Case No. 20-16401

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GRAND CANYON TRUST, *et al.*,

Plaintiffs-Appellants,

v.

HEATHER PROVENCIO, *et al.*,

Defendants-Appellees,

and

ENERGY FUELS RESOURCES (USA) INC., *et al.*,

Intervenor-Defendants-Appellees.

Appeal from the United States District Court for the District of Arizona
District Court Case No. 3:13-cv-8045-DGC

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INTRODUCTION

A plain reading of the precedent for identifying valid mining claims under the Mining Law leads to the conclusion that all mining costs count when answering under the "marketability test" whether a mineral deposit can be "extracted, removed and marketed at a profit." *United States v. Coleman*, 390 U.S. 599, 600 (1968). That intuitive reading—a reading backed by the statute's text and purpose—is the one the Forest Service advanced when, in *United States v. Mannix*, it first litigated the question presented here: Do mining costs count if incurred before the government examines the validity of a mining claim? *See* 50 IBLA 110, 119 (1980). In this appeal, the agency has reversed course, repeating reflexively the Interior Department's *ipse dixit* in *Mannix* directing "earlier expenses" to be disregarded. *Id.* When that holding is scrutinized, it cannot be squared with the Mining Law's text, purpose, or past precedent. This Court should deliver that scrutiny and overrule the Department's statutory interpretation. And because the record precludes a finding that the Forest Service would have deemed the Canyon Mine claims valid in 2012 had it considered pre-2012 costs, the validity determination at issue here should be set aside.

ARGUMENT

I. The Plaintiffs have Article III standing.

A. Revisiting standing would defy the law of the case.

When this lawsuit was last on appeal, this Court held that the Plaintiffs[1] have Article III standing to challenge the validity determination. *See Havasupai Tribe v. Provencio*, 906 F.3d 1155, 1162 n.3 (9th Cir. 2018) ("[W]e are satisfied that the plaintiffs have suffered injuries in fact that are fairly traceable to the Service's actions and that could be redressed by a favorable judicial determination."). That holding was an essential prerequisite to the Court's ruling on the merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–102 (1998) (holding that Article III standing must be verified before deciding whether a cause of action exists). And, as the district court correctly concluded, 1-ER-9–10, that holding is "both the law of the case and binding precedent…." *Nordstrom v. Ryan*, 856 F.3d 1265, 1270 (9th Cir. 2017); *accord Cal. v. U.S. Dep't of Health & Human Servs.*, 941 F.3d 410, 421 (9th Cir. 2019), *vacated on other grounds*, 141 S. Ct. 192 (2020). The Forest Service did not address this law-of-the-case

[1] To simplify, this brief refers to all the plaintiffs as "the Trust."

precedent, let alone argue for departing from it. *See* Fed. Appellees' Answering Br. 20–21, ECF 23 (Apr. 5, 2021) ("Feds.' Br."). On this basis alone, the Trust's standing should be affirmed.

B. The requirements for Article III standing are met.

The Trust has standing in any event. The validity determination injured, and continues to injure, the Trust's interests by unlawfully declaring the Canyon Mine claims to be valid, and thereby approving of the mine's operation despite the Grand Canyon withdrawal. Because of the withdrawal, the Forest Service took the position that the mine could not operate absent a determination that Energy Fuels' mining claims were valid. *See Havasupai Tribe*, 906 F.3d at 1163 (holding that the validity determination was a "practical requirement to the continued operation of Canyon Mine"). By deeming the claims valid and consenting to the mine's operation despite the withdrawal, the validity determination injured the Trust's aesthetic, recreational, and comparable interests. *See* 1-FER-6–16 (2d Supp. Clark Decl. ¶¶ 3–28); 1-FER-32–40 (2d Supp. Silver Decl. ¶¶ 2–20); 1-FER-143–46 (Crumbo Decl. ¶¶ 4–11). And because the Forest Service on remand can again foreclose mining unless and until the claims are deemed valid, an order

correcting the agency's erroneous interpretation of the law, vacating the validity determination, and remanding to the Forest Service to lawfully exercise its authority would redress the Trust's injuries. *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998) (holding that redressability requirement is satisfied when a "discretionary agency decision" that is based on "an improper legal ground" may be vacated so that the agency may "exercise[e] its discretionary powers lawfully").

The Forest Service argues that the Trust lacks standing for two related reasons. First, it contends that the validity determination did not "authorize[]" mining operations and therefore did not cause the Trust's injuries. Feds.' Br. 20. But, again, this Court previously held that the validity determination was a "practical requirement to the continued operation of Canyon Mine" after the mineral withdrawal. *See Havasupai Tribe*, 906 F.3d at 1163. Regardless of whether the Forest Service was legally obliged to halt mining pending a determination of claim validity, it chose to do so. *See* 1-FER-147 ("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…."); 2-ER-212 ("It is Forest Service policy (FSM 2803.5) to only allow operations on mining claims within a withdrawal that have valid existing rights…."). The agency's subsequent determination that mining could go forward thus injured the Trust.

Second, the Forest Service asserts that the Trust's injuries cannot be redressed because, on remand, the Forest Service "would be under no duty to complete a new" validity determination and could not oust Canyon Mine from the national forest until the Interior Department prevailed in a claims contest. Feds.' Br. at 21. But the Supreme Court has rejected the argument that the presence of agency discretion defeats a finding of causation and redressability. "Agencies often have discretion about whether or not to take a particular action[,]" the Court has held, "[y]et those adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground." *Akins*, 524 U.S. at 25. Correcting the error and remanding for the agency to lawfully exercise its "discretionary powers" is sufficient to redress a plaintiff's injury. *Id.* That the Forest Service could again require mining to cease absent a legally adequate validity determination is sufficient to satisfy the

causation and redressability requirements. *See Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1178 (9th Cir. 2000) (reversing order on standing when the "district court placed an unreasonable burden" on the plaintiffs by requiring them to "show not only that a court's decision would invalidate a particular [land exchange] but also that no subsequent exchange would take place.").

It is not speculative, furthermore, to expect vacatur and remand to forestall Canyon Mine's operation. For mining claims to be valid, the present-marketability test must be satisfied whenever a validity determination or claims contest is completed. *See Lara v. Sec'y of Interior*, 820 F.2d 1535, 1542 (9th Cir. 1987); Feds.' Br. 41 n.9 ("Energy Fuels must maintain its discovery in order to continue to assert a valid existing right."). In recent years, the spot price of uranium has averaged below $30 per pound. *See* 1-FER-14. And at that price, the validity determination indicates that Energy Fuels could not reasonably expect to make a profit in the present market, but instead, would suffer a multi-million-dollar, undiscounted net loss, even without accounting for any pre-2012 costs or taxes. If about 1.6 million pounds of uranium can be mined at an operating cost of $17.36 per pound, as the validity

determination forecasted, a uranium price of $27 per pound, for example, would yield revenues of about $43.2 million, while costs would be about $46.9 million ($19.1 million in capital costs, plus $27.8 million in operating expenses). 2-ER-225–227.

When confronted with evidence like this of "unauthorized use of a mining claim," Forest Service policy calls on the agency to complete a mineral examination. 3-ER-338 (instructing district rangers, in the Forest Service manual, to request an examination when unauthorized use "is believed to exist"). And when an examination deems a claim invalid, it is not true that the Forest Service can "at most request" a claims contest, as the agency's lawyers contend. Feds.' Br. 21. The agency's policy is to require the Interior Department to pursue a contest unless the claimant ceases its unauthorized use. 3-ER-337–38 (if negotiation to "terminate unauthorized use" fails, "appropriate legal action is required"); 1-SER-186, 180 (stating, in interagency memorandum at §§ D. and A.5, that Interior's land manager, "will prepare, and proceed with service … of a complaint" upon receiving the Forest Service's contest recommendation); *United States v. Opperman*, 111 IBLA 152, 157–58 (1989) (explaining that Interior lacks authority

to question Forest Service's decision to initiate a contest proceeding).

Thus, given that Canyon Mine is in a withdrawn area, and given the evidence that the deposit at Canyon Mine is not presently marketable if pre-2012 costs are counted, relevant law and Forest Service policies would aim to halt the mine's operation were the validity determination vacated. The Court should reject the Forest Service's redressability argument.

II. Energy Fuels' injunctive-relief argument is irrelevant.

Energy Fuels contends at length that the Trust is not entitled to injunctive relief. *See* Intervenor-Defendants-Appellees' Answering Br. 24–27, ECF 29 (Apr. 9, 2021) ("EFR's Br."). While the Trust disagrees, this argument is, at root, beside the point because the Trust did not appeal the district court's ruling that injunctive relief is unavailable. *See* Appellants' Opening Br. 58, ECF 12 (Dec. 22, 2020) ("Trust's Br.").

The company's argument, in any event, overstates the privileges federal law confers on mining companies, like Energy Fuels. It is not true that the company has "mining rights" that the withdrawal could not affect unless a contest were to extinguish the company's mining claims. *See* EFR's Br. at 25, 19. The Forest Service has the power to

protect national forests from mining while claim validity is determined, which is precisely the course it took at Canyon Mine when completing the validity determination disputed here. *See Clouser v. Espy*, 42 F.3d 1522, 1529–31, 1536 (9th Cir. 1994) (describing Forest Service's broad authority to protect national forests by regulating mining, and affirming agency's denial of motorized access to claim "unless and until claim validity is established").

III. The validity determination should be set aside.

A. That a non-defendant agency proclaimed the sunk-cost interpretation does not insulate it from review.

Resolving the parties' dispute over sunk costs requires the Court to construe the Mining Law's requirements for establishing valid mining claims. The question presented is thus one of law to be reviewed de novo, according deference only if warranted under *Chevron*. Trust's Br. at 25–29.

The Forest Service quarrels with this black-letter principle, asserting that "[t]he validity of Interior's interpretation is … not before this Court" because Interior is not a defendant. Feds.' Br. 24. The only question, the agency maintains, is whether it was "arbitrary and capricious for the Forest Service to apply Interior's interpretation of the

Mining Law….” *Id.* But there is no support in the Administrative Procedure Act, nor any other source of law, for shielding from judicial review a legal interpretation announced by one agency whenever it is applied by another agency.

The “agency action” challenged here—the Forest Service’s validity determination—relied on Interior’s legal conclusion that past costs must be summarily disregarded under the marketability test. To decide under the APA whether the Forest Service acted “in accordance with” the Mining Law, the Court must resolve whether Interior’s interpretation of the law is erroneous, for if excluding past costs was contrary to the law, so too was the Forest Service’s action. 5 U.S.C. § 706(2)(A); *see Osman v. Ribicoff*, 195 F. Supp. 699, 700 (E.D. Mich. 1961) (“We cannot accept the argument that since an administrative agency relies on the interpretation of another agency on a matter of legal interpretation, a judicial review is likewise so bound.”).

The Forest Service has pointed to no text in the APA nor any case that sanctions a departure from this customary method of judicial review. For the notion that the Interior Department must be a defendant for its legal interpretation to be put into question, the Forest

Service cites *White v. Department of Homeland Security*, 2012 WL 4815470, *1 (D.D.C. Oct. 10, 2012). *See* Feds.' Br. at 24. But that decision says nothing about how courts should review one agency's application of another agency's legal conclusions. *Id.* at *1–2. It merely dismissed an APA lawsuit because the plaintiffs failed to name the agency whose action they sought to challenge, a holding that does not reflect the posture here, even if it were otherwise relevant. *Id.*

The Forest Service cites two other cases for the premise that the Court should assume Interior's legal interpretation to be correct and ask only whether it was arbitrary and capricious for the Forest Service to apply it. Feds.' Br. 23. Neither backs up that premise. In each case, one agency applied a regulation that had been promulgated by a different agency, and in each case, the court reviewed the regulation's lawfulness. *See CTIA-Wireless Ass'n v. Fed. Commc'n Comm'n*, 466 F.3d 105, 117–18 (D.C. Cir. 2006) (concluding that the statutory interpretation in question "was reasonable"); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 354–55 (1989) (deferring to a regulation when the statute did not mandate a particular result and the agency supplied a "well-considered basis" for its interpretation). True

enough, the courts' review was deferential, but not because each court asked solely whether it was arbitrary to apply the regulation, but because each court reached a deference-bestowing step when judging the regulation's validity under a *Chevron*-like standard of review. *Id.*

What these cases confirm is that the question of deference here is controlled by the *Chevron* framework. And that matters, as discussed further below, because that framework adds steps of analysis when resolving questions of statutory interpretation in APA cases.

B. The minimal-analysis requirement is neither inapplicable nor satisfied.

One of the prerequisites for earning deference under *Chevron* is that an agency must supply a "minimal level of analysis" to support its statutory interpretation. Trust's Br. 29 (citing *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2125 (2016)). That requirement is not met here. *Id.* at 29–33.

The Forest Service responds in two ways. First, it suggests that the minimal-analysis prerequisite applies only when an agency changes a previously held position, which did not happen here. Feds.' Br. at 35. But that suggestion misconstrues *Encino Motorcars*, which described the minimal-analysis obligation as a "basic procedural requirement" for

making rules carrying the force of law. 136 S. Ct. at 2125. An agency must always give "adequate reasons" for its statutory interpretations. *Id.* When an agency changes an existing policy, its reasons must acknowledge and explain the change. *Id.* at 2125–26. But that heightened standard does not mean that an agency may interpret a statute without a minimal analysis when it is not changing a prior position.

Second, the Forest Service asserts that Interior's explanation in *Mannix* for the sunk-cost interpretation satisfied the minimal-analysis requirement. Feds.' Br. at 35–37. Yet the explanation the Forest Service sets out and defends in its brief is not what appeared in *Mannix*. Rather, to arrive at the conclusion that the "IBLA's rationale"—IBLA, meaning the Interior Board of Land Appeals—was "based on the premise that a guaranteed profit is not required," the agency's lawyers merged the paragraph in *Mannix* about "earlier expenses" with the opinion's earlier rote statements about the marketability test. Feds.' Br. 36. Yet the Board in *Mannix* did not explain its sunk-cost ruling by pointing to general principles about "guaranteed profit" or "current estimates of costs and prices," as the Forest Service asserts. Feds.' Br.

36–37. The reasoning the Board supplied was confined to the observation that "no case law … compels consideration of [earlier] development costs in determining if an ongoing operation is presently profitable." *Mannix*, 50 IBLA at 119.

The dearth of analysis in *Mannix* likely explains why the Forest Service elsewhere in its brief offers an altogether different rationale for excluding past costs, one having to do with the expense of pre-discovery exploration (discussed further below). *See* Feds.' Br. 30–33. If *Mannix* supplied adequate reasons for Interior's interpretation, one would not expect the Forest Service to present other reasons to the Court.

The Forest Service also asserts that adequate reasons for the Board's interpretation can be found in the hearing officer's opinion the Board affirmed. Feds.' Br. 37. Yet the point of the minimal-analysis requirement is to ensure that binding rules of law are announced with a "satisfactory explanation." *Encino Motorcars*, 136 S. Ct. at 2125. And the hearing officer's decision could not serve that purpose, for it was unpublished, it could not establish binding precedent, and its reasoning was not adopted or discussed by the Board. *See In re Hensley*, 195 IBLA 345, 360 n.87 (2020) ("Decisions of administrative law judges are not

Departmental precedents and are not binding…."); 5 U.S.C. § 552(a)(2) (authorizing only indexed and published orders to be treated as precedential); *Mannix*, 50 IBLA at 119 (no discussion of the hearing officer's analysis).[2]

The Interior Department announced the sunk-cost interpretation in *Mannix* without any reasoned explanation and has since carried it forward mechanically into its handbook and other cases. *See* Trust's Br. 29–30. That interpretation does not deserve deference, and the Court's review should consequently be de novo. *See Encino Motorcars*, 136 S. Ct. at 2127.

C. The sunk-cost ruling is also not a permissible interpretation of the Mining Law.

Because Interior's treatment of sunk costs entails an impermissible construction of the Mining Law, deference is not due under *Chevron* irrespective of the minimal-analysis requirement. The question under *Chevron's* second step is whether an agency has exercised its latitude to construe an ambiguous statute in a way that is

[2] The Forest Service's similar assertion about a concurring opinion in a later Board case, *United States v. Collord*, 128 IBLA 266 (1994), Feds.' Br. 37, is off base for the same reason.

permissible, or reasonable, given the statutory text and purpose. *See Natural Res. Def. Council v. Nat'l Marine Fisheries Serv.*, 421 F.3d 872, 879 (9th Cir. 2005). That standard is not satisfied here because the sunk-cost interpretation extends the legal test for claim validity in a way that is inconsistent with the Mining Law's text and purpose. Trust's Br. 33–35.

The Forest Service answers, first, that the sunk-cost interpretation cannot be inconsistent with the Mining Law's text because that text does not explicitly require sunk costs to be considered. Feds.' Br. 37–38 (arguing that the *Chevron* inquiry should stop at the conclusion that "no language in the statute … requires consideration of sunk costs…"). Yet the text also does not require sunk costs to be disregarded. The absence of the words "sunk costs" in the statute is a reason to conclude, at most, that the statute is ambiguous; it is not a reason to deem Interior's interpretation to be consistent with the statutory text and purpose.

The agency contends, next, that the Trust has failed to identify "any statutory language" that the sunk-cost interpretation contravenes. Feds.' Br. 38. But that is not so. The Mining Law makes the value of the

mineral "deposit" the *sine qua non* of claim validity. 30 U.S.C. § 22; Trust's Br. 20–21; 33–34. Any interpretation of the test for claim validity must be consistent with that statutory text, including an interpretation that, as here, extends the marketability rule the Supreme Court has deemed the law of the land. Yet the Department's treatment of sunk costs does not ascertain the value of the "deposit" in the "lands belonging to the United States." 30 U.S.C. § 22. Rather, it overstates the deposit's value by understating what must be spent to remove and market that deposit.

The Forest Service, last, disputes the Trust's assertion that excluding past costs undermines the Mining Law's purposes by fostering speculative mining operations. Feds. Br. 43–44. The statute's goal, the agency says, is to promote "exploration of minerals, including exploration that is speculative." *Id.* at 43. But exploration and mining are not equivalent. The law may nurture speculative exploration, but it discourages tying up public lands with speculative mining claims. *See Exxon Mobil Corp. v. Norton*, 346 F.3d 1244, 1255 (10th Cir. 2003) (explaining that annual assessment requirement was intended to "prevent the location of mining claims for speculative purposes").

Because the sunk-cost interpretation cannot be squared with the Mining Law's text and purpose, it is not a permissible statutory interpretation, and it is not owed deference under *Chevron*. *See Natural Res. Defense Council*, 421 F.3d at 879.

D. The arguments the Forest Service and Energy Fuels put forward for excluding sunk costs are not sound.

The Forest Service and Energy Fuels offer varying rationales for disregarding sunk costs. Each argument falls short, regardless of whether the Court interprets the Mining Law de novo because the minimal-analysis prerequisite is not satisfied, or whether the Court asks under *Chevron* step two whether *Mannix* adopted a permissible interpretation of the Mining Law.

1. *The Forest Service is mistaken about the role of past costs in* Coleman.

The case that led the Supreme Court to embrace the marketability test as the controlling standard for determining claim validity, *United States v. Coleman*, demonstrates that past mining costs count when resolving whether a deposit can be "extracted, removed and marketed at a profit." 390 U.S. at 600; *see* Trust's Br. 18–19. The Forest Service disagrees, contending that the Interior Department's administrative decision in *Coleman* "did not consider the claimant's capital

expenditures" in applying the marketability test, nor did its "discussion of operating costs … include sunk costs." Feds.' Br. 40–41. But that is not so.

The crux of the Department's analysis was that the expense of Mr. Coleman's past labor so far exceeded the value of the mineral deposit in question that he could not possibly demonstrate present marketability. Appx. to Feds.' Br. at 15a–16a (finding a lack of marketability by comparing revenues of $15,990 to past labor costs of $157,500). That labor expense was a quintessential "sunk cost"—an unrecoverable cost of improvements made in the past. *See* 3-ER-325 (so defining "sunk costs" in the Department's handbook). And the Department's final administrative decision not only included that expense in its discussion of Mr. Coleman's operating expenses, but situated it as the cornerstone of the analysis. Appx. to Feds.' Br. at 16a.

That analysis concluded further that Mr. Coleman's capital costs, for "the use of trucks, bulldozer and blasting equipment" would have only *added* to his losses, even if amortization diminished the effect of those costs on his income. Appx. to Feds.' Br. at 16a (reasoning that these expenses were not included in the labor-cost estimate and that

amortization them would not change the conclusion about profitability).

The subsequent history reinforces how salient *Coleman's* treatment of past costs is. The Ninth Circuit reversed the Interior Department's decision invaliding Mr. Coleman's claims, and it disapproved of the Department's treatment of labor expenses, using language that closely resembled the Board's later statements in *Mannix*. *See Coleman v. United States*, 363 F.2d 190, 202 (9th Cir. 1966) *rev'd*, 390 U.S. 599. "We have found no case authority," the court said, "on the subject of whether the calculated value of a locator's labor in developing the property should be charged as an expense in determining profitability." *Id.* at 202–03. "Academic economics has little meaning for a miner," the court continued, "and his 'profit' is made if his receipts exceed his out-of-pocket expenditures, although he may be grossly underpaid for his labor." *Id.* at 203.

Yet the Supreme Court reversed, reinstating and affirming the Department's analysis of profitability, whose core focus was on past costs. 390 U.S. at 601–02 ("We cannot agree with the Court of Appeals and believe that the rulings of the Secretary of the Interior were proper."). *Coleman* thus demonstrates that past costs not only count but

can be determinative in applying the marketability test.

2. A goal of excluding exploration and investigation expenses does not vindicate the sunk-cost interpretation.

The Forest Service asserts that excluding sunk costs ensures that miners are not penalized for expenses "to explore for and develop minerals" that must be incurred to discover a valuable mineral deposit. Feds.' Br. 30–31. Yet that rationale is not tailored to the blanket rule for omitting past costs that the agency defends.

The holding in *Mannix* and the Interior Department's handbook instruct the government to disregard not just pre-discovery exploration and investigation expenses, but all mining costs incurred before the date of a validity determination. *See, e.g.*, 3-ER-325 (BLM handbook); 2-ER-226 (excluding all costs predating the examination for Canyon Mine). Whether a particular cost is omitted depends solely on the timing of the validity determination, not on the nature or purpose of the expense. The cost of the groundwater well at Canyon Mine, for example, was not an "exploration" cost, but a mine-construction cost incurred in 1986. 1-FER-152. That expense would have counted in a validity determination completed in 1985, but not in 1987. This outcome has nothing to do with the expenditures made to "sufficiently identif[y]" a

uranium deposit at the mine. Feds.' Br. 30.

Indeed, the Trust has not argued that the Forest Service erred by failing to account for whatever exploration expenses were incurred to find the uranium deposit at Canyon Mine. This appeal is entirely about the expenditures necessary to extract, remove, and market the deposit. *See* 2-ER-226 (listing major mine-development costs that were excluded, like building sediment ponds and the main head frame).

3. Economic theory does not justify disregarding sunk costs in validity determinations.

Energy Fuels argues that omitting sunk costs when determining marketability is consistent with the principle of economics asserting that unrecoverable past costs—that is, sunk costs—should be ignored in decisions about future investments in an enterprise. EFR's Br. 42–48; Feds.' Br. 31–32 (endorsing same argument). Yet the prudent-person and marketability tests do not merely recapitulate economic theory about sunk costs, for they do not turn on a simple assessment of whether further investment is economically rational. They depend on the expected *outcome* of future investment.

It is true that economic theory would say it is rational for a miner with a half-built mine to keep mining if future revenues will exceed

future costs, regardless of whether mining the deposit will deliver a profit in the final reckoning. But that is not the legal standard for determining claim validity. If it were, then half the prudent-person test would be lopped off and a deposit would be valuable if it is "of such a character that a 'person of ordinary prudence would be justified in the further expenditure of his labor and means….'" *Coleman*, 390 U.S. at 602 (*quoting Castle v. Womble*, 19 L.D. 455, 457 (1894)). The prudent-person test asks more: whether "further expenditure" is made "with a reasonable prospect of success, in developing a valuable mine." *Id.*

The same is true of the marketability test. Someone who spends $1,000 building a life-sized porcelain elephant and then sells it for its market value of $10—to use the example Energy Fuels quotes—has not made a profit, even if the elephant's sale was economically rational. So too, miners who spend more building a mine than can be recouped by selling the ore they have unearthed may act rationally by continuing to mine if it will cut their losses. That does not mean they can reasonably expect to extract and market the deposit "at a profit." *Coleman*, 390 U.S. at 600.

What the Forest Service and Energy Fuels are arguing for is a

legal test for claim validity that would ask not about prospects for success, but about prospects for somewhat less failure; not about expectations of profit, but expectations of fewer losses; not about developing a valuable mine, but one that is less invaluable. The Court should decline to adopt that test.

Energy Fuels' extended Company A-versus-Company B hypothetical does not salvage its argument. The hypothetical's premise is that a mining claim should be deemed valid even if "Company A" spends $10 million on "exploration and development" of a deposit on the claim that can be sold only for $8 million more than it will thereafter cost to extract and market. EFR's Br. 45. But Energy Fuels' reasoning is unsound. Its hypothetical disregards the outcome-oriented language of the prudent-person and marketability tests. It also assumes without foundation that all $10 million Company A spent would count in determining marketability. The Trust is not arguing that all costs "must be imposed on a subsequent mining claimant regardless of the business rationale," as Energy Fuels contends, EFR's Br. 48, only the costs that are objectively necessary to mine the deposit, Trust's Br. 16, 20, 33–34.

There is nothing "absurd" or "fundamentally unfair," furthermore, about finding the hypothetical claim invalid if the deposit cannot be mined and sold for a profit, regardless of whether Company A sells the claim to Company B for $1 million, as Energy Fuels posits. EFR's Br. 46, 48. Company B would deliver a profit to its shareholders only by exploiting the millions that Company A's shareholders have lost. In that scenario, it is not the deposit that is valuable, but Company A's fire sale. And if the deposit will cost millions more to mine than society is willing to pay for the mine's yields, allowing Company B to mine public lands for those publicly owned minerals would "work an unlawful private appropriation in derogation of the rights of the public." *Cameron v. United States*, 252 U.S. 450, 460 (1920).

Last, the market worth of the claim—to "Company C" or anyone else—is irrelevant. That market value depends on how buyers appraise the likelihood of making an adequate return on their investment, considering projected mining costs, revenues, and risks like the possible invalidation of the claim. If the law of claim validity accounts for past costs, then Company C (if prudent) will not pay $8 million for a claim it cannot expect to lawfully mine. The claim might still have a market

value, owing to speculation that the market will someday pay more for the deposit than it costs to mine. But that market value—whether $800 or $8 billion—does not control whether the plot of earth for which a speculator will pay *presently* contains a valuable mineral deposit.

4. The Forest Service's gloss on Judge Burski's concurrence in Collord *does not withstand scrutiny.*

The Forest Service argues that a concurring opinion in *United States v. Collord*, 128 IBLA 266 (1994), which the Trust discussed in its opening brief, Trust's Br. 37–39, buttresses the rationale for excluding sunk costs. Feds.' Br. 32–33. Yet the agency reads that concurrence in a way that contradicts its text.

According to the Forest Service, the concurrence "theorized that the outcome in *Mannix* would have been different" if two facts had been changed: (1) the lands had been withdrawn, and (2) the expenses had not been incurred before the withdrawal. *Id.* at 33. But the concurrence asserts only that the first of these two hypothetical conditions would have changed the outcome in *Mannix*. 128 IBLA at 304 (explaining that the Board would have counted the "already-made expenditures" if "the land embraced by the claim [had] been withdrawn from mineral entry."). The Forest Service plucked the second condition from a

discussion two paragraphs later addressing the question presented in *Collord*, which was not about sunk costs, but about how future mining costs should be allocated among a group of mining claims. *Id.* at 305 *(*observing that the "critical distinguishing factor in [*Collord*] is that the expenditures relating to infrastructure development have not yet been made"*)*.[3]

5. The words "further expenditure," "guaranteed profit," and "current estimates" do not justify omitting sunk costs.

Both Defendants argue that isolated phrases in the cases fleshing out the law of claim validity call for exclusion of past costs. But each of these assertions overstates the meaning that can be drawn from the words at issue.

The Forest Service and company argue, for example, that the words "further expenditure" in the prudent-person test "make[] clear" that the test does not account for past costs. Feds.' Br. 38; EFR's Br. 29–30. But again, that argument disregards what must result from further expenditure: "a reasonable prospect of success, in developing a valuable

[3] The point was that the claimants had not met their evidentiary burden of showing the disputed mining claims to be "presently valuable" because the profitability of those claims was contingent on future expenditures the claimants had elected not to incur. *Id.*

mine." *See Coleman*, 390 U.S. at 602.

Elsewhere, the Forest Service asserts that excluding sunk costs follows from the idea that "the law does not require a guaranteed profit to constitute a discovery." Feds.' Br. 36. Yet counting all mining costs when determining marketability is not tantamount to demanding a guaranteed profit. The question remains whether it is reasonable to expect a profit considering all mining costs and revenues. And indeed, considering both past and future costs ensures that miners are not deemed to have valid claims when they are facing *guaranteed losses* because their past costs can never be recouped.

In other parts of its brief, the Forest Service stresses that marketability depends on "current estimates" of expected costs, revenues, and other figures. Feds.' Br. 28, 36. Yet what is required is a current estimate of the "expected costs of the extraction, beneficiation, and other essential costs of the operation necessary to mine and sell the mineral, including capital and labor cost." *United States v. McKenzie*, 20 IBLA 38, 45 (1975). It is perfectly natural to read that phrase to ask for an up-to-date estimate of how much has been spent to date, together with a forecast of what will be spent in the future on the "operation

necessary to mine and sell the mineral." *Id.*

6. It is no more impractical to estimate past costs than to forecast future costs.

The Forest Service and Energy Fuels each contend that accounting for past costs would be "exceedingly impractical" because it would be impossible to know how much money may have been spent by some unidentifiable number of prospectors and miners who have explored or partially developed any given mining claim. Feds.' Br. 42–43; EFR's Br. 48 n.15, 51. This argument, however, mistakenly treats the marketability test as a subjective one that depends on the expenditures actually made by all the individuals who have searched for and worked the mineral deposit in question. Because the test for claim validity is objective, the government need only make its best current estimate of all the "essential costs of the operation necessary to mine and sell the mineral." *McKenzie*, 20 IBLA at 45.

Indeed, the government routinely does just that when it examines the validity of mining claims that, unlike Canyon Mine, are not yet partially developed. If the Forest Service had examined the Canyon Mine claims in 1978, it would have forecasted *all* the mining costs in dispute in this appeal. It consequently cannot be prohibitively

impractical to do that today, with the benefit of hindsight.

All told, this argument rings especially hollow given that Energy Fuels in this case supplied the Forest Service with an estimate of pre-2012 costs for developing Canyon Mine. *See* 2-ER-101.

7. The text "absent a prior withdrawal" does not call for exclusion of past costs when there is a prior withdrawal.

Even were the sunk-cost interpretation announced in *Mannix* correct, past costs should still have been counted here due to the Grand Canyon withdrawal, for *Mannix* sanctioned the exclusion of "earlier expenses" only "[a]bsent a prior withdrawal." Trust's Br. 37–39 (citing 50 IBLA at 119).

The Forest Service and Energy Fuels argue that *Mannix* requires "earlier expenses" to be disregarded regardless of whether a withdrawal exists. Feds.' Br. 34; EFR's Br. 53. But if that were true, the words "[a]bsent a prior withdrawal" would serve no purpose. And if there are no circumstances in which "earlier expenses" count, it is not evident why the Forest Service believes it to be germane that "a prospector may relocate mining claims on open lands so that they are unburdened by prior expenditures up until the date such lands are withdrawn." Feds.' Br. at 34. Indeed, that is the reason Judge Burski gave in *Collord* for

counting, rather than disregarding, past costs when there is a withdrawal. *See Collord*, 128 IBLA at 304.

Energy Fuels also points out that the Grand Canyon withdrawal may lapse in 2032, implying that no practical purpose would be served by invaliding its claims. EFR's Br. 54. Yet the withdrawal may be extended, *see* 43 U.S.C. § 1714(a), or may be made permanent, *see* Grand Canyon Protection Act, H.R. 1052, S. 387, 117th Cong. (2021), and regardless, invaliding the company's claims would ensure that the site would remain free of mining operations unless the present-marketability test could be satisfied in the future.

Even were it correct to follow *Mannix*, the Forest Service erred by failing to recognize that it is only "[a]bsent a prior withdrawal" that Department's holding excluding sunk costs applies. Trust's Br. 37–39.

E. The Trust was not "tardy" in arguing about sunk costs.

The Forest Service and Energy Fuels protest that the Trust raised the issue of sunk costs in an untimely way. *See* Feds.' Br. 23 n.2; EFR's Br. 57. Yet the Trust's complaint alleged a failure by the Forest Service to "consider all relevant factors including costs related to Canyon Mine approvals, operations and reclamation," 1-ER-199, an allegation that

includes past costs. And it is untrue that sunk costs "were not at issue in the first merits briefing," as Energy Fuels contends and the Forest Service implies. EFR's Br. 57; *accord* Feds.' Br. 23 n.2. Energy Fuels itself raised the legal principle for disregarding sunk costs as a defense to the Trust's arguments. 1-FER-138 ("Costs … [of] construct[ing] the monitoring well and powerlines were excluded as sunk costs, because they were built before the [validity] determination.").

Regardless, the parties presented the dispute over sunk costs to the district court, the court resolved that dispute, and the pleadings must be construed to conform to the court's judgment. *See* Fed. R. Civ. P. 15(b)(2).

IV. The Forest Service's error was not harmless.

Because accounting for pre-2012 costs may have led the Forest Service to deem the Canyon Mine claims invalid, excluding those costs was not a harmless error. *See* Trust's Br. 39–56.

Neither the Forest Service nor Energy Fuels responds directly to the Trust's main argument: that it is not possible to conclude from the record that excluding pre-2012 costs "clearly had no bearing" on the outcome, considering the evidence about costs through 1987, alongside

the record's silence about costs between 1987 and 2012. *Id.* at 39–44. Instead, both Defendants deal individually with the pre-2012 costs that can be estimated from the record, dispute the conclusions that can be drawn about each fraction of those costs, and assert that each part would not demonstrate a lack of profitability, without regard to the whole, and without regard to what the record omits about past costs.

That approach depends on a recurring, problematic contention: that uncertainties in the administrative record prevent the Trust from showing mathematically that pre-2012 costs exceed the Forest Service's estimate of post-2012 "profit." But that contention misapplies the test for harmless error, which demands that the record demonstrate clearly that the outcome would *not* change on remand, not mathematical proof that the outcome would change. *See Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1090 (9th Cir. 2011) (asking whether error "clearly had no bearing" on defective agency decision). Deficiencies in the record are thus a reason for reversal, not affirmance, because they deprive the Court of a basis for concluding that pre-2012 costs were less than post-2012 forecasted "profits."

Both the Forest Service and company assert, for example, that the

declarations to which the Trust pointed cannot be trusted as an accurate measure of pre-2012 costs. *See* Feds.' Br. 48, 50; EFR's Br. 55–56. Yet any purported deficiency in how those sworn statements—made by Energy Fuels and its predecessors—account for pre-2012 costs is not a reason to assume the Forest Service's error was harmless. It is a justification for remand so that the agency can investigate and properly account for those costs.

Similarly, both defendants argue that about half the expenses discussed in the 1987 affidavit to which the Trust pointed were for "exploration" costs that do not count in determining marketability. Feds.' Br. 48; EFR's Br. 55. Yet even assuming that "exploration" expenses should be disregarded, it is unclear from the administrative record when exploration for the deposit at Canyon Mine ceased and work necessary to extract the deposit began. The Forest Service argues that exploration lasted until 1985. Feds.' Br. 48. Yet the validity determination asserts that "drilling completed by Energy Fuels in 1983 identified a major deposit," 2-ER-223, a conclusion repeated in the company's brief, EFR's Br. 19. What followed until 1985 was drilling to delineate the ore body, *id.*, a task necessary to extract the uranium

distinct from the exploratory drilling to find it. Thus, even if "exploration" costs do not count, remand to the Forest Service to distinguish exploration from mining costs would be the proper remedy.

Likewise, the Forest Service and Energy Fuels claim that expenses discussed in a 2013 declaration from the company include some amounts incurred after the validity determination was completed and some amounts incurred to purchase the mine, improperly double counting some mine-construction expenses discussed in the 1987 affidavit. Feds.' Br. 50; EFR's Br. 56. But even if those assertions are true, it is impossible to discern from the record what share of those expenses should count and what share should not (if any). And again, that deficiency justifies remand, not an assumption that the Forest Service's error was harmless.

Two of the Defendants' remaining arguments are misplaced due to mistakes in describing the record. The Forest Service contends that the correct marketability date, and the end point for considering inflation, is July 2009. Feds.' Br. at 48. Yet the Forest Service assessed validity as of two dates: the date of the withdrawal (July 2009) and the date of the examination (early 2012). 2-ER-208 (concluding in April 2012, that

claims were valid as of July 2009 "and continue to be valid at the present time"); 2-ER-209 (same). Had the Forest Service properly accounted for past costs, the question in 2012 would have been whether the deposit at Canyon Mine could then be mined and sold at a profit, considering all expected mining costs as of that date, and the prevailing price of uranium. The Trust did not err by accounting for inflation until early 2012.

The argument about inflation, furthermore, appears to echo a fundamental misreading of the record. The Forest Service's brief asserts several times that the validity determination excluded only costs incurred before July 2009, when the public lands in question were first "segregated" to enable the later withdrawal. Feds.' Br. 3–4, 13. But that is not correct. The costs evaluated in the validity determination came from a spreadsheet Energy Fuels prepared, which forecasted costs only for the years 2012 forward. *Compare* 2-FER-161 (spreadsheet estimating costs for 2012 through 2016) and 3-SER-778 (same) *with* 2-ER-226–28 (identical cost figures in the validity determination). All expenses incurred before 2012 were omitted from the analysis.

The second misstep is one Energy Fuels makes when it argues

that the Trust "double count[ed]" estimates in the 1987 affidavit for future mine work, like preparing the site and digging underground workings. EFR's Br. 55. This is not so. The Trust's arguments were based solely on the affiant's claim that $8.2 million would be incurred by the end of 1987 and did not include the affiant's forecasts for sinking the mineshaft ($3 million), 3-ER-352, and underground development ($4.5 million), 3-ER-353. Trust's Br. 40–41. And Energy Fuels does not supply any reason to conclude that "site preparation" expenses were double counted, given that the expenses described in the 1987 affidavit match closely the "surface development" costs left out of the validity determination. *Compare* 3-ER-351 *with* 2-ER-226 (excluding costs of building sediment ponds, power lines, the main head frame, hoist house, warehouse, shop, and groundwater well).[4]

Last, the Forest Service contends that the validity determination properly accounted for the expense of environmental monitoring and wildlife-conservation measures and that those costs therefore should

[4] Energy Fuels also asserts repeatedly that the validity determination predicted that Canyon Mine would earn $29,350,736 in "profit." EFR's Br. 6–7, 24, 29–30, 39, 54, 56–57. This too is inaccurate. *See* Trust's Br. 52–53.

not be considered in the harmless-error analysis. Feds.' Br. 51. But the claim that these costs were counted is pure say-so. In an administrative record of more than 12,000 pages, all the agency cites for its argument is a fragment of the validity determination listing broad categories of expenses considered, Feds.' Br. 51 (citing 2-ER-226–28), and a letter from Energy Fuels generally describing its cost estimates, *id.* (citing 3-SER-772–78), neither of which mention the expenses in question. That does not supply a reason to second guess the district court's holding that the record cannot support the conclusion that the Forest Service accounted for the disputed costs. 1-ER-21–24.

Energy Fuels similarly spends about one-third of its argument addressing future monitoring and mitigation costs. EFR's Br. 30–40. Yet, again, the company's only citation to the record that is about costs the validity determination accounted for is the same section of the validity determination the Forest Service cites. *Id.* at 33 (citing 2-ER-225–228). And nowhere does the company address the sole contention the Trust made on appeal about these expenses: that they should have been considered in combination with pre-2012 costs in assessing harmless error. *See* Trust's Br. 45–47.

* * *

Given the sizable amount spent building Canyon Mine through 1987 and the absence of information in the administrative record about expenses in the next two decades, there is no basis to conclude that the Forest Service's error "clearly had no bearing on … the substance of [the] decision reached." *Cal. Wilderness Coal.*, 631 F.3d at 1090.

V. Allowing Energy Fuels to redact its sunk-costs estimate was improper.

Energy Fuels disputes the Trust's conditional request, Trust's Br. 56–57, that it be allowed to review and seek discovery into the company's redacted estimate of "sunk costs" if the Court concludes that the administrative record does not allow for a finding that the Forest Service's error was not harmless, EFR's Br. 58–59. Yet Energy Fuels' argument lumps together and mixes up two different court rulings—the relevant order authorizing the redaction in question, 1-ER-40, and an irrelevant ruling granting an unrelated motion to seal, 1-ER-38. *See* EFR's Br. 58. The dispute here is not about sealing from the public the company's sunk-costs estimate; it is about a redaction that withheld the estimate from the Trust. And it is not true that the district court "agreed" that Energy Fuels' motion to seal supplied "a compelling

reason to allow the redaction." EFR's Br. 58 (citing 1-SER-5–23). That motion had not even been filed when the redaction was allowed, *compare* 1-SER-5–23 (dated Sep. 25, 2019) *with* 1-ER-40 (dated Aug. 2, 2019), and the words "compelling reason" (which pertain to the legal standard for sealing) do not appear in the relevant district court order allowing the redaction, 1-ER-40. The question in resolving the redaction dispute was whether the amount of sunk costs was relevant, *see* Trust's Br. 56–57, a subject that Energy Fuels does not address.

Equally baseless is the company's assertion that the "Trust's complaints" are "untimely." EFR's Br. 58. The Trust persistently sought the document containing the disputed redaction, Appendix C to the validity determination. *See* 1-FER-67 (reflecting the Trust's request at the outset of this litigation to add to the record all the appendices to the validity determination); 1-FER-97 at n.7 (requesting Appendix C and an opportunity to conduct discovery about it after Energy Fuels put the document into issue on the merits); 1-FER-72–74 (on remand, immediately seeking Appendix C); 1-FER-53–62 (moving to compel the Defendants to add Appendix C to the record). When it was finally produced, the Trust then contested the redaction in question. *See* 1-ER-

100–109. And the Trust's contingent request in this appeal for an opportunity to seek discovery about that figure was prompted by the *sua sponte* holding about harmless error that led to this appeal, not some event early in the litigation. The company's claim that the Trust "chose not" to "conduct discovery or supplement the record" is without merit. EFR's Br. 58.

The company's offer to let the Court review *in camera* the company's secret sunk-costs estimate reveals why the Trust has sought this conditional relief. EFR's Br. 59. If the estimate is less than the Forest Service's 2012 "profit" forecast, absent a remand to the district court, this Court would have no basis for discerning whether the estimate is complete and accurate, nor how it would have affected the Forest Service's analysis.

CONCLUSION

If "sunk costs" are summarily disregarded when applying the marketability test, a mining claim can be deemed valid even if the mineral deposit claimed can be extracted, removed, and marketed only at a massive financial loss. Applying that interpretation, the Forest Service would say that a miner who has spent $50 million building a

mine to unearth a uranium deposit worth $5 million has a valid mining claim, so long as that claim's validity is examined after the mine is built and so long as the uranium will thereafter cost less than $5 million to remove and sell. Yet mining that deposit would not yield "a profit," *Coleman*, 390 U.S. at 600, nor a "paying mine," *Cameron*, 252 U.S. at 459, nor "success[] in developing a valuable mine," *Chrisman v. Miller*, 197 U.S. 313, 322 (1905).

The Court should reject that interpretation of the Mining Law and vacate the validity determination.

Respectfully submitted this 1st day of June 2021.

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