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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
PRESCOTT DIVISION

GRAND CANYON TRUST; CENTER FOR BIOLOGICAL DIVERSITY; SIERRA CLUB; and HAVASUPAI TRIBE,	)	**Case No. 13-8045-PCT-DGC**
Plaintiffs,	)	
vs.	)	**RESPONSE OF PLAINTIFF HAVASUPAI TRIBE TO FEDERAL DEFENDANTS' MOTION TO DISMISS**
MICHAEL WILLIAMS, Forest Supervisor, Kaibab National Forest; and UNITED STATES FOREST SERVICE, an agency in the U.S. Department of Agriculture,	)	
Defendants;	)	**ORAL ARGUMENT REQUESTED**
ENERGY FUELS RESOURCES (USA), INC.; and EFR ARIZONA STRIP LLC,	)	
Intervenor-Defendants.	)	

By this memorandum, Plaintiff Havasupai Tribe (the "Tribe") responds to the Federal Defendants' Motion to Dismiss (Doc. 71) (hereinafter, "Fed. Motion"), to the extent it asks this Court to dismiss the Fourth Claim of the Complaint (which is now designated as the Second Claim in Plaintiffs' Amended Complaint). The Tribe hereby incorporates by reference the arguments made by Plaintiffs Grand Canyon Trust, Center for Biological Diversity and Sierra Club ("Co-Plaintiffs") in the memorandum filed by them herein contemporaneously herewith, responding to the Fed. Motion's arguments as

to the First and Fourth Claims of the Amended Complaint, and including the introductory and background material set forth in that memorandum.

THE FEDERAL DEFENDANTS HAVE FAILED TO ASSERT ANY VALID BASIS FOR DISMISSING PLAINTIFFS' SECOND CLAIM

The Second Claim in Plaintiffs' Amended Complaint, Doc. 115 at 25-26, alleges that the Forest Service failed to undertake consultation with potentially affected Indian tribes, especially including Plaintiff Havasupai Tribe, as required by Section 106 of the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470f and the regulations at 36 C.F.R. Pt. 800, before proceeding with its valid existing rights ("VER") determination, in light of the virtual certainty that the reopening of the Canyon Mine would adversely affect the Red Butte TCP. The VER determination enabled the reopening of the Canyon Mine, notwithstanding the withdrawal of the mine site by the Secretary of the Interior in January, 2012, from the operation of the mining laws (the "Withdrawal"). As such, it constituted a "Federal permit, license or approval" within the meaning of Section 106.[1]

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[1]There is a matter of terminology here that should be cleared up. In their Complaint, Doc. 1, ¶ 89, in their briefs in support of their motion for preliminary injunction, Docs. 39, 61, and in the Amended Complaint, Doc. 115, ¶ 79, Plaintiffs stated that the VER determination was "an undertaking under Section 106 of the NHPA." On further reflection, Plaintiffs believe that to be incorrect. "Undertaking" is defined in the regulations as "a project, activity or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including . . . those requiring a Federal permit, license or approval." 36 C.F.R. § 800.16(y). (The language is taken almost verbatim from the statute, 16 U.S.C. § 470w(7).) Section 106 of the Act (16 U.S.C. § 470f) is concerned with "undertakings" that can affect historic properties. In this case, the mine project itself is the undertaking, as it will most certainly affect the Red Butte TCP. The VER determination was the "license or approval" that allowed the undertaking to go forward. *See, e.g., Sheridan Kalorama Hist. Assoc. v. Christopher,* 49 F.3d 750, 754 (D.C.Cir. 1995) ("federal authority to fund or license a project can render the project an undertaking, but the decision of the funding or licensing agency is

Cf., Karuk Tribe v. United States Forest Service, 681 F.3d 1006 (9th Cir.2012) (*en banc*) (Forest Service approval of Notices of Intent to undertake mining activities, such that formal mining plans were not required, constituted "agency action" triggering consultation obligation under Section 7 of Endangered Species Act, 16 U.S.C. § 1536).

The United States' Motion to Dismiss, however, attacks this claim primarily on the ground that neither the VER determination nor the Mine Review constituted a final agency action, and thus there is no jurisdiction for the claim under the APA. Fed. Motion, Doc. 71, at 14-15. This argument is misguided. The Second Claim alleges that under the NHPA, the Forest Service was obliged to conduct a Section 106 consultation before it conducted the VER determination. It is the Forest Service's *failure* to pursue the Section 106 process, not the quality or character of the VER determination, at which the claim is primarily directed. As the final paragraph of the claim states, the defendants' failure to conduct that process "constitutes agency action unlawfully withheld and unreasonably delayed," Amended Complaint, Doc. 115, at 26, ¶ 83, which is a separate ground for jurisdiction under 5 U.S.C. § 706(1). Whether or not the VER determination was a "final agency action" for purposes of the APA, thus, is of no consequence, as long as the complaint properly alleges that the agency "failed to take a *discrete* agency action that it is *required to take*." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphasis by the Court).[2]

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not itself an undertaking"); *Fein v. Peltier*, 949 F.Supp. 374, 378-9 (D.V.I. 1996) ("undertaking" for section 106 purposes includes activity under jurisdiction of federal agency regardless whether agency funds it in whole or in part).

[2] In *Norton*, the Supreme Court explained that to meet this jurisdictional requirement, the action that the agency is alleged to have failed to take must itself be one that would be deemed a "final agency action," *i.e.*, one that could itself be challenged under the APA had it been taken. 542 U.S. at 62-64. An agency's conduct of consultation under Section 106 has repeatedly been held to qualify as such, in cases challenging the adequacy of such consultation. *See, e.g.*, *Te-Moak*

That is precisely the claim here. The Second Claim alleges that under Section 106 of the NHPA, before performing the VER determination the Forest Service was required to "take into account the effect of the undertaking on any district [or] site . . . that is included in or eligible for inclusion in the National Register." The regulations at 36 C.F.R. §§ 800.1 - 800.6 describe the agency's responsibilities in detail.

In its Order denying Plaintiffs' Motion for Preliminary Injunction, entered herein on September 9, 2013, Doc. 86 at 8-13, this Court examined the VER determination in the context of the question whether it could be considered a "final agency action" for purposes of the APA. There is no authority of which Plaintiffs are aware that requires that the federal "license or approval" that triggers the Section 106 process must be equivalent to a "final agency action."[3] As the court held in *Atlantic Richfield Co. v. United States*, 774 F.2d 1193, 1200 (D.C.Cir. 1985), "license" can include "any form of permission." In *Vieux Carre Property Owners v. Brown*, 948 F.2d 1436, 1445 (5th Cir. 1991), the court noted that Section 106 duties apply "'as long as a Federal agency has opportunity to exercise authority *at any stage of an undertaking where alterations might be made to modify its impact on historic preservation goals*.'" (*Quoting Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271, 280 (3d Cir. 1983); emphasis

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Tribe v. United States Department of the Interior, 608 F.3d 592, 607-10 (9th Cir, 2010); *Pit River Tribe v. United States Forest Service*, 469 F.3d 768, 787 (9th Cir. 2006); *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 805-06 (9th Cir. 1999); *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995); *Quechan Tribe v. United States Department of the Interior*, 755 F.Supp.2d 1104 (S.D.Cal. 2010); *Comanche Nation v. United States*, 2008 WL 4426621 (W.D.Okla., Sept. 23, 2008); *Attakai v. United States*, 746 F.Supp. 1395 (D.Az. 1990).

[3] The Tribe nonetheless fully joins in the arguments made by Co-Plaintiffs that the VER Determination properly should be seen as a final agency action for APA review purposes.

added). That passage strongly suggests that it does not take a "final agency action" to trigger Section 106.

This Court also viewed the VER determination as not having legal consequences, in the sense meant by *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997), a case setting out a test for determining whether an action constitutes a final agency action. Doc. 86 at 10-12. Again, whether or not the VER determination meets that standard, the record seems clearly to establish that it had the effect of a federal "license or approval" for purposes of the NHPA. The VER Determination itself states that it is "Forest Service policy (FSM 2803.5) *to only allow operations on mining claims within a withdrawal that have valid existing rights* (VER)."AR 10486 (emphasis added). That statement was repeated verbatim on a page on the KNF website, describing the VER Determination for the Canyon Mine, AR 10642, and it was reiterated in the Executive Summary of the Mine Review, issued by the Defendants on June 25, 2012, in which the KNF stated, "Under the segregation and subsequent withdrawal, *any mining claimant pursuing approval for exploration or mining would need to prove their claims had valid existing rights* prior to the 2009 segregation." AR 10594 (emphasis added). *And see* other authorities referenced in the memorandum filed herein by Co-Plaintiffs.

This Court's September 9, 2013 Order acknowledged the Forest Service policy quoted above, but chose to look instead at a statement in an informal Forest Service "Q&A" handout, dated in 2009, stating that "It is the policy of the Forest Service to be consistent with the BLM direction" on when VER determinations will be made. Doc. 86 at 11 n.2; *and see* AR 7691. But the provisions of the BLM Handbook referred to by the Court are equivocal, and clearly give BLM managers broad discretion. A section specifically relied on by the Court, Section 8.1.5, states that "BLM still retains the discretion to assess the validity of any mining claim on any lands . . . when it would be in the public interest *and may choose to do so when there are ongoing operations in*

withdrawn or segregated lands." AR 11602 (emphasis added; footnote omitted). Section 8.1.1.3 ("Determination of Invalidity") states that if the VER determination concludes that the claim was invalid at the time of a withdrawal, BLM "may not approve the Plan of Operations . . . or *allow any other activities on the mining claim*." AR 11601 (emphasis added). The highlighted statements plainly suggest that on the basis of an adverse finding in a VER determination, BLM would disallow "any other activities" on withdrawn lands, even if a Plan of Operations had been approved. Plaintiffs thus submit that the BLM policies are not at all inconsistent with Forest Service policy 2803.5.

KNF Supervisor Michael Williams himself explicitly affirmed the effect of the VER Determination in a statement he made to the Hualapai Tribal Council, in a conference call on January 11, 2012. AR 10342.[4] At the outset of the conversation, Williams was asked what would happen "if Denison cannot show VER [valid existing rights]?" He replied, according to the KNF notes of the call, "they would no[t] be able to move forward without VER under the mineral withdrawal;" *and see* AR 10348 (KNF email informing Kaibab Paiute representatives that EFR "will not be doing any 'shaft sinking' at the site until the minerals exam is completed"); AR 10638 (KNF News Release issued on June 25, 2012, stating that EFR was expected to resume operations at the mine "[b]ased on the results of the mineral validity examination"). EFR itself conceded that it could not begin operations until KNF found that its two mining claims at the Canyon Mine contained valid existing rights. AR 10478 (EFR press release saying company will begin sinking Canyon Mine shaft "pending regulatory approval").

These statements are consistent with the holding of a decision relied on by the Defendants and by this Court in its decision denying the motion for preliminary

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[4]Because the Defendants considered this document to contain Confidential Information, it was filed with the Court under seal, but the statement quoted here is not Confidential Information.

injunction, *Wilderness Society v. Robertson,* 824 F.Supp. 947, 953 (D.Mont.1993). *See* Doc. 86 at 12. In rejecting a claim by the plaintiffs in that case that a VER determination made by the Forest Service should have been preceded by an environmental impact statement, the court observed that such a determination is "not a discretionary matter of granting or denying a privilege, but rather is a non-discretionary act of *determining whether rights conferred by Congress have come into existence*." (Emphasis added.) The court is plainly characterizing the VER determination as an objective inquiry with important legal consequences, in this case governing the decision whether a patent should issue to the mining company. Precisely the same reasoning applies here, that the VER determination governed the determination whether, in light of the Withdrawal and Forest Service policy FSM 2803.5, mining activity could resume at the Canyon Mine.

Thus, regardless whether the VER determination should be considered a final agency action, it unquestionably constitutes a federal "license or approval" that enabled the restarting of the Canyon Mine to proceed, notwithstanding the Withdrawal.

Defendants also argue that the Second Claim is barred by res judicata, based on the decision in *Havasupai Tribe v. United States*, 752 F.Supp.1471 (D.Az. 1990), *aff'd sub nom. Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir.1991) ("*Havasupai Tribe*"). Defendants are wrong. Res judicata bars relitigation of a claim that was or could have been litigated in a previous lawsuit between the same parties that went to final judgment, or of issues that were actually and necessarily litigated in a prior lawsuit between the same parties. *Taylor v. Sturgell*, 553 U.S. 880, 892-93 (2008). It is clear beyond any doubt that the issues raised in Plaintiffs' Second Claim were not, and could not have been, litigated or decided in *Havasupai Tribe*.

First, there is the obvious point that while the Tribe (along with several individual members of the Tribe) was the plaintiff in *Havasupai Tribe*, in this case the plaintiffs include three environmental organizations that were not parties to that earlier case, and

thus could not be barred by res judicata under any theory. *Taylor*, 553 U.S. at 892-93 ("A person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit." (*Quoting Richards v. Jefferson County*, 517 U.S. 793, 798 (1996).) On that point alone, this argument should be rejected.

Second, however, Plaintiffs' Second Claim is not, as the United States attempts to characterize it, a generalized claim of violation of the Tribe's rights to religious freedom, *see* Fed. Motion, Doc. 71 at 15-16. Rather, it alleges that the likelihood of adverse impacts on the Red Butte Traditional Cultural Property ("TCP"), which had only been designated a TCP in 2010, mandated consultation under Section 106, prior to the completion of the VER determination. No such claim could have been made in the *Havasupai Tribe* litigation, because Red Butte had not been identified as a TCP, and probably could not have been until the NHPA was amended in 1992 (*after* the *Havasupai Tribe* decision) to provide specifically that "[p]roperties of traditional religious and cultural importance to an Indian tribe" could be listed on the National Register. 16 U.S.C. § 470a(d)(6).

The Second Claim is nothing like the claim made in the earlier litigation, that the Tribe's (and individual members') religious rights are being violated by approval of the mine. Rather, the claim here is that the Forest Service failed entirely to perform the specific, discrete duties imposed on it by Section 106 of the NHPA and the regulations at 36 C.F.R. Pt. 800, to determine means to avoid, minimize or mitigate the adverse effects of the mine on the Red Butte TCP. Plainly, that claim was not, and could not have been, litigated or decided in the *Havasupai Tribe* litigation.

For the same reasons, the United States' contention that the Second Claim is barred by laches is completely without merit. The claim is not an attack on the adequacy of the Section 106 process supposedly conducted by the Forest Service in 1984 in connection with the original approval of the Plan of Operations for the Canyon Mine.

There is no claim here that there was anything wrong with that process (which consisted solely of an archaeological survey of the mine site). Rather, the claim is that before allowing the mine to reopen in 2012, the Forest Service was obliged to undertake a new Section 106 Process, in light of the identification of the Red Butte TCP in 2010. That claim only arose in 2012, when the Forest Service completed and released the VER determination without doing any further consultation under Section 106.

The situation here, thus, is very much like that in *Preservation Coalition, Inc., v. Pierce*, 667 F.2d 851 (9th Cir. 1982), a decision favorably discussed in a case cited and relied upon by the United States, *Apache Survival Coalition v. United States*, 21 F.3d 895, 909 (9th Cir. 1994). In *Preservation Coalition*, the district court had dismissed the NEPA claim on the ground of laches, concluding that the last major federal action had occurred in 1971, but suit was not filed until 1979. But the court of appeals noted that the circumstances that prompted the filing of the lawsuit were the placing of several buildings in downtown Boise on the National Register, which occurred in 1974 and 1978, and then the discovery by the plaintiffs in 1979 that the city had decided to demolish the buildings as part of the federally funded project. The plaintiffs complained to federal officials that this change in plans should force the preparation of an environmental impact statement, and when that claim was rejected they filed suit. The Ninth Circuit had no difficulty concluding that the plaintiffs had acted diligently, under the circumstances, and in *Apache Survival Coalition* the court approved that conclusion. 21 F.3d at 909.

That reasoning should apply fully here. Although the original Plan of Operations for the Canyon Mine was approved in 1986, it was not until 2010 that the Forest Service determined that Red Butte and a large area around it, including the actual site of the mine, should be designated a Traditional Cultural Property. It was then in June, 2012, that the Forest Service made the determination that the Canyon Mine could reopen without further environmental review or consultation under NHPA, and for the first time invited Plaintiff

Havasupai Tribe and other tribes to engage in consultation about the project. AR 10643-11208. The Tribe and the Advisory Council on Historic Preservation advised the Forest Service that it needed to undertake a full Section 106 process before any destructive activity occurred on the mine site, AR 11326, 11334, but the Forest Service refused to modify its position. After the Tribe attended the one "consultation" session that the Forest Service convened, in January, 2013, and saw that the entire process was a sham, *see* AR 12238-44, it joined with the Co-Plaintiffs and filed this suit in March, 2013. There can be no basis for a finding of lack of diligence on the Tribe's part on this record.

The United States finally claims that this claim is barred by the 6-year statute of limitations in 28 U.S.C. § 2401(a), relying on a total mischaracterization of the claim as an attack on the 1986 Record of Decision ("ROD") for the Canyon Mine. This argument is simply frivolous. The Second Claim makes no reference whatever to the ROD, and cannot by even the most tortured logic be construed as an attack on the ROD. It rather arises from the events of 2012, and directly attacks the Forest Service's violation of its clear duties under Section 106 of the NHPA in connection with its determination that operation of the Canyon Mine could resume.

In short, the government's motion to dismiss Plaintiffs' Second Claim must be denied.

Respectfully submitted,

Dated: May 2, 2014

/s/ Richard W. Hughes
Richard W. Hughes

Attorney for Plaintiff Havasupai Tribe

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2014, I caused to be filed a true and exact copy of Plaintiff Havasupai Tribe's Response to Federal Defendants' Motion to Dismiss with the Court's CM/ECF system, which will generate a Notice of Filing and Service on the following:

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