No. _____

In The
Supreme Court of the United States

AMERICAN INDEPENDENCE MINES AND MINERALS COMPANY and IVY MINERALS, INC.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether, in conflict with the Eighth Circuit's decision in *Friends of the Boundary Waters Wilderness* v. *Dombeck*, 164 F.3d 1115 (8th Cir. 1999), and this Court's decision in *Bennett* v. *Spear*, 520 U.S. 154 (1997), the Ninth Circuit erred in holding that claimants seeking to protect economic interests lack prudential standing to challenge an agency's compliance with the National Environmental Policy Act.

(2) Whether, in conflict with the D.C. Circuit's decisions in *National Association of Home Builders* v. *U.S. Army Corps of Engineers*, 417 F.3d 1272 (D.C. Cir. 2005), and *Mountain States Legal Foundation* v. *Glickman*, 92 F.3d 1228 (D.C. Cir. 1996), and this Court's decision in *Monsanto Co.* v. *Geertson Seed Farms*, 130 S. Ct. 2743 (2010), the Ninth Circuit erred in holding that a claimant who engages in efforts to protect the environment lacks prudential standing to challenge an agency's compliance with the National Environmental Policy Act solely because the claimant has an economic motivation for engaging in environmental protection efforts.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The caption of this petition contains all parties to the proceedings with the exception of Valley County, Idaho. The County was a plaintiff-intervenor below.

Petitioner American Independence Mines and Minerals Co. is an Idaho joint venture comprising Ivy Minerals, Inc., an Idaho corporation, and Walker Mining Company, an Idaho corporation. Petitioner Ivy Minerals, Inc., is an Idaho corporation. Petitioners are privately held corporations, and no parent or publicly held company owns 10 percent or more of either corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners American Independence Mines And Minerals Company and Ivy Minerals, Inc. (collectively "American Mines") respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND ORDERS BELOW

The order of the court of appeals denying American Mines' petition for panel rehearing and request for rehearing en banc was entered on October 26, 2012, is unreported, and is reprinted in the Appendix to the Petition ("Pet. App.") at 85-86. The underlying opinion of the court of appeals was entered on August 17, 2012, is unreported, and is reprinted in the Pet. App. at 1-5. The United States District Court's Opinion to Reconsider and Amend was entered on June 10, 2010, is published at 733 F. Supp. 2d 1241, and is reprinted in the Pet. App. at 6-57. The original opinion of the United States District Court for the District of Idaho was entered on May 12, 2010, is unreported, and is reprinted in the Pet. App. at 58-83.

STATEMENT OF JURISDICTION

The opinion of the court of appeals was entered on August 17, 2012, and the order of the court of

appeals denying American Mines' petition for panel rehearing and request for rehearing en banc was entered on October 26, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq*., the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq*., and the regulations promulgated thereunder are set forth at Pet. App. 87-102.

STATEMENT

This case presents an ideal vehicle for resolving a recognized circuit split on an important, recurring question of environmental law. In *Ashley Creek Phosphate Co*. v. *Norton*, 420 F.3d 934 (9th Cir. 2005), the Ninth Circuit held that as a matter of law, parties who seek to protect "purely economic" interests lack prudential standing to challenge an agency's compliance with the National Environmental Policy Act ("NEPA"). In reaching that conclusion, the Ninth Circuit expressly declined to follow the Eighth Circuit's contrary holding in *Friends of the Boundary Waters Wilderness* v. *Dombeck*, 164 F.3d 1115 (8th Cir. 1999).

The Ninth Circuit has twice denied rehearing en banc to resolve that direct conflict, which has

been acknowledged by courts and commentators alike. See, e.g., Christopher Warshaw & Gregory E. Wannier, *Business As Usual? Analyzing The Development Of Environmental Standing Doctrine Since 1976*, 5 HARV. L. & POL'Y REV. 289, 299 n.79 (2011) (noting the "circuit split on this issue"); Kenley S. Maddux, *NEPA's Zone of Interests*, 25 WASH. U. J.L. & POL'Y 189, 190 (2007) ("A circuit split has formed regarding the application of the zone of interests test to NEPA.").

The Ninth Circuit's decision in this case not only deepened that conflict, but also created another. The Ninth Circuit recognized that American Mines—"as part of" its pursuit of its "economic interests in mining"—also undertook environmental protection efforts. Pet. App. 5. That should have been enough to satisfy the "intertwined with" test, under which prudential standing exists for NEPA purposes where economic interests are "intertwined with" environmental protection efforts. But the Ninth Circuit held that because American Mines' environmental protection efforts were undertaken "only" in pursuit of its economic interests, those environmental protection efforts were not entitled to *any* consideration in the prudential standing analysis—and thus could not satisfy the "intertwined with" test as a matter of law. Pet. App. 4.

In reaching its conclusion that American Mines lacks prudential standing under the "intertwined with" test solely because it had economic *motivations*

for undertaking environmental protection efforts, the Ninth Circuit created a conflict with the D.C. Circuit, which has made clear that "[p]arties motivated by purely commercial interests routinely satisfy the zone of interests test," and has squarely rejected the "pur[ity] of heart" requirement grafted onto NEPA by the Ninth Circuit here. See *Nat'l Ass'n of Home Builders* v. *U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1287 (D.C. Cir. 2005) (explaining that "a party is not * * * disqualified from asserting a legal claim under NEPA because the impetus behind the NEPA claim may be economic") (internal quotation marks and citations omitted); see also *Mountain States Legal Found.* v. *Glickman*, 92 F.3d 1228, 1236 (D.C. Cir. 1996). Given that nationwide, more than half of environmental claims—including NEPA claims—are brought in either the Ninth or the D.C. Circuit, the need for this Court to restore uniformity on this recurring question of federal law is particularly great.

NEPA establishes a process of fully informed, participatory decision-making to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, *economic*, and other requirements of past, present, and future generations of Americans." 42 U.S.C. § 4331(a) (emphasis added). Yet under the Ninth Circuit's decision, parties are powerless to challenge arbitrary or unlawful agency action under NEPA—despite having suffered concrete, definite economic injury—unless they can demonstrate to the Ninth Circuit's

satisfaction that their attempts to protect the environment are entirely divorced from the pursuit of their economic interests. That result conflicts with the statute, with decisions of the Eighth and D.C. Circuits, and with decisions of this Court.

This Court's review is needed to resolve the conflicts, restore uniformity, and confirm that claimants with economic interests are not barred from seeking to protect those interests and ensuring the integrity of agency decision-making. This case is an ideal vehicle for doing so. If permitted to stand, the Ninth Circuit's decision will insulate from judicial review agency action undertaken on the basis of facts admitted by the agency to be false. Nothing in law or logic permits, much less requires, such an affront to the rigorous, comprehensive decisional process required by NEPA.

1. For decades, Petitioner American Mines has used backcountry roads within the Payette National Forest for its mining operations. Many of those roads existed even before the Forest was created in the early 1900s. American Mines' activity in the Forest—including the construction, maintenance, and use of roads—is heavily regulated by U.S. Forest Service regulations. See, e.g., 36 C.F.R. pt. 228.

Before 2005, the Forest had a policy that allowed the use of motor vehicles on virtually all roads without the need for a permit, plan of operation, or other

pre-approval. R6. Roads closed to public use were barricaded or otherwise physically marked as closed. *Ibid*.

2. In 2005, the Forest Service promulgated a new rule ("the Travel Management Rule") requiring each national forest to designate a system of roads and trails that would be open to motor vehicles, and to prohibit the use of motor vehicles elsewhere within the forests—thereby replacing the previous "open unless closed" policy with a "closed unless open" policy. R7. The Travel Management Rule underwent national NEPA review. *Ibid*. The Rule also contemplated that each national forest Travel Management Plan would receive similar, site-specific NEPA review. 70 Fed. Reg. 68,264, 68,268 (2005).

NEPA requires federal agencies like the Forest Service to prepare a detailed Environmental Impact Statement ("EIS") to analyze the impact of any major action that can significantly affect the quality of the "human environment." Pet. App. 90. The purpose of NEPA is to protect the environment by establishing a process that will result in "fully informed and well-considered" decisions by federal agencies. *Vt. Yankee Nuclear Power Corp.* v. *Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978).

An EIS must include an analysis of the various alternatives to the proposed action, called an "alternatives analysis," which should "sharply defin[e] the issues and provid[e] a clear basis for choice among

options by the decisionmaker and the public." 40 C.F.R. § 1502.14. And the EIS must accurately represent the baseline conditions existing before the proposed federal action so the public can make an informed comparison of the alternatives and provide meaningful comment, and the agency can make a "fully informed and well-considered" decision. *Vermont Yankee*, 435 U.S. at 558. It is not the purpose of NEPA to elevate environmental considerations over all others. *Baltimore Gas & Elec. Co.* v. *Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (NEPA has broad purposes and Congress "did not require agencies to elevate environmental concerns over other appropriate considerations"); *Stryker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227 (1980) (same).

3. The Payette National Forest issued Draft and Final EISes describing its proposal to implement the Travel Management Rule by designating a system of roads and trails that would be open to motor vehicle use. R9. Neither EIS, however, accurately described the baseline of existing roads the agency intended to close. It is, in fact, undisputed that both the Draft EIS and the Final EIS omitted hundreds of miles of open roads in actual public use from their baseline descriptions of the existing conditions in the Forest. R12.

American Mines submitted comments during the public comment period pointing out that the Final EIS was based on factual inaccuracies because it treated numerous roads as closed that were actually

open and in use by the public with motor vehicles. R9-10. Although the Forest Service admitted it had not accurately depicted baseline conditions in the Forest, it nonetheless adopted the proposed Travel Management Plan without including an accurate description of the excluded roads and existing conditions in its alternatives analysis. R10-13.

To exhaust its administrative remedies, American Mines filed an administrative appeal. The appeal decision acknowledged that the Forest Service's "analysis incorrectly represented the current condition showing roads closed that were not closed." R58. It acknowledged that as a result, "it was not clear to the public about the current status of several roads and trails" in the Forest. *Ibid*. And it acknowledged that "it is not clear from the record how the potential social and economic impacts of not designating these roads and trails were considered." R57. Nonetheless, American Mines' appeal was denied.

4. American Mines filed suit in the district court seeking judicial review under the Administrative Procedure Act. The district court dismissed American Mines' complaint without reaching the merits because, in the district court's view, American Mines' interest in enforcing NEPA is "purely economic" and therefore insufficient under controlling Ninth Circuit precedent to confer prudential standing. Pet. App. 5.

The district court reached its decision only by rejecting American Mines' allegations that it "engaged

in environmental assessment" (among other activities) to protect the environment. Pet. App. 68. The rejection of these allegations was appropriate, in the district court's view, because American Mines "would never have engaged" in those activities unless they "also furthered [American Mines'] economic interest." *Ibid*. Indeed, the district court went so far as to find, with no basis, that American Mines' "access on these roads would degrade the environment, not protect the environment." *Id*. at 67-68. Although the district court recognized its error in making this factual finding when challenged by American Mines' motion to alter or amend the order and judgment, the district court's remedy was merely to strike that sentence from its previous decision. *Id.* at 52-53.[1]

5. The Ninth Circuit affirmed the dismissal of American Mines' complaint. The court recognized

[1] This case is related to *Idaho Recreation Council* v. *U.S. Forest Service*, No. 12-35763 (9th Cir., appeal docketed Sept. 21, 2012) ("the *Idaho Recreation* case") and *Valley County*, *Idaho* v. *U.S. Department of Agriculture*, No. 11-233-BLW (D. Idaho, filed May 19, 2011) ("the *Valley County* case"), which also challenged the Payette National Forest Travel Management Plan. The *Idaho Recreation* and the *Valley County* cases were consolidated by the trial court and dismissed on summary judgment. The *Idaho Recreation* case is on appeal to the Ninth Circuit, while the *Valley County* case is still pending before the trial court on post-trial motions. Neither case deals with the impact of the Travel Management Plan throughout the entire Payette National Forest, as the instant case does. And neither case raises either of the questions presented in this petition.

that prudential standing analysis, which "is not meant to be especially demanding," focuses on whether "the interest sought to be protected by the complainant arguably [falls] within the zone of interests to be protected or regulated by the statute * * * in question." Pet. App. 3-4 (internal quotation marks and citations omitted, alteration and ellipses in original). And the court recognized that in addition to pleading American Mines' undisputed economic interests, the complaint also "allege[d] its commitment to environmental studies and mitigation activities." *Id*. at 5. The court nonetheless proceeded to ignore those properly pleaded allegations and determined that American Mines' interests were "purely economic" because its actions—even those helpful to the environment—"are undertaken only as part of the pursuit of American Mines' economic interests in mining." *Ibid*.

Citing Ninth Circuit precedents, the court held that "purely economic interests do not fall within NEPA's environmental zone of interests." Pet. App. 5 (citing, *inter alia*, *Ashley Creek*, 420 F.3d at 945). The Ninth Circuit thus affirmed the district court's ruling that American Mines lacks prudential standing to seek review of agency action admittedly based on statements known to be false. American Mines'

petition for rehearing and request for rehearing en banc was denied. Pet. App. 86.[2]

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Decision That "Purely Economic" Interests Cannot Support Prudential Standing To Challenge Agency Action Under The National Environmental Policy Act Conflicts With Decisions Of The Eighth Circuit

In *Bennett* v. *Spear*, this Court held that the plaintiff was "plainly within the zone of interests that the provision protects" and therefore had prudential standing because *one* purpose of the "particular provision of law upon which the plaintiff relie[d]" in seeking judicial review was to prevent unnecessary impacts on the economy. 520 U.S. 154, 177 (1997). That was so even though the plaintiffs' interest in challenging the agency action at issue was purely

[2] In the Ninth Circuit, the government argued that (1) the court of appeals lacked jurisdiction over American Mines' appeal because American Mines filed its Rule 59(e) motion one day late; and that (2) American Mines lacks Article III standing. The Ninth Circuit expressly rejected the former argument, ruling that the government forfeited its timeliness argument by not raising it in response to the Rule 59(e) motion in the district court, and implicitly (and correctly) rejected the latter argument by reaching and deciding the government's prudential standing argument.

economic, and even though the overall purpose of the statute—the Environmental Species Act—was environmental protection (i.e., species preservation). *Ibid*.

In explicit reliance on *Bennett*, the Eighth Circuit has squarely (and correctly) held that purely economic interests support prudential standing in the NEPA context, too. *Friends of the Boundary Waters*, 164 F.3d at 1115. The Eighth Circuit reasoned that NEPA's use of the term "human environment" in the EIS provision (§ 102(2)(C)) requires consideration of economic interests in every EIS. *Id*. at 1125. Accordingly, prudential standing to challenge the adequacy of an EIS in the Eighth Circuit may be supported solely by economic interests. That rule not only comports with this Court's decision in *Bennett*, but also makes good sense. Excluding parties from challenging agency action solely because their interests are economic undercuts the fully informed, participation-based decision-making process that NEPA requires.

The Ninth Circuit, however, has explicitly (and repeatedly) rejected the Eighth Circuit's rule. In *Ashley Creek*, the court criticized the Eighth Circuit's "bifurcated reading" of § 102(2)(C), on which the *Friends of the Boundary Waters* decision rested. 420 F.3d at 941. The Ninth Circuit, in direct conflict with the Eighth Circuit, determined that § 102(2)(C) "does not set out a *purely* economic factor, unconnected to environmental concerns." *Id*. at 942 (emphasis in original). As a result, the Ninth Circuit has repeatedly held—as it did in this case—that "purely

economic interests do not fall within NEPA's environmental zone of interests." Pet. App. 5 (citing *Ashley Creek*, 420 F.3d at 945; *Ranchers Cattlemen Action Legal Fund* v. *U.S. Dep't of Agric.*, 415 F.3d 1078, 1103-04 (9th Cir. 2005); and *Nev. Land Action Ass'n* v. *U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993)).[3]

In disagreeing with the Eighth Circuit and concluding that concrete economic interests are insufficient for prudential standing purposes (but amorphous "environmental protection" interests are not), the Ninth Circuit has turned prudential standing doctrine on its head. It has also manufactured a one-way ratchet that allows only those adjudged

[3] In *Ashley Creek*, a phosphate producer challenged a Bureau of Land Management decision allowing another company to open a phosphate mine on government land. The phosphate producer alleged that the EIS for the project did not consider the plaintiff's phosphate as an alternative to its competitor's mining on government land. The Ninth Circuit held that the competitor phosphate producer lacked Article III standing, but went on to consider prudential standing in the alternative. *Ashley Creek*, 420 F.3d at 939-40. Thus in successfully opposing the petition for certiorari filed in that case, the United States primarily argued that "further review is unwarranted because the court's holding that petitioner lacked standing under Article III is sufficient to dispose of this case and is not challenged in the question presented by petitioner." Brief in Opposition, *Ashley Creek Phosphate Co.* v. *Scarlett*, 126 S. Ct. 2967 (2006) (No. 05-1209), 2006 WL 1415670, at *6. That is not the case here, where resolution of the prudential standing issue in American Mines' favor is dispositive and would require reversal of the Ninth Circuit's judgment.

"environmentally friendly" to bring suit under NEPA —no matter how grave the economic injury caused by the challenged agency decision. But making NEPA litigation the exclusive province of self-proclaimed champions of the environment—whose own economic interest in receiving Equal Access to Justice Act fees and charitable contributions is not disqualifying—does nothing to advance NEPA's goal of protecting the environment by establishing a process that will result in fully informed and well-considered decisions by federal agencies. See *Vermont Yankee*, 435 U.S. at 558; see also Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 TUL. L. REV. 845, 883-84 (1999).

As the Eighth Circuit correctly reasoned, "[w]hile the overall purpose of NEPA is to establish a broad national commitment to protecting and promoting environmental quality, the particular provisions" upon which American Mines relies here to demonstrate prudential standing "indicate that the social and economic effects of proposed agency action must also be considered once it is determined that the proposed agency action significantly affects the physical environment." *Friends of the Boundary Waters*, 164 F.3d at 1125. Congress has made clear that NEPA strives to "achieve a *balance* between population and resource use which will permit high standards of living and a wide sharing of life's amenities" (42 U.S.C. § 4331(b)(5) (emphasis added)), and "to create and maintain conditions under which man and nature can

exist in productive harmony, and fulfill the social, *economic*, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331(a) (emphasis added).

The Ninth Circuit's contrary approach is thus at odds not only with that of the Eighth Circuit, but also with the statute itself. And as demonstrated below, it is at odds with this Court's prudential standing cases, too. This Court's review is needed to resolve the conflict, dispel the confusion, and clarify that plaintiffs with Article III standing and real, concrete economic interests can ensure, in court, that agencies comply with their legal duties under NEPA.

II. The Ninth Circuit's Decision That American Mines Lacks Prudential Standing Under The "Intertwined With" Test Conflicts With Decisions Of The D.C. Circuit

As discussed above, the Ninth Circuit, in conflict with the Eighth Circuit, deems purely economic interests—however concrete or significant—patently insufficient as a matter of law for prudential standing under NEPA. The Ninth Circuit does, however, purport to hold that an economic interest can support prudential standing under NEPA if that interest is "intertwined with" an environmental interest. See, e.g., *Ashley Creek*, 420 F.3d at 945.

In this case, however, the Ninth Circuit grafted a "purity of heart" requirement onto NEPA that not only makes it impossible for any party with any

economic interest whatsoever to satisfy the "intertwined with" test for prudential standing. It also creates a square conflict with the D.C. Circuit, which has made clear that "a party is not * * * disqualified from asserting a legal claim under NEPA because the impetus behind the NEPA claim may be economic." *Nat'l Ass'n of Home Builders*, 417 F.3d at 1287 (internal quotation marks and citations omitted).

Because, in the D.C. Circuit, "NEPA standing is not limited to the 'pure of heart,'" *Mountain States*, 2 F.3d at 1236, "[p]arties motivated by *purely* commercial interest *routinely* satisfy the zone of interests test." *Nat'l Ass'n of Home Builders*, 417 F.3d at 1287 (internal quotation marks and citations omitted, emphases added). In the Ninth Circuit, however, those parties (like American Mines) could *never* satisfy the zone of interests test, given the Ninth Circuit's view that environmental protection efforts "undertaken only *as part of* the pursuit of * * * economic interests" do not count as environmental protection efforts *at all* for purposes of the zone-of-interests analysis. See Pet. App. 5 (emphasis added).

In all events, there can be no real question that the allegations in American Mines' complaint would satisfy the D.C. Circuit's zone-of-interests test, which unlike the Ninth Circuit's test does not deem economic motivations disqualifying. American Mines' complaint alleges, among other things, that:

- American Mines "has been involved * * * in efforts to develop the mineral resources of the Payette National Forest in a fashion that minimizes and/or mitigates and remediates environmental impact and stimulated human welfare through economic development" (R4, ¶22);
- American Mines "has commissioned and engaged in environmental and geophysical studies in the Payette National Forest" (*Ibid*., ¶23); and
- The "lack of an accurate assessment of the existing road network has denied [American Mines] * * * the ability to properly and thoroughly analyze the environmental and ecological consequences and the interrelated social and economic consequences of the alteration of travel management procedures" (R5, ¶30).

At the very least, those factual allegations are sufficient to support an inference that American Mines' economic interests are intertwined with the environment—and thus would be enough for prudential standing in the D.C. Circuit. See, e.g., *Nat'l Ass'n of Home Builders*, 417 F.3d at 1287 (holding that "a party is not * * * disqualified from asserting a legal claim under NEPA because the impetus behind the NEPA claim may be economic" (internal quotation marks and citations omitted)); *ibid*. ("Parties motivated by *purely* commercial interest *routinely* satisfy the zone of interests test." (Internal quotation marks and citations omitted, emphases added)).

Those allegations were not, however, deemed sufficient by the Ninth Circuit because American Mines undertook its environmental protection efforts "only in the pursuit of" its economic interests. American Mines' economic motivations would have been no barrier to judicial review, however, in the D.C. Circuit. Particularly given that over half of the environmental claims—including NEPA claims—brought nationwide are filed in the Ninth Circuit or the D.C. Circuit, Warshaw & Wannier, 5 HARV. LAW & POL'Y REV. at 300, that lack of uniformity is intolerable. This Court's review is warranted for that reason, too.

III. The Ninth Circuit's Decision Conflicts With This Court's Precedents

The Ninth Circuit's decision cannot be reconciled with this Court's prudential standing cases. This Court has never held, or even suggested, that the sole purpose of NEPA is environmental protection. It *has* held, however, that NEPA has "broad" purposes and that Congress "did not require agencies to elevate environmental concerns over other appropriate considerations," *Baltimore Gas & Elec. Co.*, 462 U.S. at 97; that environmental statutes can have multiple purposes in addition to protecting the environment, *Bennett*, 520 U.S. at 176-77; and that economic interests alone can support prudential standing under the Endangered Species Act ("ESA"), *ibid*. The Ninth Circuit's decision cannot be reconciled with those precedents.

This Court's prudential standing doctrine requires that a plaintiff's grievance arguably fall within the zone of interests protected or regulated by the statutory provision invoked in the suit. *Bennett*, 520 U.S. at 162. The grievance in this case is that agency action undertaken on the basis of a factually incomplete, inaccurate, and misleading record—which omitted hundreds of miles of roads that were open and in actual public use as if they did not exist or as if they were already administratively closed—caused American Mines to suffer economic injury in terms of its ability to access and use roads in the Payette National Forest. Under this Court's decision in *Bennett*, which held that economic interests are within the zone of interests of the ESA (and thus can support prudential standing), American Mines' undisputed economic interests here are similarly within the zone of interests of NEPA § 102, and sufficient for prudential standing as well.

American Mines' economic interests are, at the same time, necessarily intertwined with its efforts to protect the environment. It is a practical, contemporary reality that mining and the use of roads associated with mining must be conducted in an environmentally responsible fashion. The intertwined interests of economics and environmental protection that result from this contemporary reality is fully within the zone of interests protected by NEPA § 102.

Although this Court has yet to resolve the question whether purely economic interests are sufficient to bring NEPA claimants within the zone of interests

protected by NEPA § 102, this Court made clear in *Monsanto Co*. v. *Geertson Seed Farms*, 130 S. Ct. 2743 (2010), that intertwined economic and environmental interests are sufficient to do so.

The claimants in *Monsanto* were organic food producers who challenged an agency action deregulating the use of genetically engineered alfalfa—a product that could cross-pollinate and destroy the value of the plaintiffs' organic and non-genetically engineered alfalfa crops. *Id*. at 2750-51. In rejecting the argument that the producers' injury was not within the NEPA zone of interests because they involved "commercial harm," this Court explained that the producers' "injury has an environmental as well as an economic component * * * [and the] mere fact that respondents also seek to avoid certain economic harms that are tied to the risk of gene flow does not strip them of prudential standing." *Id*. at 2755-56.

At the very least, the same is true of American Mines in this case, as its "injury has an environmental as well as economic component" and the "mere fact" that American Mines seeks to "avoid certain economic harms" that are intertwined with environmental injuries "does not strip" American Mines "of prudential standing." See *ibid*. The Ninth Circuit's contrary conclusion in this case cannot be reconciled with this Court's decision in *Monsanto*.

IV. The Conflict Has Important National Consequences, And This Case Presents The Ideal Vehicle For Resolving It

The need to resolve the issues of NEPA standing presented by this petition is especially pressing given the explosion of NEPA claims in recent years. Since 2000, the number of NEPA claims brought by regulated businesses like American Mines has climbed from 3.9 percent of the total claims to more than 13 percent. See Warshaw & Wannier, 5 HARV. LAW & POL'Y REV. at 311. What is more, as noted above, over half of all environmental claims—including NEPA claims—are brought in the Ninth Circuit or the D.C. Circuit. *Id*. at 300. Standing is one of the most frequently litigated issues in those cases. Maddux, 25 WASH. U. J.L. & POL'Y at 196. Given all that, the need for guidance from this Court on the recurring, important issue of prudential standing to bring NEPA claims is great.

This case is an ideal vehicle to address these issues, resolve the conflicts, and restore uniformity on an exceptionally important issue of federal law—and, in so doing, help ensure the integrity of agency decision-making. The Ninth Circuit has squarely (and repeatedly) held that as a matter of law, "purely economic" interests do not come within NEPA § 102's zone of interests (and thus cannot support prudential standing). That prudential standing issue is thus one of pure law, as American Mines' economic interests are undisputed in this case.

As to the Ninth Circuit's application of the "intertwined with" test, this case was decided on a motion to dismiss, so there are no factual disputes to muddy the waters—and the Ninth Circuit's decision to impose a "purity of heart" requirement is a purely legal error that requires no factual determinations to correct. As demonstrated above, the unambiguous allegations of American Mines' complaint establish that American Mines suffered real and concrete economic and environmental injury sufficient for prudential standing under the proper legal standard.[4]

The issues of prudential standing presented by the petition are also ones of immense practical as well as doctrinal importance. In the Ninth Circuit, a private party with Article III standing can suffer millions of dollars of actual damages—indeed, can go out of business, laying off thousands of workers to the detriment of the economy—and nonetheless be barred from judicial redress. Prudential standing doctrine exists to bar plaintiffs with remote contingent injuries or inchoate affronts, not those with real, concrete economic damages like American Mines. Perhaps the plaintiff will not prevail on the merits, but it cannot

[4] The fact that the Ninth Circuit's decision in this case is unreported does not counsel against review. See, e.g., *C.I.R.* v. *McCoy*, 484 U.S. 3, 7 (1987) (stating that "the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case"); see also *Felkner* v. *Jackson*, 131 S. Ct. 1305 (2011) (reversing unpublished Ninth Circuit judgment); *Judulang* v. *Holder*, 132 S. Ct. 476 (2011) (same).

be that the plaintiff lacks prudential standing even to find out.

Further percolation is unnecessary. The conflict between the Ninth and Eighth Circuits is entrenched, and further litigation in the lower courts is unlikely to clarify the competing arguments further. This Court's review is needed now to resolve the conflict, restore uniformity, and confirm that economic interests do not disqualify claimants from seeking judicial review of agency action under NEPA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMERICAN INDEPENDENCE MINES AND MINERALS CO., an Idaho joint venture composed of Ivy Minerals, Inc., an Idaho corporation, and Walker Mining Company, an Idaho corporation and IVY MINERALS, INC., an Idaho corporation, Plaintiffs-Appellants, and VALLEY COUNTY, Intervenor-Plaintiff, v. UNITED STATES DEPARTMENT OF AGRICULTURE, an agency of the United States; et al., Defendants-Appellees.	No. 11-35123 D.C. No. 1:09-cv-00433-EJL MEMORANDUM* (Filed Aug. 17, 2012)

Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Argued and Submitted July 10, 2012
Portland, Oregon

Before: GOODWIN, PREGERSON, and CHRISTEN, Circuit Judges.

Plaintiff-Appellant, American Independence Mines and Minerals Co. ("American Mines"), appeals the dismissal of its complaint seeking judicial review of a travel management plan governing use of the roads in the Payette National Forest. American Mines filed suit against the U.S. Department of Agriculture, the Secretary of Agriculture Tom Vilsack, the U.S. Forest Service, and several local employees of the U.S. Forest Service (collectively, the "Federal Defendants") for alleged NEPA violations stemming from the issuance of new road use regulations in the Payette Forest.

The complaint alleged that the final environmental impact statement underlying the travel management plan was based on facts that the U.S. Forest Service knew were inaccurate. The district court dismissed the complaint after concluding that American Mines' interest in the Payette National Forest was purely economic, and therefore it lacked prudential standing under NEPA. American Mines subsequently filed a motion to alter or amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure, which was untimely by one day. The Federal Defendants opposed the Rule 59(c) motion but did not object on timeliness grounds. The district court granted the Rule 59(e) motion, in part, but left intact

its holding regarding American Mines' lack of standing.

The Federal Defendants argue that we do not have jurisdiction over this appeal because the time to file a Rule 59(e) motion cannot be extended by the court. The Supreme Court has distinguished between time constraints mandated by statute, *i.e.*, jurisdictional rules that pertain to the court's ability to hear the case, and judicially-imposed time restraints, *i.e.*, claim-processing rules that can be forfeited if not raised in a timely fashion. *See Kontrick* v. *Ryan*, 540 U.S. 443, 452-56 (2004); *Eberhardt* v. *United States*, 546 U.S. 12, 15-19 (2005). We have held that Rule 6(b), the rule governing time limits for Rule 59(e) motions, is a claim-processing rule subject to forfeiture. *See Art Attacks Ink, LLC* v. *MGA Entm't Inc.*, 581 F.3d 1138, 1143 (9th Cir. 2009). Because the Federal Defendants failed to raise untimeliness until after the district court had considered the merits of the Rule 59(e) motion, they forfeited that argument. *See Eberhardt*, 546 U.S. at 18-19.

We review the denial of a Rule 59(e) motion to amend for abuse of discretion. *Sch. Dist. No. 1J, Multnomah Cnty., Or.* v. *AcandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993).

Prudential standing

Prudential standing requires that "the interest sought to be protected by the complainant arguably [must be] within the zone of interests to be protected

or regulated by the statute * * * in question." *Ashley Creek Phosphate Co.* v. *Norton*, 420 F.3d 934, 939-40 (9th Cir. 2005). Although the prudential standing test "is not meant to be especially demanding," *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 132 S. Ct. 2199, 2210 (2012) (internal quotation marks omitted), the district court did not abuse its discretion in refusing to identify a theory for prudential standing that arguably was mentioned in a 39-page, single-spaced attachment to the complaint, but such theory was neither articulated in the 33-page complaint nor argued in response to the motion to dismiss.

American Mines alleges that its economic interests are within NEPA's zone of interests because its business is necessarily intertwined with the environment. The district court concluded that American Mines' efforts "were not environmental in nature but were completed in pursuit of Plaintiffs' economic interests in mineral resource development and, therefore, do not fall within the environmental zone of interests." We agree.

The *Ashley Creek* court held that § 102 cannot be divorced from the overall purpose of NEPA, which the court defined as "a national commitment to protecting and promoting environmental quality." *Ashley Creek*, 420 F.3d at 944-45. American Mines asserts that its environmental interests are driven by considerations of practicality, regulatory compliance, and business judgment that compel it to mine in a responsible fashion. American Mines' argument relies on three

paragraphs in the complaint that allege its commitment to environmental studies and mitigation activities. However, these activities, as the district court correctly held, are undertaken only as part of the pursuit of American Mines' economic interests in mining in the Payette Forest. These purely economic interests do not fall within NEPA's environmental zone of interests. *See id.* at 945; *Ranchers Cattlemen Action Legal Fund* v. *U.S. Dep't of Agric.*, 415 F.3d 1078, 1103-04 (9th Cir. 2005); *Nevada Land Action Ass'n* v. *U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993). Therefore, American Mines lacks prudential standing.

AFFIRMED.

733 F. Supp. 2d 1241

United States District Court,
D. Idaho.

AMERICAN INDEPENDENCE MINES AND MINERALS CO., an Idaho joint venture composed of Ivy Minerals, Inc., an Idaho corporation, and Walker Mining Company, an Idaho corporation; and Ivy Minerals, Inc., an Idaho corporation, Plaintiffs,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, an Agency of the United States; Tom Vilsack, in his capacity as Secretary of Agriculture of the United States; United States Forest Service, an agency within the Unites States Forest Department of Agriculture; Tom Tidwell, in his capacity as Chief of the United States Forest Service; Harvey Forsgren, in his capacity as Regional Forester for the Intermountain Region of the United States Forest Service; Brent L. Larson, in his capacity as Forest Supervisor of the Caribou-Targhee National Forest; and Suzanne C. Rainville, in her capacity as Forest Supervisor for the Payette National Forest, Defendants.

Case No. CV-09-433-S-EJL.
June 10, 2010.
Opinion to Reconsider and Amend Granted in Part Dec. 16, 2010.

Kelsey Jae Nunez, Martin C. Hendrickson, Givens Pursley, Boise, ID, for Plaintiff.

Thomas K. Snodgrass, United States Department of Justice, Stout St., CO, Peter Whitfield, USDOJ, Washington, DC, for Defendant.

AMENDED MEMORANDUM DECISION AND ORDER

EDWARD J. LODGE, District Judge.

Before the Court is Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction (Docket No. 18), or, in the alternative, Defendants' Motion to Dismiss for Failure to State a Claim (Docket No. 19). Also before the Court is Valley County's Motion to Intervene (Docket No. 13). The Court grants Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, denies as moot Defendants' Motion to Dismiss for Failure to State a Claim, and grants Valley County's Motion to Intervene. Specifically, the Court finds that Plaintiffs' alleged injury is not within the zone of interests protected by the National Environmental Policy Act ("NEPA") nor the National Forest Management Act ("NFMA"). The Court finds that Valley County has asserted an injury in fact and that Valley County's alleged injury falls within the zone of interests protected by NEPA and the NFMA. The Court also finds that Valley County's proposed claims are not moot or unripe, and that Valley County has exhausted its proposed claims. The Court will therefore allow Valley County to intervene and its action to proceed separately.

BACKGROUND

Plaintiffs American Independence Mines and Minerals Co., Ivy Minerals, Inc., and Walker Mining Co., filed a complaint in this court in September 2009. Plaintiff American Independence is an Idaho joint

venture. Plaintiffs Ivy Minerals and Walker Mining are two Idaho corporations; they are the companies that make up the American Independence joint venture. Defendants are the United States Department of Agriculture; Tom Vilsack, in his official capacity as the Secretary of the Department of Agriculture; the United States Forest Service ("USFS"); and Tom Tidwell, Harvey Forsgren, Brent L. Larson, and Suzanne Rainville in their various official capacities with the USFS.

Plaintiffs challenge the environmental impact statement and record of decision underlying an agency rule, created on November 9, 2005, called the Travel Management Rule. The Travel Management Rule requires each national forest system to designate "those roads, trails, and areas that are open to motor vehicle use" and "prohibit[s] the use of motor vehicles off the designated system, as well as use of *motor vehicle on routes and in areas that is not consistent with the designations*." *See* 70 Fed. Reg. 68,264; *see also* 70 Fed. Reg. 68,624-68,291 (Nov. 9, 2005). Plaintiffs also challenge the record of decision from October 3, 2008 that is associated with the Travel Management Rule as applied to the McCall and Krassel Ranger Districts in the Payette National Forest. Lastly, Plaintiffs challenge Brent Larson's January 8, 2009 decision denying Plaintiffs' appeal of the record of the decision.

Plaintiffs assert that they are "actively engaged in mining, exploration and environmental assessment" in the Big Creek area of the Krassel Ranger District.

Compl. ¶ 24 (Docket No. 1). This area is referred to as "MA-13" in the Record of Decision. Plaintiffs brought eight causes of action against Defendants but withdrew without prejudice claims five, seven, and eight pursuant to the parties' stipulation. *See Stipulation* (Docket No. 25); *Order* (Docket No. 29).

Plaintiffs' five remaining claims are as follows. Plaintiffs claim that Defendants failed to follow the procedural requirements of NEPA (1) by failing to adequately describe the "no action" alternative during the rulemaking process, by which Plaintiffs mean that Defendants failed to describe ownership of existing roads in the affected area (Claim 1); (2) by failing to adequately consider the mining and associated economic impacts of the proposed rule (Claims 2 and 3); (3) by failing to notify Plaintiffs of the proposed action (Claim 4); and (4) by failing to ascertain and describe roads protected as rights of way under Revised Statute § 2477, codified at 43 U.S.C. § 932 (Claim 6). Plaintiffs also allege in claims two and four that Defendants violated the NFMA.

Plaintiffs assert federal subject matter jurisdiction, arising under NEPA, 42 U.S.C. §§ 4321-4370h, and the NFMA, 16 U.S.C. §§ 1600-1614. *Compl.* ¶ 14. Plaintiffs allege that Defendants violated various NEPA and NFMA provisions and implementing regulations. *See id.* ¶¶ 78-81, 108-10, 119, 121, 130, 144, and 146. For claims one through four and six, Plaintiffs also allege that Defendants violated the Administrative Procedure Act ("APA"), 5 U.S.C.

§ 706(2)(A) and (2)(D). *Id.* ¶¶ 104-05, 126-27, 140-41, 158-59.

Defendants move to dismiss for lack of subject matter jurisdiction and argue that Plaintiffs lack standing to file a NEPA action because Plaintiffs' alleged harm is purely economic and therefore not within the environmental zone of interests protected by NEPA.[1] *See* Docket No. 18. In the alternative, Defendants move to dismiss for failure to state a claim. *See* Docket No. 19.

In addition to Defendants' motions, the Court will also consider Valley County's motion to intervene in Plaintiffs' case. *See Motion to Intervene* (Docket No. 13). Like Plaintiffs, Valley County asserts federal subject matter jurisdiction based on NEPA and the NFMA and alleges a procedural injury related to recreational, aesthetic, and other interests on behalf of its citizens. Valley County also claims an ownership interest in some of the roads affected by the Travel Management Rule and argues that this ownership interest confers standing.

Valley County initially proposed to bring seven claims against Defendants but will voluntarily withdraw claims four, six, and seven if this Court allows Valley County to intervene. *See Valley County's*

[1] The Court will not consider Defendants organizational standing arguments because Plaintiffs do not attempt to assert organizational standing. *See Plaintiffs' Combined Response*, at 18-19 (Docket No. 26).

Reply, at 6 (Docket No. 27). Although the stipulation between Plaintiffs and Defendants did not affect Valley County's proposed intervention, Valley County's withdrawn claims parallel those withdrawn by the parties' stipulation. Of Valley County's remaining causes of action, claims one through three are the same claims that Plaintiffs asserted as claims one through three. *See Complaint in Intervention*, ¶¶ 17-19 (Docket No. 13-1). Claims one through three allege that Defendants failed to adequately describe the no action alternative and failed to consider mining and economic impacts associated with the Travel Management Rule. *See id.* Claim five in Valley County's proposed Complaint, which is identical to Plaintiffs' original claim six, alleges that the Record of Decision underlying the Travel Management Rule failed to adequately describe possible R.S. 2477 roads and the costs and benefits to quieting title to R.S. 2477 roads. *Id.* ¶ 21.[2]

[2] The Court recognizes that claims one and five are similar because both allege that Defendants failed to adequately describe the current system of roads impacted by the Travel Management Rule. Claim one is, however, about the description of the "no action" alternative, while claim five is about Defendants' description in the record of decision generally.

DISCUSSION

I. *Standard for a Motion to Dismiss for Lack of Subject Matter Jurisdiction*

Pursuant to Federal Rule of Civil Procedure 12(b)(1), a party may ask the court to dismiss for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Moreover, subject matter jurisdiction is a "threshold matter," which a court must determine before proceeding to the merits of the case. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). A court may determine subject matter jurisdiction from the facts alleged in the complaint or, if necessary, from the actual facts in the case. *Thornhill Pub. Co.* v. *General Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979) (citations omitted).

II. *Standing Requirements*

NEPA does not provide for private rights of action, but a plaintiff may challenge an agency action under the Administrative Procedure Act ("APA"). The APA provides statutory standing to a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute." 5 U.S.C. § 702. To bring an action under the APA, a plaintiff must demonstrate both constitutional and prudential standing. *Nat'l Credit Union Admin.* v. *First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488, 118 S.Ct. 927, 140 L.Ed.2d 1 (1998) (citation omitted).

In order to have prudential standing under the APA, "'the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute * * * in question.'" *Id.* (quoting *Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 152, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970)). The purpose of the zone of interests test is "to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives." *Clarke* v. *Secs. Indus. Ass'n*, 479 U.S. 388, 397 n. 12, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987). A plaintiff's asserted interest does not meet the zone of interests test "'if the plaintiff's interests are * * * marginally related to or inconsistent with the purposes implicit in the statute.'" *Id.* at 399, 107 S.Ct. 750. However, "'no indication of congressional purpose to benefit the would-be plaintiff'" need exist. *Id.* at 399-400, 107 S.Ct. 750.

The party asserting "federal jurisdiction bears the burden of establishing [the standing] elements." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Moreover, the plaintiff must support each element of standing "with the manner and degree of evidence required at the successive stages of the litigation." *Id.*

III. *Plaintiffs' Claims Do Not Fall Within NEPA's Zone of Interests*

Defendants argue that Plaintiffs' asserted claims do not fall with NEPA or the NFMA's zone of interests

because Plaintiffs assert purely economic interests. The Court agrees.

NEPA does not impose substantive requirements but instead mandates a process that the agency must follow. NEPA was enacted in order "to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321, NEPA § 101. NEPA requires a federal agency to prepare a "detailed statement" on the environmental impact of a proposed rule if that rule is a "major Federal action [] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C), NEPA § 102.

In a NEPA action, the zone of interests protected is environmental. *Nuclear Info. & Res. Serv.* v. *Nuclear Regulatory Comm'n*, 457 F.3d 941, 950 (9th Cir. 2006). A plaintiff asserting "purely economic injuries does not have standing to challenge an agency action under NEPA." *Nev. Land Action Ass'n* v. *United States Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (citations omitted); *id.* ("The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions.") (citation omitted). A plaintiff may, however, "have standing to sue under NEPA even if his or her interest is primarily economic, as long as he or she also alleges an environmental interest or economic injuries that are causally related to an act within NEPA's embrace." *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America* v. *United States Dep't Agric.*, 415 F.3d 1078, 1103 (9th Cir. 2005) (citation

and internal quotation marks omitted). A plaintiff's interest in "recreational use and aesthetic enjoyment" are also among the interests NEPA was designed to protect. *Lujan*, 497 U.S. at 886, 110 S.Ct. 3177.

In the context of an Endangered Species Act case, the Supreme Court held that the zone of interests test is "determined not by reference to the overall purpose of the Act in question * * * but by reference to the particular provision of law upon which the plaintiff relies." *Bennett* v. *Spear*, 520 U.S. 154, 175-76, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). Plaintiffs correctly point out that post-*Bennett*, a court is required to interpret NEPA's zone of interests by reference to particular provisions in the statute. Plaintiffs appear to argue that interpreting specific NEPA provisions, rather than NEPA as a whole, may expand or change the zone of interests protected by NEPA to include solely economic injuries caused by an environmental regulation. The Ninth Circuit, however, rejected this argument in *Ashley Creek Phosphate Co.* v. *Norton*, 420 F.3d 934 (9th Cir. 2005). In *Ashley Creek*, the Ninth Circuit explicitly held that § 102, which requires the preparation of environmental impact statements, did not protect "purely economic interests" and that § 102 could not be "severed

from NEPA's overarching purpose" of protecting the environment. 420 F.3d at 942.[3]

Here, Plaintiffs assert federal subject matter jurisdiction arising from NEPA, specifically 42 U.S.C. § 4332, NEPA § 102, which requires each federal agency to prepare an environmental impact statement. In order to meet the zone of interests requirement, Plaintiffs must show that their interest is environmental or that they have suffered an economic injury that is related to an environmental injury. *See Ranchers Cattlemen*, 415 F.3d at 1103.

Plaintiffs have not linked their pecuniary interest in mineral resource development to the physical environment or to an environmental interest contemplated by NEPA. *See id.* Rather, Plaintiffs' injury is the inability to freely travel a road or roads that Plaintiffs wish to travel to access mineral resource development sites. *See Plaintiffs' Combined Response*, at 10 (Docket No. 26). Contrary to NEPA's environmental purpose, Plaintiffs' access on these

[3] Plaintiffs argue that the federal regulations implemented pursuant to NEPA and the NFMA are helpful in understanding the zone of interests protected by the authorizing statute. *See Plaintiffs' Combined Response*, at 13 n. 12 (Docket No. 26). The Court assumes that Plaintiffs are not arguing that the implementing regulations protect a broader zone of interests than the statute which authorized those regulations. To be clear, however, the Court will only examine whether Plaintiffs' claims fall with the zone of interests protected by NEPA and the NFMA and not whether separate regulations provide Plaintiffs with a different or broader interest sufficient to confer standing.

roads would degrade the environment, not protect the environment.

Plaintiffs assert that their mining and resource development interests are completed "in a fashion that minimizes and/or mitigates and remediates environmental impact and stimulates human welfare through economic development." *Compl.* ¶ 22. This only demonstrates the manner in which Plaintiffs operate their business and not whether Plaintiffs' interests also align with the environmental interests protected by NEPA. Plaintiffs state that they are engaged in "environmental and geophysical studies" and "environmental assessment activities." *Id.* ¶¶ 23-24. Plaintiffs also admit, however, that the studies are completed in pursuit of mineral resource development activities. That is, Plaintiffs would never have engaged in environmental assessment unless it also furthered their economic interest. Plaintiffs' current inability to complete environmental assessments only impedes Plaintiffs' mineral resource development and therefore does not fall within the environmental zone of interests protected by NEPA.

Plaintiffs also assert that the owners of the joint venture "appreciate the environmental, historical and cultural values of lands and historic sites" affected by the decision and "derive intrinsic enjoyment from their use of the roads." *Id.* ¶¶ 26-27. The Court agrees that the owners might have these interests. The owners, however, are not suing in their individual capacities nor are Plaintiffs asserting organizational standing on behalf of these interests. It is hard

to see how mining and resource development corporations can "appreciate environmental values" or "derive intrinsic enjoyment from their use of the roads." More importantly, the promotion of either of these asserted interests is not part of the Plaintiffs' admitted interest in mineral resource development.

The Court therefore finds that the injury asserted as the basis of claims one through four and claim six does not fall within the environmental zone of interests protected by NEPA.

IV. *Plaintiffs' Claims Do Not Fall Within NFMA's Zone of Interests*

The NFMA provides for the management of national forests and requires the USFS to balance the demands on national forests by creating forest management plans. 16 U.S.C. § 1604(a). Although case law on the NFMA is sparse, the zone of interests protected by the NFMA is identifiable from the statute, which lays out "the goals" of creating a forest management plan. *Id.* § 1604(g)(3). The statute specifies the consideration and protection of the following interests: recreational use, environmental preservation, and ensuring the continued diversity of plant and animal communities. *Id.* § 1604(g)(3)(A)-(B). The other interests specified in the statute are unimportant here.

In this case, the only relevant interest Plaintiffs could assert is environmental preservation. For the reasons discussed above, Plaintiffs' asserted injury is not related to environmental preservation. *See id.*

The Court therefore finds that claims two and four fall outside the zone of interests protected by the NFMA.

V. *Valley County's Motion to Intervene*

A. *Intervention as of Right*

Federal Rule of Civil Procedure 24 allows an applicant to intervene either as of right or permissively. Fed. R. Civ. P. 24. An applicant may intervene as of right if the applicant meets four requirements: (1) "the applicant must timely move to intervene"; (2) "the applicant must have a significantly protectable interest related to the property * * * that is the subject of the action"; (3) the applicant must prove that "the disposition of the action may impair or impede" the applicant's ability to protect that interest; and (4) "the applicant's interest must not be adequately represented by existing parties." *Arakaki* v. *Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003) (citation omitted); *see* Fed. R. Civ. P. 24(a)(2).

Here, Valley County's motion to intervene was filed prior to the motions to dismiss, the first dispositive motions in the case, and was therefore timely. However, as discussed above, the Court has dismissed the originally filed complaint for lack of standing. As a result, whatever interests Valley County has cannot be impaired or impeded by Plaintiffs' action because the Court will not decide the merits of Plaintiffs' case. *See* Fed. R. Civ. P. 24(a)(2). Valley County does not, therefore, meet the third requirement for intervention as of right. *See Arakaki*, 324 F.3d at 1083.

Accordingly, the Court denies Valley County's request to intervene as of right.

B. *Permissive Intervention*

A court may also permit a party to intervene if an applicant "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(A)-(B). An applicant must meet three requirements:

(1) jurisdiction independent of the original parties; (2) a timely filed motion; and (3) a claim or defense that shares a common question of law or fact with the main action. *See Northwest Forest Res. Council* v. *Glickman*, 82 F.3d 825, 839 (9th Cir. 1996) (citation omitted). Valley County meets requirements two and three for permissive intervention because Valley County filed a timely motion to intervene and asserts claims similar to those Plaintiffs asserted. *See id.* (citation omitted).

Defendants argue that the Court lacks jurisdiction over Valley County's claims. Specifically, they contend that Valley County lacks standing to proceed with this case because it has not suffered an injury in fact and that its injury does not fall within the zone of interests protected by NEPA and the NFMA.[4] Like

[4] Defendants do not challenge Valley County's right to sue on behalf of its citizens.

Plaintiffs, Valley County asserts federal subject matter jurisdiction based on NEPA and the NFMA.[5]

1. *Valley County Has Alleged an Injury in Fact*

Pursuant to Article III's case and controversy limitation of federal court jurisdiction, a plaintiff must demonstrate constitutional standing to bring a claim in federal court. U.S. Const., art. III, § 1; *see Allen* v. *Wright*, 468 U.S. 737, 750-51, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (citations omitted). A plaintiff meets constitutional standing requirements if the Plaintiff shows an injury in fact, causation, and redressability. *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. To assert a procedural injury in fact, a plaintiff must allege that "(1) the [agency] violated certain procedural rules; (2) these rules protect [the plaintiff's] concrete interests; and (3) it is reasonably probable that the challenged action will threaten their concrete interests." *Citizens for Better Forestry* v. *United States Dep't of Agric.*, 341 F.3d 961, 969-70 (9th Cir. 2003). A plaintiff meets the concrete interest

[5] Alternatively, Defendants argue that Valley County's assertion of ownership of some of the affected roads cannot be determined by this court in a NEPA or NFMA action and is more properly decided pursuant to the Quiet Title Act ("QTA"). As discussed below, because Valley County has standing based on its citizens' recreational and aesthetic interests, the Court need not decide whether Valley County's alleged ownership of roads affected by the Travel Management Rule would separately create standing.

requirement if "a 'geographic nexus' [exists] between the individual asserting the claim and the location suffering an environmental impact." *Cantrell* v. *City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001) (citation omitted).

Valley County has demonstrated a geographic nexus because the affected roads are within Valley County. *See id.* The Court therefore finds that Valley County has alleged a procedural injury in fact.

2. *Valley County's Injury Is Within NEPA's Zone of Interests*

A plaintiff must also meet the requirements for prudential standing, namely, that the plaintiff's interests fall within the governing statute's zone of interests. *Nat'l Credit Union Admin.*, 522 U.S. at 488, 118 S.Ct. 927. In order to meet the zone of interests requirement with regard to NEPA, Valley County must show that its interest is environmental or that their economic injury is related to a NEPA-protected injury. *See Ranchers Cattlemen*, 415 F.3d at 1103. Additionally, Valley County's NEPA action may proceed if Valley County asserts an interest in "recreational use and aesthetic enjoyment" in the affected area. *See Lujan*, 497 U.S. at 886, 110 S.Ct. 3177.

Valley County alleges various interests on behalf of its citizens, one of which is to protect the rights of those citizens who "derive intrinsic enjoyment from their use of these roads." *Compl. in Intervention*, ¶ 8 (Docket No. 13-1). This asserted interest falls within the "aesthetic enjoyment" zone of interest protected

by NEPA and is therefore sufficient to confer standing upon Valley County to proceed in this action. *See Lujan*, 497 U.S. at 886, 110 S.Ct. 3177. Valley County's citizens may also "derive intrinsic enjoyment from the use of these roads" in pursuit of recreational uses, which also falls within the zone of interests protected by NEPA. *See id.*

Defendants argue that *Lujan* v. *Defenders of Wildlife* ("*Defenders*"), 504 U.S. 555, 565-66, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), requires Valley County to identify specific roads affected by the Travel Management Rule that fall within the zone of interests. It is true that *Defenders* rejected various standing arguments premised on hypothetical future injuries or on environmental injuries loosely related to the regulated area. *See Defenders*, 504 U.S. at 565-66, 112 S.Ct. 2130 ("[A] plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly 'in the vicinity of it.'" (citing *Lujan*, 497 U.S. at 887-89, 110 S.Ct. 3177)). The Court is not persuaded by Defendants' argument. Valley County may not have identified affected roads by name, but Valley County clearly limits its claims to those roads affected by the Travel Management Rule. In contrast to the Plaintiffs in *Defenders*, Valley County does not seek to redress an injury that falls somewhere outside the regulated area. *See Defenders*, 504 U.S. at 565-66, 112 S.Ct. 2130.

The Court therefore finds that Valley County's alleged injury falls within the zone of interests protected by NEPA.

3. *Valley County's Injury Is Within the NFMA's Zone of Interests*

To meet the zone of interests requirement with respect to the NFMA, Valley County must show that its interest is in protecting recreational use, environmental preservation, or ensuring the continued diversity of plant and animal communities. 16 U.S.C. § 1604(g)(3)(B). For the reasons discussed above, the Court finds that Valley County's asserted interest is related to recreational use and therefore falls within the zone of interests protected by the NFMA.

4. *Conclusion*

For the reasons discussed above, the Court finds that Valley County has standing to proceed with this action.

VI. *Other Jurisdictional Issues Regarding Intervenor Valley County*

If an intervenor cannot demonstrate that this Court has jurisdiction, the Court may deny intervention. *See EEOC* v. *Nevada Resort Ass'n*, 792 F.2d 882, 886 (9th Cir. 1986). Defendants challenge Valley County's intervention on other non-standing jurisdictional grounds. The Court will consider Defendants' other jurisdictional arguments as separate bars to intervention.

A. *Mootness* (Claim 1)

Defendants argue that claim one is moot. Valley County alleges a procedural violation of NEPA and argues that the agency's Record of Decision underlying the Travel Management Rule is invalid because it fails to adequately describe the no action alternative. Specifically, Valley County argues that the agency did not describe ownership of existing roads and therefore did not fully understand the implications of changing access to the roads affected by the Travel Management Rule.

A court lacks jurisdiction to hear moot claims. *Feldman* v. *Bomar*, 518 F.3d 637, 642 (9th Cir. 2008) (citation omitted). "The burden of demonstrating mootness is a heavy one." *Nw. Envtl. Def. Ctr.* v. *Gordon*, 849 F.2d 1241, 1244 (9th Cir. 1988). "The basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted." *Id.* "As long as effective relief may still be available to counteract the effects of the violation, the controversy remains live and present." *Id.* at 1245.

In this case, if Valley County prevails on claim one, the Court could offer effective relief by ordering the agency to restart the rulemaking process and adequately describe the no action alternative. *See Gordon*, 849 F.2d at 1244-45. The Court therefore finds that claim one is not moot and may proceed. *See id.*

B. *Ripeness* (Claims 2 and 3)

In claims two and three, Plaintiffs allege that Defendants did not adequately consider mining and the economic impact of the proposed rule. Defendants argue that these claims are not ripe.

A plaintiff, or, in this case, the intervenor, bears the burden of establishing that an issue is ripe for judicial review. A ripeness inquiry requires this Court "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), *abrogated on other grounds by Califano* v. *Sanders*, 430 U.S. 99, 104-05, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). Ordinarily, a challenge to an agency regulation is not ripe until "some concrete action applying the regulation to the claimant's situation * * * harms or threatens to harm him." *Lujan*, 497 U.S. at 891, 110 S.Ct. 3177.

In many cases, ripeness "coincides squarely with standing's injury in fact prong" and "can be characterized as standing on a timeline." *Thomas* v. *Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000). To meet the injury in fact requirement, a plaintiff asserting a purely procedural interest must demonstrate "a 'geographic nexus' between the individual asserting the claim and the location suffering an environmental impact." *Cantrell*, 241 F.3d at 679.

To the extent that Valley County alleges a purely procedural interest with respect to claims two and three, Valley County meets the geographic nexus test because the roads affected by the Travel Management Rule are at least partially within Valley County. *See id.* To the extent that Valley County alleges other non-procedural harms in claims two and three, Valley County has not demonstrated ripeness.[6] The Court finds that claims two and three are ripe and that the Court therefore has jurisdiction to hear these claims.

C. *Outside Scope of Sovereign Immunity Waiver* (Claim 5)

In claim five, Plaintiffs allege that the Record of Decision supporting the Travel Management Rule failed to adequately describe possible R.S. 2477 roads and the costs and benefits to determining the existence and ownership of R.S. 2477 roads. *Complaint in Intervention*, ¶ 21 (Docket No. 13-1). Defendants argue that this Court must determine ownership of the affected roads to decide claim five, and that this

[6] Defendants' reliance on *Park Lake Resources, LLC* v. *U.S. Department of Agriculture*, 197 F.3d 448 (10th Cir. 1999), is misplaced because the plaintiff in that case brought a substantive challenge to the regulation. *See Park Lake*, 197 F.3d at 449 (challenging a U.S. Forest Service designation as arbitrary, capricious, and contrary to the plan language of the APA).

Court must do so pursuant to the Quiet Title Act ("QTA").[7]

Revised Statute § 2477 ("R.S.2477") once provided that "the right of way for construction of highways over public lands, not reserved for public uses, is hereby granted." 43 U.S.C. § 932 (1970), *repealed by* Federal Land Policy Management Act of 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2743 (1976). Congress repealed the act in 1976 but preserved any rights of way that existed prior to the date of repeal. *See* 43 U.S.C. § 1769(a). Roads protected as rights of way pursuant to R.S. 2477 are commonly called R.S. 2477 roads.

The Court is not persuaded that determining ownership of the affected roads is necessary to adjudicating Valley County's claims. Valley County disclaims any intention of having this Court conclusively adjudicate ownership of these roads. The Court has no reason to doubt this assertion. Further, as discussed above, to the extent that Valley County is alleging procedural violations of NEPA on behalf of its citizens, this Court has jurisdiction to hear those

[7] The QTA provides: "The United States may be named as a party defendant in a civil action * * * to adjudicate a disputed title to property in which the United States claims an interest." 28 U.S.C. § 2409a(a). Valley County, however, seeks to intervene pursuant to the APA. The APA expressly waives sovereign immunity in suits against federal officers if the plaintiff seeks only nonmonetary relief. *See* 5 U.S.C. § 702. Section 702's waiver is inapplicable, however, if "any other statute * * * grants consent to suit." *Id.* The QTA is such a statute.

claims. The Court therefore finds that it has jurisdiction to hear claim five.

D. *Failure to Exhaust Administrative Remedies* (Claims 1-3, Claim 5)

Defendants argue that Valley County has not exhausted claims one through three and claim five. Pursuant to the APA, a court may review agency action that is "final." 5 U.S.C. § 704. In addition, a party seeking review of a final agency action must also exhaust administrative remedies if expressly required by the statute or an agency rule. *See Clouser* v. *Espy*, 42 F.3d 1522, 1532 (9th Cir. 1994) (citation omitted). A party meets the exhaustion requirement if the "'claims raised at the administrative appeal and in the federal complaint [are] so similar that the district court can ascertain that the agency was on notice of, and had an opportunity to consider and decide, the same claims now raised in federal court.'" *Native Ecosys. Council* v. *Dombeck*, 304 F.3d 886, 899 (9th Cir. 2002) (quoting *Kleissler* v. *United States Forest Serv.*, 183 F.3d 196, 202 (3d Cir. 1999)). A party does not need to use "precise legal formulations" in the administrative process; the claims a party raises to the agency need only alert "the decision maker to the problem in general terms." *See Idaho Sporting Cong., Inc.* v. *Rittenhouse*, 305 F.3d 957, 965 (9th Cir. 2002) (citation omitted).

Valley County submitted two documents during rulemaking: a comment letter on July 26, 2004 and

an appeal of the Travel Management Rule on November 22, 2008. *See Opposition to Motion to Intervene*, Exhs. F-G (Docket Nos. 20-1-20-2). The Court will only consider whether the *appeal* letter sufficiently raises the claims Valley County would like to assert here. Although the Ninth Circuit has not explicitly decided whether a party's comment letter is part of an administrative appeal, Ninth Circuit cases assume that exhaustion requirements begin with a party's administrative appeal. *See, e.g., Native Ecosys.*, 304 F.3d at 898-900 (describing exhaustion during the administrative appeals process and addressing only the party's administrative appeal); *Idaho Sporting Cong.*, 305 F.3d at 965-66 (same).

Defendants argue that Valley County did not mention NEPA, the EIS, or R.S. 2477 rights of way and that Valley County's claims are therefore not exhausted.[8] *See Opposition to Motion to Intervene*, at 7-8 (Docket No. 20). Valley County's appeal included the following: (1) "The primary focus of this appeal is the closing of roads that are used by landowners, recreationist[s], hunters, anglers, hikers, bikers, ATV enthusiasts, sightseers, firewood gathering, mining, and firefighters," *see id.*, Exh. F, at 2 (Docket No. 20-1); (2) Valley County provided historic and R.S. 2477

[8] The Court recognizes that Defendants made this argument with respect to Valley County's comment letter. Given that this Court will not review Valley County's comment letter, the Court will nevertheless review Valley County's *appeal* letter for the same exhaustion issues.

road information, which the travel plan ignored, *id.*; (3) the Travel Management Rule risks closing various roads without determining which are R.S. 2477 roads, *id.* at 4; (4) the Travel Management Rule "needs more work" because the rule affects roads that Defendants may or may not have the right to impact, *id.* at 5; (5) lost opportunities impact the local economy, which the travel management rule "must take into consideration," *id.*, and (6) "much more information is needed before this decision is final," *id.*

In its appeal letter, Valley County clearly identified the issue of the possible adverse impact that the Travel Management Rule could have on mining and the local economy, thereby putting the agency on notice of claims two and three in Valley County's proposed complaint. *See Native Ecosys.*, 304 F.3d at 899. Valley County also sufficiently challenged Defendants' alleged failure to describe the existing status of possible R.S. 2477 roads and therefore put the agency on notice of claims one and five in Valley County's proposed complaint. *See id.* The Court therefore finds that Valley County sufficiently raised claims one through three in its administrative appeal and has exhausted these claims. *See id.*

VII. *The Court Will Allow Valley County to Intervene*

Lastly, even if an applicant has proven independent jurisdiction and therefore meets the requirements for permissive intervention, a court has discretion to deny permissive intervention. *Donnelly* v. *Glickman*,

159 F.3d 405, 412 (9th Cir. 1998) (citations omitted). A court must consider whether "intervention will unduly delay the main action or will unfairly prejudice the existing parties." *Id.* (citations omitted). As Valley County's motion to intervene was timely filed and, as a result of this Court's dismissal of Plaintiffs' complaint, will not unfairly prejudice any party, the Court will exercise its discretion and allow Valley County to intervene in this case. *See id.* Lastly, the Court finds that Valley County's action should proceed as a separate action because this Court has already dismissed the original Plaintiffs' Complaint and because Valley County has proven independent jurisdiction. *See* 7C Wright, Miller, & Kane, *Federal Practice and Procedure* § 1917 (3d ed. 1998) (approvingly cited by the Ninth Circuit in *Blake* v. *Pallan*, 554 F.2d 947, 956 (9th Cir. 1977) without explicitly deciding the issue).

ORDER

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction (Docket No. 18) is GRANTED;

Defendants' Motion to Dismiss for Failure to State a Claim (Docket No. 19) is DENIED as moot; and

Valley County's Motion to Intervene (Docket No. 13) is GRANTED.

MEMORANDUM DECISION AND ORDER INTRODUCTION

Pending before the Court in the above-entitled matter is Plaintiff's Motion to Alter or Amend Order and Judgment. The parties have filed their briefing and matter is ripe for the Court's consideration. Having fully reviewed the record herein, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the court conclusively finds that the decisional process would not be significantly aided by oral argument, this motion shall be decided on the record before this Court without oral argument.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, American Independence Mines and Minerals Company, is an Idaho joint venture composed of Plaintiffs Ivy Minerals, Inc. and Walker Mining Company (collectively the "Plaintiffs"). (Dkt. No. 1.) Plaintiffs state they have been involved in efforts to develop the mineral resources of the Payette National Forest (PNF) in a fashion that minimizes and/or mitigates and remediates environmental impact and stimulates human welfare through economic development. (Dkt. No. 1.) To this end, Plaintiffs claim they have undertaken studies, own property, and are actively engaged in mining, exploration, and environmental assessment activities in the Big Creek area of the Krassel Ranger District

in the PNF, known as "MA-13." (Dkt. No. 1.) Such activities, Plaintiffs allege, require the use of "long-established roads, some of which are R.S. 2477 roads, to access existing mining claims and for exploration for mineral deposits which are locatable under the General Mining Act of 1872* * * *" (Dkt. No. 1.)

On November 9, 2005, the United States Department of Agriculture (USDA) and the Forest Service (FS) enacted the Travel Management Rule requiring National Forests to designate a system of roads, trails, and areas that are open to motor vehicle use and prohibits the unauthorized use of motor vehicles off the designated system. *See* 70 Fed.Reg. 68,264; *see also* 70 Fed.Reg. 68,264-68,291 (Nov. 9, 2005). On October 3, 2008, following an extended public comment period, the USDA and FS issued its Record of Decision (ROD) applying the Travel Management Rule to the McCall and Kassel Ranger Districts in the PNF. Plaintiffs oppose the ROD's application of the Travel Management Rule arguing it has adversely affected them, and the public, by closing roads within the PNF that were previously open to the public, including R.S. 2477 roads. (Dkt. No. 1.) The implementation of the Travel Management Rule in the PNF, Plaintiffs further allege, fails to achieve the purposes and requirements of the National Environmental Protection Act (NEPA) and R.S. 2477 because there was no requirement that the existing roads in the National Forest be inventoried or reviewed to determine their use by the public

and/or property owners before the roads were designated. (Dkt. No. 1, ¶¶ 30, 31.) Plaintiffs argue the ROD will "have the effect of closing and criminalizing the Public Use of multiple roads in the MA-13 area * * * which were used by [Plaintiffs] and others prior to the issuance of the ROD." (Dkt. No. 1, ¶ 73.)

Following the denial of their appeal, Plaintiffs initiated this action in September of 2009 challenging: 1) November 9, 2005 Travel Management Plan; 2) October 3, 2008 ROD; and 3) January 8, 2009 decision denying Plaintiffs' appeal. (Dkt. No. 1.) Plaintiffs' claims allege violations of NEPA and the National Forest Management Act (NFMA). (Dkt. No. 1.) Defendants filed a Motion to Dismiss arguing the Plaintiffs lacked standing to file a NEPA action because their alleged harm is purely economic and, therefore, not within the environmental zone of interests protected by NEPA. (Dkt. No. 18.) Alternatively, Defendants also moved to dismiss for failure to state a claim. (Dkt. No. 19.)

On May 12, 2010 the Court entered an Order and Judgement granting the Defendants' Motion to Dismiss for lack of subject matter jurisdiction and dismissing the case in its entirety. (Dkt. No. 31, 32.)[1]

[1] On June 10, 2010, the Court entered an Amended Order and Amended Judgment again granting Defendants' Motion to Dismiss for lack of subject matter jurisdiction and dismissing the case. (Dkt. Nos. 35, 36.) The Order was amended only as to the caption.

The Court concluded the Plaintiffs' alleged injury is not within the zone of interests protected by NEPA or NFMA because the alleged harm is purely economic. (Dkt. No. 31, 35.) As a result, Plaintiffs filed the instant Motion asking the Court to amend its Order and Judgment and deny the Defendants' Motion to Dismiss or, alternatively, amend the dismissal and grant them leave to file an amended complaint. The motion is made pursuant to Federal Rules of Civil Procedure 59(e). The Defendants oppose the Motion. (Dkt. No. 37.)

STANDARD OF LAW

Motions to alter or amend are governed by Federal Rule of Civil Procedure 59(e). *Sierra On-Line, Inc.* v. *Phoenix Software, Inc.,* 739 F.2d 1415, 1419 (9th Cir. 1984). The scope and purpose of such motions have been analyzed as follows:

> Motions for a new trial or to alter or amend a judgment must clearly establish either a manifest error of law or fact or must present newly discovered evidence. These motions cannot be used to raise arguments which could, and should, have been made before the judgment issued. Moreover they cannot be used to argue a case under a new legal theory.

Federal Deposit Insurance Corp. v. *Meyer,* 781 F.2d 1260, 1268 (7th Cir. 1986) (citations omitted).

> Whatever may be the purpose of Rule 59(e) it should not be supposed that it is intended to give an unhappy litigant one additional chance to sway the judge.
>
> * * *
>
> [A] rehash of the arguments previously presented affords no basis for a revision of the Court's order.

Illinois Central Gulf Railroad Co. v. *Tabor Grain Co.,* 488 F. Supp. 110, 122 (N.D. Ill. 1980). Where Rule 59(e) motions are merely being pursued "as a means to reargue matters already argued and disposed of and to put forward additional arguments which [the party] could have made but neglected to make before judgment, [S]uch motions are not properly classifiable as being motions under Rule 59(e)" and must therefore be dismissed. *Davis* v. *Lukhard,* 106 F.R.D. 317, 318 (E.D. Va. 1984); *see also Above the Belt, Inc.* v. *Mel Bohannan Roofing, Inc.,* 99 F.R.D. 99, 101 (E.D. Va. 1983) ("Plaintiff improperly used the motion to reconsider to ask the Court to rethink what the Court had already thought-rightly or wrongly."). The Ninth Circuit has identified three reasons sufficient to warrant a court's reconsideration of a prior order: (1) an intervening change in controlling law; (2) the discovery of new evidence not previously available; and (3) the need to correct clear or manifest error in law or fact, to prevent manifest injustice. *School Dist. No. 1J* v. *ACandS, Inc.,* 5 F.3d 1255, 1263 (9th Cir. 1993). Upon demonstration of one of these

three grounds, the movant must then come forward with "facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Donaldson* v. *Liberty Mut. Ins. Co.,* 947 F. Supp. 429, 430 (D. Haw. 1996).

DISCUSSION

The Motion asks that the Order and Judgment be altered or amended to prevent manifest injustice and correct clear legal error; challenging the Court's determination that the Plaintiffs' claims assert purely economic interests outside of both NEPA's and NFMA's the [sic] zones of interest. (Dkt. No. 33, 34.) The Court erred, Plaintiffs argue, in its application of the Rule 12(b)(1) standard by failing to draw all reasonable inferences in their favor. When properly construed in their favor, Plaintiffs argue, their claims allege injuries falling within the zone of interests sufficient for standing. Plaintiffs focus on the following language from the Court's Order:

> Plaintiffs have not linked their pecuniary interest in mineral resources development to the physical environment or to an environmental interest contemplated by NEPA. Rather, Plaintiffs' injury is the inability to freely travel a road or roads that Plaintiffs wish to travel to access mineral resource development sites. Contrary to NEPA's environmental purpose, Plaintiffs' access on

> these roads would degrade the environment, not protect the environment.

(Dkt. No. 34, p. 1 *quoting* Dkt. No. 35, p. 11.) In particular, Plaintiffs challenge the Court's statement that "Plaintiffs' access on these roads would degrade the environment, not protect the environment." (Dkt. No. 33, p. 2.) This finding, Plaintiffs contend, is not supported in the record. Plaintiffs now ask the Court to amend its Order and find that "Plaintiffs have linked their pecuniary interest in mineral resource development to the physical environment or to an environmental interest contemplated by NEPA." (Dkt. No. 33, p. 2.) Alternatively, Plaintiffs seek leave to amend their complaint and/or present evidence concerning the Court's finding regarding the use of these roads on the environment. (Dkt. No. 34, p. 6.)

I. Whether the Court Erred in Applying Rule 12(b)(1)

A. Rule 12(b)(1) Standard

A defendant may move to dismiss a complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) in one of two ways. *See Thornhill Publ'g Co., Inc.* v. *General Tel. & Elec. Corp.,* 594 F.2d 730, 733 (9th Cir. 1979). The attack may be a "facial" one where the defendant attacks the sufficiency of the allegations supporting subject matter jurisdiction. *Id.* On the other hand, the defendant may launch a "factual" attack, "attacking the existence of subject matter jurisdiction in fact."

Id. When considering a "facial" attack made pursuant to Rule 12(b)(1), a court must consider the allegations of the complaint to be true and construe them in the light most favorable to the plaintiff. *Love* v. *United States,* 915 F.2d 1242, 1245 (9th Cir. 1988). A "factual" attack made pursuant to Rule 12(b)(1) may be accompanied by extrinsic evidence. *St. Clair* v. *City of Chico,* 880 F.2d 199, 201 (9th Cir. 1989); *Trentacosta* v. *Frontier Pac. Aircraft Indus.,* 813 F.2d 1553, 1558 (9th Cir. 1987). When considering a factual attack on subject matter jurisdiction, "the district court is ordinarily free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary." *Augustine* v. *United States,* 704 F.2d 1074, 1077 (9th Cir. 1983) (citing *Thornhill,* 594 F.2d at 733). "[N]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Thornhill,* 594 F.2d at 733 (quoting *Mortensen* v. *First Fed. Sav. & Loan Ass'n,* 549 F.2d 884, 891 (3d Cir. 1977)).

However, "[t]he relatively expansive standards of a 12(b)(1) motion are not appropriate for determining jurisdiction * * * where issues of jurisdiction and substance are intertwined. A court may not resolve genuinely disputed facts where 'the question of jurisdiction is dependent on the resolution of factual issues going to the merits.'" *Roberts* v. *Corrothers,*

812 F.2d 1173, 1177 (9th Cir. 1987) (quoting *Augustine,* 704 F.2d at 1077). In such a case, "the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial." *Augustine,* 704 F.2d at 1077 (citing *Thornhill,* 594 F.2d at 733-35). This case does not require the Court to resolve substantive issues in determining whether jurisdiction is proper. Applying the above standard to this case, the Court finds as follows.

B. Zone of Interests

The Complaint filed in this action is 33 pages long and accompanied by 39 pages of exhibits. (Dkt. No. 1.) It alleges five NEPA and NFMA based claims applicable here: failure to adequately describe the "no action" alternative; failure to analyze impact on mining; failure to analyze economic impacts; failure to notify Plaintiffs of proposed action; and failure to evaluate the closure of R.S. 2477 roads. (Dkt. No. 1.)[2] The claims are raised under the Administrative Procedure Act (APA), 5 U.S.C. § 702. *See Ashley Creek Phosphate Co.* v. *Norton,* 420 F.3d 934, 939 (9th Cir. 2005). Standing to sue under these statutes requires the Plaintiffs to establish a final agency action adversely effected [sic] them and that, as a

[2] Plaintiffs raised eight claims in their complaint but later withdrew claims five, seven and eight pursuant to a Stipulation. (Dkt. Nos. 25, 29.) Claims one, three, and six allege NEPA violations. Claims two and four allege NFMA violations.

result, they suffered an injury that falls within the "zone of interests" of the statutory provision they seek to enforce. *City of Las Vegas, Nev.* v. *F.A.A.,* 570 F.3d 1109, 1114 (9th Cir. 2009); *see also Western Watersheds Project* v. *Kraayenbrink,* 620 F.3d 1187 (9th Cir. 2010) (quoting *Kootenai Tribe of Idaho* v. *Veneman,* 313 F.3d 1094, 1111-12 (9th Cir. 2002)). The party asserting federal jurisdiction has the burden of establishing standing. *See Lujan* v. *Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

The zone of interests applicable here are found in NEPA.[3] "The overall purpose of NEPA is to declare a national commitment to protecting and promoting environmental quality." *Ashley Creek,* 420 F.3d at 945 (citation omitted). Thus, "the protection of the environment falls within NEPA's zone of interests." *Kootenai Tribe of Idaho,* 313 F.3d at 1113 (citations omitted). "[B]ecause NEPA was intended to protect the environment, the harm a NEPA plaintiff asserts must 'have a sufficiently close connection to the

[3] Counts two and four of the Complaint raise claims under NFMA which governs the management of national forests. NFMA's goals include creating a forest management plan. *See* 16 U.S.C. § 1604(g)(3). The zone of interest applicable here is found in the statute which specifies the consideration and protection of: recreational use, environmental preservation, and ensuring the continued diversity of plant and animal communities. *See* 16 U.S.C. § 1604(g)(3)(A)-(B). The parties' briefing on the instant Motion addresses only NEPA's zone of interests.

physical environment.'" *Silver Dollar Graving Ass'n* v. *United States Fish and Wildlife Serv.,* No. 07-35612, 2009 WL 166924 (9th Cir., Jan. 13, 2009) (quoting *Metro. Edison Co.* v. *People Against Nuclear Energy,* 460 U.S. 766, 778, 103 S.Ct. 1556, 75 L.Ed.2d 534 (1983)).

NEPA's zone of interests do not, however, include solely or purely economic injuries. *See Ashley Creek,* 420 F.3d at 941. "[A] plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA." *Silver Dollar,* 2009 WL 166924, * 1 (quoting *Nev. Land Action Ass'n* v. *United States Forest Serv.,* 8 F.3d 713, 716 (9th Cir. 1993)). However, standing to sue under NEPA may exist even where the party's interest is primarily economic so long as the party also alleges an "environmental interest or economic injuries that are 'causally related to an act within NEPA's embrace.'" *Ranchers Cattlemen Action Legal Fund* v. *USDA,* 415 F.3d 1078, 1103 (9th Cir. 2005) (citation omitted). Thus, Plaintiffs' [sic] in this case must demonstrate a link between their economic interests and NEPA's environmental zone of interests. The Plaintiffs have failed to do so.

C. Court's Order Applied the Correct Standard

The Court's prior Order concluded "Plaintiffs have not linked their pecuniary interest in mineral resource development to the physical environment or to an environmental interest contemplated by NEPA. Rather, Plaintiffs' injury is the inability to freely travel a road or roads that Plaintiffs wish to travel to access mineral resource development sites." (Dkt. No. 35, p. 12.) In reaching this conclusion, the Court considered the allegations raised in the Complaint as well as the arguments made in the Plaintiffs' response to the Motion to Dismiss and construed the allegations in the light most favorable to the Plaintiffs.

The Complaint's principle allegations challenge that the Defendants failed to compile an accurate assessment of the existing road network so as to properly analyze the status quo in relation to the impact of the road closures in the alternatives and failed to recognize and analyze the impact on mineral exploration and the economy. (Dkt. No. 1.) Paragraphs 30 and 31 of the Complaint state:

> 30. The lack of an accurate assessment of the existing road network has denied [Plaintiffs], the public, the PNF, and other agencies the ability to properly and thoroughly analyze the environmental and ecological consequences and the interrelated social and economic consequences of the alteration of travel management procedures.

> 31. The failure of both the Travel Management Rule and the PNF's implementation of the rule to recognize and describe any R.S. 2477 roads within the PNF has denied [Plaintiffs], the public, the PNF, and other agencies the ability to properly and thoroughly analyze the environmental and ecological consequences and the interrelated social and economic consequences of the alteration of travel management procedures.

(Dkt. No. 1, ¶¶ 30, 31.)[4] Their interests are intertwined with the environment, Plaintiffs argue, as they seek full and impartial examination of the EIS of the environmental and economic effects of closing the roads Plaintiffs use. (Dkt. No. 26, p. 19.) This is evident, Plaintiffs assert, from the overall nature of the Complaint itself and, specifically, allegations such as those in Paragraph 23 noting Plaintiffs had "engaged in environmental and geophysical studies" in the subject area which required access by the very roads subject to closure. (Dkt. No. 26, p. 14 n. 14.) To this end, Plaintiffs note their geologists, geophysicists, and environmental consultants regularly travel roads in the PNF to further Plaintiffs' business interests and then conclude that because

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[4] Paragraphs 58 and 59 of the Complaint also allege the Travel Management Rule is subject to NEPA's requirements and it failed to require an inventory of existing roads in National Forests in use before designation of roads. (Dkt. No. 1, ¶¶ 58, 59.)

Defendants do not suggest these "business interests are not intertwined with use of these roads * * * [they] readily pass[ ] the test." (Dkt. No. 26, p. 15.) In sum, Plaintiffs' position is that their "business interests are intertwined with * * * NEPA's objectives." (Dkt. No. 1, p. 1.)

The Court's prior Order considered the Plaintiffs' arguments pointing to their efforts at remediation, studies, and assessment. The Court concluded such tasks were not environmental in nature but were completed in pursuit of Plaintiffs' economic interests in mineral resource development and, therefore, do not fall within the environmental zone of interests. (Dkt. No. 35, p. 13-15.) Though Plaintiffs argue otherwise, the Complaint's allegations center upon activities done for the purposes of furthering Plaintiffs' mining activities. Regardless of any findings concerning mining's impact on the environment,[5] the fact remains the allegations in the Complaint are based on Plaintiffs' mining interests which is purely economic. Having again carefully reviewed the Plaintiffs' Complaint, briefing, arguments, and the record, the Court finds it correctly applied the Rule 12(b)(1) standard in this case by construing the

[5] Plaintiffs' Motion challenges language in the Court's prior Order regarding the impact continued use of the roads would have on the environment. (Dkt. No. 34, p. 1.) The Court will address this issue in Section II of this Order.

allegations in the light most favorable to the Plaintiffs.

D. Sediment Load Argument Not Previously Raised

In this Motion, Plaintiffs bring a new basis in support of their argument that their claims are linked to environmental interests sufficient for standing purposes. Plaintiffs now argue their interest in keeping the roads open and maintained for their use in mining exploration is linked to NEPA's objectives because closure of roads may increase sediment load, thereby harming the environment. (Dkt. Nos. 34, 38.) This argument was not previously raised by the Plaintiffs in their initial briefing on the Motion to Dismiss. (Dkt. No. 26.) There, Plaintiffs' arguments centered on compliance with NEPA's requirements,[6]

[6] The Plaintiffs argued its case sought "full and impartial examination in the EIS of the environmental and economic effects * * * of closing the roads that it uses. In other words, [Plaintiffs'] concerns are intertwined with the environment." (Dkt. No. 26, p. 14) (quotations omitted). There, Plaintiffs pointed to NEPA's requirement that an EIS explore "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity." 42 U.S.C. § 4332(2)(C)(iv); NEPA § 102(2)(C)(iv); (Dkt. No. 26, pp. 20-21.) (Plaintiffs' "precise criticism of the EIS is that it fails to contain 'a discussion of the impacts on productivity that are [ ] intertwined with the environment' " and their "economic concern is very much tethered to the environment.")

Plaintiffs' regular use and travel in the area,[7] and standing for pro-business plaintiffs.[8] There was,

[7] Because its consultants regularly travel the roads at issue, Plaintiffs argued their concern with the EIS, i.e. whether it complies with § 102(2)(C)(iv), is linked to the environment and NEPA's zone of interests. (Dkt. No. 26, pp. 20-22) (Plaintiffs argued they pass the *Ashley Creek* test because "[t]he roads now subject to closure are part of the physical environment examined in the EIS."). Plaintiffs argument was because their interests exist in the same "human environment" that is the subject of the EIS then they fall within NEPA's zone of interests. ("roads now subject to closure are part of the physical environment examined in the EIS." (Dkt. No. 26, pp. 16-17.)) Plaintiffs distinguished their claims from other "failed EIS challenges" and contend they seek "NEPA compliance to ensure sound consideration of environmental, social, and economic issues affecting the very roads that are the subject of the EIS, roads that [they have] used regularly." (Dkt. No. 26, pp. 9-10.) Plaintiffs conclude that because the roads are physically located in the forest and Plaintiffs are interested in using the roads means the Plaintiffs' interests are intertwined with environmental concerns. (Dkt. No. 26, p. 10.) Shared physical proximity, however, does not necessarily also mean a shared zone of interests.

[8] Plaintiffs also spent a great deal of time on the topic of standing for probusiness/corporate plaintiffs versus pro-environmental plaintiffs. In their initial opposition to the Defendants' Motion to Dismiss, the Plaintiffs argued categorizing their interests as "pro-business" as opposed to "pro-environmental" and, therefore, outside NEPA's zone of interest is inconsistent with the principles of prudential standing. (Dkt. No. 26.) Instead, Plaintiffs argue, their interests are in-line with NEPA's requirements as environmental protection and proper adherence to NEPA's procedures is necessary to and in the Plaintiffs best interests. (Dkt. No. 26, pp. 7-8.) Pointing to *Bennett* v. *Spear*, 520 U.S. 154, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997), Plaintiffs contend that business interests may challenge an EIS if they demonstrate that their commercial interests are intertwined with the environmental interests that

(Continued on following page)

however, no mention of the sediment load argument. Further, nowhere in the Complaint is there an allegation regarding increased sediment loads let alone any allegations relating to environmental concerns within the zone of interests. (Dkt. No. 1.) Just the opposite, the Complaint's allegations are all centered on the Plaintiffs' interests in keeping roads in the PNF open and maintained for their use in mining exploration and development.

Raising this argument at this stage in a motion to alter or amend is outside the scope and purpose of such motions. *See* Fed.R.Civ.P. 59(e). A Rule 59(e) motion may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation. *See 389 Orange St. Partners* v. *Arnold,* 179 F.3d 656, 665 (9th Cir. 1999); *Kona Enters., Inc.* v. *Estate of Bishop,* 229 F.3d 877, 890 (9th Cir. 2000). Accordingly, the Court denies the motion on this basis.

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are the subject of the EIS. (Dkt. No. 26, p. 4.) The Court resolved this argument in the prior Order. (Dkt. No. 35, p. 11.)

E. Plaintiffs' New Sediment Load Argument Fails to Establish Standing

Even considering the Plaintiffs' new sediment load argument, the Court finds the Plaintiffs have failed to link their economic interest in mineral resource exploration and development to NEPA's zone of interests. The Court has again reconsidered the allegations raised in the Complaint and has construed those allegations in the light most favorable to the Plaintiffs. Having done so, the Court still finds the allegations do not support Plaintiffs' contention that their economic interests are linked to the statutes' zones of interest. The Plaintiffs' interest in keeping roads open and maintained is economic. Plaintiffs' claims are done for the purpose of ensuring the roads sought to be used by Plaintiffs for their economic purposes will be maintained and open. These economic concerns of the Plaintiffs are not "interrelated with the environmental affects [sic]" of the proposed action in this case. *See Ashley Creek,* 420 F.3d at 943.

Plaintiffs point to paragraph 22 of their Complaint as evidence of "linkage between the admitted economic interest of [Plaintiffs] and the environmental interests contemplated by NEPA." (Dkt. No. 38, p. 1.) Paragraph 22 of the Complaint states:

> [Plaintiff] has been involved, consistent with the concepts of multiple-use and sustained yield within the National Forests, in efforts to develop the mineral resources of the Payette National Forest in a fashion that

> minimizes and/or mitigates and remediates environmental impact and stimulates human welfare through economic development.

(Dkt. No. 1, ¶ 22.) Drawing all reasonable inferences in their favor, Plaintiffs contend this demonstrates the Court erred in finding "Plaintiffs' access on these roads would degrade the environment, not protect the environment." (Dkt. No. 38, p. 2 *quoting* Dkt. No. 35, p. 12.) The remediation of environmental impacts referred to in Paragraph 22, Plaintiffs argue, are not limited to mining activities but, instead, their remediation efforts include maintenance of roads for use by themselves and the public in order to reduce the sediment load.

As the Court stated in its prior Order, Paragraph 22's reference to the Plaintiffs' efforts at remediating, minimizing, and mitigating environmental impact are all done in an effort to develop the mineral resources of the PNF. (Dkt. No. 35, pp. 12-13.) The language of Paragraph 22 specifically states the Plaintiffs' activities are "in efforts to develop the mineral resources* * * *" (Dkt. No. 1, ¶ 22.) Likewise, the environmental and geophysical studies referred to in Paragraph 23 of the Complaint were done in "furtherance of its efforts to develop the mineral resources of" the PNF. (Dkt. No. 1, ¶ 23.) Even construing these allegations in favor of the Plaintiffs, the fact remains that the interests alleged in the Complaint are not environmental and not linked to NEPA's zone of interests. Both the studies and assessment activities were done in furtherance of

and in efforts to develop mineral resources which are unquestionably economic. The paragraphs relate to the manner in which Plaintiffs pursue their economic mining interests. (Dkt. No. 35, p. 13.)

F. Plaintiffs' Similar to Intervener's

Plaintiffs also attempt to liken themselves to Valley County whom this Court allowed to intervene in this matter. The Court disagrees. Valley County's interests fall squarely within the zone of interest protected by NEPA and NFMA; intrinsic and aesthetic enjoyment from and recreational use of the roads. (Dkt. No. 35, p. 18-20.) Plaintiffs, on the other hand, do not allege interests akin to Valley County's. As discussed above, it is clear from the Complaint that the Plaintiffs interests in use and maintenance of the roads begin and end with their pecuniary economic purpose.

II. Plaintiffs' Objection to Court's Finding

The Plaintiffs also object to the particular language from the Court's prior order stating: "Contrary to NEPA's environmental purpose, Plaintiffs' access on these roads would degrade the environment, not protect the environment." (Dkt. No. 34, p. 1 *quoting* Dkt. No. 35, p. 11.) Plaintiffs assert there are no allegations in the pleadings supporting the conclusion that keeping the roads open will degrade the environment as stated in is [sic] paragraph. (Dkt. No. 34, p. 1.) The Court agrees with the Plaintiffs regarding this particular statement. (Dkt. No. 34, p. 1.) As such, the Motion to Alter or Amend is granted in this

respect and the sentence will be stricken from the Order. The end result, however, remains the same. For the reasons stated in the Court's prior Order and herein, the allegations and claims raised in the Complaint are not within the zones of interests. Accordingly, the Defendants' Motion to Dismiss is well taken and will be granted.

III. Motion to Amend Complaint

Plaintiffs also request an opportunity to amend their complaint and/or to present further evidence. Federal Rule of Civil Procedure 15(a) provides that after responsive pleading has been filed, a party may amend their pleading only by leave of the court or written consent of the adverse party. Such leave "shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). "Liberality in granting a plaintiff leave to amend is subject to the qualification that the amendment not cause undue prejudice to the defendant, is not sought in bad faith, and is not futile. Additionally, the district court may consider the factor of undue delay." *Bowles* v. *Reade,* 198 F.3d 752, 757-58 (9th Cir. 1999) (citation omitted). Having reviewed the record in this matter, the Court denies the request to file an amended complaint.

Plaintiffs seek leave to amend their complaint and offer additional evidence in support of their allegation that the ROD's proposed closure of the roads will harm the environment by increasing sediment load. This, they believe, will satisfy the standing requirement of a link between their

interests and NEPA's zone of interests. Such amendment would be futile. This argument fails to show Plaintiffs' economic interests and the environmental effects of the proposed action are intertwined. Even if there is evidence of increased sediment loads resulting from the closure of roads, the fact remains that Plaintiffs' interest here is economic. As discussed above, Plaintiffs desire to keep roads open is driven by their economic interest in exploring and developing mining opportunities in the PNF.[9] This economic mining interest is not linked to NEPA's zone of interests merely by alleging that closing roads might increase sediment load. Plaintiffs' attempts to articulate claims that are linked to the environment continue to be economic injuries in disguise.

The Plaintiffs' allegations, even when construed in their favor, fail to fall within NEPA's zone of interests. As stated in the Court's prior Order, Plaintiffs interests asserted in this action are not within the zone of interests of these statutes as they are raised solely for economic interests. Again, the Plaintiffs' interest in the maintenance and use of the roads at issue arise from their economic mining interests. The interests as alleged in the Complaint here are not intertwined with the environment.

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[9] The Court does not categorically find that pro-business plaintiffs cannot find standing in similar cases. The ruling here is limited to the facts and record in this case.

Furthermore, it does not appear Plaintiffs previously raised the argument regarding increased sediment load due to road closures as required by the APA. "In order to seek judicial relief of a NEPA issue, the [Plaintiffs] were required to first raise their concerns with the agency to allow 'the agency to give the issue meaningful consideration.'" *See Wyoming State Snowmobile Ass'n.* v. *United States Fish and Wildlife Serv.,* 741 F. Supp. 2d 1245, at 1258, No. 09-cv-00095-F, 2010 WL 3743933, * 11 (D. Wyo. Sept. 10, 2010) (quoting *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council,* 435 U.S. 519, 553-54, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978)) (citations omitted). "The purpose of this rule is to ensure that reviewing courts do not substitute their 'judgment for that of the agency on matters where the agency has not had an opportunity to make a factual record or apply its expertise.'" *Id.* (citation omitted).

Attached to the Complaint are the Plaintiffs various comments presented to the Defendants during the comment period. (Dkt. No. 1, Ex. 1.) No where in them do the Plaintiffs present the sediment load argument or materials that they now seek to present to the Court.[10] Because it does not appear

[10] In the administrative appeal, Plaintiff AIMMCO makes reference to "environmental studies" it submitted relating to the Smith Creek road that it claims shows that "vehicle travel on the existing Big Creek area roads does not have measurable negative environmental impact, and that simple, user-constructed maintenance * * * significantly enhances the environmental condition." (Dkt. No. 1, Ex. 2.) These studies too

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this issue was raised previously by the Plaintiffs, the Defendants may not have been put on notice or have an opportunity to consider the argument during the administrative process and the Plaintiffs are foreclosed from raising the argument at this stage in these proceedings.

Though it may be that the sediment load argument was raised by another entity, it is unclear whether that happened in this case. *See Id.* ("For NEPA challenges, entities may challenge an issue they failed to address if someone else brought 'sufficient attention to the issue to stimulate the agency's attention and consideration of the issue during the environmental analysis comment process.' ") (citations omitted); *see also Benton County* v. *United States Dept. of Energy,* 256 F. Supp. 2d 1195, 1198-99 (E.D. Wash. 2003) ("a plaintiff, or another, must bring sufficient attention to an issue to stimulate the agency's attention and consideration of the issue during the environmental analysis comment process. A failure to do so bars judicial review.") (citations omitted). Regardless of whether it was raised previously, the Court finds the sediment load argument does not establish a link between the Plaintiffs'

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do not appear to address increased sediment loads caused by road closures. Instead, they appear to relate to the environmental impact of vehicle travel on the roads. In the most recent Motion, Plaintiffs attach a different document issued by the FS entitled "Reduction of Soil Erosion on Forest Roads" (Dkt. No. 34-1, Att.A) which they purport to offer as evidence supporting their new sediment load argument. (Dkt. No. 38, p. 3.)

economic interests and NEPA's zone of interests sufficient for standing purposes. Accordingly, the request to file an amended complaint and/or additional evidence is denied.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED that Plaintiff's Motion to Reconsider and/or Alter or Amend Judgment (Dkt. No. 33) is **GRANTED IN PART AND DENIED IN PART** as follows:

1. The Motion is **GRANTED** with respect to the Court's finding on page 11 which, as stated herein, is now **STRICKEN**.

2. The Motion is **DENIED** in all other respects.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

AMERICAN INDEPENDENCE MINES AND MINERALS CO., IVY MINERALS, INC., and WALKER MINING COMPANY, Plaintiffs, v. UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL. Defendants.	No. CV-09-433-S-EJL **MEMORANDUM DECISION AND ORDER**

Before the Court is Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction (Docket No. 18), or, in the alternative, Defendants' Motion to Dismiss for Failure to State a Claim (Docket No. 19). Also before the Court is Valley County's Motion to Intervene (Docket No. 13). The Court grants Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, denies as moot Defendants' Motion to Dismiss for Failure to State a Claim, and grants Valley County's Motion to Intervene. Specifically, the Court finds that Plaintiffs' alleged injury is not within the zone of interests protected by the National Environmental Policy Act ("NEPA") nor the National Forest Management Act ("NFMA"). The Court finds that Valley County has asserted an injury in fact and that Valley County's alleged injury falls within the zone of interests protected by NEPA and the

NMFA [sic]. The Court also finds that Valley County's proposed claims are not moot or unripe, and that Valley County has exhausted its proposed claims. The Court will therefore allow Valley County to intervene and its action to proceed separately.

BACKGROUND

Plaintiffs American Independence Mines and Minerals Co., Ivy Minerals, Inc., and Walker Mining Co., filed a complaint in this court in September 2009. Plaintiff American Independence is an Idaho joint venture. Plaintiffs Ivy Minerals and Walker Mining are two Idaho corporations; they are the companies that make up the American Independence joint venture. Defendants are the United States Department of Agriculture; Tom Vilsack, in his official capacity as the Secretary of the Department of Agriculture; the United States Forest Service ("USFS"); and Tom Tidwell, Harvey Forsgren, Brent L. Larson, and Suzanne Rainville in their various official capacities with the USFS.

Plaintiffs challenge the environmental impact statement and record of decision underlying an agency rule, created on November 9, 2005, called the Travel Management Rule. The Travel Management Rule requires each national forest system to designate "those roads, trails, and areas that are open to motor vehicle use" and "prohibit[s] the use of motor vehicles off the designated system, as well as use of motor vehicle on routes and in areas that is not consistent with the designations." *See* 70 Fed. Reg.

68,264; *see also* 70 Fed. Reg. 68,624-68,291 (Nov. 9. 2005). Plaintiffs also challenge the record of decision from October 3, 2008 that is associated with the Travel Management Rule as applied to the McCall and Krassel Ranger Districts in the Payette National Forest. Lastly, Plaintiffs challenge Brent Larson's January 8, 2009 decision denying Plaintiffs' appeal of the record of the decision.

Plaintiffs assert that they are "actively engaged in mining, exploration and environmental assessment" in the Big Creek area of the Krassel Ranger District. *Compl*. ¶ 24 (Docket No. 1). This area is referred to as "MA-13" in the Record of Decision. Plaintiffs brought eight causes of action against Defendants but withdrew without prejudice claims five, seven, and eight pursuant to the parties' stipulation. *See Stipulation* (Docket No. 25); *Order* (Docket No. 29).

Plaintiffs' five remaining claims are as follows. Plaintiffs claim that Defendants failed to follow the procedural requirements of NEPA (1) by failing to adequately describe the "no action" alternative during the rulemaking process, by which Plaintiffs mean that Defendants failed to describe ownership of existing roads in the affected area (Claim 1); (2) by failing to adequately consider the mining and associated economic impacts of the proposed rule (Claims 2 and 3); (3) by failing to notify Plaintiffs of the proposed action (Claim 4); and (4) by failing to ascertain and describe roads protected as rights of way under Revised Statute § 2477, codified at 43 U.S.C. § 932

(Claim 6). Plaintiffs also allege in claims two and four that Defendants violated the NFMA.

Plaintiffs assert federal subject matter jurisdiction, arising under NEPA, 42 U.S.C. §§ 4321-4370h, and the NFMA, 16 U.S.C. §§ 1600-1614. *Compl*. ¶ 14. Plaintiffs allege that Defendants violated various NEPA and NFMA provisions and implementing regulations. *See id*. ¶¶ 78-81, 108-10, 119, 121, 130, 144, and 146. For claims one through four and six, Plaintiffs also allege that Defendants violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A) and (2)(D). *Id*. ¶¶ 104-05, 126-27, 140-41, 158-59.

Defendants move to dismiss for lack of subject matter jurisdiction and argue that Plaintiffs lack standing to file a NEPA action because Plaintiffs' alleged harm is purely economic and therefore not within the environmental zone of interests protected by NEPA.[1] *See* Docket No. 18. In the alternative, Defendants move to dismiss for failure to state a claim. *See* Docket No. 19.

In addition to Defendants' motions, the Court will also consider Valley County's motion to intervene in Plaintiffs' case. *See Motion to Intervene* (Docket No. 13). Like Plaintiffs, Valley County asserts federal

[1] The Court will not consider Defendants organizational standing arguments because Plaintiffs do not attempt to assert organizational standing. *See Plaintiffs' Combined Response*, at 18-19 (Docket No. 26).

subject matter jurisdiction based on NEPA and the NFMA and alleges a procedural injury related to recreational, aesthetic, and other interests on behalf of its citizens. Valley County also claims an ownership interest in some of the roads affected by the Travel Management Rule and argues that this ownership interest confers standing.

Valley County initially proposed to bring seven claims against Defendants but will voluntarily withdraw claims four, six, and seven if this Court allows Valley County to intervene. *See Valley County's Reply*, at 6 (Docket No. 27). Although the stipulation between Plaintiffs and Defendants did not affect Valley County's proposed intervention, Valley County's withdrawn claims parallel those withdrawn by the parties' stipulation. Of Valley County's remaining causes of action, claims one through three are the same claims that Plaintiffs asserted as claims one through three. *See Complaint in Intervention*, ¶¶ 17-19 (Docket No. 13-1). Claims one through three allege that Defendants failed to adequately describe the no action alternative and failed to consider mining and economic impacts associated with the Travel Management Rule. *See id*. Claim five in Valley County's proposed Complaint, which is identical to Plaintiffs' original claim six, alleges that the Record of Decision underlying the Travel Management Rule failed to adequately describe possible R.S. 2477 roads

and the costs and benefits to quieting title to R.S. 2477 roads. *Id*. ¶ 21.[2]

DISCUSSION

I. Standard for a Motion to Dismiss for Lack of Subject Matter Jurisdiction

Pursuant to Federal Rule of Civil Procedure 12(b)(1), a party may ask the court to dismiss for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Moreover, subject matter jurisdiction is a "threshold matter," which a court must determine before proceeding to the merits of the case. *Steel Co*. v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). A court may determine subject matter jurisdiction from the facts alleged in the complaint or, if necessary, from the actual facts in the case. *Thornhill Pub*. *Co*. v. *General Tel*. *& Elecs*. *Corp*., 594 F.2d 730, 733 (9th Cir. 1979) (citations omitted).

II. Standing Requirements

NEPA does not provide for private rights of action, but a plaintiff may challenge an agency action under the Administrative Procedure Act ("APA"). The APA provides statutory standing to a "person suffering legal wrong because of agency action, or adversely

[2] The Court recognizes that claims one and five are similar because both allege that Defendants failed to adequately describe the current system of roads impacted by the Travel Management Rule. Claim one is, however, about the description of the "no action" alternative, while claim five is about Defendants' description in the record of decision generally.

affected or aggrieved by agency action within the meaning of the relevant statute." 5 U.S.C. § 702. To bring an action under the APA, a plaintiff must demonstrate both constitutional and prudential standing. *Nat'l Credit Union Admin* v. *First Nat'l Bank & Trust Co*., 522 U.S. 479, 488 (1998) (citation omitted).

In order to have prudential standing under the APA, "'the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute * * * in question.'" *Id*. (quoting *Ass'n of Data Processing Serv*. *Orgs*., *Inc*. v. *Camp*, 397 U.S. 150, 152 (1970)). The purpose of the zone of interests test is "to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives." *Clarke* v. *Secs*. *Indus*. *Ass'n*, 479 U.S. 388, 397 n.12 (1987). A plaintiff's asserted interest does not meet the zone of interests test "'if the plaintiff's interests are * * * marginally related to or inconsistent with the purposes implicit in the statute.'" *Id*. at 399. However, "'no indication of congressional purpose to benefit the would-be plaintiff'" need exist. *Id*. at 399-400.

The party asserting "federal jurisdiction bears the burden of establishing [the standing] elements." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Moreover, the plaintiff must support each element of standing "with the manner and degree of evidence required at the successive stages of the litigation." *Id*.

III. Plaintiffs' Claims Do Not Fall Within NEPA's Zone of Interests

Defendants argue that Plaintiffs' asserted claims do not fall with NEPA or the NFMA's zone of interests because Plaintiffs assert purely economic interests. The Court agrees.

NEPA does not impose substantive requirements but instead mandates a process that the agency must follow. NEPA was enacted in order "to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321, NEPA § 101. NEPA requires a federal agency to prepare a "detailed statement" on the environmental impact of a proposed rule if that rule is a "major Federal action[ ] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(c), NEPA § 102.

In a NEPA action, the zone of interests protected is environmental. *Nuclear Info. & Res. Serv.* v. *Nuclear Regulatory Comm'n*, 457 F.3d 941, 950 (9th Cir. 2006). A plaintiff asserting "purely economic injuries does not have standing to challenge an agency action under NEPA." *Nev. Land Action Ass'n* v. *United States Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (citations omitted); *id.* ("The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions.") (citation omitted). A plaintiff may, however, "have standing to sue under NEPA even if his or her interest is primarily economic, as long as he or she also

alleges an environmental interest or economic injuries that are causally related to an act within NEPA's embrace." *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America* v. *United States Dep't Agric*., 415 F.3d 1078, 1103 (9th Cir. 2005) (citation and internal quotation marks omitted). A plaintiff's interest in "recreational use and aesthetic enjoyment" are also among the interests NEPA was designed to protect. *Lujan*, 497 U.S. at 886.

In the context of an Endangered Species Act case, the Supreme Court held that the zone of interests test is "determined not by reference to the overall purpose of the Act in question * * * but by reference to the particular provision of law upon which the plaintiff relies." *Bennet* v. *Spear*, 520 U.S. 154, 175-76 (1997). Plaintiffs correctly point out that post-*Bennet*, a court is required to interpret NEPA's zone of interests by reference to particular provisions in the statute. Plaintiffs appear to argue that interpreting specific NEPA provisions, rather than NEPA as a whole, may expand or change the zone of interests protected by NEPA to include solely economic injuries caused by an environmental regulation. The Ninth Circuit, however, rejected this argument in *Ashley Creek Phosphate Co*. v. *Norton*, 420 F.3d 934 (9th Cir. 2005). In *Ashley Creek*, the Ninth Circuit explicitly held that § 102, which requires the preparation of environmental impact statements, did not protect "purely economic interests" and that § 102 could not

be "severed from NEPA's overarching purpose" of protecting the environment. 420 F.3d at 942.[3]

Here, Plaintiffs assert federal subject matter jurisdiction arising from NEPA, specifically 42 U.S.C. § 4332, NEPA § 102, which requires each federal agency to prepare an environmental impact statement. In order to meet the zone of interests requirement, Plaintiffs must show that their interest is environmental or that they have suffered an economic injury that is related to an environmental injury. *See Ranchers Cattlemen*, 415 F.3d at 1103.

Plaintiffs have not linked their pecuniary interest in mineral resource development to the physical environment or to an environmental interest contemplated by NEPA. *See id*. Rather, Plaintiffs' injury is the inability to freely travel a road or roads that Plaintiffs wish to travel to access mineral resource development sites. *See Plaintiffs' Combined Response*, at 10 (Docket No. 26). Contrary to NEPA's environmental purpose, Plaintiffs' access on these

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[3] Plaintiffs argue that the federal regulations implemented pursuant to NEPA and the NFMA are helpful in understanding the zone of interests protected by the authorizing statute. *See Plaintiffs' Combined Response*, at 13 n.12 (Docket No. 26). The Court assumes that Plaintiffs are not arguing that the implementing regulations protect a broader zone of interests than the statute which authorized those regulations. To be clear, however, the Court will only examine whether Plaintiffs' claims fall with the zone of interests protected by NEPA and the NFMA and not whether separate regulations provide Plaintiffs with a different or broader interest sufficient to confer standing.

roads would degrade the environment, not protect the environment.

Plaintiffs assert that their mining and resource development interests are completed "in a fashion that minimizes and/or mitigates and remediates environmental impact and stimulates human welfare through economic development." *Compl*. ¶ 22. This only demonstrates the manner in which Plaintiffs operate their business and not whether Plaintiffs' interests also align with the environmental interests protected by NEPA. Plaintiffs state that they are engaged in "environmental and geophysical studies" and "environmental assessment activities." *Id*. ¶¶ 23-24. Plaintiffs also admit, however, that the studies are completed in pursuit of mineral resource development activities. That is, Plaintiffs would never have engaged in environmental assessment unless it also furthered their economic interest. Plaintiffs' current inability to complete environmental assessments only impedes Plaintiffs' mineral resource development and therefore does not fall within the environmental zone of interests protected by NEPA.

Plaintiffs also assert that the owners of the joint venture "appreciate the environmental, historical and cultural values of lands and historic sites" affected by the decision and "derive intrinsic enjoyment from their use of the roads." *Id*. ¶¶ 26-27. The Court agrees that the owners might have these interests. The owners, however, are not suing in their individual capacities nor are Plaintiffs asserting organizational standing on behalf of these interests.

It is hard to see how mining and resource development corporations can "appreciate environmental values" or "derive intrinsic enjoyment from their use of the roads." More importantly, the promotion of either of these asserted interests is not part of the Plaintiffs' admitted interest in mineral resource development.

The Court therefore finds that the injury asserted as the basis of claims one through four and claim six does not fall within the environmental zone of interests protected by NEPA.

IV. Plaintiffs' Claims Do Not Fall Within NFMA's Zone of Interests

The NFMA provides for the management of national forests and requires the USFS to balance the demands on national forests by creating forest management plans. 16 U.S.C. § 1604(a). Although case law on the NFMA is sparse, the zone of interests protected by the NFMA is identifiable from the statute, which lays out "the goals" of creating a forest management plan. *Id*. § 1604(g)(3). The statute specifies the consideration and protection of the following interests: recreational use, environmental preservation, and ensuring the continued diversity of plant and animal communities. *Id*. § 1604(g)(3)(A)-(B). The other interests specified in the statute are unimportant here.

In this case, the only relevant interest Plaintiffs could assert is environmental preservation. For the reasons discussed above, Plaintiffs' asserted injury is

not related to environmental preservation. *See id*. The Court therefore finds that claims two and four fall outside the zone of interests protected by the NFMA.

V. Valley County's Motion to Intervene

A. Intervention as of Right

Federal Rule of Civil Procedure 24 allows an applicant to intervene either as of right or permissively. Fed. R. Civ. P. 24. An applicant may intervene as of right if the applicant meets four requirements: (1) "the applicant must timely move to intervene"; (2) "the applicant must have a significantly protectable interest related to the property * * * that is the subject of the action"; (3) the applicant must prove that "the disposition of the action may impair or impede" the applicant's ability to protect that interest; and (4) "the applicant's interest must not be adequately represented by existing parties." *Arakaki* v. *Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003) (citation omitted); *see* Fed. R. Civ. P. 24(a)(2).

Here, Valley County's motion to intervene was filed prior to the motions to dismiss, the first dispositive motions in the case, and was therefore timely. However, as discussed above, the Court has dismissed the originally filed complaint for lack of standing. As a result, whatever interests Valley County has cannot be impaired or impeded by Plaintiffs' action because the Court will not decide the merits of Plaintiffs' case. *See* Fed. R. Civ. P. 24(a)(2). Valley County does not,

therefore, meet the third requirement for intervention as of right. *See Arakaki*, 324 F.3d at 1083. Accordingly, the Court denies Valley County's request to intervene as of right.

B. Permissive Intervention

A court may also permit a party to intervene if an applicant "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(A)-(B). An applicant must meet three requirements: (1) jurisdiction independent of the original parties; (2) a timely filed motion; and (3) a claim or defense that shares a common question of law or fact with the main action. *See Northwest Forest Res. Council* v. *Glickman*, 82 F.3d 825, 839 (9th Cir. 1996) (citation omitted). Valley County meets requirements two and three for permissive intervention because Valley County filed a timely motion to intervene and asserts claims similar to those Plaintiffs asserted. *See id*. (citation omitted).

Defendants argue that the Court lacks jurisdiction over Valley County's claims. Specifically, they contend that Valley County lacks standing to proceed with this case because it has not suffered an injury in fact and that its injury does not fall within the zone of interests protected by NEPA and the NFMA.[4]

[4] Defendants do not challenge Valley County's right to sue on behalf of its citizens.

Like Plaintiffs, Valley County asserts federal subject matter jurisdiction based on NEPA and the NFMA.[5]

1. Valley County Has Alleged an Injury in Fact

Pursuant to Article III's case and controversy limitation of federal court jurisdiction, a plaintiff must demonstrate constitutional standing to bring a claim in federal court. U.S. Const., art. III, § 1; *see Allen* v. *Wright*, 468 U.S. 737, 750-51 (1984) (citations omitted). A plaintiff meets constitutional standing requirements if the Plaintiff shows an injury in fact, causation, and redressability. *Lujan*, 504 U.S. at 560. To assert a procedural injury in fact, a plaintiff must allege that "(1) the [agency] violated certain procedural rules; (2) these rules protect [the plaintiff's] concrete interests; and (3) it is reasonably probable that the challenged action will threaten their concrete interests." *Citizens for Better Forestry* v. *United States Dep't of Agric.*, 341 F.3d 961, 969-70 (9th Cir. 2003). A plaintiff meets the concrete interest requirement if "a 'geographic nexus' [exists] between the individual asserting the claim and the location

[5] Alternatively, Defendants argue that Valley County's assertion of ownership of some of the affected roads cannot be determined by this court in a NEPA or NFMA action and is more properly decided pursuant to the Quiet Title Act ("QTA"). As discussed below, because Valley County has standing based on its citizens' recreational and aesthetic interests, the Court need not decide whether Valley County's alleged ownership of roads affected by the Travel Management Rule would separately create standing.

suffering an environmental impact." *Cantrell* v. *City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001) (citation omitted).

Valley County has demonstrated a geographic nexus because the affected roads are within Valley County. *See id*. The Court therefore finds that Valley County has alleged a procedural injury in fact.

2. Valley County's Injury Is Within NEPA's Zone of Interests

A plaintiff must also meet the requirements for prudential standing, namely, that the plaintiff's interests fall within the governing statute's zone of interests. *Nat'l Credit Union Admin*, 522 U.S. at 488. In order to meet the zone of interests requirement with regard to NEPA, Valley County must show that its interest is environmental or that their economic injury is related to a NEPA-protected injury. *See Ranchers Cattlemen*, 415 F.3d at 1103. Additionally, Valley County's NEPA action may proceed if Valley County asserts an interest in "recreational use and aesthetic enjoyment" in the affected area. *See Lujan*, 497 U.S. at 886.

Valley County alleges various interests on behalf of its citizens, one of which is to protect the rights of those citizens who "derive intrinsic enjoyment from their use of these roads." *Compl. in Intervention*, ¶ 8 (Docket No. 13-1). This asserted interest falls within the "aesthetic enjoyment" zone of interest protected by NEPA and is therefore sufficient to confer standing upon Valley County to proceed in this action. *See*

Lujan, 497 U.S. at 886. Valley County's citizens may also "derive intrinsic enjoyment from the use of these roads" in pursuit of recreational uses, which also falls within the zone of interests protected by NEPA. *See id*.

Defendants argue that *Lujan* v. *Defenders of Wildlife* ("*Defenders*"), 504 U.S. 555, 565-66 (1992), requires Valley County to identify specific roads affected by the Travel Management Rule that fall within the zone of interests. It is true that *Defenders* rejected various standing arguments premised on hypothetical future injuries or on environmental injuries loosely related to the regulated area. *See Defenders*, 504 U.S. at 565-66 ("[A] plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly 'in the vicinity of it.'" (citing *Lujan*, 497 U.S. at 887-89)). The Court is not persuaded by Defendants' argument. Valley County may not have identified affected roads by name, but Valley County clearly limits its claims to those roads affected by the Travel Management Rule. In contrast to the Plaintiffs in *Defenders*, Valley County does not seek to redress an injury that falls somewhere outside the regulated area. *See Defenders*, 504 U.S. at 565-66.

The Court therefore finds that Valley County's alleged injury falls within the zone of interests protected by NEPA.

3. Valley County's Injury Is Within the NFMA's Zone of Interests

To meet the zone of interests requirement with respect to the NFMA, Valley County must show that its interest is in protecting recreational use, environmental preservation, or ensuring the continued diversity of plant and animal communities. 16 U.S.C. § 1604(g)(3)(B). For the reasons discussed above, the Court finds that Valley County's asserted interest is related to recreational use and therefore falls within the zone of interests protected by the NFMA.

4. Conclusion

For the reasons discussed above, the Court finds that Valley County has standing to proceed with this action.

VI. Other Jurisdictional Issues Regarding Intervenor Valley County

If an intervenor cannot demonstrate that this Court has jurisdiction, the Court may deny intervention. *See EEOC* v. *Nevada Resort Ass'n*, 792 F.2d 882, 886 (9th Cir. 1986). Defendants challenge Valley County's intervention on other non-standing jurisdictional grounds. The Court will consider Defendants' other jurisdictional arguments as separate bars to intervention.

A. Mootness (Claim 1)

Defendants argue that claim one is moot. Valley County alleges a procedural violation of NEPA and

argues that the agency's Record of Decision underlying the Travel Management Rule is invalid because it fails to adequately describe the no action alternative. Specifically, Valley County argues that the agency did not describe ownership of existing roads and therefore did not fully understand the implications of changing access to the roads affected by the Travel Management Rule.

A court lacks jurisdiction to hear moot claims. *Feldman* v. *Bomar*, 518 F.3d 637, 642 (9th Cir. 2008) (citation omitted). "The burden of demonstrating mootness is a heavy one." *Nw. Envtl. Def. Ctr.* v. *Gordon*, 849 F.2d 1241, 1244 (9th Cir. 1988). "The basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted." *Id.* "As long as effective relief may still be available to counteract the effects of the violation, the controversy remains live and present." *Id.* at 1245.

In this case, if Valley County prevails on claim one, the Court could offer effective relief by ordering the agency to restart the rulemaking process and adequately describe the no action alternative. *See Gordon*, 849 F.2d at 1244-45. The Court therefore finds that claim one is not moot and may proceed. *See id.*

B. Ripeness (Claims 2 and 3)

In claims two and three, Plaintiffs allege that Defendants did not adequately consider mining and

the economic impact of the proposed rule. Defendants argue that these claims are not ripe.

A plaintiff, or, in this case, the intervenor, bears the burden of establishing that an issue is ripe for judicial review. A ripeness inquiry requires this Court "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbot Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967), *abrogated on other grounds by Califano* v. *Sanders*, 430 U.S. 99, 104-05 (1977). Ordinarily, a challenge to an agency regulation is not ripe until "some concrete action applying the regulation to the claimant's situation * * * harms or threatens to harm him." *Lujan*, 497 U.S. at 891.

In many cases, ripeness "coincides squarely with standing's injury in fact prong" and "can be characterized as standing on a timeline." *Thomas* v. *Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000). To meet the injury in fact requirement, a plaintiff asserting a purely procedural interest must demonstrate "a 'geographic nexus' between the individual asserting the claim and the location suffering an environmental impact." *Cantrell*, 241 F.3d at 679.

To the extent that Valley County alleges a purely procedural interest with respect to claims two and three, Valley County meets the geographic nexus test because the roads affected by the Travel Management Rule are at least partially within Valley County. *See*

id. To the extent that Valley County alleges other nonprocedural harms in claims two and three, Valley County has not demonstrated ripeness.[6] The Court finds that claims two and three are ripe and that the Court therefore has jurisdiction to hear these claims.

C. Outside Scope of Sovereign Immunity Waiver (Claim 5)

In claim five, Plaintiffs allege that the Record of Decision supporting the Travel Management Rule failed to adequately describe possible R.S. 2477 roads and the costs and benefits to determining the existence and ownership of R.S. 2477 roads. *Complaint in Intervention*, ¶ 21 (Docket No. 13-1). Defendants argue that this Court must determine ownership of the affected roads to decide claim five, and that this Court must do so pursuant to the Quiet Title Act ("QTA").[7]

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[6] Defendants' reliance on *Park Lake Resources*, *LLC* v. *U.S. Department of Agriculture*, 197 F.3d 448 (10th Cir. 1999), is misplaced because the plaintiff in that case brought a substantive challenge to the regulation. *See Park Lake*, 197 F.3d at 449 (challenging a U.S. Forest Service designation as arbitrary, capricious, and contrary to the plan language of the APA).

[7] The QTA provides: "The United States may be named as a party defendant in a civil action * * * to adjudicate a disputed title to property in which the United States claims an interest." 28 U.S.C. § 2409a(a). Valley County, however, seeks to intervene pursuant to the APA. The APA expressly waives sovereign immunity in suits against federal officers if the plaintiff seeks only nonmonetary relief. *See* 5 U.S.C. § 702. Section 702's

(Continued on following page)

Revised Statue § 2477 ("R.S. 2477") once provided that "the right of way for construction of highways over public lands, not reserved for public uses, is hereby granted." 43 U.S.C. § 932 (1970), *repealed by* Federal Land Policy Management Act of 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2743 (1976). Congress repealed the act in 1976 but preserved any rights of way that existed prior to the date of repeal. *See* 43 U.S.C. § 1769(a). Roads protected as rights of way pursuant to R.S. 2477 are commonly called R.S. 2477 roads.

The Court is not persuaded that determining ownership of the affected roads is necessary to adjudicating Valley County's claims. Valley County disclaims any intention of having this Court conclusively adjudicate ownership of these roads. The Court has no reason to doubt this assertion. Further, as discussed above, to the extent that Valley County is alleging procedural violations of NEPA on behalf of its citizens, this Court has jurisdiction to hear those claims. The Court therefore finds that it has jurisdiction to hear claim five.

D. Failure to Exhaust Administrative Remedies (Claims 1-3, Claim 5)

Defendants argue that Valley County has not exhausted claims one through three and claim five. Pursuant to the APA, a court may review agency

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waiver is inapplicable, however, if "any other statute * * * grants consent to suit." *Id*. The QTA is such a statute.

action that is "final." 5 U.S.C. § 704. In addition, a party seeking review of a final agency action must also exhaust administrative remedies if expressly required by the statute or an agency rule. *See Clouser* v. *Espy*, 42 F.3d 1522, 1532 (9th Cir. 1994) (citation omitted). A party meets the exhaustion requirement if the "'claims raised at the administrative appeal and in the federal complaint [are] so similar that the district court can ascertain that the agency was on notice of, and had an opportunity to consider and decide, the same claims now raised in federal court.'" *Native Ecosys. Council* v. *Dombeck*, 304 F.3d 886, 899 (9th Cir. 2002) (quoting *Kleissler* v. *United States Forest Serv.*, 183 F.3d 196, 202 (3d Cir. 1999)). A party does not need to use "precise legal formulations" in the administrative process; the claims a party raises to the agency need only alert "the decision maker to the problem in general terms." *See Idaho Sporting Cong., Inc.* v. *Rittenhouse*, 305 F.3d 957, 965 (9th Cir. 2002) (citation omitted).

Valley County submitted two documents during rulemaking: a comment letter on July 26, 2004 and an appeal of the Travel Management Rule on November 22, 2008. *See Opposition to Motion to Intervene*, Exhs. F-G (Docket Nos. 20-1-20-2). The Court will only consider whether the *appeal* letter sufficiently raises the claims Valley County would like to assert here. Although the Ninth Circuit has not explicitly decided whether a party's comment letter is part of an administrative appeal, Ninth Circuit cases assume that exhaustion requirements begin with a party's

administrative appeal. *See*, *e.g.*, *Native Ecosys*., 304 F.3d at 898-900 (describing exhaustion during the administrative appeals process and addressing only the party's administrative appeal); *Idaho Sporting Cong*., 305 F.3d at 965-66 (same).

Defendants argue that Valley County did not mention NEPA, the EIS, or R.S. 2477 rights of way and that Valley County's claims are therefore not exhausted.[8] *See Opposition to Motion to Intervene*, at 7-8 (Docket No. 20). Valley County's appeal included the following: (1) "The primary focus of this appeal is the closing of roads that are used by landowners, recreationist[s], hunters, anglers, hikers, bikers, ATV enthusiasts, sightseers, firewood gathering, mining, and firefighters," *see id*., Exh. F, at 2 (Docket No. 20-1); (2) Valley County provided historic and R.S. 2477 road information, which the travel plan ignored, *id*.; (3) the Travel Management Rule risks closing various roads without determining which are R.S. 2477 roads, *id*. at 4; (4) the Travel Management Rule "needs more work" because the rule affects roads that Defendants may or may not have the right to impact, *id*. at 5; (5) lost opportunities impact the local economy, which the travel management rule "must take into consideration," *id*., and (6) "much more

[8] The Court recognizes that Defendants made this argument with respect to Valley County's comment letter. Given that this Court will not review Valley County's comment letter, the Court will nevertheless review Valley County's *appeal* letter for the same exhaustion issues.

information is needed before this decision is final," *id*.

In its appeal letter, Valley County clearly identified the issue of the possible adverse impact that the Travel Management Rule could have on mining and the local economy, thereby putting the agency on notice of claims two and three in Valley County's proposed complaint. *See Native Ecosys*., 304 F.3d at 899.

Vallley [sic] County also sufficiently challenged Defendants' alleged failure to describe the existing status of possible R.S. 2477 roads and therefore put the agency on notice of claims one and five in Valley County's proposed complaint. *See id*. The Court therefore finds that Valley County sufficiently raised claims one through three in its administrative appeal and has exhausted these claims. *See id*.

VII. The Court Will Allow Valley County to Intervene

Lastly, even if an applicant has proven independent jurisdiction and therefore meets the requirements for permissive intervention, a court has discretion to deny permissive intervention. *Donnelly* v. *Glickman*, 159 F.3d 405, 412 (9th Cir. 1998) (citations omitted). A court must consider whether "intervention will unduly delay the main action or will unfairly prejudice the existing parties." *Id*. (citations omitted). As Valley County's motion to intervene was timely filed and, as a result of this Court's dismissal of Plaintiffs' complaint, will not unfairly prejudice any party, the Court will exercise its discretion and allow Valley

County to intervene in this case. *See id*. Lastly, the Court finds that Valley County's action should proceed as a separate action because this Court has already dismissed the original Plaintiffs' Complaint and because Valley County has proven independent jurisdiction. *See* Wright, Miller, & Kane, *Federal Practice and Procedure* § 1917 (3d ed. 1998) (approvingly cited by the Ninth Circuit in *Blake* v. *Pallan*, 554 F.2d 947, 956 (9th Cir. 1977) without explicitly deciding the issue).

ORDER

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction (Docket No. 18) is GRANTED;

Defendants' Motion to Dismiss for Failure to State a Claim (Docket No. 19) is DENIED as moot; and

Valley County's Motion to Intervene (Docket No. 13) is GRANTED.

DATED: **May 12, 2010**

[SEAL] /s/ Edward J. Lodge
Honorable Edward J. Lodge
U. S. District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

AMERICAN INDEPENDENCE MINES AND MINERALS CO., IVY MINERALS, INC., and WALKER MINING COMPANY, Plaintiffs, v. UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL. Defendants.	No. CV-09-433-S-EJL **JUDGMENT**

Based upon this Court's Memorandum Decision and Order, entered herewith, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiffs take nothing from the Defendants and this case is **DISMISSED IN ITS ENTIRETY**.

DATED: **May 12, 2010**

[SEAL] /s/ Edward J. Lodge
Honorable Edward J. Lodge
U. S. District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMERICAN INDEPENDENCE MINES AND MINERALS CO., an Idaho joint venture composed of Ivy Minerals, Inc., an Idaho corporation, and Walker Mining Company, an Idaho corporation and IVY MINERALS, INC., an Idaho corporation, Plaintiffs-Appellants, and VALLEY COUNTY, Intervenor-Plaintiff, v. UNITED STATES DEPARTMENT OF AGRICULTURE, an agency of the United States; et al., Defendants-Appellees.	No. 11-35123 D.C. No. 1:09-cv-00433-EJL ORDER (Filed Oct. 26, 2012)

Before: GOODWIN, PREGERSON, and CHRISTEN, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judges Pregerson and Christen have voted to deny the petition for rehearing en banc, and Judge Goodwin recommended denial.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the petition for rehearing en banc is DENIED.

5 U.S.C. § 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641 (b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

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5 U.S.C. § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other

appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

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42 U.S.C. § 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and

shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under

this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

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[1] So in original. The period probably should be a semicolon.

36 C.F.R. § 228.1 Purpose.

It is the purpose of these regulations to set forth rules and procedures through which use of the surface of National Forest System lands in connection with operations authorized by the United States mining laws (30 U.S.C. 21-54), which confer a statutory right to enter upon the public lands to search for minerals, shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources. It is not the purpose of these regulations to provide for the management of mineral resources; the responsibility for managing such resources is in the Secretary of the Interior.

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36 C.F.R. § 228.4 Plan of operations notice of intent requirements.

(a) Except as provided in paragraph (a)(1) of this section, a notice of intent to operate is required from any person proposing to conduct operations which might cause significant disturbance of surface resources. Such notice of intent to operate shall be submitted to the District Ranger having jurisdiction over the area in which the operations will be conducted. Each notice of intent to operate shall provide information sufficient to identify the area involved, the nature of the proposed operations, the route of access to the area of operations, and the method of transport.

(1) A notice of intent to operate is not required for:

(i) Operations which will be limited to the use of vehicles on existing public roads or roads used and maintained for National Forest System purposes;

(ii) Prospecting and sampling which will not cause significant surface resource disturbance and will not involve removal of more than a reasonable amount of mineral deposit for analysis and study which generally might include searching for and occasionally removing small mineral samples or specimens, gold panning, metal detecting, non-motorized hand sluicing, using battery operated dry washers, and collecting of mineral specimens using hand tools;

(iii) Marking and monumenting a mining claim;

(iv) Underground operations which will not cause significant surface resource disturbance;

(v) Operations, which in their totality, will not cause surface resource disturbance which is substantially different than that caused by other users of the National Forest System who are not required to obtain a Forest Service special use authorization, contract, or other written authorization;

(vi) Operations which will not involve the use of mechanized earthmoving equipment, such as bulldozers or backhoes, or the cutting of trees, unless those operations otherwise might cause a significant disturbance of surface resources; or

(vii) Operations for which a proposed plan of operations is submitted for approval;

(2) The District Ranger will, within 15 days of receipt of a notice of intent to operate, notify the operator if approval of a plan of operations is required before the operations may begin.

(3) An operator shall submit a proposed plan of operations to the District Ranger having jurisdiction over the area in which operations will be conducted in lieu of a notice of intent to operate if the proposed operations will likely cause a significant disturbance of surface resources. An operator also shall submit a proposed plan of operations, or a proposed supplemental plan of operations consistent with § 228.4(d), to the District Ranger having jurisdiction over the area in which operations are being conducted if those operations are causing a significant disturbance of surface resources but are not covered by a current approved plan of operations. The requirement to submit a plan of operations shall not apply to the operations listed in paragraphs (a)(1)(i) through (v). The requirement to submit a plan of operations also shall not apply to operations which will not involve the use of mechanized earthmoving equipment, such as bulldozers or backhoes, or the cutting of trees, unless those operations otherwise will likely cause a significant disturbance of surface resources.

(4) If the District Ranger determines that any operation is causing or will likely cause significant disturbance of surface resources, the District Ranger

shall notify the operator that the operator must submit a proposed plan of operations for approval and that the operations can not be conducted until a plan of operations is approved.

(b) Any person conducting operations on the effective date of these regulations, who would have been required to submit a plan of operations under § 228.4(a), may continue operations but shall within 120 days thereafter submit a plan of operations to the District Ranger having jurisdiction over the area within which operations are being conducted: Provided, however, That upon a showing of good cause the authorized officer will grant an extension of time for submission of a plan of operations, not to exceed an additional 6 months. Operations may continue according to the submitted plan during its review, unless the authorized officer determines that the operations are unnecessarily or unreasonably causing irreparable damage to surface resources and advises the operator of those measures needed to avoid such damage. Upon approval of a plan of operations, operations shall be conducted in accordance with the approved plan. The requirement to submit a plan of operations shall not apply: (1) To operations excepted in § 228.4(a) or (2) to operations concluded prior to the effective date of the regulations in this part.

(c) The plan of operations shall include:

(1) The name and legal mailing address of the operators (and claimants if they are not the operators) and their lessees, assigns, or designees.

(2) A map or sketch showing information sufficient to locate the proposed area of operations on the ground, existing and/or proposed roads or access routes to be used in connection with the operations as set forth in § 228.12 and the approximate location and size of areas where surface resources will be disturbed.

(3) Information sufficient to describe or identify the type of operations proposed and how they would be conducted, the type and standard of existing and proposed roads or access routes, the means of transportation used or to be used as set forth in § 228.12, the period during which the proposed activity will take place, and measures to be taken to meet the requirements for environmental protection in § 228.8.

(d) The plan of operations shall cover the requirements set forth in paragraph (c) of this section, as foreseen for the entire operation for the full estimated period of activity: Provided, however, That if the development of a plan for an entire operation is not possible at the time of preparation of a plan, the operator shall file an initial plan setting forth his proposed operation to the degree reasonably foreseeable at that time, and shall thereafter file a supplemental plan or plans whenever it is proposed to undertake any significant surface disturbance not covered by the initial plan.

(e) At any time during operations under an approved plan of operations, the authorized officer may ask the operator to furnish a proposed modification of

the plan detailing the means of minimizing unforeseen significant disturbance of surface resources. If the operator does not furnish a proposed modification within a time deemed reasonable by the authorized officer, the authorized officer may recommend to his immediate superior that the operator be required to submit a proposed modification of the plan. The recommendation of the authorized officer shall be accompanied by a statement setting forth in detail the supporting facts and reasons for his recommendations. In acting upon such recommendation, the immediate superior of the authorized officer shall determine:

(1) Whether all reasonable measures were taken by the authorized officer to predict the environmental impacts of the proposed operations prior to approving the operating plan,

(2) Whether the disturbance is or probably will become of such significance as to require modification of the operating plan in order to meet the requirements for environmental protection specified in § 228.8 and

(3) Whether the disturbance can be minimized using reasonable means. Lacking such determination that unforeseen significant disturbance of surface resources is occurring or probable and that the disturbance can be minimized using reasonable means, no operator shall be required to submit a proposed modification of an approved plan of operations. Operations may continue in accordance with the

approved plan until a modified plan is approved, unless the immediate superior of the authorized officer determines that the operations are unnecessarily or unreasonably causing irreparable injury, loss or damage to surface resources and advises the operator of those measures needed to avoid such damage.

(f) Upon completion of an environmental analysis in connection with each proposed operating plan, the authorized officer will determine whether an environmental statement is required. Not every plan of operations, supplemental plan or modification will involve the preparation of an environmental statement. Environmental impacts will vary substantially depending on whether the nature of operations is prospecting, exploration, development, or processing, and on the scope of operations (such as size of operations, construction required, length of operations and equipment required), resulting in varying degrees of disturbance to vegetative resources, soil, water, air, or wildlife. The Forest Service will prepare any environmental statements that may be required.

(g) The information required to be included in a notice of intent or a plan of operations, or supplement or modification thereto, has been assigned Office of Management and Budget Control #0596-0022. The public reporting burden for this collection of information is estimated to vary from a few minutes for an activity involving little or no surface disturbance to several months for activities involving heavy capital investments and significant surface disturbance, with

an average of 2 hours per individual response. This includes time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Chief (2800), Forest Service, USDA, P.O. Box 96090, Washington, DC 20090-6090 and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

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40 C.F.R. § 1502.1 Purpose.

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact

statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

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40 C.F.R. § 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.