No. 10-___ 10-548 OCT 22 2010

IN THE

Supreme Court of the United States

KAISER EAGLE MOUNTAIN, INC., AND
MINE RECLAMATION CORPORATION,

Petitioners,

v.

NATIONAL PARKS & CONSERVATION
ASSOCIATION ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Leonard J. Feldman
Jason T. Morgan
STOEL RIVES LLP
600 University Street,
Suite 3600
Seattle, WA 98101
(206) 624-0900

Thomas C. Goldstein
Counsel of Record
Jason P. Steed
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036
(202) 887-4000
tgoldstein@akingump.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTION PRESENTED

Does a court err by vacating an agency's action and remanding for further administrative proceedings that will have no effect on the agency's decision or serve any other substantive purpose?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties listed in the caption, the following were parties in the court of appeals:

Donna Charpied; Laurence Charpied; Desert Protection Society; Center for Community Action and Environmental Justice; Bureau of Land Management; United States Department of Interior; National Park Service; Bruce Babbitt, in his official capacity as Secretary of the Interior; Tom Fry, in his official capacity as Acting Director of the Bureau of Land Management; Al Wright, in his official capacity as Acting California State Director of the Bureau of Land Management; Tim Salt, in his official capacity as Bureau of Land Management California Desert District Manager; Robert Stanton, in his official capacity as Director of the National Park Service.

RULE 29.6 STATEMENT

Kaiser Eagle Mountain, LLC (formerly Kaiser Eagle Mountain, Inc.) is a wholly owned subsidiary of Kaiser Ventures LLC.

Kaiser Ventures LLC and Itel Container Ventures, Inc. each own more than 10 percent of Mine Reclamation, LLC (formerly Mine Reclamation Corp.).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Kaiser Eagle Mountain, Inc., and Mine Reclamation Corporation respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's opinion (Pet. App. A) is published at 606 F.3d 1058. The district court's opinion (Pet. App. B) is unpublished.

JURISDICTION

The court of appeals denied petitioners' timely petition for rehearing and suggestion of rehearing en banc on July 30, 2010. Pet. App. F. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statutes and regulations relevant to this petition are reproduced in the appendix (Pet. App. G).

STATEMENT OF THE CASE

This case arises from an approved and completed land exchange between petitioners Kaiser Eagle Mountain, Inc., and Mine Reclamation Corporation (collectively, "petitioner" or "Kaiser") and the United States. The exchange is the final legal prerequisite to the construction of what will be the nation's largest landfill. The project has undergone two decades of review, including the development and publication of a 1600-page Environmental Impact Statement (EIS), and has thus far cost $80 million.

The Ninth Circuit unanimously upheld the agency's determination that the land exchange satisfies the standard specified by Congress: that it will "well serve[]" the "public interest," 43 U.S.C. § 1716(a), including by producing significant environmental benefits.

But by a divided vote, the court (per Pregerson, J.) proceeded to vacate the agency's approval of the land exchange and remand the case to BLM. A lengthy dissent argued that the majority's ruling amounted to "blind form over substance," triggering significant administrative proceedings and inevitable appeals that lack any purpose, given that the agency on remand inevitably will reaffirm the land exchange. Pet. App. 96 (Trott, J., dissenting).

1. The Federal Land and Policy Management Act (Management Act) authorizes an exchange of federal and private property if the Secretary of the Interior "determines that the public interest will be well served by making that exchange." 43 U.S.C. § 1716(a). BLM appraises the property so that "the values [can] be equalized by the payment of money." *Id.* § 1716(b). The appraisal accounts for the property's "highest and best use," which is not necessarily the use proposed by the exchanging party but instead is the "most probable legal use." 43 C.F.R. § 2200.0-5; *see also* 43 C.F.R. § 2200.0-6.

Because the National Environmental Policy Act (NEPA) requires federal agencies to prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(c), BLM must produce an EIS for a land exchange, 43 C.F.R. § 2200.0-6(a); *see* 42 U.S.C. § 4371. The EIS process compels no substantive

outcome. Instead, it requires the agency to take a "hard look" at the consequences of its environmentally significant actions and their viable alternatives. Among other requirements, the EIS must "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. When an agency "is responding" to a private proposal, it is required to discuss the private purposes motivating the project. *E.g., Colo. Envt'l Coal. v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

2. Petitioner Kaiser Eagle Mountain, Inc. (Kaiser) owns an iron ore mine in Riverside County, California. Beginning in 1989, Kaiser sought to convert some of the site – which contains massive excavation pits surrounded by unreclaimed mining wastes – into a landfill to contain safely more than 700 million tons of non-hazardous waste to be collected from several Southern California counties over more than fifty years. Most of the waste would travel by train, arriving on the rail lines that previously conveyed iron ore away.

To implement the project, Kaiser had to acquire certain federal land for which it already held mining rights. Pursuant to the Management Act, BLM gave Kaiser that land in exchange for other valuable natural habitat that Kaiser owned and a payment by Kaiser to cover the difference in the properties' value. As explained by the United States, the "private lands that Kaiser offered for the exchange" would "consolidate public landholdings" in "an area designated by the United States Fish and Wildlife

Service as critical habitat for the desert tortoise," whereas the "federal lands selected for the exchange are generally fragmented parcels that encircle the former mining pits." U.S. C.A. Br. 6.

BLM and Riverside County (the lead state agency responsible for reviewing the project) jointly undertook a massive, multi-year environmental review under NEPA and the California Environmental Quality Act (CEQA). The expert Technical Advisory Panel commissioned to study the project ultimately found that

> the designers have done essentially all that is humanly possible to make this a safe landfill that will be protective of . . . the underlying and surrounding environment. Given the favorable site conditions, sophisticated waste management systems, and elaborate monitoring systems, the proposed Eagle Mountain Landfill could well become one of the world's safest landfills and a model for others to emulate.

Pet. App. 42.

The state courts found that an initial environmental assessment did not comply with state law. In 1996, BLM and Riverside County produced a new 900-page draft Environmental Impact Statement (EIS). In 1997, after a further period of review, which included tens of thousands of pages of comments and four public hearings, BLM issued a Record of Decision (ROD) approving the land exchange and published a final EIS spanning 1600 pages. Pet. App. E, K (EIS excerpts). The full administrative record is approximately 50,000 pages.

The EIS's summary paragraph of the brief statement of the purpose and need for the project to which BLM "is responding," 40 C.F.R. § 1502.13, states:

> The primary purpose of the Project is to develop a new Class III nonhazardous municipal solid waste landfill to meet the projected long-term demand for environmentally sound landfill capacity in Southern California; provide a long-term income source from the development of a nonhazardous municipal solid waste landfill; find an economically valuable use for the existing by-products at the Kaiser Eagle Mountain Mine site, including use of existing aggregate and overburden; and provide long-term land use and development goals and guidance for the Townsite.

Pet. App. 335 (EIS excerpt). The EIS then immediately details how the project fulfills a public purpose, including because the government will use the "long-term income source" provided by the landfill to acquire valuable habitat for protected species, fund environmental monitoring and mitigation, and acquire private parcels in Joshua Tree National Park. *See generally* Pet. App. K.

BLM studied in detail the land exchange proposed by Kaiser, as well as four alternatives that would have involved some different form of exchange, and also the option of rejecting the project outright. BLM studied more briefly other alternatives for addressing the region's landfill shortage without any land exchange – such as municipal waste measures, the siting and operation of other landfills, and waste

management alternatives – because those alternatives are a matter of state and local jurisdiction, beyond BLM's authority under the Management Act.

The U.S. Fish and Wildlife Service on three separate occasions found that the project presented "no jeopardy" to threatened or endangered species. Based on Kaiser's adoption of unprecedented environmental mitigation measures, the National Park Service agreed that the project complied with NEPA and CEQA and also specifically protected Joshua Tree National Park – the outer boundaries of which are near the project. The relevant state entities approved a zoning change, land use permits, and permits governing airborne emissions.

The Secretary of the Interior found as a matter of fact under the Management Act that the "public interest" would be "well serve[d]" by the exchange, 43 U.S.C. § 1716(a), because the project would not only fill a substantial public need for landfill space, but also provide the significant public benefit of protection of threatened and endangered species of plants and animals, Pet. App. 237-38. The agency furthermore determined that "all practicable means to avoid or reduce environmental harm have been adopted." *Id.* 270. *See also id.* 167 n.18.

In assessing the property so that "the values [would] be equalized by the payment of money," 43 U.S.C. § 1716(b), BLM found in the so-called "Yerke appraisal" that the determinative "most probable" use for the government's property, 43 C.F.R. § 2200.0-5, would be "holding [it] for speculative investment," Pet. App. 7. On that basis, BLM calculated that the government's property was worth

roughly $20,000 more than the property exchanged by Kaiser, *id.*, which then paid the difference.

3. Respondents National Parks Conservation Association (Conservation Association) and Donna and Laurence Charpied oppose the landfill project. Administratively, respondents protested the EIS, the Secretary's public interest determination, and BLM's valuation of the property. BLM responded to each of respondents' objections and denied their protests. Pet. App. D.

Respondents challenged the project in state court under CEQA, which is generally regarded as more stringent than federal law. The state courts rejected those claims. *Nat'l Parks & Conservation Ass'n v. County of Riverside*, 84 Cal. Rptr. 2d 563 (Cal. Ct. App. 1999).

Respondents also appealed administratively. In 1999, already one decade into Kaiser's effort to conduct the land exchange, the Interior Board of Land Appeals (IBLA) denied those appeals in an extensive opinion. Pet. App. C. In October 1999, the land exchange was consummated.

4. Respondents separately filed this suit in federal district court under the Administrative Procedure Act (APA) against the federal government and Kaiser seeking to undo the exchange and to block the project. During the suit's pendency, Kaiser has not proceeded with construction of the landfill because its further investment would be lost if the federal courts overturn the land exchange. The district court did not decide the parties' motions for summary judgment until five years after the suit was

filed and three years after the briefing was fully submitted.

In the interim, the case law governing appraisals for land exchanges changed in one narrow respect. In *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1181 (9th Cir. 2000), the Ninth Circuit held for the first time that, in a case such as this one, BLM must explicitly determine whether there is a "market" to purchase the government's property "for landfill development." If so, and if landfill use would constitute the property's "highest and best use," then the appraisal of the government's property must account for that use – presumably by increasing its assessed value. *Id.* at 1182.

In this case, respondents invoked the *Desert Citizens* holding. In the earlier administrative proceedings, they had not identified a market to purchase the government's property for landfill use or otherwise argued that the agency improperly failed to account for that potential use. (The Conservation Association asserted in the district court that it would have been futile to make that argument to BLM.) In their motion for summary judgment in district court, respondents relied on a new appraiser's declaration, urging the district court to invalidate the Yerke appraisal because it did not expressly address the existence of a market for landfill use.

BLM promptly responded by "supplement[ing] the administrative record." Pet. App. 300. It commissioned a further expert assessment – the "Herzog report" – to determine whether there was, in fact, a market for landfill development and whether landfill use was the property's "highest and best use."

See id. 305-06. Directed to assess the prior Yerke appraisal "[i]n light of the *Desert Citizens* decision," *id.* 312, Herzog found that there was no such market and that landfill use was not the property's "most probable legal use," 43 C.F.R. § 2200.0-5, because a putative investor would conclude that the slim prospect of a financial return meant that a landfill was not "a financially feasible use." Pet. App. 91. Herzog explained that in his expert opinion the abandonment by several significant operators of proposed landfill investments in the region (including subsequent to the *Desert Citizens* decision) demonstrated that "[a] knowledgeable investor with millions of dollars to invest would not have considered investment in a rail-haul landfill to be the route to obtaining a reasonable return on the investment." *Id.* 92.

BLM agreed. The agency's Chief State Appraiser produced a report adopting Herzog's reasoning and conclusions. Pet. App. J. BLM's District Manager in turn reviewed the Herzog report and the Appraiser's report, agreed with both, Pet. App. I, and concluded on that basis that it is not "necessary to revise or revisit the District Manager's [prior decision] approving the [land] exchange." *Id.* 303. In 2002 – eight years ago – BLM formally added the Herzog report, the BLM Appraiser's approval, and the District Manager's decision to the administrative record and reaffirmed both its prior determination that landfill use was not the property's highest and best use and also its prior valuation of the property. Pet. App. H. Respondents did not appeal that administrative action. BLM lodged this further

record material and agency determination with the district court. *id.*

When the district court did finally act in 2005, it granted respondents summary judgment, "set aside" the land exchange, remanded the matter to BLM, and retained jurisdiction to decide any further challenges. Pet. App. B. Principally, the district court vacated BLM's substantive determination that the land exchange furthered the public interest and accordingly should be undertaken. Pet. App. 116-17. The court also concluded, *inter alia*, that BLM initially failed to appraise the government property properly under the *Desert Citizens* ruling, *id.* 119-20; that the EIS too narrowly defined the "purpose and need" for the project, *id.* 132-34; and that the EIS failed to give sufficient consideration to the issue of "eutrophication," *id.* 124-25 – *viz.*, "the introduction of nutrients to the desert environment" through "(1) landfill waste material; and (2) nitrogen-bearing airborne emissions," *id.* 23 n.8.

3. Kaiser and BLM appealed. The Ninth Circuit did not decide the case for a further four years, at which point it reversed in part and affirmed in part and remanded to BLM in an opinion by Judge Pregerson joined by Judge Paez. Pet. App. A. Senior Judge Trott dissented from the portions of the majority's ruling invalidating the agency's actions and remanding the case back to BLM.

As to the BLM's substantive decision, the panel unanimously upheld the agency's determination to undertake the land exchange because "the public interest will be well served" thereby. 43 U.S.C. § 1716(a). Reversing the district court's contrary holding, the Ninth Circuit concluded that the agency

had properly determined to undertake the exchange after "full consideration" of an array of state and local interests. Pet. App. 22. The court of appeals concluded that "the record as a whole establishes" that through "the analyses in the EIS" the agency appropriately considered whether the land exchange serves the public interest. *Id.* The court not only recognized that "the Final EIS alone includes over 1,600 pages of material . . . including detailed environmental analyses," *id.*, but it also specifically deemed "sufficient," *id.* n.7, the agency's finding that "disposal of these [public] lands in exchange for [Kaiser's] wildlife habitat plainly entails a net gain for the public," *id.* 50, including because "the acquired private lands have substantial value for threatened and endangered species," *id.* 49.

But by a divided vote, the court of appeals affirmed the district court's summary judgment ruling in three respects. *First*, the majority held that BLM's initial "Yerke appraisal" in 1996 failed to consider whether a market existed to purchase the government's property for landfill use, as required by that court's intervening ruling in *Desert Citizens*, *supra*. Pet. App. 15-20. Because the Yerke appraisal contained no contrary evidence, the majority held that by analogy to the facts of *Desert Citizens* "the highest and best use analysis should have taken the reasonably probable use of public lands for a landfill into consideration as part of the highest and best use analysis." *Id.* 20.

Petitioner argued on appeal that a remand to the agency was pointless because, subsequent to the Yerke appraisal, BLM in 2002 had responded to *Desert Citizens* by commissioning and adopting the

Herzog report, which found no market for landfill use, and by then reaffirming that landfill use was not the property's highest and best use. The majority did not doubt petitioner's submission that through the Herzog report BLM "did consider highest and best use, as required by our decision in *Desert Citizens*," Pet. App. 19 n.5, or that Herzog showed that, unlike in *Desert Citizens*, here there is no "market for landfill development," *Desert Citizens*, 231 F.3d at 1181. Yet the majority refused to "consider the 2002 Herzog report" because that report "was not before either BLM or the Appeals board" when the agency issued its ROD in 1997. Pet. App. 19 n.5. The majority read Ninth Circuit precedent to provide that a court will not consider "supplemental materials presented after the onset of litigation" in cases that involve challenges "to final agency action." *Id.* (citing *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006)). Nor will it do so unless the agency "has cured the defects" of its prior decision "on a basis that is immune from challenge" and is moreover itself a final agency decision subject to appeal. *Id.* (citing *Friends of the Clearwater v. Dombeck*, 222 F.3d 552 (9th Cir. 2000)). Because the majority believed those criteria were not met, it deemed the Herzog report to be irrelevant as a matter of law. *Id.*

Second, the majority held that BLM had erred when it "briefly specif[ied] the underlying purpose and need" for the land exchange, 40 C.F.R. § 1502.13. *See* Pet. App. 23-29. Whereas the full court had found that the "record as a whole" demonstrated that the landfill would well serve the public interest, *id.* 22, on this question Judge Pregerson looked only at

the wording of one summary paragraph. The majority agreed that the paragraph set forth an "unquestionably [] valid BLM purpose" to "meet long-term landfill demand." But the majority believed that other language in the paragraph impermissibly acknowledged three goals of Kaiser's for the land exchange that "can hardly be characterized as BLM needs." *Id.* 27.

The majority suggested that by so acknowledging Kaiser's private purposes the paragraph could have caused BLM not to study in detail alternative plans to address landfill shortages without engaging in the land exchange, because those alternatives were inconsistent with Kaiser's goals. The majority recognized that BLM had thoroughly studied the environmental consequences of not only the proposed land exchange, but also four variations on the exchange and also the option of rejecting the project outright, *id.* – *i.e.*, every alternative that the governing statute (the Management Act) would permit BLM to implement. But the majority believed that "[s]uch a narrowly drawn statement necessarily and unreasonably constrain[ed] BLM's consideration of" still other alternatives to addressing landfill need that did not involve the proposed land exchange. *Id.*

The majority acknowledged that the agency's determination that the land exchange furthered the public interest and should therefore be undertaken, which the court had unanimously approved, "gave full consideration to the public interest factors," including by studying in detail the environmental consequences of the exchange. *Id.* But it opined that even its own approval of the only governmental action under consideration – the land exchange under

the Management Act – "has no bearing on the adequacy of the EIS under NEPA." In the view of the majority, "the ends" of the determination that the exchange is environmentally beneficial cannot "justify the means" of failing to study even those alternatives that the agency could not implement. *Id.*

Third, the majority concluded that the land exchange was invalidated by the EIS's discussion of one environmental issue under Ninth Circuit precedent providing that a court's review of an EIS "consider[s] not only its content, but also its form." *Id.* 32 (citing *California v. Block*, 690 F.2d 753 (9th Cir. 1982)). According to Judge Pregerson, the EIS impermissibly failed to set forth a single, consolidated "discussion of eutrophication." *Id.* Judge Pregerson recognized that the substance of the EIS did in fact address eutrophication in several sections and accordingly did not accept respondents' submission that BLM had failed to study the issue adequately. The majority nonetheless deemed the "form" of the EIS's discussion of eutrophication to be invalid because it addressed that issue in the context of other "varied" environmental issues, rather than "up front" in a single section. *Id.* As a result, "[a] reader seeking enlightenment on the issue would have to cull through entirely unrelated sections of the EIS and put the pieces together." *Id.*

On that basis, the majority affirmed the district court's judgment vacating approval of the land exchange and remanding the case back to BLM to commence a third decade of proceedings. *Id.* 35.

Judge Trott dissented from the majority's decision to invalidate the land exchange and remand

the case to BLM, which he regarded as "a clear exercise in blind form over substance." *Id.* 96. Addressing the majority's conclusion that BLM initially failed to determine properly whether landfill use could be the "highest and best use" of the government property, Judge Trott explained that when "respondents did insert this new issue into the district court case" by raising it for the first time in their motion for summary judgment, the "BLM did what it would have done had it been given timely notice of this additional concern [in the administrative proceedings]: they hired a *new* independent appraiser – Stephen Herzog – to evaluate it" and "supplement the administrative record." *Id.* 91. Judge Trott explained that Herzog determined that "landfill use" is not the "highest and best use" for the property because an investor would conclude that the exceptional difficulty in securing the required governmental approvals would outweigh the low prospect of a return on investment. By contrast, respondents' reliance on petitioners' own landfill proposal was misguided:

> So, if this is true, that there was no market for the federal lands as a landfill, why would Kaiser doggedly pursue this proposal? *Because Kaiser already owns the abandoned holes in the ground and the railroad necessary to serve it* and has a considerable investment in the project. The idea that someone else might purchase the federal lands for a landfill is palpably and demonstrably hallucinatory.

Id. 92. Because the majority did not doubt Herzog's conclusions, but instead refused to consider his report

and BLM's action on the basis of it, Judge Trott would not have "sen[t] the case back to [BLM] to do something BLM has already done." *Id.* 36.

Judge Trott then turned to BLM's obligation to "briefly specify the underlying purpose and need to which the agency is responding," 40 C.F.R. § 1502.13. He found compelling that the court of appeals had unanimously upheld the agency's determination to approve the land exchange based on the now-settled finding that "the public interest will be well served" thereby. Pet. App. 20-22 & n.7. "[The majority] grudgingly conclude[s] that BLM adequately determined that the public interest is served by the landfill, but, in the same breath, they claim to have found a defect in BLM's *articulation* of a public purpose and need. How can a project that satisfies the rigorous public interest demands of the [Management Act] fail because its purpose and need over represents primarily private goals and objectives?" *Id.* 54 (emphasis added).

Judge Trott explained that the majority's exclusive reliance on the fact that one summary paragraph of BLM's required brief statement of purpose and need acknowledges Kaiser's goals in proposing the land exchange "completely misunderstands the purpose of this requirement in a setting where a private entity approaches a government entity with a joint project that will benefit both." *Id.* 44. "Of course BLM acknowledged Kaiser's purpose – *the law requires BLM to do so*! For private, non-federal proposals, '[a]gencies . . . are precluded from completely ignoring a private applicant's objectives.'" *Id.* 46-47 (brackets in original) (quoting *Colo. Envt'l Coal.*, 185 F.3d at

1175, and citing *Citizens Against Burlington*, 938 F.2d 190). The majority's suggestion that this one summary paragraph dominated BLM's assessment of the project moreover ignores the EIS's ensuing discussion of the project's public purpose, including the subsequent "12 pages reviewing and analyzing a 'critical' landfill capacity shortfall . . . . During this particularized discussion, Kaiser's obvious pecuniary goals are nowhere in sight." *Id.* 46.

Judge Trott finally stated that in his view there was no merit to the majority's holding that the "form" of the EIS invalidates the land exchange because its discussion of "eutrophication" is too dispersed. Quoting for several pages both the applicable sections of the EIS and the IBLA's decision rejecting respondents' appeal, *id.* 63-77, Judge Trott explained: "[T]he BLM *did* examine eutrophication and determined – correctly so from the record – that it was *not* a serious issue," *id.* 65 (emphases in original). In his view, the majority's characterization of the EIS as a "patchwork" "demonstrably and grossly mischaracterizes the record, and is flatly wrong. It inappropriately gives the back of this Court's hand to a massive and thorough process and resulting responsible environmental decisions and documents." *Id.* 79.

4. Kaiser's petition for rehearing and rehearing en banc produced various amendments to the panel opinion. (Citations in the petition are to the final opinion, which is set forth in the Appendix.) But further review of the decision was denied. Pet. App. F. Kaiser then sought a stay of the mandate, arguing that this Court was likely to review the panel's ruling. The court granted the stay without dissent.

REASONS FOR GRANTING THE WRIT

This Court's intervention is required to bring the Ninth Circuit's precedent into line with this Court's decisions and to resolve the conflict the decision below creates with rulings of other circuits, particularly given the manifest public importance of the specific project at issue in this case. This Court has repeatedly recognized that agency mistakes require a remand for further proceedings only if there is a substantial prospect that the agency's decision will change as a result. The D.C., First, Seventh, and Eighth Circuits have all specifically applied that settled principle to reject the assertion – accepted by the Ninth Circuit in this case – that agency errors in the form and scope of an EIS automatically warrant vacating the agency's decision. Those courts instead look to whether the alleged error affected the agency's substantive decision and whether there is anything practical to be gained by a further environmental review. In this case, those four circuits would have upheld the agency's approval of the land exchange, recognizing that respondents' "flyspecking" of the EIS is immaterial to the agency's actual decision to enter into the exchange and that further environmental review cannot affect the agency's determination to conduct the land exchange because it is in the public interest.

I. This Court's Precedents And Decisions Of Other Circuits Hold That It Is Erroneous To Vacate Agency Decisions When Further Proceedings Would Not Produce A Different Result Or Serve Any Other Substantive Purpose.

In *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969), a plurality of this Court rejected the invitation to "convert judicial review of agency action into a ping-pong game" and held that under the APA it is erroneous to vacate agency action and remand for further proceedings when doing so would be "an idle and useless formality." In that case, although the NLRB had improperly promulgated a rule requiring employers to disclose certain documents for use in a union election, the Court recognized that the Board nonetheless had the independent power to order such a disclosure. The plurality concluded that, because "the *substance* of the Board's command is not seriously contestable," "[i]t would be meaningless to remand." *Id.* (emphasis added). The Court subsequently treated the plurality's ruling in *Wyman* as binding precedent in *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1*, 128 S. Ct. 2733, 2745 (2008).

Similarly, in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), this Court held that the decision whether to find agency error and remand for further proceedings must be made "[m]indful of Congress' admonition [in the APA] that in reviewing agency action, 'due account shall be taken of the rule of prejudicial error,' 5 U.S.C. § 706." *Id.* at 659 (citing *PDK Labs., Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) ("In

administrative law, as in federal civil and criminal litigation, there is a harmless error rule . . . ."). In that case, the Court held that an environmental organization's objection that the Environmental Protection Agency (EPA) had taken an inconsistent position on the question of whether it was required to consult with other agencies before transferring to a state the authority to issue certain permits is not "the type of error that requires a remand." *Id.* Whether or not required, "the EPA had already consulted" with FWS. *Id.* Furthermore, "the agencies involved have resolved any ambiguity in their positions going forward" through their statements "[f]ollowing the issuance of the panel's opinion below." *Id.* at 660 n.5; *see also Mass. Trs. of E. Gas & Fuel Assocs. v. United States*, 377 U.S. 235, 248 (1964) (Harlan, J.) (Court will not reverse an agency's action "when a mistake of the administrative body is one that clearly has no bearing on the procedure used or the substance of decision reached").

Other circuits have consistently adhered to this Court's precedent in refusing to vacate agency decisions on the basis of a diverse array of alleged errors that could not produce a different result on remand. *See, e.g., U.S. Telecom. Ass'n v. FCC*, 400 F.3d 29, 41-42 (D.C. Cir. 2005) (failure to follow notice and comment rulemaking harmless error when parties were given equivalent opportunity to comment); *Dantran, Inc. v. U.S. Dep't of Labor*, 171 F.3d 58, 73 (1st Cir. 1999) (remand is not appropriate if it "will amount to no more than an empty exercise"); *Sierra Club v. Slater*, 120 F.3d 623, 637 (6th Cir. 1997) (agency's failure to provide notice of required water quality certification was harmless

when it would not "affect the public's review of the proposal"); *Fisher v. Bowen*, 869 F.2d 1055, 1057 (7th Cir. 1989) (Posner, J.) ("No principle of administrative law or common sense requires us to remand a case in quest of a perfect opinion unless there is reason to believe that the remand might lead to a different result."); *NLRB v. Am. Geri-Care, Inc.*, 697 F.2d 56, 64 (2d Cir. 1982) (remand is required "only where there is a significant chance that but for the error, the agency might have reached a different result" (emphasis omitted)).

This Court has not considered the circumstances in which supposed errors in EISs require vacating agency action and remanding for further proceedings, but four courts of appeals – the D.C., First, Seventh, and Eighth Circuits – have. Each has squarely held that agency errors in the promulgation and form of an EIS do not justify a remand to the agency that would produce the same result, at least so long as the public had the opportunity to comment on the agency's initial environmental assessment.

The precedent of the D.C. Circuit, which hears more agency appeals than any other court, is particularly well settled and instructive. In *Nevada v. Department of Energy*, 457 F.3d 78, 90 (D.C. Cir. 2006), the D.C. Circuit reaffirmed its settled precedent that reversal and remand to an agency is inappropriate "where the proposing agency engaged in significant environmental analysis before reaching a decision but failed to comply precisely with NEPA procedures." In that case, the State of Nevada alleged that the EIS for the Yucca Mountain waste facility impermissibly failed to identify a "preferred alternative or alternatives" to the proposed project.

40 C.F.R. § 1502.14(e). The D.C. Circuit held that any "violation was harmless error," because there would be "no purpose" in invalidating the Yucca Mountain EIS and remanding for a further round of litigation: "NEPA's goal of ensuring that relevant information is available to those participating in agency decision-making was not frustrated by the absence of language designating the Caliente Corridor as the DOE's preferred alternative." *Nevada*, 457 F.3d at 90. In the view of the D.C. Circuit, the relevant inquiry is whether "the public had sufficient information to comment on" the agency's determination, a standard that was satisfied by "[t]he many comments submitted in response to the" EIS. *Id.*

The D.C. Circuit in *Nevada* relied on that court's prior decision in *Illinois Commerce Commission v. ICC*, 848 F.2d 1246 (D.C. Cir. 1988) (per curiam). In that case, notwithstanding that the agency failed to publish a required environmental assessment at all, the D.C. Circuit held that a remand was not required because the agency had engaged in an environmental analysis of the project. "An order to the Commission to prepare an EA or an EIS for a third time would be a meaningless gesture, not necessary to guarantee that the Commission will consider environmental concerns when it authorizes abandonments." *Id.* at 1257. In support, the court quoted Judge Friendly's admonition that an agency's procedural error is not a basis for a remand "where it would accomplish nothing 'save further expense and delay.'" *Id.* (quoting *Kerner v. Celebrezze*, 340 F.2d 736, 740 (2d Cir. 1965)). *See also Friends of the River v. FERC*, 720 F.2d 93, 107 (D.C. Cir. 1983) (Ginsburg and

Scalia, JJ.) ("Sending the matter back 'to teach the agency a lesson' would be an essentially punitive measure: we can discern no benefit to the public in such a course, and no genuine service to the policies NEPA advances.").

The First Circuit followed the D.C. Circuit's lead in *Save Our Heritage, Inc. v. FAA*, 269 F.3d 49 (1st Cir. 2001) (Boudin, J.), which addressed whether the FAA erred by not producing an EIS in deciding to permit additional flights at Hanscom Field outside of Boston, Massachusetts. The First Circuit held that, although the agency's determination that there would be only minimal environmental effects was not made in the formal EIS process, any error did not justify overturning the agency decision and remanding. Citing the precedent of the D.C. Circuit, the court explained, "[I]t makes no sense to remand for an environmental assessment where, as here, the FAA has already made a reasoned finding that the environmental effects are *de minimis*." *Id.* at 61.

The Seventh Circuit applies the same rule. In *Glisson v. United States Forest Service*, 138 F.3d 1181, 1183 (7th Cir. 1998) (Posner, J.), the plaintiffs complained that the environmental assessment for a forest restoration project impermissibly failed to address the endangered status of an adversely affected species of pine trees. The Seventh Circuit rejected the argument that "the oversight in the environmental assessment warrants reversal." *Id.* The court of appeals recognized that if the agency had considered the issue it would have concluded that "the impact on the pines is not an adequate reason for blocking the project." *Id.* As such, "a remand for better findings would serve the plaintiffs'

interests in delaying the [project], but no other interests, for it is plain what those findings must be. [*SEC v. Chenery Corp.*, 332 U.S. 194 (1947)] does not require futile remands." *Id.* (first brackets in original) (quoting *Cronin v. Dep't of Agric.*, 919 F.2d 439, 442-43 (7th Cir. 1990) (Posner, J.)).

Finally, in *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1128 (8th Cir. 1999), the Eighth Circuit held that the failure in an EIS to study alternatives that are not "viable" under the governing statute is not a basis for vacating and remanding the agency's action. The plaintiffs in that case claimed that an EIS for the Forest Service's management of a wilderness area was flawed because, *inter alia*, it "failed to include" those "reasonable alternatives" that would have increased visitor use. *Id.* "The [plaintiffs] complain[ed] that the Forest Service had a predisposition toward alternatives that would reduce visitor use." *Id.* at 1128-29. The Eighth Circuit deemed any error to be harmless because the applicable statute required the Forest Service to "attain the widest range of beneficial uses of the environment without degradation," 42 U.S.C. § 4331(b)(3), and the Forest Service had determined that "current visitor use levels are beginning to strain the viability and solitude of the wilderness area." 164 F.3d at 1129. A remand would be inappropriate because the alternatives identified by the plaintiffs were thus not "viable." *Id.*

II. The Ninth Circuit's Decision In This Case Conflicts With This Court's Precedents And With Decisions Of Other Circuits.

The Ninth Circuit's formalistic decision in this case cannot be reconciled with this Court's holding that in deciding whether to vacate and remand agency action, a reviewing court must determine whether there is a realistic prospect that the agency would reach a different result or that further proceedings would serve some other substantive purpose. The ruling below equally conflicts with the rulings of other circuits applying that principle to alleged errors in the promulgation and form of EISs.

First, other circuits would reject the Ninth Circuit's holding that agency action must be reversed and the case remanded – notwithstanding that intervening agency action makes it clear that the agency will adhere to its decision so that further proceedings will be entirely futile – unless the intervening agency action both amounts to "a final, appealable decision" and is "immune to challenge." Pet. App. 19 n.5. In this case, other circuits would hold that a remand for further proceedings would be inappropriate because eight years ago, the BLM commissioned and formally adopted the Herzog report, which already answers the precise question that the Ninth Circuit has directed BLM to consider on remand by finding that there is no market to purchase the government's property for landfill use and that landfill use is not the property's "highest and best use." Pet. App. I, J. As Judge Trott explained, "what [respondents] say BLM did not do *has in fact been done*, and remains unchallenged by them," *id.* 96 (emphasis in original). Respondents

declined to appeal the agency's conclusions reached on the basis of the supplemented record, *see* 43 C.F.R. §§ 4.410(a), .411(a), which are not called into question by the ruling below.

No other court of appeals accepts the Ninth Circuit's view that it is appropriate to order a pointless remand on the theory that a court is required to blind itself to the agency's formal supplementation of the administrative record. Pet. App. 19 n.5. Consistent with this Court's recognition that "a harmless error rule" applies to review of administrative decisions, *Nat'l Ass'n of Home Builders*, 551 U.S. at 659 (quoting *PDK Labs., Inc.*, 362 U.S. at 799), other circuits would find dispositive that the agency "has already made a reasoned finding" that there is no market for landfill use, *Save Our Heritage*, 269 F.3d at 61. "[A] remand for better findings would serve the plaintiffs' interest in delaying the [project], but no other interests, for it is plain what those findings must be." *Glisson*, 138 F.3d at 1183 (internal quotation marks and citation omitted; brackets in original). Indeed, BLM's reaffirmation of its prior determination of the property's value in light of the Herzog report would be controlling even if it had occurred "[f]ollowing the issuance of the panel's opinion below" in 2010, rather than in 2002. *Nat'l Ass'n of Home Builders*, 551 U.S. at 660 n.5.

Second, other circuits would reject the Ninth Circuit's holding that an error in an agency's formulation of a paragraph of an EIS merits vacating the agency action and remanding, even assuming that the error caused the agency not to study alternatives that it had no power to implement. The

majority below held that BLM erred when it "briefly specif[ied]" the "purpose and need to which [it was] responding," 40 C.F.R. § 1502.13, by acknowledging in a summary paragraph Kaiser's purposes in promoting the project. Pet. App. 27-29. Preliminarily, those courts would agree with Judge Trott that BLM did not err because in "responding" to Kaiser's proposal, 40 C.F.R. § 1502.13, "*the law requires*" BLM to acknowledge Kaiser's purposes, Pet. App. 47 (citing cases) (emphasis in original). And those courts would conclude that the agency properly accounted for both public and private purposes in light of the extensive discussion of the public interest in which Kaiser's goals "are nowhere in sight." *Id.* 46. Indeed, the majority below flatly mischaracterized even the one paragraph on which it relies: in fact, one of the three goals that Judge Pregerson found objectionable – securing a "long-term income source" provided by the landfill – is a *public* goal, because those revenues will be received by the government (not Kaiser) and will be used for an array of environmental projects.

But even if other courts were willing to assume that BLM did technically err in this one summary paragraph, they would deem it inappropriate to vacate and remand the land exchange for BLM merely to go through the formalistic step of redrafting it. The regulation in question contains no substantive command, but merely requires the agency to "briefly specify" the purposes and needs to which it is "responding." 40 C.F.R. § 1502.13. Because NEPA merely requires that an agency take a "hard look" at environmental concerns rather than reaching any particular result, *Marsh v. Oregon*

Natural Resources Council, 490 U.S. 360, 374 (1989), other circuits have squarely rejected indistinguishable attempts to "'flyspeck[]'" the words of an EIS. *E.g.*, *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 704 (10th Cir. 2009); *Friends of Boundary Waters*, 164 F.3d at 1128. The Ninth Circuit's very different, and far more searching, review of EISs has been the source of recurring controversy. *See, e.g.*, *Ecology Center, Inc. v. Austin*, 430 F.3d 1057, 1072 (9th Cir. 2005) (scrutiny of 1900-page EIS over dissent arguing that majority addressed "only parts of this record" and changed "our posture of review to one where we sit at the table with [agency] scientists and second-guess the minutiae of the decisionmaking process"); *Sierra Club, Inc. v. Austin*, 82 Fed. Appx. 570, 576 (9th Cir. 2003) (detailed review of 1100-page EIS over dissent by Judge Kozinski that "satisfying the majority's nitpicking . . . will needlessly delay by at least two years a much-needed response to an emergency that is already three years old").

For two independent reasons, other circuits would also reject the Ninth Circuit's further suggestion, Pet. App. 27, that a remand is required because BLM's statement of purpose and need may have caused the agency not to study alternative landfill plans under which BLM would not enter into any exchange of land. Initially, they would find it dispositive that "the substance of the [BLM's] command [to undertake the land exchange] is not seriously contestable." *Wyman*, 394 U.S. at 766 n.6. The Ninth Circuit thus affirmed the agency's approval of land exchange and explicitly deemed "sufficient," Pet. App. 22 n.7, the agency's finding and

rationale that "disposal of these [public] lands in exchange for [Kaiser's] wildlife habitat plainly entails a net gain for the public," *id.* 50. BLM's decision under the Management Act to conduct the exchange is now final, except for the formalistic re-entry of the Herzog report into the administrative record for a second time. *See supra.*

It is thus now decisively settled that "the public interest will be well served by making [this land] exchange," 43 U.S.C. § 1716(a), and there is no prospect that BLM will reverse its determination to do so, as the Management Act represents the only substantive constraint on the agency's action. Given that BLM has *already* concluded that the alternatives to the land exchange the Ninth Circuit suggested should be studied are "not an adequate reason for blocking the project," *Glisson* 138 F.3d at 1183, the precise form of "BLM's articulation of the project's purpose and need," Pet. App. 54 (Trott, J., dissenting), is no basis for overturning the agency's action. Neither an agency's failure in the EIS to address a "preferred alternative," *Nevada*, 457 F.3d at 90, nor its "predisposition toward [other] alternatives," *Friends of Boundary Waters*, 164 F.3d at 1129, is a basis for reversal if, as in this case, the error did not affect the agency's judgment. The point is not, as the majority below thought, that "the ends justify the means," Pet. App. 29 n.9, but rather that the "end" of BLM's deliberative process has already been determined by an entirely separate "means" (approval under the Management Act) that the court of appeals has now unanimously affirmed.

In addition, other circuits would refuse to order a further study of alternative proposals that involve no

land exchange because those alternatives are not "viable" under the Management Act. *Friends of the Boundary Waters*, 164 F.3d at 1129. Judge Pregerson thus acknowledged that BLM had studied in detail the land exchange, four variations on the exchange, and conducting no exchange at all, Pet. App. 28 – which were all the options available to it under the Management Act. Nor did the majority attempt to suggest that the public's participation in the environmental review – which took several years and involved extensive public input including four hearings – was "frustrated" in any respect by BLM's failure to study in detail still other alternatives that it had no power to adopt. *Nevada*, 457 F.3d at 90. There is accordingly no basis for a remand to engage in such an empty and meaningless exercise in "frivolous boilerplate." *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 551 (1978).

To be sure, although the remand for such a further study will inevitably be pointless, there is reason to doubt that it will be brief or painless. The production of the existing EIS for the land exchange took years of study coordinated by federal, state, and local governments. If past is prologue, a still further detailed assessment of how the environment would fare in the entirely hypothetical but legally impossible world in which BLM ordered landfill development without any form of land exchange will take several more years at a cost of millions of dollars to the taxpayers. But even if BLM studies those alternatives for a further decade and produces a new and improved EIS that is 3200 pages long, this time on a record of 100,000 pages, the upshot of the

administrative proceedings will be the same: BLM will still have concluded that land exchange already consummated in this case serves the public interest and therefore merits approval.

Third, for the same reason, other circuits would reject the Ninth Circuit's conclusion that an EIS is invalid and agency action should be vacated *ipso facto* whenever the court of appeals finds no error in the EIS's "content" but is able to discern a flaw in its "form." Pet. App. 32. The majority below held that the EIS's supposed failure to discuss the issue of eutrophication "up front" requires vacating the land exchange and remanding for the BLM to go through the formalistic exercise of revising the EIS's language so that the reader does not have "to cull through entirely unrelated sections of the EIS and put the pieces together." *Id.* Judge Pregerson's opinion thus did not accept respondents' submission that the agency had failed to seriously consider that issue, much less that the agency was obliged to conclude that eutrophication presents a genuine environmental concern for the project.

As discussed above, other circuits would regard the error that the majority below purported to find to be no more than a forbidden effort to "flyspeck" the words of the EIS. But even in the unlikely event that another court of appeals would adopt the view of the majority below that it was appropriate to search the 1600 pages of the EIS in this case to find a supposed flaw in its wording, the D.C., First, Seventh, and Eighth Circuits would explicitly reject the Ninth Circuit's "insistence on form" and hold that an agency's action is valid so long as its environmental

analysis is "*substantively* unassailable." *Friends of the River*, 720 F.2d at 105.

The proceedings on remand with respect to the EIS are thus foreordained and a complete waste of time for everyone – everyone except respondents, who transparently are pursuing every conceivable argument in any possible forum for an indefinite period in the (thus far validated) hope that the process will go on forever and function as a substantive barrier to the landfill's construction. Certiorari should be granted to bring the Ninth Circuit's precedent into conformance with this Court's decisions and to resolve the conflict created between the ruling below and decisions of other courts of appeals.

III. The Significance Of The Question Presented Is Beyond Dispute.

This Court's intervention is also warranted because the already manifest importance of the question presented is substantially magnified by the special significance of this specific case. The question of what kinds of errors are sufficiently consequential to merit vacating agency action can arise in any challenge brought under the APA, all of which are subject to "Congress' admonition that in reviewing agency action, 'due account shall be taken of the rule of prejudicial error,' 5 U.S.C. § 706." *Nat'l Ass'n of Home Builders*, 551 U.S. at 659. This case in particular presents this Court with its first opportunity to apply that important principle to the frequently recurring context of challenges to agency decision-making under NEPA, including specifically with regard to EISs.

The requirement under NEPA that an EIS be produced for environmentally significant governmental action, 42 U.S.C. § 4332(2)(c), regularly embroils administrative agencies in time-consuming litigation. Those challenges are brought by both environmental groups and industry. Their only common thread is that the plaintiffs frequently seek to "flyspeck" the agency's analysis for arguable errors. Given that EISs are frequently massive, almost always highly technical, and generally derived from an expansive factual record, a committed opponent can almost always identify some minor flaw.

This case is a perfect example, and the precedent it sets charts a deeply troubling course for the future of administrative review of EISs in the Ninth Circuit, which is the source of far more such challenges than any other court of appeals, including even the D.C. Circuit. The EIS of the Kaiser land exchange is 1600 pages long and the record is comprised of roughly 50,000 pages. If the trivial errors identified by the majority below are sufficient to upend a critical project that expert federal and state authorities carefully studied for a decade, then it is difficult to imagine an environmentally significant agency action that cannot be successfully attacked. At the very least, the ruling below is inarguably an open invitation for opponents to try. Their efforts will be rewarded at the least by significantly delaying the agency action – this land exchange, for example, was proposed in 1989, subjected to a searching environmental review, finally approved by BLM in 1999, and yet remains embroiled in litigation – and perhaps invalidating it altogether.

Importantly, under the regime enacted by the majority below, it is impossible for an agency to predict *ex ante* which of the hundreds of questions involved in complex environmental assessments will metamorphose into a landmine that a federal court will invoke to blow up the project a decade later. In this case, respondents did not even *argue* in the administrative proceedings that BLM's statement of the purpose and need was unreasonably narrow or that BLM had failed to assess whether there was a market for landfill use for the government's property, yet the Ninth Circuit permitted them to prevail on those claims in litigation under that court's precedent that "the exhaustion requirement should be interpreted broadly." Pet. App. 13. Agencies also have no map that allows them to navigate whatever (if any) disappearingly thin space exists between the D.C. and Tenth Circuits' holding that agencies *must* acknowledge the private purposes motivating projects and the Ninth Circuit's holding that such an acknowledgment may place too much weight on those purposes and invalidate the project altogether. *Compare Colo. Envt'l Coal.*, 185 F.3d at 1175 ("Agencies . . . are precluded from completely ignoring a private applicant's objectives.") *and Burlington*, 938 F.2d at 196 ("[T]he agency should take into account the needs and goals of the parties involved in the application.") *with* Pet. App. 24-25.

The open invitation to constant litigation proffered by the ruling below is not only a distracting waste of time and money, but it also undermines the very purposes of the nation's environmental laws. "Remands in such cases would inevitably breed cynicism about the law; they would likely yield going-

through-the-motions responses on the part of those told to attend to the court's costly, resource-consuming instruction to redo, under the proper heading, what has already been done effectively." *Friends of the River*, 720 F.2d at 108. As Judge Friendly put it with typical vividness, the "tedious process of administrative adjudication and judicial review" need not "be needlessly dragged out while court and agency engage in a nigh endless game of battledore and shuttlecock with respect to subsidiary findings." *Erie-Lackawanna R.R. Co. v. United States*, 279 F. Supp. 316, 354-55 (S.D.N.Y. 1967) (three-judge court), *aff'd with modifications and remanded, Penn-Cent. Merger & N & W Inclusion Cases*, 389 U.S. 486 (1968).

It is furthermore difficult to conceive of a more important and appropriate case in which to resolve the question presented. This is no ordinary agency action. The majority below enjoined the consummation of a project that is regarded as a "model" for projects the world over by vacating a land exchange that experts have concluded is "critical," not only because it provides desperately needed landfill space but also because the land exchange itself will provide the significant public benefit of protection of threatened and endangered species of plants and animals. This Court's failure to intervene will effectively doom the entire project to years of further intolerable uncertainty and allow respondents to continue to hijack the thorough and thoughtful environmental review process undertaken by the authorities charged by Congress with that essential responsibility.

CONCLUSION

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

Respectfully submitted,

Leonard J. Feldman
Jason T. Morgan
STOEL RIVES LLP
600 University Street,
Suite 3600
Seattle, WA 98101
(206) 624-0900

Thomas C. Goldstein
Counsel of Record
Jason P. Steed
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036
(202) 887-4000
tgoldstein@akingump.com

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