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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 99-70922

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GRAND CANYON TRUST, et al.,

Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and  
UNITED STATES OF AMERICA

Respondents.

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BRIEF FOR RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	iii
JURISDICTIONAL STATEMENT .....	1
QUESTIONS PRESENTED .....	2
STATEMENT OF THE CASE .....	2
A. Nature of the Case. ....	2
B. Statutory and Regulatory Scheme .....	5
1. Atomic Energy Act and NRC Regulations .....	5
2. Endangered Species Act and Fish and Wildlife Service Regulations .....	7
C. Statement of Facts .....	9
1. Creation of Atlas's Tailings Pile .....	9
2. The License Amendment, NEPA Review, and ESA Consultation .....	11
D. Petitioners' Requests for Agency Enforcement and for an NRC Hearing .....	17
E. Related Proceedings .....	21
1. Bankruptcy Proceeding .....	22
2. Petitioners' ESA Suit in District Court .....	23
SUMMARY OF ARGUMENT .....	24
ARGUMENT .....	29
Standard and Scope of Review .....	29
<b>I. PETITIONERS CHALLENGING NUCLEAR REGULATORY COMMISSION LICENSING DECISIONS MAY NOT BYPASS THE ADMINISTRATIVE HEARING PROCESS, AND MUST AWAIT A</b>	

**FINAL AGENCY DECISION BEFORE FILING A PETITION FOR REVIEW IN THE COURT OF APPEALS . . . . . 30**

**A. Petitioners Do Not Challenge “Final” NRC Action, As**

Required By Law . . . . . 31

1. Finality Doctrine. . . . . 31

2. Particular Agency Decisions Challenged . . . . . 35

**B. Petitioners Cannot Bypass An Ongoing Agency Hearing Process. . . 38**

**C. No Exception to the Finality Requirement Allows Judicial**

Review Now . . . . . 39

**II. THE NRC STAFF ACTIONS, ALTHOUGH NOT FINAL, WERE REASONABLE AND LAWFUL UNDER THE ESA AND NEPA . . . . . 45**

A. The NRC Staff Reasonably Has Not Reinitiated ESA Consultation . . 46

B. The NRC Staff Reasonably Has Not Prepared a Supplemental EIS. . . 54

**CONCLUSION . . . . . 58**

**CERTIFICATION OF COMPLIANCE PURSUANT TO NINTH CIRCUIT RULE 32 (e)(4) . . . . . 59**

## TABLE OF AUTHORITIES

### FEDERAL CASES

<u>Acura of Bellevue v. Reich</u> , 90 F.3d 1403 (9 <sup>TH</sup> Cir. 1996), cert. denied, 659 U.S. 1609 (1997) .....	31,37,38
<u>Aluminum Co. v. Administrator, BPA</u> , 175 F.3d 1156 (9 <sup>th</sup> Cir. 1999), cert. denied, 120 S. Ct. 933 (2000) .....	8,30,43,50
<u>American Rivers v. National Marine Fisheries</u> , 126 F.3d 1118 (9 <sup>th</sup> Cir. 1997) .....	51
<u>Bennett v. Spear</u> , 520 U.S. 154 (1997) .....	7
<u>California Save our Streams Council v. Yeutter</u> , 887 F.2d 908 (9 <sup>th</sup> Cir. 1989) .....	43
<u>Camp v. Pitts</u> , 411 U.S. 138 (1973) .....	29
<u>Career Education, Inc. v. Department of Education</u> , 6 F.3d 817 (D.C. Cir. 1993) .....	45
<u>Chevron, USA, Inc. v. NRDC</u> , 467 U.S. 837 (1984) .....	30
<u>Commonwealth of Massachusetts v. NRC</u> , 924 F.2d 311 (D.C. Cir. 1991), cert. denied, 502 U.S. 899 (1991) .....	37
<u>Darby v. Cisneros</u> , 509 U.S. 137 (1993) .....	37
<u>Forest Conservation Council v. Espy</u> , 835 F.Supp. 1202, (D. Id. 1993) aff'd without published opinion, 42 F.3d 1399 (9 <sup>th</sup> Cir. 1994) .....	49,55
<u>Gallo Cattle Company v. U.S. Department of Agriculture</u> , 159 F.3d 1194 (9 <sup>th</sup> Cir. 1998) .....	passim
<u>General Atomics v. NRC</u> , 75 F.3d 536 (9 <sup>th</sup> Cir. 1996) .....	31,38
<u>Gibson v. NTSB</u> , 118 F.3d 1312 (9 <sup>th</sup> Cir. 1997), cert. denied, 523 U.S. 1047 (1998) .....	30

<u>Griggs v. Provident Consumer Discount Co.</u> , 459 U.S. 56 (1982) .....	39
<u>Honicker v. NRC</u> , 590 F.2d 1207, (D.C. Cir. 1979), cert. denied, 441 U.S. 906 (1979) .....	34
<u>Kelly v. Selin</u> , 42 F.3d 1501 (6 <sup>th</sup> cir. 1995), cert. denied, 515 U.S. 1159 (1995) .....	29
<u>Kleppe v. Sierra Club</u> , 427 U.S. 390 (1976) .....	56
<u>Leedom v. Kyne</u> , 358 U.S. 184 (1958) .....	44
<u>Lujan v. National Wildlife Federation</u> , 497 U.S. 871 (1990) .....	42
<u>Ma v. Reno</u> , 114 F.3d 128 (9 <sup>th</sup> Cir. 1997) .....	38
<u>Marsh v. Oregon Natural Resources Council</u> , 490 U.S. 360 (1989) .....	56
<u>NLRB v. California Horse Racing Brd.</u> , 940 F.2d 536 (9 <sup>th</sup> Cir. 1991) .....	44
<u>Northwest Resource Information Center v. National Marine Fisheries Service</u> , 25 F.3d 872 (9 <sup>th</sup> Cir. 1994) .....	42
<u>ONRC Action v. Bureau of Land Management</u> , 150 F.3d 1132 (9 <sup>th</sup> Cir. 1998) .....	42
<u>Outland v. CAB</u> , 284 F.2d 224 (D.C. Cir. 1960) .....	39
<u>Potomac Electric Power Co. v. ICC</u> , 702 F.2d 1026 (D.C. Cir. 1983) .....	40
<u>Proetti v. Levi</u> , 530 F.2d 836 (9 <sup>th</sup> Cir. 1976) .....	29
<u>Reid v. Engen</u> , 765 F.2d 1457 (9 <sup>th</sup> Cir. 1985) .....	41
<u>Shoreham-Wading River Central School District v. NRC</u> , 931 F.2d 102 (D.C. Cir. 1991) .....	37
<u>Sierra Club v. Marsh</u> , 816 F.2d 1356 (9 <sup>th</sup> Cir. 1987) .....	53
<u>Sierra Club v. NRC</u> , 825 F.2d 1356 (9 <sup>th</sup> Cir. 1987) .....	31,36,37,38

<u>Southwest Center v. U.S. Bureau of Reclamation</u> , 143 F.3d 515 (9 <sup>th</sup> Cir. 1998) . . . . .	53
<u>Stone v. INS</u> , 514 U.S. 386 (1995) . . . . .	39
<u>Trustees of Calif. State University v. Riley</u> , 74 F.3d 960 (9 <sup>th</sup> Cir. 1996) . . . . .	30
<u>Upper Snake River of Trout Unlimited v. Hodel</u> , 921 F.2d 232 (9 <sup>th</sup> Cir. 1990) . . . . .	56
<u>Veldhoen v. U.S. Coast Guard</u> , 35 F.3d 222 (11 <sup>th</sup> Cir. 1994) . . . . .	43
<u>Western Oil &amp; Gas v. EPA</u> , 633 F.2d 803 (9 <sup>th</sup> Cir. 1980) . . . . .	31

**DOCKETED CASES**

<u>Grand Canyon Trust et al. v. Babbitt</u> , No. 2:98CV0803S (D. Utah filed Nov. 10, 1998) . . . . .	23
<u>Greenpeace v. National Marine Fisheries Service</u> , No. C98-492Z 80 F. Supp. 2d 1137 (W.D. Wash. Jan. 25, 2000) . . . . .	49

**ADMINISTRATIVE ISSUANCES**

<u>Atlas Corp.</u> 1999 WL54709 (NRC, July 13, 1999) . . . . .	19
<u>Atlas Corp.</u> Unpublished Order, Oct. 28, 1999) . . . . .	19
<u>Atlas Corp.</u> LBP-00-04, 2000 WL 198930 (NRC, Feb. 17, 2000) . . . . .	19,33,36
<u>Hydro Resources, Inc.</u> , CLI-98-8, 47 NRC 314 (1998) . . . . .	19

**STATUTES**

5 U.S.C. § 706 . . . . .	29,40
16 U.S.C. § 1533, 1536 . . . . .	7,8,13,16
16 U.S.C. § 1636 . . . . .	15
28 U.S.C. § 1631 . . . . .	40
28 U.S.C. § 2341-2342 . . . . .	passim
42 U.S.C. § 2111-21114 . . . . .	5,12

42 U.S.C. § 2239 ..... passim

**REGULATIONS**

10 C.F.R. §§ 2.1201-2.1263 ..... passim

10 C.F.R., Part 2 ..... 6

10 C.F.R., Part 40 ..... 5

10 C.F.R. § 2.206 ..... passim

10 C.F.R. § 2.700 ..... 6

10 C.F.R. § 2.788 ..... 19

10 C.F.R. § 40.1 ..... 6

50 C.F.R. § 402.02 ..... 9

50 C.F.R. § 402.12 ..... 13

50 C.F.R. §402.14 (1995) ..... 7

50 C.F.R. §402.16 ..... 9

54 Fed. Reg. 8269 (Feb. 28, 1989) ..... 6

59 Fed.Reg. 16,665 (1994) ..... 11



## QUESTIONS PRESENTED

I. Whether petitioners, in claiming that a uranium mill tailings reclamation plan violates the Endangered Species Act, may bypass a pending NRC hearing process and request immediate judicial relief from this Court, where there has been no final agency action on the plan.

2. Presuming judicial review is permissible, whether the NRC staff acted lawfully when it approved a reclamation plan implementing a Fish and Wildlife Service Biological Opinion on protecting endangered fish, and determined to await a detailed groundwater remediation plan before reinitiating consultations with the Fish and Wildlife Service or deciding whether to issue a supplemental Environmental Impact Statement.

## STATEMENT OF THE CASE

### A. Nature of the Case.

This lawsuit is brought by multiple petitioners: Grand County Trust, Grand County, Dave Bodner, Ken Sleight, Joseph Knighton, Colorado Plateau River Guides, 3-D River Visions, Inc., and Sierra Club (collectively, "Petitioners") against the United States Nuclear Regulatory Commission and the United States of America. The case arises out of an NRC-regulated ongoing cleanup of a uranium mill tailings site in Moab, Utah, near the Colorado River. Petitioners claim agency

violations of the Endangered Species Act (“ESA”) and the National Environmental Policy Act (“NEPA”). Although the Commission as yet has taken no formal final action, petitioners seek judicial review now of two NRC staff documents which, petitioners say (Pet. Br., at 1), jointly comprise a “de facto denial by the Commission” of their pending requests for NRC action under the ESA.

At the threshold, the NRC maintains that the NRC has taken no final agency action, either formal or de facto, and thus that this Court lacks jurisdiction. The two NRC staff actions that petitioners challenge in this Court -- a denial of immediate enforcement relief under 10 C.F.R. § 2.206 and issuance of a license amendment approving a reclamation plan for the Moab site -- are interim steps, denying only the need for immediate action, and are expressly conditioned on the final result of an ongoing adjudicatory NRC hearing sought by petitioners themselves. Petitioners not only have sought an NRC hearing but also have challenged the Moab reclamation plan in a federal district court lawsuit in Utah. Neither the NRC hearing process nor the Utah lawsuit has yet reached a final decision.

The merits issues, were this Court to reach them, derive from a license amendment sought by the former Atlas Corporation, which the Atomic Energy

Commission first licensed in the 1950's to conduct uranium milling activities and to maintain a tailings pile at the Moab site. Although all milling activities ceased long ago, Atlas required an NRC license amendment to permit reclamation activities in order to close the site. The amendment Atlas sought would modify the license to require newly-imposed, more stringent procedures for the reclamation of the tailings pile. In May of 1999 the NRC staff granted the requested license amendment and approved the Atlas reclamation plan.

In connection with the reclamation plan, and as a result of inter-agency consultation required by the Endangered Species Act, the United States Fish and Wildlife Service prepared an extensive Biological Opinion covering reclamation of the Moab site. The Opinion set out a reasonable and prudent alternative (RPA) and reasonable and prudent measures to protect fish in the nearby Colorado River endangered by contaminants in the seepage from the bottom of the pile of tailings accumulated during activities licensed back in the 1950s. The Atlas reclamation plan included a requirement that Atlas significantly enhance the licensee's previous groundwater obligations by submitting a detailed plan for completing groundwater cleanup within the ten year period specified by the RPA.

Recently, the license for the Moab site activities was transferred to a reclamation trustee as the result of a Chapter 11 bankruptcy proceeding initiated

by Atlas in 1998. The reclamation trustee, PricewaterhouseCoopers, LLP, now stands in the shoes of Atlas as NRC's licensee.

In this lawsuit, petitioners ask this Court to intervene in the agency process while the NRC hearing on the reclamation plan, a hearing that petitioners requested, remains in progress. Petitioners seek reinitiation of inter-agency consultation on the Biological Opinion right away, on the ground of uncertainty about the adequacy of funding for the entire reclamation plan. On essentially the same ground, petitioners also ask this Court to order issuance of a supplemental EIS.

**B. Statutory and Regulatory Scheme.**

**1. Atomic Energy Act and NRC Regulations.**

Pursuant to sections 81-84 of the Atomic Energy Act, 42 U.S.C. §§ 2111-14, those who possess nuclear "byproduct" materials must hold an NRC license. The Act empowers the NRC to require its licensees "to conduct monitoring, perform remedial work, and to comply with such other measures as it may deem necessary or desirable to protect health or to minimize danger to life or property ... in connection with the disposal or storage of byproduct material." See 42 U.S.C. § 2112(b). Uranium milling facilities, which produce a form of byproduct material, are licensed under Part 40 of the NRC's regulations. See 10 C.F.R., Part 40.

“These regulations provide for the disposal of byproduct material and for the long-term care and custody of byproduct material and residual radioactivity.” 10 C.F.R. § 40.1.

Under the Atomic Energy Act, parties with an “interest” in an NRC licensing action, including a license amendment, may request an adjudicatory hearing before the agency. See 42 U.S.C. § 2239(a). The Commission has promulgated an elaborate regulatory scheme governing agency hearings on various licensing actions. See 10 C.F.R., Part 2. “Subpart G” of the agency’s procedural rules, for example, governs licensing of nuclear power reactors. See 10 C.F.R. § 2.700 et seq. The current case involves an amendment to an NRC “materials” license, which falls under “Subpart L” of the agency’s rules. See 10 C.F.R. §§ 2.1201-2.1263. See generally Final Rule, “Informal Hearing Procedures for Materials Licensing Adjudications,” 54 Fed. Reg. 8269 (Feb. 28, 1989).

Subpart L hearings require parties to show standing (i.e., an “interest” in the proceeding) and “areas of concern” germane to the proceeding. See 10 C.F.R. § 2.1205. An administrative judge from the NRC’s Atomic Safety Licensing Board panel presides. See 10 C.F.R. § 2.1209. The hearings are informal, and largely in writing, unless the presiding officer makes findings that the record would benefit from oral hearings with live witnesses. See 10 C.F.R. §§ 2.1234-35.

The NRC staff may issue the license or amendment at issue in a hearing while the hearing is still pending. See 10 C.F.R. § 2.1205(m). Affected parties may seek stays of NRC staff licensing actions when appropriate See 10 C.F.R. § 2.1263).

Final (and some interlocutory) decisions by presiding officers are appealable to the Commission. See 10 C.F.R. § 2.1253. In turn, final Commission orders are subject to judicial review in the courts of appeals. See 28 U.S.C. § 2341 et seq.; 42 U.S.C. § 2239(b).

## 2. Endangered Species Act and Fish and Wildlife Service Regulations.

In a recent decision, Bennett v. Spear, 520 U.S. 154 (1997), the Supreme Court discussed at length the statutory scheme established by the ESA. It bears repeating as background for the present controversy:

The ESA requires the Secretary of the Interior to promulgate regulations listing those species of animals that are “threatened” or “endangered” under specified criteria and to designate their “critical habitat.” 16 U.S.C. § 1533. The ESA further requires each federal agency to “insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary ...to be critical.” §1536(a)(2). If an agency determines that action it proposes to take may adversely affect a listed species, it must engage in formal consultation with the Fish and Wildlife Service, as delegate of the Secretary, ibid; 50 CFR §402.14 (1995), after which the Service must provide the agency with a written statement (the Biological Opinion) explaining how the proposed action will affect the species or its habitat, 16 U.S.C. §

1536(b)(3)(A). If the Service concludes that the proposed action will “jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification of [critical habitat],” §1536 (a)(2), the Biological Opinion must outline any “reasonable and prudent alternatives” that the Service believes will avoid that consequence, §1536(b)(3)(A). Additionally, if the Biological Opinion concludes that the agency action will not result in jeopardy or adverse habitat modification, or if it offers reasonable and prudent alternatives to avoid that consequence, the Service must provide the agency with a written statement (known as the Incidental Take Statement) specifying the “impact of such incidental taking on the species,” any “reasonable and prudent measures that the [Service] considers necessary or appropriate to minimize such impact,” and setting forth “the terms and conditions ... that must be complied with by the Federal agency ... to implement [those measures].”§1536(b)(4).

520 U.S. at 157-58. See also Aluminum Co. v. Administrator, BPA, 175 F.3d 1156, 1158-59 (9th Cir. 1999), cert. denied sub nom., Columbia Falls Aluminum Co. v. Administrator, BPA, 120 S. Ct. 933 (2000).

Although the ESA itself does not define the term agency “action,” the term is defined in Fish and Wildlife Service regulations implementing the ESA to mean:

all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to:

- (a) actions intended to conserve listed species or their habitat;
- (b) the promulgation of regulations;
- (c) the **granting of licenses**, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or
- (d) actions directly or indirectly causing modifications to the land, water, or air.

50 C.F.R. § 402.02 (emphasis added).

There is no statutory provision or requirement in the ESA addressing “reinitiation of consultation,” although that has become an issue in this litigation. The source of an obligation to reinitiate consultation comes from Fish and Wildlife Service regulations, which call for fresh consultation if “new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered” or if “the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion.” 50 C.F.R. § 402.16.

C. Statement of Facts.

1. Creation of Atlas’s Tailings Pile.

The Atlas property at issue is on the west bank of the Colorado River near Moab, Utah. It was originally owned by the Uranium Reduction Company, which first milled ore for uranium and piled tailings there in 1956, at the height of the Cold War, under a license from the Atomic Energy Commission, which was the precursor agency to the NRC. Atlas purchased the mill and the tailings site in

1962. See Biological Opinion (BO), ER 5-6.<sup>1</sup> “Tailings” are byproduct materials -- ground rock and additives used in the chemical process of removing uranium from ore. See ER 50. The tailings pile grew from 1956 until 1984, when Atlas ceased milling operations. See ER 8. Since 1984, no new tailings material has been generated at the site. See id.

The succession of events directly relevant to this lawsuit began in April 1994, when the NRC announced in the Federal Register that Atlas had proposed modifications to the reclamation plan in force under its then current license.<sup>2</sup> The Federal Register notice invited any interested party to request a hearing on the proposed reclamation modifications -- which involved a more rigorous process for

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<sup>1</sup>The Final Biological Opinion is reproduced at tab 1 of Petitioner’s Excerpts of the Record (hereafter “ER”). Citations to page numbers of documents appearing in the ER represent the numeration of the ER rather than the numeration within the individual documents. The facts as recited in our brief derive from the Biological Opinion and from correspondence and other documents that petitioners have placed in their Excerpts of Record, including a sworn declaration by Joseph Holonich that was first submitted to the federal district court in Utah, where petitioners’ companion lawsuit is pending. Mr. Holonich is an NRC staff official. He explains various NRC staff actions related to this lawsuit.

<sup>2</sup> Although it perhaps seems counter-intuitive, NRC licensees frequently seek amendments containing stricter requirements than their original license. When a licensee finds or is advised that changes must be made in the license to accommodate newly applicable standards or procedures, e.g., those resulting from legislative or regulatory changes or from a change in the use of the site, it is the licensee’s responsibility in the first instance to analyze what is needed and to design the proposal and propose any necessary amendment for NRC approval. Amendments provide an opportunity for a public hearing. See 42 U.S.C. § 2239.

on-site cleanup, including more stringent provisions for covering the tailings pile and for surface water drainage. See 59 Fed. Reg. 16,665 (1994). None of the petitioners in this lawsuit sought a hearing at that time, but the current petitioners did seek a hearing several years later, in January of 1999, just prior to NRC staff approval of the reclamation plan. See ER 156-197.

2. The License Amendment, NEPA Review, and ESA Consultation.

On May 28, 1999, Atlas received an updated version of the NRC license amendment it initially had sought in 1994 approving initiation of reclamation activities in order to permanently close the Moab site. See ER 313-330. Pursuant to NRC rules (10 C.F.R. § 2.1205(m)), the amendment took immediate effect, but its continuing validity remains subject to the outcome of the hearing petitioners had sought on January 27, 1999. See ER 156-197; see also ER 313-14. Issuance of the amendment culminated a lengthy pre-licensing process, including a full-scale environmental review under NEPA and extensive consultations and review under the Endangered Species Act.

Pursuant to NEPA, the NRC published a Draft Environmental Impact Statement in January, 1996, that evaluated Atlas's proposed reclamation plan and sought public comment. See ER 212. The key feature of Atlas's plan was onsite disposal of the mill tailings by covering the tailings pile with a "low permeability

radon barrier,” that is, a cover that would both seal off the escape of radon from the pile and prevent the infiltration of rainwater that would otherwise enter the pile. Rainwater that infiltrates the pile picks up contaminants and eventually seeps into the groundwater that in turn enters the Colorado river.

The environmental analysis assessed two alternatives in addition to onsite disposal plan proposed by Atlas. The first alternative considered, *inaction*, was summarily dismissed because it would not comply with NRC regulations to protect the public health and safety and was environmentally unacceptable. The second alternative considered, *moving* the tailings by rail or other transportation away from the Atlas site, was found environmentally competitive but was estimated to cost significantly more<sup>3</sup>-- over 5 times as much as reclamation onsite would cost, as then estimated. See DEIS, NUREG-1531, confirmed in FEIS, at 5-25 -26, March 1999 (attached to this brief). On a parallel track, the NRC consulted with the United States Fish and Wildlife Service on the reclamation plan’s potential to reduce contaminants adversely affecting endangered fish in the Colorado River. After a number of meetings and letters between the NRC and the

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<sup>3</sup> Congress expressly made considerations of the costs of its requirements relevant to the Commission’s regulatory management of mill tailings in 1983 when it amended Section 84a.(1) of the Atomic Energy Act to require the Commission conduct its regulatory program with “due consideration of the economic costs.” See 42 U.S.C § 2114.

Fish and Wildlife Service, the NRC formally requested consultation pursuant to Section 7 of the Endangered Species Act in November 1995. See ER 13.

Pursuant to a Fish and Wildlife Service rule, 50 C.F.R. § 402.12, the NRC initially provided to the Service the NRC's own Biological Assessment of the Atlas reclamation plan's potential effects on endangered species, See ER 13. In the course of this consultation, the NRC and the Fish and Wildlife Service engaged in a number of meetings and exchanged correspondence about the potential biological effects of the reclamation plan. See ER at 12-13. After the NRC provided a Supplemental Biological Assessment in February 1997, the Fish and Wildlife Service provided the NRC a Draft Biological Opinion on June 26, 1997. Id. The Draft BO analyzed the potential effects of Atlas's proposed cleanup plan on several endangered species -- four species of fish, the razorback sucker, Colorado squawfish, bonytail chub, and humpback chub, and a bird, the southwestern willow flycatcher. See ER at 15-16, 23-38.

Throughout this multi-year endeavor, Atlas agreed to extensions to the statutory time limits for issuance of the BO. (The Endangered Species Act calls for issuance of the BO within 90 days after consultation is initiated, unless consent of the license applicant is obtained. See 16 U.S.C. § 1536(b).) On July 29, 1998, the Fish and Wildlife Service, having ascertained that the NRC lacked authority to

deny a requested amendment that would comply with the applicable public health and safety and environmental requirements or to order Atlas to move the tailings off site absent a danger to health and safety (ER 16), issued a final Biological Opinion concluding that a number of steps were necessary, as part of Atlas's onsite reclamation plan, to protect the endangered species. See ER 1-125.

The Biological Opinion addressed an unusual situation under the ESA -- that is, the proposed agency action would mitigate a pre-existing problem threatening endangered species, as opposed to the more common situation in which an agency is considering action that would pose potential effects to an endangered species. Atlas had presented a plan to clean up a tailings pile which had been accumulating for approximately thirty years prior to 1984, the year when Atlas ceased operations. Thus, the NRC and the Fish and Wildlife Service were examining whether a proposed plan could end jeopardy to an endangered species and whether the plan would provide effective help to the fish as expeditiously as possible to counteract the harmful results of actions taken in the distant past.

The revised BO concluded that implementation of the reclamation plan as proposed by Atlas would likely leave two species of endangered fish in continued jeopardy by failing to eliminate degradation of water quality. See ER 17-18, 85-86. The BO called for prompt dewatering of the tailings to improve the critical

habitat. See ER 87. The BO noted that “a significant decrease in take should occur as soon as the pile is dewatered, and continue to decrease with time as the groundwater corrective action plan is implemented.” ER 97. The BO also stated that “a decrease in the amount of critical habitat adversely modified through leaching should occur as soon as the pile is dewatered and continue to decrease with time as the revised groundwater plan is implemented.” Id.

Thus, the BO called upon the NRC to follow a five-part “reasonable and prudent alternative” (RPA) to the reclamation plan as originally formulated, in order to avoid jeopardy to the fish and adverse modification of their critical habitat. See ER at 84-94. Most significantly, this RPA requires the development of a revised, multi-year groundwater corrective action plan that will clean up the groundwater to appropriate water quality standards. See ER 88-96. The RPA would “require Atlas to clean up contaminated groundwater to the extent necessary to meet relevant standards within 7 years” from the NRC’s approval of the revised groundwater plan. See ER 87. “Any accepted groundwater remediation plan must be designed to achieve cleanup in the shortest feasible period of time....,” the BO stated. Id. It recognized that a revised groundwater corrective action plan for the Atlas mill tailings site may require reinitiation of consultation pursuant to Section 7 of the ESA (16 U.S.C. § 1636). See ER 95.

Implementation of the plan would require an additional amendment to the NRC license.

Finally, the BO provided an "Incidental Take Statement," pursuant to § 7(b)(4) of the ESA, 16 U.S.C. § 1536(b)(4). See ER 96-104. The BO authorized take of individual members of the fish species for ten years. See ER 97. The BO placed terms and conditions on the incidental take statement and required reasonable and prudent measures to minimize the incidental take. See ER 96, 98-104. The protection of the incidental take statement depended on a condition requiring the licensee to clean up the contaminated groundwater to meet relevant water quality standards within 7 years after the NRC's approval of a revised groundwater clean-up plan. See ER 102-03.

The NRC staff duly incorporated the requirements of the Biological Opinion into the Atlas license amendment on site reclamation, which, as noted above, the agency issued on May 28, 1999. See ER 313-330. The agency letter transmitting the license amendment to Atlas noted that the license remained subject to the ongoing adjudicatory proceeding. Id. at 314.<sup>4</sup>

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<sup>4</sup> The license amendment required a more rigorous reclamation of the tailings disposal area than Atlas's original license and required the licensee to prepare a revised plan that would lead to completion of ground-water corrective measures consistent with the BO. The details for the plan to achieve the required corrective groundwater cleanup will be  
(continued...)

D. Petitioners' Requests for Agency Enforcement and for an NRC Hearing.

On January 11, 1999, nearly five years after the original offer of an NRC hearing and half a year after the issuance of the Biological Opinion, petitioners filed with the NRC a citizen's petition for agency action pursuant to 10 C.F.R. § 2.206.<sup>5</sup> That petition pointed to claimed ESA violations and set forth "facts based on which the NRC must amend the Atlas Materials License." See ER 138 et seq. Petitioners sought actions -- among them, removal of the tailings from the site for long term disposal elsewhere and prohibition of expenditure of resources on stabilizing<sup>6</sup> and covering the tailings pile -- inconsistent with Atlas's then-proposed (and later granted) license amendment providing for on-site reclamation of the mill tailings pile. Petitioners asked the NRC to take immediate action on their section 2.206 request. See id. The NRC staff sent petitioners a letter stating it would not take immediate action because there was no urgent health and safety hazard, but the staff indicated that the agency would respond to the petition on its

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<sup>4</sup>(...continued)

set forth in a separate license amendment on which there will be a fresh consultation with the Fish and Wildlife Service and another opportunity for interested persons to request an NRC hearing. See ER 337-338.

<sup>5</sup> Section 2.206 permits "[a]ny person" to "file a request to institute a proceeding ... to modify, suspend, or revoke a license, or for such other action as may be proper."

<sup>6</sup> Dewatering the tailings so that they will settle is an initial step in stabilizing.

merits within a reasonable time. See ER at 309. See also NRC's Certified Index of the Record, Index of Documents pertaining to the 10 C.F.R. § 2.206 Request of Grand Canyon Trust, document 3.

Within a matter of weeks after filing their 2.206 petition, petitioners filed another challenge to the Atlas license amendment, this time asking the Commission for an adjudicatory hearing in which to oppose the amendment. They acknowledged that their hearing request "raises essentially the same issues" as their section 2.206 petition. Id. at 156. On February 8, 1999, the Commission referred the request for a hearing to the agency's independent hearing tribunal, the Atomic Safety and Licensing Board Panel. Shortly thereafter, an administrative judge was appointed to preside over the hearing request. That hearing process is ongoing. Its outcome could include approval, alteration or withdrawal of the license amendment at issue, as well as a revision of the associated Environmental Impact Statement.

The parties in the agency hearing process, which include petitioners, the NRC staff, and the Moab licensee (originally Atlas, but now the reclamation trustee) have filed voluminous pleadings thus far, and the presiding officer has issued three lengthy and detailed interlocutory opinions holding, among other things, that petitioners had not shown that the balance of likelihood of success and

irreparable injury justified issuing a stay prohibiting implementation of the reclamation plan (Atlas Corp., 1999 WL 54709 (NRC, July 13, 1999)),<sup>7</sup> that petitioners' hearing request was timely (Atlas Corp., Unpublished Order, October 28, 1999), and that petitioners had shown sufficient "standing" and "areas of concern" to warrant a hearing (Atlas Corp., LBP-00-04, 2000 WL 198930 (NRC, February 17, 2000)). The presiding officer's final decision in the case will be appealable to the Commission itself (consisting of 5 Presidentially-appointed Commissioners). See 10 C.F.R. § 2.1253.

In the meantime, on May 13, 1999, petitioners filed a supplement to their January citizens' petition under 10 C.F.R. § 2.206. See ER at 269-306. In their supplement, petitioners pointed to "significant new information not previously considered" on the "likelihood that a revised groundwater corrective action plan...will be implemented." See ER at 269. The "new information" concerned a

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<sup>7</sup> The NRC's rules of practice permit a request for a stay of NRC staff licensing actions. See 10 C.F.R. § 2.1263; see also 10 C.F.R. § 2.788. Petitioners availed themselves of that opportunity on June 9, 1999, when they sought from the presiding official a stay of the license conditions relating to reclamation of the Moab site. The presiding administrative judge denied the stay motion, concluding that the conditions would not cause substantial changes in the current condition of the tailings site any time in the near future and that the hearing, however ultimately resolved, would conclude long before the conditions would have any significant impact on the status quo. NRC practice allowed petitioners to seek Commission review of the presiding judge's stay determination, but they did not do so. Compare Hydro Resources, Inc., CLI-98-8, 47 NRC 314 (1998).

possible financial shortfall resulting from Atlas's pending bankruptcy proceeding.

Id. Petitioners' supplement sought "immediate action with respect to the Moab site Materials License SUA-917 as follows:

- 1) Suspend the issuance of a license amendment to permit surface reclamation...
- 2) Initiate a supplemental NEPA process ....
- 3) Reinitiate consultation [under the ESA]..."

Id. at 272.

On May 27, 1999, an NRC staff official responded, saying that because the issues identified in the pending adjudicatory proceeding were similar to those raised in the 2.206 petition and supplement, he was deferring action on the citizen's petition until after the administrative judge's decision on the pending hearing request. The staff official indicated that he would respond to both the original petition and the supplement at the same time. See ER 309-310. He explained that his review of the immediate action aspect of the requests found "no immediate steps that are necessary or that could be taken to alleviate [petitioners'] concerns." See ER 309-10. Moreover, he wrote: "there is no data to indicate that there is an imminent danger that the current biological opinion will not be met; thus it would be inappropriate to immediately reinitiate consultation." Id. at 310.

Thereafter, on May 28, the NRC -- following its normal procedures for materials licenses, see 10 C.F.R. 2.1205(m) -- issued the contested license amendment notwithstanding the pendency of the section 2.206 petition and the hearing proceedings before the administrative judge. See E.R. 313 et seq. It is this license amendment, along with the NRC staff's denial of their supplemental section 2.206 petition, that petitioners claim amounts to final agency action reviewable in this Court. They filed a petition for judicial review in July of 1999.

We filed a motion in this Court to dismiss petitioners' lawsuit as premature, on the ground that petitioners still have agency remedies that they are in fact pursuing. Appellate Commissioner Peter Shaw entered an order denying our motion but "without prejudice to renewing the arguments in the answering brief" (Ninth Circuit Order, Jan. 28, 2000) -- which we do below, in Point I of this answering brief.

#### E. Related Proceedings.

Two other judicial proceedings bear on this lawsuit, although (like the NRC hearing process and the NRC 2.206 petitioning process) neither had reached a final decision at the time petitioners filed the present petition for review in this Court. One related case is a Chapter 11 bankruptcy proceeding filed by Atlas in federal bankruptcy court in Colorado, which culminated in a final decision in late

1999 removing Atlas from the Moab license and substituting a reclamation trustee as the NRC licensee for the Moab site. The other related case is petitioners' pending Endangered Species Act lawsuit, filed in late 1998 in federal district court in Utah, and still pending there.

1. Bankruptcy Proceeding.

In conjunction with the bankruptcy proceeding, the NRC has selected a reclamation trustee, in place of Atlas, to conduct the entire remediation of the tailings pile site leading to closure. See ER 337. Proceeds from the Atlas bankruptcy estate have been delivered or are deliverable to the trustee. Id. In addition, by law the Department of Energy is required to pay for a percentage of the cleanup costs. Id.

The reclamation trustee's license requires the trustee to complete technical studies and to submit a groundwater corrective action plan to the NRC. Id. When the plan is submitted, it will be more readily apparent whether the Atlas and DOE funds available to the trustee are sufficient to accomplish the entire reclamation plan. See ER 337-38.<sup>8</sup> The NRC has agreed to consult with the Fish and Wildlife

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<sup>8</sup>It is possible that additional reclamation funds will be forthcoming from the Congress or from a plan proposed by the United States Secretary of the Energy. See, e.g., "3 tough Utah problems may become solutions," [www.deseretnews.com](http://www.deseretnews.com), January 13, 2000.

Service under the ESA over the details of the proposed groundwater cleanup plan, when it is presented by the reclamation trustee. See ER 337. In the meantime, dewatering, an early step in the site cleanup preparatory to placement of the final cover, would have salutary effects on the groundwater and help to ensure the lasting effectiveness of any groundwater plan that may be submitted; dewatering is expected to take up to 30 months. See ER 337; see also ER 331-33.

## 2. Petitioners' ESA Suit in District Court.

Prior to seeking NRC relief or relief in this Court, petitioners had filed an ESA suit in federal district court in Utah. Grand Canyon Trust et al. v. Babbitt, No. 2:98CV0803S (D. Utah filed November 10, 1998). That suit names both the Fish and Wildlife Service and the NRC as defendants. It alleges that the Fish and Wildlife Service's BO violated the ESA and that the NRC's then-proposed approval of the Atlas reclamation plan also was illegal under the ESA. Petitioners specifically challenge the "incidental take" permission granted by the Fish and Wildlife Service. (An "incidental take" is essentially an unavoidable take of the fish because of the action, but not as a direct purpose of the action.) The NRC has maintained, among other things, that the district court lacks jurisdiction over an NRC licensing action. In addition, the NRC and the Fish and Wildlife Service argue that they have acted lawfully under the ESA.

Petitioners (as plaintiffs) also have argued in their federal district court suit, as they have argued in this Court and before the NRC in administrative proceedings, that *immediate* reinitiation of consultation between the NRC and the Fish and Wildlife Service is required to occur in light of Atlas's bankruptcy. The government responded that renewed consultation would be premature at this point, because the groundwater plan is not yet complete, and that the NRC and the Fish and Wildlife Service intended to consult again upon completion of the groundwater remediation plan. See ER 336-38. The government also pointed out that those involved in the initial consultation "were aware of the precarious financial position of the Atlas Corporation." See ER 336.

A series of substantive and procedural motions remains pending before the district court, which at this writing has issued no decisions.

### **SUMMARY OF ARGUMENT**

Petitioners' opening brief points to no agency order that plausibly may be characterized as sufficiently "final" to be subject to a petition for review under the Administrative Orders Review Act (popularly known as the Hobbs Act). A final agency order is a prerequisite to jurisdiction in this Court under the Hobbs Act. See 28 U.S.C. § 2342(4). Petitioners claim a variety of Endangered Species Act (ESA) and National Environmental Policy Act (NEPA) violations, but petitioners'

merits case, as discussed below, is without basis. Those claims, in any case, provide no ground for curing the absence of finality and requiring that this Court intervene in the ongoing agency process before exhaustion of the agency remedies that petitioners themselves have invoked.

1. Petitioners have initiated four simultaneous proceedings challenging the same NRC licensing action and raising essentially the same ESA and NEPA issues: one in this Court (the present petition for review), one in federal district court in Utah, one before the NRC staff and and one before an independent NRC administrative hearing tribunal. In each proceeding, petitioners seek an order blocking implementation of the NRC license amendment designed to facilitate “reclaiming” a Moab uranium mill tailings site now in trusteeship.

None of petitioners’ various challenges to the NRC license amendment has reached closure. Before the NRC, petitioners’ request for staff action under 10 C.F.R. § 2.206 has been placed on hold pending disposition of petitioners’ other pending agency request -- a petition for a license amendment hearing before a presiding officer from the NRC’s Atomic Safety and Licensing Board Panel. Even though neither the section 2.206 petition nor the license amendment proceeding has yet resulted in final Commission action, petitioners now come to this Court seeking immediate judicial relief. This they cannot do.

Absent extraordinary circumstances, a final agency decision comes at the end of the administrative process, and reflects the agency's definitive views. By definition, the NRC staff's interim denial of relief, and its grant of a license amendment subject to an agency hearing, cannot be viewed as definitive when petitioners themselves have demanded, and still are pursuing, an agency hearing in which the license amendment could be set aside. Numerous prior cases, from this Circuit and elsewhere, preclude simultaneous demands for relief before administrative agencies and federal courts. Petitioners must play out the administrative process, where they may prevail, before they may file a lawsuit.

Nothing about this case warrants extraordinary treatment. Petitioners' demand for immediate judicial oversight on the ground of unreasonable agency delay collapses of its own weight once it is realized that barely six months had gone by from the time of their initial hearing and enforcement request until the time they filed suit. Petitioners also suggest that the ESA and NEPA context of the current case overrides the usual finality prerequisite to judicial review, but a moment's reflection reveals that this cannot be correct. If it were, virtually any claim of statutory violation -- the routine fodder of the agency hearing process -- would allow litigants to bypass their agency remedies and proceed directly to court.

Accordingly, this Court should dismiss the present petition for review as premature, and require petitioners to await completion of the agency process which they themselves triggered.

2. If this Court were to overlook the prematurity of petitioners' lawsuit and examine their case on the merits, it would find their legal position insubstantial. Petitioners argue that the NRC staff erred in approving the Atlas reclamation plan without reinitiating consultation with the Fish and Wildlife Service and without issuing a supplemental EIS. Petitioners' position -- premised on the proposition that Atlas's bankruptcy renders completion of the reclamation plan financially impossible -- lacks substance.

The reclamation plan remains in force, and the reclamation trustee has undertaken the necessary first steps, including starting the process for dewatering, toward accomplishing the plan's goals. It is premature to decide now whether the financial resources of the bankrupt Atlas estate, plus statutory reclamation funds available from the United States Department of Energy, will prove insufficient to implement the entire plan. The plan's ultimate costs are uncertain, and will remain so until the reclamation trustee submits a groundwater remediation plan. At that point, the NRC has committed to consultation with the Fish and Wildlife Service.

To begin reconsultation now, as petitioners urge, would not be a productive use of government or trustee resources -- which are best devoted to dewatering and developing a detailed groundwater remediation plan. Reconsultation is not legally required and would be imprudent. Here, the NRC and its licensee are taking interim action protective of endangered fish, action that by no means compromises alternate plans that may emerge later. Unlike the cases cited in petitioners' brief, the protective measures proposed by the BO remain feasible. Their financial viability awaits completion of the trustee's detailed groundwater plan, expected during 2001. That is the point when reconsultation should take place.

Similarly, no principle of law calls for supplementing the NRC's existing EIS to consider Atlas's bankruptcy. EIS's are not routinely supplemented to account for all new information as it arises; updating is necessary only when something vital to the agency decisionmaking process has changed. Here, applying the "rule of reason" applicable to judicial review of agency EIS's, this Court ought not disturb the NRC's reasonable decision to adhere to the status quo while awaiting the groundwater remediation plan.

## ARGUMENT

### Standard and Scope of Review

“The Administrative Procedure Act (“APA”) [ 5 U.S.C. § 706] governs judicial review of administrative decisions involving the Endangered Species Act.” Aluminum Co. v. Administrator, BPA, 175 F.3d at 1160. Likewise, the APA sets out the standard that applies to judicial review of final licensing actions under the Atomic Energy Act and to review of the NRC’s NEPA compliance. See Kelley v. Selin, 42 F. 3d 1501, 1511 (6<sup>th</sup> Cir. 1995), cert. denied, 515 U.S. 1159 (1995). “Under the APA, [the Court has] authority to hold unlawful and set aside agency action...found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Aluminum Co., 175 F.3d at 1160 (citations omitted). A reviewing court may not “substitute [its] judgment for that of the agency, particularly when the challenged decision implicates substantial agency expertise.” Id. (citations omitted).

A court’s review under the APA, 5 U.S.C. § 706, normally is limited to a review of the administrative record before the agency at the time of decisionmaking. Camp v. Pitts, 411 U.S. 138, 141-142 (1973); Proetti v. Levi, 530 F.2d 836, 838 (9<sup>th</sup> Cir. 1976). This case involves, in part, a Biological Opinion issued by the United States Fish and Wildlife Service, an agency not

before this Court. In these circumstances, this Court may not review the lawfulness or reasonableness vel non of the Fish and Wildlife Service's BO. See Aluminum Co., 175 F.3d at 1160. Petitioners, however, are seeking judicial review of the BO in their pending federal district court lawsuit in Utah.

Our opening argument below (Point I) contests this Court's jurisdiction. On this issue, the Court's review is de novo. See Gibson v. NTSB, 118 F.3d 1312, 1313 (9<sup>th</sup> Cir. 1997), cert. denied, 523 U.S. 1047 (1998). Insofar as this Court's review requires it to consider NRC rules or the NRC's enabling legislation (the Atomic Energy Act), the Court should defer to reasonable agency interpretations. See, e.g., Trustees of Calif. State Univ. v. Riley, 74 F.3d 960, 964, 966 (9<sup>th</sup> Cir. 1996). See generally, Chevron, USA, Inc. v. NRDC, 467 U.S. 837, 844 (1984).

**I. PETITIONERS CHALLENGING NUCLEAR REGULATORY COMMISSION LICENSING DECISIONS MAY NOT BYPASS THE ADMINISTRATIVE HEARING PROCESS, AND MUST AWAIT A FINAL AGENCY DECISION BEFORE FILING A PETITION FOR REVIEW IN THE COURT OF APPEALS.**

Despite a pending lawsuit in federal district court in Utah, and two pending administrative proceedings before the NRC -- all on the same subject, the Atlas reclamation plan -- petitioners also seek relief in this Court. In doing so, they run afoul of the lines of jurisdiction established by the Hobbs Act, 28 U.S.C.

§ 2342(4), and section 189 of the Atomic Energy Act, 42 U.S.C. § 2239. Those provisions authorize the courts of appeals to review only “final” NRC orders.

An NRC order is final when the agency has given its “last word on the matter.” Sierra Club v. NRC, 825 F.2d 1356, 1362 (9<sup>th</sup> Cir. 1987), quoting Western Oil & Gas v. EPA, 633 F.2d 803, 807 (9<sup>th</sup> Cir. 1980). Accord, General Atomics v. NRC, 75 F.3d 536, 540-41 (9<sup>th</sup> Cir. 1996). In this case, the agency’s “last word” has not yet issued, because the NRC hearing process remains ongoing. Having sought an agency hearing on the reclamation plan, petitioners may not simultaneously seek judicial review of the plan. See Acura of Bellevue v. Reich, 90 F.3d 1403, 1408 (9<sup>th</sup> Cir. 1996), cert. denied, 519 US. 1109 (1997). Petitioners, in short, may not challenge the same agency action in two places at once

A. Petitioners Do Not Challenge “Final” NRC Action, As Required By Law.

1. Finality Doctrine.

The NRC is not only the place where petitioners must come first, but also the place where they must stay the course, in pursuing objections to the NRC license amendment and reclamation plan at issue here.<sup>9</sup> Congress gave the NRC

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<sup>9</sup> Petitioners recently sought clarification whether the presiding administrative judge had jurisdiction to decide whether a violation of the ESA had occurred. The judge affirmed his jurisdiction to decide whether NRC licensing actions comply with the ESA. See Atlas Corp., LBP-00-04, 2000 WL 198930 at \*\*6-8. He noted that if petitioners “for  
(continued...)

exclusive responsibility for licensing nuclear facilities. It also provided that only “final” NRC licensing orders, including license amendments, are judicially reviewable. See 28 U.S.C. § 2342(4). The Commission maintains legally adequate processes, including hearings before independent administrative judges, to consider the validity of licensing actions taken by its staff.

Petitioners presumably were well aware of this legal framework when, in January of 1999, they first filed their petition claiming Endangered Species Act violations and demanding NRC relief under 10 C.F.R. § 2.206, and also later in January when they sought an NRC hearing on the Atlas reclamation plan before an NRC administrative judge. The same was so on May 13, when, latching onto the recent bankruptcy of Atlas, they “supplemented” their petition for section 2.206 relief to demand immediate reinitiation of consultation with the Fish and Wildlife Service under the ESA.

Yet petitioners have not awaited the outcome of any of the agency proceedings they initiated. Instead, they have come straight to this Court. It now is transparent that petitioners had no intention of allowing NRC processes time to

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<sup>9</sup>(...continued)  
whatever reasons have now determined that they wish a kind of relief that is different from that which the Presiding Officer can provide, they are free to withdraw their intervention and seek relief elsewhere, if they deem such action appropriate.” Id. at \*\*7-8.

work, as we argue that they must, but were simply seeking a quick route to the court of appeals. This is of a piece with petitioners' simultaneous effort, over NRC is jurisdictional objection, to include the NRC as a defendant in a federal district court lawsuit they are litigating in Utah. Indeed, petitioners recently have said that the federal district court lawsuit, not the lawsuit they filed in this Court and not the proceedings they initiated before the NRC, is their preferred vehicle for litigating their ESA claims. See Atlas Corp., LBP-00-04, 2000 WL 198930 at \*7 (noting petitioners' assertion that the district court is "the proper place for their claims"). No court should reward such an obvious end run around orderly procedure. Nor can this Court simply ignore the jurisdictional requirement that judicial review come after, not before, final agency action.

This Court recently has elaborated on the requirements for finality in rejecting the notion that "a decision to deny interim relief is 'final agency action.'" Gallo Cattle Co. v. U.S. Dept. of Agriculture, 159 F.3d. 1194, 1198 (9<sup>th</sup> Cir. 1998). There, this Court stated:

Agency action is "final" if a minimum of two conditions are met: [f]irst, the action must mark the consummation of the agency's decision making process...[I]t must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.

Id. at 1199 (brackets and omissions in original; citations omitted; emphasis added). As we explain in detail below, the NRC staff's interim denial of relief in this case (ER 309-10) and its issuance of a license amendment, subject to an agency hearing (ER 313 et seq. ), do not come close to satisfying the finality requirement. By no stretch of the language can a deferral of a final staff decision while awaiting a final NRC adjudicatory decision be characterized as "the consummation of the agency's decision making process." Gallo Cattle Co., 159 F.3d at 1119. See also Honicker v. NRC, 590 F.2d 1207, 1209 (D.C. Cir. 1979), cert. denied, 441 U.S. 906 (1979) (NRC denial of immediate emergency relief not final reviewable action).

Petitioners' impatience for judicial intervention, while perhaps unsurprising, creates the potential for a waste of judicial and agency resources. It also risks conflicting results in the multiple processes petitioners have initiated, already involving two government agencies and two federal courts and no fewer than four separate proceedings -- each considering essentially the same factual and legal arguments.

## 2. Particular Agency Decisions Challenged.

Contrary to petitioners' assertions of jurisdiction in their appellate brief, neither the May 27, 1999, letter from the NRC Staff denying immediate section

2.206 relief nor the NRC staff order approving the Atlas license amendment constitutes, singly or together, “final agency action or a de facto denial of the Grand Canyon Trust’s 2.206 petition.” See Pet. Br., “Basis for Appeal,” at p. 1.

The first specified order is the NRC staff’s letter denying immediate action on Petitioners’ section 2.206 request. Plainly, no judicial review lies from this letter. To begin with, all that the NRC staff denied was interim relief, not final relief; the request for final relief is awaiting the outcome of the hearing process that petitioners initiated. It is well established that an agency’s refusal to provide an impatient litigant immediate or interim relief does not create finality. See Gallo Cattle Company, 159 F.3d at 1198; Honicker v. NRC, 590 F.2d at 1209.

Moreover, by its own terms, the May 27<sup>th</sup> letter denied only a request for immediate action; it deferred a merits response pending the outcome of the pending adjudicatory hearing process on the Atlas license amendment. See ER 309. Simple, direct statements on the face of the May 27 letter make it evident that this was an interim response. The letter stated that petitioners’ May 13 *supplement* would be considered along with the original January 11, 1999, petition under section 2.206. Id. The letter pointed out that the original petition seeking actions regarding the Atlas license also had requested immediate action and that on January 26, 1999, that request for immediate action was denied. Id. The letter

stressed that in the meantime petitioners had sought a hearing before the agency's Atomic Safety and Licensing Board Panel, identifying issues similar to those raised in the section 2.206 petition. In light of the similarity of the technical issues,<sup>10</sup> the letter indicated that the NRC would follow conventional agency practice and *defer* consideration of the petition for staff action until the conclusion of the hearing process that Petitioners had initiated. Id.

The agency hearing process was ongoing at the time of the May 27 letter and remains active today. The May 27 letter was "procedural in nature and merely denied the request for an immediate decision." See Sierra Club v. NRC, 825 F.2d at 1361. An interim agency decision like this does not allow agency litigants to go directly to court. Petitioners here were litigating the same core issues before the NRC administrative judge "when, without awaiting [the administrative judge's decision], petitioners sought from this court a ruling on the identical issues." Id. at 1361-62. This Court should "not entertain a petition where pending administrative proceedings or further agency action might render the case moot and judicial review completely unnecessary." Id. at 1362.

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<sup>10</sup> Petitioners asked that the hearing tribunal to consider, among other things, whether it was a violation of the ESA for the NRC staff to "fail[] to take action to conserve the fish before proceeding with the capping plan [plan for site reclamation including the ultimate tailings pile cover]." See Atlas Corp., LPB 00-04, 2000 WL 198930 at \*6.

Similarly, the other NRC staff document identified by petitioners -- the NRC staff's actual issuance of the Atlas license amendment on May 28 -- also cannot be viewed as "final" agency action. No judicial review lies where "the order under attack is undergoing further agency review." Shoreham-Wading River Cent. School Dist. v. NRC, 931 F.2d 102, 105 (D.C. Cir. 1991). The May 28 license amendment is the very order that is the subject of the adjudicatory proceeding invoked by petitioners themselves. It may well be set aside or modified as a result of that proceeding.<sup>11</sup> The Commission and its independent hearing tribunal obviously have not yet given the "last word" on the amendment's validity. See Sierra Club v. NRC, 825 F.2d at 1362.

Insofar as petitioners are concerned that the amendment has taken effect during the pendency of the hearing process, NRC rules provide them an adequate means -- a motion for a stay under 10 C.F.R. § 2.1263 -- to litigate their concerns. See note 7, supra, and accompanying text. This kind of immediate effectiveness scheme is lawful. See Commonwealth of Massachusetts v. NRC, 924 F.2d 311, 322 (D.C. Cir. 1991), cert. denied, 502 U.S. 899 (1991). Here, after petitioners

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<sup>11</sup> While the rule of Darby v. Cisneros, 509 U.S. 137 (1993), allows resort to the courts without exhaustion of agency processes under some regulatory schemes, that route is unavailable to petitioners here. As this Court has expressly held, "Darby is inapposite" where, as here, petitioners themselves have sought the administrative hearing. Acura of Bellevue v. Reich, 90 F.3d at 1408.

unsuccessfully asked the presiding administrative judge for the stay contemplated by NRC rules, they did not pursue the matter further, either before the Commission or in this Court. See note 7, supra.

**B. Petitioners Cannot Bypass An Ongoing Agency Hearing Process.**

Putting aside the nuances of the “finality” doctrine, it is black letter administrative law that those who challenge agency action may not resort to the judicial system while concurrently seeking further review before the agency itself. See Acura of Bellevue v. Reich, 90 F.3d at 1407-09. Accord, Ma v. Reno, 114 F.3d 128, 130-31 (9<sup>th</sup> Cir. 1997); General Atomics v. NRC, 75 F.3d at 540-41; Sierra Club v. NRC, 825 F.2d at 1362. In other words, a party cannot challenge the same agency order in two forums at once, both administrative and judicial. Yet that is precisely what petitioners here seek to do.

Already before the agency on a challenge (actually *two* challenges) to the Atlas reclamation license amendment, and already before a federal district court attacking that same amendment (improperly in our view), petitioners take a third bite at the apple and demand relief in this Court. But the Commission must be given a chance to allow its processes to work. “Allowing judicial review in the middle of the agency review process unjustifiably interferes with the agency’s right to consider and possibly change its position during the administrative

proceedings.” Acura of Bellevue, 90 F.3d at 1409. “[T]here is always a possibility that the order complained of will be modified in a way which renders judicial review unnecessary.” Id., quoting Outland v. CAB, 284 F.2d 224, 227 (D.C. Cir. 1960).

District courts lack power to issue decisions revising or affecting orders pending on appeal in this Court (and vice-versa). See, e.g., Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58-60 (1982). And courts of appeals routinely refuse to review ostensibly final agency orders at the behest of a party who is demanding agency reconsideration at the same time. See, e.g., Stone v. INS, 514 U.S. 386, 390-93 (1995). The same is true here. This Court should not entertain a petition for judicial review of an NRC staff licensing action where the NRC regulatory scheme allows for an agency hearing and internal agency review, and petitioners themselves have invoked that process.

C. No Exception to the Finality Requirement Allows Judicial Review Now.

Seemingly well aware of the doubtful, at best, nature of their jurisdictional basis for this appeal, petitioners urge mandamus-type relief as an alternative -- on the ground that “the NRC has failed to take action on the §2.206 petition within a ‘reasonable time’ as required by §2.206.” See Pet. Brief, at 2. This alternative claim is wholly without merit. Petitioners themselves invited deferral of the

section 2.206 response when, virtually immediately after filing their section 2.206 petition, they sought an adjudication on what they described as “essentially similar grounds.” Agencies, like courts, need not expend resources to provide separate parallel proceedings to resolve at the very same time the same issues with regard to the same parties.

Even absent the delay caused by deferral in favor of the adjudicatory proceeding, petitioners’ claim of “unreasonable delay” is not of the sort to require judicial interference in an ongoing agency process. When they filed their petition for review before this Court on July 22, 1999, petitioners’ original section 2.206 petition was barely 6 months old, and their May 13, 1999, “supplemental section 2.206 petition which is the basis of the present appeal” (Pet. Br. at 23) had been received only 2 months before, hardly a delay to raise an eyebrow, let alone invoke the All Writs Act (28 U.S.C. § 1631(b)) or the APA’s provision on unreasonable delay (5 U.S.C. § 706(1)). The several months’ “delay” in this case do not remotely resemble the *several years*’ delays that have concerned reviewing courts in prior unreasonable delay cases. Compare, e.g., Potomac Elec. Power Co. v. ICC, 702 F.2d 1026, 1033-35 (D.C. Cir. 1983). Petitioners themselves seemingly recognized the potential for delay at the time they sought an adjudicatory hearing on the Atlas license amendment. See ER 191. As indicated above (note 7, supra,

and accompanying text), the NRC's hearing tribunal has been active on this case virtually from its inception.

No other theory justifies overlooking the fatal lack of finality in the orders petitioners challenge. In the Hobbs Act and the Atomic Energy Act, Congress expressly prescribed the procedure to be used to challenge NRC final orders amending licenses. "Such a procedure mandates exhaustion of administrative remedies prior to seeking judicial review." Gallo Cattle Company v. U.S. Department of Agriculture, 159 F.3d at 1197. "[W]hile judicially-created exhaustion requirements may be waived by the courts for discretionary reasons, statutorily-provided exhaustion requirements deprive the court of jurisdiction and, thus, preclude any exercise of discretion by the court." Id., citing Reid v. Engen, 765 F2d 1457, 1462 (9<sup>th</sup> Cir. 1985). Here, petitioners have not exhausted any administrative remedy, but have sampled without buying one process or another, giving no time for completion. They are statutorily barred from seeking this Court's review prior to completion of the ongoing agency hearing process.

Petitioners' claims of NEPA and ESA violations do not establish a right to go to court prematurely. As we explain below (Point II), these claimed violations are without basis. The NEPA and the ESA statutory schemes, in any event, themselves require final agency action in advance of judicial review. As this

Court has held, NEPA creates no right of action of its own. See ONRC Action v. Bureau of Land Management, 150 F.3d 1132, 1135 (9<sup>th</sup> Cir. 1998), citing Lujan v. National Wildlife Federation, 497 U.S. 871, 872 (1990). “A party alleging violations of NEPA must identify a final agency action.” ONRC Action, 150 F.3d at 1135. And, while the ESA contains its own jurisdictional provisions, parties with ESA claims arising in licensing proceedings subject to direct review in the courts of appeals must follow the ordinary route to the court of appeals -- i.e., by challenging a final agency decision. See generally Northwest Resource Information Center v. National Marine Fisheries Service, 25 F.3d 872, 874-75 (9<sup>th</sup> Cir. 1994).

Petitioners urge early judicial review on the ground that the ESA and NEPA require agencies to finish endangered species and environmental reviews before irrevocable commitments are made (Pet. Br. at 34-35). But an NRC hearing on petitioners’ ESA and NEPA grievance does not place their interests at risk of irreparable harm. As the NRC hearing judge held when he rejected petitioners’ stay motion, the agency “proceeding -- however it is ultimately resolved -- will be concluded long before these license amendments will have any significant impact on the status quo.” Atlas Corp., 1999 WL 547901 at \*3 (NRC, July 13, 1999). He pointed to evidence that because the reclamation trustee must first dewater the

Moab site, “actual reclamation of the site” would not begin sooner than June 2002. Id. He also found that dewatering alone “does not irreversibly commit to perpetual storage on the site or preclude other alternatives.” Id. Petitioners made no effort to challenge these findings through a motion to reconsider, an appeal to the Commission, or otherwise. See note 7, supra.

If claims of statutory violations were enough to shift jurisdiction immediately from agencies to courts, there would be little left of the finality and exhaustion of remedies doctrines, for many if not all agency hearing tribunals, including the NRC’s, consider statutory questions on a routine basis. See Veldhoen v. U.S. Coast Guard, 35 F.3d 222, 225 (11<sup>th</sup> Cir. 1994), citing Aluminum Co. of America v. United States, 790 F.2d 938, 942 (D.C. Cir. 1986). When Congress establishes a particular scheme for review of agency action, as it did in the Atomic Energy Act, that scheme is exclusive, and all of petitioners’ claims, including ESA and NEPA claims, must be pursued within that scheme -- i.e., first before the agency and in the court of appeals only after final agency action. See, e.g., California Save our Streams Council v. Yeutter, 887 F.2d 908, 911 (9<sup>th</sup> Cir. 1989).

No claim is made here that the NRC has acted outside its statutory authority.

In Leedom v. Kyne, 358 U.S. 184 (1958), the Supreme Court circumvented usual limitations on judicial review of agency action in an extraordinary case when the Court found judicial intervention necessary to rein in blatantly lawless agency action. Our case, however, does not remotely resemble Leedom v. Kyne. There, the Court considered agency action that plainly exceeded the agency's delegated powers and flatly violated an explicit statutory command. See id. at 188; see also NLRB v. California Horse Racing Brd., 940 F.2d 536, 540 (9<sup>th</sup> Cir. 1991). The agency actions at issue here pertain directly to licensing of uranium mill tailings, matters clearly and exclusively within the delegated powers of the NRC. See 42 U.S.C. § 2111-14.

In sum, the current case should be disposed of routinely under the finality doctrine. The case by no means presents the extraordinary situation of a lawless agency, operating outside its statutory mandate, such that a reviewing court might exercise supervisory mandamus or other powers to exercise judicial review in the absence of a final agency decision.

## **II. THE NRC STAFF ACTIONS, ALTHOUGH NOT FINAL, WERE REASONABLE AND LAWFUL UNDER THE ESA AND NEPA.**

The provisions of the Hobbs Act and the Atomic Energy Act, which make only final decisions appealable, mean that ordinarily the NRC must defend in court

only those claims on which it has deliberated and reached a definitive view at the highest level. Here, though, petitioners offer a strident merits attack against interim NRC staff action, and we are constrained to answer their charges.

Petitioners' refusal to wait for the agency's final word in this case has not allowed the NRC's "top level of appeal an opportunity to place an official imprimatur" on staff level decisions -- agreeing, negating, or modifying them -- "before [they are] reviewed by a federal court." Career Education, Inc. v. Department of Education, 6 F.3d 817, 820 (D.C. Cir. 1993). Thus, agency counsel finds itself in the awkward posture of defending a not-yet-final agency decision that the Commission or its hearing tribunal may yet modify or reject. But, in the uncommon and "difficult litigating position" that arises here, counsel must be given the latitude to vigorously contest allegations of unlawfulness and unreasonableness without giving rise to a conclusion that their litigating position binds the agency in its ongoing proceedings. See Career Education, Inc., 6 F.3d at 820.

Accordingly, the NRC's litigating position in these circumstances is not tantamount to a final agency decision or proof "that further administrative proceedings should be dispensed with as futile." See 6 F.3d at 820. "The [NRC's] litigating position at this stage does not necessarily reflect," as would be far more

useful, “a deliberative adjudication of appellant’s claims.” *Id.* Nothing in this brief should be understood to provide petitioners an occasion to claim agency finality nor excuse them from exhausting their administrative remedies.

With this caveat in mind, we proceed to our response to petitioners’ two “merits” claims -- that the NRC must now reinitiate consultation under the ESA (Pet. Br. 36-42) and that it also supplement its final environmental impact statement (Pet. Br. 43-46). We will briefly review petitioners’ various arguments and explain where they fall short.

A. The NRC Staff Reasonably Has Not Reinitiated ESA Consultation.

Petitioners’ brief offers little substantive law and, notably, *no* useful alternatives to the NRC staff’s current approach to reclamation of the Moab site. The NRC is committed to consulting with the Fish and Wildlife Service (FWS) on the adoption of a groundwater remediation plan, once such a plan is completed by the reclamation trustee. Before that time it would be premature to revisit the Fish and Wildlife Service’s existing 120-page Biological Opinion (BO) (ER 4-124). None of petitioners’ arguments for immediate reconsultation is compelling.

1. Petitioners say that the danger this Court should intercede to avert is that federal agencies “will continue to follow a plan for cleanup of th[e Moab] site that is virtually certain not to work,” and that the answer is reinitiation of consultation.

See Pet. Br., at 31, 36 and passim. Their claim of “virtually certain” unworkability is unsupported. They overlook the tests and plans currently under way that will provide expertise and information on the economic and technical feasibility of meeting the “Reasonable and Prudent Alternative” set out in the BO and incorporated in the reclamation plan. All that is going forward in the short term is dewatering and preparation of a groundwater remediation plan. These actions are plainly sensible and will help, not harm, the endangered fish. Petitioners have not argued otherwise.

If NRC staff officials should conclude along the way that the current plan is not feasible --- either because cleanup cannot be designed to meet its goal or because the trustee reported insufficient funds<sup>12</sup>, the agency will reinitiate consultation on the project. Indeed, the agency has pledged to consult again when it has in hand a detailed groundwater remediation plan (ER 337-38). Moreover, the final radon barrier will not be placed until after the groundwater cleanup plan has been approved. This commitment meets the Fish and Wildlife Service (FWS) request (ER 307-09) that the NRC reinitiate consultation at a time when it

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<sup>12</sup>See 65 Fed. Reg. 138 (January 3,2000), NRC order transferring license to trustee, including requirement to report at least six months in advance in the event of any expected exhaustion in available funds. Id. at 140. The notice also states that future NRC consideration will address action dates in the license conditions that have passed or will imminently do so due to delays in the bankruptcy proceeding. Id. at 139.

determines that it lacks assurance that the provisions of the BO will be met, a request that petitioners wrongly view as an FWS request for consultation now. See, e.g., Pet. Br. at 40. The FWS reasonably left the determination to the NRC, the agency with the more intimate knowledge of the status of the project.

2. Petitioners' position amounts to a "no way if it can't be my way" approach that is rooted solely in heated rhetoric.<sup>13</sup> They refuse to credit the government agencies' reasonable compliance with the ESA in the unusual setting here -- where the proposed agency action does not add to contamination, but is a beneficial one needed to remedy present problems long in the making before the ESA was ever adopted. A significant action in that regard was a multi-year consultation that produced the extensive and lengthy BO. The BO resulted in a tiered "Reasonable and Prudent Alternative," which went beyond the site reclamation action covered by the NRC license amendment and covered the entire remediation at the site, to avoid jeopardizing the endangered fish.<sup>14</sup>

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<sup>13</sup>For example, petitioners use words such as "flood" and "pouring out" (e.g., Pet. Br. 9,11, 36) to describe the seepage and try to denigrate the NRC's entry into consultation by unsupported allegations that NRC action "was forced" and "under pressure from the FWS" (Pet. Br.18).

<sup>14</sup> In petitioners' parallel federal district court suit in Utah, they have claimed that a recent district court decision, Greenpeace v. National Marine Fisheries Service, No. C98-492Z, 80 F. Supp. 2d 1137 (W.D. Wash January 25, 2000), supports their view of the reconsultation issue. But Greenpeace on its facts is far removed from our case. The BO

(continued...)

Petitioners now want to revisit the BO, but not on the basis of a new listed species or any further technical knowledge or information about the river or the fish. See Forest Conservation Council v. Espy, 835 F. Supp. 1202, 1217 (D. Idaho 1993), aff'd without published opinion, 42 F.3d 1399 (9<sup>th</sup> Cir. 1994) (table). They are concerned that there may not be sufficient funding to carry out the reclamation plan. But petitioners have offered no concrete facts for the assertion of lack of funds or any concrete proposals of what could be discussed in a revised BO -- beyond how the cleanup would be paid for and what to do if the money cannot be raised. See Pet. Br.41-42. But the money-raising question is not a proper subject for a "biological" consultation. (The current BO does not discuss financing sources.) The second question is already addressed in the existing BO, albeit inferentially, as it requires a second consultation if the groundwater plan cannot work. And neither question is relevant absent concrete evidence that there will be a lack of funds.

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<sup>14</sup>(...continued)

at issue in Greenpeace addressed a broad program with the potential for significant future harm, whereas in the Moab case the BO addresses actions to cure existing environmental problems. Greenpeace considered a BO on the entire fishery program in the Pacific that was a scant 10 pages -- in contrast to the over 120 page comprehensive analysis of the single Moab cleanup. Moreover, the "threatened" species in Greenpeace had been relisted as "endangered." No similar relisting has occurred here.

3. Contrary to petitioners' apparent view that the NRC now should step back and restart the BO process, it makes much more sense to proceed along the lines set out in the BO's tiered Reasonable and Prudent Alternative. The Reasonable and Prudent Alternative calls for cleanup of the groundwater to desired levels of contaminants within ten years, but the starting point for cleanup is dewatering, for which preparations are going forward now under the existing reclamation plan. Draining the tailings pile is a necessary step to any alternative, much as repairing a ceiling leak precedes fixing the old rug or buying a new one. As we have stressed, a second consultation will precede the next step in the process: the issuance of a license amendment approving a detailed groundwater remediation plan.

The NRC's gradual approach is lawful and follows the Reasonable and Prudent Alternative. Biological Opinions have often prescribed Reasonable and Prudent Alternatives with multi-stage "tiered" actions where, as here, "sufficient scientific information is not available to determine with confidence what measures are necessary to ensure ultimate recovery of the listed [fish]," and there are "immediate actions which are necessary to improve survival until long term recovery measures can take effect." American Rivers v. National Marine Fisheries, 126 F.3d 1118, 1123, n. 11 (9<sup>th</sup> Cir. 1997). See also Aluminum Co. v.

Administrator, BPA, 175 F.3d at 1162 (where “differing scientific views resolved in part by expert choices and in part by commitments for further study, we cannot say the BPA acted arbitrarily, capriciously, or contrary to law in adopting ...[the] multi-part RPA”).

4. Petitioners assert that “[t]he consultation in this case was squarely based on the assumption that Atlas could pay for the kind of groundwater cleanup required,” and that it is critical that the BO be “updated when key information becomes inaccurate”. See Pet. Br. 37. As we have stated repeatedly, when, if ever, it becomes clear that the requirements cannot be met for lack of funds, consultation will occur. But because nothing in the BO reflects *any* consideration -- let alone “key” status -- of ability to pay, the BO does not require revision at this time to reflect petitioners’ current doubts.

Petitioners nonetheless demand reconsultation because “[u]nder no scenario” is there sufficient funding available to carry out the groundwater cleanup and “the fact that Atlas is insolvent” means that “the contemplated cleanup is simply not going to occur.” See Pet. Br. 38. But that conclusion is unsupported. Atlas and Department of Energy funds are available to the trustee as a result of the bankruptcy proceeding. ER 337. Petitioners themselves recognize that the amount could be as much as \$21.6 million. See ER 270. Other funds conceivably

could be forthcoming.<sup>15</sup> It will simply not be known before testing and plan specification what the final costs will be. Consequently, it is too soon to make a judgment whether presently available funds will be sufficient and if not, what the shortfall will be.

5. Petitioners have it backwards when they advise this Court that the longer the NRC delays determining the source of funds for cleaning up the pile, the longer it will take to accomplish the cleanup and the longer the fish will remain in jeopardy of extinction. See Pet. Br. at 39, 40, 41. In actuality, delaying action until there is financial certainty would be a greater risk for the fish. The sooner the licensee begins the dewatering of the pile, the sooner the cleanup will be accomplished. Moreover, the fish should receive interim benefits from the dewatering.<sup>16</sup> There is no suggestion in the BO that the contemplated dewatering, or in fact any of the contemplated actions under the reclamation plan, will harm

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<sup>15</sup>See, e.g., Statement of Hon. George Miller, Introducing bill to move the tailings, Cong. Record , E83 (daily ed. January 20, 1999); N.Y. Times, January 14, 2000 at A 13 cols. 4-6 (reporting Secretary Richardson's deal with Ute Indians including provisions for a percentage of profits to go toward the \$300 million estimated cost of moving the mill tailings from the Moab site.)

<sup>16</sup>In footnote 13 of their Brief, Petitioners say that reinitiation of consultation "does not mean that the NRC...may not take...whatever interim steps are necessary to begin the cleanup." However, the NRC's only steps are through its licensing actions and it is far from clear that a trustee would move ahead in face of the uncertainty as to its authority or goals that would result from a court-ordered reconsultation on the existing BO.

the fish. The ultimate question here is whether the licensed actions when completed will have sufficiently removed an already existing threat to the species.

Petitioners are incorrect that Sierra Club v. Marsh, 816 F.2d 1376 (9<sup>th</sup> Cir. 1987), supports their view on the reconsultation issue. In that case the agency actions were creating a new threat, not mitigating a pre-existing one. Petitioners give Marsh heavy emphasis, treating it as decisive (Pet. Br. at 30, 37, 40). The case therefore warrants close examination.

In Marsh, the Corps of Engineers began road work that was destroying present marshland habitat without having secured the new “mitigation lands” it had “traded” for them and with unexpected obstacles to ever acquiring them. Id. at 1388. As this Court pointed out when it later distinguished Marsh in Southwest Center v. U.S. Bureau of Reclamation, 143 F.3d 515, 524 (9<sup>th</sup> Cir. 1998), the Marsh court held simply that “if an agency plans to mitigate its adverse effects on an endangered species by acquiring habitat and creating a refuge, it must insure the creation of that refuge before it permits destruction or adverse modification of other habitat.” Unlike Marsh, where it was certain that the mitigation plan would not occur, here there is no solid evidence that the RPA cannot be accomplished. Thus, it is premature to do a second consultation at this point.

In our case, the proposed action does not destroy habitat but rather assures better water for the fish. When the mitigation plans collapsed in Marsh, reconsultation was necessary, as habitat was being destroyed and not replaced. Here, by contrast, the NRC and its reclamation trustee are implementing the reclamation plan as designed and destroying nothing.<sup>17</sup>

B. The NRC Staff Reasonably Has Not Prepared a Supplemental EIS.

Petitioners say that under NEPA the NRC may not lawfully “go forward with the license amendment while wearing ‘blindners’ to the Atlas bankruptcy’s ‘adverse environmental effects’” (Pet. Br. 46), but it cites no case or other authority where doubts about the adequacy of funding or other financial “new information” served as the basis for requiring a Supplemental Environmental Impact Statement.

In Forest Conservation Council v. Espy, the district court held (and this Court affirmed) that the Forest Service and National Marine Fisheries Service had not acted arbitrarily or capriciously in a case analogous to this one. 835 F.Supp. at 1219. There, the court considered a proposal to pave a forest development road to

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<sup>17</sup> Likewise the other cases cited by petitioners at pages 40-41 of their brief are not on point because in none were the actions taken or to be taken for the purpose of helping the endangered species; rather they were actions likely to affect the species adversely. In none did the timely protections for the species depend on a prompt beginning of the proposed action.

deal with drainage conditions and *provide better conditions for endangered fish*. The agencies had declined to prepare a supplemental EIS on “new information” that the fish had been relisted as an endangered species. Even though the new information was about the fish, and listing of an endangered species has important legal ramifications under the ESA, the court said that the new information changed only the “*legal* status of the salmon, but it did not change the *biological* status,” which was documented in the environmental impact statement that had been issued. *Id.* at 1216 (emphasis in original). On this basis, the court refused to require a supplement to the EIS. Here, there is even less reason to require supplementation: the suggested “new information” is speculative, not actual, and relates to the kind of business doubts that routinely occur in large projects and that are not the stuff of which supplemental EISs are made.

The Espy court emphasized the standard of reasonableness applied by the United States Supreme Court to agency decisions on whether to prepare an EIS, quoting from Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 373 (1989):

[A]n agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made...Application of the “rule of reason” thus turns on

the value of the new information to the still pending decision-making process...” Id at 373-74.

835 F. Supp at 1215. See also Upper Snake River of Trout Unlimited v. Hodel, 921 F.2d 232, 235 (9<sup>th</sup> Cir. 1990).

Espy found significant the Supreme Court’s “caution that where the decision rests upon a high level of technical expertise, the court should defer to “the informed discretion of the responsible federal agencies.” 835 F.Supp. at 1215, citing 490 U.S. at 377 (quoting Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976). This observation is of obvious relevance here. As in Espy, the judiciary should defer to the federal agencies with considerable technical expertise and resources in the relevant area. They are best positioned to judge at what stage of information and expertise consultation would be beneficial.

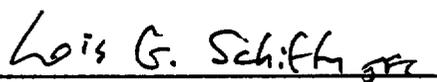
The FEIS treats the proposed license amendment comprehensively and considers the significant alternatives -- including petitioners’ preferred option, moving the tailings pile offsite. Although a funding shortage may one day prove a practical barrier to successful reclamation under the current plan, it is not clear now that that is the case, and petitioners’ speculation of a fatal financial shortfall is hardly reason to take the extraordinary step of redoing the comprehensive two-volume EIS already on the record.

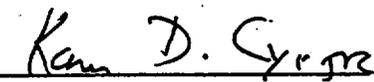
If in the end the NRC and the reclamation trustee develop a different approach for curing the groundwater problem with environmental effects that have not been evaluated in the FEIS, the NRC will revisit the question of whether to prepare a supplemental EIS. Such consideration should not precede the consultation about the groundwater remediation amendment with the FWS, in order to be sure that the proposal to be considered in an EIS is one that will end jeopardy for the fish.

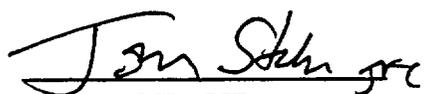
## CONCLUSION

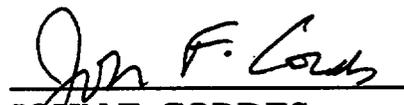
For the foregoing reasons, the petition for review should be dismissed for lack of jurisdiction, or in the alternative, denied for lack of merit.

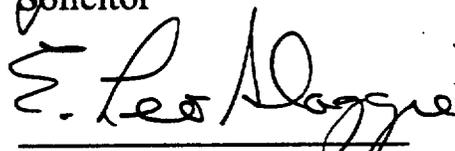
Respectfully submitted,

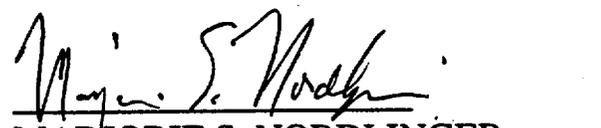
  
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March 23, 2000

CERTIFICATION OF COMPLIANCE  
PURSUANT TO NINTH CIRCUIT RULE 32(e)(4)

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the Brief for Respondents United States Nuclear Regulatory Commission and the United States uses a proportionately spaced typeface of 14 points and contains 13,072 words.

March 23, 2000

  
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Marjorie S. Nordlinger, Senior Attorney  
NRC Office of General Counsel

PRINCIPAL STATUTES INVOLVED IN THIS PROCEEDING

**§ 2342. Jurisdiction of court of appeals**

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

- (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;
- (2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7 [7 USCS §§ 181 et seq. and §§ 501 et seq.], except orders issued under sections 210(e), 217a, and 499g(a) of title 7;
- (3) all rules, regulations, or final orders of—
  - (A) the Secretary of Transportation issued pursuant to section 2, 9, 37, 41, or 43 of the Shipping Act, 1916 (46 U.S.C. App. 802, 803, 808, 835, 839, and 841a); and
  - (B) the Federal Maritime Commission issued pursuant to—
    - (i) section 23, 25, or 43 of the Shipping Act, 1916 (46 U.S.C. App. 822, 824, or 841a);
    - (ii) section 19 of the Merchant Marine Act, 1920 (46 U.S.C. App. 876);
    - (iii) section 2, 3, 4, or 5 of the Intercoastal Shipping Act, 1933 (46 U.S.C. App. 844, 845, 845a, or 845b);
    - (iv) section 14 or 17 of the Shipping Act of 1984 (46 U.S.C. App. 1713 or 1716); or
    - (v) section 2(d) or 3(d) of the Act of November 6, 1966 (46 U.S.C. App. 817d(d) or 817e(d))];
- (4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;
- (5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title and all final orders of such Commission made reviewable under section 11901(j)(2) of title 49, United States Code; and
- (6) all final orders under section 812 of the Fair Housing Act [42 USCS § 3612].

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

(Added Sept. 6, 1966, P. L. 89-554, § 4(e), 80 Stat. 622; Jan. 2, 1975, P. L. 93-584, § 4, 88 Stat. 1917; Oct. 13, 1978, P. L. 95-454, Title II, § 206, 92 Stat. 1144; Oct. 15, 1980, P. L. 96-454, § 8(b)(2), 94 Stat. 2021; Apr. 2, 1982, P. L. 97-164, P. L. 97-164, Title I, Part A, § 137, 96 Stat. 41; Oct. 30, 1984, P. L. 98-554, Title II, § 227(a)(4), 98 Stat. 2852; June 19, 1986, P. L. 99-336, § 5(a), 100 Stat. 638; Sept. 13, 1988, P. L. 100-430, § 11(a), 102 Stat. 1635.)

**§ 2344. Review of orders; time; notice; contents of petition; service**

On the entry of a final order reviewable under this chapter [28 USCS §§ 2341 et seq.], the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

- (1) the nature of the proceedings as to which review is sought;
- (2) the facts on which venue is based;
- (3) the grounds on which relief is sought; and
- (4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

(Added Sept. 6, 1966, P. L. 89-554, § 4(e), 80 Stat. 622.)

§ 2239. Hearings and judicial review

(a)(1) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceedings. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 2133 or 2134(b) of this title for a construction permit for a facility, and on any application under section 2134(c) of this title for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

(2)(A) The Commission may issue and make immediately effective any amendment to an operating license, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwith-

standing the pendency before the Commission of a request for a hearing from any person. Such amendment may be issued and made immediately effective in advance of the holding and completion of any required hearing. In determining under this section whether such amendment involves no significant hazards consideration, the Commission shall consult with the State in which the facility involved is located. In all other respects such amendment shall meet the requirements of this chapter.

(B) The Commission shall periodically (but not less frequently than once every thirty days) publish notice of any amendments issued, or proposed to be issued, as provided in subparagraph (A). Each such notice shall include all amendments issued, or proposed to be issued, since the date of publication of the last such periodic notice. Such notice shall, with respect to each amendment or proposed amendment (i) identify the facility involved, and (ii) provide a brief description of such amendment. Nothing in this subsection shall be construed to delay the effective date of any amendment.

(C) The Commission shall, during the ninety-day period following the effective date of this paragraph, promulgate regulations establishing (i) standards for determining whether any amendment to an operating license involves no significant hazards consideration; (ii) criteria for providing or, in emergency situations, dispensing with prior notice and reasonable opportunity for public comment on any such determination, which criteria shall take into account the exigency of the need for the amendment involved; and (iii) procedures for consultation on any such determination with the State in which the facility involved is located.

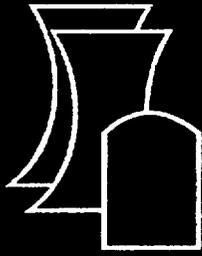
(b) Any final order entered in any proceeding of the kind specified in subsection (a) of this section shall be subject to judicial review in the manner prescribed in chapter 158 of title 28, and to the provisions of chapter 7 of title 5.

(Aug. 1, 1946, ch. 724, § 189, as added Aug. 30, 1954, ch. 1073, § 1, 68 Stat. 955, and amended Sept. 2, 1957, Pub. L. 85-256, § 7, 71 Stat. 579; Aug. 29, 1962, Pub. L. 87-615, § 2, 76 Stat. 409; Jan. 4, 1983, Pub. L. 97-415, § 12(a), 96 Stat. 2073.)

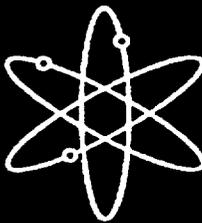
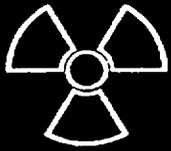
**All Writs Act, 28 U.S.C. § 1651**

**§ 1651. Writs**

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.



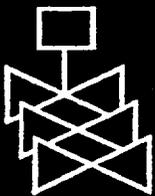
# Final Environmental Impact Statement Related to Reclamation of the Uranium Mill Tailings at the Atlas Site, Moab, Utah



Main Report  
Appendices A – I



Source Material License No. SUA 917  
Docket No. 40-3453  
Atlas Corporation



U.S. Nuclear Regulatory Commission  
Office of Nuclear Material Safety and Safeguards  
Washington, DC 20555-0001



exerted by the truck tires on the loose, unconsolidated ballast. Also, tire failure would be rapid and violent.

Anderson further states that two engineered highway overpasses for S.R. 279 and Seven Mile Highway would be required at a cost of \$2 million each and estimates between 5–10 million cubic yards of excavation at between \$15–\$30 million to achieve a width of 50 feet for a one-lane haul-road. No attempt has been made to verify either Whittington's (\$500,000 to \$2,000,000) or Anderson's (\$17,200,000 to \$32,300,000) cost estimates for a haul road.

It has been concluded that moving the tailings by large haul trucks could potentially be cost competitive with hauling by rail, depending on the cost of developing a haul road and whether the tailings would have to be dewatered before transport. However, even assuming very low costs for haul-road construction and no dewatering, the potential reduction in costs compared to hauling by rail would still result in the Plateau site alternative being several times more costly than Atlas' proposal.

## 5.6 CONCLUSION

Reviewing the key cost components in Table 5.3-3 indicates that the cost of rock and other capping material for the proposed alternative cannot begin to compensate for the large cost differences resulting from excavation, transport, and off-loading required to implement the Plateau site alternative. Requirements such as dust control, monitoring and radiation control, job-site supervision, and mobilization/demobilization are not included in Table 5.3-3 but are significant costs that are higher for the Plateau site alternative because of the longer project time and having two sites at different locations instead of just one. Finally, Table 5.3-3 does not include overhead, profit, and contingency which are major project costs. Atlas figures these at an average of 39 percent for its revised Plateau site estimate and 32 percent for its stabilization-in-place and original Plateau site estimate. Means' cost data book (Means 1995) supports margins in this range.

Several costs estimated by Atlas for the Plateau site alternative could be too high including various components of the transport costs. Also, Atlas' original estimate (including overhead, profit, and contingency) was about \$36.5 million lower than its revised estimate. Outside of the increased cost estimates for transport, much of the increase in the revised estimate can be attributed to upward adjustments for handling slimes. The fraction of slimes in the tailings pile is a significant area of uncertainty in estimating the total cost of the Plateau site alternative. It is concluded both of these estimates should be considered in representing the uncertainty in completing the Plateau site alternative. It has been determined that the original estimate may be "optimistically low" and the revised estimate may be "pessimistically high".

One of the Atlas proposal's main uncertainties is the cost of purchasing and hauling about 20,000 yds<sup>3</sup> of large riprap. This has been reflected in the independent estimate in Table 5.3-3 as potentially increasing costs by about \$550,000. If other estimated cost rates such as excavation, cleanup of contaminated materials, dust control, or health and safety have been estimated below what could be realized, the total cost of the Atlas proposal would be estimated too low. However, because similar cost rates for many of

the earthmoving variables have been applied to much larger quantities for the Plateau site alternative, then it seems likely that the total cost estimated for the Plateau site alternative would also be too low. In other words, the root causes that would result in underestimating the Atlas proposal would also tend to cause an underestimate of the Plateau site alternative. The essential difference in the alternatives that results in a variation of total project costs is the difference in the quantities of materials that must be excavated and relocated.

Based on review of other projects, it was observed that cost estimates of reclamation project costs have been low when compared to realized costs. Reasons may include unanticipated price inflation, revisions in design in response to unanticipated problems, or changing regulatory requirements. For these reasons the cost estimates of either of the reclamation alternatives could also be low. However, nothing has been found that suggests a systematic bias in the Atlas cost estimates that would overestimate the difference in alternative costs. To the contrary, the Atlas proposal reflects a design that has less inherent uncertainty than the alternative to relocate the tailings. Relocating the tailings would take much longer (624 weeks compared to 75) to complete. The off-site relocation of tailings would require handling much larger quantities of uncertain composition (a currently unknown fraction of the existing tailings could turn out to involve costly-to-handle slimes). These uncertainties would tend to increase estimates of total project costs for the Plateau site alternative relative to the Atlas proposal. Therefore, uncertainty in cost estimates could have more of a tendency to increase the realized cost over estimated cost for the Plateau site alternative.

For the Atlas proposal, it has been estimated that the maximum increase, if large riprap is not available locally, would be about \$550,000. It is not clear whether fuel taxes, included in project costs for hauling, would be sufficient to cover cumulative damage to area roads from hauling rock. However, as long as individual trucks meet weight restrictions, there is no reason to believe that they will cause damage and repair costs different than similar commercial vehicles that normally operate in the area. Repair and maintenance costs for U.S. 191 are the responsibility of the State of Utah—therefore, if cumulative damages result from the increased truck traffic associated with either alternative, Moab and Grand County taxes would not increase for repairs to this road.

Table 5.6-1 presents a comparison of the costs in 1996 dollars that have been discounted to the beginning of the project. As stated above, there is considerable uncertainty in what the realized project costs could be for either alternative. However, it has been determined that the minimum difference (present value in 1996 dollars) in project costs would be in the range of \$50 to \$60 million which reflects a present value based on Atlas' 1993 proposed alternative cost estimates. Atlas' revised estimate of the Plateau site alternative costs has been included in Table 5.6-1. Using these estimates would increase the cost difference between the Atlas proposal and the Plateau site alternatives to over \$80 million.

With respect to Atlas' 1993 cost estimates, there is an equal or greater potential for an increase in actual costs for the Plateau site alternative compared to the Atlas proposal. The uncertainty of the Plateau site alternative could be greater because of the larger volume of earthwork, the longer time required to complete the pile relocation, and the requirement to manage and control operations at two sites 30 km (18 miles) apart. In Table 5.6-1 an arbitrary 50-percent increase in costs over Atlas' 1993 estimates for each alternative to demonstrate the sensitivity of the estimated cost difference to an upside cost

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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GRAND CANYON TRUST, et al.,	)	
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	)	
Petitioner,	)	
	)	Docket No. 99-70922
v.	)	
	)	
U. S. NUCLEAR REGULATORY COMMISSION	)	
AND THE UNITED STATES OF AMERICA	)	
	)	
Federal Respondents	)	

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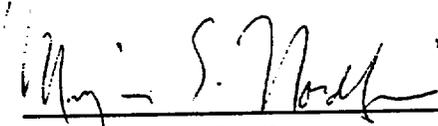
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CERTIFICATE OF SERVICE

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I hereby certify that the Respondent United States Nuclear Regulatory  
Commission's "Brief for Respondents" was served by first class mail this 23rd day of  
March 2000, upon the following:

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