No. 08-472

IN THE
Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,

v.

FRANK BUONO,
Respondent.

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

BRIEF OF PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY AND THE WESTERN LANDS PROJECT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

CHRISTOPHER KRUPP
WESTERN LANDS PROJECT
P.O. Box 95545
Seattle, WA 98145

PAULA DINERSTEIN
PUBLIC EMPLOYEES FOR
ENVIRONMENTAL
RESPONSIBILITY
2000 P Street, N.W.
Suite 240
Washington, DC 20006

SRI SRINIVASAN
IRVING L. GORNSTEIN
(*Counsel of Record*)
JUSTIN FLORENCE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5300

Attorneys for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

OTHER AUTHORITIES

BRIEF OF PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY AND THE WESTERN LANDS PROJECT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Public Employees for Environmental Responsibility and the Western Lands Project respectfully submit this brief as *amici curiae* in support of respondent.[1]

INTEREST OF *AMICI CURIAE*

Amici are not-for-profit environmental organizations with a strong interest in keeping public lands, such as the Mojave National Preserve, within control of the federal government. Public Employees for Environmental Responsibility ("PEER") is a national alliance of local, state, and federal resource professionals. PEER's objectives include monitoring natural resource management agencies by serving as a "watch dog" for the public interest. The Western Lands Project monitors federal land exchanges and sales while promoting reform in related federal policies. It scrutinizes the various efforts underway to privatize public lands, with the goal of retaining the public land base.

---

[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief. Letters reflecting the parties' consent to the filing of this brief are on file with the Clerk.

One issue raised by this case is whether the case became moot because the necessary preconditions for the conveyance of public land to the intended recipient had not been fulfilled before that entity became defunct. The resolution of that question implicates *amici*'s interest in the preservation of public land.

SUMMARY OF ARGUMENT

This case became moot when Post 385E disbanded, an event that transpired while the case was pending in the court of appeals. Because Congress's designated recipient disbanded and no longer stood ready to receive the federal land, there was no case or controversy in the court of appeals, and accordingly no jurisdiction in that court or this one.

Petitioners and their *amici* attempt to rescue this Court's jurisdiction by arguing that Post 385E's successor in interest can stand in the place of Post 385E and receive the federal land. But Congress did not grant the land to Post 385E *and its successors in interest*. And because the statutory conveyance contained unfulfilled conditions precedent—a required appraisal and equalization payment—Post 385E never received vested rights in the land that it could pass to its successor in interest.

An entity purporting to be "VFW Post 385" claims that it has been reconstituted and stands ready to receive the federal land. But that claim cannot cure the fact that the case was moot before the Ninth Circuit issued its decision. And in any event substantial fact-finding and briefing should occur before the lower courts, in the first instance, to determine whether Post 385E has been validly reconstituted as

Post 385 and whether Congress intended to transfer the land to this new entity calling itself Post 385.

ARGUMENT

I. THIS CASE WAS MOOT BEFORE THE COURT OF APPEALS ISSUED ITS DECISION

A. When Post 385E Became Defunct, The Case Became Moot

1. This Court "has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (internal quotation marks omitted). This obligation "assumes a special importance when," as here, "a constitutional question is presented." *Id.* at 541-42. This Court therefore has an obligation to determine whether the court of appeals had jurisdiction over this case at the time it issued its decision. Should the Court conclude that the court of appeals lacked jurisdiction, its jurisdiction would be limited "to correcting the error of the lower court in entertaining the suit." *United States v. Corrick*, 298 U.S. 435, 440 (1936); *see Bender*, 475 U.S. at 541.

One circumstance in which an appellate court lacks jurisdiction is when a case becomes moot on appeal. "Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies." *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983); *see DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (per curiam) (explaining that this jurisdictional limit "derives from . . . Art. III of the Constitution"). A

case becomes moot when the parties no longer have "a 'personal stake in the outcome' of the lawsuit." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990) (quoting *City of L.A. v. Lyons*, 461 U.S. 95, 101 (1983)).

2. This case became moot while it was pending in the Ninth Circuit, depriving that court of jurisdiction over petitioners' appeal. This Court should therefore vacate the lower court's decision as moot.

The facts establishing that the case became moot on appeal are straightforward. Respondent filed suit challenging the government's display of a white cross monument on a parcel of federal land, and the district court issued an injunction against the display. Congress then enacted a statutory provision (section 8121) directing the Secretary of the Interior to transfer the parcel of property on which the cross is displayed to Veterans of Foreign Wars ("VFW") Post 385E in exchange for other land conveyed by a third party (the Sandozes' land). *See* Dep't of Defense Appropriations Act, Pub. L. No. 108-87, § 8121, 117 Stat. 1100 (2003). By the terms of section 8121, that exchange was to occur after an appraisal of the property and an equalization of values through cash payments. *Id.* Before those conditions were performed, the district court enjoined the government from transferring the land.

While the case was pending on appeal, but before the court of appeals issued its decision, Post 385E ceased to exist. *See* Pet. App. 3a-4a; Pet. 1. Because Congress specified Post 385E as the sole recipient of the land containing the cross, and because Post 385E

no longer existed, the land transfer became impossible to consummate.

At that point, the appeal on the validity of the injunction against the transfer of the land to Post 385E became moot. The asserted injury to respondent that gave rise to the present controversy was caused by the threatened land transfer, and that threat had disappeared. And without the possibility of a transfer, neither party had an interest in litigating the validity of the injunction against the transfer. Because the land could not be transferred in any event, respondent no longer had an interest or need for an injunction against the transfer. And because the government could not transfer the land in any event, it no longer had an interest in having the injunction lifted. With no party having a personal stake in the outcome of the appeal, the case became moot. *Lewis*, 494 U.S. at 477.

B. The Transfer Of Post 385E's Property To The California VFW Did Not Keep The Case Alive

1. The government and its *amici* contend that the case remained alive even after Post 385E became defunct, because the California VFW succeeded to all of Post 385E's interest in land, and it stood ready to assume ownership of the public land on which the cross is displayed. Pet. Reply 10; VFW Am. Br. 35-39. But Congress directed the Secretary to convey the property containing the cross only to "Veterans of Foreign Wars Post #385E." Congress did not direct the Secretary to convey the land to Post 385E *and its successors in interest*. *Cf. Rutherford v. Greene's Heirs*, 15 U.S. (2 Wheat.) 196, 197 (1817)

(explaining that the conveyance stated that land "shall be allotted for, and given to, . . . Greene, his heirs and assigns"). And in government land transfers, "nothing passes by implication." *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 546 (1837).

The government and its *amici* contend that there was no need for a statutory directive to convey the land to Post 385E's successor, because Post 385E had already acquired an interest in the land before it became defunct and that interest automatically passed to the California VFW. But when a condition precedent to a land conveyance has not been fulfilled, there is no vested interest to pass on. And section 8121 imposes two concrete conditions precedent to the transfer of the land containing the cross, neither of which was fulfilled before Post 385E became defunct. Post 385E therefore never acquired an interest in the land containing the cross that it could pass on to the California VFW.

2. Under this Court's cases, a prospective recipient of federal land does not acquire a property right in that land until all conditions precedent to the transfer have been satisfied. When a condition precedent has not been fulfilled, the recipient has only "a promise of a title, . . . an inchoate interest." *Maynard v. Hill*, 125 U.S. 190, 214-15 (1888). This inchoate interest gives the prospective recipient neither title nor any equitable claim to the land; "nothing passe[s]" until all conditions precedent are satisfied. *Hall v. Russell*, 101 U.S. 503, 510 (1879). Only after the conditions have been satisfied does the prospective recipient's "right to a transfer of the legal

title from the United States [become] vested." *Id.* And only then can a recipient pass on an interest in the land to a successor. *Maynard*, 125 U.S. at 216.

The Court's cases illustrate that conditions precedent principle. In *Vance v. Burbank*, for example, this Court analyzed a land grant to a settler that, "when perfected, inured to the benefit of himself and his wife in equal parts." 101 U.S. 514, 521 (1879). The wife, however, "got nothing except through her husband." *Id.* Applying the conditions precedent principle discussed above, the Court held that if the husband "abandoned the possession before he became entitled to the grant, [the wife's] estate in the land was gone as well as his." *Id.*

Similarly, in *Maynard*, a wife divorced her husband before the fulfillment of the conditions precedent to a land transfer to her husband. The Court rejected the wife's claim that she had acquired her husband's interest in the land, explaining that the husband had not acquired a vested interest before the divorce and that a "divorce ends all rights not previously vested." 125 U.S. at 216.

Under those condition precedent cases, Post 385E never acquired a vested interest in the land on which the cross is displayed, and its successor therefore did not acquire such an interest when Post 385E ceased to exist. Section 8121 imposed two conditions precedent to the transfer of the land containing the cross to Post 385E: (i) an appraisal of both the federal land and the Sandozes' land, and (ii) the equalization of values through an exchange of cash payments. Neither condition was fulfilled before Post 385E became defunct.

3. The question whether Congress has created a condition precedent in a land grant turns on "the proper construction to be placed on the language employed." *Loud v. Pomona Land & Water Co.*, 153 U.S. 564, 576 (1894). In resolving that issue, courts look to whether the parties intended a required condition to be satisfied "before" the execution of the transfer. *Id.*; *see also* Lawrence P. Simpson, *Handbook of the Law of Contracts* § 152 (1965) (explaining that "[i]n bilateral contracts . . . where one party's performance is to be rendered prior in time to that of the other, it is a constructive condition precedent to the latter's duty"). Section 8121 evinces Congress's intent to defer the land transfer until after the completion of a land appraisal process and a cash equalization payment, making them conditions precedent.

a. The text of section 8121 makes that clear. Section 8121 provides that "[i]n exchange for [the Sandozes' land], the Secretary of the Interior *shall convey*" the property to Post 385E. *See* § 8121(a) (emphasis added). Congress' use of the phrase "shall convey" demonstrates its intent that the exchange happen at a future time, not instantaneously upon passage of the statute. *See* William Strunk Jr. & E.B. White, *The Elements of Style* 58 (4th ed. 1999) (explaining that the use of "shall" followed by a verb converts it to the future tense). Elsewhere, section 8121 refers to the properties "to be exchanged." § 8121(c). The use of the future tense "to be exchanged" reinforces the conclusion that Congress intended a future exchange, rather than an immediate one.

By employing the future tense, Congress departed from the language it routinely employs when

it conveys land immediately without conditions precedent. In those cases, it directs that land "hereby[] is granted." *United States v. S. Pac. R. Co.*, 146 U.S. 570, 571 (1892) (quoting 14 Stat. 292). Unlike the "shall convey" and "to be exchanged" language that appears in section 8121, the words "hereby granted" "import a transfer of a present title, not a promise to transfer one in the future." *Id.* at 593.

Congress's use of the "shall convey" and "to be exchanged" language necessarily informs the meaning of the provisions in section 8121 mandating that (i) "the values of the properties shall be determined through an appraisal" and (ii) the "values of the properties to be exchanged under this section shall be equal or equalized as provided in subsection (d)." § 8121(c). In particular, the "shall convey" and "to be exchanged" language shows that appraisal and equalization are conditions precedent. If the appraisal and equalization were not conditions precedent, there would have been no point in Congress specifying a future exchange; it could have "hereby granted" the federal land in exchange for the Sandozes' property.

Petitioners' *amici* do not come to grips with the "shall convey" and "to be exchanged" language in section 8121. Instead, they rely on cases that use the "hereby is granted" language that immediately vests rights in the recipient. *See* VFW Am. Br. 37; *Deseret Salt Co. v. Tarpey*, 142 U.S. 241, 248 (1891) (noting that this phrase has "always received the same construction, that, unless the terms are restricted by other clauses, . . . carry[] at once the interest of the grant or in the lands described");

Leavenworth, L. & G. R.R. v. United States, 92 U.S. 733, 735 (1875) (describing those words as "words of absolute donation" importing "a grant *in praesenti*"); *Schulenberg v. Harriman*, 88 U.S. (21 Wall.) 44, 60 (1874) (observing that this phrase "imports a present grant and admits of no other meaning").

b. In requiring appraisal and equalization as conditions precedent to the exchange, Congress acted consistently with the statute that governs federal land grants generally. The Federal Land Policy Management Act (FLPMA) establishes the usual practices for the Secretary of Interior's transfer of public land in exchange for non-federal land. *See* Pub. L. No. 94-579, 90 Stat. 2743 (1976) (codified as amended at 43 U.S.C. § 1701 *et. seq.*). Like section 8121, FLPMA requires the "values of the lands exchanged" to be "equal, or . . . equalized by the payment of money," 43 U.S.C. § 1716(b), and specifies that the parties conduct an appraisal of the relevant land to serve as the basis for the equalization payment, *id.* § 1716(d).

The text of FLPMA indicates that appraisal and equalization are conditions precedent to the exchange of land. Specifically, FLPMA provides that either party may respond to an unexpected appraisal by withdrawing from or modifying the exchange. *Id.* § 1716(d)(3). Consistent with that provision, the Secretary has promulgated a regulation explaining that neither party to an exchange acquires a legal right to the land prior to the execution of a "legally binding exchange agreement" that identifies the amount of an agreed-upon cash equalization payment. 43 C.F.R. § 2201.7-2(c).

FLPMA appears to apply to the conveyance at issue here. By its terms, FLPMA governs "exchange[s] pursuant to this Act *or other applicable law*." 43 U.S.C. § 1716(e) (emphasis added). Accordingly, the Department of the Interior has construed FLPMA's provisions to "apply to all land exchanges, made under the authority of the Secretary, involving Federal lands." 43 C.F.R. § 2200.0-7(b). Section 8121 would appear to be "other applicable law," and any transfer of land under section 8121 would appear to be "under the authority of the Secretary." If so, FLPMA would govern the exchange and impose appraisal and equalization as conditions precedent.

FLPMA would also appear to govern the exchange for another reason. Section 8121 is codified at 16 U.S.C. § 410aaa-56, along with other provisions governing the Mojave National Preserve. These provisions direct the Secretary to "administer the preserve in accordance with . . . the provisions of law generally applicable to units of the National Park System." 16 U.S.C. § 410aaa-46. Since FLPMA generally applies to exchanges of land within that system, it would appear to govern any exchange of Mojave lands.

Even if FLPMA did not directly govern this exchange, its imposition of appraisal and equalization as conditions precedent would still be significant. Under well-established principles of statutory construction this Court should construe the specific conveyance in section 8121 consistently with the general principles of FLPMA. *See* 2B Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 51.02 (6th ed. 2000) ("Prior statutes relating to the same subject matter are compared with the new pro-

vision; if it is possible by reasonable construction, both are construed so that effect is given to every provision in all of them.").

c. Treating appraisal and equalization as conditions precedent is not only compelled by the text of section 8121 and FLPMA; it is necessary to further important government interests. First, by making an appraisal and equalization conditions precedent, Congress protected the government against an improvident exchange. For example, if the appraisal in this case were to reveal lucrative mineral deposits on the Sandozes' land, the government might be forced to pay the Sandozes millions of dollars after the fact. By making appraisal and equalization conditions precedent to land exchanges, Congress ensured that the government would not be locked into a financially troubling land exchange. *See* 43 U.S.C. § 1716(d)(3). Instead, after such an appraisal, the government may simply back out of the deal. *Id.*

Second, by making appraisal and equalization conditions precedent, Congress ensured that it would get fair value for its land. If the government were to immediately grant its land to a private party, a private party that owes an equalization payment might abscond without paying, forcing the government to resort to expensive and uncertain legal procedures. By making equalization a condition precedent, Congress guarded against that danger.

d. In construing Congressional land grants, this Court applies the "familiar rule" that "every public grant of property . . . if ambiguous, is to be construed against the grantee and in favor of the public." *Cent. Transp. Co. v. Pullman's Palace Car Co.*, 139 U.S.

24, 49 (1891); *see* 3 Singer, *Statutory Construction* § 64:7 (6th ed. 2000) ("As a general rule, where the language of a public land grant is subject to reasonable doubt, ambiguities are resolved strictly against the grantee and in favor of the government."). Here, the text of section 8121 establishes that appraisal and equalization are conditions precedent. But if the text were ambiguous, that ambiguity would have to be resolved in favor of the public. And since, as discussed above, interpreting appraisal and equalization as conditions precedent would serve the public interest, that interpretation would be required.

The rule that ambiguities in grants are resolved in favor of the public has an ancient pedigree in English law. *See The Rebeckah*, 1 C. Rob. 227, 230 (1799) (explaining that the Crown and the public's rights should not be "diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away"). This Court has applied the presumption throughout its history. *See, e.g.*, *Caldwell v. United States*, 250 U.S. 14, 20-22 (1919) (applying the rule that in statutory grants, "nothing passes but what is conveyed in clear and explicit language – inferences being resolved not against but for the Government"); *Barden v. N. Pac. R.R. Co.*, 154 U.S. 288, 325-26 (1894) (stating that if a grant of land "admit[s] of different meanings, – one of extension, and one of limitation, – [the grant] must be accepted in a sense favorable to the grantor"). And the Court continues to apply the rule in modern cases. *See, e.g.*, *California ex rel. State Lands Commission v. United States*, 457 U.S. 273, 287-88 (1982) (reading the Submerged Lands Act in a manner that "adheres to the principle that federal

grants are to be construed strictly in favor of the United States"); *United States v. Grand River Dam Auth.*, 363 U.S. 229, 235 (1960) ("all federal grants are construed in favor of the Government lest they be enlarged to include more than what was expressly included").

This longstanding interpretive rule forms the backdrop against which Congress enacts statutory land grants, including section 8121. It also makes sense. If a court construes a conveyance strictly, in favor of keeping federal lands public, it simply returns control of the disputed land to Congress. If the court has misunderstood Congress's intent and the legislature wishes to convey the land to a private party, it can enact a new conveyance doing so explicitly. In contrast, if a court construes a conveyance liberally and allows federal land to leave public control, Congress will face significant barriers in recouping it from private hands. *See* U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation").[2]

Thus, the relevant considerations uniformly establish that appraisal and equalization are conditions precedent to the transfer of public land to Post 385E. Since those conditions were not fulfilled, Post

---

[2] This interpretive rule applies whether the government receives consideration for the conveyance or not. *See, e.g.*, *Wis. Cent. R.R. Co. v. United States*, 164 U.S. 190, 202 (1896); *S. Pac. Co. v. United States*, 307 U.S. 393, 401 (1939). The rule likewise applies even if the executive branch argues in court that a conveyance of land should be read liberally, because the rule protects Congress's control of public lands. *Samuel C. Johnson 1988 Trust v. Bayfield County*, 520 F.3d 822, 832 (7th Cir. 2008).

385E never acquired a vested interest in the land that it could pass on.

4. In response, the government asserts that a party's consideration cannot be a condition precedent. *See* Pet. Reply 11. Appraisal of the land, however, is not a form of consideration; it is simply a condition of the exchange. More fundamentally, one party's payment of consideration may, and often does, constitute a condition precedent to the other side's duty to perform. For example, in *Loud*, the Court expressly held that "*[t]he consideration* to be paid covered both the lands and the stocks, and its payment *was a condition precedent* to a transfer of either or both." 153 U.S. at 580 (emphasis added). And a leading treatise on contracts explains that "[i]n bilateral contracts . . . where one party's performance is to be rendered prior in time to that of the other, it is a constructive condition precedent to the latter's duty." Simpson, *Handbook of the Law of Contracts* § 152.

The authorities on which the government relies, *see* Pet. Reply at 11, do not suggest otherwise. They all address a distinctive doctrine concerning when a promise should be interpreted to be gratuitous. They have nothing to do with the question whether consideration can be a condition precedent to an exchange of land.

The government also argues that even if conditions precedent remained unfulfilled when Post 358E became defunct, the Court's jurisdiction is not affected because "it is the injunction here that blocked the transaction from occurring sooner." Pet. Reply 11, n.9. As authority for that proposition, the

government cites a contracts treatise noting that parties to a contract "cannot benefit from preventing other parties from performing conditions precedent." *Id.* (citing 13 Richard A. Lord, Williston on Contracts § 39:3 (4th ed. 2000)). The government's reliance on the doctrine of prevention is misplaced.

First, that doctrine only applies to the conduct of the parties to a contract. As the treatise on which the government relies explains, "[i]t is a general principle of contract law that if one *party to a contract* hinders, prevents, or makes impossible performance by the other party, the latter's failure to perform will be excused." 13 Williston on Contracts § 39:3, at 516 (emphasis added). This Court's cases reflect that settled understanding of the prevention doctrine. *See Anvil Mining. Co. v. Humble*, 153 U.S. 540, 552 (1894); *Union Mut. Ins. Co. v. Wilkinson*, 80 U.S. (13 Wall.) 222, 233 (1871). Even if the statutory "exchange" in section 8121 is treated as a contract, neither respondent nor the lower courts in this case are parties to that contract. Accordingly, their actions do not implicate the prevention doctrine.

More fundamentally, the underlying rationale of the prevention doctrine is that "one should not be able to take advantage of his or her own wrongful act." 13 Williston, *supra*, § 39:6, at 527. That doctrine therefore applies only against "a party who . . . has violated conscience, or good faith, or other equitable principle, in his prior conduct." *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 245 (1933). By filing a suit to vindicate a constitutional right, respondent obviously was not engaged in a wrongful act that violated conscience or good faith.

The prevention doctrine therefore has no application here.

C. The Alleged Revival Of Post 385E Does Not Change The Fact That The Court of Appeals Lacked Jurisdiction

An organization calling itself "Veterans of Foreign Wars of the United States Post 385" has joined an *amicus* brief arguing that the emergence of a new VFW Post 385 cures the mootness problem. The brief represents that "Post 385 is now fully operational" and "stand[s] ready to receive its property interest." *See* VFW Am. Br. 39. But the claim that Post 385 has suddenly re-emerged two years after it became defunct does not change the fact that the case was moot when the Ninth Circuit issued its decision. The judgment that is presently before the Court was therefore issued by a court without jurisdiction. And this Court has no jurisdiction to do anything other than to vacate the court of appeals' judgment on jurisdictional grounds.

That would leave it to the parties to decide in the first instance whether the claimed emergence of Post 385 raises a new live controversy. The government would have to decide whether Post 385 is a valid legal entity. And it would also have to decide whether the purported new Post 385 is the organization designated in section 8121 to which Congress intended to convey the property. In making that determination, the government would have to take into account that section 8121 specifies a land grant to "Post 385E," not "Post 385." *See* § 8121; VFW Am. Br. 39.

If the government concluded that a transfer of the land to Post 385 was warranted, respondent would then have to decide whether to seek an injunction against the transfer. And if respondent sought such an injunction, the district court would be required to resolve that issue anew, taking into account developments in the facts and the law that have occurred since its original decision. And since the court of appeals' judgment would have been vacated by this court, the district court's decision would not be constrained by that judgment.

At the very least, because the asserted reemergence of Post 385 creates new factual issues on which no findings have been made and new legal issues that have never been briefed, this Court should not resolve the significance of Post 385's claimed reemergence in the first instance. At a minimum, these new factual and legal issues should be considered first by the lower courts.

CONCLUSION

For the foregoing reasons, the court of appeals' judgment should be vacated on mootness grounds.

Respectfully submitted,

CHRISTOPHER KRUPP
WESTERN LANDS PROJECT
P.O. Box 95545
Seattle, WA 98145

PAULA DINERSTEIN
PUBLIC EMPLOYEES FOR
ENVIRONMENTAL
RESPONSIBILITY
2000 P Street, N.W.
Suite 240
Washington, DC 20006

SRI SRINIVASAN
IRVING L. GORNSTEIN
(*Counsel of Record*)
JUSTIN FLORENCE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5300

Attorneys for Amici Curiae

August 3, 2009