No. 10-548

In The
Supreme Court of the United States

KAISER EAGLE MOUNTAIN, INC., and MINE RECLAMATION CORPORATION,
Petitioners,

v.

NATIONAL PARKS AND CONSERVATION ASSOCIATION, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR JUDGE CRAIG MANSON AND L. MICHAEL BOGERT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF FOR *AMICI CURIAE*

Judge Craig Manson and L. Michael Bogert respectfully move for leave to file the following brief as *amici curiae* in support of the petition for certiorari. Petitioners have consented to the filing of this brief. Respondents have not responded to a request for consent.[1]

Amici's interest in this case arises from their past service as an officer and an attorney within the Department of the Interior with responsibility for compliance with or advice regarding the National Environmental Policy Act (NEPA), at issue in this case. Their past positions, experience, and interest in this case are more fully described in the brief, at 1-3.

This brief will the burdens on federal decisionmaking created by an excessive and impossibly demanding application of NEPA, such as reflected in the decision below.

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[1] Due to a late decision to participate in this case, and similarly late acquisition of Supreme Court counsel, *amici* were unable to provide respondents with the 10-day notice required by Supreme Court Rule 37.2(a). That failure, however, is harmless in that such notice was designed to allow respondents to seek an extension in order to address arguments by any *amici*, and respondents in this case have already sought and received an extension. This brief thus will be filed more than 30 days prior to the due date for briefs in opposition, and respondents will suffer no prejudice from the lack of earlier notice.

Respectfully submitted,

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Dated: November 26, 2010

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INTEREST OF *AMICI CURIAE* [1]

Amici are former federal public servants who, in their official roles, had responsibility for complying with the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (NEPA).

Judge Craig Manson was the former Assistant Secretary for Fish, Wildlife and Parks at the Department of the Interior. Prior to that, he was a Superior Court Judge for the County of Sacramento. Prior to that, he was the Chief Counsel to the California Department of Fish and Game where, among other responsibilities, he advised his client agency on its obligations under the California Environmental Quality Act, a statute similar, though not identical, to NEPA.

L. Michael Bogert is former Counselor to the Secretary of the Department of the Interior, where he was responsible for advising the Secretary on law and policy as it related to land-use decisions and compliance with, *inter alia*, the Federal Land Policy Management Act and the Endangered Species Act, both at issue in this case.

Amici have first-hand experience and knowledge of the often unduly burdensome interaction between NEPA's procedural requirements and the underlying substantive environmental laws governing land management and other decisions. They know well the seemingly intractable process that emerges under

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

NEPA, even when all other substantive requirements of law have been fully satisfied by the federal government. *Amici* have lived with the inherent imperfection in federal land use decision making and, in many instances, have inherited the burdensome demands for unrealistic perfection imposed by judicial review of their work under NEPA.

Amici likewise have considerable first-hand experience with the length of time that it takes to manage environmental analysis through NEPA and, in some instances, have been named as defendants in NEPA lawsuits. They have a practical understanding of the delays caused by litigation on the adequacy of NEPA documentation and thus have an interest in this case as an exemplar of judicial micro-management of a statutory framework that Congress never intended to require the unattainable perfection demanded by the federal courts in the Ninth Circuit. *Amici* have been part of lawful and valuable efforts by their client agencies to collect environmental assets that would benefit the United States, its citizens, and the environment in accordance with the ESA and the FLPMA, but which were rendered more costly and burdensome by having to comply with unreasonable and irrational interpretations of NEPA by litigants and the courts.

Finally, *amici* hail from the Western United States which, as in this case, is the *locus in quo* of many disputes under NEPA. They are familiar with the interplay between federal land-management policy and species protection in that geography, the law emanating from the Ninth Circuit, and the unique burdens

that court has imposed on decisions regarding land in that Circuit.

STATEMENT

The Ninth Circuit in this case aggressively and erroneously applied NEPA to vacate and remand a decade-old land-exchange decision by the Bureau of Land Management based on trivial purported errors of form that virtually define the category of harmless errors. It did so despite the Bureau's herculean efforts to comply with NEPA both before and after its decision, including:

- over a decade of pre-decision review beginning in 1989, which produced over 50,000 pages of administrative record;
- review by multiple federal and state agencies under both federal and state environmental laws;
- consideration of multiple alternatives, including the option of doing nothing at all;
- production of a 900-page draft and 1600-page final Environmental Impact Statement (EIS);
- successful defense of state law challenges to the land-exchange decision;
- supplementation of the record in response to new objections based on intervening standards imposed by the Ninth Circuit well after the underlying land-use decision was made in this case;
- over 10 years of litigating this current challenge to the Bureau's decision; and

- the expenditure of $80 million on the process.

Pet. at 1, 4-10.

Despite such efforts the Ninth Circuit found fault in the *form* of the Bureau's EIS, vacated the land-exchange decision, and remanded the matter back to the agency for still further proceedings and, inevitably, many years of subsequent and pointless litigation over the next iteration of the EIS. Pet. App. at 35.

The purported faults the Ninth Circuit found might well have been drafted by Lewis Carroll and articulated by the Queen of Hearts. According to the court below, the EIS:

- had a deficient summary paragraph because it supposedly included several sentences *too much* – even though such sentences addressed a particular question the Bureau was required by law to address, Pet. App. 23-29;
- was deficient in its extensive discussion of the issue of "eutrofication" because it mentioned the issue too often and in too many places, rather than addressing it in its own section and under its own heading, Pet. App. 32;
- did not consider a land-valuation methodology never argued in the administrative proceedings, imposed by a post-EIS decision of the Ninth Circuit, but which was in fact addressed when the Bureau supplemented the record in response to the new

argument being raised during litigation, Pet. App. 15-20 & n. 5.

In the face of such imaginary flaws, there was no doubt that the Bureau's decision satisfied all substantive environmental standards, had been subjected to a "hard" – one might say diamantine – look, and would not conceivably change as a result of the remand. In short, the remand served no purpose whatsoever, other than to add expense and further delay to the consummation of a beneficial land-exchange that has already been delayed by a decade of litigation.

SUMMARY OF ARGUMENT

The National Environmental Policy Act requires government agencies to follow a careful procedural regimen when making decisions that have potential environmental impacts. It is designed to ensure that decision-makers take a "hard look" at environmental concerns, but it does not require any particular outcome. Outcomes are determined by other statutes regulating the environment, the agency, or the subject matter of the decision.

But where the substance of a decision faces opposition, plaintiffs and some courts have used NEPA's procedural overlay to achieve the substantive results of blocking government decisions by entangling them in endless litigation over minor and harmless alleged procedural flaws. The excessive flyspecking of NEPA documentation drives up the time and expense it takes to prepare such documents, prolongs litigation over NEPA compliance after a decision, often delaying implementation of that decision, and demands an

unattainable procedural perfection that gives litigants and the courts a substantive veto on agency decisions.

This case is a particularly appropriate vehicle for reigning in the excesses by some courts in their application of NEPA. The underlying land-use decision in this case underwent 10 years and millions of dollars of review, resulting in a 1600-page EIS. After another 10 years of litigation, the case was remanded to the agency not because of any substantive flaws in the decision, but because of imagined and harmless errors that have nothing to do with NEPA's goal of diligent environmental decision-making.

Obstruction in the name of procedure is a serious distortion of NEPA and of the federal court's role in enforcing it. Unfortunately, such obstruction under NEPA is not unique to this case, seems to be a pattern in the Ninth Circuit, and has required this Court's attention and correction in other cases. This case – being one of the most egregious examples to date – offers an appropriate vehicle to once again reign in such abuses and return NEPA to its proper procedural role of encouraging sound decision-making rather than rendering it impossible actually to implement those decisions due to endless and pointless procedural delay.

ARGUMENT

I. NEPA Litigation Is Extensive and Now Imposes Burdens Well Beyond those Intended by Congress.

The National Environmental Policy Act was designed by Congress to provide a *process* by which federal entities make environmental decisions under other statutes defining an agency's substantive environmental obligations. "NEPA itself does not mandate particular results." *Robertson* v. *Methow Valley Citizens Council,* 490 U.S. 332, 350 (1989). Rather, it is simply a means of ensuring that agencies take a "hard look" at the issues before them. *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n. 21 (1976).

While NEPA's procedural overlay on decisions potentially subject to substantive environmental statutes will inevitably impose some additional costs and burdens, those costs and burdens have grown well out of proportion to NEPA's simple procedural goals.

According to the Council on Environmental Quality (CEQ), the federal agency with policy oversight of NEPA, "brief" environmental assessments (EAs) typically range from 10 to 30 pages in length, require from two weeks to two months to complete, and cost between $5,000 and $20,000. Larger environmental assessments associated with controversial or high profile projects, typically range from 50 to more than 200 pages in length, require from nine to 18 months to complete, and cost between $50,000 and $200,000.[2]

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[2] *See* NEPA Task Force Report to the Council on Environmental Quality, *Modernizing NEPA Implementation* (Sept.

For projects with potentially significant environmental impacts a still longer EIS must be prepared. EISs typically range from 200 to more than 2,000 pages, require from one to more than six years to complete, and cost between $250,000 and $2 million.[3] Since 2004, approximately 3,812 EISs have been published by Federal agencies.[4] Assuming a reasonable EIS median cost of $1.125 million based on CEQ data, this has resulted billions of dollars expended for NEPA compliance since 2004. And that figure does not even include the cost of environmental analysis obligations earlier in the NEPA process.

Protracted litigation over NEPA's requirements imposes still further costs on federal decision-making, particularly in connection with land-management decisions. According to CEQ, out of 132 NEPA cases filed in 2008, 77 cases can be described as "public lands" cases, for an approximate total of 58 percent of all the outstanding NEPA litigation.[5] Most cases are brought by so-called "Public Interest Groups," which typically oppose the underlying decisions on substantive or policy grounds and seek to block the decisions through any available means. NEPA litigation data from 2008 reveal that of 374 total plaintiffs, 210 were characterized as "Public Interest Groups," with State Government NEPA plaintiffs numbering only 13.[6]

2003) at 65-66, *available at* http://ceq.hss.doe.gov/publications/modernizing_nepa_implementation.html.

[3] *Id.* at 66.

[4] *See http://yosemite.epa.gov/oeca/webeis.nsf/viEIS01?OpenView*.

[5] *See* http://ceq.hss.doe.gov/nepa/NEPA2008LitigationSurvey.pdf.

[6] *Id.*

In cases such as this one, "NEPA litigation – either to decide whether an EIS is required or to determine its adequacy once it is produced – adds further costs and delays. Fear of judicial review pushes agencies toward ever-lengthier and more elaborate EISs, responding to all major comments received in the public notice and comment period." Bradley C. Karkkanian, *Wither NEPA?*, 12 N.Y.U. ENVT'L. L.J. 333, 339 (2004).

Unfortunately, NEPA's procedural requirements have been hijacked by litigants and the courts to serve private purposes unrelated to NEPA's procedural goals. Litigants and the courts – particularly in the Ninth Circuit – have used NEPA to create byzantine and counterproductive requirements that threaten to delay or derail decisions that plainly satisfy all substantive environmental standards, have received the requisite "hard look," but that continued to be opposed by third parties for policy reasons. As noted by one commenter, NEPA plaintiffs "place[] a high value on NEPA because it affords extraordinary opportunities to throw up procedural roadblocks that may delay or kill projects" that they oppose. Karkkanian, 12 N.Y.U. ENVT'L. L.J. at 339.

Such litigation vindicates no substantive environmental policies, but rather simply adds to the financial burdens that must be borne by federal agencies, even where they scrupulously discharge their substantive environmental obligations under statutes such as the FLPMA, the ESA, and the National Forest Management Act. By demanding unreasonably and impossibly perfect satisfaction of invented glosses on NEPA's procedural requirements, such lit-

igation and court decisions stifle creativity in land-management decisions and undermine decisions that actually benefit the environment.

This case is a clear example of trivial and fictitious NEPA obligations being used to stifle such beneficial – and substantively lawful – federal decisions.

II. This Case Is an Especially Appropriate Vehicle for this Court to Reinforce the Judiciary's Narrow Role in Implementing NEPA.

This case is an especially stark example of a federal court using manufactured procedural hurdles under NEPA, and utterly harmless supposed errors, to block implementation of substantively lawful land-use decisions. As Judge Trott observed in dissent below, "[o]ur well-meaning environmental laws have unintentionally made such an endeavor a fool's errand." Pet. App. at 35.

Judge Trott is meticulous, and justly scathing, in his criticism of the process thus far and of the opinion below.

Regarding the long road travelled just to reach this point in the litigation, Judge Trott observes that the process started in 1989 with an application to the Bureau for the land exchange. The final NEPA EIS was issued in 1996, and affirmed on administrative appeal in 1999. It then was challenged in federal court "in 1999 – 10 years ago." Pet. App. 43.

> The case took over five years in district court simply *to get to summary judgment!* It took the court *three years* to rule on the completed motions, and, here we are at the end of 2009, another five years later, burdened by a se-

> riously flawed district court opinion, hitting the reset button, and unnecessarily sending the parties back to a Sisyphean hill which cannot be climbed in a lifetime – ten years after the IBLA's opinion. How many of the people who started this project are still employed by Kaiser, are still in public service, or for that matter, are still alive? Yet, the *process* has developed an eternal life of its own as full employment for all swept along with or by it.

Id. (emphasis in original).

Regarding the summary of purpose and need in the EIS – rejected for deigning to include a required mention of *Kaiser's* goals in conducting the exchange – Judge Trott marvels that his colleagues

> grudgingly conclude that the BLM adequately determined that the public interest is served by the landfill, but, in the same breath, they claim to have found a defect in BLM's *articulation* of the project's purpose and need.

Pet. App. 54 (emphasis added).

Regarding the EIS's treatment of the "eutrofication" issue – rejected for appearing in multiple locations rather than in its own consolidated section – Judge Trott notes that

> (1) it was the [plaintiffs'] burden to identify the failures they alleged, (2) the California Court of Appeal thoroughly examined and analyzed the eutrophication allegations in 1999 and had no trouble finding its way through the record, (3) I had no trouble finding eutrophication in this voluminous record, and (4) neither

> did the IBLA. * * * Only someone intent on not finding what they hoped was not there could fail to locate matters of their concern in this admittedly gigantic document.

Pet. App. 68-69.

And regarding the Bureau's analysis of the monetary value of the land being exchanged – rejected for not anticipating a valuation method never raised in the administrative proceedings, imposed by a *subsequent* Ninth Circuit decision, and then fully addressed during litigation via supplementation of the record – Judge Trott ruefully notes that the "final irony is that my colleagues send the case back to the [Bureau] to do something [it] has already done: consider the value of the land involved as a commercial landfill." Pet. App. 36. Indeed, he concludes, the Bureau "has thoroughly 'considered' the issue and issued a manifestly defensible answer. To remand at this point is a clear exercise in blind form over substance." Pet. App. at 96

Judge Trott properly characterizes this case as "yet another example of how daunting – if not impossible" – it is to obtain federal approval for land use decisions likely to be opposed by self-appointed public interest advocates. Pet. App. at 35. Judge Trott ultimately observes – flamboyantly, though not incorrectly – that even measured against the mythic obstacles faced by Ulysses on his return trip to Ithaca, "nothing * * * compares to the 'due process' of unchecked environmental law." Pet. App. at 35-36.

Unfortunately, "the endless process continues":

> No doubt we will see this case back again, years from now, unless the proponents of this

> project – including seven California counties – weary of it and throw in the towel, thwarted and defeated not by substance, but by interminable process.

Pet. App. at 43 (Trott, J., dissenting).

Such problems are not unique to this case, but unfortunately reflect a pattern in the Ninth Circuit. *See, e.g.*, *Native Ecosystems Council* v. *Tidwell*, 599 F.3d 926, 929 (CA9 2010) (remanding updates to grazing allotments because the Forest Service supposedly failed to take the requisite "hard look" under NEPA); *id.* at 938 (Kozinski, J., dissenting) ("The majority oversteps the limited role of a court reviewing an agency's decision," in holding that the Forest Service's "216-page Environmental Assessment * * * and a bevy of supplemental reports" failed to satisfy NEPA's "hard look" requirement); *Center for Biological Diversity* v. *United States Dept. of Interior*, 623 F.3d 633, 636-41 (CA9 2010) (remanding because Bureau of Land Management supposedly failed to take a sufficiently "hard look" at a land exchange proposed in 1994, approved in 2000, affirmed on administrative appeal in 2004, but rejected by the Ninth Circuit in 2010); *id.* at 651 (Tallman, J., dissenting) (criticizing the majority for failing to exercise the "proper level of deference owed to agency determinations made within the agency's area of expertise" and endeavoring "to impermissibly expand the scope of judicial oversight and scrutiny of agency action"). The current case, however, is among the most egregious abuses of NEPA by the Ninth Circuit.

Given the extreme nature of the Ninth Circuit's actions below, and the sheer pointlessness of the re-

mand, the petition in this case affords this Court an excellent vehicle for reigning in the destructive excesses of certain federal courts under NEPA.

This Court is not unfamiliar with correcting judicial maneuvering under NEPA by lower federal courts. In both *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010), and *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008), this Court checked the overzealous tendency of the Ninth Circuit to issue injunctions as a matter of course in NEPA cases. Such injunctions interfered with substantively lawful federal activity and improperly elevated procedural requirements to substantive barriers.

In both cases this Court overruled decisions of the Ninth Circuit that had misused NEPA and converted it into a sword by which plaintiffs could collaterally challenge substantive decisions with which they disagreed. As this Court held in *Monsanto*, however, it is not the law "to presume that an injunction is the proper remedy for a NEPA violation except in unusual circumstances." 130 S. Ct. at 2757. And NEPA places no "thumb on the scales" for use in blocking substantively lawful decisions. *Id.* And in *Winter*, this Court chided the Ninth Circuit for "significantly understat[ing] the burden the preliminary injunction would impose on the [the Navy] * * *, and the injunction's consequent adverse impact on the public interest in national defense." *Winter*, 129 S. Ct. at 377.

The lessons of *Monsanto* and *Winter* are that this Court will not tolerate inferior federal courts using NEPA as a license to invade the underlying merits of agency decision-making. Just as this Court con-

fronted the abuse of NEPA in *Monsanto* and *Winter*, the Ninth Circuit here has once again exaggerated and expanded the burdens imposed by marginal elements of NEPA's procedural requirements. The supposed errors vigorously teased from the administrative record by the Ninth Circuit below are at best harmless and at worst imaginary, and they are currently blocking implementation of a substantively lawful and beneficial land exchange. As it did in *Monsanto* and *Winter*, this Court should grant the petition to correct such unwarranted obstructionism.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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