Neil Levine (Colo. Bar No. 29083)
Grand Canyon Trust
1127 Auraria Parkway, Suite 106
Denver, Colorado 80204
Tel: 303-455-0604
nlevine@grandcanyontrust.org

Marc Fink (Minn. Bar No. 343407)
Center for Biological Diversity
209 East 7th Street
Duluth, Minnesota 55805
Tel: 218-464-0539
mfink@biologicaldiversity.org

Roger Flynn (Colo. Bar No. 21078)
Western Mining Action Project
440 Main St., #2
Lyons, Colorado 80540
Tel: 303-823-5738
wmap@igc.org

Attorneys for Plaintiffs
Grand Canyon Trust, Center for Biological Diversity and Sierra Club

Richard W. Hughes (NM Bar No. 1230)
Rothstein, Donatelli, Hughes, Dahlstrom, Schoenburg & Bienvenu LLP
1215 Paseo De Peralta
Santa Fe, New Mexico 87504
Tel: 505-988-8004
rwhughes@rothsteinlaw.com

Attorneys for Plaintiff *Havasupai Tribe*

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

GRAND CANYON TRUST, *et al*.,	Case No. 13-8045-DGC
Plaintiffs	PLAINTIFFS' COMBINED REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT
vs.	
MICHAEL WILLIAMS, *et al*.,	
Defendants,	
and	ORAL ARGUMENT REQUESTED
ENERGY FUELS RESOURCES INC., *et al*.,	
Defendant-Intervenors.	

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Federal Regulations

INTRODUCTION

The Forest Service asks this Court to find that it did not have *any* obligations under the National Environmental Policy Act (NEPA) or National Historic Preservation Act (NHPA) when it allowed, through its Valid Existing Right (VER) Determination, Energy Fuels Resources (EFR) to recommence mining activities at Canyon Mine after more than twenty years of closure and on lands withdrawn from operation of the Mining Law. This complete abdication of its statutory obligations should be rejected. Further, the Forest Service and EFR's inability to clearly demonstrate in the VER Determination or administrative record that it considered all relevant costs in assessing the Mine's profitability shows this agency action is also abitrary and capricious.

The Forest Service also makes troubling new arguments that it did not have any NHPA consultation obligations at the time of resumed mining. The agency now contends that, even if Plaintiffs prevail in this litigation, the Forest Service would allow mining to resume without any further NHPA consultation and NEPA compliance and not determine claim validity for Canyon Mine. This new position directly contradicts the Forest Service's own prior legal determination in its Mine Review that it did have NHPA consultation obligations under Section 800.13(b)(3) (albeit, as we have explained, that determination was deeply flawed). It also shows that the Forest Service has violated the good faith requirement of the NHPA in its dealings with the tribes. The Forest Service has failed to protect the environment and the traditional cultural properties in the area of Red Butte TCP despite knowledge of the adverse effects of the Canyon Mine. Accordingly, as demonstrated herein and in their opening brief, the Court should grant summary judgment on all of Plaintiffs' claims.

ARGUMENT

I. Standard of Review

The Forest Service is not entitled to a "highly deferential"[1] standard of review, as it contends. EFR Doc. 146-1 at 20. Here, the issues in dispute are predominantly legal

[1] The Ninth Circuit case cited by the Forest Service never used the quoted phrase "highly deferential," nor does it hold that there is a presumption in favor of finding agency action valid. *See Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008).

in nature, concerning the applicability of NEPA and NHPA. *See* 5 U.S.C. § 706 ("the reviewing court shall decide all relevant questions of law"); *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1011 (9th Cir. 2009) ("Ninth Circuit jurisprudence distinguishes between the level of deference afforded to agency decisions that are primarily legal in nature and that afforded to decisions that are factual."). Moreover, as Plaintiffs have argued (ECF Doc. 140-1 at 13), the Forest Service is not entitled to deference in interpreting NEPA or NHPA because it is not the agency charged with administering these statutes. The agency provided no response on this point.

Forest Service deference is particularly inappropriate given the agency's contradictory legal positions regarding its NHPA obligations,[2] and its claim that its employees had "layman's confusion about the applicable legal requirements as the process of resuming mining operations unfolded." ECF Doc. 146-1 at 28; AR Doc. 482 at 10333 ("This is a new process for us and we are learning as we go.").

II. Plaintiffs have Established Standing To Bring Each Of Their Claims

EFR -- but not the Forest Service -- asserts that Plaintiffs have not established Article III standing to challenge the VER Determination in Claims 1, 2 and 4. ECF Doc. 147-1 at 6-7. According to EFR, Plaintiffs have not provided evidence of injuries that were caused by the VER Determination, even if Plaintiffs have demonstrated injuries to their interests that are traceable to mining operations at Canyon Mine. *See id.* ("declarants do not mention the VER Determination or anything like that process").

In fact, Plaintiffs' concrete injuries to their environmental, cultural and procedural interests stem directly from the VER Determination and the agency's failure to comply with NEPA and the NHPA. ECF Doc. 140-1 at 13.[3] As detailed throughout this case, mining was prohibited at Canyon Mine under the Withdrawal until the Forest Service concluded that the Mine's claims contained valid existing rights, allowing

[2] In the Mine Review, the Forest Service determined that the agency was obligated to consult with the tribes under 36 C.F.R. § 800.13(b)(3), AR Doc 533 at 10602-04, but now argues that it did not have any consultation obligations under NHPA at the time that mining resumed. ECF Doc. 146-1 at 32-35. It would not make sense to afford deference to either of these contradictory positions.

[3] Plaintiffs have supplemented their declarations to update Plaintiffs' standing. *See* Supplemental Decs. of Silver and Clark, filed herewith.

Canyon Mine mining to resume. The agency's non-compliance with NEPA and NHPA prevented Plaintiffs participation in environmental review and consultation processes.

The VER Determination's impact on Plaintiffs' concrete injuries is the same as the effect of the management plan at issue in *Alliance for Wild Rockies v. U.S. Dep't of Agric*., _ F.3d _, 2014 WL 6480352 (9th Cir. Nov. 20, 2014). There, the Ninth Circuit held plaintiffs had standing to challenge a Forest Service's management plan that was connected to the helicopter flights that harmed plaintiffs' interests. *Id.* *5-7. Here, too, Plaintiffs' declarations firmly establish their injuries resulting from resumed mining operations and these harms are intimately connected to the Forest Service's VER Determination. *See* ECF Doc. 23, ¶¶ 7-9; ECF Doc. 24, ¶¶ 6-10; ECF Doc. 20, ¶¶ 11-16; ECF Doc. 22, ¶ 10; ECF Doc. 21.

Furthermore, for Claim 2, the challenged action is not the VER Determination, but the Forest Service's failure to conduct an NHPA consultation, and the Tribe has demonstrated injury in fact through declarations from tribal leaders identifying the religious and cultural harms caused by this failure. ECF Doc. 37-7 at 42-48; ECF Doc. 22; ECF Doc. 21; *see also* AR Doc. 121 at 3140-42. Furthermore, the Forest Service itself recognizes the Canyon Mine's harms on areas of cultural and religious significance to the Tribe in their brief (ECF Doc. 146-1 at 20), in the Mine Review (AR Doc. 533 at 10605, 10607, 10616-17; AR Doc. 535 at 10640), and in its "consultation initiation" letter to the Tribe. AR Doc. 539 at 10690-91; *see Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 778-79 (9th Cir. 2006) (tribe established standing where agencies' own report identified religious and cultural significance of affected area); *see also* ECF Doc. 86 at 6-7 (finding irreparable harm).

EFR's redressability argument also fails. *See* ECF Doc. 147-1 at 7; *see also* ECF Doc. 146-1 at 23, n.7. As Plaintiffs have demonstrated, the Withdrawal prohibits EFR from conducting mining activities at Canyon Mine. Thus, if the VER Determination is unlawful and set aside, there would be no mining activities at Canyon Mine that cause Plaintiffs' environmental and cultural injuries. *See Alliance for Wild Rockies*, 2014 WL

6480352, at *6 (finding causation and redressability satisfied because "flights were authorized by the Management Plan").

Moreover, had the Forest Service complied with NEPA and NHPA procedures and also considered all relevant costs, the agency may have reached a different validity conclusion, including requiring additional conservation measures or precluded mining altogether at Canyon Mine due the Withdrawal, thereby redressing Plaintiffs' injuries. *See Natural Res. Def. Council v. Jewell*, 749 F.3d 776, 783 (9th Cir. 2014) (en banc) (holding redressability established when compliance with environmental laws "*could* protect his concrete interests") (emphasis in original); *Pit River Tribe*, 469 F.3d at 779 ("the causation and redressability requirements are relaxed" for procedural injury); ECF Doc. 131 at 13-14 (finding Section 106 consultation "in this case might well have resulted in a legally enforceable MOA"); *see also* ECF Doc. 23, ¶ 11 (declarant Crumbo stating injuries would be redressed if agency ordered to comply with NEPA and NHPA); ECF Doc. 24, ¶ 19 (same); Supp. Silver Decl. ¶¶ 10-11; Supp. Clark Decl. ¶¶ 22-24.

EFR's redressability argument is based, partly, on the Forest Service's new assertion that if Plaintiffs prevail in this action, the Forest Service would "void or retract the VER Determination [] rather than reissue it after completing additional analysis or NHPA consultation." ECF Doc. 146-1 at 23 n.7. Not only is this assertion problematic for reasons described below, it ignore the fact that this Court has broad authority to issue an injunction ordering the agency to comply with its legal obligations and enjoining mining until NEPA and the NHPA are satisfied. *See Pit River Tribe*, 469 F.3d at 779. Therefore, the Court has the power to provide redress for Plaintiffs' claims.

III. The VER Determination Is Unlawful

A. The VER Determination Constitutes Final Agency Action

The issue of whether the Forest Service's VER Determination constitutes "final agency action" under the Administrative Procedure Act (APA) was directly at issue in the Forest Service's Partial Motion to Dismiss, fully briefed after Plaintiffs conducted discovery, and decided by the Court. Addressing the Motion "as a motion for summary judgment attacking the merits of Plaintiff's case" (ECF Doc. 131 at 3), the Court held

that "the VER Determination is an agency action that satisfies both prongs of the *Bennett* test" and thus "is a final agency action." *Id*. at 11.

Nonetheless, the Forest Service uses its cross-motion for summary judgment to ask the Court to "revisit" this jurisdictional issue. ECF Doc. 146-1 at 21. However, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case," to promote "the finality and efficiency of the judicial process." *Christianson v. Colt Industries*, 486 U.S. 800, 816 (1988). Courts should thus be "loathe" to revisit their own prior decisions absent "extraordinary circumstances," such as where the decision was "clearly erroneous" and would result in a "manifest injustice." *Id*. at 817; *see also Thomas v. Bible*, 983 F.2d 152, 155 (9th Cir. 1993). The Forest Service neither identifies these standards nor attempts to satisfy the applicable requirements.

In restating its argument, the Forest Service claims the Court adopted a "new approach" to final agency action and *Bennett*'s second prong. ECF Doc. 146-1 at 21. *Bennett* requires that an action "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 178 (1997); *see also Oregon Nat. Desert Ass'n v. U.S. Forest Serv. ("ONDA")*, 465 F.3d 977, 986 (9th Cir. 2006). Applying this standard, this Court ruled there is no question that the Forest Service "determined rights" at the Canyon Mine though the VER Determination, as that was its sole purpose. ECF Doc. 131 at 10 ("The VER Determination thus appears to come within the express language of *Bennett*"). The Court also found the VER Determination "allowed mining operations to resume under the original Plan of Operations" and despite the Withdrawal. *Id*. The Court thus did not employ a "new approach," as the agency now claims, but relied on established Supreme Court and Ninth Circuit precedent to consider whether the VER Determination was a practical or legal requirement. ECF Doc. 131 at 7.

Moreover, the Forest Service is wrong that the Ninth Circuit "narrowed the effect" of its *ONDA* decision in *Columbia Riverkeeper v U.S. Coast Guard*, 761 F.3d 1084 (9th Cir. 2014). *See* ECF Doc. 146-1 at 23. Rather, the Ninth Circuit confirmed

that courts do consider "*the practical effects* of an agency's decision." *Columbia Riverkeeper*, 761 F.3d at 1094-95 (emphasis added). In *Columbia Riverkeeper*, the Coast Guard and the applicable statutory scheme made clear that the Coast Guard's role was limited to providing the Federal Energy Regulatory Commission (FERC) with a "letter of recommendation." *Id*. at 1093-95. The court held this letter had neither a legal nor practical effect under the statutory scheme, and found that FERC provided the only relevant approval for the challenged gas facility and pipeline. *Id*. at 1093-95. Here, in contrast, the statutory and regulatory scheme requires a Forest Service determination that claims are valid before mining may resume. AR Doc. 525 at 10489.[4]

Moreover, the Court has ruled that an agency's failure to consult under NHPA Section 106 would be a final agency action and thus Claim 2 is proper under the APA. ECF Doc. 131 at 12-14. Thus, the Forest Service's argument that the VER Determination is not a final agency action has no bearing on the reviewability of Plaintiffs' NHPA claims. This Court correctly determined that the *Bennett* test was met for the failure to consult because (1) completion of the consultation would constitute the culmination of the agency's NHPA action with respect to the Canyon Mine, and (2) the process is intended to produce an MOA with legally enforceable effects. *Id.* at 13-14.

B. The Forest Service Failed To Consider All Relevant Factors In Its VER Determination (Claim 4)

1. Claim 4 Is Reviewable Because There Is Law To Apply

As its primary defense to Claim 4, the Forest Service argues this claim is unreviewable because VER determinations are completely discretionary and there is no law to apply. ECF Doc. 146-1 at 37-38. The agency states "it is well-settled that a plaintiff cannot bring a stand-alone" claim that a decision violated the "arbitrary and capricious" standard in 5 U.S.C. § 706(2). *Id*. at 37. Notwithstanding the agency's mistaken framing of the issue, there is law to apply and Claim 4 is justiciable.

[4] The Forest Service defiantly threatens that, if the VER Determination were set aside, it would not reissue the VER Determinaton. ECF Doc. 146-1 at 23, n.7. Absent the VER Determination, however, EFR would have no authority to mine because the public lands upon which Canyon Mine sits are withdrawn and unavailable for mining under the Mining Law absent a validity determination.

There is a presumption of judicial review under the APA. *Pinnacle Armour v. U.S.*, 648 F.3d 708, 718 (9th Cir. 2011). Claims are justiciable as long as there is some law to apply. *See Heckler v. Chaney*, 470 U.S. 821, 829 (1985). Conversely, 5 U.S.C. § 701(a)(2)'s "committed to agency discretion by law" language provides a "narrow exception to the presumption of judicial review of agency action under the APA [and] applies if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1082 (9th Cir. 2014); *e.g., Or. Natural Resources Council v. Thomas*, 92 F.3d 792, 795 (9th Cir. 1996) (finding narrow exception applies when law includes "notwithstanding any other law" clause).

Here, the extensive statutory and regulatory scheme governing mining claims in withdrawn areas and validity determinations provide law for the Court to apply. Mining claims with "valid existing rights" are exempt from the effect of a FLPMA withdrawal. The meaning of valid existing rights – specifically, the prudent person test as supplemented by the marketability test -- has been the subject of significant legal interpretation, including from the Interior Board of Land Appeals (IBLA). *See infra.* The agencies have prepared manuals and handbooks that include procedures for issuing validity determinations. AR Docs. 374, 359. In short, there is substantial law to apply.

Moreover, the APA in 5 U.S.C. § 706(2) provides additional legal standards to review the VER Determination. As the Ninth Circuit held, "although 5 U.S.C. 701(a)(2) insulates from judicial review agency discretion where there is no law to apply, the APA itself commits final agency action to our review for 'abuse of discretion.' 5 U.S.C. § 706(2)(A)." *Pinnacle Armour*, 648 F.3d at 720. Indeed, this Court recently ruled that "[u]nder the APA, actions by the Secretary to withdraw land, like other agency actions, are valid if the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Yount v. Salazar*, 2014 WL 4904423, *19 (D. Ariz. Sept. 30, 2014).

The argument that there is no law to review the VER Determination fails. *See e.g., Wilderness Society v. Dombeck*, 168 F.3d 367, 375-77 (9th Cir. 1999).

2. The VER Determination Failed To Include All Costs

The Forest Service was arbitrary and capricious and abused its discretion in issuing the VER Determination and determining Canyon Mine's profitability. *See* 5 U.S.C. § 706(2). Specifically, the agency failed to consider all relevant costs associated with complying with environmental and cultural laws, including monitoring and mitigation requirements. Nothing in the administrative record indicates the agency included these costs upon exempting the Mine from the Withdrawal's effects.

Neither the Forest Service nor EFR dispute that these types of costs are required components of a VER determination. As Plaintiffs demonstrated (ECF Doc. 140-1 at 15-16, 29-30), the law makes this requirement explicit.[5] BLM's Handbook for validity determinations, which the Forest Service employs (ECF Doc. 146-1 at 39), states that costs affecting profitability include "environmental and cultural permitting, mitigation, reclamation and rehabilitation costs." AR Doc. 359 at 6792. Yet, on its face, the VER Determination omitted these costs, while clearly including other types of costs that are similarly required by BLM's Handbook, such as capital costs, labor costs, transportation costs and milling costs. *See* AR Doc. 525 at 10500-02.

Nonetheless, the Forest Service argues that the omitted costs were, in fact, included as reclamation costs ($450,000) and capital contingency costs ($1.7 million), although they failed to detail where and exactly how they were accounted for. ECF Doc. 146-1 at 39. The $450,000 for reclamation covers activities that will occur after mining concludes and are associated exclusively with removing mining equipment and structures and returning the surface to its original state. *See* AR Doc. 418 at 7677-78; *see also* AR Docs. 650, 667. Nothing in the record suggests that the $450,000 reclamation bond will cover costs of groundwater monitoring, mitigating radionuclide contamination, or measures to protect cultural and wildlife resources.

[5] *See Independence Mining v. Babbitt*, 105 F.3d 502, 506-07 (9th Cir. 1997); *Clouser v. Espy*, 42 F.3d 1522, 1530 (9th Cir. 1994); *Barrick Goldstrike Mines v. Babbitt*, 1994 WL 836324, *4 (D. Nev. Jan. 14, 1994); *Great Basin Mine Watch*, 146 IBLA 248, 256 (1999); *Moon Mining v. HECLA Mining*, 161 IBLA 334, 362 (2004).

The Forest Service and EFR attempt to portray the VER Determination's "Contingency on Total Capital Costs" as a catch-all fund that could cover any and all costs not explicitly identified. ECF Doc. 146-1 at 39; ECF Doc. 147-1 at 19. The record does not support this argument. By definition, a "capital" contingency applies to cost overruns related to capital development and equipment. None of the identified capital costs – not those in narrative description of capital costs (AR Doc. 525 at 10500) or the line-items for capital development and equipment (*id*. at 10500-01) -- include the missing costs. Further, the capital contingency is calculated as 10% of identified capital costs. AR Doc. 525 at 10501. Consequently, nothing in the record demonstrates that the $1.7 million contingency was allocated to cover environment or cultural-related costs, in addition to cost overruns on true capital costs. Indeed, the record provides no evidence that the Forest Service evaluated whether the capital contingency amount is adequate for mitigation and monitoring. Lastly, the costs of mitigation and monitoring are not unknown "contingencies," but were known requirements.[6]

EFR next contends that the missing costs were included within certain specific capital costs. ECF Doc. 147-1 at 19. Yet, the VER Determination itself provides no support for this contention, as none of the capital costs capture, for example, mitigation actions or ongoing monitoring. The VER Determination states that specific capital costs are contained in Appendix C. AR Doc. 525 at 10500. However, Appendix C was omitted from the record. EFR implicitly concedes that the VER Determination and record are wanting by submitting the extra-record declaration of Harold Roberts to address this deficiency. ECF Doc. 147-2. As an initial matter, the Court cannot consider this declaration because it is not part of the Forest Service's administrative record. *See*

[6] EFR states that wildlife measures were imposed after the VER Determination. ECF Doc. 147-1 at 19, n.23. EFR is wrong. In a letter sent after the VER Determination, the Forest Service reminded EFR of a pre-existing requirement that the company had not undertaken. AR Doc. 626. During a January-February 2012 consultation process on the Mine, measures to address the California condor were identified by the Forest Service and FWS (*see* AR Doc. 507 at 10433-34; AR Doc. 501 at 10415-16), and these were the same measures imposed during tree-cutting along a powerline corridor in the fall of 2012. AR Doc. 582. The condor measures and related costs were known before the VER Determination.

e.g., Camp v. Pitts, 411 U.S. 138, 142 (1973); *Thompson v. U.S. Dept. of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). EFR did not submit a motion to supplement the record prior to filing the declaration, and the time for seeking permission to submit extra-record documents has long since past. *See* ECF Doc. 93. In any case, like the VER Determination and the record, the Roberts declaration comes up short. It relies on a cover letter that purportedly included several spreadsheets (AR Doc. 670 at 12426), but those spreadsheets are also not in the administrative record. ECF Doc. 147-2 at ¶ 8-11.[7] At bottom, there is no record evidence that supports Mr. Roberts' assertions that the costs relating groundwater monitoring and wildlife mitigation were considered.

In addition to claiming the aforementioned costs were actually included, the Forest Service concurrently proclaims that environmental costs are "too speculative…to include in a 'prudent man' analysis." ECF Doc. 146-1 at 39; ECF Doc. 147-1 at 19-20 (EFR making same argument).[8] The record belies the agency's suggestion that compliance with environmental and cultural laws, including monitoring and mitigation actions, are unknown and that costs cannot reasonably be determined. First, one of the reasons that the Forest Service was required to undertake a full Section 106 consultation process *prior* to the VER Determination was to determine the costs of the mitigation measures, which could have affected the profitability analysis. ECF Doc. 140-1 at 32-33. Second, there is also nothing speculative about the current requirement to monitor three Grand Canyon springs every six months and, because this monitoring had been done previously (ECF Doc. 99 at 4-5), a cost estimate could be provided. *See* AR Doc. 3 at 588; AR Doc. 6 at 924. Third, the Forest Service specifically identified "the construction of other groundwater monitoring wells[]" to mitigate radioactive contamination. AR Doc. 6 at 924. This mitigation action, therefore, is not hypothetical,

---

[7] If this declaration is considered nonetheless, Plaintiffs request that the Court order EFR to release the materials referenced in the declaration, including "Canyon Mine Mineral Exam Economic Study March 2012.xls" and Appendix C to the VER Determination, and if that information is not self explanatory, allow Plaintiffs to depose Mr. Roberts to gain a full understanding of his interpretation of the documents the Forest Service omitted from the record and to file a sur-reply on this issue.

[8] Here, the Forest Service refers only to the "prudent person" test, inexplicably ignoring the marketability test and its profitability requirement. ECF Doc. 146-1 at 39.

but expressly contemplated. And because a prior monitoring well was constructed around Canyon Mine (AR Doc. 3 at 530 & AR Doc. 6 at 924) and characterized as "expensive" (AR Doc. 6 at 924), the cost of monitoring wells is known.

Moreover, the record contradicts the agency and EFR's claim that groundwater impacts – either contamination or disturbing groundwater flows – are too speculative. ECF Doc. 146-1 at 39; ECF Doc. 147-1 at 19. The Forest Service required the monitoring of springs and other radionuclide monitoring because of this impact. AR Doc. 3 at 527, 530, 588. The Court previously ruled that the Mine will likely cause Plaintiffs irreparable harm, including "because the mineshaft will drain perched aquifers and degrade regional springs." ECF Doc. 86 at 5-6. The Canyon Mine's boreholes and shaft construction have impacted groundwater, both in terms of elevated uranium concentrations and draining perched aquifers. AR Doc. 430 at 8334, 8335; *see also* ECF Doc. 63-1, ¶¶ 4, 7. The USGS reported "elevated uranium concentrations" at Canyon Mine (AR Doc. 430 at 8334, 8335), and that "[f]ifteen springs and 5 wells in the region contain concentrations of dissolved uranium that exceed the U.S. Environmental Protection Agency maximum contaminant level for drinking water *and are related to mining processes*." AR Doc. 430 at 8345 (emphasis added). In sum, the need for monitoring and mitigation is not speculative, and the costs can be determined. The Forest Service had no basis to ignore these legally-required costs.

The Forest Service's failure to include these mandatory costs is significant because, had they been considered, the Forest Service may have reached a different outcome in the VER Determination. EFR responds by claiming "the Mine is very profitable" and "could withstand a drastic increase in costs (or decrease in uranium price)." ECF Doc. 146-1 at 18. Yet, EFR's argument is belied by the fact that the Mine was closed from 1992 though April 2013 and again in November 2013 because it was not profitable. ECF Doc. 96-1 at 3. Thus, even without including the required environmental and cultural costs, the Mine's profitability is questionable at best.

C. The Forest Service Failed To Comply With NEPA When It Prepared The VER Determination (Claim 1)

1. The VER Determination Is A Major Federal Action

"The VER determination is mandatory for lands that are withdrawn." 65 Fed. Reg. 69,998, 70,026 (Nov. 21, 2000). Responding to doubts raised by this Court, Plaintiffs' opening brief explained that the Forest Service must *determine* that claims are valid before mining activities may occur on public lands withdrawn from the Mining Law. ECF Doc. 140-1 at 24-26. The Bureau of Land Management has the same obligation on BLM-lands, as the agency explained:

> One commenter asked, concerning VER examinations, how can anyone but the miner decide if a deposit is economically feasible? The law has long been well-established that determinations of VER, including whether a valuable mineral deposit has been discovered are not subjective decisions to be made by the miner. BLM mineral examiners are geologists and mining engineers who are trained in sampling, interpreting, and evaluating mineral deposits to determine whether or not, in their professional opinion, a discovery of a valuable mineral has been made.

65 Fed. Reg. at 70,026; *U.S. v. Martinek*, 166 IBLA 347, 352 (2005) ("The burden is on the Department to determine the existence of valid rights in the land so withdrawn").

In their response briefs, neither the Forest Service nor EFR disagree that the Withdrawal's "subject to valid existing rights" language requires an agency finding on claim validity. In fact, the Forest Service's brief explicitly concedes that the agency is obligated to make this finding, stating "a VER Determination would certainly be required for a new Plan on an existing mining claim." ECF Doc. 146-1 at 26; *id*. at 28 ("[T]he Forest Service conducts VER Determinations when they are required"). Putting aside the agency's proffered distinction between new mines and mines with previously-approved plans of operations, the Forest Service makes clear in no uncertain terms that the Withdrawal requires land management agencies to determine claim validity.

The Forest Service's primary argument against 'major federal action' is that the VER Determination was unnecessary despite the Withdrawal because the agency approved a plan of operations for Canyon Mine in 1986. Doc. 146-1 at 24. Plaintiffs refuted this contention in their opening brief, arguing:

-Forest Service mining regulations (36 C.F.R. §§ 228 *et seq.*) applicable to mining plans of operations do not require the agency to assess claim validity;

-in fact, the Forest Service did not determine claim validity at Canyon Mine in 1986 when it approved a plan of operations;

-the agency's Manual distinguishes between plan of operations approvals and validity determinations as two distinct agency actions; and,

-the law requires an agency finding of claim validity at the time of a withdrawal.

Doc. 140-1 at 26, 28-29. The Forest Service's response brief completely ignores these dispositive defects in its argument and simply restates its reliance on its 1986 approval. The 1986 approval, however, provides no exception to the Withdrawal's effect.[9]

As in prior briefing, the Forest Service cites BLM's regulation at 43 C.F.R. § 3809.100. ECF Doc. 146-1 at 26. During this litigation, the agency has interpreted this provision to mean that a validity determination is unnecessary for a mine with a plan of operations that was approved prior to a withdrawal. However, even though Canyon Mine had an approved plan of operations, the Forest Service *did issue* the VER Determination for Canyon Mine, and thus rejected the regulatory interpretation it now offers. This is likely because the BLM regulation does not say what government lawyers argue in litigation. The provision confirms that BLM will not approve a new plan of operations in a withdrawn area absent a validity determination (43 C.F.R. § 3809.100(a)), but does not apply to the scenario at Canyon Mine.

Indeed, the regulatory history of this provision provides that "[t]he VER determination is mandatory for lands that are withdrawn" (65 Fed. Reg. at 70,025-26), and does not suggest that mines with approved plans of operations are exempt from a withdrawal or the requirement to determine claim validity in a withdrawn area. The Forest Service's litigating position requires the Court to rewrite the Withdrawal so it reads: the Withdrawal is 'subject to mines with approved plans of operations.' However, the plain language of the Withdrawal -- and FLPMA's authorization of

[9] The Forest Service notes that the Withdrawal's EIS contemplated mining at Canyon Mine. ECF Doc. 146-1 at 26. But as Plaintiffs have explained, that EIS analyzed, as NEPA requires, reasonably foreseeable activities, but expressly warned that its analysis did not presuppose claim validity at Canyon Mine, which is to "occur[] independent[ly.]" AR Doc. 445 at 8648.

withdrawals -- states it is subject to valid existing rights, not previously approved plans of operations. AR Doc. 481 at 10310; 43 U.S.C. § 1701 note, Sec. 701(h).

EFR makes a related argument that the Withdrawal applies exclusively to *new* mining claims. ECF Doc. 147-1 at 9. This overstated contention has no support.[10] While a withdrawal prohibits new claims, it also impacts existing claims that lack valid existing rights. *See* 65 Fed. Reg. at 70,026 ("[W]here land is closed to location and entry under the mining laws, *subsequent to the location of a mining claim*, the claimant must establish the discovery of a valuable mineral deposit at the time of the withdrawal, as well as the date of the hearing") (emphasis added).[11] The VER Determination itself rejects EFR's argument, stating "[i]t is Forest Service policy (FSM 2803.5) to only allow operations *on mining claims* within a withdrawal that have valid existing rights (VER)." AR Doc. 525 at 10486 (emphasis added). The Forest Service similarly informed another mining company -- Vane Minerals -- that its existing claims required a validity determination before exploration activities can occur. ECF Doc. 140-9 at 1.[12]

Moreover, EFR misrepresents Plaintiffs' argument concerning the Withdrawal's effect. Plaintiffs do not contend, as EFR suggests, that the "Withdrawal automatically prohibited all mining within the withdrawn area" nor have Plaintiffs claimed that the Withdrawal "invalidated EFR's mining claims." Doc. 147-1 at 8. Rather, the Withdrawal prohibits new mining claims and requires valid existing rights determinations for existing claims. *See* ECF Doc. 140-1 at 23-24; *see also* 65 Fed. Reg. at 70,025 (BLM's mining regulations confirming that "operations are allowable in areas segregated or withdrawn from the mining laws *only to the extent that* a person has valid

---

[10] EFR's claim that the Withdrawal is inapplicable to existing mining claims also would render the "subject to valid existing rights" language without effect. The Withdrawal's prohibition cannot be limited to only new claims because claims that did not exist at time of a withdrawal will never have valid existing rights.

[11] BLM's website also explains: "[h]olders of mining claims… located within lands *later withdrawn* from mineral entry must prove their right to continue to occupy and use the land for mining purposes." www.blm.gov/wo/st/en/info/regulations/mining_claims.html.

[12] *See also Yount*, 2014 WL 4904423, at *5 (confirming prior holding "that NEI and NMA had shown Article III standing because the Withdrawal imposed expensive and years-long examination processes on their members and reduced the value of *existing mining claims* and claim investments") (emphasis added).

existing rights to proceed") (emphasis added).[13] And, contrary to EFR's characterization, the Withdrawal did not "invalidate" the mining claims at Canyon Mine, but simply required the Forest Service to determine whether the Mine's two claims contain valid existing rights in order for EFR to resume mining operations.

Citing the Forest Service's Manual, EFR argues validity is not required on mining claims, "even in the face of a withdrawal." ECF Doc. 147-1 at 10-11. The relied-upon statement from the Manual (AR Doc. 371 at 7280 (§ 2811.5)), however, applies only to lands that are open and are not subject to a withdrawal. Indeed, subsequent provisions in the same Manual provide:

> The use of validity determinations should be limited to situations where valid existing rights must be verified where the lands in question have been withdrawn from mineral entry.

AR Doc. 371 at 7310. The cases EFR cites do not articulate a different interpretation.[14]

The Forest Service and EFR contend, again, that a VER determination is part of a claim contest, which they characterize as an "enforcement action." Doc. 146-1 at 23-24; Doc. 147-1 at 8, 12 (VER determinations evidence for determining whether to "bring a contest claim"). Plaintiffs do not dispute that a validity determination may also be a component in claim "contests," but the VER Determination at issue in *this* case never involved a claim contest. The VER Determination for Canyon Mine was prepared instead "due to the Withdrawal." *See* AR Doc. 525 at 10489.

Even though the VER Determination allowed Canyon Mine to resume operations despite the Withdrawal and after 20 years of closure, the Forest Service contends this

---

[13] Plaintiffs agree that "the Mining Law's intent [is] to promote mining" (ECF Doc. 147-1 at 10), but note the Withdrawal's purpose was to forego this Mining Law intent within the 1,000,000 acres of public lands surrounding Grand Canyon National Park.

[14] EFR makes a similar error when arguing that a valid claim is obtained merely "by performing the location and entry steps." *See* ECF Doc. 147-1 at 9 & n.7 (citing and quoting Forest Service Manual §2811.5). The same manual EFR cites makes clear that a "discovery" is required for claim to be valid. AR Doc. 371 at 7279 ("The general mining laws impose certain obligations on a claimant who wishes to take advantage of the privileges those laws provide. A claimant must: 1. Discover a valuable deposit (FSM 2815.1, para. 1) of a locatable mineral in federally owned public domain land open to the operation of the mining laws. *Satisfaction of other requirements of the 1872 act does not make a claim valid absent a discovery of a valuable deposit* (30 U.S.C. 21-54).") (emphasis added).

agency action did not change the status quo and thus did not trigger NEPA. *See* ECF Doc. 146-1 at 34. The agency's reliance on *Nat'l Wildlife Found. v. Espy* for this proposition is misplaced. In *Espy*, the court ruled that a transfer of property from federal to private ownership did not change ongoing and continuous grazing activities. 45 F.3d 1337, 1344, 1340 (9th Cir. 1995). *Espy* is not analogous here, however, because the VER Determination did, in fact, change the status quo, both from a regulatory perspective and on-the-ground. The status quo prior to the VER Determination was no mining and the Withdrawal, which prohibited mining absent a determination of valid existing rights. 65 Fed. Reg. at 70,026; AR Doc. 525 at 10489.

Consequently, the Ninth Circuit's ruling in *Pit River Tribe* controls. There, the court distinguished *Espy* on the ground that the agency's action -- extending geothermal leases -- was required before the project could proceed. 469 F.3d at 784. Several other courts have distinguished *Espy* because an agency action changed the status quo. For instance, as cited in Plaintiffs' opening brief, the court in *Humane Soc'y v. Johanns* held an agency's new interim regulations were necessary to allow previously-occurring activities to continue and thus NEPA applied. 520 F.Supp.2d 8, 28-29 (D.D.C. 2007). The *Humane Soc'y* court explained that the agency action provided a "new regulatory structure both in content … and in regulatory authority." *Id*. at 30. This line of cases demonstrates that NEPA compliance may be avoided where, unlike here, the activities would continue regardless of the federal action taken.

2. The Forest Service Has Meaningful Discretion

While the Forest Service was legally required to evaluate claim validity due to the Withdrawal and consider environment and cultural resource costs, the Forest Service has discretion and is free to use its judgment in deciding how to value expected costs and revenues. *Independence Mining*, 105 F.3d at 509; *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin. ("NHTSA")*, 538 F.3d 1172, 1195 (9th Cir. 2008) ("The EPCA clearly requires the agency to consider these four factors, but it gives NHTSA discretion to decide how to balance the statutory factors"). Under the prudent-person test and marketability test, the Forest Service does not have to accept a

company's profit and cost projections, but has the discretionary authority to scrutinize which exact costs are to be included and determine how such costs are valued. *See* 65 Fed. Reg. at 70,026; *Martinek*, 166 IBLA at 352, 406, 408, 410 (describing factors where agency exercised discretion, including methods of pricing relevant minerals, and determining "extent of resource" and quality of minerals). The Handbook for validity determinations identifies factors where agency discretion is used:

> -determining mining methods and whether a mining "plan is operationally viable," agency "may … adjust or modify any component to improve efficiency, recovery of valuable minerals, savings on reclamation and so forth" AR Doc. 374 at 7435;
>
> -establishing resource values: "[y]our choice of method should be appropriate to the situation, recognize geologic boundaries" *id.* at 7434;
>
> -choosing method for estimating costs, involving "an iterative process" and multiple iterations "to provide a sufficient level of confidence." *Id*. at 7436-37.

Thus, the validity test is not a routine or ministerial act, but rather "complex" and "very fact-based" (65 Fed. Reg. at 70,025), wherein the Forest Service has meaningful discretion over the VER Determination's outcome.

This discretion extends to costs associated with protecting environmental and cultural resources. The courts and the IBLA have recognized that "the costs of compliance with any environmental and reclamation laws" and implementing conservation measures to address harm to the environment and cultural resources must be included when determining profitability. *Independence Mining*, 105 F.3d at 506-07; *Espy*, 42 F.3d at 1530; *Great Basin Mine Watch*, 146 IBLA at 256; *Moon Mining*, 161 IBLA at 362. In *Barrick Goldstrike Mine*, the court recognized how environmental costs can impact claim validity: "if this administration chooses to enforce the Endangered Species Act with more vigor than prior administrations, mitigation costs for the protection of threatened or endangered species will be highly relevant to the value of the deposits." 1994 WL 836324, at *4-5. Accordingly, the Forest Service has discretionary authority to meaningfully consider impacts to groundwater, wildlife, and cultural resources, as well as alternative methods of mitigating impacts and protecting these resources, which, in turn, could affect the outcome of a VER determination. *See*

Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 372 (1989); *NHTSA*, 538 F.3d at 1213 (finding agency could act "on whatever information might be contained in an EIS").

The Forest Service and EFR respond by characterizing VER determinations as a ministerial act. ECF Doc. 146-1 at 29-30; ECF Doc. 147-1 at 12.[15] However, the relied-upon cases involved a different type of mining decision – a decision to patent a claim. Notably, when specifically addressing a validity determination, the Ninth Circuit ruled:

> The Secretary's validity determination requires *considerable judgment and discretion to evaluate and assess the results of the mineral examination*, and to ultimately conclude whether the statutory requirement of a "valuable discovery" has been met.

Independence Mining, 105 F.3d at 509 (emphasis added). The court further noted:

> IMC [the plaintiff] argues that the validity determination itself is non-discretionary because it involves an objective test. In doing so, IMC confuses two different concepts. Specifically, merely because a task involves an 'objective' standard of review does not mean that it is a ministerial act.

Id. at 509, n.8.[16] As one court held, "[t]his [validity] determination is clearly an exercise of the Secretary's discretion; and therefore it cannot be ministerial." *Barrick Goldstrike Mines* 1994 WL 836324, at *4.

Ignoring the Ninth Circuit's ruling in *Independence Mining*, the agency cites a district court opinion in *Wilderness Soc'y v. Robertson*, 824 F.Supp. 947, 953 (D. Mont. 1993). ECF Doc. 146-1 at 29. In addition to having no precedential value and predating *Independence Mining*, Plaintiffs respectfully submit that *Wilderness Soc'y* was wrongly decided. As detailed above, determining claim validity is a discretionary agency action that includes consideration of environmental compliance costs. Moreover, the *Wilderness Soc'y* court relied exclusively for its conclusion on a Supreme Court case, *Wilbur v. Krushnic*, 280 U.S. 306, 318-19 (1929), which found that issuance of a

---

[15] In contrast to its argument here that a validity determination is a ministerial act, the Forest Service argues in defense to Claim 4 that a VER determination is an action committed to agency discretion. *See* ECF Doc. 146-1 at 37-38.

[16] Citing the Motion to Dismiss transcript, the Forest Service highlights a statement made by counsel for the Havasupai Tribe proclaiming that a VER determination is an "objective inquiry." ECF Doc. 146-1 at 30. Merely because claim validity is based on "an 'objective' standard does not mean that it is a ministerial act." *Independence Mining*, 105 F.3d at 509 n. 8.

mineral patent is a ministerial agency action. As noted above, Plaintiffs are not challenging a mineral patent and the Canyon Mine VER Determination was not part of a mineral patent process. Another case the Forest Service cites (ECF Doc. 146-1 at 12) -- *S. Dakota v. Andrus*, 614 F.2d 1190, 1193 (8th Cir. 1980) -- also involved a patent and relied on *Wilbur v. Krushnic*.[17] As *Independence Mining* noted in rejecting *S. Dakota*, "issuance of a mineral patent was only ministerial to the extent the [patent] application satisfied the requirements of the statute," which includes the discretionary finding as to whether claims contain valid existing rights. *Independence Mining*, 105 F.3d at 508.

3. The Mine, As Authorized By The VER Determination, May Result In Significant Impacts

Notably, neither the Forest Service nor EFR dispute Plaintiffs' argument (ECF Doc. 140-1 at 31-34) that Canyon Mine, as authorized by the VER Determination, may result in significant impacts to the environment and cultural resources. Instead, the Forest Service claims that, if the VER Determination is a major federal action, a new NEPA analysis is not necessary because the 1986 EIS provided a sufficient review. ECF Doc. 146-1 at 30-32. As an initial matter, this *post hoc* litigation position does not respond to the legal question of whether the VER Determination required NEPA compliance because it is a major federal action with significant impacts. And, in any case, nothing in the record indicates the agency determined that NEPA for the VER Determination was satisfied based on the 1986 EIS, as the agency now argues.

To the extent NEPA permits the Forest Service to reference the 1986 EIS in evaluating the VER Determination (*see e.g.*, 40 C.F.R. § 1502.20, § 1502.21), the 1986 EIS is not sufficient. Since 1986, there is new data, information and legal requirements, including, evidence of groundwater contamination, the re-establishment of a California condor population, newly-designated status for Red Butte as a cultural resource, and new management prescriptions in the revised Kaibab National Forest land use plan. *See e.g.*, AR Doc. 430 at 8334, 8335 (reporting results from late 1980s groundwater

[17] *S. Dakota* is not applicable here also because it addressed the effect of a mineral patent in an area that had not been withdrawn, such that mining could occur with or without a mineral patent. *S. Dakota*, 614 F.2d at 1194 ("the issuance of a mineral patent is not a precondition which enables a party to begin mining operations").

monitoring showing "elevated uranium concentrations" in Canyon Mine well). Further, NEPA requires the agency to consider Canyon Mine's impacts together with the impacts of other mining operations approved since the 1986 plan of operations, as part of a cumulative impact analysis. *See* 40 C.F.R. § 1508.27(b)(7). None of this new information was addressed in the 1986 EIS. The 1986 EIS also did not consider any of the relevant environmental information, reports, or analysis related to the 2012 Withdrawal, wherein the Department of Interior concluded that the area where Canyon Mine sits should be precluded from mining to protect the natural resources surrounding Grand Canyon National Park. Indeed, since 1986, the Forest Service required EFR to update and increase the reclamation bond for Canyon Mine (AR Docs. 650, 667), and state regulations recently required the installation of a new liner in the wastewater pit. AR Doc. 533 at 10598.[18] Thus, even if the 1986 EIS could provide a starting point under NEPA, additional analysis and public comment will be required.[19]

IV. Collateral Estoppel Does Not Apply To Plaintiffs' NHPA Claims

EFR makes the meritless argument, which the Forest Service does not join, that Plaintiffs' NHPA claims are barred by collateral estoppel. ECF Doc. 147-1 at 7-8. Collateral estoppel, also known as "issue preclusion," bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). This doctrine has no application here because the issues of fact or law in this proceeding were not previous previously litigated. Plaintiffs challenge the Forest Service's failure to conduct a full Section 106 consultation prior to allowing mining activity to resume, which is conduct that occurred approximately twenty years after the prior Canyon Mine litigation concluded. *See Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991).

[18] The Forest Service states the 1986 EIS prepared in connection with its approval of a plan of operations was found adequate. ECF Doc. 146-1 at 31. However, Plaintiffs are not challenging that EIS, but instead the Forest Service's failure to comply with NEPA in connection with the VER Determination.

[19] The agency notes that it prepared the 2012 Mine Review. ECF Doc. 146-1 at 31. However, that review, which was not prepared in connection with the VER Determination, was an internal agency document and thus the public did not get an opportunity to review or comment. *See Ctr. for Biological Diversity*, 538 F.3d at 1185.

The Court already rejected a nearly identical "res judicata" argument offered in the Forest Service's Motion to Dismiss, and the Court's reasoning is equally applicable here. ECF Doc. 131 at 14.

V. The Forest Service Failed to Consult Under NHPA

Plaintiffs' Second Claim is that the Forest Service violated NHPA by failing to undertake a Section 106 consultation prior to conducting the VER Determination. The Forest Service concedes that "mining activities would adversely affect Red Butte TCP." ECF No. 146-1 at 20. Nevertheless, the Forest Service now takes the position that it did not have *any* Section 106 consultation obligations in connection with the VER Determination. ECF Doc. 145-1 at 32 ("The Forest Service Was Not Required to Consult Under Section 106 of the NHPA for the VER Determination"). Additionally, the Forest Service states that even if the VER Determination were invalidated, it would allow mining to go forward without conducting any further NHPA consultation. *Id.* at 23 n.7. This complete abdication of the agency's NHPA obligations must be rejected.

A. The Forest Service Did Have Section 106 Consultation Obligations

The Forest Service's new position that it was not obligated to consult under Section 106 is directly contradicted by the Forest Service's own prior legal analysis and conduct. The Forest Service expressly determined in the Mine Review that it did have obligations under Section 106 in connection with the resumption of mining activity, albeit under the more abbreviated requirements of Section 800.13(b)(3). AR Doc 533 at 10602-04. The Forest Service also sent letters to the tribes and the ACHP purporting to "initiate" the NHPA consultation process. AR Doc. 531 at 10544; AR Doc 539 at 10690. The Forest Service's inconsistent legal positions show that the agency has failed to understand its NHPA obligations and has acted arbitrarily and capriciously.[20]

[20] The Forest Service's newly asserted position that it did not have any Section 106 consultation obligations in connection with the resumption of mining activity, and that it would refuse to engage in further consultation even if the VER Determination were invalidated (ECF Doc. 146-1 at 23 n.7, 32-35), shows that the Forest Service's prior representations to the Tribe regarding NHPA consultation were false. *See, e.g.,* AR Doc 539 at 10690 ("The Kaibab National Forest would like to enter into government-to-government consultation with you pursuant to 36 CFR 800.13(b) of the [NHPA]."). This failure to consult with the Tribe in good faith is itself a violation of the agency's obligations under NHPA. *See* 36 C.F.R. §§ 800.2(c)(ii), 800.3(f)(2), 800.4(b)(1)

The Forest Service's brief also shows a fundamental misunderstanding about when its Section 106 obligations arise. The Forest Service and EFR both argue that the VER Determination did not "trigger" the Forest Service's obligation to consult under Section 106. ECF Doc. 146-1 at 12-13, 33; ECF Doc. 147-1 at 12-14. But it is well established that NHPA imposes a continuing obligation on agencies to preserve historic properties. ECF Doc. 140-1 at 35-36 n.17, 39. As this Court has already recognized, the case law establishes that an agency's NHPA obligations arise when the "Federal agency has opportunity to exercise authority at any stage of an undertaking where alterations might be made to modify its impact on historic preservation goals." ECF Doc. 131 at 13.[21] It is clear that at the time of the VER Determination, the Forest Service did have an opportunity to exercise authority to modify the Canyon Mine's impact on historic preservation goals, as is evident from its own statements in the Mine Review that "*no modification or amendment* to the existing Plan of Operations is *necessary*." AR Doc. 533 at 10592 (emphasis added); ECF Doc. 140-1 at 39. This opportunity for modifications is also evident from the Forest Service's statements to the tribes that it sought to identify potential "mitigation measures" and draft an MOU memorializing these measures. The Forest Service's NHPA obligations were thus "triggered" at the time the Forest Service learned that EFR proposed to restart mining operations.

(requiring that agencies make a "reasonable and good faith efforts" during consultation); *see also Pueblo of Sandia v. U.S.*, 50 F.3d 856, 862 (10th Cir. 1995) (finding that the Forest Service "failed to make the requisite good faith effort" under NHPA by withholding information regarding traditional cultural properties from the SHPO during the consultation process). This "good faith" requirement is reinforced by the obligations under the NHPA regulations that "[c]onsultation with Indian tribes should be conducted in a sensitive manner and respectful of tribal sovereignty" and "must recognize the government-to-government relationship between the Federal Government and Indian tribes." 36 C.F.R. §§ 800.2(c)(ii)(B), (C). Moreover, it is well-established that consultations must be undertaken in a manner consistent with the fiduciary duty that federal agencies owe Indian tribes. *See Pit River Tribe*, 469 F.3d at 788; *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 755 F. Supp. 2d 1104, 1110 (S.D. Cal. 2010).

[21] The Forest Service attempts to distinguish the cases cited by the Plaintiffs and this Court on the grounds this case involves "the Forest Service's one-time approval of a Plan that a private party would implement without requiring further federal involvement." ECF Doc. 146-1 at 34. This is self-evidently false given the Forest Service's extensive continuing involvement in the Canyon Mine, as evident from the VER Determination, Mine Review, and its "consultation" with the Tribes.

The Forest Service's obligation to undertake consultation prior to the VER Determination is further demonstrated by *Pit River Tribe*, which ruled that the BLM was required to undertake a consultation process prior to extending leases to drill and extract geothermal resources in an area of religious significance to Indian tribes, even though there had been prior approval of the project by the agency and there had been no change in the character of the project. ECF Doc. 140-1 at 35; *Pit River Tribe*, 469 F.3d at 787. The Forest Service attempts to distinguish this case based on the erroneous claim that "the VER determination was not required before resumption of mining activities at Canyon Mine." ECF Doc. 146-1 at 34. This Court has already found, based on the Forest Service's own statements and policies, that the VER determination was a "practical if not legal requirement" for resumption of mining activities. ECF Doc. 131 at 7-9; *see also* ECF Doc. 140-1 at 36-37 n.18 (identifying Forest Service statements and policies that support this ruling).

The Forest Service instead relies on *Espy*, a NEPA case, where the court ruled that an agency's transfer of title to lands did not require an EIS because the lands were used for livestock grazing before and after the transfer. ECF Doc. 146-1 at 34. However, unlike that case, where any adverse effects on the environment were completely unchanged by the agency's transfer of title, here the resumption of mining activity represents a significant change from the dormant status of the mine, and this change will adversely affect Red Butte TCP. Furthermore, *Espy* is not an NHPA case, and the court's reasoning is inapplicable in the NHPA context where it is well-established that an agency has continuing obligations to preserve and protect historic properties where an undertaking is continuing.

B. Defendants' Arguments Regarding Whether The VER Determination Is An "Undertaking" Are Misplaced

Defendants also argue that the Forest Service did not have NHPA consultation obligations because the VER determination does not constitute an "undertaking." *See* ECF Doc. 146-1 at 33 ("the VER Determination does not constitute a federal undertaking that triggers NHPA consultation."); *id.* at 34-35 n.10 ("The relevant inquiry

is whether the VER Determination constituted an undertaking. It did not."); ECF Doc 147-1 at 14 (VER Determination didn't trigger NHPA because it's not an undertaking). This argument is mistaken.

The "undertaking" in this case is not the VER Determination, it is the resumption of mining activity at Canyon Mine. ECF Doc. 140-1 at 34-35, 39. The resumption of mining activity is a "project [or] activity" that required a "permit, license or approval" from a Federal agency. *See* 36 C.F.R. § 800.16(y) (defining the term "undertaking"). Even if the resumption of mining activity was not considered a "new" undertaking, moreover, as the Forest Service contends, the Canyon Mine constituted an ongoing undertaking that required continued compliance with NHPA. ECF Doc. 140-1 at 35-36 n.17, 39. The Forest Service's arguments that the VER Determination was not an undertaking are therefore misplaced and irrelevant to the agency's NHPA obligations.[22] Indeed, the Forest Service's brief repeatedly admits that there was an "undertaking" that was "approved," although the Forest Service does not specify what the "undertaking" was. ECF Doc. 146-1 at 19, 36.[23] The Forest Service's argument that the VER Determination is not an "undertaking" because it is not a "major federal action" are similarly inapposite because no party to this action claims that the VER Determination was the relevant undertaking. ECF Doc. 146-1 at 33.

The Forest Service's misunderstanding of the applicable regulations is further evident when it argues that "the VER Determination does not constitute a federal undertaking . . . because it is not a 'Federal permit, license or approval.'" ECF Doc. 146-1 at 33. This argument conflates an "undertaking" with a "permit, license or approval," which are distinct concepts under the regulation. *See* 36 C.F.R. § 800.16(y) (defining an "undertaking" as a project, activity or program "*requiring* a Federal permit, license or approval") (emphasis added); *Sheridan Kalorama Hist. Assoc. v. Christopher*,

[22] The Forest Service also contends that the VER Determination is not an "undertaking" because it "has no direct effect on the historic property," ECF Doc. 146-1 at 33, but the resumption of mining *would* have a direct effect on the historic property, which further demonstrates that the mining activity is the relevant undertaking.

[23] In places, the Forest Service appears to acknowledge that Canyon Mine is the undertaking. *See* ECF Doc. 146-1 at 13 ("Because *Canyon Mine* was already approved . . . following 36 C.F.R. § 800.13(b)(3) was appropriate.") (emphasis added).

49 F.3d 750, 754 (D.C. Cir. 1995) ("federal authority to fund or license a project can render the project an undertaking, but the decision of the funding or licensing agency is not itself an undertaking"). The VER Determination was a "permit, license or approval," because, as this Court has already found, it "allowed" mining operations to resume, but the "undertaking" is the mining activity. *See* ECF Doc. 140-1 at 34.[24]

Finally, the Forest Service also makes the remarkable claim that it was "exempted from any Section 106 requirements" in connection with the VER Determination under a Regional Programmatic Agreement. ECF Doc. 146-1 at 34. The Forest Service cannot contract away its statutory consultation obligations, especially in an agreement to which no tribe is a party. Additionally, the Regional Programmatic Agreement expressly provides that "mine operating plans" are "undertakings subject to standard consultations." AR Doc. 360 at 6832. Thus, this contract, to which the Forest Service is a party, removes any doubt that the resumption of mining activity at Canyon Mine is an undertaking and requires a "standard consultation."

For all of these reasons, the Forest Service's argument that it has no Section 106 consultation obligations must be rejected. As detailed in Plaintiffs' opening brief, the Forest Service was obligated to undertake a full Section 106 consultation with the Tribes and failed to do so. *See* ECF Doc. 140-1 at 34-40.[25]

VI. The Forest Service Incorrectly Applied the Limited and Expedited 800.13(b)(3) Process

Plaintiffs' Third Claim is that the Forest Service's decision to apply Section 800.13(b)(3) was a violation of the regulations, and the Forest Service failed to even comply with these regulations. *See* ECF Doc. 115 at ¶¶ 84-88.[26] The Forest Service

[24] The Forest Service also incorrectly suggests that its NHPA obligation was somehow dependent upon whether NEPA applied. *See* ECF Doc. 146-1 at 34 ("Because NEPA was not required, NHPA consultation was also not required."). NHPA and NEPA are separate obligations and the obligation to comply with NHPA Section 106 is independent from, and not dependent upon, its NEPA duties.

[25] This was not an isolated incident. As described in Plaintiffs' opening brief, the Administrative Record reveals a second incident in which the Forest Service completely failed to consult with the tribes until after it had already given approval to a project. ECF Doc. 140-1 at 38 n.22.

[26] The distinction between Plaintiffs' NHPA claims is that the Second Claim asserts that the Forest Service was required to and failed to undertake a full consultation under the ordinary Section 106 process, whereas the Third Claim asserts that even accepting

responds with the conclusory statement that its "application of Section 800.13(b)(3) was proper and should be upheld," but this assertion must be rejected. ECF Doc. 146-1 at 37. Among other reasons, the claim that the Forest Service's acted properly in applying Section 800.13(b)(3) is contradicted and repudiated by the Forest Service's own argument that it actually did not have any Section 106 consultation obligations.

A. Section 800.13(b)(3) Did Not Apply

As shown in Plaintiffs' opening brief, even if one were to accept the Forest Service's legally erroneous position that Red Butte TCP was an after-discovered historic property, it was not proper for the Forest Service to apply Section 800.13(b)(3). ECF Doc. 140-1 at 40-43. Among other reasons, this is an "*emergency measure* to ensure historic properties are not inadvertently damaged *during project implementation*," as the Forest Service stated in its own Mine Review. *Id.* at 34-35; AR Doc. 533 at 10603 (emphasis added); *see also* ECF Doc. 140-1 at 40-41. The Forest Service now admits that expedited action was not required in this case. *See* ECF Doc. 146-1 at 36 ("review did not have to be expedited as in other situations where subsection (b)(3) is used"). This alone demonstrates that the application of this emergency provision was not consistent with the purpose of this provision and was improper.[27] The Forest Service had the opportunity to conduct a full consultation, which would have furthered the NHPA's goals to preserve historic properties.

Section 800.13(b)(3) also does not apply here because it requires that the agency has already "approved the undertaking" and "completed the section 106 process," neither of which had occurred when the Forest Service learned of EFR's intention to

---

the Forest Service's legally erroneous position that there was an after-discovered historic property under Section 800.13(b), the Forest Service erred in applying 800.13(b)(3) rather than 800.13(b)(1), which would have also required a full consultation. EFR argues that "the entire subsection" of Section 800.13(b) was not triggered because there was no "discovery," as contemplated by the regulations. ECF Doc. 147-1 at 14-15. This argument just further supports Plaintiffs' Second Claim that the Forest Service should have followed the full Section 106 consultation process.

[27] The Administrative Record shows that the Forest Service recognized that this provision was "not a great fit," ECF Doc. 140-1 at 43 (quoting AR Doc. 800 at 10389), but the Forest Service was determined to apply it anyway to avoid conducting a full Section 106 process, as would have been required had it applied Section 800.13(b)(1).

resume mining operations. ECF Doc. 140-1 at 42-43.[28] The history of the Section 800.13(b)(3) regulations also confirms that this provision was not intended to apply where there was an opportunity for a full consultation. *Id*. at 41-42. EFR's brief even acknowledges that this history shows that ACHP was concerned about providing "the flexibility to complete full consultation." ECF Doc. 147-1 at 15.[29] This history is consistent with the ACHP's advice to the Forest Service, AR Doc. 565 at 11335, and Plaintiffs' opening brief (ECF Doc. 140-1 at 41-42) cites numerous authorities showing the ACHP is entitled to deference in interpreting its regulations.[30]

The Forest Service's argument that Section 800.13(b)(3) applies relies heavily on the phrase "construction has commenced." ECF Doc 146-1 at 35, 36 n.11, 37. But this phrase does not mean that the emergency procedures of Section 800.13(b)(3) automatically apply every time any amount of construction has occurred, even if construction was subsequently halted and suspended for over twenty years. Such an interpretation is inconsistent with the purpose of this provision, the broader goals of the NHPA to preserve historic properties, the history of the regulations, and the advice of the ACHP. *See* AR Doc. 565 at 11335 (Section 800.13(b)(3) is intended to apply where "construction activities have begun *and would be ongoing*") (emphasis added). Accordingly, it was improper for the Forest Service to apply Section 800.13(b)(3).

---

[28] The Forest Service does claim that an "undertaking had already been approved," apparently in reference to the original ROD approving of the Canyon Mine. ECF Doc. 146-1 at 19. As described above, however, the relevant undertaking was the resumption of mining activity, and the approval was the VER Determination, which allowed mining to proceed. Thus, the undertaking had not yet been approved at the time that the Forest Service learned of EFR's intention to restart the mine.

[29] EFR's suggestion that this concern was limited to cases where construction had not yet started is squarely refuted by the history of this provision, which was originally titled "Resources discovered *during construction*," and later renamed "Properties discovered *during implementation* of an undertaking." ECF Doc. 140-1 at 41 (emphasis added).

[30] The Forest Service argues in a footnote that the ACHP's interpretation should "not be viewed as ACHP's final word regarding the NHPA regulations," citing a self-serving declaration of Forest Service employee Margaret Hangan. ECF Doc. 146-1 at 37 n.12. In fact, the ACHP has never changed its view that Section 800.13(b)(3) was not intended to apply to situations where expedited action was not required, and that view is consistent with the history of the regulations that it promulgated. There was also no "misinformation" in the ACHP's letter, notwithstanding Hangan's refusal to disclose key facts when seeking advice from the ACHP. *See* ECF Doc. 140-1 at 41-42 n.23.

B. The Forest Service Did Not Follow the Section 800.13(b)(3) Procedure

The Forest Service also makes conclusory assertions that it "properly followed" and "properly applied" Section 800.13(b)(3), but the agency fails to demonstrate that any of the regulatory requirements of this process were met. ECF Doc. 146-1 at 35-37. The Forest Service does not even identify the regulatory requirements, and instead makes only vague assertions that it "worked with the tribes to identify actions to address their concerns." *Id.* at 9. Periodic meetings and cursory information sessions do not meet the required "government-to-government" consultation required under Section 106. ECF Doc 140-1 at 37 n.20.

Plaintiffs' opening brief details numerous ways in which the Forest Service failed to comply with the procedures required under Section 800.13(b)(3). ECF Doc 140-1 at 43-45. Among other things, the Forest Service was permitted to take unilateral action to avoid or mitigate adverse effects to historic properties, but the Forest Service took no such action and instead falsely informed the tribes that the only mitigation measures that would occur are those voluntarily undertaken by EFR. *Id.* at 44. EFR admits that "additional mitigation measures regarding Red Butte have not been required." ECF Doc. 147-1 at 20. The Forest Service also asserts that it "went above and beyond" the regulatory requirements by providing the tribes with 30 days for comments, rather than 48 hours, ECF Doc. 146-1 at 35, but Plaintiffs have already shown that this was itself a violation of the Section 800.13(b)(3) procedures and a demonstration that this expedited process was unnecessary and inapplicable. ECF Doc. 140-1 at 44. The Forest Service also allowed mining operations to resume during this extended consultation period, contrary to the advice of the ACHP, AR Doc. 656 at 12346, and this extension actually helped ensure that mitigation measures would *not* be implemented until it was too late to prevent adverse effects. EFC Doc. 140-1 at 44-45.

Even if the Forest Service had complied with the Section 800.13(b)(3) procedures, it would not have satisfied the agency's NHPA obligations because, as described above, a full Section 106 consultation was required. However, the Forest Service's complete failure to comply with these procedures is significant because it

undermines the Forest Service's claims that this provision was applicable, and it strongly indicates that the Forest Service relied on this provision solely to avoid undertaking a full Section 106 consultation. ECF Doc. 140-1 at 45. The Forest Service's new assertions that it did not have any Section 106 obligations at the time of the resumption of mining activity (ECF Doc. 146-1 at 32) further confirms that the decision to apply Section 800.13(b)(3) was not made in good faith. For all of these reasons, the Forest Service failed to comply with its obligations under the NHPA.

VII. The Court Should Vacate the VER Determination And Issue An Injunction

As set forth in Plaintiffs' opening brief (ECF Doc. 140-1 at 46), the Court should vacate and remand the unlawful VER Determination. *See* 5 U.S.C. § 706(2). The Court should also order the Forest Service to comply with NEPA and undertake a full NHPA Section 106 consultation process prior to completing a VER determination and allowing mining activities to resume at Canyon Mine. *See id*. § 706(1).

Vacatur provides the normal remedy in this type of case, required under the APA. 5 U.S.C. § 706 (courts "shall" … set aside" unlawful agency actions); *see Tinoqui–Chalola Council of Kitanemuk & Yowlumne Tejon Indians v. U.S. Dep't of Energy,* 232 F.3d 1300, 1305 (9th Cir. 2000). "In all cases agency action must be set aside if the action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *FCC v. NextWave Pers. Commc'n,* 537 U.S. 293, 300 (2003). The Forest Service, however, argues for an exception to vacatur without detailing the reasons why the APA's general rule should not apply here. *See Cal. Communities Against Toxics v. EPA*, 688 F.3d 989, 992, 994 (9th Cir. 2012) (noting "we have only ordered remand without vacatur in limited circumstances").[31] Nonetheless, vacatur of the VER Determination is warranted here, because the Forest Service committed serious legal errors by failing to comply *at all* with NEPA procedures and the NHPA consultation process, and by skewing its validity determination by ignoring relevant costs. These legal errors will allow mining to occur in an area that has been withdrawn from the

[31] *See id* at 994 (not vacating because doing so would impact region's power supply): *Idaho Farm Bureau v Babbitt*, 58 F.3d 1392, 1405-06 (9th Cir. 1995) ("leaving the listing rule in place while FWS remedies its procedural error").

Mining Law, wherein the Department of the Interior determined that uranium mining presents a significant risk to invaluable resources, including the culturally-rich Red Butte TCP. And, because EFR has stopped operations at Canyon Mine for business reasons, vacating the VER Determination would not have "disruptive consequences." *See Cal. Communities Against Toxics*, 688 F.3d at 992.

Plaintiffs also request that the Court enjoin further mining activities at Canyon Mine pending the Forest Service's full compliance with the law. *See Pit River Tribe*, 469 F.3d at 779; *Rogue Riverkeeper v. Bean*, No. 1:11-CV-3013-CL, 2013 WL 1785778, at *3 (D. Or. Jan. 23, 2013) (enjoining mining activity until defendant complies with environmental statutes); *Colo. Envtl. Coal. v. Office of Legacy Mgmt.*, 819 F. Supp. 2d 1193, 1223-24 (D. Colo. 2011) (staying uranium mining leases pending NEPA compliance). Plaintiffs satisfy the four-part test for injunctive relief. *See Monsanto v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010). Plaintiffs have already shown, and the Court has found, that a likelihood of irreparable injury if mining proceeds. ECF Doc. 86 at 6. It is implicit in this ruling that there are no remedies at law that would compensate Plaintiffs for injuries to their environmental and cultural interests if mining resumes, and Plaintiffs do not seek any monetary relief. Moreover, other available remedies, including vacatur, are inadequate to prevent Plaintiffs' injuries because the Forest Service has made clear that it would not comply with NEPA and NHPA even if the VER Determination was invalidated. ECF Doc. 146-1 at 23 n.7. The balance of harms also tips sharply in Plaintiffs' favor, as the financial harms identified by EFR at the preliminary injunction stage (which, it is now clear, were overstated) are no longer applicable because EFR has shut down the mine indefinitely. ECF Doc. 96-1 at 3. The public interest would be not be disserved by injunctive relief; instead, the public interest is served by ensuring compliance with federal laws. *Alliance for the Wild Rockies*, 632 F.3d at 1138.[32] As a result, an injunction against mining activities is warranted.

[32] The public interest in an injunction is supported by the Withdrawal, which was the result of public concern about the impacts of uranium mining in this area and was supported by the Forest Service for this same reason. *See Yount*, 2014 WL 4904423, at *1, *25.

Respectfully submitted,

December 19, 2014

/s/ Neil Levine
Neil Levine
Marc Fink
Roger Flynn

Attorneys for Plaintiffs *Grand Canyon Trust, Center for Biological Diversity and Sierra Club*

/s/ Richard Hughes
Richard Hughes

Attorney for Plaintiff
Havasupai Tribe

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2014, I filed a true and exact copy of PLAINTIFFS' COMBINED REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT with the Court's CM/ECF system, which will generate a Notice of Filing and Service on the following:

Jared S. Pettinato
United States Department of Justice
Environment & Natural Resources Division
Natural Resources Section
P.O. Box 7611, Room 2121
Washington, D.C. 20044-7611

Attorney for Federal Defendants

David J DePippo
Hunton & Williams
Riverfront Plaza, East Tower
951 E. Byrd Street
Richmond, VA 23219

Michael K Kennedy
Bradley Joseph Glass
Gallagher & Kennedy PA
2575 E Camelback Rd., Ste. 1100
Phoenix, AZ 85016-9225

Attorneys for Defendants-Intervenors

/s/ Richard Hughes