SAM HIRSCH
Acting Assistant Attorney General
U.S. Department of Justice
Environment and Natural Resources Division

BEVERLY F. LI (WSBA # 33267)
Trial Attorney, Natural Resources Section
U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 7611
Washington, D.C. 20044-7611
Telephone: (202) 353-9213
Fax: (202) 305-0506
Email: beverly.li@usdoj.gov

Attorney for Federal Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
PRESCOTT DIVISION

GRAND CANYON TRUST, *et al.*, Plaintiffs, v. MICHAEL WILLIAMS, Forest Supervisor, Kaibab National Forest *et al.*, Defendants, and Energy Fuels Resources (USA), INC., *et al.*, Defendants-Intervenors.	Case No. 3:13-cv-08045-DGC **FEDERAL DEFENDANTS' COMBINED MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATUTES

REGULATIONS

GLOSSARY OF ACRONYMS

ACHP	Advisory Council on Historic Preservation
AIRFA	American Indian Religious Freedom Act
APA	Administrative Procedure Act
BLM	Bureau of Land Management
DOI	Department of the Interior
EIS	Environmental Impact Statement
FLPMA	Federal Land Policy and Management Act
FSM	Forest Service Manual
MOA	Memorandum of Agreement
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
Plan	Plan of Operations
ROD	Record of Decision
SHPO	Arizona State Historic Preservation Officer
TCP	Traditional Cultural Property
THPO	Tribal Historic Preservation Officer
VER	Valid Existing Rights

INTRODUCTION

In 1986, the Forest Service issued a Record of Decision ("ROD") that approved the Plan of Operations ("Plan") for Canyon Mine on the Kaibab National Forest and prepared an Environmental Impact Statement ("EIS") in compliance with the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370h. This Court and the Ninth Circuit upheld the EIS and ROD against challenges brought by Plaintiff the Havasupai Tribe and others. *Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991) (per curiam). The Plan has remained valid and in effect since it was approved. When activities went on standby status in 1992, surface structures had already been built and drilling of the mine shaft had begun. After the mine operator informed the Forest Service that it intended to resume activities, the Forest Service in 2012 reviewed the Plan, EIS and ROD. The Forest Service reasonably concluded that no further agency decision-making or NEPA analysis was required because no changes to the already-approved Plan were needed. The Forest Service also prepared a Valid Existing Rights ("VER") Determination that confirmed that the mining claims at Canyon Mine were valid.

Plaintiffs challenge the Forest Service's actions regarding the resumption of activities at Canyon Mine under NEPA, the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470f, and other laws addressing mining on public lands. Plaintiffs' claims all fail on the merits. Most of Plaintiffs' arguments stem from their mischaracterization of the effect of the VER Determination. But when the role of the VER Determination as an expert report is appropriately understood, Plaintiffs cannot show any violation of law. First, under NEPA, no EIS was required for the VER Determination because it did not authorize any activities and thus did not constitute major federal action. Moreover, the 1986 EIS already analyzed the effects of Canyon Mine.

Second, just as the VER Determination did not constitute major federal action under NEPA, it also did not constitute an "undertaking" that triggered consultation

requirements under Section 106 of the NHPA. Thus, the Forest Service did not fail to carry out a discrete, mandatory duty.

Third, Plaintiffs cannot show that the Forest Service used the wrong subsection of the NHPA regulations when it engaged with area tribes and other entities with respect to Red Butte Traditional and Cultural Property ("TCP"). Because Canyon Mine was already approved and construction had already commenced, following the procedures in 36 C.F.R. § 800.13(b)(3) was appropriate.

Finally, even assuming that the VER Determination is subject to judicial review, Plaintiffs' alleged deficiencies in the VER Determination are not relevant to the only authorization for continued operation of the Canyon Mine, namely the ROD approving the Plan. Although the Forest Service was not required by law to prepare a VER Determination, this document evaluated all relevant costs when reaching the reasonable conclusion that the claims at Canyon Mine were valid. The speculative costs that Plaintiffs raise did not have to be considered in the economic analysis.

The Forest Service's actions in response to the notice that operations would resume at Canyon Mine were in compliance with all applicable laws. The Court should find in favor of the Forest Service on the merits.

STATUTORY BACKGROUND

A. National Environmental Policy Act

To ensure informed decision-making, NEPA requires federal agencies to analyze and disclose significant environmental effects of major federal actions, but the statute does not require any particular substantive decision. *See* 42 U.S.C. §§ 4321-4370; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1978); *see Lands Council v. McNair*, 537 F.3d 981, 1000 (9th Cir. 2008) (en banc). Under NEPA, federal agencies must prepare a detailed EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). An agency's

compliance with NEPA's requirements is bounded by a "rule of reason." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004). Under the "rule of reason," when determining whether and to what extent to prepare an EIS, agencies consider the usefulness of the information that would be analyzed in an EIS and the purposes of NEPA's regulatory scheme. *Id*.

B. National Historic Preservation Act

Section 106 of the NHPA requires a federal agency having jurisdiction over a proposed undertaking, prior to the issuance of a federal license, to take into account the effect of the undertaking on a site eligible for listing in the National Register. 16 U.S.C. § 470f.[1] The federal agency official must determine whether a proposed federal action is an "undertaking," and if so, whether it is a type of activity that has the potential to cause effects on historic properties. 36 C.F.R. § 800.3(a). The consultation process consists of identification of historic properties that may be affected, an assessment of the property's historical significance, a determination of whether there will be an adverse effect on the property, and consideration of ways to reduce or avoid any adverse effect on such historic property. 36 C.F.R. §§ 800.4, 800.6; *Attakai v. United States*, 746 F. Supp. 1395, 1404 (D. Ariz. 1990).

C. Mining Law of 1872

The Mining Law, 30 U.S.C. §§ 22-54, made public lands available "for the purpose of mining valuable mineral deposits." *United States v. Coleman*, 390 U.S. 599, 602 (1968); *see* 30 U.S.C. § 22; *Cameron v. United States*, 252 U.S. 450, 460 (1920). It authorizes citizens to "locate" valid mining claims upon "discovery" of valuable mineral deposits and compliance with applicable legal requirements. *Chrisman v. Miller*, 197 U.S. 313, 320-21 (1905). A valid claim affords its holder the right to possess, occupy,

[1] An "undertaking" is a "project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including . . . those requiring a Federal permit, license, or approval. . . ." 16 U.S.C. § 470w(7); *see* 36 C.F.R. § 800.16(y).

and extract minerals from federal lands. 30 U.S.C. § 26; *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306, 316 (1930); *Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30, 47 (D.D.C. 2003). The Mining Law does not include any requirement to "diligently develop" or extract minerals on the claim within a certain time frame. *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1281-82 (9th Cir. 1980).

Under the Federal Land Policy and Management Act ("FLPMA"), lands may be withdrawn from operation of the mining law. 43 U.S.C. § 1714(a). 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. 43 C.F.R. § 3809.100; AR 11602 (Bureau of Land Management ("BLM") Handbook H3809-1, § 8.1.5)[2]; AR 7310, 7298 (FSM 2818.3, 2817.23, ¶ 6). The VER Determination will confirm whether mining claims constitute valid existing rights exempt from the withdrawal based on whether there was a discovery of a valuable mineral deposit at the time of the withdrawal. *See United States v. Pass Minerals, Inc.*, 168 IBLA 115, 122 (2006); Linden Decl. ¶ 7 (ECF No. 53-2).

The Secretary of the Interior has plenary authority to determine the validity of mining claims. 43 U.S.C. § 1457. The Forest Service conducts validity determinations pursuant to a Memorandum of Understanding with the Department of the Interior ("DOI"). *See* Linden Decl. ¶ 6 (citing Forest Service Manual ("FSM") 1531.12). The Forest Service does not have the authority to declare a mining claim void; rather, such adjudications are conducted by DOI. *See* AR 7311 (FSM 2819).

D. Forest Service Regulation of Surface Resources

The Forest Service regulates and permits mineral development activities for locatable minerals that may affect surface resources on National Forest System lands. *See* 36 C.F.R. Part 228; *Freese v United States*, 6 Cl. Ct. 1, 11-12 (1984), *aff'd*, 770 F.2d

[2] Defendants cite the administrative record filed with this Court in 1988 as "1988 AR __" and cite the subsequent administrative record for Canyon Mine as "AR __".

177 (Fed. Cir. 1985). Operators must have an approved mining plan of operations before conducting operations that cause "significant disturbance." *See* 36 C.F.R. § 228.4.

FACTUAL BACKGROUND

A. 1986 EIS and ROD Approving Plan of Operations

In 1984, Energy Fuels Nuclear submitted to the Kaibab National Forest a proposed Plan to mine uranium at the Canyon Mine site, approximately six miles south of the Grand Canyon National Park boundary. 1988 AR 193. The Forest Service completed an EIS to evaluate the potential environmental effects of the Plan, and considered comment and input from federally recognized tribes. 1988 AR 461. In 1986, the Forest Service issued the final EIS and ROD, approving the Plan with modifications. 1988 AR 915. The Plan did not have an expiration date.

The Forest Service received twelve administrative appeals on the ROD, including appeals from the Hopi and Havasupai Tribes, and the Sierra Club Legal Defense Fund. 1988 AR 3932. The appeals raised 25 different issues including First Amendment and American Indian Religious Freedom Act ("AIRFA") challenges, a variety of NEPA challenges regarding resources such as groundwater, and a challenge to the validity of mining claims. 1988 AR 3933. The tribes' appeals were not limited to the record developed at the time of the EIS and ROD, but included new information. 1988 AR 3137-43, 3716-825, 3733-69, 1882-992, 1811-14.

In 1987, the Deputy Regional Forester issued his appeal decision, affirming the ROD. 1988 AR 3928. This decision was based on the entire record, including the new information the Tribes had submitted. 1988 AR 3931, 3934-35. In 1988, the Chief of the Forest Service affirmed the decision below after considering all information that had been presented. 1988 AR 5230. The Chief's decision discussed the tribal religious issues (including the sacred nature of Red Butte and the Canyon Mine site), the claimed groundwater contamination, and mineral claim validity. 1988 AR 5231-39, 5242-44, 5239-40. The Secretary of Agriculture decided not to review the appeal. 1988 AR 5288.

The Havasupai Tribe and others challenged the 1986 EIS and ROD in this Court. *Havasupai Tribe v. United States*, 752 F. Supp. 1471 (D. Ariz. 1990). In that proceeding, the plaintiffs submitted additional evidence about tribal religious concerns as an offer of proof to the District Court. *Id.* at 1485 n.7. The Court "assum[ed] that all of plaintiff's assertions about the religious sanctity of the Canyon Mine site and adverse [e]ffects upon the Havasupai [religion] are true," *id.* at 1485, and found in favor of the Forest Service on all of the plaintiffs' NEPA, First Amendment, and AIRFA claims. *Id.* at 1505. The Ninth Circuit affirmed. *Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991).

B. Implementation of the Plan Prior to Standby Status

In the 1990s, all surface structures at Canyon Mine were constructed, including access roads, hoist, storage buildings, the power line, a perimeter fence and diversion structures, a head frame, support buildings, and sediment ponds. AR 10487 (confidential). The sinking of the mine shaft began, but stopped at around 50 feet when the mine went into standby status in 1992. *Id.*; Schuppert Decl. ¶ 3 (ECF No. 53-3).

C. The Secretary of the Interior's Land Withdrawal Decision and the Forest Service's VER Determination

Canyon Mine is within the area in northern Arizona that was the subject of the Secretary of the Interior's July 2009 proposal to withdraw certain public lands from location and entry under the Mining Law for up to twenty years, subject to valid existing rights. Notice of Proposed Withdrawal, 74 Fed. Reg. 35887-01 (July 21, 2009). The Notice of Proposed Withdrawal temporarily "segregated" or closed the designated lands to entry and location of new mining claims.

In January 2012, after completing an EIS and other studies, the Secretary of the Interior published a "Public Land Order," which withdrew approximately one million acres from mineral location and entry for twenty years. 77 Fed. Reg. 2317-01 (Jan. 17, 2012). The withdrawal was subject to valid existing rights and the EIS for the withdrawal expressly contemplated that mining will proceed at Canyon Mine, as well as

three other previously authorized mines on BLM-managed lands. AR 10313-14, 8657. Although Canyon Mine was approved before the segregation and withdrawal, and therefore didn't require a VER Determination, the Forest Service on April 18, 2012 took a conservative approach and completed a VER Determination of the mining claims. This VER Determination confirmed that the mining claims were valid as of the date of the segregation, and thus were unaffected by the withdrawal. AR 10487 (confidential).

D. The Forest Service's 2012 Review of 1986 EIS and ROD

In 2011, the mine operator informed the Forest Service that it intended to resume active mining operations under its existing Plan. In 2012, the Forest Service conducted a review of the 1986 EIS and ROD, and associated documents. AR 10594, 10600. The Forest Service determined that no amendment or modification of the Plan was required because there was no new information or changed circumstances that would give rise to unforeseen significant disturbance of surface resources, and there was no new proposal. *Id.* No further federal authorizations were needed for mining activities at Canyon Mine to continue. AR 10592. While the Forest Service used a conservative approach and prepared a VER Determination even when it was not required to do so, the VER Determination did not itself authorize any activities or make any decisions.

E. Consultation Under the NHPA

In conjunction with the 1986 EIS and ROD, the Forest Service completed consultation under Section 106 of the NHPA. In 1992, the NHPA was amended to provide for more robust tribal consultation and explicit inclusion of TCPs as historic properties. *See* Pub. L. No. 102-575, § 4001 *et seq*., 106 Stat. 4600. The Advisory Council on Historic Preservation ("ACHP") subsequently amended its regulations to define "historic property" as including "properties of traditional religious and cultural importance to an Indian tribe . . . that meet the National Register criteria." 36 C.F.R. § 800.16 (l)(1); *see* 65 Fed. Reg. 77698, 77738 (Dec. 12, 2000).

As early as 2008, the Forest Service communicated with multiple tribes, including the Havasupai, about potential resumption of operations at Canyon Mine during yearly tribal consultation meetings and through letters. Lyndon Decl. ¶ 3 (ECF No. 53-1). In 2010, in response to a separate proposed undertaking, the Forest Service determined that the Red Butte TCP was eligible for inclusion on the National Register. Lyndon Decl. ¶ 2.[3] This determination of eligibility evaluated the physical integrity of Red Butte TCP as a cultural landscape and took into account that all surface structures at Canyon Mine had been built and the drilling of the mine shaft had begun.

Because there were no new proposed activities at Canyon Mine that would require a modification of the existing mining Plan or a new Plan, the Forest Service concluded there was no new federal undertaking subject to NHPA Section 106 compliance. However, since the definition of "historic property" had changed since the 1986 ROD, the Red Butte TCP could be considered a newly "discovered" historic property, and potential effects could then be considered "unanticipated effects" to a historic property. AR 10544. Accordingly, the Forest Service officially initiated consultation with the Havasupai and other tribes, Arizona State Historic Preservation Officer ("SHPO"), and ACHP regarding the potential effects of mining activities on the Red Butte TCP. AR 10592. The Forest Service applied the procedures in 36 C.F.R. § 800.13(b)(3) to the consideration of Red Butte TCP because the undertaking had already been approved and construction activities had begun. AR 10555-57.

The Forest Service recognized that the regulation's 48-hour response timeline might not provide for adequate consultation and, consequently, extended the response

[3] The Forest Service's "determination of eligibility" is an internal determination that the agency will treat the historic property as eligible for the National Register and subject to NHPA procedural requirements. *See* 36 C.F.R. § 63.2. Only the Keeper of the National Register can make a formal determination of eligibility. *See* 36 C.F.R. § 63.3.

period to allow thirty days from the date of its letter for a response. AR 10545. The Forest Service acknowledged that mining activities would adversely affect Red Butte TCP and sought to work with the tribes to identify actions to address their concerns. Hangan Decl. ¶ 2 (ECF No. 53-4). The Havasupai Tribe and the Forest Service subsequently exchanged letters regarding consultation for several months and met in person on multiple occasions. Lyndon Decl. ¶¶ 3-4.

STANDARD OF REVIEW

A. The Administrative Procedure Act

Judicial review in this case is governed by section 706(2)(A) of the APA, 5 U.S.C. § 706(2)(A). Section 706(2)(A) provides that a reviewing court may set aside "agency action, findings, and conclusions" that it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Earth Island Inst. v. Carlton*, 626 F.3d 462, 468 (9th Cir. 2010). Review under this standard is "highly deferential," with a presumption in favor of finding the agency action valid. *McNair*, 537 F.3d at 993 (citation and quotation marks omitted). The reviewing court may not substitute its judgment for that of the Forest Service, *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 376 (1989), and must uphold the agency's reasonable decision "even if the administrative record contains evidence for and against its decision." *Modesto Irrigation Dist. v. Gutierrez*, 619 F.3d 1024, 1036 (9th Cir. 2010) (quotation marks and citation omitted). A court may find that an agency has acted "arbitrarily and capriciously" only "when 'the record plainly demonstrates that [the agency] made a clear error in judgment in concluding that a project meets the [statutory] requirements.'" *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1052 (9th Cir. 2012) (quoting *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1124 (9th Cir. 2012)); *McNair*, 537 F.3d at 994. When examining agency scientific findings made within an area of an agency's technical expertise, the court must generally be at its most deferential. *Marsh*,

490 U.S. at 376-77; *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983); *McNair*, 537 F.3d at 993.

ARGUMENT

I. The VER Determination Does Not Constitute Final Agency Action

Federal Defendants respectfully request that the Court revisit the question of whether the VER Determination constitutes a final agency action. In denying Defendants' motion to dismiss, this Court held that "a practical effect alone is sufficient to satisfy the second prong" of the test in *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).[4] *See* Order on Mot. to Dismiss at 9, Aug. 7, 2014 (ECF No. 131). In applying this new approach—which Plaintiffs had not argued in their briefing—the Court found that the VER Determination constituted a final agency action, even though there were "no specific *legal* consequences that flow from the determination itself." *Id.* at 10. Federal Defendants did not have an opportunity to thoroughly address the Court's new approach to the final agency action inquiry in their earlier briefing. Furthermore, counsel for Federal Defendants was not aware of the Ninth Circuit's August 5, 2014 decision regarding final agency action in *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084 (9th Cir. 2014), until after the Court denied the motion to dismiss. Federal Defendants believe that decision implicates this Court's analysis. Thus, the Forest Service asks this Court to dismiss Plaintiffs' claims against the VER Determination for lack of final agency action based on the additional arguments set forth below.

In addressing the second prong of the *Bennett* test, this Court focused solely on the practical and not the legal effects of the agency action, stating that the VER Determination "was a practical if not a legal requirement," Order on Mot. to Dismiss at 9, and cited *Oregon Natural Desert Ass'n v. U.S. Forest Service ("ONDA")*, 465 F.3d 977,

[4] In *Bennett*, the Supreme Court held that a final agency action "must mark the consummation of the agency's decision making process," and be an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 177-78 (internal quotation marks and citation omitted).

982 (9th Cir. 2006), in support of this approach.[5] However, by relying alone on a practical effect of the VER Determination without a legal consequence, this Court went beyond the holding and intent of *ONDA*. Although the *ONDA* court stated that "[t]he 'finality element must be interpreted in a pragmatic and flexible manner,'" 456 F.3d at 982 (quotation marks and citation omitted), ultimately the Ninth Circuit concluded that the Annual Operating Instructions at issue were final agency actions because the Instructions were a "signed agreement" between the agency and the permit holder that, according to the "explicit terms" of the agreement, were "made part of the grazing permit" and governed the permit holder's operations. *Id.* at 980. The Instructions "impose[d] legal consequences on the permit holder." *Id.* at 983. Thus, *ONDA* did not hold that practical consequences alone can meet the *Bennett* test for finality.

Likewise, in *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586 (9th Cir. 2008), the Ninth Circuit cited *ONDA* and rejected the plaintiff's argument that "erroneously conflate[d] a potential *practical* effect with a *legal* consequence." *Id.* at 596. When determining that the Army Corps of Engineers' jurisdictional determination under the Clean Water Act was not a final agency action, the *Fairbanks* court stated that "any difficulty Fairbanks might face . . . flows not from the *legal* status of the Corps' determination as agency action, but instead from the *practical* effect of Fairbanks having been placed on notice that construction might require a Section 404 permit." *Id.* at 595. Similarly, in *Columbia Riverkeeper*, the Ninth Circuit found that a Coast Guard's letter of recommendation that was not "a necessary prerequisite for siting [a Liquified Natural Gas] facility" did not have legal consequences and therefore was not final agency action. 761 F.3d at 1095. While *Columbia Riverkeeper* discussed the plaintiff's arguments regarding practical considerations, the

[5] Federal Defendants do not concede that the VER Determination necessarily has any practical effect, as it is merely an expert opinion regarding claim validity that may inform future agency decision-making processes or adjudications.

court did not find that any of the asserted practical effects, such as non-binding mitigation measures, gave rise to a final agency action. *Id.* at 1096. Thus, the Ninth Circuit has narrowed the effect of any implications from *ONDA* regarding reliance on a practical effect to satisfy the test for final agency action.[6]

Because the record shows no legal consequence flowing from the VER Determination, *see* Order on Mot. to Dismiss at 10, the second prong of the *Bennett* test is not met. A practical effect alone is insufficient. Thus, the VER Determination does not constitute final agency action. Claims 1, 2, and 4 should be dismissed.[7]

II. The Forest Service Was Not Required to Prepare a NEPA Analysis for the VER Determination (Claim 1)

A. The VER Determination Was Not Major Federal Action Because the VER Determination Was Not Necessary Before Mining Activities Resumed

Even if the Court finds that Plaintiffs have established jurisdiction, Plaintiffs' NEPA claim that an EIS was required for the VER Determination fails on the merits. Pls.' Mem. in Supp. of Mot. for Summ. J. ("Pls.' Br.") at 15-28 (ECF No. 140-1). NEPA requires an EIS only for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The VER Determination does not authorize any activities, and thus does not constitute a major federal action under NEPA.

---

[6] The D.C. Circuit cases which this Court cited also did not hold that a practical effect alone was sufficient to satisfy the *Bennett* test. *See Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005) (stating that "if the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purpose of judicial review"); *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) (addressing a binding guidance document that had the "force of law" and was effectively a "legislative rule").

[7] Plaintiffs also face a jurisdictional issue with regard to redressability for their claims against the VER Determination. If the Court were to invalidate the VER Determination, the Forest Service would plan to void or retract the VER Determination (rather than reissue it after completing additional analysis or NHPA consultation) because the Agency believes that the VER Determination was not necessary. The Forest Service's retraction would have no effect on the mine operator's ability to conduct activities at Canyon Mine. Therefore, Plaintiffs' alleged injury is not redressable by any order this Court could make. Intervenors' merits brief will address redressability in more depth.

Once an agency has taken action to approve a regulated project, "there is no ongoing 'major Federal action'" and the agency's "obligation under NEPA has been fulfilled." *Cold Mountain v. Garber*, 375 F.3d 884, 894 (9th Cir. 2004); *see also Greater Yellowstone Coal. v. Tidwell*, 572 F.3d 1115, 1121-22 (10th Cir. 2009) (no ongoing major federal action where agency issued permit for use of federal land; NEPA applies only to federal agencies, so actions of non-federal party implementing project are not relevant). In 1986, the Forest Service prepared a thorough EIS for Canyon Mine, *Havasupai Tribe*, 943 F.2d at 32, and conducted consultation before issuing the ROD. The federal action came to an end in 1988 after the Forest Service issued its ROD and the Chief concluded the administrative appeal process. *See Norton v. S. Utah Wilderness Alliance* (*"SUWA"*), 542 U.S. 55, at 73 (2004). The existing Plan remains in effect despite the hiatus in mining activities, so there is no ongoing federal action. AR 10600. Thus, no further NEPA analysis was required.

Plaintiffs' argument is based on their misunderstanding of the role of the VER Determination. Pls.' Br. at 15-25. "[O]perations could continue at Canyon Mine under the existing and effective Plan of Operations regardless of whether or not a VER Determination had been made." Fed. Defs.' Supp. Resp. to Req. for Admis. No. 8 (ECF No. 123-1). The mine operator voluntarily decided not to proceed until after the VER Determination was completed. Roberts Decl. ¶¶ 15-16 (ECF No. 59). As this Court previously held, the VER Determination serves the functions of providing "a professionally prepared and technically reviewed report on the merits of the mining claim," and is "a powerful tool when submitted into evidence at a [mineral] contest hearing." Order Den. Prelim. Inj. at 11-12 (citing AR 5901); *see also* AR 6796, 7286; Linden Decl. ¶¶ 5-6. In other words, a VER Determination is an internal document that the Forest Service or BLM may use as a tool in future decision-making processes or

adjudications, but has no legal effect by itself.[8] This Court recently recognized that the VER Determination has "no specific *legal* consequences," "does not create mineral rights, but merely confirms they already exist [, and] is not required by the FLPMA or the Withdrawal." Order on Mot. to Dismiss at 9-10.

The Ninth Circuit in *Center for Biological Diversity v. Salazar ("CBD")*, 706 F.3d 1085 (9th Cir. 2013), held that no further NEPA analysis was required in factual circumstances analogous to those at Canyon Mine. In that case, the BLM had approved the Plan for the Arizona 1 Mine in 1988, after which the mining company began developing the mine until mining activities suspended in 1992. *Id.* at 1088. After a 17-year hiatus under the existing Plan for Arizona 1 Mine, the mine operator informed BLM of its intention to restart mining operations. *Id.* at 1089. While the Withdrawal also affected the area in which the previously-approved Arizona 1 Mine was located and BLM completed neither a VER Determination nor further NEPA analysis, the Ninth Circuit allowed mining activities to resume. The Ninth Circuit held that the NEPA review for the 1988 Arizona 1 Plan was complete and no major federal action triggered

[8] The Forest Service does not retain the authority to revoke or invalidate a Plan of Operations based on its conclusions in a VER Determination. If the VER Determination concluded that valid existing rights were not established, the Forest Service would forward its conclusion to BLM with a recommendation regarding whether to contest the mining claim. AR 7284, 7310-11 (FSM 2814.11, 2819); *see also McKown v. United States*, 908 F. Supp. 2d 1122, 1129-34 (E.D. Cal. 2012) (describing lengthy administrative adjudicatory process for deciding validity of mining claims). If BLM concurs with the Forest Service's finding of no valid existing rights, BLM could initiate a mineral contest against the mining claim on behalf of the Forest Service. *See Cameron*, 252 U.S. at 464; 43 C.F.R. § 3809.100(a). The VER Determination would then be submitted as an expert report in support of the contest charges. Linden Decl. ¶ 6 (ECF No. 53-2); *see* AR 7691, 5901. Until DOI makes a final determination of invalidity--and that determination withstands any subsequent federal court challenge--the Forest Service could not terminate or revoke a Plan on withdrawn lands. *Ctr. for Biological Diversity*, 162 IBLA 268, 281 (2004); *Pass Minerals, Inc.*, 151 IBLA 78, 87 (1999); AR 7279-80 (FSM 2811.5). Any Plan revocation or suspension would involve a further adjudicatory process, with opportunity for administrative appeal and judicial challenge.

supplemental NEPA analysis for the 1988 Plan, which had remained in effect despite the period of inactivity. *Id.* at 1095-96. Following *CBD*, this Court should likewise find that no further EIS was required for Canyon Mine.

Plaintiffs claim that a VER Determination was a "permit or other regulatory decision," 40 C.F.R. § 1508.18(b)(4), which approved operations at Canyon Mine after the Withdrawal. Pls.' Br. at 16-17, 20-23. They are incorrect. While a VER Determination would certainly be required for a new Plan on an existing mining claim, there is no such requirement when a Plan was approved before the Withdrawal. As noted in the Withdrawal ROD, "On withdrawn lands, neither the BLM nor the USFS will process a *new* notice or plan of operations until the surface managing agency conducts a mineral examination and determines that the mining claims on which the surface disturbance would occur were valid as of the date the lands were segregated or withdrawn." AR 10314-15 (emphasis added). This is consistent with Forest Service policy to conduct VER Determinations for *new* proposals to authorize new mineral exploration or mining in withdrawn areas, *see* Linden Decl. ¶ 7; AR 7310, 7298 (FSM 2818.3, 2817.23, ¶ 6), as well as BLM guidance. 43 C.F.R. § 3809.100; AR 11602 (BLM Handbook H3809-1, § 8.1.5). The Withdrawal was subject to valid existing rights and the Withdrawal EIS expressly contemplated that mining would occur at the already-approved Canyon Mine. AR 10313-15, 8657; Order Den. Prelim. Inj. at 3 (ECF No. 86).

No law or policy requires a VER Determination for already-approved mines with effective Plans. Nonetheless, the Forest Service retains the discretion to conduct a VER Determination at any time. Linden Decl. ¶¶ 4, 6; AR 7284, 7310 (FSM 2814.11, 2819). Although BLM did not prepare a VER Determination for the Arizona I Mine after the Withdrawal, the Forest Service took a conservative approach for Canyon Mine and did prepare a VER Determination. The Forest Service's VER Determination, however, did not make any decision or authorize any activities. Thus, the VER Determination, which

was not required and did not authorize any activities, is not a major federal action that triggers NEPA.

Plaintiffs' reliance on *Ramsey v. Kantor*, 96 F.3d 434 (9th Cir. 1996), is unavailing. *See* Pls.' Br. at 16. The *Ramsey* court found that an Incidental Take Statement under the Endangered Species Act was the "functional equivalent" of a permit for which NEPA analysis was required. 96 F.3d at 444. The court held that "if a federal permit is a prerequisite for a project with adverse impact on the environment, issuance of that permit does constitute major federal action." *Id.* But here, the VER Determination was not a prerequisite to resuming activities at Canyon Mine. Mining activities could continue with or without a VER, under the existing Plan of Operations. The Forest Service voluntarily prepared the VER Determination to inform itself of factual circumstances, not to permit or authorize any activity. Thus, *Ramsey* does not apply.

Plaintiffs also cite *Clouser v. Espy*, 42 F.3d 1522, 1524-25 (9th Cir. 1994), to argue that the VER Determination was a prerequisite to allowing operations at Canyon Mine to resume after the Withdrawal. Pls.' Br. at 17. But the unpatented mining claims in *Clouser* were not the subject of plans of operations approved before the relevant withdrawals. 42 F.3d at 1525. Additional Forest Service authorizations were needed in order to gain motorized access to the claims in *Clouser*. *Id.* Thus, *Clouser* does not stand for the proposition that a VER Determination is required in a withdrawn area for previously-approved claims.

While Plaintiffs cherry-pick from the administrative record various documents that they believe show the Forest Service admitted that the VER Determination was required, Pls.' Br. at 17-18, none of these cites squarely concedes that a VER Determination was specifically required by law for Canyon Mine operations to resume. Some of these cites address withdrawals generally and principles applicable to plans or projects not yet approved at the time of the Withdrawal. *See, e.g.*, AR 10486-87, 10489, 10594, 10638, 12429. Other cites merely address the mine operator's intent regarding the timing of

when operations would resume. *See, e.g.*, AR 8611, 10348. And still other cites reflect some degree of layman's confusion about the applicable legal requirements as the process of resuming mining operations unfolded. *See, e.g.*, AR 10277, 10335, 10342, 10345. But not one of these cites demonstrates a VER Determination was required for Canyon Mine. As this Court recognized, "there is a difference between valid existing rights and a valid existing rights determination, and neither the statute nor the Withdrawal requires a determination." Order on Mot. to Dismiss at 10 n.4.

Contrary to Plaintiffs' assertions, Pls.' Br. at 19-20, no document formally confirming the existence of valid existing rights was required for the mines located within the withdrawn area that already had an approved Plan. The BLM and the Forest Service do not necessarily conduct a VER Determination prior to approving plans of operations. *See, e.g.*, *In re W. Shoshone Def. Project*, 160 IBLA 32, 56-57, 2003 WL 22424947, at *19 (Aug. 21, 2003) (BLM generally does not determine the validity of the affected mining claims before approving a plan of operations); *In re Ctr. for Biological Diversity*, 162 IBLA 268, 281, 2004 WL 2968215, at *11 (Aug. 16, 2004) (until a claim contest "renders a final determination of invalidity, it is well established that the claimant will be permitted to engage in mining and processing operations"); Linden Decl. ¶ 7. Although no formal mineral report of valid existing rights was prepared at the time of the 1986 ROD, the EIS and ensuing administrative appeal decision found that relevant information had been reviewed and there was no reason to initiate a validity contest. *See, e.g.*, 1988 AR 704, 3942, 5239-40. Plaintiffs contend that this approach "conflates two different regulatory regimes" with regard to validity determinations and approvals of Plans, Pls.' Br. at 22, but they are mistaken. The approval of the Plan comports with the Forest Service's mining regulations at 36 C.F.R. Part 228. Consistent with the Mining Law and FLPMA, the Forest Service conducts VER Determinations when they are required, or when it determines in its discretion to prepare one. *See* Linden Decl. ¶ 4; AR 7284, 7310-13 (FSM 2814.11, 2819). Nothing in the Forest Service's (or BLM's)

regulations prevent previously-approved mining from occurring absent a VER Determination. The Arizona 1 Mine is a prime example of a valid resumption of mining activities under an existing Plan after the Withdrawal, even though no VER Determination was prepared. For these reasons, the VER Determination was not a major federal action because it authorized no activities.

B. The Agency Lacked Discretion Over the VER Determination's Outcome

The VER Determination also does not constitute major federal action because the Agency did not have meaningful discretion over its outcome. "NEPA's EIS requirements apply only to discretionary federal decisions." *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 780 (9th Cir. 2006), *aff'd in part, rev'd in part*, 615 F.3d 1069 (9th Cir. 2010) (citation omitted). Plaintiffs' assertions to the contrary fall flat. Pls.' Br. at 23-25.

Once the Forest Service initiated the VER Determination, the outcome of the VER Determination was governed strictly by the facts pertaining to the mining claim. The Forest Service was not at liberty to make a choice among alternatives, nor to consider environmental impacts, when reaching its conclusion in the VER Determination as to the existence of a valid mining claim. In that sense, the VER Determination was nondiscretionary and therefore did not trigger NEPA. *See, e.g., Sierra Club v. Babbitt*, 65 F.3d 1502, 1512 (9th Cir. 1995) (collecting cases showing that nondiscretionary agency action is excused from NEPA); *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1262-1263 (10th Cir. 2001) ("NEPA compliance is unnecessary where the agency action at issue involves little or no discretion on the part of the agency"); *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1245 (D.C. Cir. 1980); *S. Dakota v. Andrus* 614 F.2d 1190, 1193 (8th Cir. 1980); *see also CBD*, 706 F.3d. at 1096 (NEPA not required for BLM ministerial actions associated with updating reclamation bond).

In *Wilderness Society v. Robertson*, the court rejected the plaintiffs' claim that an EA or EIS had to be prepared for a VER determination. 824 F. Supp. 947, 953 (D. Mont. 1993). The court held that "[t]he Forest Service's decision-making process in

determining the validity of a mining claim under [Section] 1133(d)(3) of the Wilderness Act is not a discretionary matter of granting or denying a privilege, but rather is a non-discretionary act of determining whether rights conferred by Congress have come into existence." *Id.* The court explained that an EIS is not required for nondiscretionary agency action for which "no viable options or alternatives exist." *Id.* The same conclusion should be reached in this case. Indeed, Plaintiffs conceded at oral argument on the motion to dismiss when referencing *Wilderness Society* that "the VER Determination was not a discretionary act." Tr. of Aug. 1, 2014 Hearing at 53 (Ex. 1 hereto). Plaintiffs further stated that the VER Determination "is supposed to be an objective inquiry as to whether the mining operation, given market conditions and so forth, is economical." *Id.* at 53-54.

Plaintiffs incorrectly argue that an agency can reach alternative outcomes when preparing a VER Determination. Pls.' Br. at 23-25. However, VER Determinations contain objective analyses and recommendations as to whether a property right exists as of a date certain. The cost factors that are examined do not provide unbounded discretion to consider environmental impacts. *See* Linden Decl. ¶ 12; AR 6767 (BLM Handbook H3890-3). The costs analysis that the Forest Service properly conducted, as discussed below, *see* Linden Decl. ¶¶ 12-14; AR 10500-02 (confidential), did not constitute a "meaningful opportunity" to consider environmental impacts and choose among alternatives. *Marsh*, 490 U.S. at 372, 374. Rather, the VER Determination is akin to the "crunching [of] some numbers" that the Ninth Circuit in *CBD* found to be exempt from NEPA. 706 F.3d at 1096. Because the outcome of the VER Determination was not discretionary, it did not require an EIS.

C. The 1986 EIS Already Analyzed Canyon Mine's Environmental Effects

Plaintiffs' argument that an EIS was required because significant environmental effects would result from operations at Canyon Mine, Pls.' Br. at 25-28, also fails since the requisite analysis has already been done. The 1986 EIS that the Forest Service

prepared for the Canyon Mine sufficiently analyzed potential environmental effects in compliance with NEPA, as the Ninth Circuit held. *Havasupai Tribe*, 943 F.2d at 32. A further analysis of Canyon Mine's effects would therefore be redundant.

Plaintiffs argue that an EIS is required in order to analyze the impacts on "unique characteristics" of the area near the Grand Canyon National Park, groundwater issues, public health and safety, and Red Butte TCP. Pls.' Br. at 25-28. But the 1986 EIS adequately analyzed relevant impacts, and there is no new agency action triggering the need for any further review. *Cold Mountain*, 375 F.3d at 894. For instance, the EIS discussed visual impacts and air quality at the Grand Canyon. 1988 AR 488-89 495-96, 541-42, 548, 627-633, 635. Plaintiffs' allegations regarding groundwater were thoroughly analyzed in the 1986 EIS, which explained that no operations at the depth of the aquifer were proposed, no dewatering of the aquifer was proposed or permitted, and thus no effect on the springs fed by that aquifer was expected. 1988 AR 586 ("[I]t is unlikely that any significant groundwater resources or aquifers will be encountered by mine construction and operation."), 647 (stating that the Redwall-Muav aquifer is well below the shaft depth for Canyon Mine), 773. While Plaintiffs reference a U.S. Geological Survey report regarding sampling, Pls.' Br. at 26, the EIS already recognized that sampling shows that the Project area itself has high background levels of metals and uranium. *See, e.g.*, 1988 AR 545, 575-77, 586-607, 647. The conclusions of the 1986 EIS regarding groundwater were actually litigated and resolved in favor of the Forest Service in *Havasupai Tribe*, 943 F.2d at 34; *Havasupai Tribe*, 752 F. Supp. at 1500-03. Collateral estoppel bars re-litigation of these groundwater issues. *See Montana v. United States*, 440 U.S. 147, 153 (1979); *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1000 (9th Cir. 1980). The 2012 Mine Review considered the EIS's analysis of the original Plan and found no reason to reevaluate the groundwater conditions. AR 10624. Moreover, the Withdrawal EIS found that Canyon Mine would not impact the water quantity or quality of springs fed by perched aquifers, and would have negligible to

immeasurable impacts on only one spring. AR 9518-22. This Court upheld the Withdrawal EIS's analysis of effects on water resources. *Yount v. Salazar*, No. CV11-8171 PCT-DGC, 2014 WL 4904423, at *17 (D. Ariz. Sept. 30, 2014).[9]

As for effects on cultural resources, the 1986 EIS and ROD discussed potential effects on tribal religious concerns in the area, and minimization of those impacts such as through haul route options. 1988 AR 518, 608, 923. The Chief of the Forest Service's administrative appeal decision considered additional information that was subsequently made known to the Forest Service. 1988 AR 5231-40, 5242-44. The geographic area affected by Canyon Mine and its geographic relationship to Red Butte has not changed since 1986, even if Red Butte later became eligible for consideration as a TCP. Thus, much of the specific information related to religious concerns was already considered earlier and concerns about effects on area tribes' religious practices and cultural resources were appropriately addressed previously. AR 10617. Thus, Canyon Mine's effects on Red Butte TCP do not require the preparation of an EIS for the VER Determination.

Accordingly, there is no reason for the Court to revisit the conclusion that the EIS satisfied NEPA, and the Court should grant judgment in favor of Federal Defendants.

III. The Forest Service Was Not Required to Consult Under Section 106 of the NHPA for the VER Determination (Claim 2)

Plaintiffs argue that the Forest Service violated the NHPA in connection with its VER Determination because it failed to initiate and complete a Section 106 Process. Pls.' Br. at 28-34. Plaintiffs bring this claim solely as a failure to act claim under Section 706(1) of the APA. Tr. of August 1, 2014 Hearing at 29-30. A Section 706(1) claim, "can proceed only [if] plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *SUWA*, 542 U.S. at 64. A plaintiff must make a showing of "agency recalcitrance . . . in the face of a clear statutory duty or . . . of such

[9] Plaintiffs' references to other portions of *Yount*, Pls.' Br. at 26-27, concern uranium mining generally, but ignore the particular facts of Canyon Mine, which were analyzed in the 1986 EIS and will not affect the Redwall-Muav-aquifer, as discussed above.

magnitude that it amounts to an abdication of statutory responsibility." *N. County Cmty. Alliance, Inc. v. Salazar*, 573 F.3d 738, 744 (9th Cir. 2009) (internal quotation marks and citation omitted). Plaintiffs cannot make the requisite showing here.

Contrary to Plaintiffs assertions, Pls.' Br. at 28-29, 32-33, the VER Determination does not constitute a federal undertaking that triggers NHPA consultation because it is not a "Federal permit, license or approval." 16 U.S.C. § 470f; 36 C.F.R § 800.16. Whether an undertaking exists under the NHPA is analogous to the question of whether a major federal action exists under NEPA. *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 197 n.7 (D.C. Cir. 2003); *Karst Envtl. Educ. & Prot., Inc. v. EPA*, 403 F. Supp. 2d 74, 79 (D.D.C. 2005), *aff'd*, 475 F.3d 1291 (D.C. Cir. 2007); *Okinawa Dugong*, 2005 WL 522106, at *12 (N.D. Cal. March 2, 2005) ("The standards for identifying 'undertakings' under the NHPA have been widely held to be 'similar' to those for identifying 'major federal actions' under [NEPA]."). For the same reasons the VER Determination is not a major federal action under NEPA, as discussed above, it is also not an undertaking under the NHPA. The VER Determination did not authorize any activities. Instead, the only authorization in this case was the 1986 ROD which approved the Plan. Legal consequences flowed from the Forest Service's 1986 ROD, but not from the VER Determination. Because mining operations could have resumed without the VER Determination, the VER Determination was not a "permit, license or approval" under the NHPA. The VER Determination therefore is not a NHPA undertaking.

Additionally, because a VER Determination merely sets forth an expert's position on the ownership of minerals located at the site and has no direct effect on the historic property, it is not an NHPA undertaking. *See Yerger v. Robertson*, 981 F.2d 460, 465 (9th Cir. 1992) (Forest Service's assertion of ownership of historic structure is not an undertaking because mere existence of ownership rights does not affect the historic property even when the assumption of control is clearly preparatory to action that will affect the site). Indeed, mineral patenting (for which a VER determination is only one

step) has been exempted from any Section 106 requirements under the Regional Programmatic Agreement with the Arizona SHPO and the ACHP. AR 6834.

Plaintiffs' reliance on *Pit River Tribe*, 469 F.3d at 775-77, 787, is misplaced. Pls.' Br. at 29, 33. *Pit River Tribe* dealt with lease extensions that had to be extended affirmatively by the agency in order for activities to continue. In contrast, the VER Determination was not required before resumption of mining activities at Canyon Mine. As a result, the issuance of the VER Determination did not alter the status quo. Therefore, the VER Determination for Canyon Mine presents a factual scenario that is different from *Pit River Tribe* but on all fours with the transfer of title by the agency in *National Wildlife Federation v. Espy*, 45 F.3d 1337, 1343-44 (9th Cir. 1995). The wetlands at issue in *National Wildlife Federation* were used for grazing before the agency acquired the property, and were used for that purpose after the agency transferred title. *Id.* at 1343. The Ninth Circuit agreed that such a transfer of title did not alter the status quo and was therefore not subject to NEPA. *Id.* Following *National Wildlife Federation*, because the VER Determination did not alter the status quo, no NEPA was required. Because NEPA was not required, NHPA consultation was also not required.

Finally, the cases Plaintiffs cite to argue that there is ongoing federal action subject to the NHPA are inapposite. Pls. Pls.' Br. at 30 n.17, 33 (citing *Vieux Carre Prop. Owners v. Brown*, 948 F.2d 1436, 1445 (5th Cir. 1991); *Morris County Trust for Historic Pres. v. Pierce*, 714 F.2d 271, 280 (3d Cir. 1983); *WATCH v Harris*, 603 F.2d 310, 326 (2d Cir. 1979)). These out-of-circuit cases all involved situations that required further federal action to fund or approve activities, which is not comparable to the Forest Service's one-time approval of a Plan that a private party would implement without requiring further federal involvement.[10]

[10] Plaintiffs argue confusingly that a legally binding and enforceable Memorandum of Agreement ("MOA") could have been prepared, Pls.' Br. at 31-32, but this assertion misses the mark. That a MOA could have been prepared does not mean that Section 106 consultation on the VER Determination was required by law. The relevant inquiry is

For these reasons, Plaintiffs' NHPA claim regarding failure to conduct Section 106 consultation is without merit.

IV. The Forest Service Properly Followed the Procedures at 36 C.F.R. § 800.13(b)(3) for Tribal Consultation (Claim 3)

Plaintiffs contend that the Forest Service should have followed 36 C.F.R. § 800.13(b)(1) when engaging in formal consultation with the Havasupai Tribe regarding the Red Butte TCP. Pls.' Br. at 34-39. This claim lacks merit because construction had already begun so that Section 800.13(b)(1) is inapplicable. The Agency instead applied Section 800.13(b)(3), with enhancements beyond the requirements of the regulation.

After approval of an undertaking, further Section 106 compliance may be required in only limited circumstances. NHPA regulations allow for reasonable considerations of potential effects to historic properties if they were not anticipated or if new historic properties are "discovered" after the Section 106 process concluded, but the undertaking has not been completed and there is still an opportunity to avoid, minimize, or mitigate effects from the undertaking. 36 C.F.R. § 800.13. Section 800.13(b)(3) provides that if

> the agency official has approved the undertaking and construction has commenced, determine actions that the agency official can take to resolve adverse effects, and notify the SHPO/THPO, any Indian tribe . . . that might attach religious and cultural significance to the affected property, and the Council within 48 hours of the discovery.

Id. Section 800.13(b)(3) also provides a 48-hour timeline for consulting parties to respond with any concerns.

Because the mine operator did not propose any new activities that would require a modified or new Plan, there was no new federal undertaking subject to the NHPA after the agency issued the 1986 ROD. Given that the undertaking had been approved and construction had begun, the Forest Service properly applied 36 C.F.R. § 800.13(b)(3), rather than subsection (b)(1). In fact, the Forest Service went above and beyond the requirements of subsection (b)(3) by providing Plaintiffs up to 30 days for comments and

---

whether the VER Determination constituted an undertaking. It did not.

not merely 48 hours. AR 10545; Hangan Decl. ¶ 2 (ECF No. 53-4). The Agency then sought to establish agreed-upon mitigation measures to address effects to Red Butte TCP. Hangan Decl. ¶ 9. This shows the Forest Service recognized that even though subsection (b)(3) was properly used, the particular circumstances of Canyon Mine could allow time for additional process because review did not have to be as expedited as in other situations where subsection (b)(3) is used. This approach was not arbitrary or capricious, and furthered the goals of the regulation.

This Court previously found that Plaintiffs were not likely to succeed on the merits of this claim. Order Den. Prelim. Inj. at 14-17 (ECF No. 86). In so holding, the Court looked at the plain language of 36 C.F.R. § 800.13(b)(1), the provision that Plaintiffs argue should have applied, which mentions neither the recommencement of construction nor ongoing construction activities. The Court stated, "Section 800.13(b)(3) plainly applies where 'construction has commenced' and (b)(1) where 'construction . . . has not commenced.'" Order Den. Prelim. Inj. at 16 (ECF No. 86). Given the plain language of Section 800.13(b)(3), the Court found that deference under *Auer v. Robbins*, 519 U.S. 452, 461 (1997), to the ACHP's opinion interpreting the regulations differently did not apply. The Court held that the Forest Service had used the proper regulation.

At this time, Plaintiffs have not provided further evidence to cause the Court to reach a different determination on the merits regarding this issue.[11] Pls.' Br. at 35-36. As established in Federal Defendants' preliminary injunction brief at 21 (ECF No. 53), *Auer* deference is inappropriate "when the agency's interpretation is 'plainly erroneous or inconsistent with the regulation,'" or "when there is reason to suspect that the agency's

[11] Plaintiffs assert that at the time of the preliminary injunction decision the Court did not have before it the "history of the development of the regulations," Pls.' Br. at 36 n.24, but the cited Federal Register notices were publicly available when issued in 1986 and 1999. In any event, none of the notices changes the conclusion that Section 800.13(b)(3) applies when construction has commenced, as was the case with Canyon Mine because surface structures had been built and the mine shaft had been drilled to 50 feet before the hiatus.

interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (internal quotation marks and citations omitted)). The plain language of the regulations has not changed, and remains clear that "after the agency official has approved the undertaking and construction has commenced," Section 800.13(b)(3) applies.

Accordingly, the Forest Service's application of Section 800.13(b)(3) was proper and should be upheld.[12]

V. The Forest Service's Certified Mineral Examiner Properly Evaluated Relevant Costs in the VER Determination (Claim 4)

The Forest Service's certified mineral examiners prepared a VER Determination for Canyon Mine that considered a variety of capital and operating costs in its economic analysis. AR 10499-506 (confidential). Plaintiffs argue that the VER Determination is arbitrary and capricious because it did not consider additional costs of compliance with environmental and cultural laws. Pls.' Br. at 11-15. This argument lacks merit.

A. Plaintiffs Cannot Bring a Stand-Alone APA Claim So the Claim Should Be Dismissed

As a threshold matter, Plaintiffs appear to bring Claim 4 as a stand-alone APA claim because they do not explain how the costs analysis in the VER Determination violated any statutory or regulatory provision. Pls.' Br. at 11-15. To the extent Plaintiffs assert a violation of the APA that is not tethered to any substantive statute, they fail to state a claim upon which relief can be granted. It is well-settled that a plaintiff cannot bring a "stand-alone" allegation that an agency decision is "arbitrary and capricious" and

[12] In the event the Court looks to the ACHP's August 1, 2012 letter, AR 11335, in which the ACHP stated that it believed the Forest Service should proceed under 36 C.F.R. § 800.13(b)(1), this letter should not be viewed as the ACHP's final word regarding the NHPA regulations. In subsequent communications with the ACHP, it became evident that this letter was based on a misunderstanding about the status of the construction at Canyon Mine before standby status. Hangan Decl. ¶¶ 4-5. In an April 3, 2013 conference call, after the misinformation was clarified, the ACHP stated that its letter set forth a policy position, not a legal position. *Id.* ¶ 8.

therefore violates the APA. Rather than imposing substantive requirements, the APA provides the framework for review of allegations that an agency has violated some other underlying substantive statutory requirement. *See Or. Natural Res. Council v. Thomas*, 92 F.3d 792, 798 (9th Cir. 1996) (court must have "law to apply" under the APA); *El Rescate Legal Servs. v. Exec. Office of Immigration Review*, 959 F.2d 742, 753 (9th Cir. 1991) ("There is no right to sue for a violation of the APA in the absence of a 'relevant statute' whose violation 'forms the legal basis for [the] complaint.'") (citation omitted); *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 132 F. Supp. 2d 876, 889 (D. Or. 2001); *Rocky Mountain Oil & Gas Ass'n v. U.S. Forest Serv.*, 157 F. Supp. 2d 1142, 1145 (D. Mont. 2000), *aff'd* 12 F. App'x 498 (9th Cir. 2001).

Plaintiffs reference *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983), in bringing their stand-alone APA claim regarding timber market demand. Pls.' Br. at 6-7, 12-13, 14-15. But nothing in *State Farm* suggests that such a review can take place in the absence of a substantive statute. *See State Farm*, 463 U.S. at 33 (discussing statutory language of the National Traffic and Motor Vehicle Safety Act of 1966 in holding that the agency action was arbitrary and capricious). Thus, Claim 4 is not justiciable.

B. The VER Determination Does Not Affect Continued Operations

Plaintiffs' argument is further misplaced because the VER Determination is not a final agency action subject to judicial review, as discussed above, and because the quality of the VER Determination is irrelevant to the continued operation of Canyon Mine. As previously stated, the Forest Service would not undertake further analysis of this expert opinion if it were deemed deficient, but would plan to retract the document. With or without the VER Determination, Canyon Mine could continue to operate under the approved Plan. Plaintiffs therefore face a redressability issue because their alleged harms stem from continued mine operations, not the completion of the VER Determination.

C. The VER Determination Did Not Need to Consider Speculative Costs

Even if the Court entertains the merits of Plaintiffs' argument, their claim that the Agency was obligated to consider particular costs of compliance with environmental and cultural laws fails. First, as discussed above, the VER Determination was not required by law before mining activities resumed. Thus, Plaintiffs cannot establish a violation of law.

Second, to the extent the Court examines the sufficiency of the VER Determination, the document met the necessary standards. A determination of validity requires an analysis of whether a discovered mineral deposit is "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.'" *Coleman*, 390 U.S. at 602 (1968) (quoting *Castle v. Womble*, 19 Pub. Lands. Dec. 455, 457 (1984)). In conducting the economic analysis of the Canyon Mine claims, Forest Service certified mineral examiners used standard procedures that are applied to all mineral validity examinations. AR 7436-40 (BLM Handbook H-3890-1).

Plaintiffs argue that costs of radionuclide and water monitoring and mitigation, compliance with the NHPA, and the implementation of wildlife conservation measures were not fully considered. Pls.' Br. at 12-15, 32-33. But the VER Determination's economic analysis of capital costs included a sum of $450,000 for reclamation costs, as well as a sum of $1.7 million to cover unspecified contingencies. AR 10501 (confidential). These sums will cover many possible costs related to compliance with environmental and cultural laws, as discussed further in Intervenors' brief. Other costs not encompassed by these sums are too speculative and unproven to include in a "prudent man" analysis. For instance, no evidence suggests that Canyon Mine will affect the deep aquifer or cause contamination to groundwater. 1988 AR 545, 587, 647, 773; AR 3809-10, 8341, 8355-92. In short, the costs Plaintiffs identify are hypothetical and irrelevant, and they can point to no authority to show that such costs must be included in a "prudent man" analysis.

Accordingly, the Court should find for Federal Defendants on this claim.

VI. Plaintiffs Are Not Entitled to the Requested Remedy and Any Remedy Should be Narrowly Tailored

As explained above, Plaintiffs are not entitled to relief on their claims. Plaintiffs assume that should they prevail, the Court should "set aside" or vacate the VER Determination, the Court should order the Agency to comply with NEPA and consult under Section 106 of the NHPA, and that the Court should enjoin all activities at Canyon Mine. Pls.' Br. at 40. But even if Plaintiffs were to prevail in whole or in part on any of their claims, they have not demonstrated entitlement to the remedies they demand.

The Court's formulation of a remedy under the APA is controlled by principles of equity. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157–58 (2010); *Nat'l Wildlife Fed'n*, 45 F.3d at 1343. Whether an agency decision should be vacated depends upon whether the deficiencies identified by the court may be corrected while the challenged decision is left in place and, conversely, whether vacating the decision pending further analysis would be unduly disruptive. *See Cal. Communities Against Toxics v. E.P.A.*, 688 F.3d 989, 992 (9th Cir. 2012) (per curiam); *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 755–56 (D.C. Cir. 2002); *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993). The Court is not required to vacate the decision even if it finds a violation of law. *Conner v. Burford*, 848 F.2d 1441, 1460–62 (9th Cir. 1988); *Native Vill. of Point Hope v. Salazar*, 730 F. Supp. 2d 1009, 1019 (D. Alaska 2010); *see also Pit River Tribe*, 615 F.3d at 1080–82. Nor have Plaintiffs demonstrated entitlement to extraordinary, injunctive relief. In considering whether an injunction is appropriate, a court will weigh the traditional four equitable factors: (1) irreparable injury to the Plaintiffs; (2) inadequate remedy at law; (3) the balance of the hardships; and (4) the public interest. *Monsanto*, 561 U.S. at 156–57. Plaintiffs have made no effort to make the requisite showing.[13]

[13] Federal Defendants recognize that at this point it may be premature to undertake that analysis, both because Plaintiffs have yet to prevail on any aspect of any of their claims

CONCLUSION

For the foregoing reasons, the Court should grant Federal Defendants' Cross-Motion for Summary Judgment and deny Plaintiffs' Motion for Summary Judgment.

Respectfully submitted this 19th day of November, 2014.

SAM HIRSCH
Acting Assistant Attorney General
/s/ Beverly F. Li
BEVERLY F. LI
Trial Attorney, Natural Resources Section
Environment & Natural Resources Division
U.S. Department of Justice
Beverly.Li@usdoj.gov
Tel: 202-353-9213

Of Counsel:
Steve Hattenbach
U.S. Department of Agriculture
Office of General Counsel
P.O. Box 586
Albuquerque, NM 87103
Tel: 505-248-6020

Attorney for Federal Defendants

---

and because the parties have not had the opportunity to fully brief the relevant equities. Accordingly, we respectfully request that, should the Court rule in Plaintiffs' favor to the degree that a remedy must be fashioned, the Court allow supplemental remedy briefing.

LIST OF EXHIBITS

1.	Transcript of Aug. 1, 2014 Hearing on Federal Defendants' Motion to Dismiss

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2014, a copy of the foregoing was served by electronic means on the following:

Marc D. Fink
Center for Biological Diversity
209 E 7th St
Duluth, MN 55805
218-525-3884
Fax: 218-525-3857
Email: mfink@biologicaldiversity.org

Neil Levine
Grand Canyon Trust
4438 Tennyson St.
Denver, CO 80212
303-455-0604
Email: nlevine@grandcanyontrust.org

Richard Warren Hughes
Rothstein Donatelli Hughes Dahlstrom Schoenburg
& Bienvenu LLP
1215 Paseo De Peralta
Santa Fe, NM 87504
505-988-8004
Fax: 505-982-0307
Email: rwhughes@rothsteinlaw.com

Roger Flynn
Western Mining Action Project
P.O. Box 349
Lyons, CO 80540
303-823-5738
Fax: 303-823-5732
Email: wmap@igc.org

Attorneys for Plaintiffs

David J. DePippo (Ariz. Bar 028428)
HUNTON & WILLIAMS, LLP
Riverfront Plaza, East Tower
951 East Byrd Street

Richmond, Virginia 23219
Telephone: (804) 788-7304
Facsimile: (804) 778-8218
ddepippo@hunton.com

Bradley Joseph Glass
Michael K Kennedy
Gallagher & Kennedy PA
2575 E Camelback Rd., Ste. 1100
Phoenix, AZ 85016-9225
602-530-8000
Fax: 602-530-8500
Email: brad.glass@gknet.com
Email: mkk@gknet.com

Attorneys for Defendant-Intervenors

/s/ Beverly F. Li
Beverly F. Li
Counsel for Federal Defendants