Jean E. Williams
Deputy Assistant Attorney General

Sean C. Duffy (NY Bar No. 4103131)
United States Department of Justice
Environment & Natural Resources Division
Natural Resources Section
150 M Street NE
Washington, DC 20002
(202) 305-0445
sean.c.duffy@usdoj.gov

Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Grand Canyon Trust, *et al.*,

Plaintiffs,

v.

Heather Provencio, Forest Supervisor, Kaibab National Forest, *et al.*,

Federal Defendants,

and

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

Defendant-Intervenors.

No. CV-13-08045-PCT-DGC

FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Introduction

For this Court to have Article III subject matter jurisdiction over Plaintiffs' claim that the Forest Service did not properly conduct the valid existing rights (VER) determination, Plaintiffs must show that they suffered an injury that is traceable to the Forest Service and redressable by an order of this Court. However, because a VER determination is not required for previously approved mining plans and cannot on its own affect previously authorized mining operations, Plaintiffs cannot show any of the required elements of subject matter jurisdiction over this one remaining claim. Were the Court to reach the merits of the VER determination, the record shows that the Forest Service reasonably relied on the considered judgment of its mineral examiners, who concluded that the mining claims contained a valuable mineral deposit that could be mined and marketed for a profit and thus constituted a valid existing right. That conclusion is well within the bound of reasoned decisionmaking and must be upheld.

I. FACTUAL BACKGROUND

A. Approval and Implementation of the Plan of Operations

In 1984, Energy Fuels Nuclear submitted a proposed Plan of Operations ("Plan") to mine uranium at the Canyon Mine site, approximately six miles south of the Grand Canyon National Park boundary on the Kaibab National Forest. 1988 AR 193.[1] The Forest Service evaluated the potential environmental effects of the Plan, and in 1986 issued an environmental impact statement (EIS) and record of decision (ROD) approving the Plan with modifications. 1988 AR 915. On administrative appeal, the Deputy Regional Forester issued a decision affirming the ROD. 1988 AR 3928. The Plan authorizes Energy Fuels to conduct mine operations at the site. 1988 AR 916.

In the early 1990s, surface structures at Canyon Mine were constructed, including access roads, hoist, storage buildings, the power line, a perimeter fence and diversion

[1] Federal Defendants cite the administrative record filed with this Court in 1988 as "1988 AR __" and cite the administrative record filed for this case as "AR __".

structures, a head frame, support buildings, and sediment ponds. AR 10487. The sinking of the mine shaft was started and then stopped at a depth of around 50 feet in 1992 when the mine went into standby status as allowed by the Plan. Schuppert Decl. ¶ 3 (ECF No. 53-3).

In 2011, Energy Fuels Resources, Inc. ("Intervenors") which acquired the mine from Energy Fuels Nuclear, informed the Forest Service that it intended to resume active mining operations under the approved Plan. The Forest Service reviewed the 1986 EIS and ROD, and associated documents and in 2012 determined that no amendment or modification of the Plan was required. AR 10594, 10600. No further federal authorizations were needed for mining operations at Canyon Mine to resume. AR 10592.

B. The Secretary of the Interior's Withdrawal Decision and the Forest Service's VER determination

In 2009, the Secretary of the Interior ("Secretary") proposed to withdraw federal lands in northern Arizona, including lands where Canyon Mine is located, subject to valid existing rights, for a period up to twenty years. Notice of Proposed Withdrawal, 74 Fed. Reg. 35887 (July 21, 2009). Publication of the withdrawal proposal "segregated" the designated lands, temporarily closing them to entry and location of new mining claims while the agency considered the withdrawal proposal. 43 C.F.R. § 2310.2(a).

In January 2012, after completing an EIS and other studies, the Secretary withdrew approximately one million acres of federal lands from the Mining Law, for twenty years, subject to valid existing rights. 77 Fed. Reg. 2317 (Jan. 17, 2012). The EIS for the withdrawal expressly contemplated that approved mining operations would proceed at Canyon Mine and three other previously authorized mines on BLM-managed lands. AR 10313-14, 8657. Neither Forest Service regulations nor policy require the agency to determine whether mining claims on lands subject to approved mine plans constitute valid existing rights (VER) immediately following a withdrawal. Nonetheless, the Forest Service exercised its discretion to undertake a VER determination, which it completed on April 18, 2012. Forest Service mineral examiners concluded that a discovery of a

valuable mineral deposit existed at the time of segregation and as of the date of the determination, and thus the mining operations authorized under the Plan were valid and unaffected by the withdrawal. AR 10487.

II. PROCEDURAL BACKGROUND

Plaintiffs sued in March 2013, seeking declaratory and injunctive relief under the Administrative Procedure Act (APA). The amended complaint alleges four claims. Claim four, the only claim at issue on this motion, asserts that the Forest Service's VER determination failed to consider all relevant cost factors in violation of the APA. Am. Compl. for Declaratory and Inj. Relief ¶¶ 78-92, ECF No. 115 ("Compl."). In addition to being brought pursuant to the APA, claim four was brought pursuant the Mining Law, the Federal Land Policy and Management Act (FLPMA), the Organic Administration Act of 1897, and the Secretary's withdrawal decision. *Id.* at 27. Federal Defendants, Intervenors (Energy Fuels Resources (USA), Inc. and EFR Arizona Strip, LLC), and Plaintiffs filed motions for summary judgment. Pls.' Mot. for Summary J., ECF No. 140; Fed. Defs.' Mot. for Summary J., ECF No. 146; Intervenors' Mot. for Summary J., ECF No. 147. In April 2015, this Court granted Federal Defendants and Intervenors' motions for summary judgment as to all four counts. April 7, 2015 Order, ECF No. 166. This Court determined that Plaintiffs failed to establish a violation of the National Environmental Policy Act (NEPA) in claim one or a violation of the National Historical Preservation Act (NHPA) in claims two and three. *Id.* at 41. It also determined that Plaintiffs do not fall within the zone of interests protected by the Mining Law and thus lacked prudential standing[2] as to claim four. *Id.* at 15-21, 41. Plaintiffs appealed.

---

[2] Subsequent to the Parties' briefing on the motions for summary judgment, in *Lexmark International, Inc. v. Static Control Components, Inc.*, the Supreme Court described the term "prudential standing" and "in some tension with . . . the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." 572 U.S. 118, 125-26 (2014). It held that a zone-of-interests inquiry instead asks "whether a legislatively conferred cause of action encompasses a particular plaintiffs' claim" and whether a plaintiff's interests "are so marginally related to or inconsistent

In October 2018, the Court of Appeals for the Ninth Circuit affirmed this Court's order granting summary judgment on claims one, two, and three. *Havasupai Tribe v. Provencio*, 906 F.3d 1155, 1163-65 (9th Cir. 2018). With respect to claim four, the Ninth Circuit affirmed this Court's determination that the claim falls outside the Mining Law's zone of interests, but concluded that "FLPMA, and not the Mining Act, forms the legal basis of [Plaintiffs'] fourth claim," *id.* at 1166, and the claim that "the VER determination was in error remains a claim under the FLPMA." *Id.* at 1167. The Court of Appeals remanded the case for consideration of claim four.

III. LEGAL BACKGROUND

A. The Administrative Procedure Act

Judicial review of claim four is governed by the APA, which provides that a reviewing court may set aside "agency action, findings, and conclusions" that it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Earth Island Inst. v. Carlton*, 626 F.3d 462, 468 (9th Cir. 2010). Review under this standard is "highly deferential," with a presumption in favor of finding the agency action valid. *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008), *overruled on other grounds by, Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008). The reviewing court may not substitute its judgment for that of the Forest Service, *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 376-78 (1989), and must uphold the agency's determination "even if the administrative record contains evidence for and against its decision." *Modesto Irrigation Dist. v. Gutierrez*, 619 F.3d 1024, 1036 (9th Cir. 2010) (quotation marks and citation omitted). An agency has acted "arbitrarily and capriciously only when 'the record plainly demonstrates that [the agency] made a clear error in judgment in concluding that a project meets the [statutory] requirements.'" *Tri-*

---

with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue." *Id.* at 127, 130.

Valley CAREs v. U.S. Dep't of Energy, 671 F.3d 1113, 1124 (9th Cir. 2012) (internal citation omitted).

The APA requires the Court to review "the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977). Typically, a court reviews only the evidence and proceedings before the agency at the time it acted. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985). "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

B. Federal Land Policy and Management Act

Under the Federal Land Policy and Management Act (FLPMA), the Secretary may withdraw federal lands from the operation of the public land laws, including the mining laws. 43 U.S.C. § 1714(a). All administrative withdrawals under that provision of FLPMA are subject to valid existing rights. *Id.* § 1701.

C. Forest Service Regulation under the Mining Law

Forest Service regulations provide that "use of the surface of National Forest System lands in connection with operations authorized by the United States mining laws . . . shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources. . . ." 36 C.F.R. § 228.1. These regulations generally require that when a proposed operation will likely cause significant disturbance of surface resources, the mine operator is required to submit a proposed Plan of Operations to the District Ranger and obtain authorization to conduct the proposed actions. *Id.* §§ 228.4(a)(1)(vii), 228.4(a)(3)-(4).

If lands on which mining operations are proposed are withdrawn from mineral entry, the Forest Service policy is to conduct a VER determination before allowing *new* mining operations. AR 7310, 7298 (FSM 2818.3, 2817.23, ¶ 6). The VER determination allows the Forest Service to ascertain whether the mining claims on which the new

mining operations are proposed constitute valid existing rights that are exempt from the withdrawal. *See United States v. Pass Minerals, Inc.*, 168 IBLA 115, 122 (2006); Linden Decl. ¶ 7 (ECF No. 53-2). For operations that were approved prior to a withdrawal, neither the Forest Service's regulations nor its policy require a VER determination on the underlying mining claims, although it retains discretion to conduct a VER determination at any time. The Forest Service conducts VER determinations pursuant to a Memorandum of Understanding with the Department of the Interior ("DOI"). *See* Linden Decl. ¶ 6 (citing Forest Service Manual ("FSM") 1531.12). If it concludes in the VER determination that mining claims are not valid, the Forest Service will recommend that the Interior Department initiate administrative contest proceedings to formally determine the validity of the mining claims. *See Clouser v. Espy*, 42 F.3d 1522, 1525 (9th Cir. 1994) ("The validity of such claims is determined by the U.S. Department of the Interior . . . through its Bureau of Land Management . . ., which administers the federal laws governing the right to stake mining claims on federal land."); AR 7311 (FSM 2819). The Forest Service does not have authority to declare a mining claim void as a result of its VER determination.

IV. ARGUMENT

A. The Court does not have Article III jurisdiction to entertain Plaintiffs' challenge to the VER determination.

1. The irreducible constitutional requirements of standing.

"In limiting the judicial power to 'Cases' and 'Controversies,' Article III of the Constitution restricts it to the traditional role of Anglo–American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009). "Because Article III limits federal judicial jurisdiction to cases and controversies, *see* U.S. CONST. art. III, § 2, federal courts are without authority" to decide disputes unless the plaintiff has standing—that is, "a personal stake in the outcome of the controversy [sufficient] as to warrant *his* invocation of federal-court jurisdiction." *Chamber of*

Commerce v. EPA, 642 F.3d 192, 199 (D.C. Cir. 2011) (quoting *Summers*, 555 U.S. at 493). Plaintiffs bear the burden of demonstrating that they have met Article III's threshold requirement by alleging facts that "affirmatively" and "clearly" demonstrate that they have standing to sue. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). A "showing of standing 'is an essential and unchanging' predicate to any exercise of . . . jurisdiction." *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) (en banc) (citation omitted). "The party invoking federal jurisdiction bears the burden of establishing standing—and, at the summary judgment stage," "can no longer rest on . . . 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts.'" *Clapper v. Amnesty Int'l, USA*, 568 U.S. 398, 412 (2013) (quoting *Defenders of Wildlife*, 504 U.S. at 561).

The "irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, a plaintiff must show that it has suffered an injury that is concrete and particularized and actual or imminent and not conjectural or hypothetical. *Id*. Second, a plaintiff must show that there is a causal connection between the injury and the defendant's conduct. *Id.* Third, a plaintiff must show that it is likely that the injury will be redressed by a favorable decision. *Id.* at 561; *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). The elements of standing are "an indispensable part of the plaintiff's case," and "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Lujan*, 504 U.S. at 561. A "plaintiff must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006).

2. The VER determination was not required.

Prior to the withdrawal, the National Forest System lands at issue were open to location and entry under the Mining Law. 30 U.S.C. § 22 ("all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and

purchase[]"). It was while the lands were open to location and entry that the Forest Service approved the mining operations.

The Secretary's withdrawal of these lands in 2012 did not terminate existing approved plans within its boundaries. Instead it acknowledged that approved mines would to continue to operate. *See* AR 10319 ("Withdrawal of the entire withdrawal area will not result in cessation of uranium mining. Four mines are currently approved within the withdrawal," including Canyon Mine.). And no Forest Service regulation or policy requires the agency to conduct a VER determination following withdrawal on mining claims within an already-approved plan of operations.[3] Instead, on "withdrawn lands, neither the BLM nor the [Forest Service] will process a *new* . . . plan of operations until the surface managing agency conducts a mineral examination and determines that the mining claims . . . were valid as of the date the lands were . . . withdrawn." AR 10314.[4]

This Court thus concluded "that a VER Determination was not legally required before operations at the Canyon Mine could resume." April 17, 2015 Order, ECF No. 166, at 10. This conclusion "comports with the Forest Service's own statement that '[o]nce the lands have been segregated or withdrawn, the Forest Service will not *approve* a plan of operation without first determining if valid existing rights exist'" and the withdrawal's requirement of a VER determination only for a 'new' plan of operations." *Id.* at 11 (quoting AR 7691 and citing AR 10314-15). Although Forest Service staff, and the VER determination, erroneously suggested that the determination was required before

---

[3] *See also United States v. Shumway*, 199 F.3d 1093, 1103 (9th Cir. 1999) (noting that so long as the miners complied with the Mining Law and Forest Service regulations, they could not be evicted unless the Interior Department determined their mining claim to be invalid).

[4] S*ee also* 43 C.F.R. § 3809.100(a) ("After the date on which the lands are withdrawn from appropriation under the mining laws, BLM will not *approve* a plan of operations . . . until BLM has prepared a mineral examination report to determine whether the mining claim was valid before the withdrawal, and whether it remains valid.") (emphasis added)

Energy Fuels could proceed with renewed operations, *see* AR 12429, 10335, 10342, 10486, "the law did not require the VER Determination . . . ." ECF 166 at 12.

3. Because the VER determination was not required for mining to resume, Plaintiffs have no standing to assert a claim challenging it.

"The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing" that it has suffered an injury, that is traceable to the defendants and that a judicial order will provide redress. *Spokeo v. Robins*, 136 S. Ct. 1540, 1547 (2016) (internal quotations and citation omitted). Even at the pleading stage, the plaintiff must "clearly . . . allege facts demonstrating" each element of standing. *Warth v. Seldin*, 422 U.S. 490, 518 (1975). And at the summary judgment stage, "each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Lujan*, 504 U.S. at 561.[5] Plaintiffs must prove by a preponderance of the evidence that they have standing and that this Court has federal subject matter jurisdiction. They have not done so.

The VER determination could not, on its own, affect whether previously approved mining operations could continue and the determination could thus not affect Plaintiffs' interests. For this reason, Plaintiffs cannot assert a cognizable injury for purposes of Article III. And because they cannot demonstrate that they suffered a cognizable Article III injury from the VER determination, Plaintiffs also cannot trace any injury from the VER determination to the Forest Service. Plaintiffs accordingly have not established the first two prongs of standing as to claim four.

---

[5] "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan*, 504 U.S. at 561 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)). However, in response to a summary judgment motion, "the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' Fed. R. Civ. P. 56(e), which for purposes of the summary judgment motion will be taken to be true." *Id.*

Even if they were to succeed on claim four, Plaintiffs cannot demonstrate that their alleged injuries are redressable. If the Court were to vacate the VER determination, the Forest Service would have no obligation to undertake a new VER determination or conduct any additional analysis regarding the validity of the mining claims because a VER determination is not legally required. An order vacating the VER determination would thus have no effect on the mine operator's ability to conduct mining operations under the approved Plan.

Plaintiffs' motion underscores the absence of standing to bring a claim challenging the VER determination. In their motion, Plaintiffs claim that their interests are injured by "allowing Energy Fuels to mine." Pls.' Mot. for Summary J. & Mem in Supp. 6, ECF No. 226 ("Pls.' Mot."). Yet, it is the 1986 ROD and approved Plan that authorize mining operations, not the 2012 VER determination. Thus, even if this Court were to invalidate the VER determination, it would not, and could not, affect the underlying mine approval.

Plaintiffs claim that their injuries could be redressed if the Court "remand[ed] for compliance with the procedural requirements for determining validity" yet they fail to identify any statutory or regulatory procedural requirements governing VER determinations. *Id.* at 6-7. Even if this Court identified specific procedural requirements that must be adhered to in any future VER determination, Plaintiffs' injuries would not be redressed because the Forest Service is under no mandatory duty to perform a new VER determination, and there is no indication that it would voluntarily undertake such an analysis again.

Finally, Plaintiffs suggest that claim four is redressable because they argue that the VER determination is a "certification of claim validity" that "insulates" a company from a claims contest and absolves the company from being required "to clean up the mine." *Id.* at 7. Plaintiffs offer no support for this allegation and indeed, there is none. *See* 36 C.F.R. § 228.8(g) (requiring full reclamation of mining operations); *United States v. Armstrong*, 184 IBLA 195 (2013) (discussing how a mining claim previously determined

to be valid might lose its "discovery"); *see also Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963) (same).

Plaintiffs speculate that if the Forest Service were to "revisit the [VER] determination, the Canyon Mine claims would be invalidated." Pls.' Mot., 7. There is no reason why the Forest Service would "revisit" the VER determination, however, because that inquiry is only required by Forest Service policy for *new* plans of operation, not previously approved ones. Even if the Forest Service were to exercise its discretion to investigate the validity of the Canyon Mine mining claims while approved operations continued, and internally conclude that the mining claims did not contain a discovery of a valuable mineral deposit, it is not the Forest Service, but the Secretary of the Interior who has plenary authority to determine the validity of mining claims. 43 U.S.C. § 1457. The Forest Service does not have the authority to invalidate a mining claim or even initiate its own administrative contest proceedings. Such adjudications are initiated by BLM and conducted before the Interior Department's Office of Hearings and Appeals. *See* AR 7311 (FSM 2819). Therefore, Plaintiffs' alleged injuries to "environmental, cultural, and procedural" interests would not be remedied by a judicial decision.

Because Plaintiffs have no standing to challenge the VER determination, this Court lacks subject matter jurisdiction over the remaining claim and should dismiss this action.

4. The law of the case doctrine does not preclude a challenge to subject matter jurisdiction.

Plaintiffs contend that prior rulings on standing by this Court and the Ninth Circuit cannot be disturbed because they are law of the case. Pls.' Mot. 6. This is incorrect. Article III of the Constitution limits federal-court jurisdiction to "Cases" and "Controversies." U.S. CONST. art. III, § 2. "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy." *Spokeo*, 136 S. Ct. at 1547. When a defendant challenges a plaintiff's Article III standing to bring a claim, it challenges the Court's subject matter jurisdiction to hear the claim. Because "[s]ubject matter

jurisdiction cannot be forfeited or waived" it "should be considered when fairly in doubt," as it is here. *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009).

"The objection that a federal court lacks subject-matter jurisdiction, may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006). Thus, "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3).

The law of the case doctrine imposes no impediment to dismissal where jurisdiction is lacking. "A lack of subject matter jurisdiction goes to the very power of a court to hear a controversy," and an earlier decision where jurisdiction is lacking "can be accorded no weight either as precedent or as law of the case." *Orff v. United States*, 358 F.3d 1137, 1149-50 (9th Cir. 2004) (quoting *United States v. Troup*, 821 F.2d 194, 197 (3d Cir. 1987); *see also United States v. Houser*, 804 F.2d 565, 569 (9th Cir. 1986) ("the doctrine of 'law of the case' does not apply to the fundamental question of subject matter jurisdiction") (quoting *Green v. Dep't of Commerce*, 618 F.2d 836, 839 n.9 (D.C. Cir. 1980).

Even if the law of the case doctrine applied, a court may "depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice." *Arizona v. California*, 460 U.S. 605, 619 n.8 (1983). Here, this Court decided that Plaintiffs had standing to assert claim four without the benefit of briefing on the issue by Federal Defendants. Federal Defendants respectfully disagree with this Court's conclusion that "Plaintiffs' declarations are sufficient to establish injury in fact" as to the VER determination, ECF No. 166 at 14, and that the Court "must assume that Plaintiffs will prevail when deciding whether they have standing to pursue their claims." *Id.* at 15.

Plaintiffs will not prevail on claim four, where they allege that the Forest Service failed to adequately account for costs in its VER determination in violation of the APA. Compl. ¶¶ 91-92. In finding that Plaintiffs established that they suffered an Article III injury, this Court relied on declarations asserting that Plaintiffs suffered injuries to

"environmental, cultural and procedural interests [that] stem directly from the [VER determination] and the agency's failure to comply with NEPA and the NHPA." ECF No. 166 at 13 (quoting ECF No. 151 at 6). But those declarations, even if they could assert an injury under NEPA or NHPA, cannot establish any injury due to the VER determination because a VER determination is not required prior to resuming approved mining operations and Plaintiffs' claim that the alleged injuries "stem directly from the VER determination," *see* ECF No. 151 at 2, is thus a misstatement of law, as is their claim that the VER determination permitted approved mining operations to resume. Because authorization to mine at Canyon Mine derives solely from the 1986 Plan approval, and not from the VER determination, any alleged injuries are traceable to the 1986 Plan approval alone, and none of the asserted environmental or cultural harms related to mining can flow from the VER determination. Plaintiffs therefore cannot establish standing as to claim four. *See Cuno*, 547 U.S. at 335 ("plaintiff must demonstrate standing for each claim he seeks to press").

In the Ninth Circuit, Federal Defendants did not raise a separate challenge to Plaintiffs' standing as to claim four and instead relied on this Court's determination that claim four does not fall within the Mining Law's zone of interests. In dicta, and without the benefit of briefing on the issue by Federal Defendants, the Ninth Circuit observed that "uranium mining at Canyon Mine causes concrete injury" to Plaintiffs' interests and it "assume[d]" that "continued mining required the Forest Service's approval" for purposes of assessing standing. *Havasupai Tribe*, 906 F.3d at 1163 n.3. That Court tentatively observed that "[*i]f* [Plaintiffs] are correct that continued mining required approval, then their injuries are fairly traceable to that approval and could be redressed by setting it aside." *Id.* (emphasis added). However, the Ninth Circuit never determined that Plaintiffs have standing to assert claim four. And as noted above, Plaintiffs' standing is predicated on their own misstatement of law and cannot establish federal subject matter jurisdiction.

This Court's subject matter jurisdiction to consider claim four is now squarely before it. Now with Federal Defendants' briefing on this issue, this Court should consider the objection that it lacks subject matter jurisdiction over claim four and dismiss the action. *See Arbaugh*, 546 U.S. at 506; Fed. R. Civ. P. 12(h)(3).

B. The Forest Service properly considered costs in the VER determination.

Were the Court to conclude that Plaintiffs have standing to challenge the VER determination, the record shows that the determination is sound. The Forest Service's certified mineral examiners considered a variety of capital and operating costs in the economic analysis in preparing the VER determination for the mining claims. AR 10499-506. After reviewing the economic analysis, the mineral examiners concluded, based on the information available at that time, that a discovery of a valuable mineral deposit on the mining claims existed at the time of segregation (July 21, 2009) and continued through the time of the VER determination. The examiners concluded that the uranium deposit could be mined and marketed for a profit, and thus the mining claims constituted "valid existing rights" unaffected by the withdrawal.[6] AR 10483.

Under the highly deferential review standards of the APA, this Court may set aside the VER determination only if finds that it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency has "acted arbitrarily and capriciously only when 'the record plainly demonstrates that'" it "made a clear error in judgment in concluding" that the challenged action meets

---

[6] In exhibits to their motion for summary judgment, Plaintiffs improperly submit post-decisional documents concerning uranium prices that are not part of the Administrative Record, and were not before the agency decisionmakers when the determinations challenged in this case were made. *See* Second Supp. Decl. of Roger Clark ¶ 23 and Attachment A, ECF No. 226-4. Plaintiffs also improperly submit a table that counsel prepared for purposes of this litigation, which was not before the agency when the determination challenged in this litigation was made. *See* Decl. of Aaron M. Paul, ECF No. 226-3. Federal Defendants request that these post-decisional extra-record submissions be stricken.

"[statutory] requirements.'" *Tri-Valley CAREs*, 671 F.3d at 1124 (internal citation and quotation marks omitted).

Plaintiffs agree that the relevant test in a VER determination is whether a claimant has made a discovery of a valuable mineral deposit. *See* Pls.' Mot. 8-9. They argue that the VER determination was arbitrary and capricious because it allegedly: (1) failed to account for the costs of radiation monitoring, mitigation, and wildlife conservation, *id.* at 9-11, and failed to include those costs in a spreadsheet attached to the VER determination, *id.* at 11-13; and (2) impermissibly excluded sunk costs, such as the cost of building a groundwater well, from the cost calculation. *Id.* at 13-17. Neither of these arguments has merit.

1. The VER determination adequately accounted for costs, including monitoring, mitigation, and conservation costs.

A determination of mining claim validity requires an analysis of whether a discovered mineral deposit is "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.'" *United States v. Coleman*, 390 U.S. 599, 602 (1968) (quoting *Castle v. Womble*, 19 Pub. Lands. Dec. 455, 457 (1894)). In conducting the economic analysis of the mining claims, Forest Service certified mineral examiners used procedures applicable to all validity mineral examinations, reviewing the mining company's "records and data for the Canyon Mine and claims . . . ." AR 10489; AR 7436-40. The mineral examiners concluded that the mine would bring in $29 million of profit, AR 10505, and identified a $1.7 million contingency for capital costs. AR 10500. The Forest Service relied on these figures and concluded that Energy Fuels could feasibly mine the minerals "at a profit" and thus the mining claims were valid. AR 10483. The mineral examiners had a reasonable basis for reaching this conclusion.

The APA requires this Court to uphold the Forest Service's VER determination unless its analysis 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 of U.S., Inc. v. State*

Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Under the APA, the Forest Service does not act arbitrarily or capriciously when it relies on its "own qualified experts." *See Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989) ("an agency must have discretion to rely on the reasonable opinions of its own qualified experts . . . ." (quotations omitted)). Here, the VER determination was certainly not arbitrary and capricious merely because it did not itemize the specific cost items that interest Plaintiffs most in the granular manner that they would prefer. *See Lands Council*, 537 F.3d at 992 (deferring to an agency to identify the "evidence" that "is, or is not, necessary to support" its expert conclusions). The Forest Service's conclusion that the mining claims contain a mineral deposit that is marketable at a profit lies well "within the bounds of reasoned decisionmaking." *See Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 105 (1983). The APA requires this Court to uphold it.

2. The VER determination properly excluded sunk costs.

Whether a mineral deposit is "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," *Coleman*, 390 U.S. at 602, requires an economic analysis of whether the mining claims could support a profitable mine as of certain critical dates. *See* 65 Fed. Reg. 41,724, 41,725-26 (July 6, 2000) (Interior policy explaining applicable "marketability dates"). Longstanding Interior administrative decisions have established that this economic analysis excludes unrecoverable capital costs and capital costs that were sunk before the date of marketability, but includes replacement costs of equipment after the marketability date. *See United States v. Mannix*, 50 IBLA 110, 119 (Sept. 24, 1980); *United States v. Clouser*, 144 IBLA 110, 131-32 (May 22, 1998); *United States v. Collord*, 128 IBLA 266, 288 n.24 (Mar. 10, 1994); *United States v. Copple*, 81 IBLA 109, 129 (May 30, 1984). BLM's handbook for mineral examiners likewise states that excavations, structures, and equipment affixed to the land and that cannot be removed (such as pits, underground workings, dumps, tailings ponds and some buildings) may qualify as "sunk"

costs in the marketability analysis. AR 7438. That prospective approach to profitability is precisely the approach that the Forest Service used here. AR 10487.

Plaintiffs argue that the Forest Service's approach, by focusing on prospective costs might allow a mining company to "game the validity-determination and patenting process by doing pricey work before seeking a validity determination or patent." Pls.' Mot. 14. However, Plaintiffs offer no example of the hazard they warn of, nor a rationale as to why a mining company would want to incur costs doing pricey work on an unprofitable mine. Plaintiffs contend that an IBLA decision finding that opportunity costs of selling mine equipment or putting it to use elsewhere are appropriate cost considerations, Pls.' Mot. 16 (citing *Armstrong v. United States*, 184 IBLA 180 (Oct. 31, 2013)), and argue this rationale "applies equally" to fixed assets such as "a groundwater well or evaporation pond." *Id.* But Plaintiffs' contention is at odds with the IBLA decision they cite. In *Armstrong*, the IBLA affirmed only the inclusion of costs of "portable equipment" owned by the mining claimant, not capital improvements or facilities. *See Armstrong*, 184 IBLA at 219. BLM's guidance likewise distinguishes between the costs portable equipment and the capital costs here, which are considered "sunk." The rationale behind including opportunity costs of portable equipment does not apply to fixed assets such as a groundwater well or evaporation pond, which cannot be sold or transported to another location.

Following the guidance of the Supreme Court, IBLA decisions and BLM's handbook for mineral examiners, the Forest Service's VER determination was not arbitrary and capricious because it analyzed profitability in a prospective manner. The Forest Service's conclusion that the mining claims could make a profit lies well "within the bounds of reasoned decisionmaking," and the APA requires this Court to uphold it. *See Balt. Gas & Elec. Co.*, 462 U.S. at 105.

Conclusion

For the foregoing reasons, the Court should deny Plaintiffs' Motion for Summary Judgment and grant Federal Defendants' Cross-Motion for Summary Judgment.

Dated: October 23, 2019

Respectfully submitted,

JEAN E. WILLIAMS
Deputy Assistant Attorney General

/s/ Sean C. Duffy
SEAN C. DUFFY
United States Department of Justice
Environment & Natural Resources Division
Natural Resources Section
150 M Street NE
Washington, DC 20002
ph: (202) 305-0445
sean.c.duffy@usdoj.gov

Attorneys for Federal Defendants