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

Grand Canyon Trust;
Center for Biological Diversity;
Sierra Club; and
Havasupai Tribe,

Plaintiffs,

v.

Michael Williams, Forest Supervisor,
Kaibab National Forest; and
The United States Forest Service, an
Agency in the U.S. Department of
Agriculture,

Defendants,

and

Energy Fuels Resources (USA) Inc.; and
EFR Arizona Strip LLC,

Defendant-Intervenors.

No. CV 13-8045-PCT-DGC

Judge David G. Campbell

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

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Table of Authorities

Cases

Statutes

Regulations

ACRONYMS

ACHP	The Advisory Council on Historic Preservation
APA	Administrative Procedure Act, 5 U.S.C. §§ 701-706
ARxxxx	Forest Service Administrative Record citation to page xxxx
The BLM	The Bureau of Land Management
Energy Fuels	Energy Fuels Resources (USA) Inc. and EFR Arizona Strip LLC
FEIS	The Canyon Uranium Mine Plan Final Environmental Impact Statement (FEIS).
FS Br.	Fed. Defs.' Combined Mem. in Supp. of Cross-Mot. for Summ. J., ECF No. 146-1.
NEPA	The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347
NHPA	The National Historic Preservation Act, 16 U.S.C. §§ 470 to 470x-6 (recodified in scattered sections of 54 U.S.C. Part 300000, Pub. L. No. 113-287)
MTD Order	Order on Mot. to Dismiss, ECF No. 131
PI Order	Order on Pls.' Mot. for Prelim. Inj., ECF No. 86
Pls.' Br.	Pls.' Mem. in Supp. of Mot. for Summ. J., ECF No. 140-1
Pls.' Reply	Pls.' Combined Reply in Supp. of Pls.' Mot. for Summ. J., ECF No. 151.
The Plan	Energy Fuels's Plan of Operation (the Plan) for Canyon Uranium Mine
Red Butte	Red Butte Traditional Cultural Property
ROD	The Plan Record of Decision
The Tribe	Havasupai Tribe
VER Report	The mineral report on whether Energy Fuels has valid existing mineral rights at the mine, AR10482
The Withdrawal	The Department of the Interior's 2012 decision to withdraw the land underlying the Canyon Mine from location and entry under the 1872 Mining Law, AR10308

CHRONOLOGY

Oct. 1984	Energy Fuels Nuclear, Inc., (Energy Fuels) submitted to the Forest Service its Plan of Operation (the Plan) for Canyon Uranium Mine. Admin. R. (AR) 470.
Aug. 1986	The Forest Service issued the Plan Final Environmental Impact Statement (FEIS). AR461.
Sept. 1986	The Forest Service issued the Record of Decision (ROD) that approved the Plan. AR929.
Nov. 7, 1986	Energy Fuels began surface development of Canyon Mine. AR2637.
Nov. 6-13, 1986	The Havasupai Tribe and others administratively appealed from the ROD. *See, e.g.*, AR2680; AR2602; AR2616; AR2619; AR2648; AR2652.
Nov. 21, 1986	The Deputy Regional Forester granted a partial stay based on appeals of the ROD. AR3071. It allowed development activities required prior to shaft sinking. *Id.*
June 9, 1988	The Forest Service Associate Deputy Chief denied the appeals. AR5246.
June 17, 1988	The Havasupai Tribe (the Tribe) and some individuals sued the United States. AR5870 (docket).
Apr. 1990	This Court upheld the ROD. *Havasupai Tribe v. United States*, 752 F. Supp. 1471 (D. Ariz. 1990).
Aug. 1991	The United States Court of Appeals for the Ninth Circuit upheld this Court. *Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991).
Mar. 1992	The United States Supreme Court denied the Tribe's petition for a writ of certiorari. *Havasupai Tribe v. Robertson*, 503 U.S. 959 (1992).
By Oct. 27, 1992	Energy Fuels put Canyon Mine in standby mode because the price of uranium dropped. AR10594; AR5861.
Oct. 30, 1992	Congress amended the National Historic Preservation Act (NHPA) to expand tribal consultation. *See* NHPA Ams. of 1992, Pub. L. No. 102-575, 106 Stat. 4753 (Oct. 30, 1992) (codified in scattered sections of 16 U.S.C. Part 300000, Pub. L. No. 113-287).
2010	The Forest Service determined the Red Butte Traditional Cultural Property (Red Butte) was eligible for the National Register. AR8011.
Sept. 13, 2011	Denison Mines sent a letter to the Kaibab Forest Supervisor in which it stated that it intended to resume operations at Canyon Mine. AR8611-12.
Sept. 19, 2011	The Forest Service informed the Havasupai Tribal Council that the mining company intended to reactivate the mine. AR10276-77.
Nov. 1, 2011	Denison Mines informed the Forest Service it would not change the Plan. AR10241-44.
Jan. 9, 2012	The United States Department of the Interior issued its Withdrawal Record of Decision. AR10308.
Apr. 18, 2012	The Forest Service completed the VER Report for Canyon Mine. AR10482.
June 25, 2012	The Forest Service concluded it need complete no further environmental analysis under the National Environmental Policy Act. AR10592. It informed the Tribal Chairman, and other consulting parties, it was starting government-to-government consultation under the NHPA for Red Butte. AR10690.
Mar. 2013	The Forest Service summarized its NHPA consultation activities with tribes over the Red Butte Traditional Cultural Property. AR12387-89.

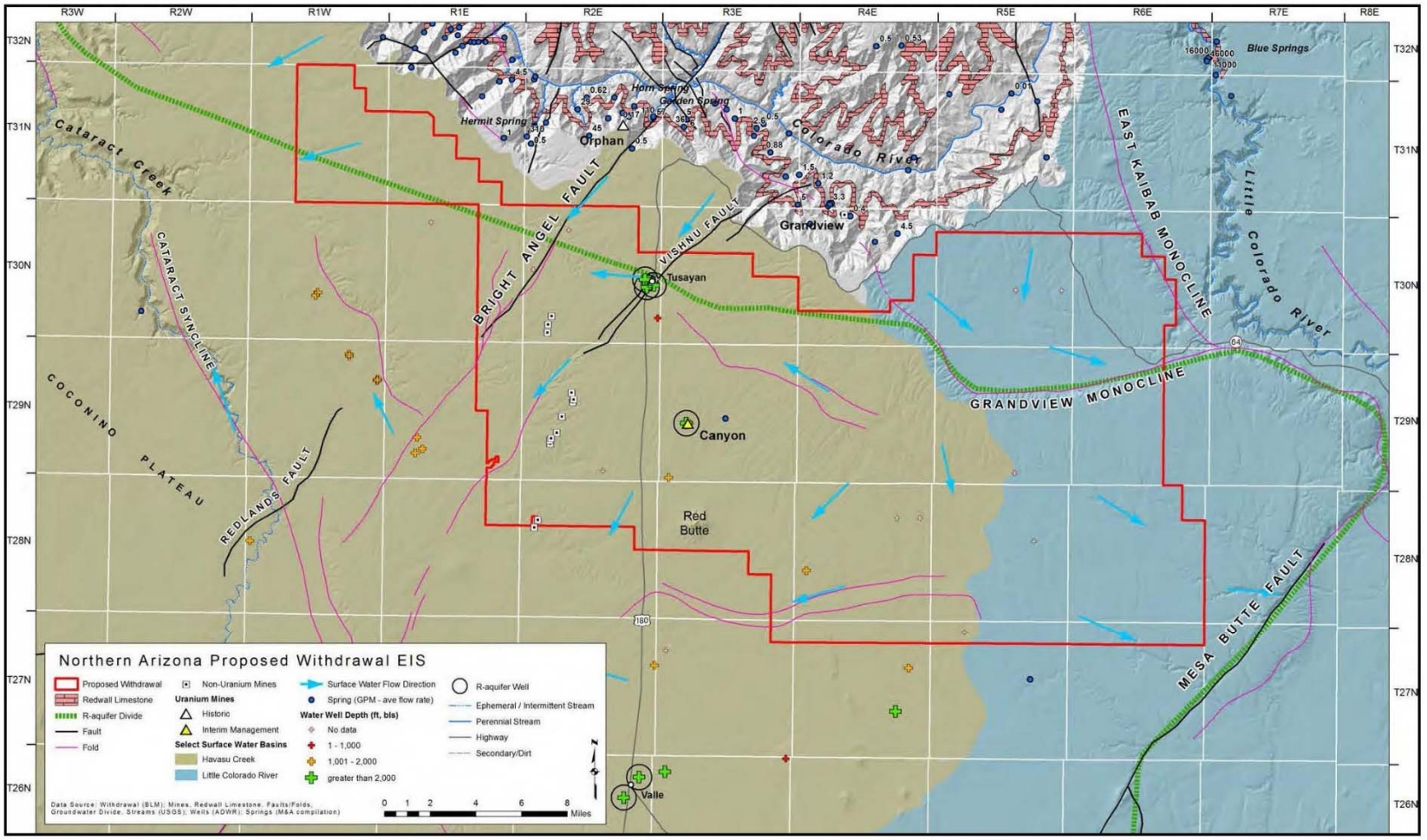
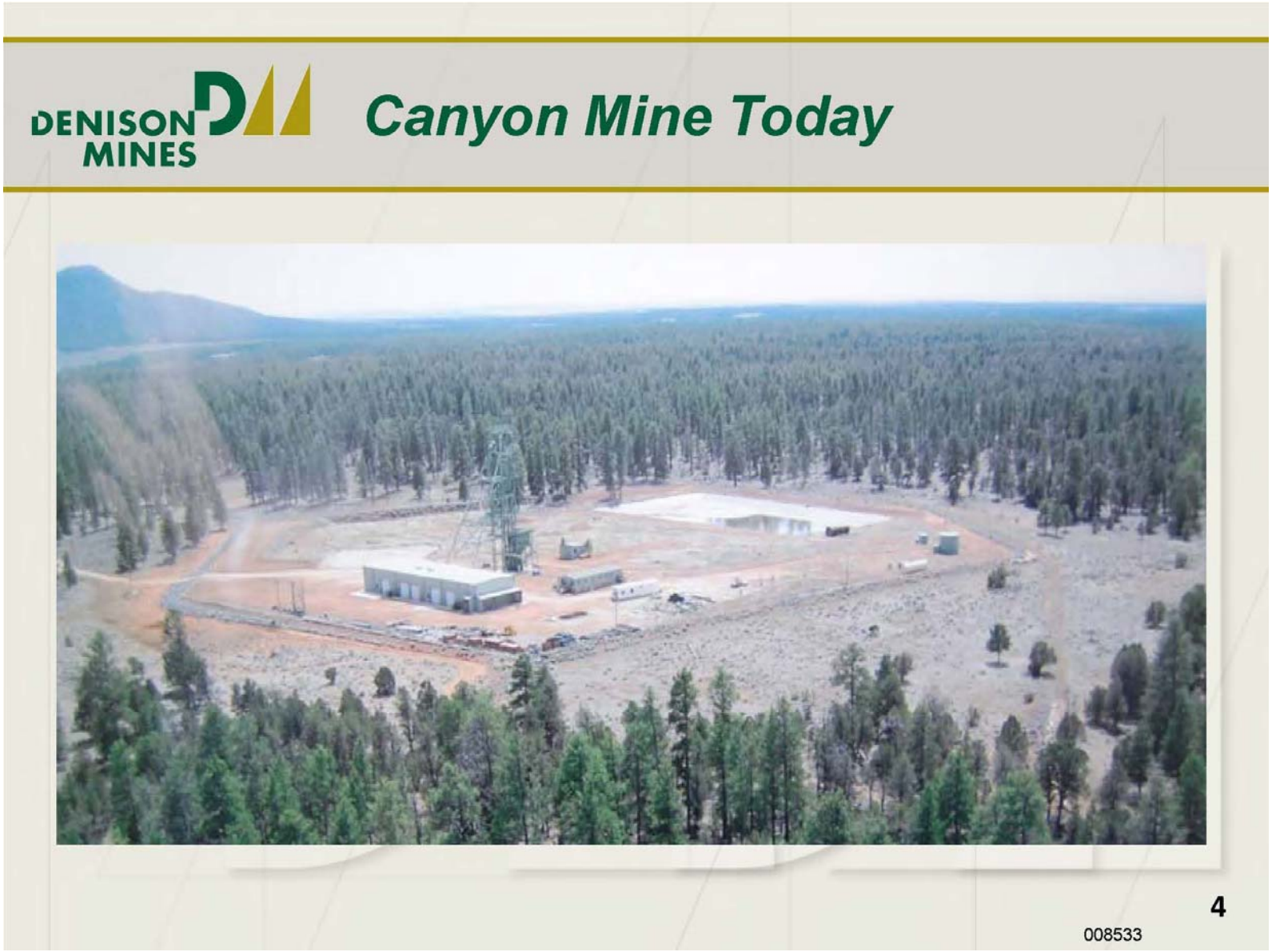


Figure 3.4-13. Hydrologic features for South Parcel.

009197

Canyon Mine Location Map, Admin. R. (AR) 9197



Picture of Canyon Mine, AR8533 (Aug. 22, 2011)

INTRODUCTION

Over twenty years ago, this Court and the United States Court of Appeals for the Ninth Circuit held that the Forest Service complied with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4347, and various other statutes when it approved the mining company's plan of operations for the Canyon Mine (the Plan). *See Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991) (per curiam). The Forest Service made no new final agency action that this Court can review. Now, Plaintiffs seek a backdoor procedural challenge to attempt to reopen that 1988 final agency action as a means to stop Energy Fuels Resources (USA) Inc. and EFR Arizona Strip LLC (collectively, "Energy Fuels"), from reactivating the mine. Those claims have no merit.

Plaintiffs assert that, before the Forest Service could allow reactivation, it had to issue a mineral report on whether Energy Fuels has valid existing mineral rights at the mine (the VER Report, Admin. R. (AR) 10482). But Plaintiffs identify no statute or regulation supporting that proposition. Instead, the 1988 Plan approval allows Energy Fuels to mine, and 36 C.F.R. § 228.13(c) allows mining operations to "cease[] temporarily" without a new federal permit, license, or decision. NEPA and the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470 to 470x-6 (recodified in scattered sections of 54 U.S.C. Part 300000, Pub. L. No. 113-287), do not require the Forest Service to re-analyze or re-consult on the 1988 Plan. The Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706 entitles the Forest Service to summary judgment and to a denial of Plaintiffs' motion.

ARGUMENT

I. The Forest Service reasonably completed the VER Report.

A. Plaintiffs lack standing to challenge the VER Report.

The Court may not consider Plaintiffs' claims because they lack standing to challenge the VER Report. In their opening brief, Plaintiffs claimed they had established standing to challenge the VER Report based on (a) their procedural injuries, (b) the Havasupai Tribe's (the Tribe) traditional and religious interest in Red Butte Traditional Cultural Property (Red Butte), and (c) injury to Plaintiffs' enjoyment of the Kaibab National

Forest and the Grand Canyon National Park from the "mineshaft . . . drain[ing] perched aquifers and degrad[ing] regional springs." Order on Pls.' Mot. for Prelim. Inj. 6 (PI Order), ECF No. 86 (cited by Pls.' Mem. in Supp. of Mot. for Summ. J. 7 (Pls.' Br.), ECF No. 140-1). In response, the Forest Service explained that even setting aside the VER Report would not stop Plaintiffs' alleged harms because no statute or regulation required the VER Report before mining resumed. Fed. Defs.' Combined Mem. in Supp. of Cross-Mot. for Summ. J. 12 n.7 (FS Br.), ECF No. 146-1. In reply, Plaintiffs now contend their injuries "stem directly from the [VER Report]," and if the Forest Service had completed additional NEPA and NHPA processes, it "may have reached a different validity conclusion," or may have "precluded mining altogether at Canyon Mine due to the Withdrawal . . . ." Pls.' Combined Reply in Supp. of Pls.' Mot. for Summ. J. 2-4 (Pls.' Reply), ECF No. 151.

Plaintiffs' reply illuminates the crux of the matter: they lack zone-of-interest and third-party standing to challenge the VER Report because the 1872 Mining Law, Act of May 10, 1872, 17 Stat. 91 (codified as amended at 30 U.S.C. §§ 22-54), that prompted the report only gives miners rights. With that law, Congress did not intend to allow strangers to title like Plaintiffs to challenge miners' rights as the agency decided them.

Plaintiffs must "demonstrate standing for each claim [they] seek[] to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). The APA waives sovereign immunity only for "[a] person . . . adversely affected or aggrieved by agency action *within the meaning of a relevant statute* . . . ." 5 U.S.C. § 702 (emphasis added). Under the zone-of-interests test, courts ask "whether this particular class of persons has a right to sue under this substantive statute." *Lexmark Int'l., Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014) (quotations and alterations omitted). Plaintiffs have no "right of review" if their "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Secs. Industry Ass'n*, 479 U.S. 388, 399-400 (1987). Congress intended the 1872 Mining Law to protect miners who assert their

mining interests against others who claim rights in those lands. *See United States v. Coleman*, 390 U.S. 599, 602 (1968) ("The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense.").

Here, Plaintiffs assert no claim to the minerals, and no outcome from the VER Report could give them ownership. The VER Report analyzed only whether Energy Fuels possessed a "valuable mineral deposit" under the 1872 Mining Law. *See* 30 U.S.C. § 22; AR10483. Plaintiffs' purported injuries arise not from Energy Fuels's mining rights but from unrelated interests. They have no right to challenge the VER Report's substance because they are not within the 1872 Mining Law's zone of interests. *See High Country Citizens Alliance v. Clarke*, 454 F.3d 1177, 1186-92 (10th Cir. 2006) ("Congress has not chosen to amend the 1872 Mining Law to provide Plaintiffs with a right of action.").

Moreover, a plaintiff "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). As strangers to the title, Plaintiffs lack third-party standing to challenge any mineral rights ownership issues between the Forest Service and Energy Fuels. *See High Country Citizens*, 454 F.3d at 1186-92; *Raypath, Inc. v. City of Anchorage*, 544 F.2d 1019, 1021 (9th Cir. 1976). Because Plaintiffs lack standing to challenge the VER Report, this Court lacks jurisdiction to rule on their claims.

B. The VER Report is not a final agency action that Plaintiffs can challenge.

Federal Defendants' opening brief respectfully disagreed with the Court's opinion, and elucidated how practical effects do not satisfy the second prong of the final agency action test in *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).[1] FS Br. at 10-12. Through the VER Report, the Forest Service obtains its experts' opinions on whether a miner claims valuable mineral rights, so the Forest Service can decide whether to contest that

[1] There, the Supreme Court held that final agency actions "mark the consummation of the agency's decision making process," and include actions "by which rights or obligations have been determined or from which legal consequences will flow." *Id.* at 177-78 (quotations omitted).

claim. *Id.* at 13-14 (quoting the Order on Mot. to Dismiss 11 (MTD Order), ECF No. 131). In response, Plaintiffs argue that the law of the case prevents this Court from revisiting this issue. Pls.' Reply 5 (citing MTD Order 11). It does not.

Under that doctrine, a court's decision on a rule of law "should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). Courts, however, may use their discretion in applying that doctrine to their own earlier rulings. *United States v. Bainbridge*, 746 F.3d 943, 950 n.8 (9th Cir. 2014). A court may "depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice." *Arizona*, 460 U.S. at 619 n.8. Here, the Court expressed uncertainty on whether the VER Report had any legal effect. MTD Order 9. The VER Report had none, and injustice could result if the Court does not revisit the decision. Moreover, "[s]ubject-matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt," as here. *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009).

When deciding the motion to dismiss, this Court did not have the benefit of the Ninth Circuit's analysis in *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1095 (9th Cir. 2014) (decided two days after the Court's MTD Order). The VER Report had no legal effect or function. Although the Ninth Circuit views finality in a "pragmatic and flexible manner," only actions with specific "functions" qualify as final agency actions. *Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982, 985 (9th Cir. 2006) (quotations omitted). A mere pragmatic effect has no specific function. The Ninth Circuit recognized, for example, that "an agency determination that certain property contains wetlands subject to the Clean Water Act is not a reviewable action under the APA, because that decision does not determine rights or obligations from which legal consequences will flow." *Columbia Riverkeeper*, 761 F.3d at 1095. This addresses the very issue at the heart of the Court's decision and weighs in favor of a new decision that no final agency action occurred here. *See id.*

Both (a) an agency analysis of a valuable mineral deposit and (b) an agency analysis of the extent of the waters of the United States provide the agency's experts' factual

conclusions, and neither has effect without further action. *See Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 591 (9th Cir. 2008). At most, the VER Report informs the Forest Service on whether to dispute Energy Fuels's claim to a mineral deposit. Like the determination in *Fairbanks*, it is "a bare statement of the agency's opinion . . . ." *Id.* at 593-94. It does not qualify as a final agency action. *See id.*

Ultimately, mere *analysis* does not qualify as agency *action*. It does not create a "go/no go point of commitment." *See Conner v. Burford*, 848 F.2d 1441, 1448 (9th Cir. 1988). The VER Report only analyzes facts; it takes no action and authorizes none. Accordingly *Columbia Riverkeeper* compels the conclusion that the VER report is not a final agency action. The APA requires the Court to dismiss Plaintiffs' claims.

C. The Forest Service reasonably considered production costs in the VER Report.

Even if Plaintiffs could challenge the VER Report, which they cannot, Plaintiffs failed to demonstrate the Forest Service acted arbitrarily or capriciously. Forest Service specialists analyzed the mine's costs, and decided Energy Fuels could profit. AR10483. Under the APA, the Forest Service does not act arbitrarily or capriciously when it relies on its "own qualified experts." *See Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989) ("an agency must have discretion to rely on the reasonable opinions of its own qualified experts . . . ." (quotations omitted)). If the Court considers this claim, the APA will require it to uphold the VER Report.

Plaintiffs initially argued that the VER Report was deficient because the Forest Service failed to consider the "costs of compliance with environmental and cultural laws," like "monitoring and mitigation actions." Pls.' Br. 11. Plaintiffs claim that the costs would "affect the profitability of the Mine, and thus whether the Canyon Mine mining claims were valid." *Id.* at 13. Energy Fuels explained that the "general and administrative" site operating costs for per ton used in the VER Report incorporated the costs of monitoring and mitigation measures. Energy Fuels' Mem. in Opp'n to Pls.' Mot. for Summ. J. 13, ECF No. 147-1; *see* AR10502. And the Forest Service pointed to a line item in the VER Report listing $1.7 million for unspecified contingencies that would

cover any other monitoring or mitigation costs. FS Br. 28 (citing AR10501).

Plaintiffs argued in reply that the Bureau of Land Management (BLM) Handbook required the Forest Service to include a line-item for every monitoring and mitigation measure cost. Pls.' Reply 9. This argument has no merit. The BLM's handbook does not bind the BLM—and certainly not the Forest Service. *See W. Radio Servs. Co. v. Espy*, 79 F.3d 896, 902 (9th Cir. 1996) (recognizing that courts "have no authority to bind the [Forest] Service to the guidelines in the Manual or the Handbook."); *Clouser v. Espy*, 42 F.3d 1522, 1535 (9th Cir. 1994) ("plaintiffs have cited no authority for the proposition that one agency may promulgate regulations that bind another agency" in deciding "how to treat putative mining claims"). The BLM's guidance is not relevant to considering whether the Forest Service acted arbitrarily or capriciously.

Indeed, whether the VER Report itemized each cost does not undermine the validity of the analysis. A valuable mineral deposit exists when a prudent person could reasonably expect to make money mining that mineral. *See Coleman*, 390 U.S. at 602. As part of its expert analysis, the Forest Service reviewed the mining company's "records and data for the Canyon Mine and claims . . . ." AR10489. The mine would bring in $29 million of profit, AR10505, and the VER Report identified a $1.7 million contingency for capital costs. AR10501-02. Line-items for monitoring and mitigation will not cost $29 million, and the Forest Service relied on that profit in concluding that Energy Fuels could feasibly mine the minerals "at a profit." AR10483. The total costs gave the Forest Service's Certified Review Mineral Examiners a reasonable basis for determining the feasibility of profiting from the mine. *See* AR10483. The APA requires this Court to uphold the Forest Service's VER Report because its analysis is not "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Plaintiffs' fault the VER Report for failing to contain line-item entries for every cost. Pls.' Reply 9. But the APA does not allow a court to second-guess the quantum of information agencies need to make their conclusions. *Lands Council v. McNair*, 537 F.3d

981, 992 (2008) (en banc) (deferring to an agency to identify the "evidence" that "is, or is not, necessary to support" its expert conclusions), overruled on other grounds by *Winter v. NRDC*, 555 U.S. 7 (2008)); *Sierra Club v. Kenna*, No. 1:12-CV-1193 AWI JLT, 2013 WL 144251, 13 (E.D. Cal. Jan. 11, 2013) ("Where the record establishes that these facts were before the [agency] and considered by them . . . the court is in no position to impose a contrary conclusion simply because an opposing party is of the opinion that more proof should have been required."), appeal docketed No. 13-15383 (9th Cir. Feb. 27, 2013). Plaintiffs' flyspecking does not establish the Forest Service's process was irrational.

Plaintiffs also claim the Court cannot uphold the Forest Service's analysis without access to Appendix C to the VER Report, so it can track every single dollar. Pls.' Reply 9-11. But the APA does not require courts to "replicate each calculation contained in the agency's analysis . . . in minute detail . . ." to uphold an agency decision. *Banner Health v. Sebelius*, 945 F. Supp. 2d 1, 28 (D.D.C. 2013); *Common Sense Salmon Recovery v. Evans*, 217 F. Supp. 2d 17, 22 (D.D.C. 2002); *Todd v. Campbell*, 446 F. Supp. 149, 152-53 (D.D.C. 1978) (holding that "[t]here is no general requirement that the agency include in the record the data underlying each factor" an agency considered), aff'd 593 F.2d 1372 (D.C. Cir. 1979). Because the Forest Service's conclusion that Canyon Mine could make a profit lies "within the bounds of reasoned decision making," the APA requires this Court to uphold it. *See Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 105 (1983).

II. NEPA does not apply to the VER Report.

NEPA requires analysis only of major federal actions, and the VER Report did not authorize any new action. Plaintiffs argued initially that mining at Canyon Mine could not resume "but for" the Forest Service issuing the VER Report. Pls.' Br. 15-16. Therefore, Plaintiffs contended, NEPA requires the Forest Service to analyze the consequences of issuing the VER Report, which include the resumption of mining. *Id.* at 15-23. The Forest Service clarified that the VER Report did not authorize mining and that "[m]ining activities could continue with or without a [VER Report], under the existing [Plan]." FS Br. 12-18. Therefore, the VER Report did not qualify as a major federal

action under NEPA. *Id.* In reply, Plaintiffs argue that BLM regulations and the Department of the Interior's 2012 decision to withdraw the land underlying the Canyon Mine from location and entry under the 1872 Mining Law (the Withdrawal), AR10308, require the Forest Service to issue a VER Report before it could allow Energy Fuels to reactivate the mine. Pls.' Reply 15. Plaintiffs argue that the VER Report is a major federal action. Plaintiffs' argument suffers from several fatal flaws. The VER Report was not a but-for cause of reactivated mining operations because no statute or regulation required the Forest Service to determine whether a valuable mineral deposit existed before Energy Fuels reactivated the mine. Moreover, NEPA does not require analysis for every but-for cause of environmental impacts. Plaintiffs have identified no authority that allows them to make a backdoor challenge to the 1988 Plan.

A. No statute or regulation required the VER Report.

No statute or regulation required the Forest Service to determine whether a valuable mineral deposit existed before allowing Energy Fuels to reactivate the mine, and Plaintiffs have identified none. Plaintiffs rely on the Forest Service Manual and a Forest Service letter for that authority. Pls.' Reply 14. Those documents, however, do not bind the Forest Service. *See W. Radio*, 79 F.3d at 902; *see also Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) (recognizing "three boxes" for administrative actions: "legislative rules, interpretive rules, and general statements of policy," and that courts do not review "general statements of policy"). Because no binding obligation required the Forest Service to issue the VER Report before Energy Fuels reactivated the mine, the VER Report is not a but-for cause of the mining.

Plaintiffs point to BLM regulations as requiring a validity determination. Pls.' Br. 15-23; Pls.' Reply 7, 8, 12-16. But those regulations do not bind the Forest Service, either. *See Clouser*, 42 F.3d at 1535. Plaintiffs also rely on the Withdrawal as authority for requiring the Forest Service to complete the VER Report. Pls.' Reply 12. Indeed, the Federal Land and Policy Management Act, 43 U.S.C. § 1714(c)(1), allows the Secretary of the Interior to withdraw federal lands—even Forest Service lands—from the reach of

the 1872 Mining Law. The Secretary did so here, but he explicitly made that Withdrawal "subject to valid existing rights." AR10310. By its own terms, the Withdrawal does not require a VER Report. No statute or regulation required a VER Report. To the contrary, Energy Fuels could have reactivated mining under the Plan at any time without additional Forest Service approvals. The VER Report is not a but-for cause of mining reactivating and cannot be a major federal action.

B. NEPA does not require analysis of all but-for causes of environmental impacts.

Even if the VER Report were a but-for cause of the mining, NEPA did not require the Forest Service to analyze the impacts of reactivating the mine. "[A] 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004). If an agency action is not "proximately related to a change in the physical environment," NEPA requires no analysis. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983). The VER Report was not related to a change in the physical environment—that change happened in the 1988 approval. NEPA required no analysis of the VER Report.

The Forest Service confirmed in the VER Report that a valuable mineral deposit exists underground, AR10482, but that opinion does not cause any environmental impacts. *See Fairbanks*, 543 F.3d at 594 ("the land is what and where it is. The [agency] does not alter that physical reality . . . simply by opining" on its significance.). Only the 1986 Record of Decision (ROD) for the Plan, AR915, and the 1988 Forest Service denials of the administrative appeals, AR5226, proximately caused the environmental impacts Plaintiffs allege. Plaintiffs are far too late to challenge that approval. In the 1986 FEIS (Final Envtl. Impact Statement), AR461, the Forest Service analyzed the Plan's environmental impacts related to haul routes, water diversion, wildlife mitigation, and fire protection, AR517-519, and in the ROD, the Forest Service approved the Plan. AR915. That approval is the "legally relevant cause" of the mining impacts. *See Pub.*

Citizen, 541 U.S. at 769.[2] Plaintiffs identified no decision the Forest Service made based on the VER Report, except a decision *not* to contest Energy Fuels's claim. The Forest Service did not, for example, "affirmative[ly]" extend any leases. *See, e.g.*, *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 787 (9th Cir. 2006).

The affirmative decision approving operations happened in 1988, AR929; AR5246, and NEPA allows no challenge now. Once an agency has approved a regulated project, "there is no ongoing 'major Federal action,'" and the agency's "obligation under NEPA has been fulfilled." *Cold Mountain v. Garber*, 375 F.3d 884, 894 (9th Cir. 2004); FS Br. 14-15 (citing *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085 (9th Cir. 2013)). The Tribe challenged the 1988 approval and lost. The other Plaintiffs never challenged it. And the six-year statute of limitations ran in 1994 for challenges to the Plan. *See* 28 U.S.C. § 2401; *Gros Ventre Tribe v. United States*, 469 F.3d 801, 814 (9th Cir. 2006).

By considering the potential impact of the VER Report on Energy Fuels' ability to undertake mining, one can see further evidence that no major federal action occurred. If the VER Report had demonstrated that no valuable mineral deposit existed for Canyon Mine, the Forest Service could have contested Energy Fuels's claim through Interior's administrative process.[3] FS Br. 13-14. But that scenario did not occur, anyway. The Forest Service relied on its experts and decided not to contest Energy Fuels's mining

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[2] Plaintiffs allege that new evidence of groundwater contamination and California condors returning has arisen, and "[n]one of this new information was addressed in the 1986 [F]EIS." Pls.' Reply 20. Plaintiffs are essentially seeking a supplemental environmental impact statement (EIS), but they cannot obtain relief on this argument. They dropped their supplemental EIS claims in their amended complaint. *Compare* Compl. ¶¶ 71-79, ECF No. 1, with Am. Compl. ¶¶ 70-92, ECF No. 115. In any event, the Ninth Circuit and this Court rejected this precise argument. *Ctr. for Biological Diversity*, 706 F.3d at 1094-95.

[3] "Congress delegated to the Secretary of the Interior the responsibility of determining the validity of mining claims" under the 1872 Mining Law. *Rawls v. Sec'y of Interior*, 460 F.2d 1200, 1200-01 (9th Cir. 1972) (per curiam); 43 U.S.C. §§ 2, 1201; 43 C.F.R. § 4.451-1 ("The Government may initiate contests . . . affecting the . . . validity of any . . . mining claim.").

claims. NEPA does not allow Plaintiffs to challenge the decision not to pursue an administrative process. *See Molokai Homesteaders Co-op. Ass'n v. Morton*, 506 F.2d 572, 580 (9th Cir. 1974) ("The right of the federal government to object to violations of its loan agreements, or its determination not to object, cannot realistically be classified as 'Federal action,' much less 'major' federal action."); *Alaska v. Andrus*, 591 F.2d 537, 541-42 (9th Cir. 1979).

Indeed, the APA also disallows "back door procedural challenges by those who had the opportunity to seek direct review of" completed agency actions "but failed to do so in a timely fashion." *NRDC v. Nuclear Regulatory Comm'n*, 666 F.2d 595, 602 (D.C. Cir. 1981); *see Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) ("regulations and interpretations that have not been reopened by agency action remain at repose and are not newly reviewable."); *Montana v. Clark*, 749 F.2d 740, 744 (D.C. Cir. 1984) ("To permit any complainant to restart the limitations period by petitioning for review of a rule . . . would eviscerate the congressional concern for finality embodied in time limitations on review."); *see Burbank Anti-Noise Group v. Goldschmidt*, 623 F.2d 115, 116 (9th Cir .1980) (per curiam) ("An EIS need not discuss the environmental effects of mere continued operation of a facility."). Practically, if a plaintiff could challenge an agency's decision to leave the status quo, they could challenge any past decision anytime. That result would undermine the six-year statute of limitations in 28 U.S.C. § 2401. The APA does not allow that. The Forest Service is entitled to summary judgment on Plaintiffs' NEPA claims.

III. The Forest Service complied with the NHPA.

A. The NHPA did not require the Forest Service to consult on the VER Report.

Plaintiffs make the same arguments that the NHPA required the Forest Service to consult on the VER Report as they made under NEPA. In Plaintiffs' opening brief, they argued that the Report "permitted" the "resumption of mining activities," and that the NHPA required the Forest Service to consult under the NHPA before issuing it. Pls.' Br. 29. The same principles define NEPA "major federal actions" and NHPA "undertakings,"

Coal. For Underground Expansion v. Mineta, 333 F.3d 193, 197 n.7 (D.C. Cir. 2003), and the same reasoning shows why Plaintiffs' NHPA claims have no merit. *See United States v. 0.95 Acres of Land*, 994 F.2d 696, 698 (9th Cir. 1993). The VER Report does not qualify as an undertaking, and the NHPA required no consultation. FS Br. 12-18.

In reply, Plaintiffs shift direction to admit that they are not challenging the VER Report as an undertaking under the NHPA, and declare they are challenging "the resumption of mining activity" as the relevant undertaking. Pls.' Reply 24. As shown above, however, the only agency action authorizing mining occurred in 1988, and the VER Report is not an undertaking at all. Plaintiffs have again identified only a decision *not* to contest Energy Fuels's claim. This is the same type of backdoor procedural challenge under the NHPA that had no merit under NEPA. The NHPA does not recognize them, either. *See Sheridan Kalorama Historical Ass'n v. Christopher*, 49 F.3d 750, 754, 756 (D.C. Cir. 1995) ("The State Department's failure to disapprove Turkey's proposal may have been a prerequisite to Turkey's project going forward, but it cannot itself be an undertaking within the meaning of the [NHPA].").

Plaintiffs argue that all NHPA undertakings are "ongoing" undertakings, and that the Canyon Mine therefore required "continued compliance with the NHPA." Pls.' Br. 35; Pls' Reply 22-23. This Court, too, recognized that the NHPA may require additional consultation if the agency has some "opportunity to exercise authority at [a] stage of an undertaking where alterations might be made to modify its impact on preservation goals." *See Vieux Carre Prop. Owners, Residents & Assoc., Inc. v. Brown*, 948 F.2d 1436, 1445 (5th Cir. 1991) (quoted by MTD Order 13). In *Vieux Carre*, however, the Army Corps of Engineers's regulations gave it authority to modify its permits in "the public interest." *Id.* at 1443; 33 C.F.R. § 325.7. Here, the Forest Service approved the Plan in 1988 and had no opportunity to exercise further authority. Therefore, NHPA did not require the Forest Service to restart consultations on the whole Plan.

Just as they sought to do under NEPA, Plaintiffs seek to interject the VER Report under the NHPA as an opportunity to exercise authority on the 1988 Plan approval. This

argument has no more force under the NHPA than it had under NEPA. The Ninth Circuit recently rejected a similar back-door procedural challenge under NEPA by some of these Plaintiffs. *Ctr. for Biological Diversity*, 706 F.3d at 1095. Those plaintiffs tried to interject an air control permit decision and a reclamation bond decision as prerequisite "decisions" to resuming approved mining at the Arizona 1 mine. The Ninth Circuit declined to require further environmental analysis of the Arizona 1 mine because it had "been approved[, and the agency's] obligation under NEPA has been fulfilled." *Id.* (quotations and alterations omitted). Here, Plaintiffs seek to use the same tactic to interject the VER Report, AR10482, as a "permit, license, or approval" necessary before the Forest Service "permitted" Energy Fuels to resume mining. Pls.' Br. 28-31 (quoting 36 C.F.R. § 800.16(y)). This attempt at a new procedural backdoor has no more merit. The Forest Service is entitled to summary judgment on Plaintiffs' NHPA claims.

B. The Forest Service complied with the NPHA by consulting on Red Butte.

NHPA regulation 36 C.F.R. § 800.13 applies to post-review discoveries. If an agency has approved an undertaking, if construction has commenced, and if an agency identifies unanticipated impacts on historic properties, Section 800.13(b)(3) requires the Forest Service to send a notice to appropriate Indian tribes, to provide opportunity to respond, to "take into account" any resulting recommendations, and to report on the "appropriate actions" when it completes them. Here, the Forest Service recognized that it designated the Red Butte after mining commenced, and that mining reactivation could have unanticipated effects on Red Butte. AR10601-04. The day on which the Forest Service concluded Section 800.13(b)(3) applied, it sent letters to consulting parties that include the Tribe. *Compare* AR10592, 10603-04 *with* AR10690. Over the next several months, it met in person and exchanged letters with the Tribe, although they reached no agreement. AR12388-39 (consultation timeline).

Plaintiffs initially contended that the Forest Service applied the wrong section because construction had "ceased for over twenty years, and" was "recommenc[ing]." Pls.' Br. 34-36. This Court already concluded that Plaintiffs were unlikely to succeed on the merits

of their claim because, under Section 800.13(b)(3)'s plain language, construction had already "commenced." PI Order 15-17 (citing AR10602); *see* AR8533. In its initial brief, the Forest Service adopted and expanded upon the Court's correct conclusion. FS Br. 24-26. In reply, Plaintiffs argue that the NHPA's purpose, goal, and history, and the advice of the Advisory Council on Historic Preservation (ACHP) weigh in favor of requiring renewed NHPA consultation on the mine's impacts when "construction was subsequently halted and suspended for over twenty years." Pls.' Reply 27. Even if all of those considerations weighed in favor of Plaintiffs' arguments, which they do not, they do not outweigh the plain language of the regulation. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." (citations and quotations omitted)). Contrary to Plaintiffs' arguments, this Court may not "impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good." *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978).

Section 800.13(b)(3) also requires notice to Indian tribes of newly discovered impacts within forty-eight hours of the discovery. Plaintiffs argue that the Forest Service failed to provide that notice on time for the newly discovered impacts on Red Butte. Pls.' Br. 37-39; Pls.' Reply 28-29. The Forest Service's Administrative Record explains that the Forest Service expanded the consultation period because more time would allow for "an adequate discussion or response," "would not result in project delays," and would not "prohibit the company from reinitiating mining." AR10603-04. That decision was reasonable, and it ultimately benefitted the Tribe. *See* 5 U.S.C. § 702 (waiving sovereign immunity only for lawsuits by people "adversely affected or aggrieved by agency action . . . ."). The Forest Service's decision not to abide by the forty-eight-hour notice requirement does not "void" its action. *See Brock v. Pierce Cnty.*, 476 U.S. 253, 260 (1986); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1400 (9th Cir. 1995) (holding that an agency's "failure . . . to act within a statutory time frame does not bar

subsequent agency action absent a specific indication that Congress intended the time frame to serve as a bar.").

Plaintiffs argue the Forest Service's consultation was arbitrary and capricious because the NHPA required "a full Section 106 consultation." Pls.' Reply 28. Congress created the ACHP to advise it, the President, and agencies on historic preservation. *Id.* §§ 201, 202. It also authorized the ACHP to promulgate regulations to implement Section 106. Act of Sept. 28, 1976 § 201(9), Pub. L. No. 94-422, 90 Stat. 1313 (codified as amended at 16 U.S.C. § 470s). The ACHP did so. 36 C.F.R. 800.1-800.16. Therefore, when an agency complies with the ACHP's regulations, it completes its NHPA consultation.

Here, the Forest Service reasonably limited its consultation to the new information that arose on Red Butte. It concluded that "there will be no changes or alterations in effects on historic properties as described at the time of the ROD." AR10602. Because the Plan did not cause any other unanticipated effects, that decision was reasonable. AR10602-06; *see McMillan Park Comm. v. Nat'l Capital Planning Comm'n*, 968 F.2d 1283, 1288 (D.C. Cir. 1992) ("if a project has previously satisfied the § 106 process, then nothing would be gained by further review if there are no new, unconsidered elements presented by the project."). The Forest Service is completing its Section 800.13(b)(3) process, *see* AR12387-89, and thus is complying with its NHPA obligations.[4] The Forest Service is entitled to judgment on Plaintiffs' NHPA claims.

IV. Plaintiffs have established no right to any remedy.

If this Court identifies some flaw in the Forest Service's procedures, the Forest Service respectfully requests the opportunity to brief the scope of an appropriate remedy. Equity requires courts to craft the least drastic remedy that would alleviate demonstrated imminent, irreparable harm to the relief-seeking party—although only harms that the

[4] To be clear, Section 800.13(b)(3) requires no memorandum of agreement to document completion. Allowing Plaintiffs to veto the Forest Service's action, by declining to agree, would expand the NHPA beyond its reach as "a procedural statute" that requires agencies only "to 'stop, look, and listen' before proceeding with agency action." *Te-Moak Tribe of W. Shoshone v. U.S. Dep't of Interior*, 608 F.3d 592, 610 (9th Cir. 2010).

legal violation caused. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 771 (1961); *United States v. BNS Inc.*, 858 F.2d 456, 466 (9th Cir.1988); *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). Further briefing on relief would be most appropriate upon identifying a flaw, if any. *See NRDC v. EPA*, 489 F.3d 1250, 1263 (D.C. Cir. 2007) (Randolph, J., concurring).

At this juncture, Plaintiffs have demonstrated no right to any remedy. They initially claimed the APA entitled them to an automatic injunction. Pls.' Br. 40. The Forest Service demonstrated that Plaintiffs failed to establish entitlement under the Supreme Court's four-factor test. FS Br. 29 (citing *Monsanto*, 561 U.S. at 165-66); *see* 5 U.S.C.§ 702 (leaving courts "the power . . . to . . . deny relief on any other appropriate . . . equitable ground . . . ."). Plaintiffs do not deny that the *Monsanto* test applies, but assert broad irreparable injury without naming it, state that stopping the mining will not harm the United States, and declare its interests lie in the public interest. Pls.' Reply 30.

Plaintiffs are wrong on all points. The Ninth Circuit has recognized that "[r]elief under NEPA should be remedial rather than punitive." *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1022 (9th Cir. 1980). The same rationale applies under the NHPA. Simply because Plaintiffs object to mining does not mean that they are entitled to relief barring reactivation of Canyon Mine. Congress authorized mining like this in the 1872 Mining Law, and courts follow Congress's public policy direction. The Forest Service has analyzed the environmental effects of mining Canyon Mine and consulted on them. Anyway, setting aside the VER Report as Plaintiffs request ultimately would not stop Energy Fuels from reactivating the mine because the Plan ROD already authorizes those operations. The balance of equities weighs in favor of leaving the status quo in place. *See* Fed. Defs.' Mem. in Opp'n to Pls.' Mot. for Summ. J. 22-25, ECF No. 53.

CONCLUSION

Thus, the Forest Service complied with all applicable laws and regulations, and it is entitled to summary judgment on all claims and to a denial of Plaintiffs' motion.

Respectfully submitted, this January 29, 2015,

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2015, I served a copy of Federal Defendants' Reply in Support of Their Cross-Motion for Summary Judgment via CM/ECF on the following counsel:

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