UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 15-15857 (Consolidated with No. 15-15754)

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GRAND CANYON TRUST, *et al*.,
*Plaintiffs-Appellants*

v.

MICHAEL WILLIAMS and UNITED STATES FOREST SERVICE,
*Defendants-Appellees*

ENERGY FUELS RESOURCES (USA), INC., *et al*.,
*Intervenor-Defendants-Appellees*

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On Appeal From The United States District Court
For The District Of Arizona
Case No: 13-8045-DGC

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# OPENING BRIEF OF APPELLANTS GRAND CANYON TRUST, CENTER FOR BIOLOGICAL DIVERSITY and SIERRA CLUB

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## STATEMENT OF JURISDICTION

The United States District Court for the District of Arizona had jurisdiction under 5 U.S.C. §§ 701 *et seq*. and 28 U.S.C. § 1331. Appellants Grand Canyon Trust, Center for Biological Diversity, and Sierra Club (collectively the "Trust"), timely filed a Notice of Appeal on April 27, 2015. ER 53 (Notice of Appeal).[1] This Court has jurisdiction over this appeal of the District Court's denial of the Trust's Motion for Summary Judgment pursuant to 28 U.S.C. § 1291.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. In 2012, through a Valid Existing Rights Determination, the U.S. Forest Service authorized the long-dormant Canyon Uranium Mine (Mine) to conduct operations on public lands that had been formally withdrawn from mining under the Federal Land Policy and Management Act (FLPMA). Was the Forest Service required to conduct a public review of this authorization under the National Environmental Policy Act (NEPA)?

2. Based on their environmental, recreational, cultural and aesthetic interests, do Appellants satisfy the not "especially demanding" zone-of-interest test under the Administrative Procedure Act to challenge the Forest Service's Valid Existing Rights Determination for non-compliance with FLPMA's rules governing land withdrawals?

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[1] The Havasupai Tribe filed Volumes 1-4 of the Excerpts of Record in this consolidated appeal. The Trust has filed Volume 5 with this Opening Brief.

## ADDENDUM STATEMENT

The attached addendum contains pertinent statutes and regulations.

## STATEMENT OF THE CASE

FLPMA authorizes the Department of the Interior (Interior) to withdraw public lands that are otherwise open to mining under the 1872 Mining Law. In 2012, Interior did so for one million acres surrounding Grand Canyon National Park (the "Withdrawal"). The Withdrawal changed the legal status of lands within the Kaibab National Forest, where the Canyon Uranium Mine (Mine) is located. It prohibits new mining claims and requires "valid existing rights" in order to develop existing claims.

The Forest Service approved the Mine's "plan of operations" in 1986, in accordance with its surface mining regulations. Shortly thereafter, the Mine was closed and boarded up. At that time, only some preliminary construction activities had taken place. Its owners later went bankrupt.

The Mine remained dormant until its new owners – Intervenor-Appellee Energy Fuels Resources (Energy Fuels) – announced plans in 2011 to reopen. In response and because of the Withdrawal, the Forest Service initiated an internal analysis and determined in April 2012 that "valid existing rights" are present on the Mine's claims (the "Valid Existing Rights Determination"). This decision authorized Energy Fuels to construct the Mine and extract uranium ore despite the

Withdrawal. Even though it had been twenty-five years since the Mine was initially approved, the Forest Service conducted no new public environmental review of the Mine in connection with this new approval action.

The Trust sued, arguing that this Forest Service authorization of the Mine violated NEPA and FLPMA. More specifically, the Trust argued that the Valid Existing Rights Determination – a prerequisite for the Mine to begin operations on public lands withdrawn under FLPMA – was a "major federal action" requiring a public and agency review under NEPA. The Trust also argued that, in violation of FLPMA and the Withdrawal, the Valid Existing Rights Determination failed to properly account for all of the costs of operating the Mine, including the costs of environmental monitoring and mitigation. The District Court ruled against the Trust on cross-motions for summary judgment. The Court held that the Valid Existing Rights Determination was not an action that triggered NEPA. The Court did not decide whether the Valid Existing Right Determination failed to consider all relevant costs, finding instead that zone-of-interest principles barred the Trust from challenging the Valid Existing Rights Determination. The Trust appealed.

## STATEMENT OF FACTS

### I. A Withdrawal Of Public Lands Under FLPMA

Under the 1872 Mining Law, all lands held by the U.S. Government are open for "locating" a mining claim and, provided a "valuable mineral deposit" is

discovered, for mining. 30 U.S.C. §§ 22, 26; *see Cameron v. United States*, 252 U.S. 450, 456 (1920).[2] Locating a claim involves marking "the boundaries of the claim" and fulfilling the Mining Law's administrative requirements. *Cole v. Ralph*, 252 U.S. 286, 296 (1920); *Shumway*, 199 F.3d at 1099. By locating a claim, the claimant establishes certain rights versus other potential claimants and the public and may explore for valuable mineral deposits on public lands. *Cal. Coastal Comm'n v. Granite Rock*, 480 U.S. 572, 575 (1987); *Shumway*, 199 F.3d at 1098-99.

A claim only becomes "valid," and may be mined, upon the discovery of a "valuable mineral deposit." *Cole*, 252 U.S. at 296 ("Location … confers no right in the absence of discovery…."); *see McMaster v. United States*, 731 F.3d 881, 888 (9th Cir. 2013) ("[D]iscovery is a necessary … condition for establishing a valid claim…."). Claim validity is determined based on the objective "prudent-person" and "marketability" tests, which require an economic determination that considers the projected costs and revenues of operating a particular mine. *Lara v. Sec'y of Interior*, 820 F.2d 1535, 1540-41 (9th Cir. 1987). Owners of valid claims may possess, occupy, and extract minerals from federal lands. 30 U.S.C. § 26; *Indep. Mining v. Babbitt*, 105 F.3d 502, 506 (9th Cir. 1997). "[P]rior to validity

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[2] "A mineral claim is a parcel of land containing precious metal in its soil or rock." *United States v. Shumway*, 199 F.3d 1093, 1099 (9th Cir. 1999).

proceedings," however, "unpatented claims amount to a potential property interest, since it is the discovery of a valuable mineral deposit and satisfaction of statutory and regulatory requirements that bestows possessory rights." *Freeman v. Dep't of Interior*, 37 F.Supp.3d 313, 321 (D.D.C. 2014).[3]

Since its enactment, the Mining Law's effect has been narrowed. In 1955, Congress adopted the Surface Resources and Multiple Use Act, 30 U.S.C. §§ 601 *et seq*., "to permit the multiple use of the surface resources," including recreational activities, on mining claims. *United States v. Curtis-Nevada Mines*, 611 F.2d 1277, 1283 (9th Cir. 1980). Thus, mining claimants do not obtain an exclusive right to the surface overlaying a mining claim and all unpatented claims are subject to Forest Service or BLM management. *McMaster*, 731 F.3d at 886.

Similarly, in 1976, Congress enacted FLPMA, which authorizes Interior to, among other things, "withdraw" public lands from operation of the Mining Law. 43 U.S.C. § 1714(a); § 1702(j) (defining withdrawals); *see Lara*, 820 F.2d at 1542 ("[T]he right to prospect for minerals ceases on the date of withdrawal…."); *see also Swanson*, 3 F.3d at 1352 ("[T]he government may … withdraw public lands from mining under the Mining Act."). Through this authority, Interior may

[3] Persons with valid claims may apply to "patent" such claims. 30 U.S.C. §§ 22, 29; 43 C.F.R. §§ 3860 *et seq*. (detailing patent procedures), which bestows on the claimant title to both the surface estate and mineral deposits. *Swanson v. Babbitt,* 3 F.3d 1348, 1350 (9th Cir.1993). The ability to patent mining claims, however, has been suspended indefinitely. *See R.T. Vanderbilt v. Babbitt*, 113 F.3d 1061, 1064 (9th Cir. 1997).

withdraw public lands "to maintain other public values in the area." 43 U.S.C. §§ 1702(j), 1714(a). No new mining claims may be located on withdrawn lands. ER 269, 272.

A FLPMA withdrawal also impacts mining claims previously located under the Mining Law. Such existing claims may be developed only if they are shown to contain "valid existing rights" at the time of the withdrawal. 43 U.S.C. § 1701, Pub. Law 94-579, Note (h). Valid existing rights requires the discovery of a "valuable mineral deposit" based on the "prudent-person" and "marketability" tests within each claim. *United States v. Coleman*, 390 U.S. 599, 602 (1968); *Hjelvik v. Babbitt*, 198 F.3d 1072, 1074-75 (9th Cir. 1999).

## II. The Grand Canyon Withdrawal

The Grand Canyon is one of the world's greatest natural wonders. ER 269-70. Protected as a national park, the mile-deep canyon is encircled by over one million acres of public lands managed by the Forest Service and the Bureau of Land Management (BLM). ER 269-70. These surrounding lands range from deserts to ponderosa pine forests, where groundwater-fed springs support a diversity of species up to 500 times greater than the surrounding, more arid, lands. ER 270. The Grand Canyon region welcomes nearly five million visitors a year, making tourism a leading economic driver in the area. ER 270. The Grand Canyon and the surrounding lands also contain the ancestral homelands of numerous

American Indian tribes. ER 269-70. The Havasupai Tribe has lived within the Grand Canyon for millennia and their history, culture and spiritual identity are intimately connected to the Canyon and its resources. ER 270.

Uranium mining in and around the Grand Canyon began during the 1950s and continued, to varying degrees, until the early 1990s when the uranium market fell. ER 267. Mining left behind a legacy of radioactive contamination that continues to threaten the region's public health, ecosystems, tribal interests, and recreational opportunities. For example, on the Grand Canyon's South Rim, the abandoned Orphan Mine contaminated Horn Creek, which flows into the Colorado River in the National Park. ER 693. The Environmental Protection Agency has designated this mine a "Superfund" site (ER 693) and the National Park Service has warned hikers not to drink from Horn Creek "unless death by thirst is the only other option." ER 701. And just north of the National Park on lands managed by BLM, a 1984 flash flood washed tons of high-grade uranium ore from the Hack 1 Mine into Kanab Creek, which flows into the Colorado River and the National Park. ER 662.

Uranium prices shot up in the mid-2000s, leading to the location of thousands of new mining claims on public lands adjacent to Grand Canyon National Park. ER 268. In response, federal legislation was introduced to permanently close the region to mining. ER 268.

This threat to the Grand Canyon also prompted Interior to propose withdrawing the public lands surrounding Grand Canyon National Park under FLPMA. 74 Fed. Reg. 35,887 (July 21, 2009). The proposal included a 2-year "segregation," which immediately removed these lands from open access under the Mining Law while Interior evaluated the proposed withdrawal. *Id*.; *see* 43 U.S.C. § 1714(b).

On January 9, 2012, based on an Environmental Impact Statement and reports prepared by the U.S. Geological Survey, Interior issued a Public Land Order to withdraw 1,006,545 acres of federal lands in northern Arizona. 77 Fed. Reg. 2317 (Jan. 7, 2012). Interior explained that the Withdrawal was promulgated "to protect the Grand Canyon Watershed from adverse effects of locatable mineral exploration and development." ER 267. In addition to lands managed by BLM, the Withdrawal also applies to the Kaibab National Forest with the consent of the Forest Service. *See* 43 U.S.C. § 1714(i); ER 267.

The Withdrawal record acknowledged that there were several uranium mines located within the withdrawn area whose operations had been approved by the Forest Service and BLM but had been closed since the late 1980s and early 1990s. ER 271. The Withdrawal recognizes that these mines could operate if their claims contain valid existing rights. See ER 271-72. Addressing these mines, which

included the Canyon Mine at issue in this case, one of the Withdrawal's approval documents states:

> [T]he assumptions used to develop the RFD [reasonably foreseeable development] scenarios do not reflect any ongoing analysis of a specific mining claim's valid existing rights, nor does the use of these data for the purposes of this analysis presume or supersede any determination of valid existing rights through the normal administrative process, which occurs independent of the RFD analysis and the EIS. The assumption stated above—that the typical mine would require a 2-year permitting/planning time frame—does not incorporate any part of the administrative process to verify or establish valid existing rights that is required by BLM and USFS before authorizing surface disturbing activities on withdrawn lands.

ER 639.

## III. The Canyon Uranium Mine

The Mine is located on withdrawn lands in the Kaibab National Forest, only a few miles south of Grand Canyon National Park. ER 231; ER 183. It also sits within the Red Butte Traditional Cultural Property, an area that was specially designated in 2010 due to its significant cultural and religious values to regional tribes. ER 194-95.

Underneath the Mine are important groundwater resources, including those originating in the deep Redwall-Muav aquifer and shallower "perched" aquifers. ER 575-78, ¶¶ 3-7; ER 695; ER 663. Both aquifer types generate springs in and around the Grand Canyon. ER 663, 665; ER 615; ER 702-03. Springs are a critical natural resource in Grand Canyon National Park, providing base flows to the Colorado River and drinking water to wildlife and Park visitors, supporting

valuable riparian habitats with exceptional species diversity, and holding cultural significance to Native American tribes. ER 652; ER 628; ER 702.

In 1984, the Mine's original owner – Energy Fuels Nuclear – sought Forest Service permission to develop the Mine. ER 376. The company submitted a Plan of Operations for approval, as required under Forest Service regulations, because the Mine's operations "will likely cause a significant disturbance of surface resources." *See* 36 C.F.R. § 228.4(a)(3); *Siskiyou Reg'l Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545, 551 (9th Cir. 2009).[4] The plan contemplated mining for uranium ore within a cylindrical "breccia" pipe – at depths between 900 and 1400 feet – to extract 200 tons of ore per day for five years. ER 400-02. As approved in 1986, the Forest Service imposed monitoring requirements on the Mine, including sampling water quality at Grand Canyon springs. ER 747-48; ER 384. The Forest Service also required the gathering of baseline radiological data in air, soil and water at least one year before extracting uranium ore. ER 757. The Forest Service did not determine at this time whether the Mine's two claims contain valid existing rights.

After plan approval, some of the Mine's infrastructure was built and a small portion of the mineshaft (50 feet) was constructed. ER 585. However, in 1992, the

[4] The Organic Act of 1897 "granted the Forest Service the authority to promulgate regulations for mining in national forests," which led to the § 228 mining regulations. *Siskiyou Reg'l Educ. Project*, 565 F.3d at 550.

Mine was closed because the uranium market dropped. ER 585, ¶ 3; ER 181. No uranium ore had been extracted.

Energy Fuels, through its predecessors-in-interest Denison Mines, purchased the Mine in 1997. ER 181. The Mine is one of many assets owned and operated by Energy Fuels, a Canadian company headquartered in Toronto, Ontario. ER 500, 508. The company's U.S. assets include uranium, gold, and copper mines and mills in Utah, Arizona, and Wyoming. ER 500. Despite volatility in uranium prices, Energy Fuels maintains economic viability by relying on long-term supply contracts, including one with the largest electric utility in South Korea. ER 510, 503.

In August 2011, Energy Fuels informed the Forest Service that it wished to begin operations at the Mine. In response and due to the Withdrawal, the Forest Service initiated a process to determine whether the Mine had valid existing rights. ER 231-32; ER 183; *see* ER 231 ("It is Forest Service policy (FSM 2803.5) to only allow operations on mining claims within a withdrawal that have valid existing

rights.").[5] On April 18, 2012, the Forest Service concluded that the Mine's two mining claims contain valid existing rights. ER 227, 228, 231.[6]

Mine construction did not begin immediately after the Valid Existing Rights Determination, for two matters required resolution. The first involved an internal review of the Mine by the Forest Service. According to the Forest Service's NEPA Handbook, additional environmental review may be necessary when an approved action has not been completed or is "awaiting implementation." ER 604-05; ER 698; ER 641-42. The Forest Service's June 25, 2012 "Canyon Uranium Mine Review" (ER 180) concluded, however, that (1) the original plan of operations did not require modification (ER 186-87),[7] (2) supplementation of the 1986 EIS was unnecessary (ER 216), and (3) there was no need to engage in a full National Historic Preservation Act (NHPA) consultation process concerning the Mine's adverse effects on the Red Butte Traditional Cultural Property. ER 187-191.

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[5] "Before a determination of validity can be made, a mineral examiner must do a field examination; collect and analyze samples; estimate the value of the mineral deposit and the cost of extracting, processing and marketing the minerals, including the costs of complying with any environmental and reclamation laws." *Independence Mining,* 105 F.3d at 506-07.

[6] Through a Memorandum of Understanding with Interior, the Forest Service conducts valid existing rights determinations on land it administers. ER 589, ¶ 6.

[7] Modifications to approved plans of operations occur when there are "unforeseen significant disturbances" or operations will cause "unnecessary and unreasonable" "irreparable injury, loss or damage to surface resources." 36 C.F.R. § 228.4(e).

The second issue arose when the Advisory Council on Historic Preservation – the federal agency that oversees implementation of the NHPA – voiced its objection as to how the Forest Service was addressing its duties under the NHPA. The Advisory Council informed the Forest Service on August 1, 2012 and again on February 6, 2013 that it was wrongly short-cutting the required consultation process with regional tribes. ER 163-65; ER 143-44. The Havasupai Tribe – the Trust's co-plaintiffs in the district court proceedings – had hoped the Forest Service would adhere to the Advisory Council's criticisms. But the Forest Service did nothing in response.

The Trust and the Havasupai Tribe thus filed suit on March 7, 2013. ER 74. The Trust challenged the Valid Existing Rights Determination for violations of NEPA (Claim 1) and FLPMA (Claim 4).[8]

## SUMMARY OF ARGUMENT

The Valid Existing Rights Determination is a "major federal action" that requires compliance with NEPA's duty to evaluate and publicly disclose the Mine's environmental impacts. FLPMA and the Withdrawal specify that previously located mining claims may be developed on withdrawn lands only if the Forest Service finds, based on the objective tests for a "valuable mineral deposit,"

[8] Two additional claims under the NHPA (Claims 2 and 3) were argued by the Havasupai Tribe in the District Court and are addressed by the Tribe in this consolidated appeal (*Havasupai Tribe v. Williams*, Case No. 15-15754).

that such mining claims contain "valid existing rights." The Forest Service made this finding in its Valid Existing Rights Determination, providing Energy Fuels with approval to mine on withdrawn lands. That approval action meets the test for major federal action and requires NEPA compliance.

The Trust satisfies the zone-of-interest test under the APA to challenge the Valid Existing Rights Determination for the Forest Service's failure to include the environmental costs of mining. The Trust's environmental, cultural, aesthetic and recreational interests fall within the zone of interests covered by FLPMA's withdrawal provisions, including the valid existing rights exception and its test for determining whether valid mining claims exist. Indeed, the limits and conditions FLPMA imposes on mining on withdrawn lands benefit the Trust, such that the Trust's interests are within FLPMA's zone of interests. And even if the Trust's challenge to the Valid Existing Rights Determination can be characterized as a Mining Law claim, that law also benefits the Trust's interests by limiting development only to claims containing a "valuable mineral deposit." This requirement ensures the protection of public lands from unchecked and unsustainable mining activities.

## STANDARDS OF REVIEW

The court reviews *de novo* decisions on cross-motions for summary judgment. *Hoopa Valley Indian Tribe v. Ryan,* 415 F.3d 986, 989 (9th Cir. 2005).

Issues concerning jurisdiction and APA reviewability are also reviewed *de novo*. *Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 979 n. 1 (9th Cir. 2006).

Agency actions like the Valid Existing Rights Determination are reviewed pursuant to APA standards. *Ctr. for Biological Diversity v. Dep't of Interior*, 623 F.3d 633, 641 (9th Cir. 2010). Under the APA, the Court shall "hold unlawful and set aside agency action … found to be arbitrary, capricious, an abuse of discretion, … not in accordance with law, … [or] without observance of procedure required by law. 5 U.S.C. § 706(2). Under the arbitrary and capricious standard, a decision will be vacated when an agency:

> has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). Courts evaluate "whether the [agency's] decision was based on a consideration of the relevant factors," "whether there has been a clear error of judgment," and "whether the [agency] articulated a rational connection between the facts found and the choice made." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 859 (9th Cir. 2005).

Because the Trust's NEPA claim asks whether NEPA was applicable and thus "involves primarily legal issues," the "reasonableness" standard governs, rather than the arbitrary and capricious standard. *Northcoast Envtl. Ctr. v. Glickman,* 136 F.3d 660, 667 (9th Cir. 1998); *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1070 (9th Cir. 2002) ("[A]n agency's threshold decision that certain activities are not subject to NEPA is reviewed for reasonableness.").

## ARGUMENT

### I. The Forest Service Violated NEPA By Issuing The Valid Existing Rights Determination Without Preparing An Environmental Impact Statement Or Environmental Assessment

#### A. The National Environmental Policy Act

"NEPA is our basic national charter for protection of the environment." *Center for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008) (quotations and citations omitted). NEPA requires federal agencies to evaluate and publicly disclose the potential environmental impacts of their actions. *Marsh v. Or. Natural Desert Ass'n*, 490 U.S. 360, 371 (1989); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (NEPA ensures that an agency, "in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to

the larger audience that may also play a role in both the decision-making process and implementation of that decision").[9]

Federal agencies must prepare an EIS before undertaking "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Major federal actions include "new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies." 40 C.F.R. § 1508.18(a). These actions include the "[a]pproval of specific projects ... by permit or other regulatory decision…." *Id*. § 1508.18(b)(4). Further, an EIS is required when a proposed action "may" result in significant impacts. *Sierra Club v. Bosworth*, 510 F.3d 1016, 1018 (9th Cir. 2007). If an agency is uncertain as to whether an action may result in significant impacts on the environment, the agency may first prepare a less detailed "environmental assessment" (EA), which must provide sufficient evidence and analysis to determine if an EIS is needed. 40 C.F.R. §§ 1501.4, 1508.9.

### B. The Valid Existing Rights Determination Is An Agency Action That Is Final Under The Administrative Procedure Act

The APA authorizes judicial review of "final agency actions." 5 U.S.C. § 704; *see Or. Natural Desert Ass'n*, 465 F.3d at 982. Under the APA, there is a

[9] 40 C.F.R. § 1500.1(b) ("[P]ublic scrutiny [is] essential to implementing NEPA"); *id*. § 1506.6(a) (agencies shall "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures"); *id*. § 1501.4(b) (agencies must involve public "to the extent practicable" in preparing EAs).

presumption that agency decisions are reviewable. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,* 132 S.Ct. 2199, 2210 (2012); *Pit River Tribe v. BLM*, 793 F.3d 1147, 1156 (9th Cir. 2015).

Judicial review of the Trust's NEPA challenge to the Valid Existing Rights Determination is available under the APA. As detailed below and as the District Court held (ER 59-73), the Valid Existing Rights Determination is an APA "agency action" that satisfies the finality test set forth in *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997). *See, e.g.*, *Or. Natural Desert Ass'n*, 465 F.3d at 982-90.[10]

1. The APA's Definition For Agency Action Is Met

The APA defines "agency action" very broadly. *Lundeen v. Mineta*, 291 F.3d 300, 304 (5th Cir. 2002). Agency actions include "the whole or part of an agency … license, … relief, or the equivalent … thereof." 5 U.S.C. § 551(13). License is defined as "the whole or part of an agency permit, … approval, … statutory exception or other form of permission." *Id*. § 551(8). "Relief" includes the "recognition of a claim … privilege, exemption or exception." *Id*. § 551(11).

The Valid Existing Rights Determination is both a "license" and "relief." Although the Withdrawal precludes new mining claims without exception (ER

[10] Because the Forest Service has made this "final agency action" argument at every stage in the District Court proceedings, including after the Court *denied* the agency's Motion to Dismiss on this same theory, the Trust expects this argument to be offered in this appeal and thus addresses it here. The government, however, has not appealed the District Court's ruling on final agency action.

269, 272), FLPMA authorizes exemptions for existing claims that contain "valid existing rights." 43 U.S.C. § 1701, Pub. Law 94-579, Note (h). By finding that this FLPMA exemption applied at the Mine, the Forest Service's Valid Existing Rights Determination provided Energy Fuels with permission to conduct mining operations on withdrawn lands. *See* 5 U.S.C. § 551(8). Similarly, the Valid Existing Rights Determination "recognized" that Energy Fuels' mining claims are valid and constitutes an "exemption or exception" to the Withdrawal. *See* 5 U.S.C. § 551(11)(B). The agency conceded this point to the District Court. ER 63.

Indeed, the Forest Service prepared the Valid Existing Rights Determination for the sole reason of deciding whether Energy Fuels met FLPMA's "valid existing rights" exception. The Forest Service explained in the Valid Existing Rights Determination itself that "[d]ue to the withdrawal, all locatable operations within this area must have valid existing rights (VER) in order to be able to operate on these claims." ER 234; ER 231 (also stating "[t]he area containing the [Mine's] claim block is within the Northern Arizona Mineral Withdrawal that was segregated from the Mining Law … [and] was withdrawn for a period of 20 years by the Secretary of the Interior. It is the Forest Service policy (FSM 2803.5) to only allow operations on mining claims within a withdrawal that have valid existing rights (VER).").

While preparing the Valid Existing Rights Determination, the Forest Service

repeatedly maintained – in letters to, and in meetings with, Energy Fuels and regional tribes – that claim validity was a required approval for the Mine. ER 290 ("A mineral exam is scheduled to determine that your company has valid existing rights for the Canyon Mine location. *This is a requirement* for any public domain lands managed by the Forest Service that have been withdrawn from mineral entry.") (emphasis added); ER 466 ("Loretta [] asked what would happen if Denison [former name of Energy Fuels] cannot show VER? [Forest Supervisor] Mike Williams [] stated they would not be able to move forward without VER [valid existing rights] under the mineral withdrawal."); *see also* ER 464 (Forest Service stating to tribes: "[Energy Fuels] will need to show valid existing rights"); ER 469 (Forest Service "clarified that 1) the minerals exam will need to be completed before they start work at the Canyon Mine").

In sum, the APA agency action test is met here. The Valid Existing Rights Determination gave Energy Fuels permission to mine (a "license") and recognized the validity of two mining claims ("relief").

2. The Finality Test Is Satisfied: The Valid Existing Rights Determination Was The Forest Service's Last Word On Claim Validity, And The Determination Had A Legal Effect Under FLPMA

Agency actions must be "final" to be subject to judicial review. 5 U.S.C. § 704. Courts have "interpreted the 'finality' element in a pragmatic way." *FTC v. Standard Oil of Cal.*, 449 U.S. 232, 239 (1980) (quoting *Abbott Labs. v. Gardner*,

387 U.S. 136, 149 (1967)). The finality analysis focuses on the "practical and legal effects of the agency action." *Or. Natural Desert*, 465 F.3d at 982.

The familiar two-part finality test provides: (1) "the action must mark the consummation of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature" and (2) "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 177-178 (internal quotations and citations omitted). Interpreting *Bennett*, the Ninth Circuit has ruled that there are "several avenues for meeting the second finality requirement." *Or. Natural Desert*, 465 F.3d at 987 (citing cases). These include actions that "will directly affect the parties" and have a "direct and immediate ... effect on the day-to-day business of the subject party." *Id*. at 982 (quoting *Indus. Customers of NW Utils. v. Bonneville Power Admin.*, 408 F.3d 638, 646 (9th Cir. 2005)); *FTC*, 449 U.S. at 239.

First, the Valid Existing Rights Determination was the Forest Service's "last word" as to whether the Mine's two mining claims contain valid existing rights and thus are exempt from the Withdrawal's effect. *See Or. Natural Desert*, 465 F.3d at 984. The Forest Service began reviewing claim validity in September 2011, responding to Interior's segregation and proposed withdrawal, and completed the process on April 18, 2012. ER 231 ("We conclude that a discovery of valuable mineral deposit existed at the time of the segregated withdrawal on July 21,

2009"); ER 179; ER 231, 232-24 (describing agency's process). This was the only assessment of claim validity by the Forest Service or any federal agency. *See* ER 546 (Forest Service discovery response stating "neither the Forest Service nor any other federal agency has engaged in decision-making relating to the validity of the mining claims at Canyon Mine after the April 2012 VER Determination"); *see also* ER 551. The District Court agreed, noting "[n]o additional Forest Service action is planned on this issue." ER 64. Indeed, no further steps are needed to complete the Valid Existing Rights Determination to provide the Mine with an exception to the Withdrawal. The Valid Existing Rights Determination thus concluded a Forest Service decision-making process.

The second finality requirement is also met. In the Valid Existing Rights Determination, the Forest Service found that Energy Fuels' two mining claims contain valuable mineral deposits and are valid based on the prudent-person and marketability tests. Consequently, the Forest Service's Valid Existing Rights Determination exempted the Mine from the Withdrawal's effect. As the District Court ruled, the Valid Existing Rights Determination "appears to come within the express language of *Bennett*" because, in part, it "determined rights" – the existence of valid mineral rights at the Mine and the ability to conduct mining operations despite the Withdrawal. ER 68.[11]

[11] The Valid Existing Rights Determination also effectively insulates Energy

The Valid Existing Rights Determination also directly impacted Energy Fuels' "day-to-day business." *See Bennett*, 520 U.S. at 178. The Mine could not begin construction or operate until the Forest Service completed its process of determining claim validity. ER 262 (Energy Fuels conceding it "will not be doing any 'shaft sinking' at the site until the minerals exam is completed"); ER 631 (Energy Fuels asking that validity determination be completed quickly "so we can hopefully close this out and proceed with our production plans"). The District Court found this impact to Energy Fuels' operations compelling, reasoning that the Valid Existing Rights Determination "allowed mining operations to resume under the original Plan of Operations." ER 68.

Because it triggered the commencement of Mine construction and operations, the Valid Existing Rights Determination also had real consequences for the Trust. *See Williamson Cty v. Hamilton Bank*, 473 U.S. 172, 193 (1985) (asking whether action "inflict[ed] an actual, concrete injury"). Absent the Valid Existing Rights Determination's authorization of the Mine, the Trust's interests in preserving public lands, groundwater resources, and the Red Butte Traditional Cultural Property would not be adversely impacted. *See Franklin v. Massachusetts*,

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Fuels from a potential enforcement action, known as a "claim contest," where the Forest Service or BLM could take action to evict Energy Fuels from its unpatented mining claims at the Mine. *See Freeman*, 37 F.Supp.3d at 321. At the Mine, the Forest Service did not prepare the Valid Existing Rights Determination as part of a claim contest. *See* ER 553 (Forest Service discovery response admitting there has been no claim contest).

505 U.S. 788, 797-98 (1992); *accord Or. Natural Desert*, 465 F.3d at 982, 987. "[T]he VER Determination," as the District Court held, "directly affected the parties." ER 67.

Accordingly, the Forest Service's Valid Existing Rights Determination is a final agency action – it determined Energy Fuels' rights, had legal consequences as a result of the Withdrawal, and impacted both the company and the Trust. And, consistent with the FLPMA Withdrawal, both the Forest Service and Energy Fuels viewed the Valid Existing Rights Determination as a precondition to mining on withdrawn lands.

### C. The Valid Existing Rights Determination Is A Major Federal Action That Requires A NEPA Review

The District Court erred by finding that the Valid Existing Rights Determination was not subject to NEPA. NEPA applies to "major federal actions." 42 U.S.C. § 4332(2)(C). Major federal actions are those whose effects may be major and are "potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18.[12] "Actions include new and continuing activities, including projects and programs entirely or partly … regulated, or approved by federal agencies." *Id.* § 1508.18(a). One type of major federal action is the "[a]pproval of specific

[12] The word "major" in major federal action relates only to the action's effects. 40 C.F.R. § 1508.18 ("Major reinforces but does not have a meaning independent of significantly [as defined in] § 1508.27.").

projects, such as construction or management activities located in a defined geographic area, ... by permit or other regulatory decision…." *Id.* § 1508.18(b)(4).

Federal agency actions that function as a pre-requisite for a project are subject to NEPA. *See Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996); *Md. Conservation Council v. Gilchrist,* 808 F.2d 1039, 1042 (4th Cir. 1986) ("A non-federal project is considered a 'federal action' if it cannot begin or continue without prior approval of a federal agency."); *Scientists' Inst. for Pub. Info. v. Atomic Energy Comm'n,* 481 F.2d 1079, 1088–89 (D.C. Cir. 1973) (finding major federal action "whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment"); *see also Reoforce v. U.S.*, 118 Fed. Cl. 632, 661 (Fed. Cl. 2014) (noting earlier ruling was based on principle that "valid existing rights determination was the functional equivalent of a permitting process"). In *Ramsey*, the Ninth Circuit held that the issuance of an Endangered Species Act "incidental take statement" required NEPA compliance. *Ramsey*, 96 F.3d at 444. Finding the take statement was a major federal action, the court explained that the statement was the "functional equivalent" of a permit because the activity in question was prohibited "but for" the statement. *Id*.

The Valid Existing Rights Determination is a major federal action because it was a pre-requisite for Energy Fuels to construct and operate the Mine on lands withdrawn under FLPMA. Mining activities on claims located before the

Withdrawal, like those at the Mine, may only occur provided the Forest Service – or BLM on lands it administers – first finds that the claims are valid under the prudent-person and marketability tests. ER 267; *see also* 43 U.S.C. § 1701, Pub. Law 94-579, Note (h) (requiring land withdrawal to be "subject to valid existing rights"). The Ninth Circuit has explained the effect of a withdrawal on existing claims:

> [T]he national forest land in which the mining claims are located was at one time open to the public for exploration, prospecting, and the extraction of minerals; however, the land was subsequently withdrawn from mineral entry under the Wilderness Act or Wild and Scenic Rivers Act, so that *only persons establishing that they discovered a valuable mineral deposit prior to the withdrawal possess a valid right to mine claims there (a 'valid claim')*.

*Clouser v. Espy*, 42 F.3d 1522, 1524-25 (9th Cir. 1994) (emphasis added); *Hjelvik*, 198 F.3d at 1074 ("Where a claim is located on land withdrawn from mineral entry …, a claim must be supported by a discovery of a valuable mineral deposit at the time of withdrawal….").[13] Accordingly, because the Withdrawal changed the legal status of the National Forest lands where the Mine sits,[14] the Valid Existing Rights Determination was a required agency approval for the Mine.

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[13] A withdrawal does not automatically exterminate existing mining claims. But in order to develop such claims on withdrawn lands, the Forest Service must find them valid based on the prudent-person and marketability tests. To void a claim, the Forest Service or BLM must bring an enforcement action.

[14] *Swanson*, 3 F.3d at 1352 ("[T]he government may … withdraw public lands from mining under the Mining Act."); *Lara*, 820 F.2d at 1542 (recognizing "the right to prospect for minerals ceases on the date of withdrawal"); *Kosanke v. U.S. Dep't of Interior*, 144 F.3d 873, 874 (D.C. Cir. 1998) ("[L]ands withdrawn from

The Valid Existing Rights Determination itself and the Forest Service's Manual confirm that an agency validity finding was required because of the Withdrawal. Indeed, the Forest Service cited its Manual in the Valid Existing Rights Determination as the reason why the Determination was prepared:

> It is Forest Service policy (FSM 2803.5) to *only allow* operations on mining claims within a withdrawal that have valid existing rights (VER).

ER 232 (emphasis added); *see* ER 234 ("Due to the withdrawal, all locatable operations within this area must have valid existing rights in order to be able to operate on the [Mine's] claims."). The cited Manual provision requires the Forest Service to "[e]nsure that valid existing rights have been established before allowing mineral or energy activities in congressionally designated or other withdrawn areas." ER 254 (Forest Service Manual § 2803(5)); *see also* ER 742 (Forest Service Manual § 2818.3: validity determinations are required "where the lands in question have been withdrawn from mineral entry").

The District Court, however, believed that the Forest Service was not required to issue an agency *determination*, even if the Mine's claims had to have valid existing rights as a result of the Withdrawal. *See* ER 10 ("[T]here is a difference between valid existing rights and a valid existing rights

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mineral entry are no longer considered to be within the public domain and therefore are not subject to the statutory rights enumerated in the General Mining Law."); *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 308 (D.C. Cir. 1987) ("A withdrawal withholds land from operation of one or more of the general land and mineral disposal laws, including the 1872 Mining Law….").

determination."). Essentially, according to the Court, validity is presumed for existing claims on withdrawn lands and an agency determination is unnecessary.

But that is not the law. Rather, claim validity requires the government to evaluate the each claim based on objective standards and specific factors. Federal agencies, including the Forest Service and BLM, determine whether there is a "discovery of a valuable mineral deposit" on a claim based on the "prudent person test" and the "marketability test." *See Hjelvik*, 198 F.3d at 1074; *Coleman*, 390 U.S. at 602 ("[T]o qualify as 'valuable mineral deposits,' the discovered deposits must be of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine."); *Clouser*, 42 F.3d at 1525 ("The validity of such claims is determined by the U.S. Department of the Interior … through its Bureau of Land Management…."); *Freeman v. Dep't of Interior*, 83 F.Supp.3d 173, 178 (D.D.C. 2015) ("To determine whether a mining claim is valid, BLM conducts a mineral examination."); *United States v. Martinek*, 166 IBLA 347, 351 (2005) ("The test of whether a mining claim is supported by a discovery is objective and is framed in terms of what a 'prudent person' would do knowing all the facts."). As this court has recognized, a "validity determination requires considerable judgment and discretion to evaluate and assess the results of the

mineral examination, and to ultimately conclude whether the statutory requirement of a 'valuable discovery' has been met." *Indep. Mining*, 105 F.3d at 509.

Accordingly, a claimant does not establish claim validity through a self-evaluation. Stated another way, a claim is not valid simply because a mining company is willing to develop it. 65 Fed. Reg. 69,998, 70,026 (Nov. 21, 2000) (BLM rejecting contention that "miner decide(s) if a deposit is economically feasible," highlighting "[t]he 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"); *see also Vane Minerals v. U.S.*, 116 Fed. Cl. 48, 64 (Fed. Cl. 2014) (ruling "fact that Plaintiff's unpatented mining claims are centered on breccia pipes that are 'likely to contain mineralization' does not excuse Plaintiff from compliance with the VER determination process…").

This is why the Forest Service issued the Valid Existing Rights Determination. The agency did not presume the claims were valid, despite Energy Fuels' intent to begin operations, but rather informed the public, regional tribes and Energy Fuels that it was required to determine claim validity before operations could begin at the Mine. *See* ER 290; ER 466; ER 469.

The District Court was thus wrong to conclude that a validity determination is not required to develop claims on withdrawn lands. Indeed, the Court was not

entirely convinced that an agency determination was unnecessary. Elsewhere, the District Court acknowledged that an agency determination was, in fact, required when a mine lacks an approved plan of operations. ER 9 ("*[N]ew* plans of operations would be approved only if BLM or the Forest Service first determined that the parties submitting the plans had valid existing mineral rights at the time of the Withdrawal.") (emphasis in original).

However, in recognizing that an agency determination is required, the District Court erroneously conflated the existence of an approved plan of operations with the validity requirement under FLPMA and the Withdrawal. *See* ER 10. For the purposes of the Withdrawal and FLPMA's "valid existing rights" exception, there is no reason to distinguish between mines with approved plans of operations and those without. Simply put, mines without a validity determination cannot proceed on lands withdrawn under FLPMA, whether they have an approved plan or not. Because of the Withdrawal, *both* a plan approval and a valid existing rights determination are necessary to mine. And NEPA applies to both agency actions, because both "partly" approved the Mine. *See* 40 C.F.R. § 1508.18(a).

Indeed, a Forest Service plan approval is unrelated to claim validity. That is, nothing in the Forest Service's surface mining regulations require evaluating whether mining claims are valid when reviewing and approving a plan of

operations. *See* 36 C.F.R. § 228.1-228.15. The Forest Service's Manual § 2817.23 makes clear that plan approval:

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

ER 731 (emphasis added); *see also* ER 591, ¶ 10 (USFS staff stating validity determinations and plan approvals "are separate actions and treated as such under the Forest Service's locatable mineral regulations at 36 C.F.R. 228 Subpart A").

The Forest Service's behavior acknowledges and illustrates this distinction. The agency did not determine claim validity upon approving the Mine's plan of operations in 1986, as that approval occurred long before the Withdrawal. Instead, the Forest Service issued the Valid Existing Rights Determination in response to the Withdrawal in 2012 – and did so despite the agency's prior approval of the Mine's plan of operations. ER 232, 234 (expressly acknowledging prior plan approval).[15]

The District Court (ER 9-10) thus erred in ruling that the Mine did not require a validity determination because of the 1986 approved plan of operations – that plan approval did not somehow give Energy Fuels valid existing rights on its mining claims.

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[15] In any case, had it been done, a 1986 validity determination would have been legally insufficient because mining claims must be valid "at the date of withdrawal []." *Lara*, 820 F.2d at 1542; *Hjelvik*, 198 F.3d at 1074.

Finally, the District Court offered that the Withdrawal "contemplated" that the Mine "could continue to operate." ER 8; ER 46. The inferences the District Court drew from the Withdrawal miscast the Withdrawal in relation to the Mine. The Withdrawal did not opine that the Mine's two claims were, in fact, valid. To the contrary, the Withdrawal recognized that claim validity would have to be demonstrated at the Mine. *See* ER 272 ("It was assumed for purposes of determining the *impacts* of withdrawing the lands from the Mining Law that any mining claim containing these seven breccia pipes *would be able to demonstrate valid existing rights* and would be mined.") (emphasis added). Although the Withdrawal noted that operations *could* continue provided there was a future determination of valid existing rights, it made no determinations whatsoever as to whether the Mine contains valid existing rights and instead left that inquiry for another day.

The EIS that accompanied the Withdrawal cautioned against the District Court's very mischaracterization. It warned that assumptions made for the purpose of analyzing the Withdrawal under NEPA "do not reflect any ongoing analysis of a specific mining claim's valid existing rights, nor does the use of these data for the purposes of this [EIS] analysis presume or supersede any determination of valid existing rights through the normal administrative process." ER 639; ER 640 ("None of the assumptions in this analysis, even if referring to specific breccia

pipes, should be construed as a determination or indication that certain mining claims may contain a discovery."). Notably, the Forest Service did not understand the Withdrawal itself to authorize the Mine, or otherwise exempt the Mine from the valid existing rights requirement, as the agency in fact undertook a process to issue the Valid Existing Rights Determination.

In sum, the Valid Existing Rights Determination is a major federal action requiring NEPA compliance: it authorized otherwise prohibited mining operations on public lands withdrawn from mining under FLPMA.

### D. The Mine, As Authorized By The Valid Existing Rights Determination, May Cause Significant Impacts To The Environment

A major federal action requires an EIS when environmental impacts may be significant. *Sierra Club*, 510 F.3d at 1018. Agencies must consider several "significance factors" (40 C.F.R. § 1508.27) in determining whether an action requires an EA or EIS.

Because the Mine is located on withdrawn public lands, the Valid Existing Rights Determination provided a required authorization for Energy Fuels to begin mining operations. These operations will cause significant environmental impacts, including impacts not considered in the 1986 EIS that accompanied the Forest Service's plan of operations approval. The Mine will impact the values for which the Withdrawal was adopted. *See* ER 267; ER 274 ("to protect the Grand Canyon Watershed from adverse effects of locatable mineral exploration and development"

and to preserve "sacred and traditional places of tribal peoples"). Digging and constructing the mineshaft will adversely impact cultural resources at the Red Butte Traditional Cultural Property – an impact not evaluated in the 1986 EIS. ER 195 ("[T]he affects of the Canyon Mine operations on the TCP could not have been analyzed as part of the original EIS because it was not identified as a historic property."). In addition, the Mine will dewater shallow perched aquifers, may deplete groundwater supplies, and contaminate creeks, seeps and springs located in the Kaibab National Forest and Grand Canyon National Park. ER 575-80; ER 695. Mining activities may also impact California condors, an endangered species that was introduced into the area in 1996. ER 205-08.

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The District Court's ruling that NEPA did not apply to the Valid Existing Rights Determination should be reversed. The Forest Service was required to fully and publicly evaluate the Mine's environmental impacts – in either an EIS or an EA – in connection with its Valid Existing Rights Determination.

## II. The Trust Satisfies The APA's Zone-Of-Interest Test In Order To Challenge The Valid Existing Rights Determination Under FLPMA

Not only did the Forest Service violate NEPA upon issuing the Valid Existing Rights Determination, but, as set forth in Claim 4 (ER 100-01), the Forest Service also failed to evaluate all factors relevant under FLPMA. *See State Farm*, 463 U.S. at 42-43. The Forest Service specifically violated the FLPMA's valid-

existing-rights exception to land withdrawals – and thus the FLPMA Withdrawal – by not accounting for all costs of mining that it was required to consider as part of the validity tests. In particular, the Valid Existing Rights Determination ignored all environmental and cultural compliance costs, including the costs of undertaking monitoring and mitigation requirements. *See* ER 757, 760, 761; ER 384; ER 599; ER 535-37.

The District Court did not reach the merits of this claim.[16] Instead, the District Court ruled that the Trust was barred from bringing this FLPMA claim because the zone-of-interest requirement was not satisfied. But the District Court misapplied the zone-of-interest test under the APA. It analyzed the wrong underlying statute – the Mining Law, rather than FLPMA – and then misread the Mining Law to find that its zone of interests only protects miners and does not encompass those with environmental and cultural interests in public lands.

### A. The Zone-Of-Interest Test Under The APA Is Not Demanding – There Must Be Evidence That Congress Intended To Bar A Particular Claim

The zone-of-interest test asks "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated

[16] Because the District Court did not address the substance of this claim, the Trust is not briefing the merits of Claim 4 in this appeal. *See Am. President Lines v. Int'l Longshore & Warehouse Union*, 721 F.3d 1147, 1157 (9th Cir. 2013) ("It is the general rule … that a federal appellate court does not consider an issue not passed upon below.").

by the statute … in question." *Ass'n of Data Processing Servs. Orgs. v. Camp*, 397 U.S. 150, 153 (1970). "[A]ll that is required is a rough correspondence of the plaintiff's interests with the statutory purpose." *Bernhardt v. Cty. of Los Angeles*, 279 F.3d 862, 870 (9th Cir. 2002).[17]

For claims brought under the APA, like Claim 4, "[t]he zone-of-interests test should be applied consistent with Congress's intent to make agency action presumptively reviewable…." *Pit River Tribe*, 793 F.3d at 1156 (quotations and citations omitted). The APA makes judicial review of agency actions available to any person "adversely affected or aggrieved" by the action. 5 U.S.C. § 702; *cf. Lexmark v. Static Control Components*, 134 S.Ct. 1377, 1389 (2014). Consequently, the zone-of-interest test for APA claims is not "especially demanding." *Clarke v. Security Industries Ass'n.*, 479 U.S. 388, 399-400 (1987); *Lexmark*, 134 S.Ct. at 1389; *accord Organized Village of Kake v. U.S. Dep't of Agriculture*, 795 F.3d 956, 964 (9th Cir. 2015).[18] Cognizant of the APA's gloss on the zone-of-interest test, the Supreme Court "ha[s] always conspicuously included

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[17] The zone-of-interest test is no longer a component of prudential standing or a jurisdictional requirement. The Supreme Court ruled recently that this test concerns "whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark Int'l v. Static Control*, 134 S.Ct. 1377, 1387 (2014).

[18] The Supreme Court and Ninth Circuit have ruled that the zone-of-interest test may be heightened in non-APA cases. *Lexmark*, 134 S.Ct. at 1389; *Ray Charles Foundation v. Robinson*, --- F.3d ---, 2015 WL 4591871, *9 (9th Cir. July 31, 2015).

the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff." *Patchak,* 132 S.Ct. at 2210 (internal quotations omitted).

The APA zone-of-interest test is easily satisfied when the statute providing the basis for a claim provides a benefit to the plaintiff's interests. But this test is also met when a plaintiff's interests fall generally within the scope of the statute and there is no evidence that Congress intended to preclude the plaintiff's claim. *Barrow v. Collins*, 397 U.S. 159, 166-67 (1970) (affirming that "nonreviewability [is] an exception which must be demonstrated" by "clear and convincing evidence of contrary legislative intent" in underlying statutory scheme); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (observing judicial review "will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress"); *Graham v. Fed. Emergency Mgmt. Agency,* 149 F.3d 997, 1004 (9th Cir. 1998) (ruling parties "need only show that their interests fall within the general policy of the underlying statute, such that interpretations of the statute's provisions or scope could directly affect them"). That is, "[t]he test forecloses suit only when a plaintiff's 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." *Patchak*, 132 S.Ct. at 2210 (quotations omitted); *Ass'n of Public Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 954-55 (9th Cir. 2013).

Indeed, the Supreme Court recently made clear that, to satisfy the zone-of-interest test, "there need be no indication of congressional purpose to benefit the would-be plaintiff." *Clarke*, 479 U.S. at 399-400. In *Patchak*, for example, the underlying Indian Reorganization Act was intended to serve tribal interests and provide for economic development through land acquisitions. *Patchak,* 132 S.Ct. at 2210-2212; *see Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) ("The intent and purpose of the Reorganization Act was to rehabilitate the Indian's economic life….") (internal quotations omitted). The Reorganization Act was not enacted for the benefit of the plaintiff, who was a property owner asserting that a proposed casino would injure his economic, environmental and aesthetic interests. *Patchak*, 132 S.Ct. at 2210 & n.7, 2212. But the Supreme Court ruled that the zone-of-interest test was met because plaintiff's interests were impacted by the proposed use of the acquired property. *Patchak*, 132 S.Ct. at 2210-2212.[19]

Similarly, another Supreme Court ruling found that banks competing with credit unions were within zone of interests of a statute that, among other things,

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[19] Citing a clause from *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 886 (1990), the District Court wrongly opined that the zone-of-interest test *only* looks to interests that a statute was "specifically designed to protect." ER 17. But Supreme Court rulings applying the zone-of-interest test under the APA are far more generous. While the test obviously allows claims when a plaintiff's interests are explicitly protected by a statute, which characterized the situation in *Nat'l Wildlife Fed'n*, the test only *forecloses* claims if there is evidence of legislative intent to preclude the type of claim offered. *See Clarke*, 479 U.S. at 399-400; *Patchak,* 132 S.Ct. at 2210-2212.

defined the membership criteria for credit unions (and not banks). *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust*, 522 U.S. 479, 492-94 (1998). Although the law benefitted the banks' competitors (credit unions), commercial banks were nonetheless aggrieved persons entitled to judicial review. *Id*. at 488-500; 495 ("[W]e do not ask whether, in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff."). As these decisions reveal, a law that defines one group's rights places parties with interests adverse to those rights within the zone of interest of that law.

Finally, to identify the relevant zone of interests, it is proper to assess the specific provision as well as the overall statutory purpose. The Supreme Court in *Bennett v. Spear* stated that the zone-of-interest inquiry turns on "the particular provision of law upon which the plaintiff relies" and "not … the overall purpose of the Act in question." *Bennett*, 520 U.S. at 175-76; *accord Pit River*, 793 F.3d at 1157 (ruling interests "cannot be determined by looking to the broad objectives of the Geothermal Steam Act").

But *Bennett* is not the only word on the matter. Since that case was decided, several courts, including the Supreme Court, have extended their inquiry to the statute's overall purpose as a means to understand a specific provision. *See, e.g.*, *Lexmark*, 134 S.Ct. at 1389 (looking to purposes of Lanham Act); *Patchak*, 132 S.Ct. at 2211 (looking to Indian Rehabilitation Act's overall purpose); *Ass'n of*

*Public Agency Customers*, 733 F.3d at 954-55 (reviewing statutory purpose of Northwest Power Act, not just specific provisions); *Ashley Creek Phosphate v. Norton*, 420 F.3d 934, 945 (9th Cir. 2005) (evaluating "overall purpose of NEPA"); *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1179 (9th Cir. 2000) (considering FLPMA's purpose as well as purpose of land exchange provisions). In fact, *Bennett* did not look solely at the Endangered Species Act provision being enforced, but reviewed other provisions that did not provide the basis of the alleged violation. *Bennett*, 520 U.S. at 176 (reviewing ESA section 7(h), 16 U.S.C. § 1536(h), to compare and interpret meaning of ESA provision being enforced).

B. The Trust's Interests Fall Within FLPMA's Zone Of Interests

In Claim 4, the underlying statute at issue is FLPMA, which authorized the Withdrawal and provides an exemption from the Withdrawal's prohibitions. FLPMA's "valid existing rights" exception means that existing claims must be "valid" at the time of the Withdrawal in order to mine – they must contain a "valuable mineral deposit." *Hjelvik*, 198 F.3d at 1074; *Clouser*, 42 F.3d at 1524-25; *see also Robert B. Lara*, 67 IBLA 48, 53 (1982) ("[C]laim must be supported by a discovery at the time of withdrawal…."). Conversely, on public lands withdrawn under FLPMA, mining operations are prohibited on invalid claims. *See id*. Claim 4 seeks to enforce the Withdrawal by asserting that the Forest Service

erroneously conducted its Valid Existing Rights Determination and thus did not lawfully exempt the Mine from the Withdrawal.

FLPMA's withdrawal provisions provide the relevant zone of interests for reviewing Claim 4. FLPMA provides Interior with broad discretion to protect public lands by "mak[ing], modify[ing], extend[ing], or revok[ing] withdrawals." 43 U.S.C. § 1714(a); 43 C.F.R. § 2300.0-3; *see also Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745, 756 (D.C. Cir. 2007). FLPMA defines a "withdrawal" to mean withholding public lands "for the purpose of limiting activities under [the land] laws *in order to maintain other public values* in the area or reserving the area for a particular public purpose or program." 43 U.S.C. § 1702(j) (emphasis added). Although the withdrawal definition does not elaborate on the phrase "other public values," FLPMA's purpose gives it meaning. The statute's purpose is to ensure the protection of various public land values and uses, including "the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values" as well as "outdoor recreation and human occupancy and use." 43 U.S.C. § 1701(a)(8); *see Desert Citizens*, 231 F.3d at 1179 (ruling non-parties to land exchange able to bring FLPMA challenge to exchange based on these purposes).

Accordingly, the values protected by FLPMA's provisions authorizing land withdrawals match the Trust's interests. And the specific interests that this

particular Withdrawal protects are the same as the Trust's. Interior issued the Withdrawal to conserve the Grand Canyon, its Colorado River watershed, groundwater, adjacent public lands, and tribal sacred places. ER 267; ER 274 ("to protect the Grand Canyon Watershed from adverse effects of locatable mineral exploration and development" and to preserve "sacred and traditional places of tribal peoples"). The Trust, Center for Biological Diversity and Sierra Club are dedicated to preserving the land, water and cultural resources affected by the Mine, including Grand Canyon National Park, the Red Butte Traditional Cultural Property, the Kaibab National Forest, the Colorado River watershed, groundwater, and regional seeps and springs.[20]

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[20] *See, e.g.*, ER 516, ¶ 11 (stating throughout Trust's history, it "has been engaged in protecting values unique to Grand Canyon National Park from threats within and outside the Park's boundaries"); ER 515, ¶ 8 ("Absent mining operations, we intend to return into the Monument Creek area to backpack, to the Red Butte area to car camp and day hike, and use and enjoy the area's seeps, springs, and streams, diverse and healthy wildlife population and their supporting native vegetation, archaeological sites and traditional cultural properties, scenic vistas and natural landscapes, and vast spaces offering natural quiet and solitude"); ER 596, ¶ 6 (stating as part of Sierra Club's Grand Canyon Protection Campaign, Mr. Crumbo has worked "for many years to protect the region from harmful actions," in part to "protect the water quality and quantity of the Grand Canyon's fragile seeps and springs"); ER 596, ¶ 7 ("On my frequent visits to the South Rim, I generally stop to contemplate the spiritual significance the Havasupai give the place as well as to admire the small mountain and its symbolic importance to me personally"); ER 531, ¶ 15 (stating as member of Center for Biological Diversity, Mr. Silver's interests are "significantly threatened, as the mining operations at Canyon Mine risk irreparable harm to the spring and seeps of the Redwall layer by contaminating them with radioactive material"); ER 531, ¶ 12 ("[T]he mining activities threaten to destroy my aesthetic enjoyment of the Red Butte area due to

Not only do the Withdrawal and FLPMA's provisions authorizing withdrawals benefit the Trust, but so too does the process for determining whether FLPMA's valid-existing-rights exception applies. In particular, the requirement that costs associated with compliance with environmental and cultural resource laws are included in a validity determination captures the Trust's interests.

The valid existing rights question for mining claims is based on the same tests developed under the Mining Law for a valuable mineral deposit. *Hjelvik*, 198 F.3d at 1074; *Clouser*, 42 F.3d at 1524-25; *See e.g.*, ER 231 (applying prudent person and marketability tests in Valid Existing Rights Determination). The Supreme Court has sanctioned the use of the "prudent-person" and "marketability" tests for assessing whether claims are valid. *Cameron*, 252 U.S. at 459 (affirming "person of ordinary prudence" test); *Coleman*, 390 U.S. at 602 ("[M]arketability test is an admirable effort to identify with greater precision and objectivity the factors relevant to a determination that a mineral deposit is 'valuable.' It is a logical complement to the 'prudent-man test' which the Secretary has been using to interpret the mining laws since 1894."). These tests require that mineral deposits underlying a claim can be "extracted, removed, and marketed at a profit." *Coleman*, 390 U.S. at 600, 601-03.

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dust, heavy truck traffic, light pollution and noise.").

Profitability depends on expected revenues and costs. *Lara,* 820 F.2d at 1541 (recognizing "evidence of the costs and profits of mining the claims should have been considered in determining whether a person of ordinary prudence would be justified in the further investment of labor and capital"); *Great Basin Mine Watch*, 146 IBLA 248, 256 (1999) ("Claim validity is determined by the ability of the claimant to show that a profit can be made *after* accounting for the costs of compliance with all applicable laws….") (emphasis in original). And the costs must include environmental compliance costs. *See Indep. Mining*, 105 F.3d at 506-07 (validity determinations must "includ[e] the costs of complying with any environmental and reclamation laws"); *see also Great Basin Mine Watch*, 146 IBLA at 256 ("[T]he costs of compliance with all applicable Federal and State laws (including environmental laws) are properly considered in determining whether or not the mineral deposit is presently marketable at a profit."); *Moon Mining v. HECLA Mining*, 161 IBLA 334, 362 (2004) (recognizing "cost of compliance with … environmental requirements are properly considered in determining whether there has been a discovery"); *cf. Clouser*, 42 F.3d at 1530 (costs include those to "reduce incidental environmental damage").

Accordingly, the manner in which agencies must assess claim validity align with the Trust's interests. A validity determination *must* account for all costs of complying with environmental and cultural resource protection laws. FLPMA's

requirement for valid existing rights determinations in a withdrawn area therefore benefits the Trust's interests. This limitation ensures costs related the environmental mitigation and monitoring, for instance, are addressed. And if a claim is found unprofitable, the Withdrawal prohibits developing that invalid claim.

* * *

In sum, the Trust's environmental, cultural, recreational and aesthetic interests fall within the zone of interests encompassed in FLPMA, its provisions authorizing withdrawals, and its exception to withdrawals. There is no evidence in FLPMA that Congress intended to prohibit the Trust, and others with like interests, from asserting claims to enforce the Withdrawal and challenge exceptions to the Withdrawal. *See, e.g.*, *Wilderness Soc'y v. Dombeck*, 168 F.3d 367, 375-78 (9th Cir. 1999) (without addressing zone of interest test, adjudicating environmental group's challenge to valid existing rights determination in withdrawn area). To rule otherwise would "undermine FLPMA's stated goal of providing 'judicial review of public land adjudication decisions.' 43 U.S.C. § 1701(a)(6)." *See Desert Citizens*, 231 F.3d at 1179.

### C. The District Court Based Its Ruling On The Wrong Underlying Statute

The Forest Service issued the Valid Existing Rights Determination solely to conform to FLPMA and that law's limitation that only claims with valid existing

rights can proceed on withdrawn public lands. *See* 43 U.S.C. § 1714 (authorizing withdrawals); § 1701, Pub. Law 94-579, Note (h) (providing exceptions to withdrawals). As detailed above, the Valid Existing Rights Determination and the record make clear that this Determination was being issued "[d]ue to the Withdrawal." ER 234; ER 290 (Forest Supervisor informing Energy Fuels "[t]his is a requirement for any public domain lands managed by the Forest Service that have been withdrawn from mineral entry[.]").

The District Court found otherwise. It maintained that the Valid Existing Rights Determination was prepared to comply with the Mining Law and decide whether rights available under that law were realized, and thus Claim 4 is a Mining Law claim. *See* ER 16-20; ER 48 (reasoning "claim four essentially challenged Energy Fuels' rights to the uranium beneath Canyon Mine").

This is incorrect. There is no evidence that the Forest Service prepared the Valid Existing Rights Determination to comply with the Mining Law. Indeed, before the Withdrawal, the Forest Service could have chosen to verify, by enforcing the Mining Law, whether the Mine's claims contain a discovery of a valuable mineral deposit, including when the plan of operations was approved in 1986. *See Ernest K. Lehmann & Associates of Montana v. Salazar*, 602 F.Supp.2d 146, 150 (D. D.C. 2009) ("Until the United States issues a patent, it has the right to determine whether a claim is valid, i.e., whether a discovery of a valuable mineral

deposit has been made."). But that is not what the Forest Service did – the agency never determined whether there had been a discovery of a valuable mineral deposit at the Mine to ensure compliance with the Mining Law. Rather, the Forest Service was compelled to issue the Valid Existing Rights Determination because of the 2012 FLPMA Withdrawal. The Valid Existing Rights Determination says so explicitly. ER 231, 232, 234.

The District Court's error may stem from the fact that the test for claim validity is the same whether a validity determination is issued to comply with FLPMA or the Mining Law. *See* ER 588, ¶ 4 (Forest Service's Michael Linden explaining claim validity could come up in a variety of circumstances, but they "all basically address the same question, whether or not a specific mining claim[] is 'valid."). A mining claim may be exempt from the Withdrawal based on the discovery of a valuable mineral deposit. *Hjelvik*, 198 F.3d at 1074; *Clouser*, 42 F.3d at 1524-25. Although the same tests are used, the Withdrawal prompted this Valid Existing Rights Determination – not the Mining Law. ER 231-32; *see Cameron*, 252 U.S. at 456 (explaining "to bring the claim within the saving clause in the withdrawal for the monument reserve the discovery must have preceded the creation of that reserve"). The District Court was wrong to conclude that the Valid

Existing Rights Determination was prepared under the Mining Law and to assess the zone-of-interest test under the Mining Law.[21]

D. Limits Imposed By The Mining Law Protect The Trust

Even if the District Court was correct – that the Forest Service did not issue the Valid Existing Rights Determination to comply with the FLPMA Withdrawal, but the Mining Law – the Trust satisfies the zone-of-interest test under the Mining Law. The Mining Law limits development to claims that contain a "valuable mineral deposit." *See* 30 U.S.C. § 22. This validity requirement and the mandatory process it involves protect the Trust's interests.

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[21] The Forest Service's initial defense to Claim 4 during summary judgment briefing was that "there is no law to apply" and a "stand alone APA claim" is not permissible. ER 434 (*See* ECF No. 146, citing *Or. Natural Res. Council v. Thomas*, 92 F.3d 792, 798 (9th Cir. 1996) and *El Rescate Legal Servs. v. Exec. Office of Immigration Review*, 959 F.2d 742, 753 (9th Cir. 1991)). However, a FLPMA exemption from a land withdrawal is reviewed based on the prudent-person and marketability tests for claim validity, which supply legal standards for the court to apply.

The District Court's initial discussion of the zone-of-interest test in its summary judgment order is misleading because it is based on a dialogue concerning the "law-to-apply" issue, and not the zone-of-interest test. *See* ER 16. The Forest Service raised the zone-of-interest argument for the first time in its reply brief and the Trust's first opportunity to address this new argument was in supplemental briefing. ER 436 (District Court Order asking for supplemental briefing on issue). In any case, Claim 4 is tied to the Mining Law only insofar as the tests for satisfying FLPMA's "valid existing rights" exception are the prudent-person and marketability tests. But just because FLPMA's exception employs these same tests for determining valid existing rights does not mean that Claim 4 is a Mining Law claim.

First, to evaluate whether a claimant has discovered a valuable mineral deposit under the Mining Law (30 U.S.C. § 22), the costs of complying with environmental and cultural resource laws must be assessed. In Claim 4, the Trust seeks to ensure that the Forest Service considers such costs. As such, these validity tests serve the Trust's interests.

Second, the Mining Law places restrictions on public land mining. It opens public lands to U.S. citizens for the purpose of exploring for valuable mineral deposits. 30 U.S.C. § 22; *Cal. Coastal Comm'n*, 480 U.S. at 575 ("Under the Mining Act …, a private citizen may enter federal lands to explore for mineral deposits."). But to extract the minerals the Mining Law requires the discovery of a valuable mineral deposit. 30 U.S.C. § 22; *see* ER 638 (in describing Mining Law, Interior stating "valid mining claim gives the claimant the right to possess and develop mineral deposit"); ER 715 (Forest Service Manual § 2813.2 providing that to "meet the requirements as specific or implied by the mining laws…claimant [must] 2. Discover a valuable mineral deposit … 7. Be prepared to show evidence of mineral discovery").

Through this validity requirement, the Mining Law protects public lands and resources from unfettered exploitation, and thus advances the Trust's interests in conserving environmental and cultural resources and recreational opportunities. Had Congress meant *only* to promote mineral development through the Mining

Law and to afford *no* protection to public lands, it could have enacted a statute that placed no constraints whatsoever on the extraction of minerals. It could have said all public lands are open to exploration and development. But it did not do that. The Mining Law's validity requirement provides protection against needless damage to public lands resources from mining companies seeking to exploit the country's mineral reserves for their private financial gain.

The Supreme Court has affirmed this Mining Law limitation. Underscoring the significance of the valuable mineral deposit requirement, the Court made clear that "no right arises from an invalid [mining] claim of any kind. All must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public." *Cameron*, 252 U.S. at 460 (valuable mineral deposit requirement ensures "…the rights of the public [are] preserved."); *see Mineral Policy Ctr. v. Norton*, 292 F.Supp.2d 30, 47 (D.D.C. 2003) ("While a claimant can explore for valuable mineral deposits before perfecting a valid mining claim, without such a claim, she has no property rights against the United States…."). The Court thus recognized that the Mining Law's "obvious intent" to promote mining was buffered by the requirement that mining claims be "valuable in an economic sense." *See Coleman*, 390 U.S. at 602. Accordingly, by only allowing the mining of valuable mineral deposits, the Mining Law protects the Trust's interests in preserving public lands.

Furthermore, a 1955 amendment to the Mining Law provides additional evidence that the law recognizes interests beyond mining. Before 1955, the Mining Law stated that a claimant was entitled to exclusive possession of the public lands overlaying a mining claim in order to develop a valuable mineral deposit. 30 U.S.C. § 26; *Curtis-Nevada Mines*, 611 F.2d at 1281. But the Multiple Use Act, 30 U.S.C. § 612, eliminated a claimant's "exclusive possession of mining claim[s] so as to permit the multiple use of the surface resources…." *Curtis-Nevada Mines*, 611 F.2d at 1283; *McMaster*, 731 F.3d at 886 ("Claimants would no longer receive the exclusive right of possession and enjoyment of the surface prior to patenting their claim."); *United States v. Godfrey*, 2015 WL 3541337, *2 (E.D. Cal. June 4, 2015) (recognizing claimant's "exclusive right was modified and limited by the Surface Resources and Multiple Use Act of 1955…"). As a consequence, recreational uses – as well as other uses – are recognized as a protected interest. *Curtis-Nevada Mines*, 611 F.2d at 1283 ("[T]he phrase 'other surface resources' was clearly intended to include recreational uses."). The Trust seeks to protect its recreational uses of public lands through its challenge to the Valid Existing Rights Determination.[22]

[22] *See* ER 515, ¶ 8 ("My family and I wish to continue to undertake recreational activities below the South Rim of the Grand Canyon and in the Tusayan Ranger District of the Kaibab National Forest, but will be precluded from doing so should activities resume at the Canyon Mine"); ER 516, ¶¶ 10-11; ER 521, ¶ 20; ER 597, ¶ 9 ("I am very concerned that the proposed and ongoing

Moreover, a statute's primary purpose does not prevent those with adverse interests from enforcing that statute. Again, the Supreme Court has expressly rejected the idea that only those who are a statute's intended beneficiaries are within that statute's zone of interests. *See, e.g.*, *Patchak*, 132 S.Ct. at 2210 n.7; *Nat'l Credit Union Admin.*, 522 U.S. at 492-94. Courts have heard APA-based claims asserted by parties seeking to protect public lands and environmental values for violations of laws enacted primarily to facilitate resource development. *See, e.g.*, *Pit River Tribe*, 793 F.3d at 1149-50, 1155-58; *Nat'l Wildlife Fed'n. v. Burford*, 871 F.2d 849, 853 (9th Cir. 1989) (zone-of-interest test satisfied for claim contesting whether BLM obtained "fair market value" for federal coal leases); *NRDC v. Jamison*, 787 F.Supp. 231, 244 (D.D.C. 1999) (rejecting argument that only those with "pro-production" interests could sue over violation of Federal Coal Leasing Amendments Act").

*Bennett v. Spear* further illustrates this point. There, the Supreme Court acknowledged that the Endangered Species Act was adopted to conserve species. However, the Court held that parties with economic interests, and who had no interest in protecting endangered species, were also within that statute's zone of interest. *Bennett*, 520 U.S. at 176. As the court explained:

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uranium mining activities will impair my ability to enjoy the Forest surrounding Grand Canyon National Park").

> The obvious purpose of the requirement that each agency 'use the best scientific and commercial data available' is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise. While this no doubt serves to advance the ESA's overall goal of species preservation, we think it readily apparent that another objective (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.

*Id*. at 176-77.

Accordingly, the Trust does not have to be a mining company to bring claims under the Mining Law. Non-miners may enforce the Mining Law's validity requirement. *See Thomas v. Morton*, 408 F.Supp. 1361 (D. Ariz. 1976), *aff'd*, *Thomas v. Andrus*, 552 F.2d 871 (9th Cir. 1977). In *Thomas*, those who challenged mining claims were grazing permittees and landowners that intended to use the land occupied by mining claims for livestock grazing. *Thomas v. Andrus*, 552 F.2d at 872. The district court in *Thomas* explained:

> it is only reasonable that the public interest is served by allowing *anyone* with sufficient nexus, i.e., *a possible conflicting or adverse interest*[,] such as surface owner or permittee[,] to bring to the attention of the Government, through a private contest, the possibility of an invalid claim of title or interest in public land.
>
> …
>
> [C]ertainly a private party with any interest in land which might reasonably be affected by the mining claim or any activity incident thereto or stemming therefrom, should have standing to institute a private contest to put the Government on notice and to resolve the issue of the claimed invalidity of a mining claim.

*Thomas v. Morton*, 408 F.Supp. at 1370 (emphasis added). Like the grazing plaintiffs in *Thomas*, that the Trust has adverse interests to mining does not defeat the zone-of-interest test.

In sum, even if it were proper to look at the Mining Law to satisfy the zone of interests test (which it is not), the Trust's interests fall within the Mining Law's ambit. This is true even though the Trust's interests are adverse to mining – and seek to prevent damage to public lands and resources caused by mining. Importantly, there is no evidence that the Mining Law intended to preclude the Trust's challenge to a validity determination. *See Patchak*, 132 S.Ct. at 2210; *Barrow*, 397 U.S. at 166-67. And to rule that only miners can enforce the Mining Law's validity requirement contradicts the Supreme Court's holding that the zone-of-interest test must be read in concert with the APA's presumption of judicial review of agency actions and requires a "lenient approach." *See Patchak,* 132 S.Ct. at 2210; *Lexmark*, 134 S.Ct. at 1389. The District Court's decision to the contrary should be reversed.

## CONCLUSION

For the foregoing reasons, the District Court's ruling on summary judgment should be reversed.

Respectfully submitted,

September 25, 2015

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## STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the Trust notes that *Havasupai Tribe v. Williams*, Case No. 15-15754 is a related case that has been consolidated.

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a), the undersigned hereby certifies that the foregoing brief complies with typeface requirements, was prepared using Microsoft Times New Roman 14-point font, and contains 13,105 words.

## CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2015, I filed APPELLANTS GRAND CANYON TRUST, CENTER FOR BIOLOGICAL DIVERSITY AND SIERRA CLUB'S OPENING BRIEF using the Ninth Circuit's ECF system for filing and transmittal of a Notice of Electronic Filing.

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# APPELLANTS' ADDENDUM

## STATUTES

### 5 U.S.C. § 551 - Definitions

For the purpose of this subchapter—

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;
(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or
(C) taking of other action on the application or petition of, and beneficial to, a person;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

### 5 U.S.C. § 702 - Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of

legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

**5 U.S.C. § 704 - Actions reviewable**

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

**30 U.S.C. § 22 - Lands open to purchase by citizens**

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

**30 U.S.C. § 26 - Locators' rights of possession and enjoyment**

The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the

exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. Nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

**30 U.S.C. § 612 - Unpatented mining claims**

(b) Reservations in the United States to use of the surface and surface resources Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: Provided, however, That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto: Provided further, That if at any time the locator requires more timber for his mining operations than is available to him from the claim after disposition of timber therefrom by the United States, subsequent to the location of the claim, he shall be entitled, free of charge, to be supplied with timber for such requirements from the nearest timber administered by the disposing agency which is ready for harvesting under the rules and regulations of that agency and which is substantially equivalent in kind and quantity to the timber estimated by the disposing agency to have been disposed of from the claim: Provided further, That nothing in this subchapter and sections 601 and 603 of this title shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the

ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim.

**43 U.S.C. § 1701 - Congressional declaration of policy**

(a) The Congress declares that it is the policy of the United States that—

> (4) the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action;
>
> (6) judicial review of public land adjudication decisions be provided by law;
>
> (8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;
>
> (12) the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands; and

**Notes on 43 U.S.C § 1701 -**

Savings Provision
Pub. L. 94–579, title VII, § 701,Oct. 21, 1976, 90 Stat. 2786, provided that:

"(h) All actions by the Secretary concerned under this Act shall be subject to valid existing rights.

**43 U.S.C. § 1702 - Definitions**

Without altering in any way the meaning of the following terms as used in any other statute, whether or not such statute is referred to in, or amended by, this Act, as used in this Act—

(j) The term "withdrawal" means withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for

the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program; or transferring jurisdiction over an area of Federal land, other than "property" governed by the Federal Property and Administrative Services Act, as amended (40 U.S.C. 472) from one department, bureau or agency to another department, bureau or agency.

**43 U.S.C. § 1714 - Withdrawals of lands**

(a) Authorization and limitation; delegation of authority
On and after the effective date of this Act the Secretary is authorized to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section. The Secretary may delegate this withdrawal authority only to individuals in the Office of the Secretary who have been appointed by the President, by and with the advice and consent of the Senate.

REGULATIONS

**36 C.F.R. § 228.2 - Scope.**

§ 228.2 Scope.

These regulations apply to operations hereafter conducted under the United States mining laws of May 10, 1872, as amended (30 U.S.C. 22 *et seq.*), as they affect surface resources on all National Forest System lands under the jurisdiction of the Secretary of Agriculture to which such laws are applicable: *Provided, however,* That any area of National Forest lands covered by a special Act of Congress (16 U.S.C. 482a-482q) is subject to the provisions of this part and the provisions of the special act, and in the case of conflict the provisions of the special act shall apply.

**36 C.F.R. § 228.4 - Plan of operations**

§ 228.4 Plan of operations—notice of intent—requirements.
(a) Except as provided in paragraph (a)(1) of this section, a notice of intent to operate is required from any person proposing to conduct operations which might cause significant disturbance of surface resources. Such notice of intent to operate shall be submitted to the District Ranger having jurisdiction over the area in which the operations will be conducted. Each notice of intent to operate shall provide information sufficient to identify the area involved, the nature of the proposed

operations, the route of access to the area of operations, and the method of transport.

(1) A notice of intent to operate is not required for:

(i) Operations which will be limited to the use of vehicles on existing public roads or roads used and maintained for National Forest System purposes;

(ii) Prospecting and sampling which will not cause significant surface resource disturbance and will not involve removal of more than a reasonable amount of mineral deposit for analysis and study which generally might include searching for and occasionally removing small mineral samples or specimens, gold panning, metal detecting, non-motorized hand sluicing, using battery operated dry washers, and collecting of mineral specimens using hand tools;

(iii) Marking and monumenting a mining claim;

(iv) Underground operations which will not cause significant surface resource disturbance;

(v) Operations, which in their totality, will not cause surface resource disturbance which is substantially different than that caused by other users of the National Forest System who are not required to obtain a Forest Service special use authorization, contract, or other written authorization;

(vi) Operations which will not involve the use of mechanized earthmoving equipment, such as bulldozers or backhoes, or the cutting of trees, unless those operations otherwise might cause a significant disturbance of surface resources; or

(vii) Operations for which a proposed plan of operations is submitted for approval;

(2) The District Ranger will, within 15 days of receipt of a notice of intent to operate, notify the operator if approval of a plan of operations is required before the operations may begin.

(3) An operator shall submit a proposed plan of operations to the District Ranger having jurisdiction over the area in which operations will be conducted in lieu of a notice of intent to operate if the proposed operations will likely cause a significant disturbance of surface resources. An operator also shall submit a proposed plan of operations, or a proposed supplemental plan of operations consistent with § 228.4(d), to the District Ranger having jurisdiction over the area in which operations are being conducted if those operations are causing a significant disturbance of surface resources but are

not covered by a current approved plan of operations. The requirement to submit a plan of operations shall not apply to the operations listed in paragraphs (a)(1)(i) through (v). The requirement to submit a plan of operations also shall not apply to operations which will not involve the use of mechanized earthmoving equipment, such as bulldozers or backhoes, or the cutting of trees, unless those operations otherwise will likely cause a significant disturbance of surface resources.

(4) If the District Ranger determines that any operation is causing or will likely cause significant disturbance of surface resources, the District Ranger shall notify the operator that the operator must submit a proposed plan of operations for approval and that the operations can not be conducted until a plan of operations is approved.

(b) Any person conducting operations on the effective date of these regulations, who would have been required to submit a plan of operations under § 228.4(a), may continue operations but shall within 120 days thereafter submit a plan of operations to the District Ranger having jurisdiction over the area within which operations are being conducted: *Provided, however,* That upon a showing of good cause the authorized officer will grant an extension of time for submission of a plan of operations, not to exceed an additional 6 months. Operations may continue according to the submitted plan during its review, unless the authorized officer determines that the operations are unnecessarily or unreasonably causing irreparable damage to surface resources and advises the operator of those measures needed to avoid such damage. Upon approval of a plan of operations, operations shall be conducted in accordance with the approved plan. The requirement to submit a plan of operations shall not apply: (1) To operations excepted in § 228.4(a) or (2) to operations concluded prior to the effective date of the regulations in this part.

(c) The plan of operations shall include:

(1) The name and legal mailing address of the operators (and claimants if they are not the operators) and their lessees, assigns, or designees.

(2) A map or sketch showing information sufficient to locate the proposed area of operations on the ground, existing and/or proposed roads or access routes to be used in connection with the operations as set forth in § 228.12 and the approximate location and size of areas where surface resources will be disturbed.

(3) Information sufficient to describe or identify the type of operations proposed and how they would be conducted, the type and standard of

existing and proposed roads or access routes, the means of transportation used or to be used as set forth in § 228.12, the period during which the proposed activity will take place, and measures to be taken to meet the requirements for environmental protection in § 228.8.

(d) The plan of operations shall cover the requirements set forth in paragraph (c) of this section, as foreseen for the entire operation for the full estimated period of activity: *Provided, however,* That if the development of a plan for an entire operation is not possible at the time of preparation of a plan, the operator shall file an initial plan setting forth his proposed operation to the degree reasonably foreseeable at that time, and shall thereafter file a supplemental plan or plans whenever it is proposed to undertake any significant surface disturbance not covered by the initial plan.

(e) At any time during operations under an approved plan of operations, the authorized officer may ask the operator to furnish a proposed modification of the plan detailing the means of minimizing unforeseen significant disturbance of surface resources. If the operator does not furnish a proposed modification within a time deemed reasonable by the authorized officer, the authorized officer may recommend to his immediate superior that the operator be required to submit a proposed modification of the plan. The recommendation of the authorized officer shall be accompanied by a statement setting forth in detail the supporting facts and reasons for his recommendations. In acting upon such recommendation, the immediate superior of the authorized officer shall determine:

(1) Whether all reasonable measures were taken by the authorized officer to predict the environmental impacts of the proposed operations prior to approving the operating plan,

(2) Whether the disturbance is or probably will become of such significance as to require modification of the operating plan in order to meet the requirements for environmental protection specified in § 228.8 and

(3) Whether the disturbance can be minimized using reasonable means.

Lacking such determination that unforeseen significant disturbance of surface resources is occurring or probable and that the disturbance can be minimized using reasonable means, no operator shall be required to submit a proposed modification of an approved plan of operations. Operations may continue in accordance with the approved plan until a modified plan is approved, unless the immediate superior of the authorized officer determines that the operations are unnecessarily or unreasonably causing irreparable injury, loss or damage to surface resources and advises the operator of those measures needed to avoid such damage.

(f) Upon completion of an environmental analysis in connection with each proposed operating plan, the authorized officer will determine whether an environmental statement is required. Not every plan of operations, supplemental plan or modification will involve the preparation of an environmental statement. Environmental impacts will vary substantially depending on whether the nature of operations is prospecting, exploration, development, or processing, and on the scope of operations (such as size of operations, construction required, length of operations and equipment required), resulting in varying degrees of disturbance to vegetative resources, soil, water, air, or wildlife. The Forest Service will prepare any environmental statements that may be required.

(g) The information required to be included in a notice of intent or a plan of operations, or supplement or modification thereto, has been assigned Office of Management and Budget Control #0596-0022. The public reporting burden for this collection of information is estimated to vary from a few minutes for an activity involving little or no surface disturbance to several months for activities involving heavy capital investments and significant surface disturbance, with an average of 2 hours per individual response. This includes time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Chief (2800), Forest Service, USDA, P.O. Box 96090, Washington, DC 20090-6090 and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

**40 C.F.R. § 1508.18 - Major Federal action.**

§ 1508.18 Major Federal action.
*Major Federal action* includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under

the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq.,* with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act,5 U.S.C. 551 *et seq.;* treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

**40 C.F.R. § 1508.27 - Significantly.**

§ 1508.27 Significantly.
*Significantly* as used in NEPA requires considerations of both context and intensity:

(a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity.* This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.
(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.