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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Grand Canyon Trust, *et al.*,

Plaintiffs,

v.

Heather Provencio, *et al.*,

Defendants,

and

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

Intervenors-Defendants.

No. CV-13-8045-PCT-DGC

INTERVENORS-DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Assigned to The Honorable David G. Campbell)

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Intervenors-Defendants Energy Fuels Resources (USA) Inc. and EFR Arizona Strip LLC (together, "EFR") hereby file their Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment (Doc. 226) and in Support of their Motion for Summary Judgment. There is a single remaining claim before the Court alleging that the Defendant United States Forest Service's ("USFS") certified, professional mineral examiners failed to consider certain costs when completing an April 18, 2012 valid existing rights ("VER") determination (the "VER Determination") that concluded that EFR had VER to the Canyon Mine. The VER Determination and administrative record demonstrate that USFS's mineral examiners considered all relevant costs and completed the VER Determination consistent with applicable federal regulations and guidance. Further, the administrative record demonstrates that USFS and EFR accounted for future unknown costs, including those identified by Plaintiffs, as a contingency in the cost estimates. In addition, as the Court previously concluded, the VER Determination was not legally required; had no legal effect on EFR's valid plan of operations; and therefore, Plaintiffs are not entitled to any relief for the remaining claim. Finally, in an effort to now challenge the entire VER Determination, Plaintiffs attempt to expand their Fourth Claim by adding a number of additional claims, including that USFS used the wrong uranium price and that it should have included "sunk costs" in the VER Determination. Although EFR addresses each of these additional claims below, they should not be considered because they are not part of the Amended Complaint or original record. For these reasons, EFR now requests that the Court enter summary judgment in its and USFS's favors.

I. FACTUAL BACKGROUND

The Court entered summary judgment for Defendants in an Order dated April 7, 2015 (Doc. 166) ("2015 Order") setting forth the detailed factual background of the Canyon Mine and this litigation. The Ninth Circuit also issued an opinion setting forth facts relevant to Plaintiffs' claims. *See Havasupai Tribe v. Provencio*, 906 F.3d 1155, 1167 (9th Cir. 2018). EFR incorporates the factual background therein by reference and sets forth additional relevant facts below.

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A. The Withdrawal

In January 2012, the Secretary of the Department of the Interior ("DOI"), pursuant to the Federal Land Policy and Management Act ("FLPMA"), 42 U.S.C. § 1714(A), withdrew approximately 633,547 acres of public lands and 360,002 acres of National Forest System lands for up to 20 years from location and entry under the Mining Law of 1872, 30 U.S.C. §§ 22-54 (the "Withdrawal"). 77 Fed. Reg. 2317-01 (Jan. 17, 2012); A.R. 481:10308-31. The Withdrawal, which included the location of the Canyon Mine, had been proposed by DOI in 2009. 74 Fed. Reg. 35,887-01 (July 21, 2009). DOI undertook extensive study and preparation of an Environmental Impact Statement ("EIS") before finalizing the Withdrawal.

B. The VER Determination

In August 2011, EFR notified USFS that it intended to resume operation at the Canyon Mine under its Plan of Operations that was approved in 1986 (the "Plan"). A.R. 443:8611-12. In response, USFS, while acknowledging it was not required, decided to complete the VER Determination to supplement the record. A.R. 525:10482-528. The purpose of the VER Determination was to confirm that EFR had VER to the Canyon 74-75 mining claim's uranium mineral deposits (the "Canyon Mine"). Although EFR asserted that it had valid rights to the uranium mineral deposits, a valid Plan, and that it did not believe any additional government approvals were required before the mine reopened (A.R. 443:8611-12), EFR agreed to withhold shaft sinking until the VER Determination was complete. *See* Doc. 123-2 at 2-3. The VER Determination was completed on April 18, 2012 and confirmed that EFR had VER to the Canyon Mine. A.R. 525:10483-527.

The VER Determination was completed by USFS's certified mineral examiners after they conducted a field examination of the subject claims, verified claim boundaries, documented development activities at the claims, observed drill core, reviewed land and mineral status documents, analyzed geological reports and maps from the U.S. Geologic Survey and the Arizona Geologic Survey, reviewed case file documents from the

applicable USFS offices, reviewed EFR's financial records and data relating to the Canyon Mine, requested and received EFR's financial records and data associated with the Canyon and Arizona 1 Mines, independently verified and confirmed EFR's financial records and data, and prepared a comprehensive and detailed report summarizing the findings and conclusion that EFR had VER to the Canyon Mine. *Id.* at 010487-89. After completing this work, USFS's mineral examiners issued the VER Determination, which they certified was completed consistent with all applicable regulations and guidance, including the U.S. Department of the Interior Bureau of Land Management's H-3890-Handbook for Mineral Examiners ("Handbook"). A.R. 374:7349-65.

C. Plaintiffs' Fourth Claim

Plaintiffs originally asserted four claims under the Administrative Procedure Act ("APA"); however, their Fourth Claim is the only claim remaining before the Court. It alleges that USFS violated several federal laws (*i.e.*, the Mining Law of 1872, FLPMA, the Withdrawal, 1897 Organic Law, and the APA) by failing to take various costs into account in its determination that the Canyon Mine can be operated at a profit. Doc. 115 at 27-28. In their Fourth Claim, Plaintiffs alleged USFS failed to consider the costs of certain environmental monitoring, mitigation, and wildlife conservation measures. Plaintiffs now allege those claims plus they have inappropriately expanded their Fourth Claim to now include the following additional claims: USFS used the incorrect uranium price in the VER Determination and USFS did not consider "sunk costs" associated with the Canyon Mine. For the reasons set forth below, Plaintiffs' Fourth Claim should be dismissed in its entirety.

II. ARGUMENT

A. Plaintiffs raise costs and issues outside of their Fourth Claim.

As an initial matter, Plaintiffs have challenged "sunk costs" and the price of uranium used in the VER Determination, which are both outside the scope of the following allegations in their Fourth Claim. Doc. 115 at ¶ 91. The Amended Complaint does not specifically identify "sunk costs" and "sunk costs" do not fall into the general

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categories of "approvals, operations and reclamation" costs identified by Plaintiffs. It also does not allege that USFS used the incorrect uranium price in the VER Determination or that USFS's certified mineral examiners failed to comply with applicable regulations and guidance when performing the VER Determination. Further, "sunk costs" and the uranium price were not identified or at issue in the prior summary judgment briefing before the Court. Because Plaintiffs did not identify or challenge "sunk costs" or the uranium price in their Amended Complaint or in this matter to date, the Court should dismiss them. *See Apache Survival Coal. v. United States*, 21 F.3d 895, 911–12 (9th Cir. 1994) (issue raised in briefing not properly considered when not included in complaint due to inexcusable delay). Plaintiffs are attempting to expand the limited claims in their Fourth Claim to a challenge of the entire VER Determination. The Court should now reject those arguments.

B. <u>The VER Determination was not legally required; has no legal impact on the approved Plan; and therefore, Plaintiffs are not entitled to the relief they seek relating to the VER Determination</u>.

The Court previously examined the legal effect of the Withdrawal in detail and concluded that the Withdrawal did not extinguish mining rights that already existed, including EFR's VER to the Canyon Mine, and that existing mines, such as the Canyon Mine, could continue to operate regardless of whether the VER Determination was completed. 2015 Order at 7-10. The Withdrawal's EIS acknowledged the existence of the Canyon Mine and stated its assumption that the Mine would continue operations. A.R. 481:10314; 2015 Order at 8.

The Court's reasoning remains sound because the Withdrawal, by its terms, is prospective and forbids only the future location and entry of mining claims under the Mining Law. 77 Fed. Reg. 2563, 2563 (Jan. 19, 2012); *see In re Goergen*, 144 IBLA 293, 297 (1998) (withdrawals forbid only future locations and entries). The Withdrawal did not mandate anything and did not impact previously-located and entered mining claims, except to restate FLPMA's required language that it is subject to VER. As USFS's

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actions here make clear, the Withdrawal has no legal impact on EFR's mining rights or the approved Plan. *See* BLM, H-3809-1 – Surface Management Handbook § 8.1.5 ("Plans of Operations that were in place prior to the withdrawal or segregation are not subject to the mandatory [VER] determination procedures at 43 CFR § 3809.100(a)."). A.R. 591:11602. Instead, where a mine's plan of operations has been approved and a withdrawal later occurs, such as here, those "operations . . . *do not require a validity examination* unless there is a material change in the activity." *Id*. (emphasis added). In addition to the VER Determination, USFS assembled a 13-person interdisciplinary team with expertise in minerals and geology, surface and groundwater, air quality, transportation, tribal consultation, heritage resources, vegetation, NEPA, and socioeconomic issues to conduct a Mine Review and determine if there was new information or material changes in circumstances. 2015 Order at 4; A.R. 533:10592-637. That team determined that there were no material changes at the Canyon Mine; that no amendment or modification of the Plan was required; and that EFR could resume operations under the Plan without the need for any additional approvals. *Id*.; A.R. 533:10594. Because there were no changed circumstances or material changes, no validity examination was required by applicable regulations and guidance. Consequently, the VER Determination was not legally required, had no legal effect, and Plaintiffs are not entitled to any relief associated with it, much less an injunction enjoining activity at the Canyon Mine until a new validity examination is completed. *See In re Ctr. for Biological Diversity*, 162 IBLA 268, 281 (2004) (until a claim contest "renders a final determination of invalidity, it is well established that the claimant will be permitted to engage in mining and processing operations").

Additionally, a VER determination does not provide any authority to conduct mining operations; the relevant approval for those activities is a plan of operations. *See, e.g.*, 36 C.F.R. § 288.5. USFS and BLM routinely approve plans of operations without conducting VER determinations. *See, e.g., In re W. Shoshone Def. Project*, 160 IBLA 32, 56-57 (2003). There is nothing in USFS's (or BLM's) regulations to prevent previously-

approved mining from occurring during a VER examination. To the contrary, BLM guidance says that it may occur, even in the context of a withdrawal. *See* BLM, H-3809-1 – Surface Management Handbook § 8.1.5 (A.R. 591:11602). Thus, USFS's decision to perform the VER Determination did nothing to adversely impact the presumptively valid and ongoing rights of EFR to conduct its mining operations at the Canyon Mine. Instead, it was undertaken primarily as an internal procedure to provide USFS with additional comfort as to the Withdrawal's area's VERs, and at most constituted a first step toward the possibility that USFS would refer the matter to BLM to determine whether to bring a contest hearing. *See Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335-37 (1963) (explaining BLM's role); Forest Service Manual ("FSM") § 2814.11 (explaining USFS's right to test the validity of mining claims) (A.R. 371:7284), § 2819 (explaining that "[n]o adjudicative power has been given to [USFS]" with respect to mining claims: "Thus, [USFS] statements about validity are statements of belief and not formal determinations") (*Id*. at 7310-13, and § 2819.1-.2 (explaining USFS's and BLM's roles in validity contests; if USFS believes a contest should be initiated, it must request that BLM do so) (*Id*. at 7312).

The Fourth Claim does not challenge the Plan, which authorizes EFR's operations at the Canyon Mine. Instead, it seeks to set aside the VER Determination and enjoin all activity at the Canyon Mine until a new validity examination is completed. However, under the authorities set forth above, Plaintiffs are not entitled to such relief, as a VER Determination is not required and setting aside the VER Determination would have no effect on the project. However, even if the Court were to order a new VER determination, EFR is entitled to operate under its Plan. The only remedy available to Plaintiffs would be an order directing USFS to complete a new VER examination. In this unlikely scenario, USFS policy tracks federal case law and DOI decisions holding that properly-located and entered mining claims are recognized property interests that vest the holder with the full right to develop and mine the claims unless and until the claims are invalidated through notice and a contest hearing (*i.e.*, Fifth Amendment due process),

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even in the face of a withdrawal. *Compare Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335-38 (1963); *United States v. Shumway*, 199 F.3d 1093, 1099-1100 (9th Cir. 1999); *United States v. Martinek*, 166 IBLA 347, 351-53 (2005); *In re Ctr. for Biological Diversity*, 162 IBLA 268, 281 (2004) (until a claim contest "renders a final determination of invalidity, it is well established that the claimant will be permitted to engage in mining and processing operations"); *In re Sw. Res. Council*, 96 IBLA 105, 118 (1987) *with* FSM § 2811.5 ("A mining claim may lack the elements of validity and be invalid in fact, but must be recognized as a claim until it has been finally declared invalid by [DOI] or Federal courts.") (A.R. 371:7279-80). Simply put, Plaintiffs are not entitled to the relief that they now seek from the Court and their Fourth Claim should be dismissed.

C. USFS considered all relevant factors in assessing the validity of the Canyon Mine.

USFS's certified mineral examiners completed the VER Determination consistent with all applicable laws, regulations, guidance, and standard procedures that are applied to all mineral validity examinations. They did so after a thorough and comprehensive review of the Canyon Mine. Plaintiffs do not challenge their methodology. Rather, they allege that the detailed cost estimates and financial information that EFR provided to USFS, upon its request, failed to include the costs of certain environmental monitoring, mitigation, and wildlife conservation measures. Plaintiffs are wrong. The administrative record demonstrates that USFS requested, EFR provided, and USFS independently verified all of the costs to implement the Plan and operate the Canyon Mine. The Court's review of the VER Determination is highly deferential. USFS's action is presumed valid and must be affirmed if a reasonable basis exists for it. *Ctr. for Biological Diversity v. Jewell*, 2014 WL 5703029, at *5 (D. Ariz. Nov. 5, 2014).

1. USFS requested, received, and independently verified detailed cost information from EFR and used the correct uranium price.

USFS requested, and EFR submitted, comprehensive capital and operating costs information regarding the development and operation of the Canyon Mine under the Plan

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in compliance with all applicable laws. *See* A.R. 669-680:12396-617 (2019 Supplement).[1] Consistent with the Handbook at V-10 (A.R.Doc. 374:7436), USFS independently verified the cost information and inserted it into a "well-accepted" computer program, known as APEX, which was "specifically designed for the economic evaluation of mining projects." A.R. 525:10504-05. USFS attached EFR's cost information and its APEX cost models to the VER Determination as Appendices C and F and referred to them throughout the VER Determination. A.R. 525:10485. Notably, Plaintiffs do not discuss or challenge the APEX cost models and USFS's independent verification of EFR's costs, but rather, focus on EFR's cost information.

Using APEX, USFS determined that after all costs and taxes were considered, the net sum of cash flow at the Canyon Mine (*i.e.*, the profit) was $29,350,736. A.R. 525:10505. That results in an internal rate of return ("IROR") of 78%, which is 6.5 times greater than the USFS conservatively estimated minimum mining industry IROR of 12%. *Id.* Simply put, the Canyon Mine is very profitable, and based on USFS's calculations, the Mine likely could withstand a drastic increase in costs (or decrease in uranium price) and remain profitable. The VER Determination ultimately concluded that the test for discovery of a valuable mineral was satisfied and that EFR had valid existing rights to the Canyon Mine. A.R. 525:10486; *United States v. Coleman*, 390 U.S. 599, 600-03 (1968); *Castle v. Womble*, 19 Publ. Lands Dec. 455, 457 (1984). None of Plaintiffs' arguments and allegations change this conclusion.

To attack profitability, Plaintiffs now assert in addition to the Fourth Claim that USFS used the wrong price of uranium in the VER Determination's cost models. Without citation to any authority or guidance, Plaintiffs claim that USFS should have used a much lower uranium price in an attempt to render the Canyon Mine unprofitable. There is no

[1] The administrative record was supplemented in both 2013 and 2019. The supplements contain some duplicate document and Bates-labeling numbering so EFR will refer to them as the 2013 and 2019 Supplements.

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basis for this new claim.[2] USFS's mineral examiners set forth the basis for the commodity price assumptions and cost models in detail in the VER Determination. A.R. 525:10502-04. Specifically, they followed BLM's guidance for pricing of mineral commodities, which are set forth in the Handbook at V-9 (A.R. 374:7435); looked at the current price for uranium at specific dates connected to the project, which were the initial segregation/withdrawal date and the date of the mineral exam; and accounted for current market trends and historic price fluctuations. A.R. 525:10502. Consistent with the Handbook, the mineral examiners considered the monthly spot price of uranium over the three-year period before the segregation/withdrawal date (*i.e.*, average spot price of $70.79/lb. of uranium), the monthly spot price of uranium over the three-year period before the VER Determination's date (*i.e.*, average spot price of $49.69/lb. of uranium), the average price for EFR's long term supply contracts (*i.e.*, $57 to $61/lb. of uranium), and the average price for EFR's short term supply contracts (*i.e.*, $52/lb. of uranium). *Id.* at 10502-04. After considering these prices, the mineral examiners selected a price of $56/lb. of uranium for USFS's cost models. *Id.* at 10503. The price was conservative; accounted for both current market trends and historic price fluctuations; was consistent with BLM's guidance on pricing mineral commodities; and was an entirely reasonable and proper decision by BLM. For these reasons and because this was not part of the Fourth Claim in the Amended Complaint, the Court should reject Plaintiffs' new claim that USFS should have used a different uranium price.

2. USFS considered the costs of environmental safeguards.

Plaintiffs allege that USFS omitted the costs of environmental monitoring, mitigation, and wildlife-conservation measures. They are wrong. USFS requested, and EFR submitted, comprehensive capital and operating cost information regarding the

[2] Plaintiffs suggest that $23/lb. of uranium (*i.e.*, the average price of uranium from 1980-2011) should have been used in the cost models. This argument is flawed for two reasons. First, there is no support for this approach in the Handbook. Second, it fails to adjust the average price over that period into 2011 dollars, which would be significantly higher than $23/lb. Additionally, contrary to their argument, neither USFS nor EFR ran this price in any model or sought to inflate the price. Both simply followed the Handbook.

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development and operation of the Canyon Mine under the Plan consistent with applicable laws. *See* A.R. 669-680:12396-12617 (2019 Supplement). USFS requested this information because EFR is the only uranium mining company that has mined breccia pipe uranium mines on the federal lands subject to the Withdrawal (*i.e.*, the Arizona 1, Pinenut, and Kanab North Mines). A.R. 669:12396 (2019 Supplement). It also owns and operates the White Mesa Mill, which is the only operating uranium mill in the United States. *Id.* As a result of these unique mining experiences and assets, EFR provided extremely reliable and detailed cost information that accounted for all costs of mining a breccia pipe uranium mine and of milling uranium bearing ores. Upon receipt of this information, USFS independently confirmed that EFR's costs were accurate, and USFS also verified the costs against the costs EFR experienced at the Arizona 1 Mine. A.R. 525:10500. The administrative record demonstrates that USFS and EFR considered all relevant costs in the VER Determination.

With respect to the cost of environmental monitoring, mitigation, and wildlife-conservation measures, USFS considered the following costs in the VER Determination: mining and site general and administrative ("G&A") costs (*i.e.*, the cost of operating under the Plan at $110.42/ton) of $9,298,136.94; indirect operating costs at $36.56/ton, which is $3,078,607.92 and includes costs for permitting and land related issues; capital costs related to required surface facilities of $508,000.00; capital costs of permitting and engineering of $218,000.00; reclamation costs of $450,000.00; and a contingency of $1,700,000.00. A.R. 525:10499-502. The Canyon Mine's costs totaled $15,252,744.86. Plaintiffs do not contest these costs. Instead, Plaintiffs allege that USFS did not consider several costs that were not specifically identified in EFR's cost information. However, a close review of the cost information provided by EFR and considered by USFS demonstrates that all costs were considered, and Plaintiffs' claims have no merit.

a. Monitoring costs were considered.

Plaintiffs claim that USFS and EFR did not consider the costs of a year of pre-operational sampling to establish baseline radioactivity values, the cost of a groundwater

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well, and the costs of subsequent monitoring. These claims are untrue. First, regarding pre-operational sampling, the administrative record includes several documents demonstrating that the required monitoring was completed before the VER Determination was completed. *See* A.R. 269:5556 (Arizona Department of Water Resource information regarding the drilling of the monitoring well); 283:5584-96 (letter regarding sampling); 318:5823 (letter regarding Arizona groundwater quality protection permit); 325:5858 (letter regarding sampling); 332:595559 (letter regarding sampling); 357:6526-6658 (thesis regarding geologic framework and groundwater flow models); 429 (USGS Scientific Investigations Report, which discusses sampling data); and 430:8147-8505 (USGS Scientific Investigations Report 2010-5025, which also discusses sampling data); and A.R.Doc 533:10624 (Mine Review). Second, the cost information that EFR provided to USFS included costs associated with EFR's ongoing environmental monitoring obligations under the Plan and its federal and state permits and authorization.[3] Specifically, the monitoring costs were included in EFR's cost estimate. A.R. 673:12567 (2019 Supplement). This is confirmed by the Declaration of Harold R. Roberts ("Roberts Dec."), who was EFR's Executive Vice President and Chief Operating Officer in charge of preparing and submitting the cost information requested by USFS, at ¶ 8. Unlike the declarations that Plaintiffs have submitted to the Court, Mr. Roberts has first-hand knowledge of EFR's costs, and his sworn declaration confirms that all known costs, including the monitoring costs identified by Plaintiffs, were in fact included in EFR's costs. Next, Plaintiffs allege that the costs of the groundwater monitoring well required by the Plan were not considered. They were. The well was constructed in 1987, long before USFS completed the VER Determination. Roberts Dec. at ¶ 12. As such, it constitutes a "sunk cost" and its construction cost was properly excluded for the reasons set forth below. Finally, Plaintiffs have long complained about potential groundwater impacts at the Canyon Mine. There is absolutely no evidence or support in the

[3] EFR's employees perform the monitoring and sampling identified by Plaintiffs. It is undisputed that EFR's labor costs were included as were lab costs. Roberts Dec. ¶ 15.

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administrative record for this allegation. As noted above, in addition to the VER Determination, USFS assembled a 13-person interdisciplinary team to conduct a Mine Review and determine if there was new information or material changes in circumstances, including new concerns about groundwater. A.R. 533:10592-637. USFS concluded: "Very little has changed since the 1986 FEIS and ROD. . . . There does not seem to be any reason to reevaluate the groundwater conditions or mining effects to them, as there is not new information or changed circumstance related to ground water that would indicate the original analysis is insufficient." A.R. 533:10622. The Mine Review demonstrates that USFS thoroughly evaluated potential groundwater impacts associated with the Canyon Mine both during mining and after reclamation operations. USFS concluded that the Mine would not pose any adverse impact to groundwater; Plaintiffs have offered no citations to the administrative record demonstrating otherwise; and therefore, their allegations should be dismissed.

b. Wildlife conservation measures were considered.

Plaintiffs allege that USFS failed to consider the costs of certain wildlife conservation measures. The Plan does require EFR to replace 32 acres of big-game-foraging habitat and a watering source. A.R. 6:925. However, the Plan does not set a deadline for this work to be completed, and EFR has undertaken several wildlife mitigation measures, as acknowledged in a USFS letter dated December 22, 1989:

> . . . Since 1986, EF has contributed a total of $12,000 for the reconstruction and sealing of nine earthen wildlife and livestock tanks on the District . . . . The positive effect of these projects is substantial, and may exceed the total scope of the work specified in the Canyon Mine EIS. This, of course, does not relieve EF of their responsibility to compete the required wildlife mitigation. However, with the ultimate fate of the Canyon Mine as yet undetermined, we feel it is not reasonable to require EF to undertake this work.

A.R. 326:5859. After the VER Determination was completed, USFS identified additional wildlife mitigation measures for EFR to complete and the parties have discussed and intend to complete them in the future. As a result, Plaintiffs' reference to wildlife mitigation measure in A.R.Docs. 582 and 628 post-date the VER Determination and could

not have been considered by USFS as part of the VER Determination. Regardless, the costs of replacing foraging habitat were included in EFR's costs provided to USFS.[4] Roberts Dec. ¶ 9; A.R.Doc. 673:12567 (2019 Supplement) (Excel spreadsheet); and A.R.Doc. 669:12396-400 (2019 Supplement) (Transmittal Letter). The record reveals that the wildlife mitigation measures identified by Plaintiffs were included in EFR's costs estimates and considered by USFS.

Regarding the California condor, the Arizona population of that species is "nonessential and experimental." Therefore, USFS concluded only to make recommendations to EFR regarding the California condor, which are not required but which EFR has largely completed.[5] A.R.Doc. 533:10619-20. Again, these voluntary recommendations post-date the VER Determination, and thus, could not have been considered. Nevertheless, if the costs become necessary or are mandated, they would be covered by the contingency. Roberts Dec. ¶ 10. Additionally, the powerlines to the Canyon Mine were made with crossarms, insulators, and adequate spacing so that condors or other birds could not be harmed. Roberts Dec. ¶ 12. Accordingly, the powerline costs constitute "sunk cost" and were properly excluded from the VER Determination.

3. USFS is not required to consider speculative, potential future mitigation costs, but nonetheless, EFR built in a contingency into its cost information to account for unknown costs, including those identified by Plaintiffs.

Plaintiffs have alleged that EFR and USFS failed to consider several speculative potential costs, including the potential cost of future mitigation measures, potential remediation of groundwater, an additional impoundment that could potentially be required, and unspecified wildlife mitigation measures. Notably, Plaintiffs have not quantified or provided cost estimates for any of these costs to the Court. They cannot

[4] This wildlife mitigation consists of mechanical thinning of conifers on 32 acres and is estimated to cost approximately $30,000. A.R. 628:11874-7; Roberts Dec. ¶ 16.

[5] A net, which is one possible mitigation method, has not been installed over the impoundment because no California condor has been seen at the Canyon Mine and there are concerns that netting can cause more harm than good. Should a net be required, the estimated cost is $163,323.20, which is well within the contingency. Roberts Dec. ¶ 17.

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because they are pure speculation, and it is well-established that USFS is not required to speculate as to unknown, and potential future costs when preparing a mineral exam. *U.S. v. Dwyer*, 175 IBLA 100, 118 (2008); *U.S. v. Gracia*, 161 235, 257 (2004); *U.S. v. Clouser*, 144 IBLA 110, 130 (1998); *U.S. v. Highsmith*, 137 IBLA 262, 278 (1977). USFS properly did not consider the speculative, unknown, future costs identified by Plaintiffs. Notwithstanding this fact, EFR provided, and USFS independently verified, all known and reasonably foreseeable costs related to the operation of the Canyon Mine under the Plan and applicable environmental laws. These costs included a significant contingency for unexpected costs of approximately $1,700,000, which was based on EFR's experience and history at the Arizona 1 Mine. The contingency was significant and specifically designed to account for uncertain and unknown costs, such as those identified by Plaintiffs. Even with this contingency, the Canyon Mine met the VER test.[6]

4. USFS considered "sunk costs" consistent with applicable guidance.

Plaintiffs now allege, as an addition to their Fourth Claim, that USFS failed to consider certain "sunk costs" when performing the VER Determination. The Handbook states: "Sunk costs are the unrecoverable past capital costs of certain types of equipment that the claimant already owned or the costs of improvements already made before the marketability date. Do not include as expenses in the operation's cash flow those capital costs that were sunk before the date of marketability. . . ." A.R. 374:7438 (footnotes omitted). The Handbook was used by USFS's mineral examiners (A.R. 525:10506); is guidance for mineral examinations; is used by BLM and USFS-certified mineral examiners as a reference when performing mineral examination; and clearly states that "sunk costs" are not to be included or considered when performing a mineral exam. And for good reason, as a mineral examination is a forward-looking economic evaluation of whether mining on a claim or set of claims can reasonably be expected to make a profit going forward. The evaluation does not look back at or consider past or "sunk costs" by

[6] Even if the Court were to find that USFS erred and the contingency was not significant enough, the VER Determination concluded the Canyon Mine's profit was $29,350,736, which is ample profit to account for any errors or contingency overruns.

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the claimant or other former owners of the mining claim.[7] These "sunk costs" do not relate to the question of whether mining from the date of the mineral examination can reasonably be expected to make a profit going forward. Recognizing this, the Handbook explains what should and should not be considered when conducting a mineral examination and expressly states that "sunk costs" are not relevant and should not be considered. Notably, Plaintiffs did not challenge the Handbook's guidance in the Amended Complaint. In light of the clear guidance in the Handbook, "sunk costs" are not relevant and they were properly not considered by USFS in the VER Determination.

The Handbook references several cases from the U.S. Department of the Interior, Office of Hearings and Appeals, Interior Board of Land Appeals ("IBLA"). Unlike this dispute, IBLA cases typically involve a situation where the United States determines that a mining claim is invalid; a mining claimant contests that determination; and third parties are not involved in the contest. Despite these differences, it is worth noting that the Handbook identifies three IBLA decisions that confirm "sunk costs" should not be considered in a mineral examination. *See United States v. Clouser*, 144 IBLA 110, 131 (1998) ("To the extent that there are existing tracks and lighting, the costs attributable to them need not be considered. However, the claimants did not consider the costs of additional tracks and lighting that would be used in the course of extending the existing underground workings along the veins.") (citation omitted); *United States v. Mannix*, 50 IBLA 110, 119 (1980) ("We would address the question of mining at a profit. The Government argues that all earlier expenses in development of the property be considered, *e.g.*, the cost of constructing cabins, sheds, and an access road and the purchase of rail and ore cars, and that such expenses must be recouped before it can be said that the mine is a profitable venture. We think the Government errs in its argument and analysis. Absent a prior withdrawal, if the mineral material may be now mined, removed, and marketed at a

[7] The question is simply whether the miner can make a profit going forward; not what the miner or other unrelated parties spent in the past developing the mine. Past expenditures helped to create the current value, but once the current value is created, it no longer matters how it was created.

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present profit over and above the costs of such operations, we would hold that the requirements of discovery have been met. There is no case law of which we have knowledge, nor has the Government adduced any, that compels consideration of the above-mentioned development costs in determining if an ongoing operation is profitable. *Cf. Andrus v. Shell Oil Co.*, 48 U.S.L.W. 4603, 4605 (U.S. June 2, 1980) (No. 78 1815).”); and *United States v. Garner*, 30 IBLA 42, 67 (1977) (While concluding that the acquisition cost of equipment previously acquired should not be included in the VER determination, the IBLA concluded that the future costs necessarily must include the amortization cost of the equipment used in the mining operations, even though the claimant by fortuitous circumstances has access to machinery at a cost less than the average prudent person would have to pay.”) (citation omitted). In light of the Handbook and these IBLA authorities, USFS properly excluded the Canyon Mine’s “sunk costs.”

In arguing that “sunk costs” should have been considered, Plaintiffs rely upon the following two IBLA cases to argue that “sunk costs” are relevant to the VER Determination and should be disclosed: *United States v. Collord*, 128 IBLA 266 (1994) and *United States v. Armstrong*, 184 IBLA 180 (2013). Neither supports their argument. First, Plaintiffs’ reliance on *Collord* is misplaced. The three-judge majority opinion in *Collord* actually relied on the *Mannix* decision cited above and held the following when considering capital costs: “Not included are development and capital costs that have already been spent before the date on which a valuable mineral deposit must be shown to exist. *See United States v. Mannix*, supra at 119.” *Collard*, 128 IBLA at FN 24. The IBLA’s *Collord* decision is consistent with the Handbook. While the concurring opinion in *Collord* attempted to draw some distinctions with the *Mannix* decision, it was not the majority opinion in the case, so it does not support Plaintiffs’ argument.

Additionally, Plaintiffs’ citation to the *Armstrong* decision does not support their argument. In *Armstrong*, the claimant tried to argue that certain portable equipment and machinery that had already been purchased by the claimant was a “sunk cost” and need not be included in its capital costs and related operating costs for purposes of calculating

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profitability. The IBLA disagreed and determined that the claimant had failed to account for certain machinery in its capital costs. *Armstrong*, 184 IBLA at 219. This holding is entirely consistent with the definition of "sunk costs" in the Handbook ("Sunk Costs do not include ongoing equipment, improvement or maintenance expenses. Purchase of new equipment or planned replacement of equipment or facilities after the date of marketability, consumable stores, repairs, and daily operating expenses are not sunk costs." A.R. 374:7438 (footnotes omitted)). It is also distinguishable from EFR's "sunk costs," which relate to "sunk costs" only at the Canyon Mine. EFR prepared detailed cost information and submitted it to USFS. That information demonstrates that EFR's "sunk costs" were proper and are distinguishable from those at issue in the *Armstrong* decision. For these reasons, and because it was not included in the Fourth Claim, the Court should reject this new claim.

III. MOTION TO STRIKE

Pursuant to LRCiv. 7.2(m)(2), EFR moves to strike the five exhibits that Plaintiffs filed with the Court to support their Motion for Summary Judgment (Doc. 226-1) because those documents are not part of the administrative record; seek to discuss and introduce information outside the scope of the administrative record; and contain information that is not relevant to the claim before the Court. *See, e.g., Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Thompson v. U.S. Dept. of Labor*, 885 F.2d 551, 555 (9th Circ. 1989). EFR also moves to strike Plaintiffs' two modified versions of documents already in the administrative record because Plaintiffs did not move to supplement the administrative record with the documents, and they do not accurately represent documents that were before USFS. Finally, EFR moves to strike Plaintiffs' exhibits because they contain facts and information that occurred after the VER Determination was completed, are irrelevant to the remaining claim, and are outside the scope of the Fourth Claim.

IV. CONCLUSION

For the forgoing reasons, EFR requests that the Court enter summary judgment in its and USFS's favor on Plaintiffs' Fourth Claim.

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RESPECTFULLY SUBMITTED this 23rd day of October 2019.

GALLAGHER & KENNEDY, P.A.

By: */s/ Bradley J. Glass*
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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2019, I electronically transmitted a PDF version of this document to the Clerk of the Court, using the CM/ECF System for filing and for transmittal of a Notice of Electronic Filing to the CM/ECF registrants and via U.S. mail to:

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