pandora mines."

holes and “up to approximately 200 exploration holes per year for a period of 11 years.” POA at 1-6. These are just the impacts to the surface lands; the operations also involve substantial expansion of the underground mining as it proceeds in the direction of the uranium ore body.

As discussed in the challenged Decision Memo, and noted above, the Radon Vent Hole Project and Uranium Exploration Project “are in support of mining operations at the Pandora Mine” and the expansion proposed in the POA. DM at 3. Without venting the radon gas as approved by the Decision Memo, the existing operations at the Pandora Mine and La Sal Complex, and/or its expansion, could not safely occur.

In 2009, Denison also sought approval from the State of Utah for the expansion of the Pandora Mine, including the drilling and construction of four radon vent holes – two of which were later approved by the challenged Decision Memo:

This letter is to inform you that Denison Mines (USA) Corp. will be adding four vent holes to the Pandora Mine site. Two vents (on US Forest Service Land) are located in the northwest quarter of Section 5 and two vents (on US Bureau of Land Management Land) are located in the northeast quarter of Section 6, Township 29 South, Range 24 East, Salt Lake Base Meridian, San Juan County, Utah.

July 20, 2009, letter from Denison to the Utah Division of Oil, Gas and Mining, attached hereto as Exhibit 4. Denison also sent a similar letter seeking approval of the two radon vent holes to the Forest Service on the same day. July 20, 2009, letter from Denison to the Moab/Monticello Ranger District, Manti-La Sal National Forest, attached hereto as Exhibit 5.

In addition to all of these other Denison operations, the Forest Service ignored a number of other proposed or approved uranium operations in the area. For example, the BLM recently approved 14 uranium exploration drill holes on land adjacent to the proposed Exploration Project. A copy of the BLM’s approval letter is attached hereto as Exhibit 6. Further, the Forest

Service or BLM are currently considering numerous additional uranium-mining related activities proposed in the area. See, Exhibit 4 (two radon vent shafts on BLM land adjacent to the proposed Vent Hole Project); Exhibit 7 (Colorado Plateau Partners, LLC's La Sal uranium exploration project on Forest Service land); Exhibit 8 (Denison's Notice of Intent to construct seven radon vent holes on BLM, Forest Service, and private land).

Despite the acknowledged connection between the two Projects approved in the Decision Memo and the Pandora Mine, as well as the clearly-evident other uranium projects in the area, the Decision Memo approved Denison's PoO without preparing either an Environmental Assessment ("EA") or Environmental Impact Statement ("EIS") under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4331 *et seq.* Instead, the agency approved the PoO using a Categorical Exclusion ("CE"), which bypasses the need to conduct the environmental reviews and full public comment opportunities required by the preparation of an EA or EIS. DM at 6-7. Consequently, the Forest Service failed to consider the Pandora Mine as a connected action under NEPA, and failed to review the cumulative environmental and other impacts from the Pandora Mine and other Denison operations – despite the agency's acknowledgement that the uranium exploration and radon venting are "in support of," "needed" by, and "necessary" parts, of the Pandora Mine.

Further, the agency utilized a "Category 3" categorical exclusion, applicable to non-mining "special uses," to exempt the Radon Vent Hole Project from NEPA review. Id. However, the Decision Memo and CE authorized the Radon Vent Hole Project as a mineral operation under the 1872 Mining Law and Forest Service mining regulations, instead of as a

“special use” under the agency’s special use permitting regulations at 36 C.F.R. Part 251. Id. at 3.

The Forest Service excluded the Uranium Exploration Project using Category 8, which is only applicable to “routine”, “short-term,” “mineral, energy, or geophysical investigations.” DM at 6. In none of its decision documents, however, does the Forest Service explain how approval of uranium exploration was “routine” for the Moab/Monticello Ranger District, in light of the fact that this Ranger District has only approved three uranium exploration projects in the last five years.

None of the potential impacts were ever reviewed by the Forest Service in an EA or EIS. Rather, the agency simply allowed only one opportunity for the public to comment upon the proposed Projects, and no opportunity at all to review the agency’s findings prior to the signing of the Decision Memo. Further, the agency provided no opportunity for the public to appeal the DM to the agency’s Regional Office, as would have been the case if the agency had not issued the Categorical Exclusion.

III. STANDARDS OF REVIEW

A. Temporary Restraining Order – Preliminary Injunction Standard.

The Supreme Court has stated that “environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable.” Amoco Prod. v. Vill. of Gambell, 480 U.S. 531, 545 (1987). See Davis v. Mineta, 302 F.3d 1104, 1115 (10th Cir. 2002); Catron County v. U.S. Fish & Wildlife Serv., 75 F.3d 1429, 1440 (10th Cir. 1996) (“environmental injury usually is of an enduring or permanent nature, seldom remedied by money damages and generally considered irreparable”). The

accompanying Motion details the appropriate Tenth Circuit standards for obtaining preliminary relief, specifically the four factors to be considered by the Court. See Davis v. Mineta, 302 F.3d at 1111; Nilson v. JP Morgan Chase Bank, 690 F.Supp. 2d 1231, 1237 (D. Utah, 2009) (“In order to obtain a preliminary injunction, the movant must demonstrate: (1) a likelihood of success on the merits; (2) a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the movant's favor; and (4) that the injunction is in the public interest.”).

In this case, there is no question that Plaintiffs meet each prong of the temporary restraining order/preliminary injunction four part test or in the alternative the Tenth Circuit’s modification of that standard. The Court should thus enjoin the Forest Service from allowing any surface disturbing activities to take place at the proposed Project sites.²

B. Review of Agency Action Under the APA and NEPA.

This Court reviews Forest Service decisions “under 5 U.S.C. § 706(2)(A) to whether it was ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” Colorado Envtl. Coal. v. Dombeck, 185 F.3d 1162, 1167 (10th Cir. 1999) (additional citations omitted). An agency decision is arbitrary and capricious if:

² This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* Plaintiffs have standing because their members’ use and enjoyment of the proposed project site and the adjacent affected areas will be severely, irreparably, and immediately injured. See Sarah Fields Decl. ¶¶ 6-14 (Exhibit 9); William Love Decl. ¶¶ 5-8 (Ex. 10); Harold Shepard Decl. ¶¶ 5-10 (Ex. 11); John Weisheit Decl. ¶¶ 6-12 (Ex. 12). The injury to Plaintiffs from the Forest Service’s decision to approve the Projects and not to prepare a NEPA analysis can be remedied by the requested relief. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 562-63 (1992).

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 contrary 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 (1983).

This review, while giving deference to the agencies, is to be both “probing” and “in-depth” so as to enable the Court to determine if the Forest Service’s decisions were “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law” or unsupported by substantial evidence in the record. Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1574 (10th Cir. 1994) (citations omitted). In this review, the Court examines Plaintiffs’ claims under NEPA to determine whether the Forest Service examined the relevant data and articulated a rational connection between the facts found and the decision made. Colorado Env'tl. Coal., 185 F.3d at 1167 (citing Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43). Additionally, as the Tenth Circuit recently stated:

As with other challenges arising under the APA, we review an agency’s NEPA compliance to see whether it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(a). An agency’s decision is arbitrary and capricious if the agency (1) “entirely failed to consider an important aspect of the problem,” (2) “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,” (3) “failed to base its decision on consideration of the relevant factors,” or (4) made “a clear error of judgment.”

New Mexico ex rel Richardson v. BLM, 565 F.3d 683, 704 (10th Cir. 2009) (citations omitted).

Courts in the Tenth and Ninth Circuits have recently issued preliminary injunctions against mineral exploration projects similar to (or smaller than) the two Projects in this case – particularly when the agency likely failed to undertake the proper reviews under NEPA. In San

Luis Valley Ecosystem Council v. U.S. Fish & Wildlife Serv., 657 F.Supp. 2d 1233, 1241 (D. Colo. 2009), the court enjoined the construction of two drill wells, holding that “the failure to undertake an EIS when required to do so constitutes procedural injury to those affected by the environmental impacts of a project.”) (citations omitted).

In a very similar context to the case at bar, the Arizona district court recently enjoined the impending construction of uranium exploratory drill holes based on a finding that the federal agency’s issuance of a “Category 8” categorical exclusion failed to account for the cumulative impacts of other nearby projects, including other projects by the same uranium company. Center for Biological Diversity v. Stahn, Order, at 3-4, CV-08-8031 (D. Ariz. 2008), attached hereto as Exhibit 13.

IV. STATUTORY BACKGROUND

Congress enacted NEPA to ensure that federal agencies, before approving a project, (1) consider and evaluate all environmental impacts of their decisions, and (2) disclose and provide an opportunity for the public to comment on such environmental impacts. 40 C.F.R. §§ 1501.2, 1502.5; Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). Through the NEPA process, agencies are required to take a “hard look” at the environmental impacts of their actions:

NEPA's intent is to “focus[] the agency's attention on the environmental consequences of a proposed project,” to “guarantee[] that the relevant information will be made available to the larger audience that may also play a role” in forming and implementing the agency's decision, and to provide other governmental bodies that may be affected with “adequate notice of the expected consequences and the opportunity to plan and implement corrective measures in a timely manner.”

Robertson, 490 U.S. at 349-50. See also Davis v. Mineta, 302 F.3d at 1114, n. 5 (same). “The thrust of [NEPA] is ... that environmental concerns be integrated into the very process of agency decision-making.” Andrus v. Sierra Club, 442 U.S. 347, 350 (1979).

The centerpiece of environmental regulation in the United States, NEPA requires federal agencies to pause before committing resources to a project and consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives. See 42 U.S.C. § 4331(b) (congressional declaration of national environmental policy). By focusing both agency and public attention on the environmental effects of proposed actions, NEPA facilitates informed decisionmaking by agencies and allows the political process to check those decisions. Balt. Gas & Elec. Co. v. Natural Res. Defense Council, 462 U.S. 87, 97 (1983) (identifying the facilitation of informed agency decisionmaking and public involvement as the “twin aims” of NEPA). The requirements of the statute have been augmented by longstanding regulations issued by the Council on Environmental Quality (“CEQ”), to which we owe substantial deference.

New Mexico ex rel. Richardson v. BLM, 565 F.3d at 703 (10th Cir. 2009) (other citations omitted).

To satisfy NEPA's dual purpose, prior to undertaking or approving an action, federal agencies must prepare and circulate an environmental impact statement (“EIS”) for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4. In an EIS, a federal agency must evaluate and disclose the impacts of a proposed action, consider alternative actions and their impacts, and identify all irreversible and irretrievable commitments of resources associated with an action. 42 U.S.C. § 4332(2). An agency may first prepare a detailed environmental assessment (“EA”) to determine whether a project has significant impacts and, therefore, requires an EIS. 40 C.F.R. § 1508.9. If the EA concludes that the project may have a significant impact on the environment, then an EIS

must be prepared. Id.; National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001). If not, the federal agency must provide a detailed statement of reasons why the project's impacts are insignificant and issue a "finding of no significant impacts" ("FONSI"). 40 C.F.R. § 1508.13. See generally, New Mexico ex rel. Richardson, 565 F.3d at 703-704.

Certain agency actions may be categorically excluded from full NEPA review. NEPA regulations define categorical exclusions as "actions which do not individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4. CEQ directed each federal agency to develop a list of activities that meet this definition. Id. § 1507.3(b)(2)(ii).

In determining whether an action requires an EIS, EA, or is categorically excluded, federal agencies must broadly review the impacts of the action. Agencies must not only review the direct impacts of the action, but also analyze indirect and cumulative impacts. 40 C.F.R. §§ 1508.7, 1508.8, 1508.25(a)(2). In addition, NEPA regulations require agencies to consider the impacts of "connected actions." Id. § 1508.25(a)(1). To decide whether actions have "significant" impacts, agencies consider their "intensity" and "context." Id. § 1508.27. "Context" refers to the geographic and temporal scope of the agency action and interests affected. Id. at § 1508.27(a). "Intensity" addresses the severity of the environmental impacts and includes consideration of "other actions with individually insignificant but cumulatively significant effects," controversial actions, actions with unknown risks, actions that may establish a precedent for future actions and the proximity to park lands or "ecologically critical areas." Id. at § 1508.27(b).

V. ARGUMENT

Plaintiffs satisfy all the requirements for a temporary restraining order and preliminary

injunction. First, Plaintiffs are likely to prevail on the merits of the case because the Forest Service has clearly failed to consider the cumulative impacts of the proposed Projects under NEPA and has improperly avoided environmental review under NEPA by invoking categorical exclusions. Second, as demonstrated in the attached Declarations, Plaintiffs are likely to suffer irreparable harm if an injunction is not granted. Third, any harm the Forest Service may suffer or any economic harm that Denison might bear is outweighed by the proposed Projects' harm to Plaintiffs and the environment. Finally, the public interest in a thorough environmental review will be protected by preserving the *status quo*.

A. Plaintiffs Are Likely to Prevail on the Merits of Their NEPA Claims.

As shown below, the Forest Service's categorical exclusions of the Projects from NEPA do not apply because: (1) for both Projects, the agency failed to consider the cumulative impacts from Denison's adjacent and connected Pandora Mine/La Sal Complex existing and proposed uranium operations, as well as other projects in the area; (2) the agency failed to consider the Projects as a "connected action" with Denison's Pandora Mine/La Sal Complex operations – which requires that these connected operations be reviewed in one comprehensive NEPA document (either an EA or EIS); (3) for the Radon Vent Hole Project, the agency illegally relied upon Category 3 for the CE, as the radon venting is not a "minor special use" pursuant to agency regulations³; and (4) the CE for Uranium Exploration Project illegally considered the exploration to be "routine" and ignored the fact that the exploration is actually part of the larger Pandora/La

³ The Radon Vent Hole Project was approved as a "mineral operation" under the agency's mining regulations and thus cannot qualify for a CE applicable only to non-mining "special uses."

Sal Complex operation/expansion, and as such, will not be completed within one-year, as required by Category 8.

1. *The Agency Failed to Consider the Cumulative Impacts from Denison's Pandora/La Sal Complex Mining Operations.*

In limiting the type of activities that can be considered for a categorical exclusion, the federal NEPA regulations define a “categorical exclusion” as “a category of actions which do not individually or cumulatively have a significant effect on the human environment.” 40 C.F.R. § 1508.4. Moreover, the Forest Service's CE regulations require that if “it is uncertain whether the proposed action may have a significant effect on the environment, prepare an EIS,” and not a categorical exclusion. 36 C.F.R. § 220.6(c). Here, Plaintiffs “need not show that significant impacts will in fact occur, because raising ‘substantial questions’ that a project may have significant impacts is sufficient.” Ocean Advocates v. U.S. Army Corps of Engineers, 402 F.3d 846, 865 (9th Cir. 2005). “[A]ll that is required to render the CE [Categorical Exclusion] inappropriate is the possibility of significant effects.” Citizens for a Better Forestry v. Dept. of Agriculture, 481 F.Supp. 2d 1059, 1088 (N.D. Cal. 2007).

NEPA thus requires the Forest Service to consider the cumulative impacts before categorically excluding an action from NEPA review. Center for Biological Diversity, Order at 3-4; West v. Secretary of Department of Transportation, 206 F.3d 920, 928-29 (9th Cir. 2000) (rejecting reliance on categorical exclusion for highway interchange); High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 641 (9th Cir. 2004) (categorical exclusion could not be applied to special-use permits). The question as to whether a project may “significantly” effect the environment is defined as: “Whether an action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to

anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.” 40 C.F.R. § 1508.27(b)(7).

Cumulative impacts are defined as:

[T]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. §1508.7. “If several actions have a cumulative environmental effect, this consequence must be considered in an EIS.” Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214 (9th Cir. 1998). See also Te-Moak Tribe of Western Shoshone v. Department of the Interior, ___ F.3d ___, 2010 WL 2431001, at * 7 (9th Cir., June 18, 2010) (“NEPA requires that where several actions have a cumulative ... environmental effect, this consequence must be considered in an EIS.”).

“The CEQ regulations require agencies to discuss the cumulative impacts of a project as part of the environmental analysis. 40 C.F.R. § 1508.7.” Davis v. Mineta, 302 F.3d at 1125 (10th Cir. 2002). “Of course, effects must be considered cumulatively, and impacts that are insignificant standing alone continue to require analysis if they are significant when combined with other impacts. 40 C.F.R. §1508.25(a)(2).” New Mexico ex rel. Richardson, 565 F.3d at 713, n. 36.

In a cumulative impact analysis, an agency must take a “hard look” at all actions. An EA's analysis of cumulative impacts must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment. ... Without such information, neither the courts nor the public ... can be assured that the [agency] provided the hard look that it is required to provide.

Te-Moak Tribe of Western Shoshone, 2010 WL 2431001, at *8 (9th Cir., June 18, 2010) (citations omitted) (rejecting EA for mineral exploration that had failed to include detailed analysis of impacts from nearby proposed mining operations).

A cumulative impact analysis must provide a “useful analysis” that includes a detailed and quantified evaluation of cumulative impacts to allow for informed decision-making and public disclosure. Kern v. U.S. Bureau of Land Management, 284 F.3d 1062, 1066 (9th Cir. 2002); Ocean Advocates v. U.S. Army Corps of Engineers, 361 F.3d 1108 1118 (9th Cir. 2004). The NEPA requirement to analyze cumulative impacts prevents agencies from undertaking a piecemeal review of environmental impacts. Earth Island Institute v. U.S. Forest Service, 351 F.3d 1291, 1306-07 (9th Cir. 2003).

The NEPA obligation to consider cumulative impacts extends to all “present” and “reasonably foreseeable” future projects, including when a project is part of larger program or an identifiable series of projects. Blue Mountains, 161 F.3d at 1214-15; Kern, 284 F.3d at 1076; Hall v. Norton, 266 F.3d 969, 978 (9th Cir. 2001) (finding cumulative analysis on land exchange for one development failed to consider impacts from other developments potentially subject to land exchanges); Great Basin Mine Watch v. Hankins, 456 F.3d 955, 971-974 (9th Cir. 2006) (requiring “mine-specific ... cumulative data,” a “quantified assessment of their [other projects] combined environmental impacts,” and “objective quantification of the impacts” from other existing and proposed mining operations in the region).

Thus, without an understanding of the “cumulative impacts,” the agency cannot credibly determine whether the impacts from the two Projects are insignificant – yet that is precisely what the Forest Service did in this case. The Decision Memo and CE were based on the assertion that:

“Approving this Plan does not have individual or cumulative significant effects on the quality of the human environment.” DM at 6. However, the Forest Service was well aware of Denison’s other present and reasonably foreseeable uranium mining and processing operations adjacent to and connected with the two challenged Projects and could not have credibly ignored the cumulative impacts of those operations.

As detailed above, the Forest Service approved the two challenged Projects without considering the ongoing activities (and proposed expansion) of Denison’s Pandora/La Sal Complex mining operations (and other related projects). Thus, there can be no doubt that the existing operations and proposed expansion of Denison’s Pandora/La Sal Complex mines, as well as the transportation and processing of uranium ore to/at Denison’s nearby White Mesa Mill are “past, present, and reasonably foreseeable future actions” that should have been reviewed prior to the agency’s issuance of the DM and CE. The agency’s failure to conduct this required analysis violates NEPA and is grounds for the issuance on an injunction. See, e.g., Center for Biological Diversity, Order at 3-4 (issuing preliminary injunction against Forest Service CE for uranium exploration for failing to conduct cumulative impacts analysis of other uranium operations in the area).

2. *The Projects Should Have Been Considered as Connected Actions with Denison’s Pandora/La Sal Complex Mining Operations and Expansions.*

In addition to failing to consider the cumulative impacts from Denison’s Pandora/La Sal Complex, the Decision Memo and CE fail to recognize that the challenged Projects are part of

these Denison operations. This is a separate requirement under NEPA which requires that “connected actions” be considered in one NEPA document.

“[A]n agency is required to consider more than one action in a single EIS if they are ‘connected actions,’ ‘cumulative actions,’ or ‘similar actions.’” Kleppe v. Sierra Club, 427 U.S. 390, 408 (1976). The federal courts use a “but for” or “independent utility” test for connected actions. Thomas v. Peterson, 753 F. 2d 754, 758-60 (9th Cir. 1985). If one project cannot proceed without the other project (i.e., “but for” the other project), or if the first project is not “independent” of the second project, the two projects are considered connected actions and must be reviewed in the same EIS. Id. “The purpose of this requirement is to prevent an agency from dividing a project into multiple ‘actions,’ each of which individually has an insignificant environmental impact, but which collectively have a substantial impact. ... The crux of the test is whether each of the two projects would have taken place with or without the other and thus had independent utility.” Great Basin Mine Watch, 456 F.3d at 969 (9th Cir. 2006).

As detailed above, the agency concedes that: “The need for uranium exploration and vent holes in relation to underground mining [at the Pandora/La Sal Complex] continues to exist. The vent holes will help provide adequate ventilation for the miners and meet Mine Safety and Health Administration requirements.” DM at 7. “These activities [the two challenged projects approved in the Decision Memo] are in support of mining operations at the Pandora Mine.... Vent holes are needed to move air through the mine to provide fresh air for the miners.” DM at 3. “These vent holes are necessary to provide adequate ventilation as the mining moves further from the surface facilities.” DM at 5.

According to the Decision Memo, the continued operation and expansion of the Pandora/La Sal Complex mining cannot proceed without at least the radon vent holes approved in the DM. In other words, “but for” the Radon Vent Hole Project, the Pandora/La Sal Complex operations could not safely proceed or at a minimum expand, as proposed by Denison in its December 2009 Plan of Operation. Similarly, the Radon Vent Hole Project is not “independent” of the other Denison operations so as to allow the Forest Service to piecemeal its environmental review of the combined Denison projects. Thus, because of the direct connection between the approved Projects and Denison’s existing and proposed expansion of the Pandora/La Sal Complex operations, the Forest Service violated NEPA when it refused to consider the projects as “connected actions” that should be reviewed in the same NEPA document.

3. *Category 3, for “Minor Special Uses,” Does Not Apply to Mineral Operations Approved Under the 1872 Mining Law and the Agency’s Mining Regulations.*

The Forest Service's reliance on categorical exclusions to avoid full NEPA review of the Radon Vent Hole Project is plainly erroneous and inconsistent with NEPA and the CEQ regulations. When an agency’s action does not comport with the chosen categorical exclusion, courts invalidate the action. See, Center for Biological Diversity v. Stahn, Order at 2-4; West v. Secretary of Department of Transportation, 206 F.3d 920, 928-29 (9th Cir. 2000) (rejecting reliance on categorical exclusion for highway interchange); High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 641 (9th Cir. 2004). Courts must review "whether the path taken to reach the conclusion was the right one in light of NEPA's procedural requirements." West, 206 F.3d at 929.

The Forest Service did not prepare an EA or EIS for the challenged Projects, relying instead on a NEPA "categorical exclusion" in approving the Projects. According to the Decision

Memo:

Approving this Plan does not have individual or cumulative significant effects on the quality of the human environment. The project falls under 36 C.F.R. 220.6, which states that there are routine actions that require documentation in a Decision Memo of the rationale for not preparing an environmental assessment or environmental impact statement. Specifically, it falls into 36 C.F.R. 220.6 (e):

3. Approval, modification, or continuation of minor special uses of National Forest System lands that require less than five contiguous acres of land.

And:

8. Short-term (one year or less) mineral, energy, or geophysical investigations and their incidental support activities that may require cross-country travel by vehicles and equipment, construction of less than one mile of low standard road (Service Level D, FSH 7709.56), or use and minor repair of existing roads.

The two vent holes fall in the #3 category in that they are minor in nature and create less than 5 contiguous acres of disturbance to construct and implement. Although air quality and the effects of radon were brought up during the scoping period, we have determined these are minor. The exploration drilling falls into the #8 category in that it is a short term project with minor use of existing roads and with some cross-country travel.

DM, at 6-7.

In bypassing NEPA review of the Radon Vent Hole Project, the agency relied upon Category 3 in its categorical exclusion regulations. Category 3, however, cannot be used in this case because Category 3 is only applicable to "minor special uses of National Forest System lands." The Forest Service relied upon Category 3 in its 36 C.F.R. § 220.6(e) regulations. Those regulations define Category 3 as:

(3) Approval, modification, or continuation of minor special uses of NFS lands that require less than five contiguous acres of land. Examples include, but are not limited to:

- (i) Approving the construction of a meteorological sampling site;
- (ii) Approving the use of land for a one-time group event;
- (iii) Approving the construction of temporary facilities for filming of staged or natural events or studies of natural or cultural history;
- (iv) Approving the use of land for a 40-foot utility corridor that crosses one mile of a national forest;
- (v) Approving the installation of a driveway, mailbox, or other facilities incidental to use of a residence;
- (vi) Approving an additional telecommunication use at a site already used for such purposes;
- (vii) Approving the removal of mineral materials from an existing community pit or common-use area; and
- (viii) Approving the continued use of land where such use has not changed since authorized and no change in the physical environment or facilities are proposed.

Id. The “special uses of NFS lands” that may qualify for a categorical exclusion under Category 3 (36 C.F.R. § 220.6(e)(3)) do not include “mineral operations” approved pursuant to the 1872 Mining Law and 36 C.F.R. Part 228 regulations – the regulations under which the Forest Service approved the Radon Vent Hole Project.

The Decision Memo approved Denison’s Plan of Operations (including both the Radon Venting and Uranium Exploration Projects) under the agency’s mining regulations at 36 C.F.R. Part 228. “Denison’s existing mining operation and proposed activities are pursuant to the Mining Law of 1872, as amended. Operations approved by this decision must be in compliance with the rules and regulations for operations on National Forest System lands (36 C.F.R. 228, Subpart A). ... Approval of this Plan of Operations is consistent with 36 C.F.R. 228.5.” Decision Memo at 3. According to the Forest Service, the agency is obligated to approve such mineral investigations pursuant to the 1872 Mining Law and 36 C.F.R. Part 228 regulations. Id.

at 3-4.

While still considered part of a “mineral operation” regulated by the Forest Service’s 36 C.F.R. Part 228 mining regulations, radon venting is not a “mineral investigation.” Yet the agency nevertheless utilized Category 3, which cannot be used for mineral operations regulated under the Part 228 regulations. “Special Uses” are regulated under the agency’s permitting requirements for non-mineral “special uses” found at 36 C.F.R. Part 251. The Part 251 “special use” regulations were promulgated pursuant to the Federal Land Policy and Management Act of 1976 (“FLPMA”), 42 U.S.C. §§1701 *et. seq.*, among other statutes (such as the Forest Service Organic Act of 1987, 16 U.S.C. § 551).

Activities regulated under the Part 251 “special use” regulations, are not regulated under the 1872 Mining Law and the agency’s mining regulations at 36 C.F.R. Part 228. The Forest Service regulations specifically exclude mineral operations approved pursuant to Part 228 from the category of “special uses.” Under the heading of “Special Uses” in Subpart B of Part 251, the regulations state: “All uses of National Forest System lands, improvements, and resources, **except those authorized by the regulations governing ... minerals (part 228)** are designated ‘special uses’.” 36 C.F.R. § 251.50(a) (emphasis added).

Moreover, under 36 C.F.R. Part 251 — and unlike mineral operations proposed under the Mining Law and Part 228 regulations — the Forest Service has discretion to deny proposed activities under various criteria, and must reject any project that is not “in the public interest.” 36 C.F.R. § 251.54(e). This “public interest” determination under FLPMA and Part 251 was never made by the agency in this case. In addition, “special uses” under these regulations cannot be authorized if they may result in the “disposal of radioactive or other hazardous substances.”

Id. As noted above, the Radon Vent Hole Project will result in the emission of radioactive radon gas and radioactive particulates into the environment, as well as the disposal of potentially radioactive or hazardous drill cuttings and waste rock removed as part of the construction of the mine vents. DM at 5. Because it was part of the mineral operation, the Decision Memo and CE never regulated the Radon Vent Hole “special use” project under the Part 251 regulations. The agency never followed the applicable permitting, public comment, and review procedures in part 251.

The Forest Service cannot have it both ways – regulating the Radon Vent Hole Project as a “mineral operation” under its 36 C.F.R. Part 228 regulations and the Mining Law to avoid the Part 251 restrictions, while at the same time utilizing Category 3 which is reserved for non-mining “special uses” (uses regulated under part 251). Thus, the agency illegally utilized Category 3 for the Radon Vent Hole project and illegally authorized the Radon Vent Hole Project.

4. *Category 8 is Not Applicable to the Uranium Exploration Project As It Is Not “Routine” and Is Part of the Larger Denison Projects Lasting More Than One Year.*

In exempting the Uranium Exploration Project from NEPA review, the Forest Service utilized a Category 8 exclusion. As described in the Decision Memo, Category 8 can only be used for “routine actions” involving “Short-term (one year or less) mineral, energy, or geophysical investigations and their incidental support activities that may require cross-country travel by vehicles and equipment, construction of less than one mile of low standard road (Service Level D, FSH 7709.56), or use and minor repair of existing roads.” DM at 6.

The Uranium Exploration Project, however, is neither “routine” nor “short-term (one year or less).” First, the Project is only the third uranium exploration project approved on Manti-La Sal Forest Service land since 2005. Because uranium exploration projects are approved so infrequently, their approval cannot be considered routine.

Secondly, because the exploration drilling is “in support of mining operations at the Pandora Mine,” DM at 3, and the fact that the Pandora Mine is proposed to last at least another 20 years (see Denison’s December 2009 POA), it is clear that the exploration drilling is part of a project that will last longer than the one year allowed under Category 8. In the Arizona federal case, the court found that the one-year-limit in Category 8 also did not apply due to the connection between exploratory drilling and potential future mining. “[T]he Court hesitates in concluding that the project is temporally limited, based on the uncertain relationship between exploratory drilling and potential uranium mining activities allowed under the Mining Act of 1872.” Order at 3. In this case, there is not even an “uncertain relationship” between Denison’s exploratory drilling and future mining – it is certain because Denison has already submitted its POA for mining in the same area connected to this new exploratory drilling.

Lastly, even if the exploration drilling is not considered part of the Pandora/La Sal Complex operations (which any reading of the record would not support), the Decision Memo admits that the drilling could last until next year, depending on site conditions. “If reclamation is impractical ... reclamation will be delayed until the following season.” DM at 4. Thus, while Denison hopes to conclude drilling and reclamation this year, that may not be the case.

Overall, it is clear that the exploratory drilling approved by the DM is just the first stage in Denison’s expansion plans. The new drilling is certainly not “routine” in the National Forest,

and is part of an operation that will potentially last decades, not just one year. Had the agency reviewed the entirety of Denison's program as NEPA requires, the "short-term" categorical exclusion could not have been invoked. As such, the agency's reliance on Category 8 violates NEPA and its implementing regulations.

B. Plaintiffs' Interests and the Public Interest Will be Irreparably Harmed Absent the Requested Injunction.

1. *Plaintiffs' Interest Will Suffer Irreparable Harm If The Project Proceeds.*

Environmental injury is generally irreparable and favors the issuing an injunction. As the Supreme Court held, "environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." Amoco Prod. v. Vill. of Gambell, 480 U.S. 531, 545 (1987). See, Catron County v. U.S. Fish & Wildlife Serv., 75 F.3d 1429, 1440 (10th Cir. 1996) (stating that "environmental injury usually is of an enduring or permanent nature, seldom remedied by money damages and generally considered irreparable"); Davis v. Mineta, 302 F.3d 1104, 1115 (10th Cir. 2002) (same) (quoting Amoco Prod. Co., 480 U.S. at 545).

As explained in the Declaration of Ms. Melinda Ronca-Battista ("Ronca-Battista"), the Denison Uranium Exploration Project and Vent Hole Project are likely to result in the release of radioactive air emissions and toxic heavy metals substances to the environment in excess of regulatory limits. Ronca-Battista Decl. ¶ 26, attached hereto as Exhibit 14. The radioactive releases from the proposed vent holes and uranium exploration project pose an increased exposure risk for nearby residents and wildlife and humans who have unrestricted access to the proposed project areas. Id. at ¶ 25. These increased risks can lead to irreparable injury from

disease such as lung cancer. *Id.* at ¶¶ 12-15. These risks are increased due to the cumulative effects of existing uranium exploration and production activities in the area. *Id.* at ¶ 16.

Radon decay products from the proposed projects, such as polonium 210 and lead, also pose irreparable health risks. *Id.* at ¶ 17-18. These decay products could accumulate in soil at the site of the proposed projects exposing both humans and wildlife to their hazards. *Id.* at ¶ 25.

Finally, Plaintiffs' ability to recreate in the area will be significantly and irreparably harmed. *See* Declaration of Sarah Fields, ¶¶ 10-14; Declaration of Harold Shepard, ¶¶ 8-10; Declaration of Bill Love, ¶¶ 5-8; Declaration of John Weisheit, ¶¶ 6-12.

2. *Plaintiffs Will Suffer Irreparable Procedural Harm.*

Plaintiffs will also suffer irreparable procedural harm from the Forest Service's failure to comply with NEPA procedures. As the Tenth Circuit has held:

In mandating compliance with NEPA's procedural requirements as a means of safeguarding against environmental harms, Congress has presumptively determined that the failure to comply with NEPA has detrimental consequences for the environment. See 42 U.S.C. § 4321 (congressional declaration of purpose); cf. *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989) (stating harm NEPA seeks to prevent is complete when agency makes decision without considering information NEPA seeks to place before decision-maker and public). *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 448-49 (10th Cir.1996) (“The injury of an increased risk of harm due to an agency’s uninformed decision is precisely the type of injury the National Environmental Policy Act was designed to prevent.”). For this reason, we hold that harm to the environment may be presumed when an agency fails to comply with the required NEPA procedure.

Davis v. Mineta, 302 F.3d at 1114-1115. “In the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of a major federal action.” *High Sierra Hikers*, 390 F.3d at 642 (citation omitted).

Here, the two Projects should be enjoined because that is the only way for the Court to ensure NEPA's goals and procedures are achieved. See, Robertson, 490 U.S. at 349. NEPA must be complied with “before any irreversible and irretrievable commitment of resources is made.” Hall v. Norton, 311 F.3d at 1175. NEPA requires compliance “before decisions are made and before actions are taken” (40 C.F.R. § 1500.1(b)) to ensure “the agency will not act on incomplete information, only to regret its decision after its too late to correct.” Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989); see also, 40 C.F.R. §§ 1501.2, 1502.5.

Implementing the two Projects is a commitment of resources that cannot be undone. That NEPA’s violations are causing irreparable harm is particularly true in this case because unlawful use of a categorical exclusion prevented an evaluation and public disclosure of the environmental impacts. See, West, 206 F.3d at 930 (plaintiff “has surely been harmed by the application of a [categorical exclusion] since it precluded the kind of public comment and participation NEPA requires”).

The Forest Service never fully analyzed the environmental impacts under NEPA before issuing its Decision Memo. The Forest Service began the process of noticing the Exploration and Radon Vent Hole Projects by sending out a September 16, 2009 letter to potentially interested parties soliciting comments on the Projects. The letter to Plaintiff Uranium Watch is attached hereto as Exhibit 15. The letter to Plaintiff Uranium Watch did not disclose any of the environmental impact from either of the Projects. Plaintiff Uranium Watch commented on the proposed projects and the Forest Service responded at the same time it issued its Decision Memo. The Forest Service’s response is attached hereto as Exhibit 16.

As acknowledged by the Supreme Court, one of NEPA's primary purposes is to inform

and involve the public in government decisions that will impact the human and natural environment. Robertson, 490 U.S. at 370 (NEPA's purpose is broad public dissemination of relevant information); see, 40 C.F.R. § 1500.1(b) (“Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA”). In short, the Forest Service failed to meet both the letter and spirit of NEPA by not providing the public a meaningful opportunity to comment on the environmental impacts of the Uranium Exploration Project and the Radon Vent Hole Projects, causing irreparable injury.

3. *The Public Interest Weighs In Favor Of The Requested Injunction.*

The public interest also warrants issuing an injunction staying implementation of the two Projects. Courts must consider the public interest when ruling on a request for preliminary injunction. Davis v. Mineta, 302 F.3d at 1116 (issuing a preliminary injunction because “plaintiffs assert a strong public interest in NEPA compliance.”). Thus, the public interest warrants an injunction when faced with violations of NEPA.

“Congress's determination in enacting NEPA was that the public interest requires careful consideration of environmental impacts before major federal projects may go forward. Suspending a project until that consideration has occurred thus comports with the public interest.” South Fork Band Council v. Department of the Interior, 588 F.3d 718, 728 (9th Cir. 2009) (injunction proper when agency violates NEPA in approving mining operation). “The preservation of our environment, as required by NEPA ... is clearly in the public interest.” Sierra Club. v. Bosworth, 510 F.3d 1016, 1033 (9th Cir. 2007). Allowing an environmentally damaging project to proceed without NEPA compliance “runs contrary to very purpose of the statutory requirement.” National Parks, 241 F.3d at 738.

There is a strong public interest in preserving the *status quo* with regard to public land and the environment. “[T]here is an overriding public interest in preservation of the undeveloped character of the area This public interest in preserving the character of the environment is one that the plaintiffs may seek to protect by obtaining equitable relief.”

Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244, 1250 (10th Cir. 1973).

In addition to the public interest in maintaining the *status quo*, there may be a public economic interest in the mine. However, as the Ninth Circuit found, “there is no reason to believe that the delay in construction activities caused by the court's injunction will reduce significantly any future economic benefit that may result from the mine's operation.” Se. Alaska Conservation Council v. U.S Army Corps of Eng'rs, 472 F.3d 1097, 1101 (9th Cir. 2006), rev'd on other grounds, 129 S. Ct. 2458 (2009).

In this case, the two Projects are expected to employ “from 3 to 6 people.” DM at 4. Although the temporary loss of any job must be considered, the minimal public interest in delaying the start of construction pending this Court’s review on the merits is substantially outweighed by the strong public interest in seeing that federal agencies comply with the law and that the rights of the public under NEPA are protected. See, Center for Biological Diversity, Order at 4 (enjoining uranium exploration, finding that “the public’s interest in protecting public resources . . . and in requiring the Forest Service to comply with environmental laws is high, and the issuance of a temporary restraining order and preliminary injunction in this case advances the public interest”).

C. The Balance of Harms Warrants an Injunction.

Any alleged harm to the Forest Service or the mining company does not outweigh the

irreparable harm to Plaintiffs and the environment. First, the Forest Service's interests would not be harmed by a suspension of their project approvals. As held by the Tenth Circuit, “[t]he self-inflicted nature of [the government’s] harm [in violating NEPA] ... weighs in favor of granting preliminary injunctive relief”). Davis v. Mineta, 302 F.3d at 1116. Administrative burdens on government agencies do not outweigh the threat of irreparable environmental harm. American Motorcyclist Ass'n v. Watt, 714 F.2d 962, 966 (9th Cir. 1983) (“harm to Inyo [County]’s planning processes was not comparable to the harm enjoining the Plan would cause to the [environment] and the public interest”).

Second, Denison would not be irreparably harmed by an injunction. A delay in exploration activities does not weigh against an injunction. See, Save Our Sonoran, Inc. v. Flowers, 227 F.Supp.2d 1111, 1115 (D. Ariz. 2002), *aff’d*, 381 F.3d 905, 914 (9th Cir. 2004) (delay in project and possible financial loss did not offset environmental destruction); Alaska Center for the Environment v. West, 31 F.Supp.2d 711, 723 (D. Alaska 1998) (noting longer permit processing time was “not of consequence sufficient to outweigh irreversible harm to the environment”).

To the extent delay may result in some financial loss, courts have held that economic harm is not irreparable. Sampson v. Murray, 415 U.S. 61, 90 (1974); National Parks, 241 F.3d at 738 (“loss of anticipated revenues ... does not outweigh the potential irreparable damage to the environment”). Accordingly, where there is a threat of irreparable environmental harm, “more than pecuniary harm must be demonstrated” to avoid a preliminary injunction. Save Our Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1124-1125 (9th Cir. 2005) (affirming preliminary

injunction because, while developer "may suffer financial harm," without injunction, "unlawful disruption to the desert is likely irreparable").

Courts have repeatedly enjoined mining operations, despite the claimed economic harms by the mining company even in the situation where the mining has already commenced. Se. Alaska Conservation Council, 472 F.3d at 1097. In S. Fork Band Council, the Ninth Circuit noted that, even with billions of dollars in potential lost or delayed revenue that could result from a preliminary injunction against the mine, and even though the company had already spent hundreds of millions of dollars on initial construction, a preliminary injunction should issue because "the resulting hardship asserted by [the mining company] and the government is cast principally in economic terms of employment loss, but that may for the most part be temporary." Id., 588 F.3d at 728.

D. The Circumstances Weigh in Favor of this Court Waiving the Bond Requirement.

If a temporary restraining order or preliminary injunction is granted, Plaintiffs respectfully request that the Court waive the bond requirements or impose a nominal bond. Under Federal Rule of Civil Procedure 65(c), courts have such discretion. As the Tenth Circuit has held: "Ordinarily, where a party is seeking to vindicate the public interest served by NEPA, a minimal bond amount should be considered." Davis v. Mineta, 302 F.3d at 1126 (citation omitted).

In cases where plaintiffs are public interest organizations or individual citizens seeking a preliminary injunction to protect the environment, courts routinely waive the bond requirement or impose a nominal bond. Id.; see also, Friends of the Earth v. Brinegar, 518 F.2d 322, 323 (9th Cir. 1975).

Congress intended that private citizens be able to enforce environmental statutes like NEPA and ensure that governmental agencies are held to account when they violate the law. People of the State of California v. Tahoe Regional Planning Agency, 766 F.2d 1319, 1325 (9th Cir. 1985) (“special precautions to ensure access to the courts must be taken where Congress has provided for private enforcement of a statute”). Requiring a substantial bond would “seriously undermine the mechanisms in NEPA for private enforcement” of law and likely would have a chilling effect on litigation to protect the environment and the public interest. Id. (requiring no bond); see also, West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232, 236 (4th Cir. 1971) (\$100 bond); Colorado Wild v. U.S. Forest Serv., 299 F.Supp. 2d 1184, 1191 (D. Colo. 2004) (no bond); Sierra Club v. Block, 614 F.Supp. 488 (D.D.C. 1985) (\$20 bond).

In addition, Rule 65(c) is based on the theory of unjust enrichment. As such, a plaintiff should not benefit financially from the wrongful granting of preliminary relief. Where, as here, Plaintiffs gain no pecuniary interest from an injunction, there is no unjust enrichment concern and no bond should be required. See, Wisconsin Heritages v. Harris, 476 F.Supp. 300, 302 (E.D. Wisc. 1979) (no bond required where plaintiff “is a nonprofit organization with no apparent financial stake in the outcome of this suit.”). Finally, the likelihood of success on the merits tips in favor of a minimal bond or no bond. Davis v. Mineta, 302 F.3d at 1126.

VI. CONCLUSION

Plaintiffs respectfully request that this Court grant their motion for a temporary restraining order and preliminary injunction enjoining the Forest Service from proceeding with any further implementation of Denison’s Uranium Exploration Project and Radon Vent Hole Project.

Respectfully submitted, this 29th day of July, 2010,



Joro Walker, Utah Bar # 6676

Charles R. Dubuc, Utah Bar # 12079

Western Resource Advocates
150 South 600 East, Suite 2AB
Salt Lake City, Utah 84102
Tel: 801-487-9911

jwalker@westernresources.org, rdubuc@westernresources.org

Eric Jantz, (pro hac vice application pending)

New Mexico Environmental Law Center

1405 Luisa Street, Suite 5

Santa Fe, New Mexico 87505

Tel: 505-989-9022; Fax: 505-989-3769

ejantz@nmelec.org

Roger Flynn (pro hac vice application pending)

Western Mining Action Project

P.O. Box 349

440 Main St., #2

Lyons, Colorado 80540

Tel: 303-823-5738; Fax: 303-823-5732

wmap@igc.org

Attorneys for Plaintiffs

Index to Exhibits

Exhibit	Title
Exhibit 1	Denison Decision Memo
Exhibit 2	Denison Plan of Operations Amendment
Exhibit 3	Denison Web Page
Exhibit 4	Letter to Utah DOGM, July 20, 2009, from Denison
Exhibit 5	Letter to U.S. Forest Service, July 20, 2009, from Denison
Exhibit 6	Letter to Denison, Sep. 15, 2009, from U.S. BLM
Exhibit 7	Project Description
Exhibit 8	Letter to Utah DAQ, January 27, 2010, from Denison
Exhibit 9	Fields Declaration
Exhibit 10	Love Declaration
Exhibit 11	Shepherd Declaration
Exhibit 12	Weisheit Declaration
Exhibit 13	CBD v. Stahn Order
Exhibit 14	Ronca-Battista Declaration (plus Attachment A)
Exhibit 15	U.S. Forest Service Scoping Letter
Exhibit 16	U.S. Forest Service Response Letter

CERTIFICATE OF SERVICE

I hereby certify that on this 29th of July, 2010, I filed a true and exact copy of **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** with the Court's CM/ECF system, and will email a true and exact copy to the following:

Jared Bennett: Jared.Bennett@usdoj.gov

Michael Zody: MZody@parsonsbehle.com


