

**SUBSTITUTE THIS DECISION FOR NATIONAL ADUBUDON SOCIETY v. HODEL,
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**CENTER FOR BIOLOGICAL DIVERSITY, ET AL., v. U.S. DEPARTMENT OF THE
INTERIOR.**

United States Court of Appeals, Ninth Circuit, 2010
623 F.3d 633.

[W. FLETCHER](#), Circuit Judge:

The Center for Biological Diversity, the Western Land Exchange Project, and the Sierra Club (collectively, “Appellants”) bring suit against Asarco LLC (“Asarco”), a mining company, and the Department of Interior and the Bureau of Land Management (collectively, “BLM”). Appellants contend that the BLM’s approval of a land exchange violates the National Environmental Policy Act (“NEPA”), [42 U.S.C. §§ 4321-70](#); the Federal Land Policy and Management Act (“FLPMA”), [43 U.S.C. §§ 1701-87](#); and the Mining Law of 1872, [30 U.S.C. §§ 21-54](#).

If the proposed exchange does not occur, the land will continue to be owned by the United States. In that event, Asarco will be permitted to conduct mining operations on the land only if it complies with the Mining Law of 1872. Specifically, Asarco will not be able to conduct a new mining operation on the land without first submitting a Mining Plan of Operations (“MPO”) to the BLM. The MPO would have to include detailed information about the operations, management, monitoring, and environmental impacts of the proposed mining activities. The BLM would then have to approve the MPO before the new mining could proceed.

If the proposed exchange occurs, Asarco would take fee simple ownership of the exchanged land. In that event, Asarco’s use of the land would not be subject to the requirements of the Mining Law of 1872. Asarco has spent sixteen years, and considerable amounts of time and money, seeking to achieve private ownership of the exchanged land, which would allow Asarco to avoid having to prepare the MPOs that are required so long as the land remains in public hands.

As part of the process of approving the land exchange, the BLM prepared a Final Environmental Impact Statement (“FEIS”) pursuant to NEPA. In the FEIS, the BLM assumed without analysis that the MPO process would impose no constraints on, and would have no effect on, the manner in which Asarco would conduct new mining operations on the exchanged land. That is, the BLM assumed that the manner and extent of Asarco’s new mining operations would be the same whether or not the United States owned the land. Because of this assumption, the BLM did not compare the environmental effects of exchanging the land with the effects of not exchanging the land.

Under these circumstances, we hold that the BLM has not “taken a ‘hard look’ at the environmental consequences of its proposed action” in violation of NEPA, and that its action was therefore arbitrary and capricious. [Blue Mountains Biodiversity Project v. Blackwood](#), 161 F.3d 1208, 1211 (9th Cir.1998). We also hold that the BLM’s approval of the proposed land exchange was a violation of FLPMA and similarly arbitrary and capricious. We therefore reverse the decision of the district court approving the actions of the BLM.

I. Background

Asarco owns and operates the Ray Mine complex in Gila and Pinal Counties, Arizona. The complex now includes a 265,000 ton-per-day open pit [copper](#) mine * * * and related support facilities. Ore from the mine is transported eighteen miles to the Hayden Smelter for processing. * * * The Ray Mine is the * * * third most productive [copper](#) mine in the United States.

In 1994, Asarco proposed a land exchange with the BLM that would consolidate its holdings and expand its mining operations at the complex. As amended in 1997, the proposed land exchange would convey to Asarco in fee simple thirty-one parcels of public land totaling 10,976 acres (the “selected lands”). In return, Asarco would convey to the BLM eighteen parcels of private land totaling roughly 7,300 acres (the “offered lands”). FLPMA authorizes the Secretary of Interior to approve land exchanges. [43 U.S.C. § 1716](#).

The United States owns, and the BLM administers as full estates, 8,196 acres of the selected lands. The remaining 2,780 acres of the selected lands are owned and administered as “split estates.” Asarco owns or is purchasing, in transactions not at issue in this appeal, the surface estate of these lands, while the United States owns and the BLM administers the mineral estate.* * *

The selected lands provide important wildlife and plant habitat, including high priority reintroduction habitat for desert bighorn sheep, 6,860 acres of endangered desert tortoise habitat, and potential habitat for threatened and endangered birds. Upland plant communities cover 99.2% of the selected lands and include riparian plant communities and three plant species designated for special status by the BLM. Some of the selected lands are immediately adjacent to the White Canyon Area of Critical Environmental Concern, and some are adjacent to or in close proximity to the White Canyon Wilderness. The selected lands include seventy-eight archaeological sites, of which forty are regarded as eligible for nomination to the National Register of Historic Places.

The selected lands are now encumbered by 751 mining claims or mill site claims under the Mining Law of 1872, of which 747 are held by Asarco. These claims are unpatented, and the BLM has not determined if they are valid. Every parcel of the selected lands except for Parcel CH-5 (comprising 480 acres) is encumbered by at least one such claim.

Asarco and the BLM are forthright in stating that they foresee the following five mining and mining-related uses for the selected lands following the land exchange. These uses are described, with specified acreage, in the FEIS as follows:

- (1) Existing mining: 272 acres (2%) already have had and would continue to have substantial surface disturbance due to Asarco's mining operations.
- (2) Production operations and support areas: 3,614 acres (33%) would be used to expand open pits, construct haul roads, and deposit solution-extraction rock. This would result in substantial disturbance to between 25% and 100% of the land surface.
- (3) Transition: 875 acres (8%) would be used as “raveling areas” around overburden and leach rock deposition areas, access roads, storm water diversion ditches, and administrative facilities. This would result in some disturbance to between 5% and 25% of the land surface.
- (4) Intermittent use: 4,481 acres (41%) would not be subject to direct mining activity and would be used to consolidate Asarco's ownership and to buffer neighboring landowners from mining operations.
- (5) Long-range prospect: 1,733 acres (16%) could be used for mine development and support in the future resulting in an unknown degree of surface disturbance.

The offered lands comprise five parcels or groups of parcels: the Knisely Ranch Parcels (160 acres), the Gila River Parcel (320 acres), the Tomlin Parcels (320 acres), the McCracken Mountain Parcels (6,384 acres), and the Sacramento Valley Parcel (120 acres). Following the land exchange, no mining claims would exist or be permitted on the Knisely Ranch Parcels. The BLM would petition to withdraw the Gila River Parcel and Tomlin Parcels from

mineral entry, which, if successful, would mean that only persons who had established a valid mining claim before withdrawal would be permitted to mine on those parcels. The McCracken Mountain Parcels, which comprise 87% of the offered lands, and the Sacramento Valley Parcel would remain open to mineral entry. Of the 7,300 acres of offered lands, 1,126 acres exhibit moderate potential for locatable mineral resources, with the rest exhibiting low potential for locatable mineral resources.

The offered lands include riparian plant communities and important wildlife habitat, including habitat for some special status species, potential habitat for some threatened or endangered species, including peregrine falcons, and proposed critical habitat for the cactus ferruginous pygmy owl. The offered lands include segments of the Gila River Riparian Management Area, the Black Mountains (Burro) Herd Management Area, the Cerbat (Wild Horse) Herd Area, the Big Sandy (Burro) Herd Management Area, and the McCracken Desert Tortoise Habitat Area of Critical Environmental Concern.

Between 1995 and 1997, the BLM consulted with various federal, state, and local agencies, elected representatives, non-governmental organizations, tribal governments, and private individuals concerning the land exchange. The BLM published a Draft Environmental Impact Statement (“DEIS”) in October 1998. * * * [A final EIS was issued in June 1999.]

The FEIS states that the “foreseeable uses of the selected lands are mining-related uses and *are expected to occur under all alternatives.*” (Emphasis added.) In a section entitled “Actions Common to All Alternatives,” the FEIS explains:

This section describes actions that are common to all alternatives; that is, activities that would occur regardless of which alternative is selected. In developing alternatives, BLM concluded that foreseeable mining-related uses would likely occur whether any one of the land exchange alternatives were selected or the No Action alternative was selected. This is because a land exchange is not required for mining-related activities to take place on the selected lands. Asarco currently holds the vast majority of the mining claims on the public lands selected for exchange, and through these mining claims, Asarco has the right to pursue development on the selected lands for mining or mining-related uses.

[Several commenters, including the federal Environmental Protection Agency, objected that the BLM should not assume that the foreseeable use reflects mining that would take place whether or not the land exchange occurred. BLM did not directly answer that objection.] * * *

In April 2000, the BLM issued a Record of Decision (“ROD”) in which it did two things. First, the BLM amended two existing Resource Management Plans (“RMPs”) to change the designation of the selected lands under FLPMA * * * from “retention” to “disposal.” * * *

Second, the BLM approved the proposed land exchange. Section 206 of FLPMA forbids land exchanges unless the “public interest will be well served.” [43 U.S.C. § 1716\(a\)](#). This section directs the Secretary of Interior to “give full consideration” to better land management and “needs for lands for the economy, ... food, fiber, minerals, and fish and wildlife” when determining the public interest. *Id.* In part, the ROD justified the exchange by denying that any harm to the public would result from conveying the selected lands to private ownership. The ROD concluded that the public interest would not be harmed by the conveyance because it assumed, as the FEIS had assumed, that mining would be conducted in the same manner whether or not the exchange occurred. The ROD stated that “the BLM considers the continuation of mining as the foreseeable use of most of the selected federal lands whether the exchange occurs or not.”

[Plaintiff conservation groups filed an administrative appeal with the Interior Board of Land Appeals (“IBLA”), which stayed the exchange. More than four years later, IBLA denied the appeal. Almost three years after that, the federal district court rejected plaintiffs’ arguments and upheld the exchange, and plaintiffs appealed to the Ninth

Circuit.] * * *

III. Discussion

For the reasons that follow, we hold that the BLM's assumption that mining would occur on the selected lands in the same manner regardless of the land exchange was arbitrary and capricious, and that the BLM therefore violated NEPA. We further hold that the BLM's reliance on this assumption in the ROD to conclude that the proposed land exchange is in the "public interest" was arbitrary and capricious, and that the BLM therefore violated FLPMA.

A. NEPA

*** The FEIS prepared by the BLM examined the proposed land exchange and three alternatives: the Buckeye Alternative, the Copper Butte Alternative, and the No Action Alternative. Under the No Action Alternative, the exchange would not proceed, and the selected lands would remain in public hands. A no action alternative in an EIS allows policymakers and the public to compare the environmental consequences of the status quo to the consequences of the proposed action. * * * A no action alternative must be considered in every EIS. *See* [40 C.F.R. § 1502.14\(d\)](#).

The BLM's assumption in the FEIS that the environmental consequences of the land exchange alternative and the no action alternative would be the same was arbitrary and capricious. The BLM based its assumption that mining would occur in the same manner on the fact that Asarco already holds mining claims on the selected lands. However, if the proposed land exchange does not occur, the selected lands would remain in public hands. In that event, Asarco's ability to conduct mining operations on its claims would be subject to the Mining Law of 1872. In contrast, if the proposed land exchange occurs, Asarco would own the selected lands in fee simple. In that event, Asarco's use of the land would not be subject to the requirements of the Mining Law. The BLM thus assumed that the Mining Law would have no impact on the manner in which Asarco will conduct mining if the selected lands remained public lands. A description of the operation of the Mining Law of 1872 shows why this assumption is arbitrary and capricious.

Asarco has a right to engage in mining on the selected lands under the Mining Law even if the exchange does not proceed, based on its 747 unpatented mining and mill site claims. *See, e.g.,* [30 U.S.C. § 612\(a\)](#) (holders of unpatented mining claims can engage in "prospecting, mining or processing operations and uses reasonably incident thereto") * * *. But the manner and extent of that mining is likely to differ depending on whether the selected lands are owned by the United States as public lands or by Asarco as private lands in fee simple.

1. The MPO Requirement

If the land exchange does not occur and the selected lands remain public, Asarco will be obliged to comply with the requirements of the Mining Law. Under that law, Asarco would have to submit Mining Plans of Operations ("MPOs") to the BLM before engaging in mining operations on its claims * * *. Each MPO would have to provide a significant amount of information on Asarco's mining plans * * *. Further, depending on the circumstances, the MPO process requires BLM to consult with other agencies. For example, the selected lands include dozens of archaeological sites, many of which, according to the FEIS, would be destroyed or severely disturbed by mining operations. Consequently, the BLM may have to perform the consultation required under the National Historical Preservation Act. *See* [43 C.F.R. § 3809.411\(a\)\(3\)\(iii\)](#). Similarly, the BLM may have to perform the consultation required under the Endangered Species Act * * * [and] with Native American tribes * * * [and] with the State of Arizona to ensure that Asarco--which in the past has violated the federal Clean Water Act at the Ray Mine Complex--complies with State water quality requirements. *See id.* [§ 3809.411\(a\)\(3\)\(ix\)](#).

Still further, the MPO process requires the BLM to comply with NEPA. *See id.* [§ 3809.411\(a\)\(3\)\(ii\)](#). NEPA requires

the preparation of an EIS before approving an MPO if the approval would constitute a “major Federal action[] significantly affecting the quality of the human environment.” [42 U.S.C. § 4332\(2\)\(C\)](#). Based on the uses that Asarco and the BLM foresee for the selected lands, as detailed in the FEIS, it is virtually certain that BLM approval of an MPO for the selected lands would constitute a “major federal action.” Each EIS would have to provide detailed information on the environmental impacts of Asarco's planned mining as outlined in the MPO.

Finally, the BLM cannot approve an MPO unless it complies with FLPMA. Under FLPMA, the Secretary of Interior is required to “take any action necessary to prevent unnecessary or undue degradation of the [public] lands.” [43 U.S.C. § 1732\(b\)](#). BLM regulations define “unnecessary or undue degradation” (“UUD”) to mean “conditions, activities, or practices” that fail to comply with the “performance standards in [[43 C.F.R.\] § 3809.420](#),” that fail to comply with “other Federal and state laws related to environmental protection and protection of cultural resources,” that are “not ‘reasonably incident’ to prospecting, mining, or processing operations” as defined in [43 C.F.R. § 3715.0-5](#), or that “[f]ail to attain a stated level of protection or reclamation required by specific laws” in special status areas. [43 C.F.R. § 3809.5](#). FLPMA and its implementing regulations require the Secretary to “take any action necessary” to prevent UUD.

FLPMA's requirement that the Secretary prevent UUD supplements requirements imposed by other federal laws and by state law. *See id.* § 3809.415 (“You prevent unnecessary or undue degradation while conducting operations on public lands by ... [c]omplying with [§ 3809.420](#), as applicable; the terms and conditions of your notice or approved plan of operations; *and* other Federal and State laws related to environmental protection and protection of cultural resources.”) (emphasis added). Prevention of UUD includes designing access routes that minimize adverse environmental impacts, [§ 3809.420\(b\)\(1\)](#); disposing appropriately of “tailings, dumps, deleterious materials or substances, and other waste,” [§ 3809.420\(b\)\(2\)](#); reclaiming disturbed areas, [§ 3809.420\(b\)\(3\)](#); protecting fisheries, wildlife and plant habitat, [§ 3809.420\(b\)\(7\)](#); and performing appropriate leaching operations and impoundments, [§ 3809.420\(b\)\(12\)](#). UUD requirements are distinct from requirements under NEPA. “A finding that there will not be significant impact [under NEPA] does not mean either that the project has been reviewed for unnecessary and undue degradation or that unnecessary or undue degradation will not occur.” *Kendall's Concerned Area Residents*, 129 I.B.L.A. 130, 140 (1994).

In *Mineral Policy Center v. Norton*, 292 F.Supp.2d 30 (D.D.C.2003), plaintiffs challenged newly promulgated regulations, including [§ 3809.420](#), implementing the UUD mandate of FLPMA. Plaintiffs' central contention was that the new regulations were too weak to satisfy the statutory mandate of preventing UUD. The Department of the Interior (“Interior”) responded by arguing that the regulations would satisfy the mandate, *in significant part because of the environmental protection provided by the MPO process*. The district court wrote, “Interior argues that it will protect the public lands from any UUD by exercising case-by-case discretion to protect the environment through the process of: (1) approving or rejecting individual mining plans of operation....” *Id.* at 44. The BLM is, of course, part of Interior. It ill becomes Interior and the BLM to take the position in this litigation that the MPO process would not alter the manner of mining, and its environmental consequences, when Interior took precisely the opposite position in *Mineral Policy Center*.

* * * In the circumstances of the case before us, where it is obvious, as detailed in the record, that Asarco and the BLM know a great deal about Asarco's mining plans for the selected lands, NEPA requires a meaningful analysis of the different environmental consequences that would result from public ownership (with an MPO requirement) and private ownership (without an MPO requirement). This does not mean that the BLM must require, in connection with the preparation of the FEIS, that Asarco file full-fledged MPOs for the mining it will conduct on the selected lands. But it does mean that, based on the information now reasonably available, the BLM must make a meaningful comparison of the environmental consequences of Asarco's likely mining operations with and without the requirement that MPOs be prepared by Asarco and approved by the BLM--that is, with and without the proposed exchange. In the absence of such a comparison in the FEIS, the BLM has not conducted the “hard look” that NEPA requires. Rather, the BLM has averted its eyes from what is in plain view before it.

* * *

B. FLPMA

* * * FLPMA forbids land exchanges unless the “public interest will be well served by making that exchange.” *Id.* § 1716(a). FLPMA directs the Secretary of the Interior, in considering the public interest, to “give full consideration to better Federal land management and the needs of State and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife.” *Id.* The Secretary must also “find[] that the values and the objectives which Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the values of the non-Federal lands or interests and the public objectives they could serve if acquired.” *Id.*

In approving the land exchange, the ROD emphasized what the BLM saw as the advantages of acquiring the offered land. Those advantages include: (1) facilitating better federal land management by acquiring private lands within special areas of designation that exhibit a “checker board” land ownership pattern; (2) improving wildlife and Area of Critical Environmental Concern habitats by adding parcels to federal protection and management; (3) supporting resource objectives for improving riparian zones by acquiring parcels along the Big Sandy and Gila Rivers; (4) continuing to support mining activities by providing lands that will enable Asarco to plan expansions, comply with environmental permits, buffer operations from surrounding lands, and continue operating on parcels with approved mining plans of operations; and (5) improving management of mineral rights.

The ROD listed no disadvantages of conveying the selected lands into Asarco's private ownership. The ROD stated, “An additional rationale for approving the land exchange is that the BLM considers the continuation of mining as the foreseeable use of most of the selected federal lands whether the exchange occurs or not.” In other words, the ROD, like the FEIS, assumed that mining would occur on the selected lands in the same manner whether or not the exchange took place. For the reasons discussed above, this assumption is unreasonable. The manner in which Asarco engages in mining on the selected lands is likely to differ depending on whether the land exchange occurs, and the environmental consequences will differ accordingly.

Because the ROD unreasonably assumed that mining would occur in the same manner, its analysis of the public interest under FLPMA is fatally flawed. Without an accurate picture of the environmental consequences of the land exchange, the BLM cannot determine if the “public interest will be well served by making the exchange,” and the Secretary cannot determine if the “values and the objectives” which the selected lands “may serve if retained in Federal ownership are not more than the values” of the offered lands. We therefore hold that the conclusion in the ROD that the proposed land exchange is in the “public interest” within the meaning of FLPMA was arbitrary and capricious.

* * * Our colleague states that the BLM found that the environmental consequences of the proposed exchange would be “similar” to those of the no-action alternative. * * * Our colleague errs in so stating. The core problem in this case is that the BLM assumed that the environmental impacts of the proposed exchange and of the no action alternative would be “*the same*.”

Our colleague writes that our opinion is “based on a distaste for the particular industrial goals at issue.” * * * This is not true. We express no view--indeed, we have no view--on the question whether the proposed land exchange is a good or bad idea. That question is not properly before us. But our colleague has a very definite view. In his view, the land exchange is “beneficial.” * * * In his view, the “offered lands ... are undisputably superior in almost all respects (except for mineral deposits) to the selected lands.” * * * In his view, our approach is not only “legally untenable” [but] “impractical, misguided, and contrary to the best interests and welfare of the public at large.”

We confine ourselves to the legal questions before us. We continue to adhere to the standard of deference to agency

action [required by the Ninth Circuit’s en banc decision in Lands Council v. McNair, 537 F.3d 981 (2008).] But we are not compelled to defer-indeed, we are compelled *not* to defer-when an agency has acted arbitrarily and capriciously. In this case, we conclude that the BLM acted arbitrarily and capriciously in assuming without explanation that the MPO process is a meaningless formality that provides no environmental protection and, based on that assumption, in failing to make a meaningful comparison between the proposed land exchange and the no action alternative.

TALLMAN, Circuit Judge, dissenting:

*** With respect to my distinguished colleagues, the holding today undermines a *** land exchange that, until now, has been approved at every stage of its fifteen-year history. The court’s opinion is based on a fundamentally flawed reading of selective portions of a comprehensive record. The opinion then culminates in a novel and unworkable legal standard that not only effectively precludes these beneficial land exchanges between the federal government and private or public landowners, but also impairs the Bureau of Land Management’s (“BLM”) ability to effectively manage the public lands in a manner that furthers the public interest. Finally, the opinion gives no credence to the ability of the State of Arizona to manage lands under its regulatory jurisdiction, nor consideration to the substantial federal and state environmental, mining, and land use laws that will nonetheless be applicable whether or not the land exchange is approved.

In Lands Council, our en banc court confirmed the proper level of deference owed to agency determinations made within the agency’s area of expertise. Nevertheless, my colleagues disregard that precedent and once again endeavor to impermissibly expand the scope of judicial oversight and scrutiny of agency action. Today’s opinion is irreconcilable with Lands Council, which sought to rein in this type of judicial second-guessing in highly specialized areas.

*** Public land exchanges frequently benefit everyone involved in the transfer-the federal government, the exchanging public or private property owner, and, most importantly, the public at large. Exchanges are typically employed, as is proposed here, to eliminate patchwork ownership of isolated parcels. Once consolidated, such lands can be managed efficiently, effectively, and economically for all sorts of beneficial uses-creation of parklands, wilderness areas, hiking and biking trails, environmental remediation and protection, or improved stewardship of multiple-use lands and forests. It is undisputed that the Land Exchange at issue would serve these very purposes, among others.

What is unusual about these particular types of land swaps is the overlay of congressionally authorized mineral exploration and extraction rights in federal lands to which the miner-in this case, Asarco-needs no title. Asarco’s preexisting mining rights under the Mining Law therefore lie at the core of this agency action.

*** Under the Mining Law, all citizens have the right to enter public lands open to mineral entry and locate mining claims or mill site claims. Independence Mining Co. v. Babbitt, 105 F.3d 502, 506 (9th Cir.1997). Once a claim is staked, the holder “has the exclusive right to possession and enjoyment of all the surface included within the lines of the locations, but the United States retains title to the land. This possessory interest entitles the claimant to ‘the right to extract all minerals from the claim without paying royalties to the United States.’ ” Id. “If a discovery of a ‘valuable mineral deposit’ is made, the claim can be held indefinitely so long as the annual assessment work is performed, the necessary filings are made, fees are paid, and a valuable mineral deposit continues to exist.” Id. * * * In other words, a mining claim, without more, still involves significant mining rights.

*** Mining activities are always subject to governmental oversight and regulation and must comply with a panoply of federal, state, and local laws, including the Clean Air Act, the Clean Water Act, and the Solid Waste Disposal Act, among myriad other regulatory requirements. See 43 C.F.R. § 3809.420. Before engaging in mining operations beyond casual use on public land, a claim holder must submit a proposed plan of operation, an MPO, for

consideration and approval by the BLM--a point upon which the majority improperly fixates. Unless “unnecessary or undue degradation of public lands” is found to result from the proposed operation, the BLM will approve a properly filed MPO. *Id.* § 3809.411(d).

With the exception of a single 480-acre parcel, the totality of the 10,976 acres that comprise the selected lands is completely encumbered by at least one of 751 mining or mill site claims. Asarco holds 747 of these claims. Accordingly, Asarco's ability to develop its claims on the selected lands and to engage in mining activities and activities incident to mining is firmly established under the Mining Law, predates the Land Exchange proposal, and will continue to exist whether the Land Exchange goes forward or not. It is with this practicality in mind that we should review the BLM's decision to approve the Land Exchange.

*** The manner and intensity of mining and mining-related activity pose an entirely distinct question from whether mining will likely occur on the selected lands. The EIS does not reveal an unwarranted presumption on the part of the BLM that the actual operations would be identical whether or not the Land Exchange is approved. * * * Because Asarco already holds mining claims to nearly all of the selected lands, the BLM reached the logical conclusion that, to the extent foreseeable, the environmental impacts would be in many ways similar under the various alternatives. Based on the facts of this case, there is nothing improper or even surprising about this reasoning. Indeed, a contrary conclusion would be absurd.

The majority, however, seems focused on the hypothetical, noting that “[t]he manner in which Asarco engages in mining on the selected lands is likely to differ depending on whether the land exchange occurs, and the environmental consequences will differ accordingly.” Of course, the manner in which Asarco's future mining will occur is dependent on a variety of factors. Mining activities would differ if the worldwide price of [copper](#) plummeted, or if particular parcels of land did not contain sufficient quantities of minerals to warrant mining at all. However, the majority's rumination is unaccompanied by any factual basis from the administrative record. Nor do my colleagues disclose how the inevitable mining activities might materially differ. It is of course axiomatic that NEPA does not encompass all conceivable scenarios. * * *

But even assuming the selected lands remained publicly owned, given the facts of this case (namely, Asarco's continuing mining rights on the selected lands), there is nothing unreasonable or illogical about a conclusion that, while the timing might differ, the ultimate mining-related activities would be substantially similar and in turn result in comparable environmental impacts. On the contrary, in light of the variables in play, that conclusion is quite sound. My colleagues' position is premised on an inflated portrayal of the MPO process. Given the substantial rights and interests provided by the Mining Law and its goal of encouraging the location and extraction of valuable minerals, the BLM's review of a claim holder's proposed MPO is limited. The BLM may disapprove or withhold approval of a properly submitted MPO concerning an area open to mining only if a proposed operation “would result in unnecessary or undue degradation of public lands.” [43 C.F.R. § 3809.411\(d\)\(3\)](#); *see* [43 U.S.C. § 1732\(b\)](#). “A reasonable interpretation of the word ‘unnecessary’ is that which is not necessary for mining. ‘Undue’ is that which is excessive, improper, immoderate or unwarranted.” [Utah v. Andrus](#), 486 F.Supp. 995, 1005 & n. 13 (D.Utah 1979) (noting that “[t]he word ‘impair’ would prevent many activities that would not be prevented by the language of ‘unnecessary or undue degradation’ ”).

*** Indeed, it is the majority--not the BLM--that has engaged in improper conjecture and has adopted unfounded presumptions. Substantial governmental regulations--such as the Clean Air Act, the Clean Water Act, and various other federal and local safeguards--remain applicable to operations on private land. Today's opinion, based on a distaste for the particular industrial goals at issue, requires that courts presume that in the absence of the MPO process, mining companies will conduct their activities unsupervised by any environmental regulator in a manner that unnecessarily and unduly degrades the environment. And, in doing so, my colleagues assume that mining companies will somehow evade the substantial state and federal governmental regulations that remain applicable to mining operations on private land in Arizona.

But it gets much worse. Here, because Asarco has neither engineered nor submitted an MPO for the selected lands, a foreseeable use plan was instead developed by the BLM as the basis for analyzing the land exchange proposal and the potential environmental consequences. * * *

While not an MPO approved in accordance with the “unnecessary or undue degradation” standard, the foreseeable use plan developed for the Land Exchange reasonably approximated Asarco's planned mining-related activities and considered the ongoing regulation of anticipated mining activities whether or not the exchange was approved. * * *

This, however, is not enough for the majority. * * * [It] has essentially determined that in order to fully comprehend “the different environmental consequences” of the Land Exchange, NEPA requires an analysis that mimics the MPO submission and approval process. * * *

According to today's opinion, the BLM was obliged to determine the exact environmental consequences under hypothetical future MPOs for hypothetical future mines and compare them to the environmental consequences of hypothetical future mines not subject to the MPO requirement. Essentially, the BLM must demand that Asarco fully explore the selected lands, develop a detailed mining plan, and submit a proposed plan of mining operations for approval—one mimicking an MPO. The BLM is then required, under NEPA, to consider that quasi-MPO as if it were in fact a filed MPO under the Mining Law. Stated in real terms, the approval process of a proposed land exchange under FLPMA henceforth incorporates, by way of NEPA, the Mining Law's governance of mining activities on public lands. But, of course, the majority will not say that if Asarco does all this, it will have complied with the Mining Law.

I find no legal basis for this newly-minted, quasi-MPO requirement * * *. My colleagues clearly disagree. Who needs [Chevron](#) deference? Why adhere to [Lands Council?](#) Judges will now administer the duties Congress has entrusted to the administrative agency.

In sum, the majority's creation of the novel quasi-MPO requirement grossly oversteps our role in reviewing agency action and is irreconcilable with our precedent. * * * It is certainly not for us as Article III judges to feign superior expertise in such specialized areas and to micro-manage agencies in executing their congressionally delegated administrative functions. * * *

The majority opinion's curt analysis regarding FLPMA is perhaps even more problematic and falters for the reasons stated above. Rather than engaging the material legal question whether or not the Land Exchange was in the public interest, *see* [43 U.S.C. § 1716\(a\)](#), my colleagues repeat their flawed NEPA analysis * * *. Despite the BLM's well-articulated bases for its approval of the Land Exchange, the majority declares that this alone renders the reasoned “public interest” determination arbitrary and capricious.

That declaration ignores the fact that, in the ROD, the BLM gave five main reasons why approval of the Land Exchange was in the public interest and thus satisfied § 206 of FLPMA [these reasons are listed in the majority opinion, *supra*]. * * * “As an additional rationale for approving the land exchange,” the ROD also noted that “the continuation of mining [was] the foreseeable use of most of the selected lands whether the exchange occurs or not.” In reaching this conclusion, the BLM referred to the Mining Law and Asarco's rights arising from its 747 mining claims, Asarco's pending patent application for portions of the selected lands (which, if approved, would convey fee title to Asarco), mineral potential reports indicating the presence of ore bodies that may have economic potential for future mining, and the current use of parcels in the neighboring Ray Mine Complex, which was 100% mining-related.

Moreover, the ROD recognized that, under the No Action Alternative, the BLM must anticipate substantial future management actions, including processing multiple MPOs and patent applications, while the offered lands would remain in Asarco's ownership and most likely be divided into smaller parcels and sold for profit. In other words, significant portions of the selected lands would inevitably be burdened by mining-related activities, either pursuant

to Asarco's mining claims or after fee title was conveyed to Asarco through the patenting process. Simultaneously, the offered lands, which would provide significant public benefit under federal ownership * * *, would remain in private hands and likely be subject to subdivision and private development, including possible mining activities. How could the public interest possibly be served by this outcome? This reality weighed heavily in the BLM's determination.

The majority's analysis literally ignores the reasons provided in the ROD and the sound logic of the BLM in determining which course best serves the public interest. * * *

In reaching its result, the majority focuses almost exclusively on the regulatory mechanism behind MPOs, while at the same time diminishing or ignoring altogether Asarco's substantial preexisting mining rights under the Mining Law, the standard for and purpose of FLPMA land exchanges, and the state and federal environmental regulations that remain applicable to the selected lands whether under private or public ownership. The thrust of the opinion relates to the difference in governmental oversight of mining operations conducted on federal versus non-federal lands, i.e., whether prior agency approval of mining plans is required. This demonstrates a clear distrust of Asarco and the BLM--a distrust unsupported in the extensive record before us.

The majority is plainly concerned about the unavoidable uncertainty regarding the ultimate environmental impacts that will occur, which admittedly could be substantial and perhaps different than estimated in the EIS. Apprehension over a speculative outcome should neither drive a particular result nor prompt the creation of bad law. Unfortunately, my colleagues have succumbed to this temptation and, in doing so, have sacrificed the integrity of our precedent and the best interests of the public in order to achieve a particular outcome in the instant case.

The majority's holding is shortsighted and unreasonably impairs the BLM's ability to effectively manage the public lands in a manner that we all desire. In practice, the newly minted quasi-MPO requirement will unquestionably stifle, if not altogether stymie, land exchanges, especially whenever mining companies are involved or mining-related activities are contemplated. Indeed, this judicially created obstacle would be, in application, an impenetrable wall.

Furthermore, by grafting this time-consuming and expensive process onto FLPMA's "public interest" determination (ostensibly though NEPA), our opinion today eliminates one key incentive that encourages private landowners, such as Asarco and other mining claim holders, to offer their valuable private property in exchange for federal land. Like it or not, most businesses are driven largely by economic considerations. At some point, claim holders will elect to simply exercise their rights under the Mining Law to the offered lands and proceed through the MPO or patenting process in order to engage in mining activities and to simultaneously develop or market their valuable private lands for additional commercial gain. Then what? The public would be deprived of the offered lands, which are undisputedly superior in almost all respects (except for mineral deposits) to the selected lands--a collection of scattered parcels near an active, large-scale mining operation, which are, and which will continue to be, heavily burdened by mining claims. In addition to being legally untenable, the majority's approach announced today is impractical, misguided, and contrary to the best interests and welfare of the public at large.

Today's opinion embodies the type of judicial meddling in agency action that we intended to put to rest in [Lands Council](#). Its implications are far-reaching and severe. I respectfully dissent. * * *

NOTES AND QUESTIONS:

1. Must an agency prepare written findings and conclusions in making a decision as to what is

in the "public interest" under FLPMA? Even if not required, would an agency be advised to document its determination to better withstand judicial scrutiny? As the principal case demonstrates, NEPA's mandates will almost always produce an administrative record comparing alternatives. And sometimes, as here, the objections from other agencies in commenting on the action agency's NEPA documents can be helpful to plaintiffs by providing a basis for the court to rule NEPA compliance inadequate.

2. Who is more persuasive, the majority or the dissent, on whether the court should defer to the BLM's finding that the exchange would be in the public interest? Does the Secretary have expertise that a federal judge ought to respect? Compare Lodge Tower Condominium Association v. Lodge Properties Inc., 880 F.Supp. 1370 (D.Colo.1995), *aff'd*, 85 F.3d 476 (10th Cir.1996), upheld a Forest Service exchange, relying heavily on the Forest Service's finding that "better land management" would result from exchanging two acres of federal land on a slope among condominiums at the Vail resort for 385 acres of private inholding (including wetlands, streams, and an endangered species of fish) in a nearby wilderness area.

3. Are the five (or six, according to the dissent) reasons the BLM gave in support of the public interest persuasive? What more would the BLM need to do in order to justify a complex land swap? In holding that the FLPMA public interest test requires a more precise exploration of the environmental consequences of private land mining as compared to public land mining, did the court adequately consider the opportunity costs of that additional analysis? Might the federal government end up losing out on the benefits of offered lands if it has to engage in a deeper (more expensive and time consuming) analysis? The dissent notes that the land exchange had been in the works for fifteen years. Does the court simply ask too much of the agency in interpreting 43 U.S.C. § 1716(a)?

4. The dissent argues that the majority opinion essentially requires Asarco and the BLM to prepare a premature and duplicative MPO. Under the majority's theory, what kind of analysis of the prospective mining operation is necessary under the FLPMA public interest test? We explore the requirements of the MPO, and FLPMA's substantive standard that mining not result in "unnecessary or undue degradation of public lands," in Chapter 7.A.8.b.

5. Furthermore, an important part of the debate between the majority and the dissent involved their differing assessments of the character and strength of ASARCO's rights in the mining claims it had already located on the land it would acquire in the exchange. Dissenting Judge Tallman called them ASARCO's "substantial preexisting mining rights under the Mining Law," which he suggested included a right to mine with comparatively little environmental regulation, so that the ultimate mining-related activities would be substantially similar whether or not the exchange took place. The majority, on the other hand, seemed to regard ASARCO's claims as not diminishing the federal government's power

to regulate very much. In legal terms, the question is how the Interior Department's duty to protect the public lands from "unnecessary or undue degradation" fits with the rights of the holder of a mining claim. That issue, and the Mineral Policy Center decision cited in this case, is set out at pp. 607-616 of the casebook.

6. The Asarco ROD listed no disadvantages of the land exchange. Suppose that the BLM had not assumed that mining would be conducted in the same manner if it approved the land exchange. Instead, the BLM could have been more candid in its appraisal, admitting that the harm caused by the exchange is substantial, but going on to argue that there is a strong national interest in developing all sources of domestic copper and silver rather than rely on imports from unstable (and less environmentally protective) areas of the world. Would the public interest holding have fared better in court? How should the Secretary weigh difficult-to-quantify values (protecting the U.S. environment, protecting foreign lands, supporting the Arizona economy, the strategic value of minerals production) against monetary differences in value? Does 43 U.S.C. § 1716(a) allow the federal government to consider all of those values? Which is better at assessing these issues, the executive branch agency or the courts?

7. Does it matter that the federal government would be giving Asarco over ten thousand acres in exchange for only a little over seven thousand acres, thus shrinking the public domain? Typically, lands transferred to the U.S. in exchange for federal lands have greater conservation values than the privatized lands. How does the BLM attempt to quantify that value? Note that the McCracken Mountain Parcels, which comprised 87% of the offered lands, and the Sacramento Valley Parcel would have remained open to entry and location of mining claims under the Mining Law of 1872. In other words, Asarco could have turned around and staked mining claims on those newly federal lands and potentially mined them as well as the selected lands. Is that in the public interest? More typically, the Secretary withdraws offered lands at the time they are transferred into federal ownership.

8. The "public interest" standard is frequently found, in one form or another, in modern statutes governing administrative agency decisions in a wide variety of contexts. *See, e.g., Udall v. Federal Power Comm'n*, 387 U.S. 428, 450 (1967) (an early landmark decision in modern environmental law, holding that the Federal Power Commission construed the public interest standard in the Federal Power Act too narrowly in connection with a proposed hydropower license, to exclude consideration of "the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife"); *National Audubon Society v. Hodel*, 606 F. Supp. 825 (D. Alaska 1984) (overturning a land exchange under ANILCA, which requires a Secretarial finding that any land exchange be in the public interest if it involves a swap of lands not of equal value). Will judicial reviewability of an agency's

application of such a standard vary from statute to statute, even if the statutes have identical formulations? Could, in fact, a "public interest" determination in another statute be held entirely unreviewable by a court?

9. In Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172 (9th Cir.2000), the plaintiffs challenged BLM's conveyance of 1745 acres of public land as part of an exchange with the private Gold Fields Co. The purpose was to allow the latter to put a landfill in Imperial County in southern California. The thrust of plaintiffs' complaint was that the exchange did not meet FLPMA's "equal value" standard because BLM had used an outdated appraisal. BLM defended the appraisal, which had concluded that the highest and best use of the federal land was either open space, or mine support, or wildlife habitat, at a value of \$350 per acre, because there was no general market for use of the land as a landfill. In part this was because the parcels to be exchanged were surrounded by or adjacent to land already owned by Gold Fields, and were not large enough by themselves to support a landfill. Plaintiffs disputed this assumption (putting forward evidence that a landfill site would be worth several thousand dollars per acre) and the court agreed. Reversing the district court, it held that the "BLM appraisal should have considered the landfill use as a possible highest and best use. Information available at the time of the appraisal made it reasonably probable that the property's potential use as a landfill was physically possible, legally permissible, and financially feasible." 231 F.3d at 1184. Although the parties had consummated the exchange the day after the district court had dismissed the case, the court ordered the exchange set aside.

10. How is "equal value" be determined? By the marketplace? Is there a real market for this land? Or, is it of value only to the adjacent, large-scale miner? *See Committee of 100 on Federal City v. Hodel*, 777 F.2d 711, 720 n. 3 (D.C.Cir.1985) (upholding a proposed exchange of land involving the Park Service against an "equal value" challenge, and giving the agency "[g]reat deference * * * because the matter is one largely within the technical expertise of the agency"). Appraisals can be manipulated, and concern that the government has failed to obtain equal value in exchanges is periodically rehearsed in the press and elsewhere. *See, e.g.*, Tim Fitzgerald, *Federal Land Exchanges: Let's End the Barter*, p.8 (PERC Policy Series No.18 2000):

Land exchanges are essentially barter-trade without a medium of exchange such as money. Those who engage in land exchanges therefore face the problem of finding some way to measure the value of different goods. Without the benefit of prices or some other standard, people with different products have a difficult time determining whether a trade makes sense for each person engaged in it; that is, whether it is fair.