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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' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

In authorizing the Canyon Uranium Mine to restart after being dormant for 20 years, Defendants Forest Supervisor Michael Williams and the U.S. Forest Service (collectively "Forest Service") took shortcuts in violation of its legal obligations. The Forest Service prepared a Valid Existing Rights (VER) Determination, in response to the 2012 Mineral Withdrawal (Withdrawal), but failed to address all costs associated with mining operations, including requirements to monitor and mitigate adverse effects of the Canyon Mine on groundwater, wildllife and the culturally-significant Red Butte. Prior to completing the VER Determination, the Forest Service also failed to undertake the required review and consultation processes under the National Environmental Policy Act (NEPA) and National Historic Preservation Act (NHPA), which are designed to ensure federal agencies account for environmental and cultural impacts prior to approving potentially harmful projects or activities. Plaintiffs are thus entitled to summary judgment on Claims 1-4 in the Amended Complaint (ECF Doc. 115).

FACTUAL BACKGROUND

I. THE FOREST SERVICE'S 1986 APPROVAL OF CANYON MINE'S PLAN OF OPERATIONS

The Canyon Mine is "located six miles south of Grand Canyon National Park in the Kaibab National Forest, and four miles north of Red Butte." ECF Doc. 131 at 1. Red Butte and its surrounding area, including the location of the Canyon Mine, is a sacred place with tremendous religious and cultural significance to the Indian tribes in the region, especially including Plaintiff Havasupai Tribe (Tribe), but also the Hualapai, Hopi, Navajo, and Zuni tribes. AR Doc. 428 at 8016-24; AR Doc. 121 at 3140-42 (description of religious importance of area to Havasupai by four respected elders).

In 1984, Energy Fuels Nuclear submitted to the Forest Service a Plan of Operations for the Canyon Mine under the Forest Service's mining regulations, 36 C.F.R. §§ 228 *et seq*. AR Doc. 2 at 193-221. The Forest Service prepared an Environmental Impact Statement pursuant to NEPA (AR Doc. 3 at 461-693) and Energy Fuels Nuclear commissioned an archaeological survey that encountered two relatively

minor cultural sites near the mine site. AR Doc. 264 at 5370-96; AR Doc. 3 at 557-58.[1] In a Record of Decision dated September 26, 1986, the Forest Service approved a modified Plan of Operations for Canyon Mine. AR Doc. 6 at 915-29. The approval permitted underground mining and surface disturbance of approximately 17 acres - including a 100-foot headframe over the main shaft and various other surface structures - plus 1.7 miles of power lines. AR Doc. 6 at 916; AR Doc. 2 at 205-12.

The Forest Service's Record of Decision recognized the significant risk that Canyon Mine posed to groundwater and public health through the potential release of radioactive contamination, and thus imposed groundwater and radionuclide monitoring requirements on the operator. AR Doc. 6 at 922-23; AR Doc. 5 at 876; AR Doc. 3 at 517-18. Among other things, the Forest Service required the mining company to gather at least one year of baseline data relating to radioactivity prior to commencing ore production. AR Doc. 3 at 527 (including "direct gamma radiation, radon gas and progeny concentrations, and radioactivity concentrations in air, soil and water"). This required monitoring has not yet occurred. ECF Doc. 95 at 5-6.

The Record of Decision also acknowledged that the Tribe had informed the Forest Service of the religious importance of the Red Butte area and further acknowledged that mining activity would violate Havasupai religious values and "may pose a threat to their very existence." AR Doc. 6 at 923. Nonetheless, the Forest Service concluded that the mining activity would not "curtail" religious activity nor restrict access to "any known religious sites or areas." *Id.* The Tribe subsequently challenged the Forest Service's decision in court, but this challenge was unsuccessful. *Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991).

Following the Forest Service's approval of the Plan of Operations, "[s]urface structures were built and the mine shaft was constructed to a depth of 50 feet." ECF Doc. 131 at 2. To reach the orebody, the mine shaft was projected to go 1,400 to 2,100

[1] This document, as well as other in the administrative record, are designated as containing "Confidential Information" under a Stipulated Protective Order entered on May 20, 2013. ECF Doc. 64. The statements from such documents referred to or quoted from in this brief are not "Confidential Information."

feet deep. AR Doc. 2 at 202-03. "[Energy Fuels Nuclear] placed the mine on standby status when uranium prices dropped in 1992." ECF Doc. 131 at 2.

In 1997, the Canyon Mine was acquired by Denison Mines, a predecessor company to Intervenors Energy Fuels Resources (USA), Inc. and EFR Arizona Strip LLC (the Intervenors and predecessor companies, collectively, "Energy Fuels"). For over twenty years, there was no mining activity at the Canyon Mine. ECF Doc. 53-3 at 3 (mine-shaft construction resumed in April 2013).

II. THE DESIGNATION OF RED BUTTE AS A TRADITIONAL CULTURAL PROPERTY

In 1992, Congress amended the NHPA, 16 U.S.C. §§ 470 *et seq.*, to recognize that Traditional Cultural Properties (TCPs) having cultural significance to American Indian tribes were "historic properties" eligible for listing on the National Register. 16 U.S.C. § 470a(d)(6). In 2010, the Forest Service issued a formal determination that a large area of approximately 20 square miles that includes Red Butte and the site of the Canyon Mine constitutes a TCP, due to its religious and cultural significance to the Tribe and other tribes in the region. AR Doc. 428 at 8011-28; AR Doc. 533 at 10616.

III. THE 2009 SEGREGATION AND 2012 WITHDRAWAL

On July 21, 2009, in response to "public concern that uranium mining could adversely affect natural, cultural, and social resources in the Grand Canyon watershed" (AR Doc. 481 at 10311, the Department of the Interior (DOI) proposed to withdraw approximately one-million acres of public lands surrounding Grand Canyon National Park for up to 20 years from location and entry under the Mining Law. 74 Fed. Reg. 35,887 (July 21, 2009). This proposal included an immediate 2-year "segregation," which removed these lands from mineral entry and location while DOI evaluated the impact of a proposed withdrawal. *Id.*; *see also* 43 U.S.C. § 1714(b). "Over the next two years, [DOI] undertook extensive study and preparation of an EIS and ROD to finalize a permanent withdrawal in the area." ECF Doc. 131 at 2.

The process concluded in January 2012, when DOI issued the 20-year Withdrawal, subject to valid existing mineral rights. 77 Fed. Reg. 2317 (Jan. 7, 2012);

AR Doc. 481 at 10308-10331. The lands covered by the Withdrawal include the Canyon Mine. ECF Doc. 131 at 2. The Withdrawal was promulgated "to protect the Grand Canyon Watershed from adverse effects of locatable mineral exploration and development." AR Doc. 481 at 10310. Acknowledging that this area was "a home and sacred place of origin to many Native Americans, including the Havasupai," with cultural significance going back thousands of years, the Withdrawal states that "[a]ny mining within the sacred and traditional places of tribal peoples may degrade the values of those lands to the tribes that use them" and "it is likely that the potential impacts to tribal resources could not be mitigated." AR Doc. 481 at 10312-13, 10317. Notably, the Forest Service wrote a letter to DOI expressing support for the Withdrawal due to the possible impacts of uranium mining on water resources and to protect important cultural resources. *See Yount v. Salazar*, 2014 WL 4904423, at *25 (D. Ariz. Sept. 30, 2014).

IV. THE FOREST SERVICE'S APPROVAL OF THE RESUMPTION OF MINING AT CANYON MINE

In August 2011, Energy Fuels informed the Forest Service that it intended to restart operations at the Canyon Mine. AR Doc. 439 at 8547; AR Doc. 442 at 8580. On October 17, 2011, the Arizona State Historic Preservation Office advised the Forest Service that a full consultation under Section 106 of NHPA, 16 U.S.C. § 470f, was needed to determine the effects of the resumption of uranium mining operations on the Red Butte TCP. Doc. 39-7 at 54; AR Doc. 449 at 10139. Several Indian tribes in the region also informed the Forest Service that it should undertake "meaningful" consultations (*see, e.g.,* AR Doc. 512 at 10444) and the tribes "made it clear" to the Forest Service that the resumption of mining activity would "desecrate the sacred and religious values ascribed to the [Red Butte] TCP." AR Doc. 492 at 10354. The Forest Service, however, decided against conducting a consultation under Section 106.

On April 18, 2012, the Forest Service completed the VER Determination, in which the agency concluded that Energy Fuels had valid existing rights in the two mining claims on which the Canyon Mine is situated. AR Doc. 525 at 10482-528. Among other things, the VER Determination assessed the profitability of the mine, as

required for a finding that a valuable mineral deposit existed at the time of the withdrawal; however, the costs of required monitoring, environmental mitigation and measures to comply with NHPA were not assessed or taken into consideration in the VER Determination. AR Doc. 525 at 10486, 10499-506.

On June 25, 2012, the Forest Service issued a second document entitled "The Canyon Uranium Mine Review" (the "Mine Review"), which concluded that the Forest Service was not required to take any further actions under NHPA or NEPA, or modify the existing plan of operations. AR Doc. 533 at 10593-637. A significant portion of the Mine Review is devoted to a rather circuitous explanation of why a full Section 106 consultation was not required. *See, e.g., id.* at 10600-08. The Forest Service determined that it could instead follow a more limited and expedited consultation process under 36 C.F.R. § 800.13(b)(3) for "[p]ost-review discoveries," where an agency has already "approved the undertaking and construction has commenced." 36 C.F.R. § 800.13(b)(3); AR Doc. 533 at 10602-04. On the same day the Mine Review was issued, Defendant Michael Williams, the Forest Supervisor of the Kaibab National Forest, notified the Regional Forester that "operations at the Canyon Mine may continue." AR Doc. 533 at 10592. On the same day, Williams also sent "consultation initiation letters" to the Chairman of the Havasupai Tribe, to other tribal leaders, and to the Advisory Council on Historic Preservation (ACHP), offering to "set up a meeting to . . . begin to identify the actions to address the adverse effects to the Red Butte TCP." AR Doc. 539 at 10690-91; AR Doc. 531 at 10544-45. The Forest Service thus "initiated" its consultation process with the tribes *after* it had already made the decision to permit Energy Fuels to resume mining operations.

In response, the ACHP -- which is the agency charged with overseeing implementation of Section 106 and that drafted the NHPA regulations, *see* 16 U.S.C. § 470s -- informed the Forest Service that it should undertake a full Section 106 consultation process pursuant to Section 800.13(b)(1), rather than an "expedited review process" under Section 800.13(b)(3). AR Doc. 565 at 11335. In a second letter, ACHP informed the Forest Service that a Section 106 consultation should be completed *prior*

to the resumption of "destructive activities" at the mine. AR Doc. 656 at 12346. The Tribe also urged the Forest Service that it was required to undertake a full Section 106 process to avoid or mitigate adverse effects to the Red Butte TCP. AR Doc. 561 at 11326; AR Doc. 554 at 11309-13; AR Doc. 663 at 12375-78. Other tribes similarly objected to the agency's approach as "ma[king] a farce of Traditional Cultural Property consultations." AR Doc. 558 at 11321-22. The Forest Service received correspondence from numerous members of the public who also objected to the Canyon Mine on the grounds that it threatened the Grand Canyon National Park, the Havasupai people, and sacred lands such as Red Butte. AR Doc. 604 at 11819; AR Doc. 614 at 11850-59; AR Doc. 620 at 11862-63; AR Doc. 627 at 11872-73; AR Doc. 635 at 11884-85. The Forest Service chose to disregard these concerns, and declined to undertake any form of Section 106 consultation process as requested by the ACHP and the tribes.[2]

STANDARD OF REVIEW

The APA provides for judicial review of Plaintiffs' claims. *See Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 778 (9th Cir. 2006). The reviewing court "shall compel agency action unlawfully withheld or unreasonably delayed" and set aside agency action that is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706; *see also Oregon Natural Res. Council Fund v. Goodman*, 505 F.3d 884, 889 (9th Cir. 2007). An agency action is arbitrary and capricious if the agency fails to articulate a rational connection between the facts found and conclusions made, fails to consider an important aspect of the problem, or offers an explanation that is contrary to the evidence. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*

[2] In January 2013, months after Energy Fuels had resumed activity at the mine site, a two-day "consultation" meeting with the tribes occurred at the mine site, during which the Forest Service made clear to the tribes that the only mitigation measures that would occur would be those voluntarily undertaken by Energy Fuels. *See* AR Doc. 657 at 12354. Following the meeting, the Forest Service sent an e-mail to tribal representatives proposing "possible mitigation measures," which does not mention desecration of sacred tribal sites or interference with traditional and religious practices. *See* AR Doc. 654 at 12324-34. On March 2, 2013, the Tribe once again wrote to the Forest Service and identified the numerous ways in which the Forest Service had failed to comply with NHPA. AR Doc. 663 at 12375-78. This lawsuit followed.

Co., 463 U.S. 29, 43 (1983). Summary judgment may be granted based upon the Court's *de novo* review of the administrative record. *See Pit River Tribe*, 469 F.3d at 778. An agency's interpretation of a statute outside of the statutes it is charged with administering is reviewed *de novo*. *See Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (*en banc*). The regulations implementing NEPA and the NHPA were promulgated by the Council on Environmental Quality (CEQ) and the ACHP, respectively, and thus the Forest Service is not entitled to deference in interpreting these regulations. *See Whaley v. Schweiker*, 663 F.2d 871, 873 (9th Cir. 1981); *Grand Canyon Trust v. FAA*, 290 F.3d 339, 342 (D.C. Cir. 2002). An agency's determination that an action is not subject to NEPA or the NHPA is a question of law, subject to *de novo* review under the APA. 5 U.S.C. § 706; *Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1150-51 (D.C. Cir. 2001).

ARGUMENT

I. PLAINTIFFS HAVE STANDING

As demonstrated in submitted declarations, Defendants' challenged actions and inactions have caused and will continue to cause injury to Plaintiffs' environmental and cultural interests by authorizing and allowing Canyon Mine operations to resume. ECF Docs. 37-7 – 37-8.[3] The Court previously found these injuries to be irreparable. ECF Doc. 86 at 6-7. A court order would require the Forest Service to comply with NEPA and the NHPA prior to allowing mining to resume, and to consider all costs as part of its VER Determination. Doing so will force the Forest Service to reconsider its VER Determination and its decision to allow mining to resume at Canyon Mine, including the need for additional mitigation measures, and thereby address Plaintiffs' injuries. *See* ECF Doc. 37-7 – 37-8. Accordingly, Plaintiffs have standing to bring this action. *See Friends of the Earth v. Laidlaw Envtl. Serv.*, 528 U.S. 167, 180-85 (2000); *Massachusetts v. EPA*, 549 U.S. 497, 517-18 (2007).

[3] Plaintiffs submitted standing declarations of Don Watahomigie, Rex Tilousi, Roger Clark, Kim Crumbo and Robin Silver with their Motion for Preliminary Injunction.

II. THE VER DETERMINATION IS UNLAWFUL

Despite the Withdrawal in January 2012, the Forest Service authorized Canyon Mine to resume through its April 2012 VER Determination. As set forth in Claims 1 and 4, the VER Determination was unlawful in two respects. First, Forest Service failed to consider all relevant costs in finding that Canyon Mine would be profitable and that its two claims contain valid existing rights. Second, the Forest Service failed to comply with NEPA prior to issuing the VER Determination. The VER Determination approved Canyon Mine, notwithstanding the Withdrawal's prohibition, and also provided the Forest Service a meaningful opportunity to consider information revealed in a NEPA process. Plaintiffs are thus entitled to summary judgment on Claims 1 and 4 in the Amended Complaint.

A. Legal Background

1. Mining Law And Mineral Withdrawals

Under the 1872 Mining Law, all lands held by the U.S. government are open to mining. 30 U.S.C. § 22; *Cameron v. United States*, 252 U.S. 450, 460 (1920); *Independence Min. v. Babbitt*, 105 F.3d 502, 506 (9th Cir. 1997).

However, under the Federal Land Policy and Management Act (FLPMA), and other laws, lands may be withdrawn from operation of the Mining Law. 43 U.S.C. § 1714(a) (authorizing Interior to "make, modify, extend, or revoke withdrawals"); *see also Swanson v. Babbitt*, 3 F.3d 1348, 1352 (9th Cir. 1993) ("the government may [] withdraw public lands from mining under the Mining Act"); *National Wildlife Federation v. Burford*, 835 F.2d 305, 308 (D.C. Cir. 1987) ("A withdrawal withholds land from operation of one or more of the general land and mineral disposal laws, including the 1872 Mining Law"). Withdrawn lands are no longer available for mining. *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"). Under FLPMA, lands are

withdrawn "for the purpose of limiting activities under those laws in order to maintain public values in the area." 43 U.S.C. § 1702(j).

Nonetheless, a mining claim may be mined within a withdrawn area if there are "valid existing rights," meaning the claim contains a "valuable mineral deposit." *U.S. v. Coleman*, 390 U.S. 599, 602 (1968). A "validity determination requires considerable judgment and discretion to evaluate and assess the results of the mineral examination, and to ultimately conclude whether the statutory requirement of a 'valuable discovery' has been met." *Independence Mining*, 105 F.3d at 509.

Whether there is a "discovery of a valuable mineral deposit" based on the "prudent person test" and the "marketability test." *Hjelvik v. Babbitt*, 198 F.3d 1072, 1074 (9th Cir. 1999).

> [T]o qualify as 'valuable mineral deposits,' the discovered deposits must be of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

Independence Mining, 105 F.3d at 602 (internal quotations and citations omitted); *Lara*, 820 F.2d at 1541. Under the so-called 'marketability test,' the inherent value of a deposit is not enough to satisfy the test for claim validity. The land managing agency must find, at all relevant times, that the mineral deposit can be "mined, removed, transported, milled and marketed at a profit." *Coleman*, 390 U.S. at 601; *Hjelvik*, 198 F.3d at 1074; *see also* AR Doc. 525 at 10483, 10506. As the Ninth Circuit explained: "the nucleus of value which sustains a discovery must be such that[,] with actual mining operations under proper management[,] a profitable venture may reasonably be expected to result." *Converse v. Udall*, 399 F.2d. 616, 623 (9th Cir. 1968).

Both expected revenues and projected costs are relevant to assess claim validity. *Lara,* 820 F.2d at 1541 (recognizing "evidence of the costs and profits of mining the claims should have been considered in determining whether a person of ordinary prudence would be justified in the further investment of labor and capital"); *Great Basin Mine Watch*, 146 IBLA 248, 256 (1999) ("Claim validity is determined by the ability of the claimant to show that a profit can be made after accounting for the costs of

compliance with all applicable laws"). Mining costs include the costs of compliance with environmental and cultural laws as well as the costs of required monitoring and mitigation. As the Ninth Circuit made clear,

> [b]efore a determination of validity can be made, a mineral examiner must do a field examination; collect and analyze samples; estimate the value of the mineral deposit and the cost of extracting, processing and marketing the minerals, *including the costs of complying with any environmental and reclamation laws*.

Independence Mining, 105 F.3d at 506-07 (emphasis added); *Clouser v. Espy*, 42 F.3d 1522, 1530 (9th Cir. 1994) (noting claim validity involves calculation of operating costs, such as those to "reduce incidental environmental damage"); *Barrick Goldstrike Mines v. Babbitt,* 1994 WL 836324, *4 (D. Nev. Jan. 14, 1994) ("mitigation costs for the protection of threatened and endangered species will be highly relevant to the value of the [mineral] deposits"); *Great Basin Mine Watch*, 146 IBLA at 256 ("the costs of compliance with all applicable Federal and State laws (including environmental laws) are properly considered in determining whether or not the mineral deposit is presently marketable at a profit"); *Moon Mining v. HECLA Mining*, 161 IBLA 334, 362 (2004) (recognizing "cost of compliance with … environmental requirements are properly considered in determining whether there has been a discovery"). BLM's Validity Handbook, which the Forest Service purportedly follows, details the costs that affect profitability, which specifically include "environmental and cultural permitting, mitigation, reclamation and rehabilitation costs." AR Doc. 359 at 006792.

2. National Environmental Policy Act

Under NEPA, federal agencies must evaluate and publicly disclose potential environmental impacts before taking an action. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989); *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin*. ("*NHTSA*"), 538 F.3d 1172, 1185 (9th Cir. 2008). NEPA ensures "that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger [public] audience that may also play a role in both the decision-making process and

implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

To accomplish NEPA's purpose, agencies must prepare an "environmental impact statement" (EIS) for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). An EIS is required if "substantial questions" are raised as to whether a project "may" result in significant impacts. *Ocean Advocates v. U.S. Army Corps of Eng'rs,* 402 F.3d 846, 864-65 (9th Cir. 2005).

NEPA regulations define "major federal actions" as those "potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. "Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies." *Id.* § 1508.18(a). These actions include the "[a]pproval of specific projects, such as construction or management activities located in a defined geographic area, ... by permit or other regulatory decision." *Id.* § 1508.18(b)(4). NEPA compliance is required when agencies have some discretionary authority to affect the action's outcome. *Ctr. for Biological Diversity*, 538 F.3d at 1213. The word "major" in major federal action does not qualify the agency action, but instead relates only to the action's effects. 40 C.F.R. § 1508.18(a) (major federal action defined as "actions with *effects* that *may be* major") (emphasis added). Major "reinforces but does not have a meaning independent of significantly [as defined in] § 1508.27." *Id.*

B. The Forest Service Failed To Consider All Relevant Factors In Its VER Determination

In the VER Determination, the Forest Service considered some, but not all, of the costs associated with mining uranium at Canyon Mine's two mining claims. The Forest Service considered capital and operating costs, which included the cost of labor, transportation, and milling. AR Doc. 525 at 10500-04. However, as the VER Determination reveals, the Forest Service did not consider the costs of compliance with environmental and cultural laws, and related requirements imposed by the Forest Service, including the costs of monitoring and mitigation actions. *See id.* As detailed

above, the courts and agencies have ruled that these costs must be considered in determining whether mining can occur at a profit. The Forest Service's failure to consider all relevant costs renders its VER Determination arbitrary, capricious, an abuse of discretion, and not in accordance with law. *See Motor Vehicle*, 463 U.S. at 43.

1. Costs Of Radionuclide And Water Monitoring

As detailed in Plaintiffs' Motion to Supplement the Record (ECF Doc. 91), the Forest Service's 1986 approval of Canyon Mine's plan of operations imposed mandatory monitoring relating to radionuclide contamination. The 1986 approval required groundwater, air and soil monitoring to establish a baseline. AR Doc. 3 at 527 ("preoperational baseline data collection program will last one year prior to ore production and will involve background measurements of direct gamma radiation, radon gas and progeny concentrations and radioactivity concentrations in air, soil and water"). Further, "[a] water well to the Redwall-Muav aquifer will be constructed and tested at the Canyon Mine site prior to the intersection of ore by mining operations." AR Doc. 3 at 530. In addition, the Forest Service required the Mine owner to collect water samples every six months from Havasu, Indian Gardens, and Blue Springs. AR Doc. 3 at 588; AR Doc. 6 at 924.[4]

This required monitoring will result in additional costs and thus affect the profitability of Canyon Mine operations. Notably, in approving the 1986 plan of operations, the Forest Service acknowledged the significance of these costs.

> [G]roundwater monitoring well, *while expensive*, is an important element of the monitoring and mitigation strategy as it responds to the unique concerns raised by the proposed Canyon Mine.

AR Doc. 6 at 924 (emphasis added).

These monitoring costs are thus a relevant factor that the Forest Service was required to consider in the VER Determination. They are a cost of mining. The Forest Service has acknowledged that this required monitoring will occur once mining operations resume. ECF Doc. 95 at 5-6; *see* ECF Doc. 99 at 4. Regardless of when the

[4] The prior Mine owner began collecting the required samples from these springs in the 1980s, but ceased when the Mine closed. ECF Doc. 99 at 4-5. There is no evidence of any springs monitoring after 1994. *See id*.

monitoring begins, monitoring is a mandatory component of mining operations and will result in additional costs. Accordingly, the Forest Service's failure to account for these monitoring costs in the VER Determination was arbitrary, capricious and not in accordance with its approval of Canyon Mine. *See Motor Vehicle*, 463 U.S. at 43.

2. Costs Of Mitigation Related To Radionuclide Contamination

Relatedly, the results of the groundwater, air and soil monitoring will translate to additional mitigation. The agency's 1986 approval explains:

> The groundwater monitoring will confirm or invalidate assumptions about groundwater hydrology used in the Canyon Mine analysis. It helps assure that important water sources, including springs which are sacred to the Hopi and Havasupai Tribes, will not be adversely affected by the Canyon Mine. The monitoring program also responds to the fear of radioactive contamination of air, water and soil expressed by some members of the public. *It will help determine the need to further modify the Plan of Operations to provide additional mitigation measures*, including the construction of other groundwater monitoring wells, should any unforeseen impacts occur.

AR Doc. 6 at 924 (emphasis added). As the Forest Service states, "the monitoring may be used as part of subsequent mitigation." ECF Doc. 95 at 6.

A 2010 report from the U.S. Geological Survey (USGS) reveals that water samples taken from a Canyon Mine water well had "elevated uranium concentrations" that were the "highest … on the Kaibab Plateau" and far above safe drinking water levels. AR Doc. 430 at 8334 (finding concentrations ranged from "4.1 μg/L in 1987 to 309 μg/L in 1989"); *id.* at 8335 (reporting concentrations including "65 μg/L in December 1987 and 309 μg/L in May 1989 at the Canyon Mine Well"). These results and the 1986 Mine approval will thus require additional mitigation measures.

However, the Forest Service did not include or consider the cost of implementing additional measures in the VER Determination. Such costs would again affect the profitability of the Mine, and thus whether the Canyon Mine mining claims were valid. Accordingly, the Forest Service's failure to consider this relevant factor renders the VER Determination arbitrary and capricious. *See Motor Vehicle*, 463 U.S. at 43.

3. Costs Of NHPA Compliance And Protecting Cultural Resources

The VER Determination similarly fails to account for costs attributable to compliance with cultural resources laws. The Forest Service's 2010 designation of Red

Butte and adjacent areas as a TCP (AR Doc. 533 at 10616) triggered the NHPA's requirements to develop, in consultation with the tribes, alternatives and measures that address the Mine's significant adverse effects on the Red Butte TCP. 16 U.S.C. § 470f; 36 C.F.R. § 800.6. Although the parties dispute the appropriate timing of this NHPA process and disagree as to which regulatory provision applies, there is no dispute that Canyon Mine will cause adverse effects. ECF Doc. 53 at 19 ("The Forest Service acknowledged that mining activities would adversely affect Red Butte TCP"); AR Doc. 533 at 10606-07 (Forest Service acknowledging Mine's adverse effects prior to designating Red Butte TCP in 2010).

As discussed below, serious measures to minimize these adverse effects from Canyon Mine operations are required under the NHPA. Canyon Mine's costs will thus include implementing such measures. However, the Forest Service arbitrarily failed to include such costs when completing the VER Determination and calculating whether mining at Canyon Mine would be profitable. *See Motor Vehicle*, 463 U.S. at 43.

4. Costs Of Implementing Wildlife Conservation Measures

The Forest Service's VER Determination also did not consider and include the costs of protecting the endangered California condor and other wildlife from Canyon Mine operations. To reduce adverse impacts to California condors, the Forest Service and the U.S. Fish and Wildlife Service (FWS) identified several actions for Energy Fuels to undertake. AR Doc. 507 at 10433-34; AR Doc. 501 at 10415-16. Moreover, FWS noted that the Forest Service and Energy Fuels did not fully disclose the route for transporting uranium ore to the mill and, therefore, additional measures will be required to address impacts from the transportation route. AR Doc. 507 at 10433-34; *see also* AR Doc. 582 at 11403 (noting additional measures for condor protection required for powerline construction). All of these required actions relating to the Mine's impacts on the California condor will increase the cost of mining.

In addition, the Forest Service imposed wildlife mitigation measures that will further increase the costs of Canyon Mine operations. AR Doc. 628 at 11874. Citing its 1986 approval, the Forest Service informed Energy Fuels of the requirement to "replace

the 32 acres of big game foraging habitat lost at the mine site and replace one key watering source impacted by the mine access and ore transportation route." *Id* (noting these actions have "never been completed" and still must occur).

However, in determining claim validity, the Forest Service failed to include both the costs of protecting condors and the measures required to ameliorate the loss of big game foraging habitat and a watering source caused by Canyon Mine. Because these are known costs of mining, the Forest Service acted arbitrarily by ignoring these relevant costs in the VER Determination. *See Motor Vehicle*, 463 U.S. at 43.

In sum, the Forest Service failed to include all relevant costs in its VER Determination. The aforementioned costs are highly relevant to the VER determination due to Canyon Mine's slim profit margin. After twenty years of closure due to a drop in uranium prices (AR Doc. 525 at 10487; AR Doc. 533 at 10593), Energy Fuels restarted mining operations in March 2013, only to close the Mine six months later, in part, because the market price for uranium dropped again. ECF Doc. 96-1 at 3 (Stipulated Agreement explaining "EFR's decision to place shaft sinking operations at the Mine on standby for business reasons"); Exh. 1 (EFR letter to USFS noting mining may resume "depending on market conditions and the company's needs").

C. The Forest Service Failed To Comply With NEPA When It Prepared The VER Determination

1. The VER Determination Is A Major Federal Action

a. The Forest Service Authorized Mining Operations To Resume At Canyon Mine Through Its VER Determination

If a federal approval is needed for a project, that approval action is a NEPA "major federal action." *Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996); *Md. Conservation Council v. Gilchrist,* 808 F.2d 1039, 1042 (4th Cir. 1986) ("A non-federal project is considered a 'federal action' if it cannot begin or continue without prior approval of a federal agency."); *Scientists' Inst. for Pub. Info. v. Atomic Energy Comm'n,* 481 F.2d 1079, 1088–89 (D.C. Cir. 1973) (finding major federal action "whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment"). As set forth in NEPA's regulations, the

agency's approval may be provided in a "permit *or other regulatory decision*." 40 C.F.R. § 1508.18(b)(4) (emphasis added). In *Ramsey v. Kantor*, the Ninth Circuit held that the issuance of an Endangered Species Act "incidental take statement" required NEPA compliance. *Ramsey*, 96 F.3d at 444. Finding that the take statement was a major federal action, the court explained that the statement was the "functional equivalent" of a permit because the activity in question was prohibited "but for" the statement. Because the incidental take statement was a prerequisite for a project with adverse environmental impacts, the court held that NEPA compliance was required. *Id*.

In this case, the VER Determination was a regulatory decision that approved mining operations at Canyon Mine. *See* 40 C.F.R. § 1508.18(b)(4). The Withdrawal changed the legal status of the public lands upon which Canyon Mine sits. On January 10, 2012, DOI exercised its FLPMA authority and withdrew one-million acres from operation of the Mining Law to protect the region around Grand Canyon National Park from uranium mining. AR Doc. 481 at 10310. The Withdrawal rendered the Forest Service lands at issue here unavailable for mining under the Mining Law.[5] However, the Withdrawal has an exemption, as it is "subject to valid existing rights." AR Doc. 481 at 10310; 43 U.S.C. § 1701, Note Pub. L. 94-579, § 701(h) ("All actions by the Secretary concerned under this Act shall be subject to valid existing rights."). That is, a mining claim may be developed in the withdrawn area if, at the time of the Withdrawal, the land managing agency determines that the claim contains valid existing rights. *Ctr. for Biological Diversity v. Dept of Interior*, 623 F.3d 633, 638 (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"). The Ninth Circuit has explained the relationship between a withdrawal and a validity determination:

[5] This changed legal status of previously-available lands spawned several lawsuits by mining trade groups. *See e.g., Yount*, 2014 WL 4904423.

> [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')*.

Clouser, 42 F.3d at 1524-25 (emphasis added).

Consequently, as a result of the Withdrawal, the VER Determination was a pre-requisite for resumed mining operations at Canyon Mine. As this Court correctly held, the VER Determination "*allowed* mining operations to resume under the original Plan of Operations." ECF Doc. 131 at 10 (emphasis added); *see also id.* at 5, 10 (finding VER Determination "recognized" and "determined" mining claims were valid). The agency also acknowledged the significance of its VER Determination, announcing "*[b]ased on the results of the mineral validity examination*, [Energy Fuels] is expected the resume operations at the mine." AR 534 at 10638 (emphasis added).

Indeed, as this Court recognized upon reviewing the record (ECF Doc. 131 at 7-9), the Forest Service prepared the VER Determination for Canyon Mine in direct response to the Withdrawal and Energy Fuels' "intent to resume active mining operations" (AR Doc. 443 at 8611) within the withdrawn area. In the VER Determination *for Canyon Mine*, the agency explains that "[d]ue to the withdrawal, all locatable operations within this area must have valid existing rights in order to be able to operate on these claims." AR Doc. 525 at 10489; *id*. at 10486, 10487 ("It is Forest Service policy (FSM 2803.5) to *only allow* operations on mining claims within a withdrawal that have valid existing rights (VER).") (emphasis added). The agency's Canyon Mine webpage publicly reiterates the need for the VER Determination. Exh. 2. The Forest Service's Canyon Mine Review further makes clear that:

> any mining claimant pursuing approval for exploration or mining would need to prove their claims had valid existing rights prior to the 2009 segregation. Denison Mines' mining claims at the Canyon Mine were evaluated by the US Forest Service mineral examiners with regards to valid existing rights under the 1872 Mining Law. The mineral validity examination, completed on April 18, 2012, confirmed that the mining claims have valid existing rights.

AR Doc. 533 at 10594. And, the Forest Service repeatedly revealed to Energy Fuels, tribes and the public that the VER Determination was required due to the Withdrawal.

> 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[.]

AR Doc. 671 at 12429 (emphasis added); AR Doc. 487 at 10342 (USFS conference call minutes: "Loretta (LIK) asked what would happen if Denison cannot show VER? Mike Williams (MRW) stated they would no[t] be able to move forward without VER under the mineral withdrawal"); AR Doc. 483 at 10335 (USFS conference call minutes: "LS - is the Canyon Mine subject to valid existing rights per the recent mineral withdrawal? [Mike Williams] – Yes, subject to VER, minerals exam is currently in progress."); AR Doc. 490 ("Denison will not be doing any 'shaft sinking' at the site until the minerals exam is completed"); AR Doc. 464 at 10277 ("Canyon mine is subject to VER"); AR Doc. 488 at 10345 ("Denison will need to show valid existing rights").

The Forest Service's Manual -- upon which the agency relied as the legal basis for the VER Determination (AR Doc. 525 at 10486, 10487) -- reinforces the need for validity determinations prior to mining operations in the withdrawn area. The Manual requires the Forest Service to "[e]nsure that valid existing rights have been established before allowing mineral or energy activities in congressionally designated or other withdrawn areas." Exh. 4 (Forest Service Manual, FSM 2800 – Minerals & Geology, § 2803(5)). The Manual also makes clear that validity determinations are required "where the lands in question have been withdrawn from mineral entry." AR Doc. 371 at 7310.

Consequently, the VER Determination was a NEPA major federal action. Canyon Mine is a "project" that was "entirely or partly …regulated or approved" by the Forest Service's VER Determination. *See* 40 C.F.R. § 1508.18(a). Also, under NEPA's definition, the VER Determination is an "approval of [a] specific project[]" – Canyon Mine – and constitutes a Forest Service "approv[al]" "by permit *or other regulatory decision*." *See id.* § 1508.18(b)(4) (emphasis added).

Lastly, the Court's prior order questioned whether a Forest Service *determination* was necessary to mine in a withdrawn area. ECF Doc. 131 at 10, n.4 ("there is a difference between valid existing rights and a valid existing rights determination"). The legal test for claim validity does, in fact, require a determination by the agency. *See*

Clouser, 42 F.3d at 1525 ("The validity of such claims is determined by [DOI]"); *see also* ECF Doc. 71 at 11 (describing MOU between Forest Service and DOI). As the Supreme Court ruled, the relevant inquiry is based on the "prudent-person" and "marketability" tests, objectively measured by the government. *Coleman*, 390 U.S. at 602. As one court recently confirmed, miners do not determine claim validity on their own, but require a determination by the land managing agency. *Freeman v. U.S. Dept. of Interior*, _ F.Supp.2d _, 2014 WL 1491248, *4 (D.D.C. April 16, 2014) ("To determine whether a claim is valid, BLM conducts a mineral examination") (citing, *Payne v. United States,* 31 Fed. Cl. 709, 711 (1994) (rejecting request to take at face value assertion that claims are supported by adequate mineral discovery) and *Ford v. U.S.*, 101 Fed. Cl. 234, 238 (Fed. Cl. 2011) (ruling plaintiff could not establish a valid property interest without BLM determination)).[6]

Notably, in this case, the Forest Service has agreed that *it* must determine claim validity in a withdrawn area. ECF Doc. 123 at 14 ("if there is a withdrawal and an entity seeks to conduct mining under a new Plan of Operations, it must accomplish the step of obtaining a VER Determination").[7] As support, the Forest Service cites its own Manual, as well as BLM's regulations, which provide:

> After the date on which the lands are withdrawn from appropriation under the mining laws, BLM will not approve a plan of operations or allow notice-level operations to proceed until *BLM has prepared a mineral examination report to determine whether the mining claim was valid* before the withdrawal, and whether it remains valid.

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[6] Further, NEPA does not apply only to actions that agencies are required to take as a matter of law. *See* 40 C.F.R. 1508.18. While the criteria for an APA final agency action includes actions that are required by law, and thus have a "legal effect," a NEPA major federal action includes actions that an agency chooses to take, such as mineral withdrawals (*Yount*, 2014 WL 4904423*)*, land exchanges (*Ctr. for Biological Diversity*, 623 F.3d 633), or an experimental water release program.

[7] *See also* ECF Doc. 71 at 3-4 ("If lands on which mining operations are proposed are withdrawn from mineral entry, subject to valid existing rights, the surface managing agency will conduct a validity determination before allowing *new* operations.") (emphasis in original); *Id*. at 10-11 (claiming "these other mines involved Plans of Operations that were not approved as of the time of the withdrawal"); Exh. 7 (Discovery Response, RFA #12) (USFS "admit[ting] that the Forest Service would intend to conduct a valid existing rights determination for a new plan of operations to authorize new mineral exploration or new mine development in withdrawn areas."); Exh. 8 (Forest Service noting "the valid existing rights (VER) determination [] is now required during the 2-year mineral segregation in order to process your [Vane Minerals] plan of operations").

43 C.F.R. § 3809.100(a) (emphasis added). An Interior Solicitor's Memorandum confirms that "the Department *must verify* whether the claimant has located a valid mining claim, including whether the claimant has discovered a valuable mineral deposit as of the withdrawal date, before approving a plan of operations." Exh. 3 at 4 (emphasis added). In short, the agencies agree they are required to determine validity when lands are withdrawn.[8]

Moreover, an agency's validity determination is required for *all* mines present within a withdrawn area. Although the Forest Service suggests there is a distinction between new and old mines, the agency, in fact, required a validity determination before Canyon Mine could resume operations, even though Canyon Mine had an approved plan of operations when the Withdrawal was issued.[9] Indeed, distinguishing between proposed plans of operations and approved plans that predate a withdrawal is legally defective, because claim validity must be established "at the time of the withdrawal." *Hjelvik*, 198 F.3d at 1074; *Lara,* 820 F.2d at 1542. Thus, any validity determination that pre-dates a withdrawal is insufficient. *See* 65 Fed. Reg. 69,998, 70,026 (Nov. 21, 2000) (BLM explaining: "[w]here land is closed to location and entry under the mining laws, subsequent to the location of a mining claim, the claimant must establish the discovery of a valuable mineral deposit *at the time of the withdrawal*") (emphasis added). Regardless, at Canyon Mine, the agency did not determine claim validity prior to the 2012 VER Determination.

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[8] In briefing, the Forest Service has suggested the VER Determination was issued "voluntarily" because it was the "conservative approach." ECF Doc. 123 at 10, 14. But, as depicted above, the record reveals the Forest Service evaluated claim validity because it was required at Canyon Mine. Indeed, the government only determines the claim validity when it is required. *See* Exh. 3 at 4 ("In practice, the Department has determined the validity on only a very small percentage of the hundreds of thousands of unpatented claims and mill sites on public lands.").

[9] Other mining companies agree that the Withdrawal changed the legal requirements to initiate new mines *and* develop existing mines. Exh. 9 at 6 ("the 20-year withdrawal drastically altered the legal regime under which VANE could explore for and locate new claims and corroborate its discoveries and *develop the valuable mineral deposits on its existing claims*") (emphasis added); *id.* at 4 ("on segregated or withdrawn lands, the BLM and Forest Service now must prepare a mineral examination report to confirm the existence of a 'mineral discovery' before operations may proceed").

b. Canyon Mine Could Not Resume Operations Based On Prior Rights And Approvals

The Court has suggested that the VER Determination did not create any new mineral rights at Canyon Mine because mining claims under the Mining Law already existed. ECF Doc. 131 at 9-10 (stating "it does not create mineral rights, but merely confirms they already exist"); ECF Doc. 86 at 12 (reasoning "the VER Determination did not augment any rights"). But there is a significant, and relevant, distinction between mining claims and mining claims with valid existing rights. Whereas a mining claim may have been a sufficient mineral right under the Mining Law before the Withdrawal, it no longer is.

The Withdrawal removes lands previously available under the Mining Law. *See* Exh. 3 at 4 (explaining "Mining Law's authorization for citizens to explore for and develop minerals on those public lands terminates"). It requires that Canyon Mine have mining claims with *valid existing rights*, meaning there must be a discovery of a "valuable mineral deposit." As agency tribunals have held:

> [w]here the Government subsequently withdraws the land from mineral entry and location, permission to prospect is thereby revoked and only claims then supported by a discovery [of VER] are protected from the withdrawal.

U.S. v. Boucher, 147 IBLA 236, 243 (1999). Courts have also ruled that

> Any 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*.

Kosanke, 144 F.3d at 874 (emphasis added); *Ctr. for Biological Diversity*, 623 F.3d at 638. Recognizing that Canyon Mine's claims were inadequate to resume mining operations, the Forest Service informed Energy Fuels of the requirement for a validity determination. AR Doc. 671 at 12429 ("this [VER Determination] is a requirement for any public domain lands managed by the Forest Service that have been withdrawn from mineral entry").

The VER Determination thus added 'validity' to Canyon Mine's two mining claims, as required under FLPMA and the Withdrawal. In this respect, the VER Determination changed the regulatory status quo at Canyon Mine. *See Pit River Tribe*, 469 F.3d at 784; *see also Humane Society v. Johanns*, 520 F.Supp.2d 8, 28-29 (D.D.C.

2007) (proposed action changed regulatory status quo, providing new rule under different law). It provided Canyon Mine with a new and additional layer of regulatory approval that previously was not present on the claims. The VER Determination is an affirmative authorization like the lease extensions in *Pit River Tribe*, 469 F.3d at 784. There, the Forest Service argued that issuance of the extensions merely preserved the status quo and therefore did not require a NEPA analysis. *Id*. The Ninth Circuit ruled otherwise, reasoning that the company would not have retained rights on the property without the agency's extension of the leases. *Id.*

The Forest Service has suggested that, because it approved a plan of operations in 1986, the VER Determination did not change the status of Canyon Mine. ECF Doc. 71 at 21-22; ECF Doc. 123 at 7. The Forest Service's argument conflates two different regulatory regimes. The Forest Service's plan approval under its mining regulations serves an entirely different function than a finding of claim validity under the Withdrawal and FLPMA. Under the Forest Service's regulations, plans of operations are used to minimize the adverse impacts of mining on the national forests; however, the Forest Service does not consider claim validity under these regulations. *See* 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"); § 228.1 ("to minimize adverse environmental impacts"); § 228.8 (identifying factors to consider). Notably, the agency's Manual confirms that plan approval

> does not constitute now or in the future recognition or certification of the validity of any mining claim to which it may relate or to the mineral character of the land on which it lies.

AR Doc. 371 at 7299 (§ 2817.23).[10] In fact, the Forest Service did not make a validity determination in 1986, as the lands upon which Canyon Mine lies were "open" under

[10] DOI prepared an EIS for the Withdrawal. As part of that NEPA process, DOI evaluated "cumulative impacts," defined as "reasonably foreseeable future actions." *See* 40 C.F.R. § 1508.7. In the EIS, Interior found Canyon Mine to be reasonably foreseeable, but expressly cautioned

> the 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*

the Mining Law and had not been withdrawn at that time. In any case, a validity determination in 1986 would not have been legally sufficient because mining claims must be valid "at the date of withdrawal as well as at the date of the hearing." *Lara,* 820 F.2d at 1542); *Hjelvik*, 198 F.3d at 1074.[11]

Accordingly, although the 1986 approval of a plan of operations and the mining claims were previously sufficient, the Withdrawal necessitated an additional approval for Canyon Mine. That approval, in the form of the VER Determination, is a major federal action. *See* 40 C.F.R. § 1508.18(a) (major federal actions include actions that partially approve projects).

c. The Forest Service Had Meaningful Discretion

The VER Determination is also a major federal action because the Forest Service possesses discretion over this action. In *Ctr. For Biological Diversity*, the plaintiffs claimed the NHTSA was required to comply with NEPA for a rule that set fuel economy standards for light trucks. 538 F.3d at 1212-15. NHSTA argued that the underlying statute prevented the agency from considering a more stringent alternative fuel standard. *Id.* at 1212. The Court rejected this argument, finding NHTSA had the power to act "on whatever information might be contained in an EIS," including setting higher fuel economy standards, "if an EIS contained evidence that so warranted." *Id.* at 1213. The court thus ruled NHTSA had the requisite discretionary authority.[12]

Here, too, the Forest Service had the requisite discretion in determining whether the mining claims were valid. In a VER determination, the law requires that the Forest Service consider and evaluate the costs of complying with environmental and cultural

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and the EIS.
AR Doc. 445 at 8648 (emphasis added).

[11] Whether claims can be mined at a meaningful "profit," and thus contain valid existing rights, depends on the market value of uranium. Uranium's depressed market value explains why Canyon Mine closed in 1992 and remained that way for almost two decades. It also explains, in part, why Energy Fuels agreed to stop operations in November 2013. ECF Doc. 96-1 at 3; AR Doc. 490 at 10348 (EFR letter stating it will forego "shaft sinking" until "market conditions" dictate otherwise).

[12] *See also League of Wilderness Defenders- Blue Mountains Biodiversity Project v. U.S. Forest Serv.,* 549 F.3d 1211, 1217 (9th Cir. 2008) (finding "Forest Service has statutory authority to regulate the environmental consequences of the Project"); *U.S. v. S. Fla. Water Mgmt. Dist.*, 28 F.3d 1563, 1572 (11th Cir. 1994); *Sierra Club v. Hodel*, 848 F.2d 1068, 1090 (10th Cir. 1988).

protection laws. *Independence Mining*, 105 F.3d at 506-07; *Clouser*, 42 F.3d at 1530; *Barrick Goldstrike Mines*, 1994 WL 836324, *4; *Great Basin Mine Watch*, 146 IBLA at 256; *Moon Mining,* 161 IBLA at 362; AR Doc. 359 at 006792. However, the Forest Service has significant discretion is determining *how* to evaluate these costs. *See Ass'n of Pacific Fisheries v. EPA*, 615 F.2d 794, 805 (9th Cir. 1980) ("EPA is required to consider the costs and benefits of a proposed technology in its inquiry to determine the BPT. The Agency has broad discretion in weighing these competing factors, however"). Indeed, as stated by the Ninth Circuit, a "validity determination requires *considerable judgment and discretion to evaluate and assess the results of the mineral examination*, and to ultimately conclude whether the statutory requirement of a 'valuable discovery' has been met." *Independence Mining*, 105 F.3d at 509 (emphasis added). Accordingly, information obtained through a NEPA review would properly be considered in a validity determination, and may in fact be a significant factor in determining profitability.

Moreover, Forest Service regulations expressly authorize modifications to mining operations, where warranted. 36 C.F.R. § 228.4(e) (plan modifications intended to "minimiz[e] any unforeseen significant disturbance of surface resources"); *see also Clouser*, 42 F.3d at 1530 ("there can be no doubt that the Department of Agriculture possesses statutory authority to regulate activities related to mining . . . in order to preserve the national forests"). And, at Canyon Mine, the Forest Service was prepared to exercise its discretion, as it undertook the Mine Review to assess whether to require a modified plan of operations. AR Doc. 533 at 10599-60.[13]

In sum, the VER Determination is a major federal action requiring NEPA compliance. It authorized otherwise prohibited mining operations to resume. *See* 40 C.F.R. § 1508.18(a). The Forest Service had a "meaningful opportunity" to use its

[13] The Forest Service cannot avoid NEPA compliance by simply not exercising its discretion. *Ctr. For Biological Diversity*, 538 F.3d at 1213 (recognizing agency "could have" exercised discretion to set higher fuel economy standards based on EIS). Similarly, agencies cannot avoid NEPA compliance "by narrowly construing other statutory directives to create a conflict with NEPA." *Forelaws on Board v. Johnson*, 743 F.2d 677, 683 (9th Cir. 1984).

discretion to consider environmental impacts and use the NEPA process to inform the VER Determination. *See Marsh*, 390 U.S. at 372, 374.

2. Canyon Mine, As Authorized By VER Determination, May Cause Significant Impacts to the Environment

In considering the potential significance of a proposed action, NEPA requires agencies to consider several 'intensity' factors. 40 C.F.R. § 1508.27(b). Any "one of these factors may be sufficient to require preparation of an EIS in appropriate circumstances." *Ocean Advocates*, 402 F.3d at 865. There is little doubt Canyon Mine may result in significant environmental impacts, as the Court acknowledged when finding that potential impacts are likely irreparable. ECF Doc. 86 at 6. Further, as detailed below, NEPA's intensity factors demonstrate that Canyon Mine, as authorized by the VER Determination, may result in significant environmental impacts, requiring preparation of an EIS.

The Forest Service was required to consider the unique characteristics of the geographic area where the project is located, such as impacts to park lands. 40 C.F.R. § 1508.27(b)(3); *Presidio Golf Club v. Nat'l Park Service*, 155 F.3d 1153, 1162 (9th Cir. 1998). Canyon Mine is located just south of Grand Canyon National Park. ECF Doc. 131 at 1. The Park has "long been recognized as one of the Nation's most treasured landscapes." AR Doc. 481 at 10312. The Withdrawal was issued because the "unique resources" in this area "support a cautious and careful approach." *Id*. at 10317. A District of Arizona court found that a uranium exploration project in the same Kaibab National Forest may result in significant impacts due to adverse impacts to Grand Canyon National Park. Exh. 5 at 3-4; *see* 73 Fed. Reg. 60,233 (Oct. 10, 2008) (Forest Service notice of finding EIS preparation for same project).

More specifically, Canyon Mine's operations, as authorized by the VER Determination, will dewater shallow perched aquifers, and may contaminate creeks, seeps and springs located in the Kaibab National Forest and Grand Canyon National Park. ECF Doc. 63-1 (Kreamer Decl.) at 3-8; ECF Doc. 19-2 at 38; Exh. 6. Both shallow "perched" aquifers and the deeper Redwall-Muav aquifer are found below

Canyon Mine, and both discharge naturally through springs. ECF Doc. 63-1 (Kreamer Decl.) ¶ 4; Doc. 19-2 at 23-24. At Canyon Mine, drilling exploratory boreholes, constructing a monitoring and water well, and digging the mineshaft have pierced and drained several perched aquifers. ECF Doc. 63-1 (Kreamer Decl.) ¶ 4; AR Doc. 3 at 586; Exh. 6. By draining these perched aquifers, mineshaft construction may degrade important regional springs. ECF Doc. 19-2 at 38 (draining 1.3 millions gallons per year); ECF Doc. 63-1 at 7-9. Draining perched aquifers also interferes with replenishing the deeper Redwall-Muav aquifer. AR Doc 3 at 391; ECF Doc. 63-1, ¶ 7 ("Groundwater within these perched aquifers have a downward hydraulic head" and thus "significant amounts of water could be lost and rerouted by piercing the perched aquifers during mining operations").

Further, the Canyon Mine, which could not occur absent the VER Determination, is likely to significantly impact public health and safety. *See* 40 C.F.R. § 1508.27(b)(2). A USGS Report analyzed soil and sediment and "consistently detected" uranium and arsenic at levels above natural background. *Yount*, 2014 WL 4904423, *3. USGS also evaluated water samples "and found that about 70 sites exceeded the primary or secondary maximum contaminant levels for certain major ions and trace elements such as arsenic, iron, lead, manganese, radium, sulfate, and uranium." *Id*. More specifically, at previously mined sites, "[s]amples from 15 springs and five wells in the region contained dissolved uranium concentrations greater than EPA maximum concentrations for drinking water." *Id*. As this Court has acknowledged, the possible consequences of groundwater contamination are severe. *Id*. at *4.[14]

Moreover, to the extent Canyon Mine's impacts to public health and safety from groundwater contamination are uncertain or involve unknown risk, an EIS is necessary. *See* 40 C.F.R. § 1508.27(b)(5); *Ocean Advocates*, 402 F.3d at 870. This Court's recent ruling highlighted some of the uncertainties. *See Yount*, 2014 WL 4904423, *3 ("noted

[14] In addition, mining operations are likely to contaminate springs in Grand Canyon and the Redwall-Muav aquifer. ECF Doc. 63-1, ¶¶ 14-18. Recognizing this impact, the Forest Service required continuous monitoring of Grand Canyon springs at 6-month intervals for the Mine's life. AR Doc. 3 at 588; AR Doc. 6 at 924.

uncertainty about the potential impacts of uranium mining on perched and deep aquifers, including the R-aquifer (the principal aquifer in the area), and about the effects of increased radionuclide exposure on plants and animals").[15]

As authorized by the VER Determination, the Mine will also adversely affect the Red Butte TCP, which is was found to be eligible for the National Register of Historic Places in 2010. 40 C.F.R. § 1508.27(b)(8). The Red Butte TCP is one of Plaintiff Havasupai Tribe's most sacred sites, and would be significantly impacted by Canyon Mine operations, including any further digging of the mineshaft. This Court specifically found that Canyon Mine's impacts to "the Havasupai Tribe's traditional cultural and religious interest in the Red Butte TCP" constituted irreparable injury. ECF Doc. 86 at 6; *see also* ECF Doc. 22, ¶ 10 (describing religious and cultural impacts); AR Doc. 533 at 10607 (Forest Service Mine Review detailed religious and cultural impacts); AR Doc. 481 at 10319 (Withdrawal finding entire Red Butte area "is recognized as the traditional homeland and use area for seven tribes," and that all of the tribes "uniformly believe that continued uranium mining will result in the loss of their functional use of the area's natural resources"). The Forest Service summarized the adverse impacts as follows:

> [T]he tribes have made it clear that any mining activity in the area of Red Butte will desecrate the sacred and religious values ascribed to the TCP. Consequently it could significantly diminish Red Butte's value as a religious symbol which will have a negative effect on the traditional culture of the Havasupai, Hualapai, Hopi and other area tribes.

AR Doc. 492 at 10354; *see also Yount*, 2014 WL 4904423, *4 (noting Interior recognized any mining "within the sacred and traditional places of tribal people may degrade the values of those lands to the tribes who use them"). Accordingly, these impacts to Red Butte may result in significant impact, requiring an EIS.

[15] *See also* AR Doc. 481 at 10317 (USGS scientific report "acknowledged uncertainty due to limited data," including "uncertainties of subsurface water movement, radionuclide migration, and biological toxicological pathways"); *id.* at 10318 ("The most prominent example of uncertainty of impacts is with respect to how mining might affect perched aquifers," and uncertainty "also affects the potential impacts to deep aquifer springs," "effects to water quantity and quality," and "effects to animals and humans").

In sum, the administrative record and NEPA's "intensity" factors show that the resumption of mining at Canyon Mine, as authorized by the VER Determination, will result in significant impacts to the environment, requiring an EIS.

III. THE FOREST SERVICE VIOLATED NHPA BY FAILING TO COMPLETE A SECTION 106 CONSULTATION PROCESS PRIOR TO CONDUCTING VER DETERMINATION

Plaintiffs' Second Claim alleges that the Forest Service violated NHPA by failing to undertake the required consultation process under Section 106 of NHPA regarding measures to avoid or mitigate adverse effects on the Red Butte TCP that would result from the resumption of operations at Canyon Mine, prior to conducting the VER Determination. *See* ECF Doc. 115 at ¶¶ 78-83.

A. The Forest Service Was Required to Complete the Section 106 Consultation Process Prior to the VER Determination

NHPA obligates federal agencies to "assume responsibility for the preservation of historic properties" under their control. 16 U.S.C. § 470h-2(a)(1). Section 106 requires that federal agencies "having authority to license any undertaking shall . . . prior to the issuance of any license . . . take into account the effect of the undertaking" on historic properties. *Id*. § 470f; s*ee also* 36 C.F.R. § 800.1. The "undertaking" is an activity or project, whether federally funded or under the jurisdiction of a federal agency, or merely requiring some federal approval or license, that may impact a historic property. *See* 16 U.S.C. § 470w(7); 36 C.F.R. § 800.16(y). The resumption of the Canyon Mine was the undertaking in this case. The VER Determination, which, as this Court has already determined, "once issued, *allowed* mining operations to resume," ECF Doc. 131 at 10 (emphasis added), was the "Federal license or approval" that made the non-federal activity of reopening the mine an "undertaking" under NHPA. *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 not itself an undertaking").

The statutory obligation imposed by Section 106 is met through the "[S]ection 106 process," which requires a federal agency to consult with interested parties in order

to identify historic properties potentially affected by an undertaking and to seek ways to avoid, minimize or mitigate such adverse effects. 36 C.F.R. § 800.1(a). Agencies are specifically obligated to comply with a detailed consultation process for Indian tribes that "attach[] religious and cultural significance to historic properties that may be affected." *Id*. § 800.2(c)(2)(ii); *see also Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 755 F. Supp.2d 1104, 1108-09 (S.D. Cal. 2010). The implementing regulations set forth detailed steps that the agency is required to take to complete the Section 106 process. *See* 36 C.F.R. §§ 800.3-800.13.

Under NHPA, the Forest Service is responsible for the preservation of Red Butte TCP, a "historic property" under its control, and the Forest Service is required to complete the Section 106 process prior to issuing a license for any undertaking that may adversely affect Red Butte TCP. The Ninth Circuit's decision in *Pit River Tribe* is instructive. In that case, the Bureau of Land Management granted a power company leases to drill for and extract geothermal resources in an area of religious significance to Indian tribes, and then, after little activity had occurred for ten years, the Bureau extended the leases for another five years without conducting any NHPA analysis. *Pit River Tribe*, 469 F.3d at 775-77. The Ninth Circuit ruled that the extension of the leases was a "federal undertaking requiring review [under NHPA]," rejecting the district court's ruling that the extensions were not subject to NHPA because they did not change the status quo. *Id.* at 787.[16] Similarly, the resumption of mining activities at the Canyon Mine permitted by the VER Determination was an undertaking that required the Forest Service to first complete the Section 106 process.[17]

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[16] Although the Ninth Circuit expressly held that "the extension of the leases was a federal undertaking requiring [Section 106] review," Plaintiffs believe that it would have been more accurate for the Ninth Circuit to have characterized the geothermal projects as the "undertaking" and the extension of the leases as a "license or approval" requiring Section 106 review. *Pit River*, at 787. Regardless of the terminology used, however, the *Pit River* case makes clear that a Section 106 process was required prior to the extensions of the leases, even though, as here, the lease had previously been approved, and there was no change in the character of the project. Likewise, in this case, a Section 106 process was required prior to the VER Determination that allowed resumption of mine operations.

[17] Even if the Court were to determine that the resumption of mining activity was not a "new" undertaking, the Forest Service was nonetheless required to complete the Section 106 process prior to undertaking the VER Determination. As was illustrated in

Both the statute and regulation clearly specify that the Section 106 process must be concluded "prior to the issuance of any license" by the agency. 16 U.S.C. § 470f; 36 C.F.R. § 800.1(c). This timing requirement ensures that the agency may consider a broad range of alternatives to avoid, minimize or mitigate the undertaking's adverse effects to historic properties. *See* 36 C.F.R. § 800.1(c); AR Doc. 656 at 12346. The term "license" is not defined in NHPA, but it is defined broadly in the APA to include "an agency permit, certificate, approval . . . statutory exemption or other form of permission." 5 U.S.C. § 551(8); *see also Yount*, 2014 WL 4904423, at *23 (finding Forest Service's consent to mining withdrawal was approval constituting APA "license"). References to agency "approval" and "permit[s]" in Section 106 and the regulations suggest that the term "license" should be given a similarly broad reading under NHPA. *See, e.g.,* 16 U.S.C. § 470(w)(7) (defining "undertakings" covered by Section 106 to include projects, activities or programs "requiring a Federal *permit, license or approval*.") (emphasis added); 36 C.F.R. § 800.16(y) (same); 36 C.F.R. § 800.13(b)(1) (discussing consultation requirements for agency "*approved*" undertakings) (emphasis added). The VER Determination conducted by the Forest Service was therefore a "license" under Section 106 because it permitted Energy Fuels to recommence mining activities, notwithstanding the withdrawal of the mine site from the operation of the mining laws in January 2012. As this Court has ruled, the VER Determination was a "practical if not legal requirement" for the mine to resume operations, and "once issued, it *allowed* mining operations to resume." *See* ECF Doc. 131 at 9-11 (emphasis added).[18] Accordingly, the Forest Service was required to

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Pit River, and as numerous other courts have held, Section 106 imposes a *continuing* obligation on agencies to preserve historic properties, and the agencies' duties under Section 106 are triggered whenever the 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.'" *Vieux Carre Property Owners v. Brown*, 948 F.2d 1436, 1445 (5th Cir 1991) (quoting *Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271, 280 (3d Cir. 1983)); *see also WATCH (Waterbury Action to Conserve Our Heritage, Inc.) v. Harris*, 603 F.2d 310, 326 (2d. Cir. 1979) (finding NHPA imposes continuing obligation at each stage of undertaking requiring agency approval).

[18] This ruling is amply supported by the administrative record, including the Forest Service's statements informing Energy Fuels that the VER Determination "is a requirement" for any lands managed by the Forest Service that have been withdrawn from mineral entry, AR Doc. 671 at 12429, and similar statements the Forest Service

complete the Section 106 process prior to the VER Determination. *See Pit Tribe*, 469 F.3d at 787 ("the agency violated NHPA by failing to complete the necessary review *before extending the leases*") (emphasis added). Indeed, ACHP, which drafted the Section 106 regulations,[19] informed the Forest Service that it was required to undertake a Section 106 consultation process, prior to the "resumption of destructive activities at the mine." AR Doc. 656 at 12347.

B. The Forest Service Failed to Undertake, Much Less Complete, the Required Section 106 Process

There is no dispute that the Forest Service failed to complete a Section 106 consultation process prior to conducting the VER Determination.[20] To the contrary, the Forest Service did not even send out "consultation initiation letters" to the tribes, which purported to "begin" the consultation process, until months after the VER Determination had been completed, and after the Forest Service had already concluded that Energy Fuels could resume operations with no modifications to the Plan of Operations. AR Doc. 539 at 10690-91. Nor is there any dispute that the resumption of mining at Canyon Mine would have severe negative impacts on the Red Butte TCP and traditional practices conducted there by the Tribe.[21] A memorandum of agreement (MOA), the device contemplated by the NHPA regulations as the embodiment of

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made to the tribes, *see* AR Doc. 487 at 10342; AR Doc. 490 at 10348. Similarly, 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 Doc. 525 at 10486-87; *see also* AR Doc. 537 at 10642 (verbatim statement on Forest Service website). The Forest Service's Mine Review likewise stated that under the withdrawal "any mining claimant pursuing approval for exploration or mining would need to prove their claims had valid existing rights." AR Doc. 533 at 10594.

[19] The Section 106 regulations were promulgated by ACHP pursuant to a specific directive by Congress. *See* 16 U.S.C. § 470s.

[20] The Forest Service's periodic meetings and cursory information sessions with the tribes concerning the Canyon Mine did not constitute a Section 106 consultation. *See Quechan Tribe*, 755 F. Supp. 2d at 1119 ("While public information meetings, consultations with individual tribal members . . . and written updates are obviously a helpful and necessary part of the [consultation] process, they don't amount to the type of 'government-to-government' consultation contemplated by the regulations.").

[21] The administrative record amply demonstrates that the mining operations at Canyon Mine would have adverse effects on the Red Butte TCP, given the cultural and religious significance of the area to the tribes. *See, e.g.,* AR Doc. 533 at 10607 (acknowledgement in Mine Review that Havasupai and other tribes had informed Forest Service that Canyon Mine "would have a very negative impact on the religious and sacred values important to the tribe" which could even affect Red Butte TCP's continued eligibility for National Register).

agreed-on measures to avoid or mitigate these impacts, *see* 36 C.F.R. § 88.6(c), would have been legally binding and enforceable by third-party beneficiaries, such as the Tribe. *Tyler v. Cuomo*, 236 F.3d 1124, 1134-35 (9th Cir. 2000) (holding that an MOA resulting from a Section 106 consultation was legally binding and enforceable by third-party beneficiaries). The Forest Service's complete failure to convene and complete this process, before making the determination whether the undertaking could proceed, plainly violated NHPA. *See Pit River*, 469 F.3d at 787.[22]

The Forest Service's disregard for, or complete lack of understanding of, its obligations under Section 106 is evident in the Mine Review. The Forest Service determined that because Energy Fuels "has not proposed any new activities which would require a modification of the existing [Plan of Operations] or a new [Plan of Operations], there will be no new federal undertakings subject to NHPA Section 106 compliance." AR Doc. 533 at 10601. This reasoning is exactly backwards. As described *supra*, the Forest Service was required by the statute and regulations to conduct a Section 106 process *prior* to the VER Determination, and it is the Section 106 process that should have determined whether modifications to the Plan of Operations were required to avoid or mitigate adverse effects on the Red Butte TCP. Additionally, the costs of measures to mitigate or avoid adverse effects to Red Butte TCP needed to be taken into account in the VER Determination, which could have affected the conclusion that the uranium ore could be profitably mined. *See Clouser*, 42 F.3d at 1530

[22] Illustrative of the Forest Service's disregard of its obligations under Section 106 is a second incident shown in the administrative record where the Forest Service failed to consult with potentially affected Indian tribes until after it had already given approval to a project. On September 13, 2012, the Forest Service approved a request by Energy Fuels to thin trees and burn the slash along 4.8 miles of power line that access the uranium mine. AR Doc. 590 at 11424. The Forest Service acknowledged that there were seven archeological or historic sites within the power line right-of-way, three of which would be affected by the project, but nonetheless the Forest Service approved the project with minor "mitigation measures" regarding the manner of piling and burning the trees. *Id.* The Forest Service stated in its letter that "this concludes the Section 106 evaluation for this project," even though the Forest Service had not consulted with any of the tribes, the AZSHPO, ACHP or any other potentially interested parties, as Section 106 requires, and even though this "Section 106 evaluation" did not mention or consider any potential adverse effects on the Red Butte TCP. *Id.* The Forest Service did not inform the Tribe of the tree thinning proposal until weeks after the Forest Service had already approved the project. AR Doc. 601 at 11810.

("Virtually all forms of Forest Service regulation of mining claims—for instance, limiting the permissible methods of mining and prospecting in order to reduce incidental environmental damage—will result in increased operating costs, and thereby will affect claim validity . . . ."); *Barrick Goldstrike Mines*, 1994 WL 836324, at *4 ("mitigation costs for the production of threatened or endangered species will be highly relevant to the value of the deposits"); *Great Basin Mine Watch*, 146 IBLA at 256 ("the costs of compliance with all applicable Federal and State laws (including environmental laws) are properly considered in determining whether or not the mineral deposit is presently marketable at a profit").

The Forest Service's determination in the Mine Review that there were "no new federal undertakings subject to NHPA Section 106 compliance" was also misguided. AR Doc. 533 at 10601. As described above, the resumption of mining activity itself was a new undertaking that triggered Section 106 compliance. *See Pit River Tribe*, 469 F.3d at 787 (finding lease extensions to be an undertaking requiring NHPA compliance). Furthermore, as explained *supra*, Section 106 is a continuing obligation that applied to the Forest Service regardless of whether the reopening of the mine was a "new" undertaking. *Vieux Carre*, 948 F.2d at 1445; *Morris County Trust*, 714 F.2d at 280; *WATCH*, 603 F.2d at 326 (finding NHPA imposes continuing obligation at each stage of undertaking requiring agency approval). The Forest Service had the opportunity in 2011 to exercise authority and make alterations to the Canyon Mine Plan of Operations to modify its impact on Red Butte TCP before it undertook the VER Determination, but declined to do so. AR Doc. 533 at 10592 (statement in Mine Review that "no modification or amendment to the existing Plan of Operation is necessary").

Finally, it should be noted that the truncated Section 106 process that the Forest Service purported to undertake pursuant to Section 800.13(b)(3) after the VER Determination had concluded, even had it been properly conducted, could not cure the Forest Service's prior failure to comply with Section 106. *See Pit River Tribe*, 469 F.3d at 787 (post-undertaking assessment of historic properties cannot cure prior failure to undertake Section 106 process). Genuine compliance with Section 106 requires that the

agency and the parties return to square one, so that the Section 106 Process can occur free of the constraints of decisions made before adverse effects had been fully assessed.

IV. THE FOREST SERVICE INCORRECTLY DETERMINED THAT A LIMITED AND EXPEDITED SECTION 106 PROCESS WAS APPLICABLE

As described in the Mine Review, the Forest Service determined that rather than following the ordinary Section 106 process it would instead follow a more limited and expedited process for "[p]ost-review discoveries" that applies where an agency has already "approved the undertaking and construction has commenced." 36 C.F.R. § 800.13(b)(3); AR Doc. 533 at 10602-04. The Plaintiffs' Third Claim asserts that the Forest Service's decision that the expedited process applied, thus avoiding having to conduct a full consultation under Section 106, was a clear violation of the regulations, and regardless, the Forest Service failed to comply even with the regulation it claimed was applicable. *See* ECF Doc. 115 at ¶¶ 84-88.

A. The Forest Service Incorrectly Determined that Section 800.13(b)(3) Applied

The Forest Service's determination that Section 800.13(b)(3) was applicable to the Canyon Mine resumption was erroneous because, as ACHP informed the Forest Service, "the intent of Section 800.13(b)(3) is to provide *an expedited review process* where construction on activities have begun and *would be ongoing*, and thus, the agency has *limited time* for consultation." *See* AR Doc. 565 at 11335 (emphasis added). The Forest Service's own analysis in the Mine Review agreed with this assessment of the purpose of this provision, stating that Section 800.13(b)(3) "is in a sense *an emergency measure* to ensure historic properties are not inadvertently damaged *during project implementation*." AR Doc. 533 at 10603 (emphasis added). The Forest Service also correctly stated that the 48-hour timelines that this provision provides for the agency to notify interested parties and for the parties to respond "illustrate[] the intent to address potential impacts quickly, and to *avoid delaying projects*." *See id* (emphasis added). It is evident from the Forest Service's own analysis, therefore, that the emergency procedures provided by Section 800.13(b)(3) were not intended to apply to situations such as the Canyon Mine, where mining activity had ceased for over twenty years and

there was no need for expedited action. In fact, it took the Forest Service almost a year to send out "consultation initiation letters" after it learned of Energy Fuels' intent to resume mining, *see, e.g.,* AR Doc. 539 at 10690-91, a fact that clearly undermines the claim that an expedited consultation process was at all appropriate, much less necessary.

The history of Section 800.13(b)(3) confirms that this provision was intended to apply to ongoing projects where the consultation process could prove disruptive. Section 800.13(b)(3) originated in 1979 as Section 800.7, entitled "Resources discovered *during construction*." 44 Fed. Reg. 6068, 6077 (Jan. 30, 1979) (emphasis added). In a 1986 revision of the regulations, this provision became Section 800.11, renamed "Properties discovered *during implementation* of an undertaking." 51 Fed. Reg. 31115, 31123 (Sept. 2, 1986) (emphasis added). The provision took its current form as Section 800.13(b)(3) in a 1999 revision, and ACHP's commentary to that rule change noted that Section 800.13(b)(1) – which requires full consultation – was changed to include situations where "construction on an approved undertaking has not commenced," because "[ACHP] realized that such a circumstance would also provide the opportunity for consultation." *See* 64 Fed. Reg. 27044, 20758, 27080-81 (May 18, 1999). In other words, where there was an opportunity for an agency to undertake a full consultation, even if an undertaking had already been approved, ACHP intended Section 800.13(b)(1) to apply rather than Section 800.13(b)(3). In light of this history, it is clear that ACHP was correct in advising the Forest Service that it should not apply Section 800.13(b)(3) because the circumstances of the Canyon Mine, where operations had been suspended for two decades, provided ample opportunity for a full consultation to take place.[23] ACHP's interpretation is entitled to "substantial deference" as ACHP is

[23] The Forest Service may argue that ACHP agreed with the Forest Service that Section 800.13(b)(3) was the appropriate provision to apply based on an informal phone call, but e-mail correspondence in the administrative record confirms that the Forest Service refused to disclose key facts in this call that would have affected ACHP's advice, and ACHP also informed the Forest Service that it could not advise them because it didn't have all the facts. AR Doc. 664 at 12383 (describing the call); AR Doc. 664 at 12382 (confirming that this description was accurate); *see also Pueblo of Sandia v. United States*, 50 F.3d 856, 862 (10th Cir. 1995) (finding that the Forest Service had not complied with the good faith requirement of NHPA where it withheld relevant information from a state historic preservation officer during the consultation process); *Preservation Coalition, Inc. v. Pierce*, 66 F.2d 851, 858 n.2 (9th Cir. 1982)

the agency that drafted these regulations and oversees their implementation.[24] *See CTIA–The Wireless Assoc. v. Fed. Communications Comm'n*, 466 F.3d 105,115-16 (D.C. Cir. 2006) (affirming appropriateness of agency's deference to Council's interpretation of Section 106 regulations); *see also Stinson v. United States*, 508 U.S. 36, 45 (1993) ("[P]rovided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation.") (quotation marks omitted); *Karuk Tribe*, 681 F.3d at 1017 ("we defer to an agency's interpretation of its own regulations and the statutes it is charged with administering"); *Sayler Park Village Council v. U.S. Army Corps of Engineers*, 2002 WL 32191511, at *6 n.5 (S.D. Ohio, Dec. 30, 2002) (deferring to Council's interpretation of Section 106 regulations). Both the Arizona SHPO and the Tribe also informed the Forest Service that it should undertake a full Section 106 process. *See* AR Doc. 449 at 10139, AR Doc. 561 at 11326-27.

Importantly, moreover, Section 800.13(b)(3) only applies if the agency official has already "approved the undertaking." 36 C.F.R. § 800.13(b)(3). In this case, approval of the undertaking took the form of the VER Determination, which "allowed mining operations to resume." ECF Doc. 131 at 10. As described above, under both the statute and regulations the Forest Service was required to undertake the Section 106 process prior to approving the recommencement of mining activities through the VER Determination. *See* 16 U.S.C. § 470f; 36 C.F.R. § 800.1(c). If the Forest Service had complied with these timing requirements, it would have been clear that the resumption of mining activities had not yet been "approved" and thus Section 800.13(b)(3) would not have applied. Instead, the Forest Service should have applied Section 800.13(b)(1), which applies when "an agency official has not approved the undertaking" and which

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("cooperation with the Advisory Council [by federal agencies] is a regulatory mandate").

[24] This Court did not have the history of the development of this provision of the regulations before it when it previously considered Plaintiffs' argument that the Council's interpretations of its own regulations were entitled to substantial deference at the preliminary injunction stage. *See* ECF Doc. 86 at 16.

requires a full Section 106 consultation process. *Id.*; AR Doc. 565 at 11335.

Finally, it is clear that the Forest Service's reliance on Section 800.13(b) was erroneous because this provision applies in situations where "historic properties are discovered or unanticipated effects on historic properties are found *after the agency official has completed the section 106 process*." 36 C.F.R. § 800.13(b) (emphasis added). The Forest Service admits in the Mine Review that it had never conducted a Section 106 process to assess the potential effects of the Mine on the Red Butte TCP, plainly because when the original Section 106 process was conducted Red Butte was not considered an "historic property."

The administrative record shows that the Forest Service was determined to apply Section 800.13(b)(3), and thereby avoid a full Section 106 consultation process, notwithstanding its knowledge that this provision did not fit the factual circumstances of the Canyon Mine reopening. *See* AR Doc. 500 at 10389 (statement by Forest Service representative at a tribal meeting that "Kaibab [National Forest] is using 36 CFR 800.13(b) *which is not a great fit*") (emphasis added). The Forest Service did not draft the Section 106 regulations and is not the agency charged with administering the statute, and thus its interpretation of the regulations is not entitled to deference. *Karuk Tribe*, 681 F.3d at 1017 ("an agency's interpretation of a statute outside its administration is reviewed *de novo*"); *see also* AR Doc. 482 at 10333 (Forest Service Outline for Canyon Mine Tribal Conference Call states: "This is a new process for [the Forest Service] and we are learning as we go"). The Forest Service's failure to comply with any of the procedural requirements of an expedited consultation under Section 800.13(b)(3), as described below, further undermines the Forest Service's assertions that it was reasonable or appropriate to apply this provision.

B. The Forest Service Failed to Comply With Any of the Procedural Requirements of Section 800.13(b)(3)

The Forest Service's assertion that the emergency process provided by Section 800.13(b)(3) applied to the Canyon Mine is belied by its own conduct, as it failed to comply with any of the procedures required under Section 800.13(b)(3). For example,

the Forest Service failed to provide notice to interested parties "within 48 hours,"[25] as Section 800.13(b) requires, and instead sent out "consultation initiation letters" to interested tribes and ACHP nearly a year after the Forest Service had first learned that Energy Fuels intended to resume operations in August 2011. *See* 36 C.F.R. § 800.13(b)(3); AR Doc. 539 at 10690-91; AR Doc. 439 at 8547. The Forest Service's notification also failed to describe any "proposed actions to resolve the adverse effects," as required under the regulations. *See* 36 C.F.R. § 800.13(b)(3). When the tribes responded to the Forest Service's letter, informing the agency that some of the impacts of the mine on Red Butte could not be mitigated and that the tribes were opposed to any uranium-related activity, *see, e.g.,* AR Doc. 657 at 12354, the Forest Service did not take into account these responses, nor did it carry out "appropriate actions," 36 C.F.R. § 800.13(b)(3). The Forest Service was required to "make reasonable efforts to avoid, minimize or mitigate adverse effects to such properties," and to provide interested parties with "a report of the actions [carried out by the agency] when they are completed," which the Forest Service did not do. *Id.* at 800.13(b), (b)(3). Section 800.13(b)(3) permits an agency to take unilateral action to avoid or mitigate adverse effects to historic properties, *see* AR Doc. 565 at 11335, but the Forest Service took no such action and instead falsely informed the tribes that the only mitigation measures that would occur would be those voluntarily undertaken by Energy Fuels, *see* AR Doc. 657 at 12354 ("[Energy Fuels] must agree to mitigations, has expressed interest in doing so"). This is an extraordinary limitation found nowhere in Section 800.13(b)(3).

Additionally, the Forest Service repeatedly assured the tribes and ACHP that "mitigation" measures would be addressed through an MOA, *see, e.g.,* AR Doc. 596 at 11801; AR Doc. 592 at 11789, even though an MOA is not part of the Section 800.13(b)(3) process and the time it would take to agree upon an MOA is incompatible

[25] This highly-expedited timeline ensures that steps are taken quickly to resolve potential adverse effects where construction is ongoing. The regulation requires that responses to the Forest Service's notice be provided within 48 hours, but the Forest Service unilaterally decided to extend the time for interested parties to respond to 30 days, during which time destructive mining activity had resumed. *See, e.g.,* AR Doc. 539 at 10690-91. The regulations do not provide for any such extensions of time.

with the expedited nature of this emergency process. *See* AR Doc. 565 at 11335 (informing the Forest Service that the Section 800.13(b)(3) process concludes with "unilateral decision making" by the agency rather than an agreement among the consulting parties).[26] Indeed, the Forest Service admitted to one tribe that it wanted to have an MOA "on paper" in 18 months, when Energy Fuels was scheduled to begin transporting ore, but "not necessarily a final draft," revealing that such an agreement would not be in place until long after it could possibly have any meaningful effect. AR Doc. 596 at 11801.[27] ACHP specifically informed the Forest Service that if it was going to pursue an MOA, it "should refrain from destructive activities" before this process was complete, AR Doc. 656 at 12346, but the Forest Service ignored this instruction and permitted mining activities to continue without delay. *See, e.g.,* AR Doc. 659 at 12367-68 (notes of Forest Service meeting stating that Energy Fuels is "on schedule to start sinking the [mine] shaft"). The Forest Service's complete disregard for the procedures required under Section 800.13(b)(3) belie its assertion that this provision applied to the Mine. Rather, the Forest Service's conduct indicates that it asserted reliance on this provision solely to avoid undertaking a full Section 106 process.

[26] The Forest Service told some tribes that mitigation measures would be addressed under "existing" MOAs, *see, e.g.,* AR Doc. 500 at 10389; AR Doc. 489 at 10347, but these assurances were false as no such MOAs were ever located and the Forest Service later concluded that no such MOAs ever existed, *see* AR Doc. 506 at 10429.

[27] The tribes also repeatedly informed the Forest Service that the type of "mitigation" measures that the Forest Service was proposing would not address the adverse effects the Canyon Mine would have on their religious beliefs and practices. *See, e.g.,* AR Doc. 594 at 11795 (informing the Forest Service that there would be emotional and spiritual impacts that would not be addressed by an MOA); AR Doc. 599 at 11806-07 (describing the MOA as simply a political statement that would not mitigate the personal trauma of the impacts); AR Doc. 596 at 11800 (describing "mitigation" as insulting to the tribe's religious beliefs). But when the Forest Service finally did circulate a draft MOA to the tribes, it contained no mention of the effect of the mine on the tribes' religion, and instead focused on trivial measures, such as paint color and seeding of the site. AR Doc. 654 at 12324-34. The draft MOA also permitted any party to unilaterally terminate the agreement, rendering its terms unenforceable. AR Doc. 658 at 12363.

CONCLUSION AND REQUESTED REMEDY

For the foregoing reasons, Plaintiffs are entitled to summary judgment on their four claims. The Court should set aside the VER Determination for violations of NEPA and the NHPA and because the Forest Service's VER Determination failed to consider all relevant costs of mining operations at Canyon Mine. *See Pit River Tribe*, 469 F.3d at 788 (ruling that agencies' failure to comply with NEPA and NHPA required that lease extensions "must be undone" and agencies' subsequent decisions "premised on [energy company's] possession of a valid right to develop the land . . . must be set aside"); *see also* 5 U.S.C. § 706(2). The Court should also order the agency to fully comply with NEPA and undergo full Section 106 consultation under the NHPA. *See* 5 U.S.C. § 706(1). In addition, this Court should enjoin any further activity at the Canyon Mine, including mining activity and uranium exploration, until the Forest Service satisfies its NHPA and NEPA obligations and completes a new VER determination in compliance with law. *See Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 815 (9th Cir. 1999) (enjoining "any further activities" under logging agreement until Forest Service satisfied NHPA and NEPA); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1230 (9th Cir. 1988) (enjoining "all activity" under oil and gas leases "until all statutory requirements [under NEPA] are met").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2014, I filed a true and exact copy of PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND SUPPORTING EXHIBITS with the Court's CM/ECF system, which will generate a Notice of Filing and Service on the following:

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