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

GRAND CANYON TRUST, et al., Plaintiffs vs. MICHAEL WILLIAMS, et al., Defendants, and ENERGY FUELS RESOURCES INC., et al., Defendant-Intervenors.	Case No. 13-8045-DGC PLAINTIFFS GRAND CANYON TRUST, CENTER FOR BIOLOGICAL DIVERSITY, AND SIERRA CLUB'S OPPOSITON TO MOTION TO DISMISS ORAL ARGUMENT REQUESTED

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TABLE OF AUTHORITIES

Plaintiffs Grand Canyon Trust, Center for Biological Diversity and Sierra Club submit this opposition to Defendants' Forest Supervisor Michael Williams and the U.S. Forest Service (collectively "Forest Service") Partial Motion to Dismiss (Doc. 71) as it pertains to Claims 1 and 4 in the Amended Complaint (Doc. 115).[1]

INTRODUCTION

The Federal Land Policy and Management Act (FLPMA) authorizes the Secretary of the Interior to withdraw lands otherwise open under the 1872 Mining Law. On January 9, 2012, the Secretary issued a 20-year withdrawal of lands that surround Grand Canyon National Park to protect the region's water, land and cultural resources from uranium mining (the "Withdrawal"). The Withdrawal prohibits mining unless the Forest Service determines mining claims contain "valid existing rights."

The Canyon Uranium Mine and its two mining claims are within the area covered by the Withdrawal. On April 26, 2012, the Forest Service determined the Mine's claims contain valid existing rights (the "VER Determination"), which permitted Energy Fuels Resources (Energy Fuels) to restart Canyon Mine despite the Withdrawal.

In Claims 1 and 4 (formerly Claims 3 and 7) of the Amended Complaint, Plaintiffs challenge the VER Determination: Claim 1 alleges that the Forest Service failed to comply with the National Environmental Policy Act (NEPA) prior to issuing the VER Determination; Claim 4 contends the VER Determination was arbitrary because the Forest Service ignored relevant economic factors. The Forest Service has moved to dismiss Claims 1 and 4, arguing the VER Determination is not a "final agency action" under the Administrative Procedure Act (APA). Doc. 71 at 22.

The Forest Service's Motion should be denied as to these claims. The VER Determination is a final agency action. It is an APA "agency action," as defined by 5 U.S.C. § 551: (1) it is a "license" to mine on claims that the Withdrawal renders unavailable (id. § 551(8)), and (2) it provides "relief" recognizing that Canyon Mine's claims are valid. Id. § 551(11). For several reasons, the VER Determination is also a

[1] Co-Plaintiff Havasupai Tribe is addressing Claim 2 is a separate opposition brief. The Motion to Dismiss does not address Claim 3.

"final" agency action: it culminated a Forest Service administrative process regarding claim validity, had legal consequences for Canyon Mine in an area covered by the Withdrawal, determined Energy Fuels' rights at the Mine' two claims, affected Energy Fuels' day-to-day Mine operations, and harmed Plaintiffs' interests in conserving environmental and cultural resources. In short, Energy Fuels could not mine these claims without the VER Determination.

Fundamentally, the Forest Service's Motion errs by ignoring the sole purpose of the VER Determination – to permit Canyon Mine to restart on withdrawn lands. The Motion wrongly focuses on another purpose served by a validity determination in other contexts, specifically, to initiate a "contest proceeding," which is irrelevant at the Mine. The Court should reject this distraction as well as the agency's misplaced emphasis on the 1986 plan of operations approval, wherein claim validity was not addressed.

BACKGROUND

The Motion to Dismiss and the Court's preliminary jurisdictional order (Doc. 86) require Plaintiffs to detail the relationship between 1872 Mining Law, land withdrawals, and claim validity, and the approvals required for Energy Fuels to restart Canyon Mine.

I. The Mining Law – Lands Open To Mineral Entry

Under the Mining Law, federal lands are open for "locating" a mining claim and "discovering" a "valuable mineral deposit." 30 U.S.C. § 22; Cameron v. United States, 252 U.S. 450, 460 (1920); Independence Min. v. Babbitt, 105 F.3d 502, 507 n.6 (9th Cir. 1997). "A mineral claim is a parcel of land containing precious metal in its soil [placer] or rock [lode]." U.S. v. Shumway, 199 F.3d 1093, 1099 (9th Cir. 1999).

A. Locating Claims and Discovering A Valuable Mineral Deposit

The act of locating a claim involves marking "the boundaries of the claim" and fulfilling the Mining Law's administrative requirements. Cole v. Ralph, 252 U.S. 286, 296 (1920); Shumway, 199 F.3d at 1099. Locating a claim establishes a miner's interests versus other potential claimants, and authorizes their right to possess lands within the lines of the claims. Union Oil v. Smith, 249 U.S. 337, 346-47 (1919);

Shumway, 199 F.3d at 1098-99. The U.S. maintains title to all lands within located claims. Calif. Coastal Comm'n v. Granite Rock, 480 U.S. 572, 575 (1987).

A claim is not valid prior to the discovery of a valuable mineral deposit. 30 U.S.C. § 23; Cole, 252 U.S. at 295–96; Exh. 6 (AR 7310). There are two tests for determining whether a valuable mineral deposit has been discovered: the "marketability" test, whereby a claimant must demonstrate that the mineral can be "extracted, removed and marketed at a profit;" and the "prudent-person" test, which means "the discovered deposits must be of such a character that a person of ordinary prudence would be justified in the further expenditure of his labors and means, with a reasonable prospect of success, in developing a valuable mine." U.S. v. Coleman, 390 U.S. 599, 600, 602 (1968). If a valuable mineral deposit is established, the claimant may possess, occupy, and extract minerals from federal lands. 30 U.S.C. § 26; Swanson v. Babbitt, 3 F.3d 1348, 1350 (9th Cir. 1993).

B. Patents and Contests - Claim Validity

The Mining Law allows persons to "patent" a located mining claim. 30 U.S.C. §§ 22, 29; 43 C.F.R. §§ 3860 et seq. (detailing patent procedures). To patent a claim, Interior must find that the claim is "valid," meaning there is a valuable mineral deposit. Independence Min., 105 F.3d at 506-07. By patenting a claim, claimants increase their property rights and obtain title to both the surface estate and mineral deposits. McMaster v. U.S., 731 F.3d 881, 885 (9th Cir. 2013). For instance, on unpatented claims, claimants may only use the claim and accompanying public land for mining-related purposes. 30 U.S.C. § 612(a) (uses limited to "prospecting, mining or processing operations and uses reasonable incident thereto"); U.S. v. Backlund, 689 F.3d 986, 991 (9th Cir. 2012); Clouser v. Espy, 42 F.3d 1522, 1525 n.2 (9th Cir. 1994). Moreover, federal agencies regulate unpatented claims based on their authorities to manage surface resources. 30 U.S.C. § 612(b); 28 C.F.R. §§ 228 et seq.; Shumway, 199 F.3d at 1101; U.S. v. Goldfield Deep Mines, 644 F.2d 1307, 1309 (9th Cir. 1987) (upholding Forest Service's regulatory action on unpatented claims disturbing national forest land).

The federal government may challenge a claimant's discovery of a valuable mineral deposit on unpatented claims through "contest" proceedings. 43 C.F.R. § 4.451-1; e.g. McKown v. U.S., 908 F.Supp.2d 1122, 1129 (E.D. Cal. 2012). The Department of the Interior had adopted contest procedures to ensure the claimant receives due process. See 43 C.F.R. § 4.451-1 et seq. Both the land management agency and Interior play a role in contest proceedings. Exh. 6 (AR 7310-12). For the Forest Service, the first step in the process is preparation of a mineral report. Id. (AR 7311). If the mineral report finds no discovery on the claim, Interior may then, on its own or at the request of the land management agency, initiate "contest" proceedings to invalidate the claim and evict the claimant. Hjelvik v. Babbitt, 198 F.3d 1072, 1074-75 (9th Cir. 1999). In this scenario, the mineral report functions as evidence in the contest proceeding. Id. At the conclusion of the contest, Interior determines whether the mining claims should be declared null and void for lack of discovery of a valuable mineral deposit. Cameron, 252 U.S. at 460; Swanson, 3 F.3d at 1354.

II. Forest Service Management Of Surface Resources On Public Lands

Although the national forests are open under the Mining Law, the Forest Service regulates the use of surface resources for claimants seeking to develop unpatented mining claims. 36 C.F.R. § 228.2 (regulations "apply to operations ... conducted under the United States mining laws ... as they affect surface resources on all National Forest Service lands"); U.S. v. Locke, 471 U.S. 84, 105 (1985) (unpatented mining claimants "take their mineral interests with the knowledge that the Government retains substantial regulatory power over those interests"); see Goldfield Deep Mines, 644 F.2d at 1309 ("where mining activity disturbs national forest lands, Forest Service regulation is proper"). Forest Service regulations ensure mining operations "minimize adverse environmental impacts on National Forest System surface resources." 36 C.F.R. § 228.1; § 228.8; see id. § 228.3(a) (defining "operations" as inclusive of exploration and development activities and related infrastructure and roads).

Under these regulations, a miner must obtain Forest Service approval of mining operations that "will likely cause a significant disturbance of surface resources" through

plans of operations. 36 C.F.R. § 228.4(a)(4) ("operations can not be conducted until a plan of operations is approved"); § 228.4(a)(3), § 228.5; Siskiyou Reg'l Educ. Project v. U.S. Forest Serv., 565 F.3d 545, 551 (9th Cir. 2009). A plan of operations must detail the location of operations, disturbed areas and access roads, the type and duration of operations, and the measures for environmental protection. 36 C.F.R. § 228.4(c). In addition, the operator must furnish a bond to cover the "cost of stabilizing, rehabilitating and reclaiming." Id. § 228.13(a), (b). Through this plan approval process and by imposing conditions, the agency is able to minimize adverse impacts. Exh. 6 (AR 7297-98); see California Coastal Comm'n, 480 U.S. at 576.

III. 2012 Mining Withdrawal And The Valid Existing Rights Exemption

Public lands may be withdrawn from operation of the Mining Law. FLPMA authorizes the Secretary of the Interior to withdraw lands from certain uses, including mining, to accomplish specified purposes. 43 U.S.C. § 1714(a) (authorizing Interior to "make, modify, extend, or revoke withdrawals" of public lands); id. § 1701(a)(4) (in FLPMA, "Congress delineate[d] the extent to which the Executive may withdraw lands without legislative action"). A "withdrawal" is the "withholding an area of Federal land from settlement, sale, location or entry under some or all of the general land laws, for the purpose of limiting activities under these laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program." Id. § 1702(j); see Mt. Royal Joint Venture v. Kempthorne, 477 F.3d 745, 750, n.3 (D.C. Cir. 2007) ("Mineral entry refers to the right of entry on public land to mine valuable mineral deposits."). Once withdrawn, the Mining Law no longer authorizes mining. See Lara v. Sec'y of Interior, 820 F.2d 1535, 1542 (9th Cir. 1987) (recognizing "the right to prospect for minerals ceases on the date of withdrawal…"); Kosanke v. U.S. Dept. of Interior, 144 F.3d 873, 874 (D.C. Cir. 1998) ("[L]ands withdrawn from mineral entry are no longer considered to be within the public domain and therefore are not subject to the statutory rights enumerated in the General Mining Law"); National Wildlife Federation v. Burford, 835 F.2d 305, 308 (D.C. Cir. 1987) ("The purpose of

withdrawals is to limit activities under those [mining] laws and to preserve other public values, such as recreation and fish and wildlife.").

However, FLPMA withdrawals are made subject to valid existing rights. 43 U.S.C. § 1701, Note Pub. L. 94-579, § 701(h); see also id. § 1714; Yount v. Salazar, 2013 WL 93372, *2 (D. Ariz. Jan. 8, 2013). Valid existing rights exist if there has been a discovery of a valuable mineral deposit within the limits of a claim at the time of the withdrawal. Ctr. for Biological Diversity v. U.S. Dep't. of the Interior, 623 F.3d 633 (9th Cir. 2010) ("only persons who had established a valid mining claim before withdrawal would be permitted to mine on those parcels"); Hjelvik, 198 F.3d at 1074 ("Where a claim is located on land withdrawn from mineral entry pursuant to the Wilderness Act, a claim must be supported by a discovery of a valuable mineral deposit at the time of withdrawal"). No one can discover a mining claim after a withdrawal, and no one can mine a withdrawn area without valid existing rights. Clouser, 42 F.3d at 1525. The Ninth Circuit has explained a withdrawal's effect:

> [T]he national forest land in which the mining claims are located was at one time open to the public for exploration, prospecting, and the extraction of minerals; however, the land was subsequently withdrawn from mineral entry under the Wilderness Act or Wild and Scenic Rivers Act, so that only persons establishing that they discovered a valuable mineral deposit prior to the withdrawal possess a valid right to mine claims there (a 'valid claim').

Id. at 1524-25. Accordingly, in addition to patents and contest proceedings, claim validity must be determined when a claimant wishes to mine in a withdrawn area.

On July 21, 2009, the Secretary of the Interior proposed to "withdraw approximately 633,547 acres of public lands and 360,002 acres of National Forest System lands for up to 20 years from location and entry under the Mining Law of 1872." 74. Fed. Reg. 35,887 (July 21, 2009). The proposal – referred to as a "segregation" under FLPMA (43 U.S.C. § 1714(b)(1)) -- was in effect for over two years to allow for the preparation of an Environmental Impact Statement (EIS) under NEPA. Id. "The purpose of the withdrawal … [is] to protect the Grand Canyon watershed from adverse effects of locatable hardrock mineral exploration and mining for up to a 20-year period, which is the maximum allowable for a withdrawal

aggregating more than 5,000 acres." Id. One justification for the withdrawal was to address inadequacies in existing management and regulations. Id. (explaining "the Forest Service under 36 CFR 228 would not adequately constrain nondiscretionary uses which could result in permanent loss of significant values and irreplaceable resources at the site").

After extending the segregation for six months (76 Fed. Reg. 66,747 (Oct. 27, 2011)), Interior issued a Public Land Order to withdraw from location and entry over one-million acres of public lands. 77 Fed. Reg. 2317 (Jan. 7, 2012); Exh. 1. The Withdrawal's effect is significant, as explained in a supporting report:

> [I]f the [mineral] deposits at depth have not been drilled by the date of the withdrawal or segregation, or if drilling at the [claim] site failed to demonstrate uranium mineralization, the claim would not be valid and the deposits could not be mined.

Exh. 10 at 23 (emphasis added). However, mining claims with valid existing rights are exempt from the Withdrawal. 77 Fed. Reg. 2317; Exh. 1 (AR 10310).

IV. Canyon Mine Approvals: 1986 Plan of Operations and 2012 VER Determination

Energy Fuels required both an approved plan of operations to comply with Forest Service regulations and a validity determination due to the Withdrawal to restart Canyon Mine.

On September 26, 1986, the Forest Service approved the Canyon Mine through a plan of operations. AR 915-29; 10391-414. The Forest Service determined that mining operations at Canyon Mine "were likely to adversely affect surface resources" in the Kaibab National Forest. See 36 U.S.C. § 228.4(a). This approval action triggered NEPA, and thus the Forest Service prepared an EIS and Record of Decision. AR 461-693; 915-29. The Forest Service's approval recognized the significant risk the Mine posed to groundwater resources and to public health through the potential release of radioactive contamination, and thus monitoring requirements were imposed on the operator. AR 922; AR 876; AR 924; AR 527 (requiring one-year of pre-operational baseline monitoring data). For several reasons, the agency's 1986 approval did not include a validity determination: validity is not part of the plan of operations approval

process, the operator was not seeking to patent the mining claims, the Forest Service was not attempting to contest the claims, and no withdrawal was in place.

After approval, some infrastructure projects were initiated and a small portion (50 feet) of the mineshaft was constructed. Exh. 2 (AR 10487). However, the original operator (Energy Fuels Nuclear) closed Canyon Mine in 1992 because the price of uranium declined. Since then, Canyon Mine has remained dormant and no uranium ore has been removed. Energy Fuels purchased the Mine in 1997.[2]

On September 13, 2011, Energy Fuels informed the Forest Service that it wished to restart operations at Canyon Mine. Exh. 3 (AR 10594). Because Canyon Mine was located in the Withdrawal area, on October 11, 2011, the Forest Service initiated a process to assess the validity of the Mine's two unpatented mining claims. Exh. 2 (AR 10486, 10487). As the agency acknowledged, valid existing rights were required before Canyon Mine could restart. Exh. 2 (AR 10486) ("It is Forest Service policy (FSM 2803.5) to only allow operations on mining claims within a withdrawal that have valid existing rights"); id. at (AR 10489) ("Due to the withdrawal, all locatable operations within this area must have valid existing rights (VER) in order to be able to operate on these claims."); Exh. 3 (AR 10594) (due to 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"); see Yount, 2013 WL 93372, *2 (noting because lands are withdrawn, "BLM or another federal land management agency must conduct a mineral examination before allowing the development of noticed claims"). On April 18, 2012, the Forest Service issued its final VER Determination, concluding the two claims were "discovered" prior to the 2009 Segregation. Exh. 2 (AR 10483) (finding "under present economic conditions, the uranium deposit on Canyon 74 and 75 claims could be mined, removed, transported, milled, and marketed at a profit"); id. (AR 10486) ("We conclude that a discovery of a valuable mineral deposit existed at the time of the segregated withdrawal.").

[2] Energy Fuels merged with Denison in July 2012. For ease, Plaintiffs refer to both as Energy Fuels.

In response to Energy Fuels' desire to restart mining, the Forest Service also initiated a "Mine Review." Exh. 3. This review, which did not involve the public, was required under NEPA because the Mine was "awaiting implementation." Exh. 8 at 4. In its Mine Review, the Forest Service determined not to prepare a supplemental EIS, concluded a modified plan of operations was unnecessary under 36 C.F.R. § 228.4(e),[3] and postponed assessing impacts to the Red Butte Traditional Cultural Property as required by the National Historic Preservation Act (NHPA) until after operations began. Exh. 3 (AR 10599-60; 10601-02).

V. Procedural History

On March 7, 2013, Plaintiffs filed suit challenging, among other things, the Forest Service's VER Determination for Canyon Mine. Plaintiffs had been monitoring the Forest Service's discussions with the Advisory Council on Historic Preservation (ACHP) – the expert agency on NHPA implementation – regarding the applicable process to address adverse effects to the Red Butte Traditional Cultural Property. The ACHP sent two letters, dated August 1, 2012 and February 6, 2013, informing the Forest Service that it was not complying with the NHPA correctly. AR 11334-35; 12346-47. According to the ACHP:

> [A]gencies should refrain from destructive activities before completing [NHPA] Section 106 to avoid restricting the subsequent consideration of alternatives to avoid, minimize and mitigat[e] the undertaking's adverse effects to historic properties. . . . resumption of destructive activities at the mine, prior to the completion of the Section 106 process would undercut the FS efforts to consult in good faith with the parties.

AR 12346-47. When the Forest Service made clear it would not adhere to the ACHP's warnings and Energy Fuels was about to restart mineshaft construction, Plaintiffs filed this case.

Subsequently, on April 6, 2013, Energy Fuels began constructing the mineshaft. Doc. 53-3, ¶ 5. Plaintiffs moved for a preliminary injunction on April 11, 2013. Doc. 17. In a September 9, 2013 Order, the Court denied the motion, finding the VER

[3] Modification to plan approvals occur when there are "unforeseen significant disturbances" or operations will cause "unnecessary and unreasonable" "irreparable injury, loss or damage to surface resources." 36 C.F.R. § 228.4(e).

Determination was not a final agency action and thus jurisdiction was wanting. Doc. 86. Plaintiffs appealed. As part of an agreement to stay Plaintiffs' appeal, Energy Fuels agreed to cease operations at Canyon Mine. Doc. 96, 97. Energy Fuels also indicated it was closing the Mine temporarily because it is not currently economically viable.

STANDARD OF REVIEW

The Forest Service's Motion raises jurisdictional defenses to Plaintiffs' challenge to the VER Determination. A motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction can be either a facial or factual attack. Thornhill Publ'g v. Gen. Tel. & Elec., 594 F.2d 730, 733 (9th Cir. 1979). A facial attack occurs when the moving party asserts that the complaint's allegations are "insufficient on their face to invoke federal jurisdiction." Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). In resolving a facial challenge, courts assume plaintiffs' factual allegations are true and draw all reasonable inferences in their favor. Doe v. Holy See, 557 F.3d 1066, 1073 (9th Cir. 2009). A factual attack "disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." Safe Air, 373 F.3d at 1039. If the attack is factual, a court may look beyond the pleadings to resolve factual disputes, and the plaintiff has the burden of proving that jurisdiction exists. Id.

ARGUMENT

I. The Court Has Jurisdiction Over The VER Determination

Jurisdiction over Plaintiffs' challenge to the VER Determination in Claims 1 and 4 is rooted in the APA. 5 U.S.C. § 551 et seq.; Doc. 115, ¶ 6. The APA "creates a strong presumption of reviewability that can be rebutted only by a clear showing that judicial review would be inappropriate." Defenders of Wildlife v. Tuggle, 607 F.Supp.2d 1095, 1098 (D. Ari. 2009) (quoting, Natural Res. Defense Council v. Sec. & Exchange Commission, 606 F.2d 1031, 1043 (D.C. Cir. 1979)). Under the APA, courts have jurisdiction over challenges to "final agency actions." 5 U.S.C. §§ 702, 704.

Plaintiffs have alleged sufficient facts to demonstrate the VER Determination is a final agency action. Doc. 115, ¶¶ 4, 6, 18, 52, 58. Indeed, Defendants' Motion does not facially attack the Amended Complaint. Nonetheless, the Forest Service asserts

Plaintiffs have "not met their burden" (Doc. 71 at 9) and attempts to dispute the alleged facts by proclaiming that the VER Determination did not end a decisionmaking process or authorize mining. Id. at 22. The agency is wrong. As detailed below, the law and supporting facts demonstrates the Court's jurisdiction over Claims 1 and 4. Due to the Withdrawal, the Forest Service's VER Determination permitted Energy Fuels to mine uranium at Canyon Mine and found the Mine's claim valid. Once the agency completed the VER Determination, no further agency actions were required to restart the Mine.

A. The VER Determination Is An "Agency Action"

For an action to be reviewable under the APA, it must first be an "agency action." Agency action is defined broadly to include "the whole or part of an agency … license, … relief, or the equivalent or denial thereof." Id. § 551(13); Lundeen v. Mineta, 291 F.3d 300, 304 (5th Cir. 2002) (noting APA "definition is very broad"). "License" means "the whole or part of an agency permit … or other form of permission." 5 U.S.C. § 551(8). "Relief" is defined to include the "recognition of a claim … privilege, exemption or exception." Id. § 551(11). By requiring challenges to agency actions, a plaintiff must "direct its attack against some particular 'agency action' that causes it harm," rather than seeking "wholesale improvements" of agency programs. Siskiyou Reg'l Educ. Project, 565 F.3d at 553-54.

The challenged VER Determination meets the test for agency action, as it is both a license and relief. Absent the Forest Service finding that Canyon Mine's claims are valid in the VER Determination, the Mine could not have restarted due to its location in the Withdrawal area. Indeed, the Forest Service's VER Determination states: "[d]ue to the withdrawal, all locatable operations within this area must have valid existing rights (VER) in order to be able to operate on these claims." Exh. 2 (AR 10489). As the agency recognized, the VER Determination was conducted solely to determine whether to grant Energy Fuels permission to restart Canyon Mine in light of the Withdrawal:

> The area containing the claim block [for Canyon Mine] is within the Northern Arizona Mineral Withdrawal that was segregated from the Mining Law … [and which] was withdrawn for a period of 20 years by the Secretary of the Interior.

> It is the Forest Service policy (FSM 2803.5) to only allow operations on mining claims within a withdrawal that have valid existing rights (VER).

Id. ((AR 10486); id. (AR (AR 10487) (same). Similarly, the Forest Service's Canyon Mine webpage informed the public that "[i]t is the Forest Service policy (FSM 2803.5) to only allow operations on mining claims within a withdrawal that have valid existing rights." Exh. 4 (noting VER Determination prepared due to Energy Fuels' "request to resume development and mining operations at [] Canyon Mine").

Other formal agency communications confirm that, due to the Withdrawal, the VER Determination was legally required for Canyon Mine to restart. For instance, when company expressed its "intent to resume mining operations at Canyon Mine," the agency informed Energy Fuels that "the Forest Service's next steps are … to complete a mineral exam at the Mine." Exh. 11 (AR 12429).

> A mineral exam is scheduled to determine that your company has valid existing rights for the Canyon Mine location. This is a requirement for any public domain lands managed by the Forest Service that have been withdrawn from mineral entry…
>
> We will inform you regarding the outcomes of …the mineral exam when [it is] completed.

Id. (emphasis added). The agency's Mine Review notes that, because Canyon Mine is within the Withdrawal area, Energy Fuels must "prove their claims had valid existing rights prior to the 2009 Segregation." Exh. 3 (AR 10594). Forest Supervisor Williams informed regional tribes that claim validity was required specifically for the Mine:

> [redacted]

Exh. 17 (AR 10342) (emphasis added). Forest Supervisor Williams and other agency staff explained that even though "[redacted]" Exh. 13 (AR 10345) (emphasis added). The agency emphasized this requirement: [redacted]" Exh. 14 (AR 10335) (emphasis added).

Because of the Withdrawal and the Forest Service's unwavering recognition of the Withdrawal's effect, Energy Fuels also recognized the significance of the VER Determination. The company informed the Forest Service that it "will not be doing any

'shaft sinking' at the site until the minerals exam is completed." Exh. 12 (AR 10348) (emphasis added). As the VER Determination was being prepared, Energy Fuels expressed its interest in having that review completed quickly "so we can hopefully close this out and proceed with our production plans." Exh. 15 at 1. As Energy Fuels conceded, the Mine could not restart until valid claims were found.

The VER Determination itself, the Forest Service's webpage for Canyon Mine, and the agency's formal communications all reveal that the VER Determination provided permission for the Mine to restart in response to the Withdrawal, and not undertaken for some other purpose. See Ctr. for Biological Diversity, 623 F.3d at 638 ("only persons who had established a valid mining claim before withdrawal would be permitted to mine on those parcels"). Tellingly, validity was determined based on the date of the Withdrawal (Exh. 2 (AR (AR 10487); Exh. 4 ("valid existing rights [] were established prior to the mineral withdrawal")), which highlights that the Withdrawal triggered the requirement to determine claim validity at the Mine.

Indeed, wherever there has been a withdrawal of public lands, a finding of valid existing rights is required because mining activities are otherwise prohibited. For instance, where lands have been withdrawn due to a "wilderness" designation, the Forest Service conducts similar valid existing rights determinations:

> Based on our economic analysis, a discovery of valuable mineral deposits did not exist within the boundaries of the claim at the date of examination (2003). Consequently, the claimants … do not have valid existing rights to conduct mineral-related activities within the withdrawn area.

Exh. 18 at 22. Another VER determination echoes the requirement when there has been a withdrawal: "Before claimant can mine …, valid existing rights must have been present at the time of this exam…." Exh. 19 at 1; see also Wilderness Society v. Dombeck, 168 F.3d 367, 375 (9th Cir. 1999) (requiring valid claims to mine in area withdrawn based on wilderness designation); Exh. 16 (Forest Service noting validity required due to Withdrawal, and informing company agency "can't approve your plan of operations until VER has been established").

The Forest Service's Motion suggests that the 1986 plan of operations approval was sufficient to restart Canyon Mine operations, and the VER Determination was unnecessary. Doc. 71 at 22, n.10.[4] Plaintiffs do not quarrel that plan approval was *also* required. Under the Forest Service regulations, "operations can not be conducted until a plan of operations is approved." See 36 C.F.R. § 228.4(a)(4). However, the regulations do not require the Forest Service to assess claim validity when approving plans of operations. This is why the Forest Service issued the VER Determination in 2012, in recognition that the Mine's 1986 plan approval had not determined whether the claims contain valid existing rights.

Accordingly, *both* the 1986 approved plan of operations and the 2012 VER Determination were required before Energy Fuels could restart the Mine.[5] The Forest Service's Handbook makes the distinction between plan approval and claim validity explicit. This guidance document warns:

> [a]pproval of [an] operating plan does not constitute now or in the future recognition or certification of the validity of any mining claim.

Exh. 6 (AR 7299). The Handbook further notes that the approval of a plan of operations under 36 C.F.R. § 228 *and* the discovery of a valuable mineral deposit are both required. Id. (AR 7283-84) ("claimant must meet the requirements as specified or implied by the mining laws, in addition to the rules and regulations of the Forest Service."). And in the VER Determination, the Forest Service assessed the validity of the Mine's claims due to the Withdrawal even while expressly acknowledging the Mine had an approved plan. Exh. 2 (AR 10487, 10497).

In sum, the Forest Service's VER Determination qualifies as both a "license" and "relief." It is a license because Canyon Mine could not restart in the Withdrawal area absent finding its claims contain valid existing rights. As such, the VER Determination

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[4] Although the Motion does not explicitly address the APA's "agency action" requirement, a footnote claims the VER Determination is not a license, arguing it "provided no permission" for Canyon Mine. Doc. 71 at 22, n.10.

[5] Multiple final agency actions may be required to conduct activities on public lands. E.g., Or. Natural Desert Ass'n v. U.S. Foreset Service, 465 F.3d 977, 983 (9th Cir. 2006) (finding "annual operating instructions" were also license that permitted livestock grazing).

provided Energy Fuels with a "form of permission." See 5 U.S.C. § 551(8). The VER Determination is also relief because the Forest Service "recogni[zed]" the validity of Canyon Mine's two mining claims and provided an "exemption or exception" to the Withdrawal. See id. § 551(11)(B). The VER Determination is an APA agency action.

B. The VER Determination Is A Final Agency Action

The APA also requires that the agency action is "final." 5 U.S.C. § 704. Courts have "interpreted the 'finality' element in a pragmatic way" by considering a number of factors. FTC v. Standard Oil of Cal., 449 U.S. 232, 239 (1980). The finality analysis focuses on the "practical and legal effects of the agency action." Oregon Natural Desert, 465 F.3d at 982. "The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." Franklin v. Massachusetts, 505 U.S. 788, 798 (1992). Elaborating further, the Supreme Court has ruled that the action "must mark the consummation of the agency's decisionmaking process - it must not be of a merely tentative or interlocutory nature." Bennett v. Spear, 520 U.S. 154, 177-78 (1997). It must also be an action "by which rights or obligations have been determined, or from which legal consequences will flow." Id. at 178; Oregon Natural Desert, 465 F.3d at 987. The other factors that courts consider are whether the action has a direct impact on the day-to-day business of the parties, or impacts the parties and their interests. Williamson County v. Hamilton Bank, 473 U.S. 172, 193 (1985) (inquiry involves whether action "inflicts an actual, concrete injury"); Oregon Natural Desert, 465 F.3d at 987.

The Forest Service's argument that the VER Determination is not a final agency action is based on inapplicable guidance documents, and offers general observations about mineral reports and VER determinations. Noticeably, it does not address the specific VER Determination for Canyon Mine or the Withdrawal.

1. The VER Determination Concluded A Forest Service Decision-Making Process On The Validity Of The Canyon Mine Claims

As this Court previously ruled (Doc. 86 at 9-10), the VER Determination provided the Forest Service's "last word" on the validity of Canyon Mine's mining

claims. See Or. Natural Desert, 465 F.3d at 984. The process for claim validity began in September 2011 and concluded on April 18, 2012. Exh. 2 (AR 10486) ("We conclude that a discovery of valuable mineral deposit existed at the time of the segregated withdrawal on July 21, 2009"); Exh. 3 (AR 10592) ("The mineral examination was completed on April 18, 2012 and determined that Canyon Mine has valid existing rights.").[6] The VER Determination is not in draft form or "tentative or interlocutory [in] nature," but rather offers the agency's definitive findings on claim validity. See id; Bennett, 520 U.S. at 178. Moreover, the Forest Service agrees that no additional validity determinations were made or needed for Canyon Mine. Exh. 5 (Discovery Response to RFA No. 4) ("the Forest Service did not take steps relating to the validity of the mining claims at Canyon Mine after the April 2012 VER Determination").

The Forest Service's Motion implies that there *could be* additional BLM or Department of Interior action relating to mining claims generally. Doc. 71 at 22. However, when pressed about Canyon Mine in particular, the agency conceded that "the Bureau of Land Management (BLM) [and] the Department of the Interior (DOI) have not taken steps relating to the validity of Canyon Mine's mining claims after the April 2012 VER Determination." Exh. 5 (Discovery Response to Interrogatory No. 11); id. (Response to RFA No. 1).[7] Indeed, further action by BLM or DOI would only be necessary if an agency finds that a claim does *not* have valid existing rights. See Doc. 71 at 22; Doc. 53 at 23, n.6 (stating that "[i]f the mineral report concluded that valid existing rights were not established, the Forest Service would forward its conclusion to

[6] The Forest Service's administrative process included visits to the mine site, other regional mines, the company's offices, and the White Mesa uranium mill in Utah. Exh. 2 (AR 10486, 10487-89). The analysis included relying on exploratory drilling and sampling data to demonstrate an actual physical exposure of the mineral deposit. Id.

[7] That the Forest Service or some other agency could do something in the future does not negate the fact that the VER Determination is a final agency action. See Bell v. New Jersey, 461 U.S. 773, 779–80 (1983); Alaska v. EPA, 244 F.3d 748, 750 (9th Cir. 2001) (holding decision consummated agency process even if agency may adopt new position in response to changed circumstances); see also U.S. Air Tour Ass'n v. FAA, 298 F.3d 997, 1013 (D.C. Cir. 2002) ("if the possibility . . . of future revision in fact could make agency action non-final as a matter of law, then it would be hard to imagine when any agency rule . . . would ever be final as a matter of law").

BLM"). Here, however, the Forest Service determined the claims contain valid existing rights, and thus no further action was needed.

The Forest Service's argument that VER determinations are "internal documents that the agency uses as a tool in later decision-making processes or adjudications" (Doc. 71 at 22) and the Court's prior finding that VER determinations serve a "limited purpose" (Doc. 86 at 12) are based on the assumption that *this Canyon Mine* VER Determination was part of a claim "contest." That is incorrect. The Forest Service was not contesting Canyon Mine claims, and the Motion offers no evidence of one. Whereas a mineral report may provide a "tool" in a mining claim contest, here, the Forest Service did not assess claim validity or issue the VER Determination for that purpose. Rather, the VER Determination unequivocally states that its *sole* purpose was to determine whether the claims could be mined in the Withdrawal area. Exh. 2 (AR 10486, 10487); Exh. 3 (AR 10596) (revealing VER Determination was "due to the segregation and withdrawal"); Doc. 53-2 at 2-3 (explaining "VER determination is concerned with claim validity as of a certain date relating to a mineral withdrawal").[8] Whereas a contest may involve additional agency actions, the VER Determination provided the conclusive finding on claim validity at Canyon Mine, permitting the Mine to restart despite the Withdrawal. Once the VER Determination was complete, no additional proceedings were needed to determine that the Mine's claims were valid.

Similarly, the Forest Service's reliance on a BLM Handbook and the Court's citation to a Forest Service Manual are misplaced because they too address "contest proceedings." Doc. 71 at 22 (citing, AR 5901); Doc. 86 at 10 (citing, AR 7311). The referenced section in the Manual is entitled "Mining Claim Contests" (Exh. 6 (AR 7310)) and discusses "whether to contest the validity of a mining claim or to challenge questionable mining claim occupancy and use." Id. (AR 7311). Notably, the Manual distinguishes between contests designed to resolve unauthorized mining or occupancy, and validity determinations where there is a withdrawal. Id. (AR 7310). It specifies:

[8] The Forest Service's Michael Linden explained claim validity could come up in a variety of circumstances, but they "all basically address the same question, whether or not a specific mining claim[] is 'valid.'" Doc. 53-2 at 2-3.

> [T]the use of validity determinations should be limited to situations where valid existing rights must be verified where the lands in question have been withdrawn from mineral entry [] or meeting Forest Service interagency agreement obligations regarding patent applications [].

Id. (emphasis added). The cited BLM Handbook also concerns "Government Contests" (Exh. 7 (AR 5900)), and describes the "Role of Mineral Report" in contest proceedings. Exh. 7 (AR 5901). The Forest Service's discovery responses emphasize that mineral reports, rather than valid existing rights determinations, are issued "when no withdrawal is at issue." Exh. 5 (Discovery Response to RFA 2) (emphasis added).

The Forest Service also asserts that "[a]dditional processes would be needed before the Forest Service could revoke or invalidate a plan of Operations." Doc. 71 at 22. This is a red herring. As detailed above, plan approval under 36 C.F.R. § 228.4 and claim validity under the 2012 Withdrawal are two separate legal requirements and agency actions. Plaintiffs are challenging the VER Determination, which authorized Energy Fuels to restart Canyon Mine despite the Withdrawal. Whether and how the Forest Service revokes or invalidates the 1986 plan approval is not at issue.

2. The VER Determination Had Legal Consequences, Determined Rights And Impacted the Parties

The second finality requirement is met for the same reasons that the VER Determination is an APA "agency action." The Withdrawal prohibits mining operations absent valid existing rights. Exh. 2 (AR 10489); 43 U.S.C. § 1702(j) (land withdrawals "limit[] activities…to maintain other public values in the area"). The VER Determination thus had "direct consequences" by "alter[ing] the legal regime" that existed under the Withdrawal at Canyon Mine. See Bennett, 520 U.S. at 178; Tuggle, 607 F.Supp.2d at 1113. It had "legal consequences" due to the Withdrawal, "determined" Energy Fuels "rights" at Canyon Mine, and directly impacted the company's "day-to-day business." Bennett, 520 U.S. at 178; Or. Natural Desert, 465 F.3d at 982 (court consider "the practical and legal effects of the agency action"), id. at 986-87.

The VER Determination also "inflict[ed] an actual, concrete injury" on Plaintiffs. See Williamson County, 473 U.S. at 193. It permitted the Mine to restart. Absent

mining operations, Plaintiffs' interests in preserving the Red Butte Traditional Cultural Property (Exh. 3 (AR 10607)) and groundwater resources (Doc. 63-1) would not be adversely impacted. See Franklin, 505 U.S. at 798; Or. Natural Desert, 465 F.3d at 982.

Notwithstanding the Withdrawal's effect on Canyon Mine and the Forest Service's recognition of those effects, the Court's prior order (Doc. 86) offered two reasons why the VER Determination did not have legal consequences. First, the VER Determination did not "augment any rights or obligations pertaining to the Canyon Mine," but was "verifying only whether the rights conferred by Congress under the Mining Law have come into existence." Doc. 86 at 12. Second, the Court equated the Forest Service's 1986 plan approval with conveying mining rights. Id. (stating agency simply affirmed that "mining rights under the Plan were valid"). Neither rationale is legally correct. When it comes to mining on public lands, Congress, through the Mining Law, provided that such lands are open for "location and entry." 30 U.S.C. § 22. However, through FLPMA, Congress authorized Interior to withdraw public lands from the Mining Law. 43 U.S.C. §§ 1701(4), 1702(j), 1714(a). Exercising this authority, the Secretary issued the Withdrawal, which covers Canyon Mine. Exh. 1 (AR 10310). Therefore, due to the Withdrawal, the VER Determination "augmented" Energy Fuels' rights and permitted mining on these claims. See Kosanke, 144 F.3d at 874 ("[A]ny lands withdrawn from mineral entry are no longer considered to be within the public domain and therefore are not subject to the statutory rights enumerated in the General Mining Law."). Moreover, plan approval under Forest Service regulations does not address claim validity, and the Forest Service did not do so in the 1986 plan approval.[9]

Although not expressly argued in the Motion, it is intimated that the Withdrawal applies only to *new* mining operations, and not those with an existing approved plan of operations. Doc. 71 at 11, 14 (Motion's background section); Doc. 106 at 8. Neither the

[9] Two cases cited in the Court's preliminary injunction order -- Fairbanks N. Star Borough v. U.S. Army Corps of Engineers, 543 F.3d 586 (9th Cir. 2008) and Building Industry Ass'n. v. Norton, 415 F.3d 8 (D.C. Cir. 2005) -- support finding that the VER Determination is a final agency action. Whereas these two cases involved challenges to agency actions that had no direct consequences, the VER Determination permits Energy Fuels to mine in an area that the Withdrawal explicitly precludes from mineral entry.

law nor the facts support the agency. Based on its plain language, the Withdrawal's prohibition turns on whether particular claims contain "valid existing rights," not whether a mine has an existing plan of operations. The Withdrawal contains no exemption for mines with an approved plan, but no validity determination. Indeed, had the Forest Service previously determined that Canyon Mine's claims were valid, the agency would not have undertaken the VER Determination or informed Energy Fuels, tribal governments, and the public that a validity determination was required before the Mine could restart. See Exh. 11 (AR 12429); Exh. 17 (AR 10342); Exh. 13 (AR 10345); Exh. 14 (AR 10335); Exh. 12 (AR 10348).

Lastly, the Forest Service notes that the EIS prepared for the Withdrawal "contemplated that mining will proceed at Canyon Mine." Doc. 71 at 14 (citing, AR 10313-14, AR 8657). The supporting citations merely confirm that Canyon Mine had an approved plan of operations. The EIS, however, states that its assumption that some mines (such as Canyon Mine) would proceed was made for the sole purpose of analyzing the Withdrawal's environmental impacts under certain scenarios. Exh. 9 (AR 8656). Indeed, the EIS makes clear that "[n]one of the assumptions in this [NEPA] analysis, even if referring to specific breccia pipes, should be construed as a determination or indication that certain mining claims may contain a discovery [of a valuable mineral deposit]." Id. Significantly, the EIS further states:

> [T]he assumptions used to develop the RFD [reasonably foreseeable development] scenarios do not reflect any ongoing analysis of a specific mining claim's valid existing rights, nor does the use of these data for the purposes of this analysis presume or supersede any determination of valid existing rights through the normal administrative process, which occurs independent of the RFD analysis and the EIS.

Id. (AR 8648) (emphasis added).

CONCLUSION

The Forest Service's Motion to Dismiss claims 1 and 4 should be denied.

Respectfully submitted,

May 2, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2014, I filed a true and exact copy of PLAINTIFFS GRAND CANYON TRUST, CENTER FOR BIOLOGICAL DIVERSITY AND SIERRA CLUB'S OPPOSITON TO 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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