Nos. 05-56814 and 05-56832

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL PARKS CONSERVATION ASSOCIATION,

Plaintiff/Appellee,

v.

BUREAU OF LAND MANAGEMENT; UNITED STATES DEPARTMENT OF THE INTERIOR

Defendants/Appellants

and

KAISER EAGLE MOUNTAIN, INC. and MINE RECLAMATION CORPORATION,

Defendants/Appellants.

On Appeal from the United States District Court for the Central District of California
Case No. CV-00-00041-RJT

ANSWERING BRIEF OF APPELLEE NATIONAL PARKS CONSERVATION ASSOCIATION

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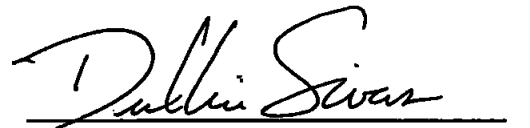
CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, National Parks Conservation Association states that it is a not-for-profit conservation organization and has no parent companies, subsidiaries, or affiliates that have issued stock to the public in the United States or abroad.



DEBORAH A. SIVAS

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INTRODUCTION

At the heart of this case lies a single federal action – the Bureau of Land Management's ("BLM") decision to trade away nearly 4,000 acres of mostly unspoiled public canyon lands on the border of one of our most fragile wilderness parks, Joshua Tree National Park, for private development of what would be the nation's largest trash landfill. In exchange, the American public received ten scattered parcels, comprising roughly 2,800 acres, along an old railroad line leading to the proposed landfill, plus $20,000. Such a divestment of federal public lands is highly disfavored and is sanctioned by Congress only where the "public interest will be well served" by the disposition. 43 U.S.C. § 1716(a). Here, BLM justified the land exchange largely on the purported public need for new landfill capacity, without conducting a meaningful analysis of that need or the alternatives for satisfying it, and then claimed, incredibly, that the low value received by the American public for the exchanged land was justified by the absence of "market demand" for landfill capacity. The record reveals how Federal Defendants got themselves into this untenable position: BLM improperly approached the environmental analysis and ultimate land exchange decision from the perspective of a private party's business interests, rather than from the perspective of a public agency whose primary mission is to manage its lands "in a manner that will protect

the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values." Id. § 1701(a)(8). The result was a land transaction that does not advance any legitimate public interest, but provides a substantial windfall to a private developer at the expense of the American public. The District Court thus properly set aside the land exchange and ancillary decisions and remanded the matter to BLM.

On appeal, the Court must determine two issues: (1) whether BLM's Eagle Mountain land exchange decision was arbitrary and capricious because it failed to fairly appraise the subject lands and to demonstrate that the public interest is well-served, as required under the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1701 et seq., and (2) whether BLM violated its statutory obligations under the National Environmental Protection Act ("NEPA"), 42 U.S.C. § 4321 et seq., because the "purpose and need" and "alternatives" discussions in the land exchange Environmental Impact Statement ("EIS") were improperly constrained by the private business desires of the project proponents (collectively "Kaiser"). This Court's decision in Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172 (9th Cir. 2000) is wholly dispositive of the FLMPA land appraisal issue; indeed, it is hard to imagine a more factually analogous case. The remaining issues are readily resolved on the administrative record, which

demonstrates that both the FLPMA "public interest" and NEPA "purpose and need" analyses improperly conflated the public's interest with the private business interests of Kaiser. This confusion over the legitimate purpose for the land exchange caused BLM to unreasonably truncate the alternatives analysis in the EIS. Because the EIS did not meaningfully inform the public or the decisionmaker of the options available to BLM, it cannot stand.

Kaiser and BLM (collectively "Appellants") seek to bury these fatal flaws in a series of muddled and meritless exhaustion arguments. However, the record shows unambiguously that Plaintiff National Parks and Conservation Association ("NPCA") properly raised its concerns during the administrative process, thoroughly exhausted its administrative remedies, and correctly challenged Federal Defendants' action granting the Eagle Mountain land exchange. Accordingly, NPCA respectfully requests that this Court reject Defendants' frivolous procedural defenses and affirm the District Court's judgment.

ISSUES PRESENTED

1. Did BLM's land exchange decision violate FLPMA because (a) the land appraisal on which it was based failed to consider the value of the exchanged lands for a landfill and (b) the administrative record does not

contain substantial evidence to demonstrate that the public interest is well-served by the exchange?

2. Did the EIS for the land exchange violate NEPA by (a) improperly defining the purpose of the project to reflect Kaiser's private business interests rather than BLM's broader public mandate and (b) considering an unreasonably narrow range of alternatives?

3. Did NPCA properly exhaust and present its claims for judicial review by challenging BLM's compliance with NEPA and FLPMA at every point in the administrative process and by naming the BLM and the Department of the Interior ("DOI") as Defendants?

STATEMENT OF THE CASE

This case arises out of BLM's decision to transfer thousands of acres of public land on the flanks of Joshua Tree National Park to Kaiser for the development of a landfill that will, at its peak, accept 20,000 tons per day of rail-hauled and trucked solid waste from Southern California coastal communities. From the project's earliest inception, NPCA joined many others in opposing the land exchange as ill-conceived and inconsistent with Federal Defendants' mandate to protect the environmental and public use values of these lands and of the surrounding parklands and wilderness areas. NPCA participated at every available

opportunity, repeatedly commenting on the NEPA inadequacies and FLPMA inconsistencies during BLM's administrative process, protesting the District Manager's Record of Decision ("ROD") to the California State BLM Office, appealing the final land exchange decision before DOI's Interior Board of Land Appeals ("IBLA"), and finally, seeking judicial review in the District Court pursuant to the Administrative Procedure Act ("APA"). The District Court ultimately granted summary judgment in NPCA's favor on all but one of its claims and, accordingly, set aside the land exchange decision. Separate appeals by Federal Defendants and Kaiser followed.[1]

STATEMENT OF FACTS

A. The Setting

Kaiser proposes to build a landfill largely on public land nestled in the foothills of the Eagle Mountains and surrounded on three sides by Joshua Tree National Park. Kaiser Excerpted Record ("ER") at 7:45. Joshua Tree contains unmatched desert wildlife and spectacular geologic formations, and its wilderness resources are a "preeminent feature" of the Park. NPCA's Supplemental Excerpts

[1] Donna Charpied, et al. filed and litigated a separate case over the same BLM decision. The District Court decided the two lawsuits in tandem and issued a single judgment. Federal Defendants and Kaiser filed separate appeals in the Charpied case, and plaintiffs in that matter cross-appealed. For efficiency's sake, all five appeals are being briefed in parallel before this Court.

of Record ("SER") 658, 661. Indeed, the "vast majority" of the Park's lands are managed as wilderness. SER 658. Additionally, the Park's "[c]lean and unpolluted air affords distant vistas," and its "natural quiet and clear night skies" are world renowned for their "beauty and tranquility." SER 660. Originally set aside as a National Monument by Presidential Proclamation in 1936 to "preserve an ecologically dynamic component of the California Desert" and to recognize that the "lands contain historic and prehistoric structures and . . . objects of historic and scientific interest," SER 659; ER 7:394, the Park became part of an International Biosphere Reserve in 1984. SER 665.

In 1994, Congress expanded and upgraded Joshua Tree to national park status with passage of the California Desert Protection Act ("CDPA"), 16 U.S.C. § 410aaa et seq. SER 659, ER 7:394. The CDPA recognized Joshua Tree as "having extraordinary values enjoyed by millions of visitors" and added 234,000 acres of contiguous federal land (previously under BLM jurisdiction) to the new Park boundaries to protect the "essential and superlative natural, ecological, archeological, paleontological, cultural, historical, and wilderness values" of these additional lands. 16 U.S.C. § 410aaa-21.

A large section of the land added to the Park by the CDPA lies just south and west of Kaiser's proposed landfill, and at the time the EIS in this case was

prepared, these lands were designated for management by the National Park Service as Primitive Wilderness, Semi-Primitive Wilderness, and Sensitive Resource Protection. ER 7:390. The BLM lands immediately adjacent to these Park areas, including those subject to the land exchange, are within the California Desert Conservation Area, which Congress has recognized as an extremely fragile, easily scarred, and slow-to-heal ecosystem that warrants special resource protection and management. 43 U.S.C. § 1781.

B. The Proposed Landfill Project

The proposed Eagle Mountain Landfill project calls for construction of a Class III non-hazardous solid waste landfill that, if built, will be the largest landfill in the nation, capable of handling up to 20,000 tons of trash per day. As proposed and approved, the project includes a 1,500-foot-tall pile of trash, ER 7:264, and sprawls over 4,654 acres. ER 7:48. Roughly 2,164 acres of this total will constitute the actual footprint of the landfill and be used for garbage disposal, while the remaining 2,490 acres will be used for ancillary facilities. ER 7:9. Of the 2,164 acres to be filled with trash, at least 1,038 acres – nearly half of the total – consist of canyon land and rocky hillside habitat that is "largely undisturbed" by human activity. ER 7:263-64. As designed, the project will operate for 117 years and will receive more than 700 billion pounds of trash over its lifetime. ER 7:9.

Although touted by Defendants as a mine reclamation project, the facts in the record tell an entirely different story.

From 1948 until 1983, Kaiser operated an open-pit iron ore mine in the area, partially on land patented under the mining laws and partially on 461 acres temporarily conveyed to Kaiser by Private Law 790 ("PL 790").[2] ER 7:44. During this period, Kaiser dug four huge pits (East Pit, Central Pit, Black Eagle Pit North, and Black Eagle Pit South), some of them hundreds of feet deep, from which it extracted over 940 million tons of ore and earth. Id. The unused tailings from Kaiser's mining activities remain heaped onsite in large waste piles and surface impoundments. Id. Over 5,500 acres of land were disturbed by Kaiser's mining operations and the company has done nothing in the 25 years since mine operations ceased to repair these scarred areas, except to remove equipment and buildings and limit public access. Id.

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[2] Passed in 1952, PL 790 conveyed approximately 461 acres of federal land to Kaiser for uses incidental to its mining operations; the statute provided that these lands "shall" revert to the United States in the event that they are not used for such purposes for a continuous period of seven years. ER 7:117, SER 470-475. The PL 790 lands were used for the mining townsite until the early 1980's, when the mine closed and Kaiser began leasing them to a correctional facility. No reversion has ever been proffered by Kaiser or demanded by the federal government, despite the cessation of mining-related uses over two decades ago.

The proposed landfill, however, will be constructed largely on undisturbed public land, not mining-disturbed Kaiser land. The project EIS explains that a landfill built entirely on Kaiser's own patented lands, without the benefit of the exchanged public lands, would have a footprint of only 289 acres – a mere fraction of the 2,164 acres that Kaiser intends to fill with trash. ER 7:169. Altogether, 3,942 of the 4,654 acres necessary to satisfy Kaiser's business plan for the project – or roughly 85 percent of the total – will be acquired through the land exchange, including 3,481 acres of newly transferred federal land and a full fee interest in the 461-acre former townsite that is presently subject to the PL 790 reverter. ER 7:113-17. Thus, Kaiser intends to leverage a few hundred acres of its patented lands into a massive private landfill development by acquiring and despoiling thousands of acres of federal public land that currently buffers important wilderness areas within adjacent Joshua Tree National Park.

Kaiser's operational plans confirm that the project will not result in substantial land reclamation. As proposed, the landfill will come "on line" in five phases. ER 7:154-55. The first three phases – spanning the first 59 years of Project operations – will occur almost entirely on the transferred public lands and will fill the undisturbed canyon habitat, presently managed by BLM and located nearest to Joshua Tree, with garbage. ER 7:154-55, 7:555-56. Compare 7:114

(EIS Figure 2-1 delineating federal and Kaiser lands) with 7:152 (EIS Figure 2-16 delineating landfill phases). Of the four large mining pits left behind by Kaiser's past operations, three will never be part of the landfill and thus will not enjoy the project's alleged "reclamation" benefits. ER 7:172, 7:264, 7:47. The fourth "East Pit" is not slated for filling until the final phase of the project, some 78 years after the landfill starts accepting waste, and will not be completed for 117 years. ER 7:155. Thus, even if Kaiser's landfill commenced operations tomorrow, its limited "reclamation" of one mining pit would not be realized until at least the year 2124. Id.

Even the ancillary parts of the landfill project will result in more land destruction, not less. As part of the transaction, BLM also will grant two rights-of-way along several miles of the Eagle Mountain Railroad line and over the two-lane Eagle Mountain Road. These new, permanent rights-of-way replace and expand the temporary rights-of-way previously granted by PL 790, eliminating the federal government's reversionary interests, allowing for widening and extension of the road, and expanding the width of the railroad easement and the purposes for which it may be used.[3] ER 7:117-23, SER 470-75, ER 8:570.

[3] PL 790 granted Kaiser a right-of-way along almost 27 miles of the 52-mile Eagle Mountain Railroad line and along the Eagle Mountain Road that runs across BLM lands adjacent to the eastern edge of Joshua Tree for limited mining-

In return, Kaiser will convey 2,846 acres of its previously acquired land, comprised of ten separate, mostly non-contiguous parcels scattered along the Eagle Mountain Railroad, a now-dormant railway line that will be reactivated as a result of the landfill project. ER 7:113-17. These conveyances, however, expressly reserve a 200-wide-easement to allow for reactivation, operation, and maintenance of the trash hauling operations. Id.

C. The Decisionmaking Process for the Exchange

The decisionmaking process that led to the September 25, 1997 Record of Decision ("ROD") began with BLM's May 12, 1995 Notice of Exchange Proposal and involved the production of an EIS and an Appraisal Report to satisfy the requirements of NEPA and FLPMA, respectively.

1. The Environmental Impact Statement

In July 1996, Federal Defendants issued a Draft EIS that drew hundreds of public comments from organizations and individual citizens. The majority of these comments raised significant concerns about NEPA compliance, the adequacy of the environmental analysis, and the ultimate wisdom of proceeding. Specifically, NPCA objected to the range of alternatives presented and the purpose

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related uses. Like the townsite, both of these rights-of-way by their own terms revert to the federal government after seven years of non-use for their intended mining-related purpose. ER 7:17-18, SER 470-75.

and need for the landfill and land exchange as defined in the Draft EIS. SER 487-562. These comments were echoed by many, including the National Park Service, which vigorously argued that the project would significantly impact the Park's biological, air, wilderness, and other resources and its recreational opportunities. See, e.g., ER 8:590, 8:597, 8:626, 8:637.

The January 1997 Final EIS incorporated the Draft EIS largely unchanged and concluded, among other things, that the landfill project will result in unavoidable significant air quality impacts (ER 7:543), the loss of many acres of wildlife habitat (ER 7:595-631), and the obliteration of 160 acres of desert tortoise critical habitat along the expanded rights-of-way. ER 1:13. The document listed four closely-related "purposes" for the land exchange: (1) to develop a new landfill to meet demands in Southern California, (2) to provide an income source for Kaiser, (3) to find an economically viable use for mining by-products at the site, and (4) to provide for long-term use and development of the old mining townsite. ER 7:62. These collectively narrow objectives led to consideration of a correspondingly narrow range of alternatives in the EIS. ER 1:275. Although not required for exhaustion purposes, NPCA submitted additional post-EIS comments, once again addressing the adequacy of BLM's alternatives analysis and critiquing the Project's stated purpose and need. SER 714.

2. The Appraisal Report

On October 5, 1996, between issuance of the Draft and Final EIS, David J. Yerke, Inc., prepared an Appraisal Report, as required by FLMPA. See 43 U.S.C. § 1716. Using a "sales comparison approach," the appraisal estimated "fair market value," defined as the amount "for which in all probability the property would be sold by a knowledgeable owner willing but not obligated to sell to a knowledgeable purchaser who desired but is not obligated to buy." ER 4:10. The report appraised the value of the 3,481 acres of selected public lands to be conveyed to Kaiser, the 461 acres at the Kaiser townsite that would otherwise revert to the United States, and the 2,846 acres of scattered Kaiser land to be conveyed to the federal government in return. See ER 4:7-11.

In valuing the selected public lands, the appraisal based its conclusions on the then-existing local land use zoning for the property, even though Kaiser had already sought (and subsequently received) upgraded zoning for these parcels from the County of Riverside. ER 4:9, 4:11. Mr. Yerke concluded that the "highest and best use" of these lands is "holding for speculative investment and future capital appreciation." ER 4:4, 4:63. Incredibly, the appraisal, while acknowledging the anticipated future use of the lands as part of Kaiser's massive landfill, expressly stated that "the opinions of value expressed within this appraisal

report do not take into consideration any aspects of the proposed landfill project." ER 4:11. Moreover, while the appraisal included several "environmental notations" highlighting the presence of imperiled species and habitats on the subject lands, it did not include these impacts in its valuations. See, e.g., ER 4:56.

The appraiser valued the selected public lands at $268,000, approximately $79 per acre, and the townsite lands at $49,000, approximately $106 per acre, thus assessing the townsite land at a total less than the monthly rental payment of $61,482 that Kaiser receives for leasing these lands. SER 476-77; ER 4:3. Meanwhile, the ten Kaiser parcels were valued at $296,000, approximately $104 per acre. ER 4:3. One year to the day from the appraisal report, BLM issued its ROD, approving all facets of the proposed landfill and attendant land exchange and requiring Kaiser to pay the federal government $20,100 as the difference between the appraised values of the lands. ER 1:7. Thereafter, the Los Angeles County Sanitation District entered into a conditional agreement to purchase the rezoned, aggregated landfill property and its various permits for $41 million, more than $8,800 an acre. SER 2. Thus, Kaiser effectively resold the exchanged public lands at more than 1,000 times the appraised value that Kaiser paid to the American public for them.

3. NPCA's Administrative Appeal

Pursuant to BLM's regulations, NPCA timely filed a protest to BLM's ROD with the California State BLM Office on November 18, 1997. SER 451-52. In its protest, NPCA raised BLM's failure to comply with FLPMA and NEPA. BLM dismissed the protest and issued its final decision on December 9, 1998. SER 444-50. NPCA then timely appealed the decision to the IBLA. SER 442-43. Before the IBLA, NPCA and others again challenged the undervaluation of the public land, especially in light of zoning changes to the site. ER 1:215; SER 408. NPCA also repeated its NEPA challenges, questioning the declared needs for the project and the limited range of alternatives analyzed. SER 608-9. The IBLA issued its opinion denying NPCA's administrative appeal on September 30, 1999. SER 563-95.[4]

D. The District Court Proceedings

NPCA then brought this suit in the District Court, challenging the land exchange under the APA for failure to comply with FLPMA and NEPA. During subsequent summary judgment briefing three years later, Defendants

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[4] NPCA received a copy of that decision via regular U.S. Mail on October 7, 1999, learned on October 8, 1999 that BLM intended to close escrow on the land exchange the next business day, and immediately notified BLM of its intent to seek judicial review. SER 4-5. Before NPCA could file its case, Defendants executed the exchange and recorded it on October 13, 1999. SER 611-43.

commissioned the preparation of a supplemental appraisal document to support the ROD that had been issued some five years earlier. SER 96-100. NPCA strenuously objected to the introduction of this post-record document, SER 186-90, and the District Court order did not consider it. See ER 1:265-67. In granting judgment for NPCA on both the FLPMA and NEPA claims, the District Court ordered the land exchange "set aside" and enjoined Appellants from "engaging in any action that would change the character and use of the exchanged properties" ER 1:278.

STANDARD OF REVIEW

In exercising de novo review over APA claims, the Court must determine that the agency "has considered the relevant factors and articulated a rational connection between the facts found and the choice made." Pac. Coast Fed'n of Fishermen's Ass'n. v. Nat'l Marine Fisheries Council, 265 F.3d 1028, 1035 (9th Cir. 2001). The Court must examine "the disputed decision's rationale and surrounding circumstances in order to . . . ensure that agency decisions are founded on a reasoned evaluation of the relevant factors." Desert Citizens, 231 F.3d at 1180 (internal quotation marks omitted). A decision cannot stand where the agency "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence . . . ." Id.

The Court "must find that the evidence before the agency provided a rational and ample basis for its decision." Nw. Motorcycle Ass'n v. U.S. Dep't of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994). Moreover, it must ensure that the EIS has taken a "hard look" at the project impacts and alternatives by providing a "reasonably thorough discussion of the significant aspects of the probable environmental consequences." Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1149 (9th Cir. 1997).

SUMMARY OF ARGUMENT

In executing the Eagle Mountain land exchange, BLM failed to meet its statutory stewardship obligations under FLPMA and NEPA. Just as it did in Desert Citizens, BLM here violated FLPMA by relying on a defective appraisal that grossly undervalued the transferred lands, thereby providing Kaiser with a windfall at the expense of the public treasury and environmental protection. The agency also unlawfully divested public lands that provide an important buffer for federal wilderness areas in Joshua Tree National Park; the record does not support a finding that the land transfer advances legitimate public goals and "well served" the public interest, as FLPMA requires. Finally, BLM violated NEPA by crafting an improperly narrow "purpose and need" statement devoted to Kaiser's business

interests rather than the American public's interest and by then using this statement to artificially constrain the "range of alternatives" considered in the EIS.

NPCA timely raised each of these issues during the public process and on the subsequent administrative appeal and then properly challenged the Department of the Interior's final agency action by seeking judicial review after the IBLA's administrative ruling. The District Court's decision should, therefore, be affirmed.

ARGUMENT

I. THE EAGLE MOUNTAIN LAND EXCHANGE VIOLATES FLPMA.

Adopted in 1976, FLPMA embodies Congress's fundamental mandate that "public lands be retained in Federal ownership, unless . . . it is determined that disposal of a particular parcel will serve the national interest." 43 U.S.C. § 1701(a)(1) (emphasis added). The statute reversed prior national policy encouraging federal land conveyances and instead instructed BLM to retain and manage the public lands to protect their scientific, scenic, ecological, historical, and similar values. Id. § 1701(a)(8). Any disposal of such lands must now be "consistent" with the agency's prescribed mission. Id. § 1701(a)(10).

One way of divesting public land is through a land exchange. BLM may approve an exchange of federal lands under its jurisdiction only if two explicit and distinct criteria are satisfied. First, the exchanged lands must be of equal value.

43 U.S.C. § 1716. Second, BLM must demonstrate that the public interest will be "well served" by the transfer. Id. "[T]he public interest and the equal value requirements are separate requirements that must be met prior to approval of a land exchange. Satisfaction of one of these requirements is insufficient to excuse the other." Desert Citizens, 231 F.3d at 1180. Here, BLM failed to satisfy either criteria.

A. The Appraisal for the Land Exchange Is Fatally Flawed.

To ensure compliance with the equal value requirement, FLPMA directs BLM to formally appraise the public and private lands to be exchanged. This mandatory appraisal must comply with agency regulations that "shall reflect nationally recognized appraisal standards, including, to the extent appropriate, the Uniform Appraisal Standards for Federal Land Acquisitions ("UAS")." 43 U.S.C. § 1716(f)(2); 43 C.F.R. § 2201.3. BLM regulations instruct the agency to negotiate the most lucrative land exchange possible. Thus, the appraisal must determine the "market value" based on the "highest and best use" of the appraised property by estimating the value of the lands and interests "as if in private ownership and available for sale in the open market." 43 C.F.R. § 2201.3-2(a)(1)-(2). It also must consider "historic, wildlife, recreation, wilderness, scenic, cultural, or other resource values or amenities that are reflected in prices paid for

similar properties in the competitive market." Id. § 2201.3-2(a)(3). Moreover, BLM Handbook Manual H-2200-1 requires reconsideration of an appraisal when intervening "significant local events" may have affected the value of the property; "significant local events" include "zoning changes" and "announcement of plans in the area for major projects." SER 469. The Eagle Mountain appraisal violated each of these requirements.

1. The Eagle Mountain Appraisal Unlawfully Failed to Consider the Value of the Exchanged Lands for a Landfill.

This Court recently interpreted and applied FLPMA land appraisal requirements in Desert Citizens. On facts strikingly similar to those presented here, Desert Citizens set aside a land exchange between BLM and proponents of the very similar Mesquite Regional Landfill in nearby Imperial County because the underlying appraisal "flagrantly undervalued" the public lands to be traded away. 231 F.3d at 1187. The Eagle Mountain appraisal suffers from precisely the same defects.

In Desert Citizens, just as here, a private company sought to aggregate its former mining lands with additional public lands acquired through a land exchange in order to construct a large rail-haul landfill in the Southern California desert. 231 F.3d at 1174. The appraisal valued the federal land at $350 per acre,

based on a conclusion that their "highest and best use" was for "open space" or "mine support." Id. at 1175. There, as here, the appraiser acknowledged the intended use of the property as a landfill, but failed to value the property in light of this information. Id. at 1181-82.

This Court held that the appraiser's failure to consider the use of the exchanged lands for a landfill violated FLPMA. It explained that the UAS requires an appraiser to evaluate whether potential land uses are "physically possible, legally permissible, financially feasible" and "result in the highest value" for the property. Desert Citizens, 231 F.3d at 1181 (citing UAS at 73). In making this assessment, "[a]n appraiser has an obligation to consider not only the effect of existing land use regulations, but also the effect of reasonably probable modifications of such land use regulations. This includes . . . the probability of a rezone of the property being appraised . . . ." Id. at 1184 (citing UAS at 85). Thus, "[w]hile uses that are merely speculative or conjectural need not be considered, uses that are 'reasonably probable' must be analyzed as a necessary part of the highest and best use determination." Id. at 1181 n.10 (citing UAS at 8-9). Moreover, significant local events between the appraisal and completion of the ROD, including zoning changes to facilitate the landfill, required BLM to update the appraisal before authorizing the exchange. Id. at 1185-87.

Here, as in Desert Citizens, the Eagle Mountain appraisal expressly recognized the proposed landfill use, but entirely omitted the landfill project from its land valuations. ER 4:35-36. Instead, the appraisal assessed the land's highest and best use as "holding for speculative investment and future capital appreciation," ER 4:63, even though information generally available when the appraisal was prepared in 1996 strongly suggested that a landfill would be built on the exchanged lands. Indeed, the construction of a landfill was the very purpose for the land exchange. The Draft EIS, circulated for public comment months before the appraisal, concluded that many landfill types were feasible at the project location. ER 7:168-172. Furthermore, in November 1992, the County certified an Environmental Impact Report for Kaiser's landfill at the Eagle Mountain site and approved the necessary land-use changes. ER 7:12. Additionally, the Draft EIS identified comparable landfill projects, including the Bolo Station Landfill and the Mesquite Regional Landfill, thereby highlighting the favorable market for landfill development in the region. ER 7:72. BLM relied heavily on the site's future landfill use to justify the agency's "public interest" analysis for the subject land exchange. ER 1:13. The ROD for the exchange stated that "[t]he proposed landfill site has been evaluated for its suitability as a waste disposal site," id., and

rationalized the land transfer on grounds that "the Eagle Mountain Landfill Project would fulfill regional and local needs . . . ." ER 1:16.

The record thus plainly demonstrates that at the time of BLM's appraisal, Kaiser's proposed landfill was (1) physically possible (as explained in the Draft EIS assessment), (2) legally permissible (as suggested by the prior County approvals), and (3) financially feasible (as demonstrated by Kaiser's willingness to invest its resources in designing, evaluating, and permitting the landfill and by BLM's invocation of regional landfill need to support its decision). Thus, under UAS standards, as interpreted in Desert Citizens, a landfill use for the exchanged lands was neither speculative nor conjectural; to the contrary, "evidence available prior to [the appraisal] indicated that the selected lands were expected to be used for landfill purposes." 231 F.3d at 1181. As in Desert Citizens, it is "particularly troubling" that the appraisal explicitly acknowledged the future landfill use but failed to include that knowledge in the "highest and best" use evaluation. Id. at 1182; ER 4:29.

Moreover, on September 9, 1997 – before the Eagle Mountain ROD was issued – the County of Riverside adopted several requested planning changes to "provide for the development, operation, and reclamation of a Class III nonhazardous solid waste landfill at the abandoned Eagle Mountain iron ore mine

. . . ." SER 463. As was true in Desert Citizens, these changes constituted "significant local events" requiring reexamination of the appraisal, especially since it was at the outer margins of its shelf life. 231 F.3d at 1185-86. At the time of the appraisal, the zoning for the land permitted only "limited residential uses, light agricultural uses, and mining and mine-related activities." ER 4:52. In determining the market value of the selected lands, the appraisal considered sales of parcels with similar zoning classifications. See ER 4:72-73. The County's September 9, 1997 land use changes expanded the zoning classification of the selected lands to allow for development and operation of a solid-waste landfill, thereby rendering incomparable the "comparable sales" on which the original appraisal was based. See UAS at 84 ("In selecting comparable sales for use in the appraisal, the appraiser should select sales which have the same, or similar, zoning as the subject property."). Yet BLM moved forward with the land exchange decision in the absence of an updated appraisal, precisely the action invalidated in Desert Citizens.

Defendants try to evade the controlling precedent in Desert Citizens with two specious arguments. Federal Defendants argue that "unlike in Desert Citizens, the BLM market analysis did not show that there were other landfill proposals in the area, and did not indicate that there was a 'market demand' for

land in the Eagle Mountain area for 'landfill development.'" Brief of the Federal Government ("Govt. Br.") at 30-31. This argument is curious, and wrong. As explained above, the Eagle Mountain EIS expressly discussed the need for regional landfill capacity and identified other proposed landfills, including the Mesquite Landfill project, as possible means of meeting that need. ER 7:72. Moreover, Federal Defendants mischaracterize Desert Citizens, where the Court explicitly considered the Eagle Mountain proposal as evidence of regional market demand:

> A regional market and the presence of competitors sponsoring similar projects made reasonably probable, prior to the 1994 appraisal, that use of the lands for landfill purposes was financially feasible. The draft EIS for the Mesquite Regional Landfill described other proposed landfill projects in the region, including the Eagle Mountain Regional Landfill proposed by Kaiser and the Chocolate Mountain Landfill proposed by Chambers Waste Systems. Both of these projects would be served by the same rail line as the Mesquite Regional Landfill.

231 F.3d at 1185. If recognition of the Eagle Mountain proposal in the Mesquite project EIS was sufficient evidence of market demand in Desert Citizens, the same must necessarily be true in reverse.

Kaiser's defense is equally unavailing. Kaiser argues that the Court should consider a supplemental appraisal prepared by the Herzog Group on September 30, 2002, during summary judgment briefing. Brief of Kaiser et al. ("Kaiser Br.")

at 37-38. NPCA vigorously objected to submission of this report before the District Court, SER 186-90, because courts may only consider the administrative record "already in existence, not some new record made initially in the reviewing court" and "[p]arties may not use 'post-decision information as a new rationalization either for sustaining or attacking the Agency's decision.'" Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 450 F.3d 930, 943 (9th Cir. 2006) (citing Camp v. Pitts, 411 U.S. 138, 142 (1973) and Ass'n of Pac. Fisheries v. U.S. EPA, 615 F.2d 794, 811-12 (9th Cir. 1980)). Federal Defendants agree with NPCA's argument, noting that neither the post-decisional Roach report submitted by plaintiffs in Charpied, et al. nor the post-decisional Herzog report submitted by Defendants "were part of the administrative record" and thus both were "plainly improper." Govt. Br. at 33. As this Court has repeatedly held, "[c]onsideration of [extra-record] evidence to determine the correctness or wisdom of the agency's decision is not permitted . . . If the court determines that the agency's course of inquiry was insufficient or inadequate, it should remand the matter to the agency for further consideration and not compensate for the agency's dereliction by undertaking its own inquiry into the merits." Asarco, Inc. V. U.S. EPA, 616 F.2d 1153, 1160 (9th Cir. 1980). See also Animal Def. Council v. Hodel, 840 F.2d 1432, 1436 (9th Cir. 1988) ("The focal point for judicial review

should be the administrative record already in existence, not some new record made initially in the reviewing court."). By finding the original Yerke appraisal inadequate and remanding the matter to BLM, the District Court followed this Circuit's instructions to the letter.

Kaiser does not show that the post hoc Herzog report – prepared five years after the land exchange decision and nearly three years after NPCA filed this lawsuit – falls into one of the four extremely narrow exceptions to the well-recognized administrative record rule, nor could it. Instead, Kaiser contends that the Court should consider the Herzog report because it evidences harmless error on the part of the original appraiser, citing to Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017 (9th Cir. 1980). That case, however, is inapposite. Warm Springs challenged the agency's failure to prepare a supplemental EIS based on new information. Between trial and appeal, the agency considered the new information and reasonably determined that it did not trigger the statutory standard for a supplemental EIS. Id. at 1026. As the Court explained in Friends of Clearwater v. Dombeck, 222 F.3d 552, 560-61 (9th Cir. 2000), an action to compel an agency to prepare a supplemental EIS "is not a challenge to a final agency decision" and thus is not subject to the normal administrative record rule. Kaiser's proffered "harmless error" exception for challenges to agency decisions would

turn decades of judicial precedent on its head, allowing agencies to submit post-decisional evidence whenever a court finds that the existing record does not support their decision. It must, therefore, be rejected.[5]

Moreover, the Herzog report proves too much. In his retrospective justification for why the Yerke appraisal did not consider the value of the exchange lands for use as a landfill, Mr. Herzog opined that, as of September 1997 when the ROD was issued, "a landfill was not a financially feasible use of the selected [federal] land." ER 4:410. Putting aside the obvious point that Kaiser apparently continues to believe the project is financially feasible (as evidenced by this lawsuit), Mr. Herzog's explanation entirely undermines BLM's express rational for the land exchange. As discussed below, the purported need for a regional landfill, the purported need to revitalize the townsite, and the purported need to restore and reclaim scarred mining lands by burying them in trash were the supporting rationales offered by BLM for its finding that the transfer was in the public interest. If, as Defendants now claim, there was no market for the landfill

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[5] Kaiser misleadingly suggests that the lower court in Desert Citizens applied a "harmless error" test. Kaiser Br. at 42, fn.18. Upon remand, the parties settled that case by way of stipulated judgment. ER 4:83. Thus, no court ever permitted a post hoc appraisal into evidence to support the correctness of the agency's initial decision.

that purportedly would result in these benefits, then BLM's "public interest" determination was all the more deficient.

2. The Appraisal Failed to Consider Other Sources of Value on the Transferred Public Lands.

BLM's undervaluation was even more egregious here than in Desert Citizens because the Eagle Mountain appraisal did not account for the substantial rental revenue Kaiser generates from the former townsite land, revenue that will be rendered permanent by elimination of the federal reversionary interest and conveyance of full fee title as part of the land exchange decision. At the time of the appraisal, Kaiser earned $61,482 per month leasing these lands to a correctional facility. SER 477. Yet the Yerke appraisal assessed the 461 acres of townsite land "as if in a raw, unoccupied state," valuing it in total at only $49,000. ER 4:332. Thus, the appraised sale price is thousands of dollars less than Kaiser receives in a single month by leasing these lands. Moreover, despite the fact that this rental use is anticipated to continue into the foreseeable future (and in fact continues to this day), see, e.g., ER 7:721 (acknowledging continuing light from the correctional facility when considering the lighting impacts over the 117-year Project period), the appraisal concluded that "[n]one of the legally permissible and physically possible uses are established to be financially feasible on the [land used

for the correctional facility]." ER 4:334. Because this conclusion plainly "runs counter to the evidence before the agency," it provides additional reason to set aside the land exchange decision. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

Likewise, although the appraisal identified certain resource values present on the exchanged lands, it did not consider the required "historic, wildlife, recreation, wilderness, scenic, cultural, or other resource values or amenities that are reflected in prices paid for similar properties in the competitive market." 43 C.F.R. § 2201.3-2(a)(3). The appraisal made no effort to quantify the recreational and wildlife value associated with the unique proximity of these public lands to Joshua Tree National Park, among the richest natural environments in the nation and a treasured destination for rock climbers, hikers, and other outdoor enthusiasts. This omission is especially troubling because the appraisal focused on the habitat values associated with Kaiser's offered lands – and BLM later used those amenities to justify its decision – without similarly assessing the resource values that will be lost on the exchanged federal lands. See, e.g., ER 1:13-15.

B. BLM Failed to Demonstrate that the Exchange "Well Served" the Public Interest.

BLM did not satisfy its heavy burden to demonstrate that "that the public interest will be well served" by disposition of the exchanged lands. 43 U.S.C. § 1716(a). To meet this burden, BLM must show substantial evidence in the record to support findings that (1) "the resource values and the public objectives that the Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the resource values of the non-Federal lands or interests and the public objectives they could serve if acquired" and (2) "the intended use of the conveyed lands will not . . . significantly conflict with established management objectives on adjacent Federal lands . . . ." 43 C.F.R. § 2200.0-6(b)(1)-(2). FLPMA also requires BLM to assess federal objectives for protecting fish and wildlife habitat, cultural resources, wilderness and aesthetic values, and opportunities for recreation and public access to federal lands. 43 U.S.C. § 1716(a); 43 C.F.R. §2200.0-6(b); Nat'l Audubon Soc'y v. Hodel, 606 F. Supp. 825, 835 (D. Alaska 1984) (affirming that Congress intended consideration of non-monetary benefits in similar "public interest" land-exchange provision). As the District Court recognized, BLM failed to meet its burden on any of these requirements. ER 1:263-64. Indeed, BLM never made any finding that the land

exchange "well served" the public interest. But even BLM's less robust conclusion that the land exchange "is in the public interest," ER 1:8, is unsupported by the record. In place of supporting evidence, BLM offered only conclusory platitudes.

1. The Record Does Not Support BLM's Determination that the Resource Value of the Offered Private Land Exceeds the Resource Value of the Selected Public Lands.

While BLM does not identify the facts underlying its finding that "the resource values and Federal objectives on the BLM lands are less than the resource values and Federal objectives gained by acquisition of the non-federal lands," ER 1:8, the ROD offers four conclusory justifications for the project:

(1) an opportunity to achieve better management of environmentally sensitive areas by adding the offered parcels to BLM's holdings, ER 1:13;

(2) beneficial use and ultimate restoration of scarred lands left behind by Kaiser's mining operations, ER 1:27;

(3) economic revitalization of the presently vacant and underutilized Eagle Mountain townsite, ER 1:17; and

(4) assistance to state and local governments in meeting regional landfill capacity needs, ER 1:16.

None of these justifications, however, withstands even mild scrutiny.

First, BLM's conclusion that the transfer "would further BLM's objective of securing additional protection of important sensitive species," ER 1:14, assumes that the lands received from Kaiser are at risk of being developed for uses incompatible with the surrounding sensitive federal lands and ignores the fact that the desert tortoise, the main species of concern, also is present on the federal lands to be developed for Kaiser's landfill. See ER 1:13, 19. There simply is no record evidence that Kaiser's offered lands suffer a present or future danger from development and need additional protection. These lands are small, widely scattered desert parcels along an abandoned rail line. Moreover, they lie within designated critical habitat for the endangered species such as the desert tortoise and, therefore, are already subject to the full range of regulatory restrictions imposed by the federal Endangered Species Act and other environmental protection laws. No development is presently contemplated or reasonably foreseeable and no future development inconsistent with BLM's management objectives could legally proceed on these lands. Indeed, the only proposed development that threatens the desert tortoise and other wildlife species on these parcels is Kaiser's reactivation and expansion of the Eagle Mountain Railroad line as a result of the land exchange and proposed project. See ER 1:19 (discussing track inspections from moving trains and tortoise underpasses as mitigation to

avoid an illegal species "taking" along the reactivated railroad). Thus, the record does not support a finding that BLM will secure additional species protection by acquiring Kaiser's offered lands. Nat'l Audubon Soc'y, 606 F. Supp. at 839 (holding that because offered lands were already protected and there was no evidence suggesting "the existence of any probable or even potential threat" from development, transfer did "not materially increase the environmental protections already in place" and, therefore, could not be used to justify the land exchange).

Second, BLM's suggestion that the land exchange will restore Kaiser's abandoned mining site, ER 1:11, 1:27, is refuted by the record and is affirmatively misleading. As explained above, the proposed garbage dump will fill only one of the four massive mining pits on the site, many decades from now, and will focus its trash burying activities, instead, on roughly 2,000 acres of exchanged federal canyon lands. ER 7:169, 7:264, 7:595-96. The exchange will thus destroy, not reclaim, these fragile lands.

Third, the purported economic revitalization of the abandoned and remote townsite cannot possibly legitimate the exchange. ER 1:17. BLM has no statutory mandate to promote such business ventures, especially ones directed towards the benefit of a private corporation. To the contrary, FLPMA encourages retention of federal lands in public ownership and management of those lands in a manner that

protects their ecological, historic, scenic, and recreational value. 43 U.S.C. § 1701(a)(1), (8). Transfer of BLM-managed lands out of federal ownership can only occur where "it is determined that disposal of a particular parcel will serve the national interest," 43 U.S.C. § 1701(a)(1), and then only if the transfer "is consistent with [BLM's] prescribed mission." Id. § 1701(a)(10). There is no doubt that the exchange will benefit Kaiser, but BLM has advanced no evidence demonstrating that a revitalization of the townsite serves any legitimate national interest within BLM's land-management mission. Under even the most tortured reading of FLPMA, BLM's land stewardship obligations cannot extend to helping Kaiser extract additional profits from its abandoned mining town.

Finally, landfill capacity needs cannot justify this exchange. BLM is not in the business of meeting regional garbage disposal needs, and no local, regional or state planning agencies have approached BLM affirmatively seeking assistance in planning and siting a landfill. Rather, Kaiser solicited this exchange to facilitate its private interests in building a for-profit landfill. Even if BLM could properly prioritize landfill demand over its core mission of public land management, BLM has offered no compelling reason, other than Kaiser's self-interested objectives, for placing a garbage dump next to Joshua Tree National Park instead of on any of the millions of other acres that BLM controls in the Southern California desert. In

fact, BLM explicitly rejected consideration of other BLM-managed lands for Kaiser's landfill on the grounds that such alternatives "do not meet several important and basic objectives of the Project, including reclamation of Kaiser's abandoned iron ore mine." ER 1:11. Such reasoning, which was critical to BLM's land exchange decision, is completely circular; each purported justification for the exchange relies on the other justifications, none of which are supported by the record or by BLM's legitimate federal interests. Moreover, alternative landfill sites designed to fulfill Southern California's waste-disposal needs, such as the nearby Mesquite Regional Landfill at issue in Desert Citizens, are already under development. In fact, according to the Herzog report on which Defendants rely, there was no need for another regional landfill at the time that the ROD was issued. ER 4:403-10. BLM's exchange decision thus did nothing more than trade away public lands to enrich the very corporate interests that left the Eagle Mountain mining area in its presently degraded status.

2. The Record Does Not Support BLM's Finding that the Intended Use of the Exchanged Lands Will Not Significantly Conflict with Federal Management Objectives on Adjacent Public Lands.

BLM's finding that "the exchange and subsequent project with mitigation will not significantly conflict with the management objectives in guidances and

management plan [sic] for the nearby [Joshua Tree National Park]," ER 1:19, is likewise unsupported by the record. BLM's sister agency, the National Park Service, submitted extensive comments objecting to the project, ER 8:587-682, and concluded that the landfill's impacts on biological, air, wilderness, and recreational resources "cannot be sufficiently mitigated." ER 8:590.[6] Moreover, the EIS itself leaves no doubt that the Project will have adverse impacts on Joshua Tree, its wildlife, and its recreational opportunities. See, e.g., ER 7:721 (concluding that "the proposed Project could significantly impact the wilderness experience"); 7:724 (listing "impacts that cannot be mitigated"), 7:750-64 (acknowledging noise impacts on National Park); 8:485 (conceding skyglow impact). For these reasons, BLM itself was forced to concede that the "No Action" alternative to the land exchange is the "environmentally preferable alternative." ER 1:10. See also ER 8:29.

Thus, even if the touted environmental benefits of acquiring Kaiser's land are assumed to be true, these "benefits" do not offset the project's adverse

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[6] The Final EIS merely acknowledged these comments without response or ignored them entirely. See, e.g., ER 8:598. Although Kaiser ultimately agreed to provide some mitigation funding for the project, the Park Service nevertheless reiterated its "objections to the Project based on proximity to the Park" and expressed its opinion that the project "could cause adverse changes in the ecosystem." ER 8:453-63.

environmental impacts on existing public lands. The logic in Nat'l Audubon Soc'y applies with equal force here: "It is significant . . . that while the land exchange is said to provide added protection to the wildlife habitat [on the offered lands], the Final Assessment Report fails to disclose any threat of potential or probable incompatible uses of the land interests conveyed to the United States in exchange. . . . Indeed, the only certain and immediate impacts upon any wildlife and wilderness habitats . . . are due directly to and arise out of the land exchange itself." 606 F. Supp. at 842-45.

II. THE EAGLE MOUNTAIN EIS VIOLATES NEPA.

NEPA is our basic national charter for protection of the environment. 40 C.F.R. § 1500.1(a); Ctr. for Biological Diversity v. U.S. Forest Serv., 349 F.3d 1157, 1166 (9th Cir. 2001). The statute mandates that federal agencies proposing actions that may have a significant effect on the environment must prepare an EIS before undertaking or allowing the action. Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001). The purpose of the NEPA review process is two-fold: "First, it places upon [the action] agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." Kern v. U.S.

BLM, 284 F.3d 1062, 1066 (9th Cir. 2002). To satisfy NEPA's "hard look" requirement, the EIS must contain "a complete discussion of relevant issues [and] meaningful statements regarding the actual impacts of the proposed project" and "a 'full and fair discussion' allowing informed public participation and informed decision-making." Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1172-73 (9th Cir. 2006). The Eagle Mountain EIS utterly fail to satisfy these objectives and standards.

A. BLM's Stated "Purpose and Need" for the Exchange Was Improperly Drawn.

The statement of "purpose and need" for the land exchange in the EIS violates NEPA because BLM constructed an unreasonably narrow set of project goals, such that only the proposed exchange could possibly satisfy them. In doing so, BLM effectively ignored its obligation to advance legitimate federal interests and, instead, padded the statement of need for the exchange with Kaiser's commercial interests. By constricting the land exchange's objectives, BLM preordained the outcome of its inquiry and rendered the NEPA process an empty formality.

NEPA requires that an EIS "specify the underlying purpose and need to which the agency is responding" through the proposed action. 40 C.F.R. §

1502.13. This purpose and need inquiry is crucial for a sufficient EIS because "[t]he stated goal of a project necessarily dictates the range of 'reasonable' alternatives and an agency cannot define its objectives in unreasonably narrow terms" without violating NEPA. Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1155 (9th Cir. 1997). Thus, an agency's objectives in the EIS cannot be so narrow as to generate a specific result. See 40 C.F.R. § 1502.5 (EIS must "not be used to rationalize or justify decisions already made").

The purpose and need statement in the Eagle Mountain EIS was improperly drawn because it left the proposed land exchange as the only method for achieving BLM's stated goals. The EIS listed the following purposes and needs for the exchange:

(1) to develop a new Class III nonhazardous municipal solid waste landfill to meet the projected long-term demand for environmentally sound landfill capacity in Southern California;

(2) to provide a long-term income source from the development of a nonhazardous municipal solid waste landfill;

(3) to find an economically viable use for the existing mining by-products at the Kaiser Eagle Mountain Mine site, including use of existing aggregate and overburden; and

(4) to provide long-term land use and development goals and guidance for the townsite.

ER 7:62.

All but the first of these stated goals are business objectives of Kaiser's and cannot serve as the government's motivation for an exchange of public lands. The second "need" will not lead to any direct public benefit because Kaiser is the only party that will receive "a long-term income source" from a landfill on the exchanged public lands. Similarly, only Kaiser will benefit from the third "need" to find an "economically viable" use for the mining wastes (aggregate and overburden) from its prior mining operation. Finally, the fourth stated "need" to provide for townsite redevelopment creates yet another private boon for Kaiser, which presently leases these lands to a correctional facility and will be the prime beneficiary of any "long-term land use and development" of the site when the reversionary interest of the United States is removed as part of the exchange transaction. None of these asserted goals for the land exchange is consistent with BLM's statutory duty to serve as a steward and protector of America's public lands.

As a federal land management agency, BLM instead should have focused its purpose and need inquiry on objectives that comport with its statutory charge from Congress, rather than on Kaiser's interests. See Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991) (observing that "agencies must look hard at the factors relevant to the definition of purpose," including the views of

Congress in authorizing the agency to act, and define goals accordingly). Given clear congressional directive for BLM to retain public lands and manage them for their ecological, recreational and other public use values, see 43 U.S.C. §§ 1701(a)(8), 1716(a), the only conceivably legitimate federal purpose for the exchange, among the four advanced in the EIS, is the purported public need for regional landfill capacity – the very same need that Defendants now disavow in order to avoid the import of Desert Citizens. As discussed in the following section, however, had BLM properly focused on that potentially legitimate public need, a very different alternatives analysis necessarily would have emerged.

Appellants maintain that BLM properly considered "Kaiser's interest in developing its own land" as a legitimate purpose for the land exchange because the proposed landfill was the reason that Kaiser had sought the exchange. Kaiser Br. at 44-45; Govt. Br. at 48-50. This argument fails. The only federal agency decision under review is BLM's grant of the proposed land exchange. While the joint state EIR for the proposed landfill project might consider Kaiser's business objectives in evaluating whether Riverside County should rezone the property to allow private development of the landfill, the relevant federal "project" is not a landfill but, a land exchange. BLM has no role in the permit and approval process for the landfill itself, and as Appellants themselves acknowledged below, "the

only federal action in this case is BLM's approval of the land exchange." SER 158.

Appellants rely heavily on City of Angoon v. Hodel, 803 F.2d 1016 (9th Cir. 1986), to justify the EIS's inclusion of Kaiser's myriad business interests as legitimate purposes for the land exchange. That case, however, is inapplicable because it involved a corporation seeking a permit to build a log transfer facility on an island that the corporation already owned. Here, in sharp contrast, Kaiser is not seeking any type of permit or federal approval for its proposed landfill operations or for any other use of its patented lands. Rather, the only thing Kaiser seeks from BLM is transfer of federal lands, and thus the only legitimate question before BLM is whether the proposed land transfer well serves FLPMA's directive to manage BLM lands for their public use values. Whether or not the land transfer might also further Kaiser's business interests is simply irrelevant to the federal decision and cannot serve as a legitimate purpose or need for the land exchange. The fact that a joint EIR/EIS was prepared for efficiency and convenience does not alter this result. To the extent that Riverside County can look to Kaiser's private motivations and financial interests in granting land use approvals for activities on Kaiser's private land (and on those federal lands that will become private lands under the exchange), the purpose and need for the state EIR might be broader. But

here, in contrast to City of Angoon, the scope of the federal EIS – and the resulting range of alternatives – is dictated by the federal land exchange project.[7] Of course, the EIS must fully evaluate the impacts of landfill development because that development is a directly foreseeable result of the subject land exchange, but the purpose of the EIS remains to evaluate the appropriateness of the land exchange, not the wisdom of Kaiser's landfill project. See 40 C.F.R. § 1508.8; Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 811 (9th Cir. 1999).

In short, Defendants unsuccessfully try to recast the land exchange decision as a federal permit approval wherein a private landowner chooses how to utilize its land and the only question before the federal agency is whether the permit approval is consistent with the agency's mission and permitting criteria. In such cases, the applicant's pecuniary purpose for undertaking the project on its own property drives the scope of the EIS and the alternatives analysis. BLM does not face that situation here, however. Here, a private party seeks to divest the

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[7] Plaintiffs in City of Angoon made a very different NEPA argument than NPCA does here, seeking to invalidate that EIS on the grounds that the agency should have considered the possibility that the corporation could exchange its island property for land that it did not already own and build its facility on those new lands. 803 F.2d at 1020-21. The court reasoned that this alternative was "too remote and speculative." Id. at 1021. NPCA argues the opposite here – that Kaiser should not be allowed to obtain new federal lands via transfer for its proposed landfill.

American public of its land and the only legitimate question before BLM is whether that divestment is consistent with FLPMA's public land management directives. Properly focused on the propriety of the land exchange, the purpose and need statement of the EIS would have framed the analysis to evaluate FLPMA's land management objectives and the impacts of the proposed exchange on those objectives. As explained below, the improper focus and scope of the purpose and need statement in the Eagle Mountain EIS was central to the limited breadth of the alternatives analysis and effectively dictated the outcome of the decisionmaking process.

B. The EIS Failed to Consider a Reasonable Range of Alternatives.

BLM's inappropriate purpose and need statement allowed it to unreasonably constrain the range of alternatives considered in the EIS. In order to fulfill its intended role of "sharply defining the issue and providing a clear basis for choice among options by the decisionmaker and the public," an EIS must "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a). "Indeed, the alternatives analysis section is the heart of the environmental impact statement. The agency must look at every reasonable alternative within the range dictated by the nature and scope of the proposal. The existence of reasonable but unexamined alternatives renders an EIS inadequate."

IlioUlaokalani Coal. v. Rumsfeld, 464 F.3d 1083, 1095 (9th Cir. 2006). See also Muckleshoot Indian Tribe, 177 F.3d at 812-13 (land exchange EIS failed to consider adequate range of alternatives because "[a]lthough NEPA does not require the Forest Service to consider every possible alternative to a proposed action . . . we are troubled that . . . the Forest Service failed to consider an alternative that was more consistent with its basic policy objectives than the alternatives that were the subject of final consideration"); 40 C.F.R. § 1502.14. Put differently, NEPA's stringent alternatives requirement mandates that agencies "take into account all possible approaches to a particular project." Ala. Wilderness Recreation and Tourism Ass'n v. Morrison, 67 F.3d 723, 729 (9th Cir. 1995).

Here, BLM did not consider even a minimally adequate selection of reasonable alternatives to the proposed land exchange; instead, the EIS analyzed only subtle variations on a single landfill proposal. The EIS considered six so-called "alternatives": 1) Reduced Volume of Onsite Disposal; 2) Alternate Road Access; 3) Rail Access Only; 4) Landfill on Kaiser Land Only; 5) Landfill Development/No Townsite Development; and 6) No Action. ER 7:168-72. From BLM's perspective, the "No Action" and "Landfill on Kaiser Land Only" alternatives are effectively identical because Kaiser could pursue these options

without a federal land exchange and thus without any action by BLM. As the District Court correctly highlighted, the remaining alternatives do not present a reasonable "range" of alternatives because "all presuppose the existence of a landfill on the site of the proposed land exchange," thereby anticipating the subject land exchange itself. ER 1:275. The differences among these alternatives are superficial, involving details of load-size and ingress options for trash hauled into the landfill. This kind of evaluation of virtually identical alternatives is a mere "formality" and, therefore, fails to satisfy NEPA. Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1066 (9th Cir. 1998) (citing Citizens Against Burlington, 938 F.2d at 196).

The EIS clearly reveals how the improperly drawn "purpose and need" statement undermined any meaningful alternatives analysis. As discussed above, one possible legitimate federal objective articulated in the "purpose and need" statement is the need for increased regional landfill capacity. Yet the alternatives discussion made no serious effort to explore options for satisfying this objective. For instance, there was no consideration of alternative landfill sites on other BLM-managed lands that the agency could offer to local jurisdictions for use in regional solid waste planning. There was no serious consideration of increased use of existing landfills as an alternative means of absorbing future regional waste

increases. There was no consideration of recycling and other waste reduction measures as alternatives that could expand regional waste capacity without forcing BLM to dispose of public lands. The reason these options were not explored is clear: "Desert landfill proposals sponsored by others are not true alternatives because they do not meet several basic objectives of the Project, including development of an economically beneficial Class III landfill proposal site in the County of Riverside and reclamation of Kaiser's abandoned iron ore mine." ER 8:564 (emphasis added). The EIS further explained that "landfill projects sponsored by others and proposed to be located elsewhere" cannot be "feasible alternatives" under NEPA because "[t]here are no reasonable means by which the Project applicant [Kaiser] could obtain another landfill project's entitlement applications and real property interests because these properties are owned and controlled by other applicants." Id. Thus, the improperly constrained "purpose and need" statement in the EIS, which focused on Kaiser's business interests rather than the federal interests in meeting public needs through management of public lands, caused BLM to ignore potentially viable alternatives.

Other proffered federal objectives suffered the same fate. For instance, if further protection of Kaiser's scattered parcels along the railway line were actually an important BLM objective, then the EIS should have examined alternative ways

to acquire or protect these parcels without giving up thousands of acres of canyon land that buffers higher value Park land and without allowing resumption of species-threatening railroad activities across the very parcels to be protected. The EIS did not consider such alternatives because they are not consistent with Kaiser's interest in developing a landfill. Similarly, if reclamation of the mining pits were actually an important BLM objective, then the EIS should have explored alternative reclamation options (e.g., enforcement of federal environmental cleanup laws, funding from existing federal cleanup programs, appropriations from Congress, assistance from a land conservancy, etc.) that would not result in filling thousands of acres of unspoiled habitat with trash and would accomplish more comprehensive rehabilitation of mine-scarred lands. Once again, however, such options were not explored because they do not satisfy Kaiser's business plan to develop a new source of revenue from what is largely public land. Indeed, every conceivable non-landfill option for satisfying BLM's purported project objectives was rejected because it did not satisfy Kaiser's key objective of developing a landfill.

By narrowly drawing the purposes and needs for the land exchange to precisely track Kaiser's financial interest in using federal lands to develop a landfill, rather than BLM's statutory obligation to manage its lands to protect

public uses and values, the EIS ensured that the "decisional process ends its inquiry at the beginning" – with Kaiser's desire to construct a landfill on nearly 4,000 acres of public land adjacent to Joshua Tree National Park. California v. Block, 690 F.2d 753 (9th Cir. 1982) (rejecting EIS range of alternatives because all eight listed alternatives "assume[d]" the need for the exact measure being reviewed). Accordingly, this Court should affirm the District Court's holding that BLM violated NEPA.

III. NPCA FULLY EXHAUSTED ITS ADMINISTRATIVE REMEDIES.

Recognizing the serious legal defects in the land exchange decision, Appellants seek shelter in a series of confusing and unfounded exhaustion arguments.[8] As the District Court correctly concluded, however, NPCA

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[8] Conflating two distinct legal doctrines, Appellants also make a separate finality argument, the purpose of which is unclear. Govt. Br. at 14-18; Kaiser Br. at 36. The IBLA is an adjudicatory office within the Department of the Interior that hears, among other things, administrative appeals from BLM land disposal decisions. See 43 C.F.R. § 4.1(b)(3)(I). In this case, the IBLA functioned like a district court in a record review case, reviewing BLM's findings and supporting factual evidence and rendering an opinion on the legality of BLM's decision. ER 1:220-52. NPCA properly exhausted the IBLA process and then subsequently filed its APA challenges in district court against BLM and the Department of the Interior. Because the IBLA was not an independent factfinder in this case, its adjudicatory legal opinion is not imbued with any special significance; it is reviewed under the same de novo standard as the District Court's opinion. The District Court addressed this issue below in response to Defendants' bizarre contention that NPCA's claims should be dismissed because its summary judgment brief focused on the findings of fact made in the BLM's ROD. On

participated extensively in all available administrative procedures and raised its FLPMA and NEPA concerns at every opportunity, repeatedly questioning BLM's fair market value determination, the agency's unsupported public interest finding, the EIS's improper "purpose and need" statement, and the resulting overly-narrow alternatives analysis. Under applicable exhaustion doctrine, nothing more was required.

As a threshold matter, it is important to understand the contours of the Court's exhaustion jurisprudence. As the Supreme Court has explained:

> [W]here the APA applies, an appeal to "superior agency authority" is a prerequisite to judicial review only when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review. Courts are not free to impose an exhaustion requirement as a rule of judicial administration where the agency action has already become "final" under [APA] § 10.

Darby v. Cisneros, 509 U.S. 137, 154 (1993) (emphasis in original). Thus, appeal to a higher agency authority is only required where specified by statute or regulations. In this case, NPCA timely challenged the FLPMA land exchange decision pursuant to 43 C.F.R. § 4.1(b)(3)(i). Although NPCA raised both FLPMA and NEPA concerns in that appeal, there is no statutory or regulatory obligation to exhaust NEPA claims in that forum before proceeding to court.

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appeal, Defendants have wisely abandoned this argument.

Moreover, the doctrine of exhaustion "must be applied in each case with an understanding of its purposes and the particular administrative scheme involved. Where pursuit of administrative remedies does not serve the purposes behind the exhaustion doctrine, the courts have allowed a number of exceptions." Aleknagik Natives Ltd. v. Andrus, 648 F.2d 496, 499 (9th Cir. 1981).

A. NPCA Exhausted Its FLPMA Claims by Raising Them Before the IBLA.

Despite NPCA's diligence in first protesting the land exchange decision to the California State Director of BLM and then timely appealing the dismissed protest to the IBLA, Appellants argue that NPCA failed to exhaust its claim that BLM's decision violated FLPMA by seriously undervaluing the exchanged lands. Kaiser asserts that NPCA's Statement of Reasons in support of its IBLA appeal was too "cryptic and obscure" to exhaust the FLPMA undervaluation issue, Kaiser Br. at 35, while Federal Defendants argue just the opposite, that NPCA's arguments were too "particularized and express" to be intelligible to the IBLA. Govt. Br. at 25. Both of these arguments are undermined by the facts in the record and applicable judicial precedent.

In its IBLA appeal, NPCA explained:

> BLM WILL NOT RECEIVE FAIR MARKET VALUE FOR THE EXCHANGE. Any disposal of federal lands must be compensated at "fair

> market value of the use of public lands and their resources." 43 U.S.C.A. § 1701(a). Here, the compensation being offered in exchange for the public lands in question is inadequate, and egregiously low . . . . To compensate for the approximately 1,000-acre differential [between the acres of land that the government will give and receive], Kaiser will also pay BLM a lump sum of $20,1000, which is below the fair market value. Kaiser anticipates huge profits from a landfill operation on the undervalued BLM land, well beyond the $20,000 amount that would be paid for approximately one third of the property. Here again, Kaiser and a few other parties will benefit at significant cost borne by the national treasury.

ER 1:215 (emphasis in the original). The Charpieds filed their own Statement of Reasons in support of their separate IBLA appeal that likewise raised the valuation issue; among other things, they noted that "[a]t best, the public should receive fair appraisal for its lands. Not an appraisal that has been artificially reduced in value through instructions to discount development, improvements, and recent zoning changes." SER 408.[9]

"The rationale underlying the exhaustion requirement is to avoid premature claims and to ensure that the agency possessed of the most expertise in an area be given first shot at resolving a claimant's difficulties." Idaho Sporting Congress, Inc. v. Rittenhouse, 305 F.3d 957, 965 (9th Cir. 2002). Thus, a claim need only

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[9] The District Court properly concluded that, '[s]o long as an issue is raised by some party at the administrative level, it can be raised by another party on judicial review." ER 1:258. See Kern v. U.S. BLM, 38 F. Supp. 2d 1174, 1180 (D. Or. 1999), rev'd on other grounds, 284 F.3d 1062 (9th Cir. 2002); Portland General Electric Co. v. Johnson, 745 F.2d 1475, 1481 (9th Cir. 1985).

"be raised with sufficient clarity to allow the decision maker to understand and rule on the issue raised . . . ." Great Basin Mine Watch v. Hankins, 456 F.3d 955, 968 (9th Cir. 2006). "[P]laintiffs have exhausted their administrative appeals if the appeal . . . provided sufficient notice to the [agency] to afford it the opportunity to rectify the violations that the plaintiffs alleged." Id. at 965 (quoting Native Ecosystems Council v. Dombeck, 304 F.3d 886, 899 (9th Cir. 2002)).

As the District Court correctly concluded, the administrative appeals in this case "sufficiently presented to the IBLA the claim that a landfill should have been considered as the highest and best use of the exchanged lands . . . ." and "gave the IBLA the opportunity to consider the identical issue brought before this court." ER 1:258. In fact, the IBLA decision explicitly recognized that both appeals raised a number of issues involving valuation of the lands in question, and it spent several pages addressing them. ER 1:245-52. The Administrative Law Judge ("ALJ") noted that "[t]he Charpieds assert that BLM undervalued the selected public lands taken by KBM in the exchange . . . suggesting that it did not meet the requirements of 43 C.F.R. §§ 2201.3(a) and 2201.5(c)(2). NPCA also argues that BLM will not receive fair market value for the exchange." ER 1:245. The ALJ characterized these arguments, in part, as a contention that "the appraisal misstates the present use classification of the selected public lands as 'designated for Open

Space and Conservation'" and responded that

> [t]he Appraisal Report expressly states to the contrary that the selected public lands were "appraised based on [their] estimated highest and best use as if available in the open market, in accordance with the underlying zoning regulations, County of Riverside General Plan land use recommendations, and [CDCA] Plan land use recommendations" (Appraisal Report Vo. 1 at 43-44), concluding, in view of the absence of "imminent development potential," that "the highest and best use of the selected lands is estimated to be holding for speculative investment and future capital appreciation." Id. at 47.

ER 1:247. Thus, the final IBLA decision addressed (albeit incorrectly) the very question at issue here, and Federal Defendants were thus unmistakably "on notice" of the FLPMA market value claim. Great Basin, 456 F.3d at 968; Native Ecosystems Council, 304 F.3d at 899.

Appellants nevertheless argue that NPCA failed to exhaust its FLPMA challenge before the IBLA because NPCA did not use the term "highest and best use" – although the ALJ clearly did. Kaiser Br. at 34, Govt. Br. at 23. Of course, the "highest and best use" phrase is nothing more than industry jargon implementing the basic statutory requirement that BLM receive fair market value for exchanged lands. NPCA need not have employed such technical terminology to exhaust its remedies. This Court has held repeatedly that it is "unreasonable" to expect citizen-group plaintiffs to "incant magic words" or technical legal terminology to exhaust their claims. Idaho Sporting Congress, 305 F.3d at 966.

See also Native Ecosystems Council, 304 F.3d at 899 (requiring more technical information would "unduly burden" those "who may frame their claims in non-legal terms rather than precise legal formulations"); Socop-Gonzalez v. Immigration and Naturalization Serv., 272 F.3d 1176, 1183-84 (9th Cir. 2000) (plaintiff sufficiently raised issues to allow judicial review without specifically invoking the phrase "equitable tolling" in submissions before an administrative review board).[10]

Moreover, even if the Yerke appraisal had been made available to the public as part of the NEPA public process – which it was not – NPCA had every reason to believe that a more specific challenge to the appraiser's methodology would be futile. In the appeal of the nearby Mesquite Landfill project, the IBLA had already rejected the very argument that ultimately prevailed in Desert Citizens – that the appraisal of the exchanged lands should reflect their proposed use as a landfill – as "without foundation in law or fact." Charpeid, 137 IBLA 45, 1996 WL 1805695 *5-6 (Nov. 14, 1996). The IBLA also concluded in that same opinion that

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[10] Defendants are hardly in a position to complain about NPCA's lack of exactitude. A 2002 independent study commissioned by BLM found that "[a]ppraisal policies in the BLM's Manual 9310 are inconsistent with regard to certain key definitions, including 'appraisal,' 'highest and best use,' and 'market value'" and that the ambiguity inherent in the differing definitions for these terms "creates confusion and misunderstanding among appraisers as well as appraisal users." SER 236.

appellants could not prevail on their claim that the appraisal was outdated because it did not reflect recent zoning changes for the exchanged lands – the same argument NPCA makes here – because appellants had "not submitted an independent appraisal showing the relative market value of the properties." Id. at *4. Indeed, the IBLA reaffirmed the same legal position here, finding that because NPCA and the Charpieds did not submit their own appraisal, their market value arguments were without merit. ER 1:245.

Where, as here, an agency's position on the question at issue "appears already set" and recourse to administrative appeal would likely be futile, exhaustion is not required. SAIF Corp./Or. Ship v. Johnson, 908 F.2d 1434, 1441 (9th Cir. 1990). See also McCarthy v. Madigan, 503 U.S. 140, 147-49 (1992) (futility is an exception to administrative exhaustion requirement); Matthews v. Eldridge, 424 U.S. 319, 330 (1976) (exhaustion unnecessary where "[i]t is unrealistic to expect that the [agency] would consider substantial changes in [its] current" position); El Rescate Legal Serv. v. FOIR, 959 F.2d 742, 747 (9th Cir. 1992); Aleknagik Natives Ltd., 648 F.2d at 499 (IBLA exhaustion not required where Secretary had already adopted contrary legal position); Cafferello v. U.S. Civil Serv. Comm'n, 625 F.2d 285, 287 (9th Cir. 1980); Pence v. Kleppe, 529 F.2d 134, 142 (9th Cir. 1976) (IBLA exhaustion not required Secretary had

already taken contrary legal position). Because the Secretary's final position on the valuation issues was already set, NPCA was under no obligation to raise these issues with more specificity again before the IBLA or to expend the substantial resources it would take to develop its own appraisal.

B. Although Not Required by Statute or Regulation, NPCA Nevertheless Exhausted Its NEPA Claims Before the IBLA.

Appellants' argument that NPCA failed to exhaust its NEPA claims is equally meritless. NPCA submitted extensive comments on the Draft EIS, raising a host of concerns. Of relevance here, NPCA noted that the purpose and need statement in the document critically impacted the adequacy of the alternatives analysis, that the resulting narrowly drawn alternatives analysis was "nothing more than the Project, with inconsequential alterations," and that the EIS "at a minimum should include an analysis of a range of waste disposal options," including other landfill sites, increased recycling, and waste-to-energy options. SER 489-90. NPCA noted that it was not clear that any new landfill capacity is needed in light of changes in waste generation rates and the availability of landfill proposals in the region – the very conclusion that the post hoc Herzog report later suggested. Id.[11] NPCA's comments concluded that "[t]he failure to conduct a

[11] BLM subsequently responded to this comment by adding a new "objective" for the exchange – acquisition of Kaiser's parcels – as part of the final

genuine analysis of alternatives to the Project frustrates the entire purpose of the environmental review process." SER 488. Because the Final EIS did not address these concerns, NPCA raised them again in a post-EIS letter to the agency. SER 714.

Because there is no statutory or regulatory obligation for a challenger to pursue administrative appeal of NEPA issues – as opposed to a FLPMA appeal of the land exchange decision – NPCA's extensive participation in the NEPA public review and comment process sufficiently exhausted its NEPA claims for purposes of subsequent judicial reviews. Darby, 509 U.S. at 154. The Supreme Court has made clear that "a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 737 (1998) (emphasis added). To "exhaust" their NEPA claims, challengers need only "structure their participation so that it . . . alerts the agency to the [parties'] position and contentions, in order to allow the agency to give the issue meaningful consideration." U.S. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 764 (2004).

ROD. Because this "objective" was never articulated in the EIS, the alternatives analysis does not identify or assess any alternatives for satisfying it.

In Kern v. U.S. BLM, 284 F.3d 1062, 1070-71 (9th Cir. 2002), this Court relied on Ohio Forestry to conclude that because "[t]he rights conferred by NEPA are procedural rather than substantive, and plaintiffs allege a procedural rather than a substantive injury . . . [i]f there was an injury under NEPA, it occurred when the allegedly inadequate EIS was promulgated." See also Sierra Club v. Penfold 857 F.2d 1307, 1322 (9th Cir. 1988) ("The District Court can review the adequacy of the EIS . . . without first requiring administrative review."); Duval Ranching Co. v. Glickman, 965 F. Supp. 1427, 1439 (D. Nev. 1997) (holding that there are simply "no administrative remedies to exhaust before suing under NEPA"). As the District Court properly recognized, "Plaintiffs need only have raised the NEPA issues it now raises before this court at some point during the administrative process," and "[t]he record reflects that Plaintiffs first raised all of the NEPA issues before this Court during the administrative process." ER 1:259.

Appellants cannot and do not cite to a single case which supports their argument that challenger who fully participate in the NEPA public process also must pursue an administrative appeal under a separate statutory or regulatory scheme (e.g., the IBLA process for appeals of FLPMA issues) in order to exhaust their administrative remedies. In fact, many of the cases that Appellants cite reach the opposite conclusion. See, e.g., Great Basin, 456 F.3d at 961 (challenging EIS,

ROD, and other BLM decisions via direct appeal to federal court); Dep't of Transp., 541 U.S. at 764 (seeking judicial review of NEPA determinations without administrative appeal).

In any event, NPCA did raise and exhaust its NEPA claims before the IBLA. In its opening Statement of Reasons, NPCA discussed the absence of any need for the landfill and the fact that increasing waste diversion (recycling) rates and alternative landfills in the region, including the Mesquite, Sunshine Canyon, Toland Road, and El Sobrante facilities, provided alternatives to a massive new landfill at Eagle Mountain. ER 1:218-19. In its final reply brief to the IBLA, Plaintiffs more thoroughly dissected BLM's inadequate need/alternatives analysis:

> NEPA requires that the EIS describe "the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. . . . Intervenors' contention that the Final EIS/EIR for the project adequately considered the impact of other recently permitted landfills on the continuing need for this project is incorrect. In fact, the brief discussion of need referenced by intervenors in the Final EIS/EIR (Final EIS at 2-1 to 2-2) is significantly flawed in at least two respects: (1) it entirely omits any discussion of the huge new Mesquite landfill to be constructed in Imperial County, the approval for which is now in place and has survived judicial challenge, and (2) it does not take account of the major expansion of El Sobrante landfill, which also has now been approved.

SER 609. Moreover, as the IBLA decision makes clear, the ALJ had before it and considered the full EIS, which includes both NPCA's public comments and

BLM's responses to those comments. ER 1:227-44. Where a challenger participates fully in the NEPA public review and comments process, as NPCA did here with comments on both the Draft and Final EIS, it is not required to repeat its arguments with the same level of detail to an adjudicatory appellate board that provides only legal review, not fact finding. See, e.g., Sierra Club v. Dombeck, 161 F. Supp. 2d 1052, 1065-66 (D. Ariz. 2001), appeal dismissed, 55 Fed. Appx. 411 (9th Cir. 2002) (submission of comments during NEPA public process negated need to duplicate arguments to higher agency authority); Frontier Airlines, Inc. v. Civil Aeronautics Bd., 621 F.2d 369, 371 (10th Cir. 1980) (no exhaustion required where question is one of statutory interpretation).

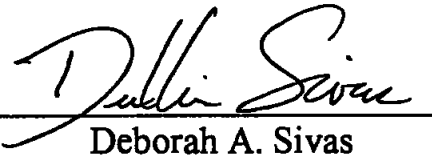
CONCLUSION

For the foregoing reasons, the District Court's judgment should be affirmed.

Date: April 11, 2007

Respectfully submitted,

STANFORD ENVIRONMENTAL LAW CLINIC

By: 

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 13,981 words, exclusive of tables and cover sheet.

Date: April 11, 2007

Deborah A. Sivas

PROOF OF SERVICE

LYNDA F. JOHNSTON declares:

I am over the age of eighteen years and not a party to this action. My business address is 559 Nathan Abbott Way, Stanford, California 94305-8610.

On April 11, 2007, I served the foregoing **ANSWERING BRIEF OF APPELLEE NATIONAL PARKSCONSERVATION ASSOCIATION** on all other parties to this action by placing two true and correct copies thereof

☐ in a sealed envelope, with postage fully prepaid, in the United States Mail at Stanford, California, addressed as follows:

☐ for facsimile transmission to each recipient identified below to the facsimile number appearing after such recipient's name and mailing address.

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I declare under penalty of perjury (under the laws of the State of California) that the foregoing is true and correct, and that this declaration was executed April 11, 2007 at Stanford, California.

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