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IN THE 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,

Energy Fuels Resources (USA) Inc., *et al*.,

Defendant-Intervenors.

No. 3:13-cv-08045 PCT-DGC

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT-INTERVENORS' MOTION FOR SUMMARY JUDGMENT

(Assigned to The Honorable David G. Campbell)

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Defendant-Intervenors Energy Fuels Resources (USA) Inc. and EFR Arizona Strip LLC (together, "EFR") hereby file their Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment ("Pl. Br.") (Doc. 140-1) and in Support of their Motion for Summary Judgment. Per this Court's Order, EFR coordinated its briefing with the Federal Defendants (herein after, "USFS"),[1] and thus, this brief incorporates the facts, statements, standards, and arguments made therein.

I. Plaintiffs Have Not Established Standing for Claims 1, 2, and 4.

Plaintiffs must establish standing for each claim they pursue. If they do not, the Court has no jurisdiction to resolve the claim. *Summers v. Earth Island Inst.*, 555 U.S. 488, 492-93 (2009). To show standing, a plaintiff must present evidence that it has an injury in fact that is fairly traceable to the challenged action, and that likely can be redressed by a favorable decision. *Id.*; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (standing must be supported by evidence consistent with the burden of proof at that stage of the case). "Standing is not dispensed in gross;" Plaintiffs must establish standing for each claim. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008).

Claims 1, 2, and 4, concern USFS's valid existing rights ("VER") determination. Am. Compl. ¶¶ 70-83, 89-92 (Doc. 115). Plaintiffs offer five declarations to establish standing. Pl. Br. at 7. The declarants do not mention the VER determination, or anything like that process. Instead, they focus on requiring USFS to force EFR to modify its current Plan of Operations ("Plan") for the Canyon Mine ("Mine"), or require a new plan, and the NEPA and NHPA issues related thereto. Decl. of Don Watahomigie ¶ 4 (Doc. 37-7); Decl. of Robin D. Silver ¶ 10 (Doc. 37-7); Decl. of Kim Crumbo ¶ 11 (Doc. 37-8).[2]

These declarations might support standing for claims regarding a failure to require a modification of the Plan or failure to supplement the Plan's EIS. Such claims were filed in the Complaint (Doc. 1 ¶¶ 70-79, 99-103, & 109-113), but were dropped in the Amended Complaint. (Doc. 115). Plaintiffs have not provided any evidence of injuries in

[1] Transcript of Motion to Dismiss Hearing at 65-69 (Aug. 1, 2014) ("Tr.") (Doc. 146-2).

[2] Mr. Tilousi's declaration makes no mention of the VER determination, the Plan, NEPA, or the NHPA. Mr. Clark's declaration seeks to force USFS to comply with NEPA and the NHPA, but does not identify any challenged action. (Docs. 37-7, -8).

fact (including procedural injuries) that are fairly traceable to the challenged action – the VER determination. *Summers*, 555 U.S. at 496 (procedural injuries must be linked to a concrete interest harmed by the challenged action). It is not enough that they may have evidence to establish standing for abandoned claims. *See Davis* and *Lujan*, *supra*.[3]

Plaintiffs also have not shown redressablity. As this Court found, the VER determination (1) "does not create mineral rights, but merely confirms they already exist," and (2) is not required by FLPMA or the Withdrawal. Motion to Dismiss ("MTD") Order at 9-10 (Doc. 131); Preliminary Injunction ("PI") Order at 12 (Doc. 86). In short, there are no legal consequences that flow from the VER determination. MTD Order at 10. Because of this, and because EFR's authority to conduct mining activities stems from the Plan—not the VER determination—even if the Court were to invalidate the VER determination, it would not stop mining activities. Thus, any injuries alleged to stem from mining operations will not be redressed. Further, in its brief, USFS stated that if the VER determination were invalidated, it would or retract it, and does not plan to reissue another VER determination for the claims at the Mine. USFS Brief at 12 n.7, 27 (Doc. 146-1).[4] Thus, any alleged procedural injuries stemming from the VER determination would not be redressed (even assuming a relaxed redressability standard).[5] *Summers*, *supra*.

II. Claims 2 and 3 are Barred by the Doctrine of Collateral Estoppel.

Collateral estoppel bars re-litigation of an issue of law or fact that was litigated in a prior suit between the parties, when the issue was necessarily decided as part of the judgment. *Hydranautics v. FilmTec Corp*., 204 F.3d 880, 885-87 (9th Cir. 2000). The sole basis for Plaintiffs' NHPA claims is that USFS has not consulted with the Havasupai regarding Red Butte and surrounding areas or considered the impacts thereon when

[3] For Claim 2, Messrs. Watahomigie and Tilousi are the only declarants identified with the Havasupai Tribe, and thus, the only declarants that could state an injury in fact with respect to a failure to consult with the Tribe. As noted, they have failed to do so.

[4] This decision is within the enforcement discretion under the Mining Law. *Cameron v. United States*, 252 U.S. 450, 459-60 (1920); *Swanson*, *v. Babbitt*, 3 F.3d 1348, 1354 (9th Cir. 1993); USFS, FOREST SERVICE MANUAL ("FSM") § 2814.11 (ARDoc. 371:7284).

[5] These conclusions are not at odds with the Court's conclusions regarding harm in the PI Order, as Plaintiffs suggest. Pl. Br. at 7. There, the Court was not considering the requirements of standing in the summary judgment context (*Lujan, supra*), or the role of the VER determination on continued mining and future USFS enforcement decisions.

approving the Plan. Pl. Br. at 25-40. That is not true. As reflected in *Havasupai Tribe v. United States*, USFS undertook a comprehensive environmental and cultural review of the Plan. This included consultation with the Havasupai and consideration of their religious and cultural concerns related to Red Butte and the surrounding areas. 752 F. Supp. 1471, 1486-88, 1495-1500 (D. Ariz. 1990). This is confirmed by the record, and Mr. Tilousi. Record of Decision at 4, 8-12 (ARDoc. 6:919, 923-28) (USFS considered the Havasupai's concerns at Red Butte and the surrounding areas, and modified the Plan to mitigate impacts therefrom); Tilousi Decl. ¶ 3 (Doc. 37-7). These facts and actions were litigated and decided in *Havasupai*, and upheld on appeal, 943 F.2d 32 (9th Cir. 1991). They are barred from relitigation in Plaintiffs' NHPA claims. *Hydranautics*, *supra.*[6]

III. The VER Determination Does Not Trigger Compliance with NEPA or the NHPA (Claims 1 and 2).

Plaintiffs argue that NEPA and NHPA were triggered because the VER determination acted as a required approval or license for EFR to resume mining at the Mine. Pl. Br. at 15-22, 28-31. That argument stems from the assertion that the Withdrawal automatically prohibited all mining within the withdrawn area, invalidated EFR's mining claims, and required USFS to perform a VER determination before EFR could resume active mining. These positions are inconsistent with the plain language of the Withdrawal, the legal effect of withdrawals and property rights regarding existing mining claims, USFS's and BLM's interpretation of the effect of withdrawals on existing, permitted mines, and the purposes of conducting VER determinations. In short, the Withdrawal only prohibited the location and entry of new mining claims, and had no effect on EFR's existing mining claims or its ability to mine. The VER determination is an enforcement investigatory tool that has no legal effect on mining claims. This Court agreed with EFR and USFS on these points in the PI Order (at 10-12) and the MTD Order (at 9-10). Plaintiffs have not provided any reason for the Court to change its conclusions.

[6] *See also Te-Moak Tribe of W. Shoshone of Nev. v. Dep't of Interior*, 608 F.3d 592, 609-10 (9th Cir. 2010) (prior consultation satisfied current NHPA responsibility as long as tribe was given sufficient opportunity to identify its concerns). The Havasupai stated that it was given such an opportunity. Havasupai Reply to Responsive Statement at 4 (Feb. 18, 1987) (ARDoc. 50:1754).

A. The VER determination is not an approval or a license.

The Withdrawal states that subject to valid existing rights, certain public lands are "withdrawn from location and entry under the Mining Law of 1872." 77 Fed. Reg. 2563, 2563 (Jan. 18, 2012). The Withdrawal says nothing about automatically invalidating previously-located and entered mining claims, mandating VER determinations, or prohibiting mining. Instead, it is prospective, and forbids only the "location and entry"[7] of new claims under the Mining Law. It does not address any other aspects of mining, or render the withdrawal area "unavailable for mining." Pl. Br. at 16. Withdrawals have long been interpreted as such. *See, e.g.*, *In re Goergen*, 144 IBLA 293, 297 (1998); *Alaska v. Thorson*, 83 IBLA 237, 250 (1984) ("where land is withdrawn subject to valid existing rights or claims, the right or claim is not extinguished, and the withdrawal takes effect as to lands covered by such entries only upon their termination.").[8] The prospective nature of withdrawals makes sense, as FLPMA does not provide the Interior Secretary authority to promulgate retroactive rules or invalidate rights under the Mining Law. *Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204, 208 (1988). The Withdrawal is consistent with *Bowen* by including FLPMA's required language that it is subject to valid existing rights (not that it *prohibits or invalidates* valid existing rights unless USFS provides additional approvals, as Plaintiffs suggest).

BLM and USFS have interpreted the Withdrawal (and withdrawals generally) consistent with the discussion above. BLM and USFS assumed that mining at existing, permitted mines, including the Mine, would go forward despite the Withdrawal. PI Order at 3. Consistently, USFS and BLM never interpreted withdrawals as automatically invalidating claims, prohibiting previously approved mining, or requiring a VER

[7] "Location and entry" is a term of art representing the two separate requirements of establishing a valid mining claim with BLM: (1) physically locating the claim on public land by staking the corners and posting notice thereof, and (2) entering the claim by filing it with BLM. 43 C.F.R. §§ 3832.1, .11; §§ 3833.1, .11; *see* FSM § 2811.5 (ARDoc. 371:7279) (by performing the location and entry steps, the miner "obtains a valid mining claim"). Validity in this context means the establishment of a claim that triggers protected property rights recognized under the Mining Law that allow the miner to mine the claim until proven invalid by BLM in a claim contest. *See infra* discussion at 5-6 & n.9.

[8] The "subject to" in "subject to valid existing rights" means subordinate to or subservient to, contrary to Plaintiffs' assertions. *Alaska*, 83 IBLA at 243.

determination for all claims. BLM and USFS have drawn a different line. BLM regulations provide that within a withdrawn area, VER determinations are required only when a miner seeks a *new* plan of operations (or material modification of an existing plan). 43 C.F.R. § 3809.100(a). BLM's interpretation of the regulation states:

> *[A]pproved Plans of Operations* that were in place prior to the withdrawal or segregation date *are not subject to the mandatory valid existing rights determination procedures* at 43 CFR § 3809.100(a). *These operations may continue as accepted or approved and do not require a validity examination unless or until there is a material change in the activity*.[9]

BLM, Surface Management Handbook (H-3809-1), § 8.1.5 (emphasis added) (ARDoc. 591:11602); PI Order at 11 n.2 (relying on same and citing § 8.1.1.1 (ARDoc. 591:11600) for the point that claims with approved plans are exempt from § 3809.100(a)'s VER determination requirements). Thus, BLM interprets the Withdrawal as *not* impacting any rights and claims held by an existing mine with an approved plan, or compelling a VER determination in order to operate under an approved plan in a withdrawn area–as is the case at the Mine. USFS's policy tracks § 3809.100(a) and BLM's interpretation of it and states that USFS will not "allow" (*i.e*., approve a new plan of operations or material change to an existing plan) without ensuring the claims have VER. FSM § 2803.5; *see* PI Order at 11 n.2 (noting 2803.5, and USFS's policy to act consistently with BLM); Decl. of Michael Linden ¶¶ 5-11 (Doc. 53-2) (same). USFS's policy tracking BLM's is unsurprising; BLM is the agency charged with administering the Mining Law: USFS implements it by agreement with BLM. FSM § 2814.11 (ARDoc. 371;7284).

As further evidence that withdrawals do not automatically invalidate claims and mandate VER determinations, USFS policy tracks federal case law and Department of Interior decisions holding that properly-located and entered mining claims are recognized property interests that vest the holder with the full right to develop and mine the claims unless and until the claims are invalidated through notice and a contest hearing (*i.e*., Fifth Amendment due process), even in the face of a withdrawal. *Compare Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335-38 (1963); *United States v. Shumway*, 199 F.3d

[9] BLM's interpretation of the Withdrawal's preceding Segregation Order is consistent with that position. BLM, Instruction Memo. No. 2010-088 re Guidance on 43 C.F.R. § 3809.100(a) and its Application (Doc. 60-1 at 31).

1093, 1099-1100 (9th Cir. 1999); *United States v. Martinek*, 166 IBLA 347, 351-53 (2005) *In re Ctr. for Biological Diversity*, 162 IBLA 268, 281 (2004); *In re Sw. Res. Council*, 96 IBLA 105, 118 (1987) *with* FSM 2811.5 ("A mining claim may lack the elements of validity and be invalid in fact, but it must be recognized as a claim until it has been finally declared invalid by the Department of the Interior or Federal courts.") (ARDoc. 371:7280);[10] Linden Decl. ¶¶ 10-11 (Doc. 53-2); PI Order at 10 (following FSM § 2811.5). Absent from these authorities are statements that withdrawals render claims automatically invalid and mandate VER determinations.[11]

Plaintiffs' also assert that a withdrawal triggers an entirely new regulatory approval regime, Pl. Br. at 20-22, yet they cite no regulations, guidance, or legal authority for that proposition. One would assume that if withdrawals carried such immediate, severe impacts and mandates, Congress, BLM, or USFS would have promulgated rules or guidance regarding them. They have not. Instead, Plaintiffs' cited cases support EFR's and USFS's position. For example, in *U.S. v. Boucher*, IBLA merely reiterates that a withdrawal removed public land from "location and entry"– that is, permission to prospect for new claims. 147 IBLA 236, 243 (1999); *see Kosanke v. Dep't of Interior*, 144 F.3d 873, 874 (D.C. Cir. 1998) (claims located and attempted to be entered five months *after* a withdrawal were not valid). These cases say nothing about automatic invalidation of all existing claims, mandatory VER determinations, or new regulatory approval regimes.[12]

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[10] This recognition reflects a general issue of timing regarding claim validity. While no claim is fully valid unless there has been a discovery of valuable minerals, that fact rarely is known upon the location and entry of a claim. Nevertheless, consistent with the Mining Law's intent to promote mining, BLM and the courts have concluded that the proper location and entry of a claim provides miners protected property rights to use and mine the claim up and until BLM determines through a claim contest that the claim is not valid (in this sense, full validity is assumed until proven otherwise).

[11] Perhaps the point is a simple one, but if Plaintiffs were correct that a withdrawal automatically invalidated claims, there would be no need for claim contests in withdrawn areas. Yet, the IBLA reporter is replete with these cases. *See Martinek*, *supra*.

[12] Plaintiffs' citation to *Hjelvik v. Babbitt*, 198 F.2d 1072, 1074 (9th Cir. 1999) and *Lara v. Dep't of Interior*, 820 F.3d 1535, 1542 (9th Cir. 1987) for the proposition that a VER determination is required for all mines in a withdrawal area is even more off-base. The "at the time of the withdrawal" language in those cases simply refers to the fact that in order to establish VER – whenever the mineral exam is conducted – the miner must show that it made a discovery of valuable minerals prior to the withdrawal date. That is consistent with *Boucher* and *Kosanke*. *See* Mineral Exam at 5 (ARDoc. 525:10487) (the exam in this case, done in 2012, properly used the segregation date and the review date).

Notwithstanding the forgoing, BLM and USFS are tasked with enforcing the Mining Law, and retain the discretion to perform a VER determination for any claim at any time for any reason. *Cameron*, 252 U.S. at 459-60 (1920); FSM § 2814.11 (ARDoc. 371:7284). If a VER determination suggests that claims may be invalid, BLM and USFS must initiate a claim contest in order to invalidate them. *Best*, 371 U.S. at 335-37; FSM § 2819 (ARDoc. 371:7310-13). "No adjudicative power has been given to [USFS]," however. FSM § 2819. For claims on USFS-managed land, if, following a VER determination, USFS believes claims do not possess VER, it must request that BLM review and contest them. FSM §§ 2814.11, 2819.1-.2; Linden Decl. ¶ 10 (Doc. 53-2).

Under this scheme, the role of the VER determination is easily understood. It is an investigatory tool used by BLM and USFS when performing enforcement under the Mining Law. It assists them in determining whether rights created by Congress have come into existence. Depending on the outcome of the determination, they decide whether to bring a contest claim (with the VER determination used as evidence). PI Order at 11-12. Thus, VER determination "'statements about validity are statements of belief and not formal determinations.'" *Id*. at 10 (quoting FSM § 2819); *see* Linden Decl ¶ 10.

Based on the forgoing, the Court found that VER determinations do not create mineral rights, but merely confirm whether they exist, are not required by law or the Withdrawal, and have no legal effects. MTD Order at 9-10; PI Order at 12. Therefore, the VER determination is not an approval or a license, and thus, is not a NEPA major Federal action or an NHPA undertaking. 36 C.F.R. § 800.16(y); 40 C.F.R. § 1508.18.

B. The VER determination is a nondiscretionary act that does not trigger NEPA or the NHPA.

Courts have long held that VER determinations do not trigger compliance with NEPA because they are nondiscretionary, ministerial acts. *Wilderness Soc. v. Robertson*, 824 F. Supp. 947, 953 (D. Mont. 1993); *South Dakota v. Andrus*, 462 F. Supp. 905, 906-07 (D.S.D. 1978); *In re Kosanke Sand Corp.*, 12 IBLA 282, 286-99 (1973); *see Sierra Club v. Babbitt*, 65 F.3d 1502, 1512 (9th Cir. 1995) (nondiscretionary or ministerial

actions do not trigger NEPA). The same is true under the NHPA. *See Sac and Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1262-63 (10th Cir. 2001).[13]

VER determinations are nondiscretionary because when conducting a VER determination USFS is not approving or denying a privilege (such as a permit), but is verifying only "whether rights conferred by Congress [under the Mining Law] have come into existence." *Wilderness Soc.*, 824 F. Supp. at 953; PI Order at 12. To make this verification, USFS determines whether there has been a discovery of a valuable mineral deposit under the prudent person and marketability tests. *Hjelvik*, 198 F.3d at 1074; FSM § 2811.5 (ARDoc. 371: 7279). Because a miner cannot mine without an approved plan, this test necessarily and specifically considers the miner's reasonably foreseeable costs of implementing an approved mine plan, including reasonably foreseeable costs of compliance with environmental laws associated with implementing the approved plan. The test does not include an additional layer of environmental or cultural review as part of the validation process to determine whether additional changes to the approved plan should be made (or other changes or mitigation required in some other fashion) under FLPMA or other environmental laws. Doing so would be adding new requirements for the establishment of mining claims to those Congress established in the Mining Law. USFS has no authority to do that in a VER determination. *Nat'l Ass'n of Homebuilders v. EPA*, 551 U.S. 644, 668-73 (2007) ("*NAHB*") (agencies have no authority to add or subtract from Congressionally established criteria that give rights (*e.g.*, adding environmental consultation requirements); their duty is nondiscretionary and ministerial; in such circumstances, agencies have no power to act on any additional information such environmental consultation might yield in concluding whether the Congressional right is established). Without the discretion or authority to act on any additional information NEPA or NHPA may yield, or otherwise withhold a Congressionally provided right, Plaintiffs' claim of discretion in the VER process fails.

Plaintiffs also argue that USFS has discretion in gathering and evaluating costs and

[13] Contrary to their summary judgment brief, at the Motion to Dismiss hearing, Plaintiffs asserted that VER determinations are nondiscretionary, and urged the Court to follow *Wilderness Society*. Tr. at 53 (Doc.146-2). EFR agrees.

whether VER exists, the VER decision is discretionary. Pl. Br. at 24.[14] That argument was rejected in *NAHB*. 551 U.S. at 671 (discretion in gathering and evaluating a statutory test does not create discretion to add criteria to that test).[15]

Beyond the issue of discretion, the VER determination also does not trigger NEPA or the NHPA because, as discussed above, a VER determination is an investigatory tool that is part of a potential enforcement action (*i.e.*, a claim contest). Enforcement actions are excluded from the definition of major Federal action, and also do not meet the definition of undertaking. 36 C.F.R. § 800.16(y); 40 C.F.R. § 1508.18.

IV. Assuming it was Triggered, USFS Properly Applied § 800.13(b)(3) (Claim 3).

For the NHPA's post-review discovery obligations in 36 C.F.R. § 800.13(b) to be triggered, there must be a discovery of an historic property potentially impacted by a previously-approved project, or unanticipated effects to a historic property. Neither of these triggers is met here. The term "discovery" is not defined in the regulations. Its common meaning is "the act, process, or an instance of gaining knowledge or ascertaining the existence of something previously unknown or unrecognized."[16] The existence of and characteristics that make Red Butte eligible for a TCP designation long have been known to all parties involved. Mine Review at 7-24 (ARDoc. 533:10600-17). Assigning a different legal status (TCP) in 2010 to Red Butte does not make known anything new about Red Butte. The context of § 800.13(b) makes clear that the regulation is focused on finding new facts, not new legal labels, and identifying reasonable steps to mitigate adverse effects that a previously-approved action actually may have on a property. The

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[14] Assuming gathering costs and performing the test involved some discretion, the amount would be minimal. USFS gathers the costs of operations under the approved plan applying BLM guidance, calculates the metal price based on BLM guidance, and inserts the information into a computer program. Mineral Exam at 17-23 (ARDoc. 525:10499-505). The activity is ministerial and similar to BLM's calculation of a reclamation bond, which also involves the evaluation of costs under an existing plan, and does not trigger NEPA. *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1096 (9th Cir. 2013).

[15] Plaintiffs' reliance on *Independence Mining v. Babbitt*, 105 F.3d 502,509 (9th Cir. 1997), is misplaced. There, the court only noted what has been discussed here: BLM has minimal discretion in gathering and evaluating information related to performing a the nondiscretionary statutory test. Plaintiffs' reliance on *Ass'n of Pacific Fisheries v. EPA*, 615 F.2d 794, 805 (9th Cir. 1980), also is misplaced. That case is about EPA discretion in cost and benefit analyses regarding Clean Water Act control technologies.

[16] WEBSTER'S THIRD NEW INT'L DICTIONARY (UNABRIDGED) 647 (1986); *see also* BLACK'S LAW DICTIONARY 478 (7th ed. 1999) (same definition).

designation of the Red Butte area as a TCP is not a discovery under 800.13(b). For the same reasons, it cannot be said that operations at the Mine have created "unanticipated effects" on the area. The Mine was authorized under the Plan long before the TCP designation, and USFS considered and mitigated possible effects therefrom in the approved Plan after consultation with the Havasupai. USFS cannot be said to have erred in applying § 800.13(b)(3), when the entire subsection had not been triggered.

Assuming § 800.13(b) was triggered, USFS did not err in applying § 800.13(b)(3), instead of § 800.13(b)(1), as Plaintiffs argue. Pl. Br. at 34-39. The Court addressed and rejected this argument in the PI Order, and should do so again. PI Order 14-17. As the Court found, § 800.13(b)(1) applies when there has been an approved undertaking and construction has not commenced, and § 800.13(b)(3) applies when there has been an approved undertaking and construction has commenced. *Id*. at 14. Here, the relevant undertaking was USFS's approval of the Plan. *Id*. at 15. The only question is whether "construction has commenced." Because construction at the Mine had commenced in the past, the Court found that USFS reasonably determined, based on its plain terms, that § 800.13(b)(3) applied to this case. *Id*. at 15-17.

To make their case, Plaintiffs urge the Court to overlook the facts and terms of § 800.13(b)(3), and focus on the Advisory Council on Historic Preservation's ("ACHP") alleged intent behind that section, which they claim is focused on applying only to ongoing construction. Pl. Br. at 34-35 (claiming this intent is found in preambles to prior iterations of ACHP's regulations, and in the preamble to the current regulations). What is clear from these sources is that, when promulgating the current regulations, ACHP focused on ensuring the clear distinction between construction commencement and non-commencement in §§ 800.13(b)(1) and (3). According to ACHP, this distinction provides the flexibility to complete full consultation under (b)(1) when construction has not started. Contrary to Plaintiffs' suggestion, the preamble does not address whether construction is ongoing (or has stopped and restarted), and does not reference an alleged intent from prior rules. 64 Fed. Reg. 27,044, 27,058, 27,068 (May 18, 1999).

Plaintiffs also again urge the Court to look to ACHP's alleged interpretation of §§ 800.13(b)(1) and (3) in letters to USFS, and ask the Court to afford "substantial deference" thereto. The Court reviewed and rejected these arguments, finding that 800.13(b) was not ambiguous, and that 800.13(b)(3) plainly applies where "construction has commenced" and (b)(1) where "construction has not commenced." PI Order at 16. Contrary to Plaintiffs' and ACHP's assertions, the regulations do not contain the word recommence, or require construction to be ongoing for 800.13(b)(3) to apply. *Id*. The Court rejected any deference to ACHP's alleged interpretations because 1) the regulation was not ambiguous, and 2) its interpretation otherwise was at odds with its plain language. *Id*. To give ACHP deference would impermissibly allow it "'to create a *de facto* new regulation.'" *Id*. (citing *Christensen v. Harris Cnty.*, 529 U.S. 576, 587-88 (2000)). Plaintiffs have not given the Court any reason to revisit these conclusions.

Plaintiffs also argue that § 800.13(b)(3) should not apply because USFS has not "approved the undertaking" at issue, and therefore, full consultation is required. Pl. Br. at 36. For the first time, Plaintiffs claim the relevant undertaking with respect to Claim 3 is the *VER determination*, and not the approval of the Plan. That is inconsistent with the Amended Complaint, which identifies the approved undertaking as the approval of the Plan. Am. Compl. ¶ 85 (Doc. 115).[17] Plaintiffs also suggest that § 800.13(b) does not apply because that section applies to historic properties found after consultation was completed and, because USFS never completed consultation with respect to Red Butte, none of § 800.13(b) applies. Pl. Br. at 37. That also is at odds with the Amended Complaint, that states that consultation was completed, and that Claim 3 focuses on duties under §800.13(b) in light of the Red Butte TCP designation. Am. Compl. ¶¶ 85-86 (Doc. 115). Plaintiffs cannot amend their claim at this late date in their brief.

Finally, Plaintiffs change the focus of their claim to whether USFS completed consultation under § 800.13(b)(3) properly. Pl. Br. at 37-39. This claim is well outside the Amended Complaint. Claim 3 is limited to a 5 U.S.C. § 706(1) claim that USFS withheld and delayed consultation under 36 C.F.R. § 800.13(b)(1) & (c), and contains no

[17] In any event, that claim is presented in Plaintiffs' Claim 2.

allegations regarding USFS's application of § 800.13(b)(3). Am. Compl. ¶ 88 (Doc. 115). The Court should reject this line of argument out of hand.

In any event, Plaintiffs argue that USFS failed to meet § 800.13(b)(3)'s time lines and purposely evaded full consultation under NHPA. That is not true. The record makes clear, as the Court acknowledged, USFS properly implemented § 800.13(b)(3). PI Order at 15. It notified the Havasupai and others of its assessment of the situation and its plan of action, consistent with the regulation. *Id*.[18] Given that this case did not involve an actual discovery of an historic property (such as coming across an artifact with a bulldozer), but rather the change of a known area's legal status, the 48-hour timing mechanisms were not perfectly fitted to the occasion, as the Court noted. *Id*. Therefore, USFS gave the Tribe far more time and process than 800.13(b)(3) required (30 days to respond instead of 48 hours).[19] Thereafter, USFS worked for months trying to complete a memorandum of agreement, despite § 800.13(b)(3) containing no requirement to do so. Williams Ltr. (ARDoc. 579:11394-95); Email from M. Hangan, USFS, to K. Harris (Jan. 18, 2013) (ARDoc. 651:12320); *see* 36 C.F.R. § 800.13(b)(3) (agencies only must "make reasonable efforts to avoid, minimize, or mitigate adverse effects" to historic properties through "appropriate actions."). In light of this lawsuit, USFS concluded that an agreement was unlikely, and that a voluntary arrangement with EFR was an appropriate path forward. ARDoc. 668: 12394-95; Hangan Decl. ¶¶ 2-10 (Doc. 53-4). Plaintiffs' claim that USFS attempted to avoid compliance with the NHPA is baseless.

V. USFS's Determination that EFR's Mine Claims Have VER Is Not Arbitrary and Capricious (Claim 4).

Plaintiffs argue that USFS failed to consider certain costs when it determined that EFR's mining claims had VER. Pl. Br. at 11-15. These costs are related to: (1) radionuclide and water monitoring; (2) mitigation related to potential radionuclide

[18] Plaintiffs argue that USFS waited a year to tell them EFR's plan to resume active mining. Pl. Br. at 38. That is not so. ARDocs. 448-50, 464 (USFS immediately began contacting tribes and the SHPO to discuss the resumption of mining and Red Butte).

[19] Plaintiffs' complaint about USFS's implementation of § 800.13(b)(3) is confounding. They admit the 48-hour time periods therein are for the protection of operators and their projects. Pl. Br. at 38 n.25. Apparently, Plaintiffs would have been happy to have had just two days to review the circumstances, gather their thoughts, and relay them to USFS.

contamination; (3) compliance with the NHPA; and, (4) implementing wildlife conservation measures. Plaintiffs are mistaken. EFR provided USFS costs to implement its Plan and operate in compliance with applicable laws, which included the costs Plaintiffs reference. The Court's review of the VER determination is highly deferential; USFS's action is presumed valid, and must be affirmed if a reasonable basis exists for it. *Ctr. for Biological Diversity v. Jewell*, 2014 WL 5703029, at *5 (D. Ariz. Nov. 5, 2014).

EFR submitted comprehensive capital and operating cost information regarding the development and operation of the Mine under the Plan, in compliance with law. Ltr. from D. Rykman, EFR, to M. Linden, USFS (ARDoc. 670:12426). Consistent with guidance,[20] USFS independently verified these data and inserted them into a "well-accepted" computer program, known as APEX, "specifically designed for the economic evaluation of mining projects." Mineral Exam at 18, 22 (ARDoc. 525:10500, 10504-05). Using APEX, USFS determined that after all costs and taxes were considered, the net sum of cash flow at the Mine –*i.e*., the profit–was $29,350,736. *Id*. at 23 (ARDoc. 525; 10505). That results in an internal rate of return ("IROR") of 78%, which is 6.5 times greater than the USFS conservatively estimated minimum mining industry IROR of 12%. *Id*. In short, the Mine is very profitable. Based on USFS's calculations, the Mine likely could withstand a drastic increase in costs (or decrease in uranium price) and remain profitable.[21] Plaintiffs do not disagree with these conclusions, except to make the unsupported statement that the Mine has a "slim profit margin." Pl. Br. at 15.

With respect to the cost of implementing the Plan in compliance with law, USFS considered: mining and site general and administrative ("G&A") costs (*i.e*., the cost operating under the Plan at $110.42/ton, which is $9,298,136.94; indirect operating costs at $3,078,607.92 ($36.56/ton) (which includes costs for permitting and land related issues); capital costs related to required surface facilities at $508,000; capital costs of permitting and engineering at $218,000; and, reclamation costs at $450,000. In addition, a

[20] BLM Mineral Examiners Handbook, H-3890-1, at V-10 (ARDoc. 374:7436).

[21] USFS ran a sensitivity analysis using a price per pound fourteen dollars less than the amount used for the standard analysis and concluded the Mine would remain very profitable with an IROR of 36%. *Id*. at 23 (ARDoc. 525:10505).

contingency of $1.7 million was included. Mineral Exam at 17-20 (ARDoc. 525:10499-502). These costs total $15,252,744.86. Plaintiffs do not disagree with these costs.

Plaintiffs assert that USFS failed to include costs in the four categories noted above. Regarding monitoring and wildlife conservation measures (categories 1 and 4), these costs were included. Decl. of Harold Roberts ¶¶ 8-9 (Ex. 1). Costs related to the construction of the monitoring well and powerlines were excluded as sunk costs, because they were built before the VER determination. *Id*. ¶ 12; Mineral Exam at 18 (ARDoc. 525:10500). The powerlines were made with crossarms, insulators, and adequate spacing so that condors[22] or other birds could not be harmed. Roberts Decl. ¶ 12.[23] Further, filled trucks on the haul roads will be covered to prevent leakage or wildlife access. *Id*. ¶ 13. Assuming monitoring and conservation costs were not accounted for, they were calculated in the EIS at a total of $131,060. (ARDoc. 3:538). At triple that amount ($393,180), overly accounting for inflation, those costs are well within the $1.7 million contingency.

Regarding potential radionuclide contamination (category 2), Plaintiffs assert that monitoring will invalidate assumptions about regional groundwater and impacts thereto from the Mine, and in turn, USFS will require EFR to modify its Plan to incorporate new mitigation measures. Pl. Br. at 13. These assertions have no basis in fact or the record, and are speculation about the future. As of the dates considered in the Mineral Exam (the segregation date (July 21, 2009), and the exam date (April 17, 2012)), such measures were not required, and were not (and still are not) reasonably foreseeable. Mineral Exam at 5 (ARDoc. 525:10487). USFS is not required to speculate as to unknown, and potential future costs when preparing a mineral exam. *U.S. v. Dwyer*, 175 IBLA 100, 118 (2008); *U.S. v. Garcia*, 161 IBLA 235, 257 (2004); *U.S. v. Clouser*, 144 IBLA 110, 130 (1998); *U.S. v. Highsmith*, 137 IBLA 262, 278 (1997); *see* Linden Decl. ¶ 12 (Doc. 53-2).

[22] The Arizona condor population is "nonessential and experimental." Therefore, USFS rightly concluded only to make recommendations to EFR regarding the condor. Mine Review at 26-27 (ARDoc. 533:10619-20). These recommendations post-date the VER determination, and thus, could not have been considered. Nevertheless, any costs would be covered by the contingency. Roberts Decl. ¶ 10.

[23] Plaintiffs' reference to mitigation measures in ARDocs. 582 and 628 post-date the VER determination, and could not have been considered by USFS. Pl. Br. at 14. Regardless, the cost of replacing foraging habit was included as wildlife conservation, as noted.

Plaintiffs' citation to the 2010 USGS report does not support their position. That is natural background/baseline information (*i.e.*, prior to mining) about the Mine. It has been known to USFS since at least 2010, and has not compelled changes to EFR's Plan. Mine Review at 31 (ARDoc. 533:10624). Further, in the Withdrawal EIS, BLM and USFS concluded there was "a low probability of groundwater contamination from uranium mining," and that they needed additional sampling to make conclusions regarding such impacts. *Yount v. Salazar*, 2014 WL 4904423, at *15-17 (D. Ariz. Sept. 30, 2014).

Regarding NHPA compliance (category 3), Plaintiffs assert that someday "serious measures" to minimize impacts to Red Butte will be required. Pl. Br. at 14. This also is speculation as to what, if any, measures might be put in place. Any additional mitigation measures regarding Red Butte have not been required and were not (and still are not) reasonably foreseeable as of the date of the Mineral Exam. *See Dwyer* and related cases, *supra*. Despite this, potential future costs related to these issues that are not covered as indirect costs, would be covered by the contingency. Roberts Decl. ¶ 11.

USFS performed a comprehensive cost analysis of EFR's claims. This accounted for all known and reasonably foreseeable costs related to the operation of the Mine under the Plan and applicable environmental laws, and provided a contingency for unexpected costs. Based on these conservative estimates, the Mine was well above the threshold for establishing VER. USFS did not entirely fail to consider an important part of the problem, and a reasonable basis exists for its decision. *Jewell*, 2014 WL 5703029, at *5.

VI. Conclusion

For the forgoing reasons, EFR's and USFS's Motions for Summary Judgment should be granted, and Plaintiffs' Motion for Summary Judgment should be denied.

RESPECTFULLY SUBMITTED this 19th day of November, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of November, 2014, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to Clerk's to all CM/ECF registrants in this case.

By: /s/ David J. DePippo