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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RULE 26.1 DISCLOSURE STATEMENT

Appellants, Grand Canyon Trust, Sierra Club, and Center for Biological Diversity, are non-profit corporations that do not have corporate parents and have not issued stock.

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STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331. The judgment appealed from disposed of all pending claims and is final under Rules 54 and 58 of the Federal Rules of Civil Procedure. 1-ER-2. This Court has jurisdiction under 28 U.S.C. § 1291. The district court's judgment was entered on May 22, 2020, 1-ER-2, Appellants' notice of appeal was filed on July 20, 2020, 3-ER-506, and this appeal is thus timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. A mining claim is valid under federal law only after discovery on the claim of a mineral deposit that can be extracted, removed, and marketed at a profit. In 2012, the government deemed two claims to be valid after projecting that mining revenues would exceed costs in the future, disregarding millions spent in past decades to develop a yet-unproductive mine. Did the government err by determining that the deposit could be extracted, removed, and marketed at a profit without considering past costs?

2. In administrative-procedure cases, an error is harmless only if it clearly had no bearing on the substance of the decision reached. Accounting for pre-2012 costs may have rendered the mining claims

invalid. Was omitting those costs a harmless error?

STATEMENT ABOUT THE ADDENDUM

An addendum containing pertinent statutes is appended.

STATEMENT OF THE CASE

I. The Mining Law of 1872

The Mining Law of 1872 allows citizens to go onto unappropriated federal public lands to prospect for "valuable mineral deposits." 30 U.S.C. § 22 ("Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States … shall be free and open to exploration and purchase…."). Under the law, a mining claim may be staked, or "located," to gain possessory rights against rivals. *See Union Oil Co. v. Smith*, 249 U.S. 337, 347–48 (1919). But a claim is valid only after "discovery" of a "valuable mineral deposit" on the claim. *Id.*; 30 U.S.C. § 26 (granting a possessory interest for mining purposes if the law's requirements are met). The Mining Law confers no right to mine deposits that are not valuable. *See Cameron v. United States*, 252 U.S. 450, 460 (1920) ("[N]o right arises from an invalid claim….").

II. The Canyon Mine

In the late 1970s, in a national forest a few miles south of Grand Canyon National Park, a uranium-mining company staked two mining

claims in a meadow and named the site the Canyon Mine. 2-ER-213. In the ensuing years, the company spent millions drilling holes on the claims to investigate the extent of the uranium deposit. 3-ER-350. It then sought approval from the U.S. Forest Service of a proposed plan for operating a mine. 3-ER-361.

In 1986, the Forest Service approved the plan. 3-ER-374. In so doing, the agency did not inquire whether the mining claims were invalid for failure to discover a valuable mineral deposit. 3-ER-384–85. It did, however, require several revisions to the plan before approving it. Recognizing that the mine could squander and pollute groundwater, as well as irradiate its surroundings, the agency required the mine's owner to monitor groundwater and radionuclides in the nearby area. 3-ER-373 (requiring monitoring); 3-ER-437 (discussing measures for handling groundwater contamination); 3-ER-474–75, 481 (explaining that groundwater is likely to be found in perched aquifers). The plan also directed the owner to replace dozens of acres of big-game-foraging habitat and a key watering source the mine would spoil. 3-ER-370.

In the next few years, the company built the mine's "major surface structures"—an office, a warehouse, a head frame, a hoist, power lines,

a waste pond, and a groundwater well. 2-ER-289; *see also* 2-ER-205, 213, 226. But in the early 1990s, after digging fifty feet of the mineshaft, the company shuttered the mine, for it became evident that the price of uranium was too low to justify further expenditure of time and money. *See* 2-ER-205, 290. The company by then had spent at least $8.2 million developing the mine and had neither recovered nor sold any uranium ore. 3-ER-353 (attesting in October 1987, in a declaration by the company's vice president of operations, that "$8,200,000 will be expended in exploration and site preparation activities through December, 1987"). A bankruptcy sale of the mine followed. 2-ER-254.

III. The Grand Canyon Mineral Withdrawal

In 2007, a short-lived spike in the price of uranium set off a rush to stake uranium-mining claims around the Grand Canyon. 2-ER-282–83 (explaining, in a government analysis, that uranium prices were relatively constant since 1980, save for a spike around 2007). Back then, the public lands surrounding Grand Canyon National Park were still open to prospectors under the 1872 Mining Law.

In response to this claim rush, the Secretary of Interior chose in 2009 to forbid the filing of new uranium-mining claims for two years on

about a million acres around the Park while studying whether to withdraw the area from the Mining Law's open-entry system. 74 Fed. Reg. 35,887 (July 21, 2009). A secretarial "withdrawal" like this can be made under the Federal Land Policy and Management Act of 1976 to foreclose mining on designated public lands for up to two decades, "subject to valid existing rights." 43 U.S.C. § 1714(a), (c)(1); Pub. L. 94-579 § 701(h). Under this proviso, valid mining claims survive a withdrawal, while invalid claims—those on which a "valuable mineral deposit" has not been discovered—are extinguished.

In January 2012, subject to that proviso, and after more than two years of study, the Secretary made the proposed withdrawal. 77 Fed. Reg. 2,317 (Jan. 17, 2012). He did so after finding that radioactive-contamination risks to water sources and wildlife around the Grand Canyon were "unacceptable," and that "[a]ny mining within the sacred and traditional places of tribal peoples may degrade the values of those lands to the tribes that use them" in a way that likely "could not be mitigated." 2-ER-265–66.[1]

[1] Confronted with mining-industry objections, this Court upheld the withdrawal. *Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845 (9th Cir. 2017).

IV. The Forest Service's Validity Determination

Based on the Secretary's findings, the meadow in the Kaibab National Forest that Canyon Mine had overtaken—a place sacred to the Havasupai Tribe—was withdrawn. 2-ER-212; 3-ER-368. And that raised a question: Did the withdrawal extinguish the decades-old and yet-nonproducing Canyon Mine claims? To answer that question, the Forest Service set about preparing a "validity determination," whose purpose was to ascertain whether a "valuable mineral deposit" had been discovered on the claims. 2-ER-212. At its core, that inquiry depended on whether the uranium deposit on the claims could be "extracted, removed and marketed at a profit." *United States v. Coleman*, 390 U.S. 599, 600–03 (1968); 2-ER-212.

So, in the validity determination, the Forest Service used a model to evaluate the mine's finances. That model first projected total future gross revenues of mining by multiplying the amount of uranium the company thought it could mine by a projected selling price of $56 per pound, an estimate boosted by the market spike, which was continuing to fade at the time. 2-ER-228–31 (explaining that this price was calculated based on the three prior years' spot markets and existing

contracts); 2-ER-283 (showing continuing decline in uranium prices after 2007). From that estimate of gross revenues, the model then subtracted some mining expenses and future taxes, and calculated total future net cash flows of about $29 million. 2-ER-231. The Forest Service then discounted these future cash flows at a range of rates to reflect their value as of the examination date—January 11, 2012—assigning them a "net present value" ranging from $16.8–$22.3 million. *Id.*

Based on this range and the consequent internal rate of return (a measure of how much an investment is projected to gain or lose over a period of time), the Forest Service concluded that the mine's owner—Energy Fuels Resources (USA) Inc., an intervenor in this lawsuit—had valid existing rights to mine the Canyon Mine claims despite the Grand Canyon withdrawal. 2-ER-231–32. Had the conclusion been otherwise, and had Energy Fuels refused to abandon the claims, Forest Service policy would have called for legal proceedings to eject the company from the national forest. 3-ER-337–38 (if negotiation to "terminate unauthorized use" fails, "appropriate legal action is required").

Summarily excluded from the Forest Service's profitability calculations were all the expenses incurred to develop the mine before

the 2012 validity determination. 2-ER-226 (excluding a host of "surface development" expenses because they "are considered 'sunk' costs"). These pre-2012 expenses likely amounted to an inflation-adjusted sum of at least $16.1–$22.1 million, possibly much more. *See* 3-ER-353 (declaring that $8.2 million would be spent by the end of 1987, the inflation-adjusted equivalent of $16.1 million in January 2012[2]); 2-ER-205–06 (attesting in 2013, that another $6 million-plus had been spent by the mine's owners since 1997). Also left out of the agency's profitability calculations were the costs of environmental monitoring and wildlife-conservation measures. *See* 2-ER-208–32.

Neither these cost calculations nor any other element of the validity determination was put before the public for review or comment.

V. This Lawsuit

After the Forest Service published its validity determination, the Grand Canyon Trust, Sierra Club, Center for Biological Diversity, and Havasupai Tribe filed this lawsuit to assert, among other claims, that neglecting to account for all mining costs violated federal law. *See*

[2] *See* Bureau of Labor Statistics, CPI Inflation Calculator (Dec. 20, 2020) *available at* https://www.bls.gov/data/inflation_calculator.htm.

2-ER-198–99. On summary judgment, the district court rejected that claim on the grounds that the Trust and other plaintiffs[3] had not satisfied the zone-of-interests test. 2-ER-146–50. The Trust appealed, and on that issue, this Court reversed. *Havasupai Tribe v. Provencio*, 906 F.3d 1155, 1165–67 (9th Cir. 2018).

On remand, a dispute arose about mining-cost information that the Forest Service had withheld from the administrative record on confidentiality grounds. *See* 3-ER-538 (describing dispute generally in docket entry 201). A stipulated protective order resulted, which required the Forest Service to produce the disputed documents, while allowing the agency to redact "sensitive information" it believed to be irrelevant, subject to the court's review. 2-ER-128. Under that order, the Forest Service redacted an estimate that Energy Fuels had made of pre-2012 mining costs, arguing that these costs were not relevant. *See* 1-ER-40. The court agreed, over the Trust's objection. 1-ER-40.

After summary judgment on the remaining claim was then briefed, the court ruled against the Trust on the merits after

[3] For simplicity's sake, this brief refers to the Grand Canyon Trust, Sierra Club, and Center for Biological Diversity as "the Trust."

confirming, again, that the Trust had standing. 1-ER-4–39. The court first agreed with the Trust that the Forest Service's validity determination should have, but did not, account for the costs of environmental monitoring and wildlife-conservation measures. 1-ER-21–24. Yet the court concluded that this error was harmless, an issue the parties did not brief but addressed at oral argument at the court's request. 1-ER-26–31; 2-ER-98.

The court then held that the Forest Service did not err by disregarding all pre-2012 mining costs, regardless of whether, due to those costs, the uranium deposit at Canyon Mine could not be extracted, removed, and marketed at a profit. *See* 1-ER-31–37. In so holding, the court reasoned that it was not arbitrary and capricious for the Forest Service to rely on guidance in an Interior Department handbook allowing for "sunk costs" to be ignored, 1-ER-34, guidance that was based on an administrative decision in 1980 by the Interior Board of Land Appeals. *See United States v. Mannix*, 50 IBLA 110, 119 (1980). The court held further that, even if the agency's treatment of pre-2012 costs was erroneous, the error was harmless, reasoning that the Trust had not shown that "sunk costs at the Canyon Mine would, if

considered, render the mine unprofitable." 1-ER-37.

The district court's order did not address how the Trust should have made this showing when the administrative record lacked a full accounting of pre-2012 costs because of the Forest Service's decision to ignore those costs. *See* 1-ER-37; 2-ER-51, 54–57 (raising this point at oral argument after the district court put harmless error into issue). The order also did not address the court's prior ruling withholding from the Trust for lack of relevance Energy Fuels' "confidential" estimate of "sunk costs." *See* 1-ER-37; 1-ER-40. Nor did the order address the affidavit in the record attesting that mining expenses through 1987 were the inflation-adjusted equivalent of $16.1 million by 2012, 3-ER-353, a figure that, without considering costs between 1987 and 2012, nearly equaled the low end of the estimated 2012 value of the mine's future cash flows ($16.8 million). *See* 1-ER-37; 2-ER-231; 2-ER-54–55 (directing the court to this affidavit).

SUMMARY OF THE ARGUMENT

The Forest Service erred when it omitted all pre-2012 costs from the validity determination's profit calculations. Under Supreme Court precedent, a mining claim is valid only when the claimed deposit can be

"extracted, removed and marketed at a profit." *Coleman*, 390 U.S. at 600. Excluding, as a rule, all costs of extraction that pre-date a validity determination is incompatible with this standard, for answering whether a deposit can be mined at a profit depends on all amounts that must be spent to extract that deposit, regardless of when they are incurred. Reading *Coleman* otherwise would contradict the Mining Law's text, which asks not whether a mining business will report future profits, but whether the claimant has discovered a valuable mineral "deposit." 30 U.S.C. § 22. A contrary reading of *Coleman* would also contradict the Mining Law's purpose by allowing miners to speculatively tie up federal public lands and possibly acquire property rights on those lands even when the deposit they have claimed cannot be mined and marketed at a profit.

The district court thus erred when it found that it was not arbitrary and capricious for the Forest Service to follow Interior Department guidance directing past mining costs to be zeroed out. And yet, even if following that guidance were permissible, excluding those costs was unlawful here: Under the Department's precedent, on lands that are withdrawn, mining costs already incurred must be considered.

Because the Forest Service unlawfully ignored all pre-2012 costs, its determination that the Canyon Mine claims were valid was arbitrary, capricious, and not in accordance with the law.

This was not a harmless error. In an Administrative Procedure Act case, an error is harmless only if it clearly had no bearing on the substance of the agency's decision. That standard is not satisfied here. The administrative record reveals that accounting solely for expenses incurred through 1987 would have reduced the Forest Service's cash flow projections by well over half, even before adjusting them further downward to a 2012 value. How much more was spent from 1988 until 2012 cannot be determined from the administrative record. And the absence of cost information for those two-plus decades—a product of the Forest Service's error—weighed together with the substantial amount spent through 1987, is sufficient to defeat a conclusion that excluding pre-2012 costs clearly had no bearing on the outcome. If those costs had been considered, the outcome may have changed.

Even so, other considerations confirm that the error was not harmless. A declaration Energy Fuels filed early in this lawsuit indicates that the amount spent from 1997 to 2012 ran into the many

millions. Another million in costs may have been counted if the Forest Service had not unlawfully overlooked the post-2012 expense of environmental safeguards. And the accounting method the Forest Service would choose to add past costs into its financial analysis would further sway the result.

Considering the record as a whole, excluding pre-2012 costs was not a harmless error. The district court's judgment should be reversed, the validity determination should be vacated, and the matter should be remanded to the Forest Service to correct its error in a new validity determination. *See* 5 U.S.C. § 706(2).

ARGUMENT

I. Standard of Review

Review of the Forest Service's validity determination is governed by the Administrative Procedure Act. 5 U.S.C. § 706(2). Under the APA, if the validity determination was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," it must be set aside. *Id.* This Court applies that standard de novo when reviewing the district court's judgment. *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 878 F.3d 725, 732 (9th Cir. 2017).

An agency falls short of this standard if it "entirely failed to

consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or if the agency's decision is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). When judging an agency action under the APA, questions of law are reviewed de novo, with statutory interpretations sometimes earning *Chevron* deference. *See Connors v. Nat'l Transp. Safety Bd.*, 844 F.3d 1143, 1145 (9th Cir. 2017).

II. The Forest Service erred by determining the Canyon Mine claims to be valid while disregarding pre-2012 costs.

A. A mining claim is valid only if the claimed deposit can be mined at a profit.

For a mining claim to survive a withdrawal, the claimant must have discovered a valuable mineral deposit before the withdrawal, and that deposit must remain valuable whenever the claim's validity is examined. *Lara v. Sec'y of Interior*, 820 F.2d 1535, 1542 (9th Cir. 1987).

A valuable deposit is one that a prudent person would mine. *Cameron*, 252 U.S. at 459. This test, in its initial formulation, asked only whether a deposit was "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 (quoting *Castle v. Womble*, 19 L.D. 455, 457 (1894)). But in the late 1960s, the Supreme Court refined this test by approving a complementary "marketability" requirement. *Id.* at 603. Under the Mining Law, the Court reasoned, "valuable mineral deposits" are those that "are valuable in an economic sense," meaning there is "demand for them at a price higher than the costs of extraction and transportation….' *Id.* at 602. In other words, a valuable deposit is one that can be "extracted, removed and marketed at a profit." *Id.* at 600.

This is an objective test. *Id.* at 602 (approving of the test's "objectivity"). It looks at what a prudent person must do to mine the deposit claimed and not at a given miner's unique situation. *See United States v. Pass Minerals, Inc.*, 168 IBLA 115, 121 (2006) (holding that the "objective standard" focuses on "the nature of the mineral deposit disclosed on the claim, and not on the attributes or circumstances of the claimant"); *Chrisman v. Miller*, 197 U.S. 313, 322 (1905) (rejecting the idea that "a mere willingness on the part of the locator to further expend his labor and means was a fair criterion" for discovery).

This test is also one of "present marketability," a limitation imposed by the courts both to thwart speculative claims based on hoped-for future profits and to extinguish once-valid claims based on past profitability that has abated. *See Ideal Basic Indus., Inc. v. Morton*, 542 F.2d 1364, 1370 (9th Cir. 1976) ("The test of marketability is not satisfied by the existence of a possible market for the mineral at some future date under altered economic conditions."); *Mulkern v. Hammitt*, 326 F.2d 896, 898 (9th Cir. 1964) (holding that "changed economic conditions" can nullify a mining claim); *see also Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963) (explaining that failing to seek ownership of a claim by a patent creates the "risk that [the] claim will no longer support the issuance of a patent.").

B. Answering whether a deposit can be mined at a profit is not possible if past costs, as a rule, are ignored.

1. Summarily excluding past costs is incompatible with Coleman.

Coleman's marketability standard, as a matter of law, does not allow the government to disregard costs of extracting a mineral deposit simply because they were incurred before a validity determination. This conclusion follows from the plain meaning of the term profit: "the excess of returns over expenditure in a transaction or series of transactions."

Webster's Third New Int'l Dictionary 1811 (1961) ("Webster's Third"); *see also Profit*, Black's Law Dictionary 1376 (4th ed. 1957) ("The gain made by the sale of produce or manufactures, after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed."). The marketability test asks whether returns will exceed expenditures in the transaction or series of transactions to extract, remove, and market a mineral deposit. *See Coleman*, 390 U.S. at 600. In other words, will there be a "gain made" by the sale of the mineral after deducting for "labor, materials, rents, and *all* expenses, together with the interest of the capital employed"? Black's Law Dictionary at 1376 (emphasis added). Indeed, these customary definitions of the word "profit" reflect precisely the Court's framing of the marketability test in *Coleman*: "Minerals which no prudent man will extract because there is no demand for them at a price higher than the costs of extraction and transportation are hardly economically valuable." 390 U.S. at 602.

On the facts, the Court in *Coleman* itself drew no distinctions based on when mining expenses had been incurred. *Coleman* arose from an administrative proceeding before the Department of the Interior

about the validity of the mining claims in question. *See Coleman v. United States*, 363 F.2d 190, 193–94 (9th Cir. 1966) *rev'd by* 390 U.S. 599. In that proceeding, the claimant, Mr. Coleman, testified that he had spent eight or nine years working his claims, which was equivalent to a labor expense of $157,500. *Id.* at 202. Placing "great weight" on this testimony about past mining expenses, the Department "concluded that Coleman could not conceivably have made a profit" and declared his mining claims invalid. *Id.* at 202, 193–94. The Supreme Court agreed with this analysis. 390 U.S. at 601–02 ("We … believe that the rulings of the Secretary of the Interior were proper.").

That holding cannot be squared with the policy the Forest Service followed here of summarily disregarding all mining expenses predating a validity determination. After all, the government cannot reliably answer whether minerals can be sold "at a price higher than the costs of extraction and transportation" if an entire category of extraction costs are ignored as a rule. *Coleman*, 390 U.S. at 602. If, for example, Energy Fuels spent $22 million to build out Canyon Mine before 2012, and the mine stood in 2012 to generate $17 million of future revenues in excess of future costs, mining the deposit would yield a $5 million loss, not a

profit. True enough, in that example, Energy Fuels' accountants would report periodic business profits for some time after 2012. But no accountant would agree that "the deposit" at the mine would be "extracted, removed and marketed at a profit," for the returns of mining the deposit would not exceed the expenditures. *Coleman*, 390 U.S. at 602; Webster's Third at 1811.

2. *The Mining Law's text precludes an interpretation of* Coleman *that zeroes out past costs.*

Interpreting *Coleman* to allow past costs to be ignored would contradict the Mining Law's text. The touchstone for acquiring rights under the Mining Law is the discovery of a valuable mineral "deposit." 30 U.S.C. § 22. Thus, the marketability test asks not about the episodic profitability of a mining "business," but whether "the deposit" or the "the mineral" can be extracted, removed, and marketed at a profit. *Coleman*, 390 U.S. at 600–602 (repeatedly framing the test as one asking about the value of the "[m]inerals" or "mineral deposits"). As this Court has said, "profit over cost must be realizable from the material itself and it is that profit which must attract the reasonable man." *Ideal Basic Indus., Inc. v. Morton*, 542 F.2d 1364, 1369 (9th Cir. 1976); *United States v. Springer*, 491 F.2d 239, 243 (9th Cir. 1974) ("The evidence

must show that the minerals taken intrinsically satisfy the prudent man test and the marketability test established by the cases.”). The question is whether, according to the government’s best estimates in a validity determination, all revenues from mining the deposit will exceed all costs of mining the deposit by a margin that would justify mining. *See United States v. Garcia*, 184 IBLA 255, 270 (2013) (“[E]ven when a claimant is actually mining a claim at a small profit, a finding of no discovery may be justified because ‘a prudent man would not develop a mine which promised a profit below the return for a commercial venture.’”) (quoting *United States v. Kottinger*, 14 IBLA 10, 16 (1973)).

3. Ignoring past costs conflicts with the present-marketability rule.

Asking only whether a mining business’s future revenues will exceed its future costs is also at odds with the “present marketability” rule that courts have embraced to prevent speculators from tying up federal public lands. That time-honored limitation ensures that “[t]he test of marketability is not satisfied by the existence of a possible market for the mineral at some date under altered economic conditions.” *Ideal Basic Indus.*, 542 F.2d at 1370; *Barrows v. Hickel*, 447 F.2d 80, 83 (9th Cir. 1971) (“Locations based on speculation that there

may at some future date be a market for the discovered material cannot be sustained."); *Hallenbeck v. Kleppe*, 590 F.2d 852, 859 (10th Cir. 1979) (affirming that a miner "cannot locate claims upon public lands and then simply wait until the minerals are in sufficient demand to be marketed at a profit"). And yet, expunging all pre-determination expenses rewards speculators who imprudently fund mining work hoping for a future bonanza market, since excluding those expenses may tilt the ledgers just enough for speculators' claims to survive a validity examination.

Take Canyon Mine as an example. For over forty years, the mine has occupied public lands next to the Grand Canyon while its owner hopes for the price of uranium to rise enough to justify mining the uranium deposit.[4] All the while, the mine's owner has spent great sums building mine infrastructure without recouping those outlays with any

[4] *See* U.S. Forest Service, "Canyon Uranium Mine" *available at* https://www.fs.usda.gov/detail/kaibab/home/?cid=FSM91_050263 ("Energy Fuels has advised the Kaibab National Forest that ore production will not occur imminently due to current uranium prices not favoring new production.") (December 19, 2020). The lack of ore production at the mine is a fact of which the Court may take judicial notice. Fed. R. Evid. 201(b); *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998–99 (9th Cir. 2010) (taking judicial notice of facts published on government web sites that were not reasonably subject to dispute).

uranium sales. Yet the government's treatment of "sunk costs" means that, as time has passed, more and more of these expenses have vanished from the government's accounting ledgers, perpetually improving the odds that the mine will survive a validity examination, as the Forest Service concluded it did in 2012.

4. Excluding past costs is at odds with the Mining Law's purpose.

Skewing the ledgers by ignoring past costs could also enable miners to acquire fee title to federal public lands even if, contrary to *Coleman*, "the mineral" cannot be "extracted, removed and marketed at a profit." 390 U.S. at 600. By what is known as a patent, the Mining Law allows miners to acquire ownership of the mineral and surface estates within the boundaries of valid mining claims. 30 U.S.C. §§ 22, 29. Congress has suspended the patenting process since the mid-1990s by successive appropriation riders. *See R.T. Vanderbilt v. Babbitt*, 113 F.3d 1061, 1064 (9th Cir. 1997); *see also, e.g.*, Pub. L. 116-94 § 404(a) (Dec. 20, 2019). Yet were that suspension to lapse, someone who, before taking a claim to patent, were to spend more to extract a mineral than can be made selling it could nonetheless establish a valid claim, so long as mining revenues were forecasted to exceed costs *after* patenting.

Once land is taken out of public ownership, it can be used for purposes other than mining. And in that way, disregarding "past costs" could promote abuse of the Mining Law.

That sort of abuse is not idle conjecture. The mining claims whose validity Mr. Coleman took to the Supreme Court, for example, were "in a highly scenic national forest … two hours from Los Angeles" where Mr. Coleman had spent "thousands of dollars and hours … building a home." 390 U.S. at 603. Like examples abound. *See Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 616 (1978) (observing that by 1955, "many used the guise of mining locations for non-mining purposes, [like] filling stations, curio shops, cafes, residences, and summer camps.") (internal quotation omitted); *United States v. Locke*, 471 U.S. 84, 86 (1985) ("By the 1960's," the mining law's "19th-century laissez-faire regime had created virtual chaos with respect to the public lands."); *Springer*, 491 F.2d at 242–43 (affirming invalidation of mining claim used "primarily [as] a health spa").

*   *   *

Expunging past costs contradicts the marketability standard adopted in *Coleman*, the text of the Mining Law, and the

complementary judicial rules for identifying valuable mineral deposits, like the present-marketability test. It was consequently arbitrary, capricious, and not in accordance with law for the Forest Service to deem the Canyon Mine claims valid while unlawfully disregarding all pre-2012 costs. *See* 5 U.S.C. § 706(2)(A).

C. The district court erred in its analysis of pre-2012 costs.

1. The district court used an incorrect standard of review.

The district court concluded *sua sponte* that the question before it was not whether the Forest Service's decision to ignore pre-2012 costs was "incorrect," but whether it was arbitrary and capricious for the agency to rely on the Interior Department's administrative guidance on "sunk costs." 1-ER-32. For this proposition, the court pointed to cases embracing the notion that "[a]gencies are entitled to rely on the expertise of another agency without forgoing deferential review." *Id.* (citing *Bellion Spirits, LLC v. United States*, 393 F. Supp. 3d 5, 13 (D.D.C. 2019)). But these cases are inapt. They each arose from a single matter under adjudication in which one agency relied on another agency's factual determinations, not another agency's pronouncement about a pure question of law.

The main case highlighted by the district court, *Pyramid Lake*

Paiute Tribe of Indians v. U.S. Department of the Navy, 898 F.2d 1410 (9th Cir. 1990), illuminates this distinction. In that case, the Navy, following the Endangered Species Act's requirements, sought a "biological opinion" from the U.S. Fish and Wildlife Service about whether a Navy leasing program was likely to jeopardize the continued existence of an endangered species of fish. *Id.* at 1415. In the biological opinion, the Fish and Wildlife Service analyzed how the leasing program would affect the fish, and concluded that they would not be jeopardized. *Id.* The Navy then relied on the biological opinion to reach the same conclusion. *Id.* When only the Navy was sued, the court declined to scrutinize whether the biological opinion was arbitrary and capricious as if the Fish and Wildlife Service were a defendant. *Id.* It instead asked only whether the Navy's decision to rely on the biological opinion was arbitrary and capricious. *Id.* What passed muster was the Navy's decision not to redo an expert agency's analysis of the facts, and the law's application to those facts.[5]

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[5] The other cases the district court cited, 1-ER-32–34, also involved one agency's reliance on another agency's expert input on factual matters. *See Bellion Spirits*, 393 F. Supp. 3d at 13–17 (finding no error in an agency's reliance, when resolving a petition about federal advertising rules, on "scientific fact-finding" by the Food and Drug Administration);

The question presented here, in contrast, is one of law. It does not call for review of the Forest Service's analysis of the facts, let alone its reliance on another agency's judgment about factual matters. The issue before the Court is whether discovery of a "valuable mineral deposit" can occur even if, due to mining costs predating a validity determination, the deposit cannot be mined and marketed at a profit.

Another decision of this Court under the Endangered Species Act, *Defenders of Wildlife v. U.S. Environmental Protection Agency*, 420 F.3d 946, 976 (9th Cir. 2005), *rev'd on other grounds by* 551 U.S. 644 (2007), squarely embraces this fact-versus-law distinction. The question in *Pyramid Lake*, this Court explained, was about how to resolve "*factual*

City of Boston Delegation v. Fed. Energy Reg. Comm'n, 897 F.3d 241, 254–55 (D.C. Cir. 2018) (approving of one agency's reliance on another's "expert conclusion" about the safety risks of routing a gas line near a nuclear generating station); *WildEarth Guardians v. U.S. Forest Serv.*, 828 F. Supp. 2d 1223, 1237–38 (D. Colo. 2011) (approving of the Forest Service's reliance on another expert agency's assertion that extensive testing of a methane-flaring system would be needed); *Defs. of Wildlife v. U.S. Dep't of Navy*, 895 F. Supp. 2d 1285, 1318 (S.D. Ga. 2012) (approving of an agency's reliance on an expert agency's biological opinion, citing to *Pyramid Lake*); *City of Tacoma v. Fed. Energy Reg. Comm'n*, 460 F.3d 53, 75–76 (D.C. Cir. 2006) (same); *Aluminum Co. of Am. v. Bonneville Power Admin.*, 175 F.3d 1156, 1160–61 (9th Cir. 1999) (same); *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1459–60 (9th Cir. 1984) (same, without citation to *Pyramid Lake*).

objections" under the arbitrary-and-capricious standard of review, recognizing that "action agencies should be able to rely on the expert judgments that underlie most Biological Opinions." *Id.* (emphasis in original). But flaws that are "*legal* in nature" can be discerned by any agency, and acting despite legal error is "'not in accordance with law' and is thus arbitrary and capricious." *Id.* (citing 5 U.S.C. § 706(2)(A)) (emphasis in original); *see also Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 532 (9th Cir. 2010) (reaffirming this principle).

This analysis tracks a basic feature of the Administrative Procedure Act, which provides that, "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions…." 5 U.S.C. § 706. And thus, questions of law are reviewed de novo under the APA, with agencies' statutory interpretations sometimes receiving *Chevron* deference. *See Connors*, 844 F.3d at 1145; *Sauer v. Dep't of Educ.*, 668 F.3d 644, 650 (9th Cir. 2012).

Under this framework, the district court should have approached the issue of past costs as a question of law to be answered de novo by interpreting the Mining Law's "valuable mineral deposit" requirement

and the body of cases construing that text. The court erred by asking only whether it was arbitrary and capricious for the Forest Service to adhere to the Interior Department's handbook.

2. Chevron *deference is unwarranted.*

As a product of statutory interpretation, the Interior Department's sunk-cost precedent that the Forest Service followed raises a question of whether *Chevron* deference may be due.[6] For two reasons, it is not.

First, a threshold requirement for *Chevron* deference is not met here because of the Department's failure to provide a "minimal level of analysis" to support its treatment of sunk costs. *Encino Motorcars, LLC v Navarro*, 136 S.Ct. 2117, 2125 (2016). Regardless of whether other requirements of *Chevron* are met, an agency's statutory interpretation is not eligible for deference if the "agency's explanation" is not "clear enough that its path may reasonably be discerned." *Id.* (internal quotation omitted).

The Department's statutory interpretation in question here begins

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[6] Because Congress has entrusted the Department of the Interior with administering the Mining Law, *see Best*, 371 U.S. at 337, it is only the Department's interpretation of that law that may be eligible for deference, *see United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

and ends with *United States v. Mannix*, 50 IBLA at 119. Every other reference to "sunk costs" in the Department's guidance and administrative decisions merely cites back to *Mannix* without more. *See United States v. Copple*, 81 IBLA 109, 129 (1984); *United States v. Collord*, 128 IBLA 266, 288 n.24 (1994); *United States v. Clouser*, 144 IBLA 110, 131–32 (1998); 3-ER-325 (citing to *Mannix* and *Clouser* in BLM handbook guidance on "sunk costs").[7] But the Interior Board of Land Appeals did not provide in *Mannix* a "minimal level of analysis" to support its conclusion. *Encino Motorcars*, 136 S.Ct. at 2125.

That conclusion was that "[a]bsent a prior withdrawal, if the mineral material may be now mined, removed, and marketed at a present profit over and above the costs of such operations, we would hold that the requirements of discovery have been met." 50 IBLA at 119. The only reason for that holding appeared in a single sentence asserting that "no case law … compels consideration of [earlier] development costs in determining if an ongoing operation is presently

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[7] The Department's handbook lacks the force of law and deserves no deference. *See Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) ("[I]nterpretations contained in … agency manuals … lack the force of law [and] do not warrant *Chevron*-style deference.").

profitable." *Id.* (citing *Andrus v. Shell Oil*, 446 U.S. 657 (1980)). But this barebones observation is not a reasoned basis for the Board's holding.

As an initial matter, *Mannix* did not square its holding with *Coleman*, which did not make an exception for "earlier development costs" when describing profit to mean demand for minerals "at a price higher than the costs of extraction and transportation." *Coleman*, 390 U.S. at 602.

The Board's citation to *Andrus v. Shell Oil*, furthermore, does not support the Board's conclusion. By that citation and the phrase "presently profitable," the Board appears to have reasoned that the present-marketability test asks whether a "present profit" can be made in excess of ongoing costs. 50 IBLA at 119. But the point of requiring present marketability is to void mining claims that are based on a speculative future market or on a past market that has ebbed. *See Ideal Basic Indus.*, 542 F.2d at 1370; *Mulkern*, 326 F.2d at 898. The test asks whether the mineral can be extracted, removed, and marketed at a profit under present "economic conditions," as opposed to conditions in some future or past market with a better price or lower extraction costs. *Ideal Basic Indus.*, 542 F.2d at 1370. It does not follow that this

constraint on how to make reasonable forecasts about the future somehow obviates actual past expenses when calculating profitability.

Andrus does not suggest otherwise. The Supreme Court's holding in that case "liberalized the traditional valuable mineral test" by preserving a unique exemption from the present-marketability rule for pre-1920 oil-shale claims. 446 U.S. at 660–63. Claims for oil shale could be made under the Mining Law until Congress ended that practice, subject to valid existing rights, in the Mineral Leasing Act of 1920. *Id.* at 659. Yet in 1920, as now, oil shale was not a marketable resource. *Id.* at 666. So, the Interior Department in 1927 carved out what became a special rule allowing pre-1920 oil-shale claims to be deemed valid based on speculation about oil-shale's future marketability. *Id.* at 661–62, 667.

In *Andrus*, the Court affirmed this exception, holding that the government could not "impos[e] a present marketability requirement on oil-shale claims." *Id.* at 673. Yet the Court also reaffirmed that the present-marketability requirement continued to apply to "other minerals." *Id.* at 672–73 n.11. And the Court did not rule that the test of present marketability allows past costs to be ignored, even for oil-shale claims. The Court was concerned with the future market for oil

shale, not with accounting for past mining costs.

Particularly when scrutinized against federal case law, the threadbare reasoning in *Mannix* does not provide the "minimal level of analysis" necessary to receive deference. *See Encino Motorcars*, 136 S.Ct. at 2125; *Montgomery Cty. v. Fed. Comm. Comm'n*, 836 F.3d 485, 491 (6th Cir. 2017) ("[I]f an agency wants the federal courts to adopt (much less defer to) its interpretation of a statute, the agency must do the work of actually interpreting it.").

Second, even if *Chevron* deference were not otherwise precluded, deference is unwarranted under *Chevron* step two. Once a statute has been deemed ambiguous, the question is whether the government's interpretation of the statute is a "permissible" one. *See Nat. Res. Def. Council, Inc. v. Nat'l Marine Fisheries Serv.*, 421 F.3d 872, 879 (9th Cir. 2005). But the holding in *Mannix* falls short of this standard, for "it is directly at odds with the text and purpose" of the Mining Law. *Id.*

Again, it is the discovery of a valuable mineral *deposit* that allows miners to acquire rights under the Mining Law. 30 U.S.C. § 22. Textually, the question of value concerns the deposit, and "what is required to extract, process, and market the mineral on a particular

claim is the same no matter who mines it." *United States v. Armstrong*, 184 IBLA 180, 218 (2013). Yet zeroing out past expenses reveals only whether a specific mining business is likely to report future profits, even if those profits would fall far short of the cost to mine the deposit.

And again, disregarding past expenses contradicts the Mining Law's purpose. "Under the mining laws[,] Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes." *Coleman*, 390 U.S. at 602. Thus, "[t]he obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense." *Id.* Yet if "sunk costs" are ignored, a validity determination or patent examination may deem a mining claim valid even when mining the deposit claimed will generate less revenue than it will cost to mine, and the deposit is thus *not* valuable in an economic sense. That would "work an unlawful private appropriation in derogation of the rights of the public." *Cameron*, 252 U.S. at 460.

By failing to honor the text and intent of the Mining Law, *Mannix*'s holding is not a permissible interpretation of the statute, and deference to that interpretation is consequently unjustified. *See Nat.*

Res. Def. Council, 421 F.3d at 879.

3. The "further expenditure" language in the prudent-person test does not imply that past costs should be ignored.

In addition to deferring to the Forest Service's reliance on the Department's "sunk cost" precedent, the district court construed federal case law to allow pre-determination costs to be ignored, reasoning that the words "further expenditure" in the prudent-person test suggest that the profitability analysis "looks forward." 1-ER-35–36. There are two flaws in that reasoning.

First, this gloss on the words "further expenditure" divests the rest of the prudent-person test of its meaning by ignoring what must result from further expenditure. The test is whether "the discovered deposits [are] 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 (emphasis added) (internal quotation omitted). In other words, is a "valuable mine" likely to result with further expenditure of time and money? In *Coleman*, the Supreme Court clarified what qualifies as a "valuable mine"—one at which "the mineral can be extracted, removed and marketed at a profit." 390 U.S.

at 600. The inquiry is thus whether there is a reasonable likelihood that, if further expenditures are made, the deposit can be mined "at a profit." And the answer to that question depends on all mining revenues and all mining costs. After all, someone who has spent $20 million on a mine that had yet earned nothing would not boast of forthcoming success in developing a valuable mine if further expenditure would yield only $100,000 in future "profits."

Second, the district court's reading of the words "further expenditure" in the prudent-person test inverts the Supreme Court's case law by treating the prudent-person standard as if it refined the marketability test, when the opposite is true. *See* 390 U.S. at 602 ("[T]he marketability test is an admirable effort to identify with greater precision and objectivity the factors relevant to a determination that a mineral deposit is 'valuable.'"). If the Supreme Court thought the age-old words "further expenditure" signified, as the district court put it, that "the comparison of costs and revenue to determine profitability looks forward from the marketability date," 1-ER-35, the Court would have said so. This is especially true given the "great weight" placed on past mining costs in the validity determination at issue. 363 F.2d at

202. With a few words, the Court could have framed the marketability test to ask whether the mineral can be extracted, removed and marketed at a profit "looking forward," or "in the future," or "after the marketability date." *Coleman* did not use those words, and there is no justification for tacking them on to its holding.

4. *Even if following* Mannix *was lawful, neglecting its exception for "a prior withdrawal" was not.*

Even if it were correct to adhere to *Mannix*, the Forest Service nonetheless erred by not recognizing that *Mannix* consented to zeroing out sunk costs only "[a]bsent a prior withdrawal." *Mannix*, 50 IBLA at 119. Because the public lands fenced off for the Canyon Mine were withdrawn at the time of the validity determination, *Mannix* provides no basis for expunging "earlier expenses" of mining. *Id.*

This exception to *Mannix*'s holding was discussed at length in a 1994 concurring Board opinion by Administrative Judge Burski, who was on the three-judge panel in *Mannix*. "While not clearly explained," he wrote, "the non-existence of a withdrawal was critical to the Board's ruling in the *Mannix* case." *Collord*, 128 IBLA at 304 (Burski, J., concurring). "[T]he Board reasoned that while it might be argued that the specific claims at issue were invalid, nothing would prevent the

appellants from relocating new claims upon the receipt of the Board's decision." *Id.* And since those new claims "would not be burdened with the necessity of recouping past expenditures made under prior locations," the Board, "bowing to practicality," entertained the fiction that past expenditures were zero. *Id.*

Yet a withdrawal would have changed that outcome, "[s]ince no future location could be made…." *Id.* In that case, the Board's "practical concerns" would have been allayed, and it would have examined the claim's validity "in light of the expenditures both anticipated and *already incurred*." *Id.* (emphasis added).

The Forest Service did not heed this exception. Instead, the agency zeroed out pre-2012 costs despite the Grand Canyon mineral withdrawal, without acknowledging the absent-a-prior-withdrawal proviso in *Mannix*. *See* 2-ER-226. The district court's decision did not acknowledge the proviso either, despite the court's discussion of it at oral argument, 2-ER-89–91, replacing it instead with an ellipsis when quoting the holding in *Mannix*. 1-ER-31 (". . . [I]f the mineral material may be now mined, removed, and marketed at a present profit over and above the costs of such operations, we would hold that the requirements

of discovery have been met.”). This was a reversible error. If adhering to *Mannix* was the correct course, the Forest Service’s exclusion of pre-2012 mining costs despite the withdrawal was still arbitrary, capricious, and not in accordance with law. 5 U.S.C. § 706(2).

III. Omitting pre-2012 costs was not a harmless error.

After concluding that the Mining Law did not require past costs to be considered, the district court went further and held that, even if excluding past costs was an error, the error was harmless. 1-ER-37. This ruling was unwarranted and should be reversed.

A. Accounting for past costs may have changed the result.

An error is harmless in an Administrative Procedure Act case only if it “clearly had no bearing on the procedure used or the substance of [the] decision reached.” *Cal. Wilderness Coal. v. U.S. Dep’t of Energy*, 631 F.3d 1072, 1090 (9th Cir. 2011); 5 U.S.C. § 706 (“[D]ue account shall be taken of the rule of prejudicial error”). This standard recognizes that, in APA cases, “the role of harmless error is constrained.” 631 F.3d at 1091 (citing *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1071 (9th Cir. 2004)). While plaintiffs bear the burden under this standard, it is not “a particularly onerous requirement.” *Id.* at 1091 (quoting *Shinseki v. Sanders*, 556 U.S. 396, 410 (2009)).

Accounting for pre-2012 costs may have led the Forest Service to determine that the uranium deposit at Canyon Mine could not be mined at a profit as of 2012. As explained below, considering both what the record reveals about the expenses the Forest Service disregarded and what the record omits, the agency's profitability forecast would at least be a close call, one whose outcome may turn on the methodology the agency would use to fit pre-2012 expenses into its financial model. Under these circumstances, it is not clear that the agency's error had no bearing on its decision. *See Cal. Wilderness Coal.*, 631 F.3d at 1090.

1. *An affidavit about mining costs through 1987 is sufficient to find that the Forest Service's error was not harmless.*

Only some pre-2012 costs can be estimated from the record, but taking account of those estimates along with the record's silence about other pre-2012 costs is enough to conclude that the Forest Service's error was not harmless.

In an affidavit filed in October 1987 during an administrative appeal over the mine's operating plan, a vice president of the mine's then-owner attested that the company was on track to spend $8.2 million by the end of that year. 3-ER-353 (declaring that "$8,200,000 will be expended in exploration and site preparation activities through

December, 1987"). If those expenses were conservatively adjusted solely for inflation as if they had all been incurred in December 1987 (though many were incurred far earlier), they would equate to $16.1 million as of January 2012.[8] Comparing that figure to the results of the Forest Service's cash flow analysis indicates, at a minimum, that accounting solely for those pre-1988 costs would have reduced total future cash flows by more than half, from $29.4 million to $13.3 million. 2-ER-231. Discounting $13.3 million to a net present value as of 2012 at the rates the Forest Service used would reduce that amount further still (discussed more below at pp. 47–50). And that does not consider costs in the 24 years between 1987 and 2012.

How much was spent in that 24-year period, however, cannot be discerned from the administrative record. It is thus not possible to answer precisely how those additional costs would have affected the profitability forecast. And this record gap is significant, for it exists precisely because of the Forest Service's erroneous decision not to account for pre-2012 costs.

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[8] *See* Bureau of Labor Statistics, CPI Inflation Calculator (December 20, 2020) *available at* https://www.bls.gov/data/inflation_calculator.htm.

This deficiency in the record, together with the evidence that costs through 1987 were substantial, is an adequate basis to conclude that excluding pre-2012 costs was not a harmless error. The Third Circuit's decision in *Wensel v. Director, Office of Workers' Compensation Programs*, 888 F.2d 14 (3d Cir. 1989), is illustrative. In that appeal, the appellate court reversed the government's denial of a claim for black-lung benefits. *Id.* at 15. The government erred, the court found, when it concluded, based solely on the absence in the record of some social security files, that the claimant had worked as a coal miner for only twelve years, rather than eighteen. *Id.* at 15, 17. Recognizing the "established relation" between black-lung disease and the duration of exposure to coal dust, the court reasoned that five or six more years of coal-mine work, "if it is shown, *could* be evidence that supports [the] claim." *Id.* (emphasis added). It thus held that "we cannot decide whether this error was harmless." *Id.*

So too here, the absence of record evidence about mining costs between 1987 and 2012 provides no basis for concluding that those costs were zero. And adding the actual amounts spent in that period to the many millions spent through 1987 may reveal that the uranium deposit

at Canyon Mine could not be mined at a profit as of 2012. The record thus does not support a finding that the government's error "clearly had no bearing" on the substance of its decision. *Cal. Wilderness Coal.*, 631 F.3d at 1090; *Alliance for the Wild Rockies v. Savage*, 897 F.3d 1025, 1036 (9th Cir. 2018) (holding that the "error cannot be treated as harmless in light of the ambiguity in the record" about how the Forest Service's calculations may change if the error were corrected). Indeed, any other conclusion would place plaintiffs like the Trust in a Catch-22, in which the showing required to force the government to complete a legally sufficient analysis likely cannot be made because of the government's legally insufficient analysis. *See Oglala Sioux Tribe v. U.S. Nuclear Reg. Comm'n*, 896 F.3d 520, 534–35 (D.C. Cir. 2018) (rejecting argument that government had erred harmlessly when it failed in an environmental analysis to adequately evaluate potential damage to cultural resources, reasoning that the government's "inadequate" analysis may well make showing harm "impossible"); *Cf. Atieh v. Riordan*, 727 F.3d 73, 77 (1st Cir. 2013) (concluding that a failure to file the administrative record was not harmless error when the materials presented to the court lacked "crucial" parts of the record,

undermining the "court's ability to perform meaningful review").

2. Evidence submitted by Energy Fuels illuminates the administrative record's deficiencies.

A declaration that Energy Fuels submitted during this lawsuit highlights how the gap in the administrative record precludes a finding of harmless error. *See* 2-ER-203–07.

That declaration asserted in April 2013 that Energy Fuels "has spent in excess of $6 million acquiring, developing, permitting, and operating" the mine. 2-ER-206–07. While this statement is imprecise about the timing of these expenditures, a careful reading of the declaration leads to the conclusion that it is referring to the period from 1997 until 2013. After all, the declarant says that Energy Fuels' "predecessors" spent much more than $6 million exploring and developing the mine. 2-ER-206. The declaration elsewhere defines "predecessors" to mean "(EFN and previous owners)." 2-ER-204 (referring to Energy Fuels Nuclear, Inc. as "EFN"). And it is from those entities that Energy Fuels purchased the mine in 1997 (though Energy Fuels was then named Denison Mines). 2-ER-205. Taken together, the only fair interpretation of the declaration is that it asserts that more than $6 million was spent at the mine from 1997 to 2013, in addition to

the even greater sum that had been spent by 1987, and in addition to whatever amount was spent between 1987 and 1997.

It is true that some fraction of this $6 million in expenditures may have been incurred after the validity determination was completed in 2012 and before the declaration was submitted in April 2013. But even so, the 2013 declaration indicates that total, inflation-adjusted mining costs had grown from $16.1 million in 1987 to as much as $22.1 million by 2012, without accounting for costs between 1987 and 1997. In short, the declaration indicates that post-1987 costs were immense.[9]

3. *Accounting for the post-2012 expense of environmental safeguards adds to the cost ledger.*

Accounting for a separate error in the Forest Service's cost calculations further underscores that the agency's erroneous treatment of pre-2012 costs was not harmless.

The district court correctly concluded that the Forest Service improperly omitted from its calculations the costs of environmental

[9] If the Court finds that it must consider this declaration to resolve the question of harmless error, supplementation of the record would be permissible on the grounds that reviewing the declaration is "necessary to determine whether the agency has considered all relevant factors." *See Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005) (internal quotation omitted).

monitoring and wildlife-conservation measures. 1-ER-21–24. But after examining these expenses in isolation, the court held that failing to consider them was a harmless error. 1-ER-29–30. In so holding, the court concluded that estimates of these costs made by the Forest Service in 1986 would have been equivalent to about $261,000 in 2012, if adjusted for inflation. 1-ER-30. The court then recognized that the Forest Service had qualified its estimates by observing that "actual costs could vary significantly." *Id.* But the court reasoned that "even if the costs were to increase four-fold, to approximately $1 million, they would not come close to making the Canyon Mine unprofitable." *Id.*

Yet that conclusion did not consider these expenses *in combination* with pre-2012 costs. Taking the district court's line of reasoning, adding $1 million for these post-2012 environmental costs to the inflation-adjusted estimate of costs through 1987 ($16.1 million) would total $17.1 million. That figure exceeds the low end of the 2012 value the Forest Service assigned to future cash flows ($16.8 million). *See* 2-ER-231. If $6 million more in expenses were incurred after 1997 but before the validity determination, *see* 2-ER-206, that would bring total pre-2012 expenses to $23.1 million, again without considering

costs between 1987 and 1997. And that figure exceeds the high end of the 2012 value that the Forest Service forecasted for the mine's total future cash flows ($22.3 million). *See* 2-ER-231.

4. *Doubt about how the Forest Service would fit past costs into its analysis further rules out a harmless-error finding.*

If the Forest Service had considered pre-2012 costs, it would have faced a question about how to account for differences in the value of amounts spent and earned decades apart—the time value of money. Because the agency's answer would affect its profitability calculations, uncertainty about the method it would use further precludes a finding of harmless error.

The Forest Service's financial model recognized the importance of reconciling the values of revenues earned and costs incurred at different times. It did that by discounting total post-2012 mining cash flows ($29 million) at three different rates to a range of estimated values as of 2012 ($16.8 to $22.3 million). *See* 2-ER-231 ("The cash flow is then discounted at a specific discount rate to determine the net present value."). This procedure, at root, acknowledged the idea that receiving $1,000 today is better financially than receiving $1,000 in five years, owing to inflation and the interest or other returns that can be earned

in those five years. *See generally Hurlic v. S. Cal. Gas Co.*, 539 F.3d 1024, 1031 (9th Cir. 2008) (discussing time-value-of-money principles).

For the Forest Service to add pre-2012 costs into its discounted-cash-flow model, the agency would need determine how to adjust those costs to be commensurable with post-2012 costs and revenues. And the effect of that adjustment could be dramatic given the many decades at issue. For example, a multi-million-dollar net loss would result if $8.2 million in expenses were added in 1987 into the agency's existing cash flow forecasts and then the total cash flows were discounted at a rate of 10 percent annually—the most conservative rate the Forest Service used—to reflect their value as of 1987.[10]

Indeed, the mine's owner made the same sort of calculation in 1987 when urging the Forest Service not to stay the mine's development because of financial losses that would flow from delay. *See* 3-ER-354. That calculation forecasted "carrying costs" at an annual rate of ten percent per year based on the $8.2 million already spent. *Id.* Carrying

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[10] This can be predicted, even without access to the Forest Service's model results (which were withheld from the administrative record), by assuming conservatively that cash flows would be $30,000,000 in 2012, discounting that figure at a rate of 10 percent over a 24-year period ($30,000,000 ÷ 1.1^24), and then subtracting $8,200,000.

that computation forward to 2012 would result in a cost of over $80 million,[11] dwarfing by far the Forest Service's estimates of post-2012 cash flows.

Other approaches to account for pre-2012 costs could lead to a similar result. If, for example, pre-2012 costs were adjusted solely for inflation and then treated as if they would be incurred in or shortly after 2012, a net loss would result if accounting for those expenses were to yield negative net future cash flows. Or, a net loss could be forecasted by using market rates as of 2012 to reckon the expense of *all* the work necessary to mine the deposit at Canyon Mine—including work performed before 2012. Or, depending on the discount rate, adding in all the disregarded costs (in one manner or another) could yield small, positive total cash flows but reduce the internal rate of return below 12 percent, which the Forest Service described as the "minimum rate of return for the mining industry." 2-ER-231. And that too would justify finding the Canyon Mine claims invalid as of 2012. *See Garcia*, 184 IBLA at 270 (explaining that a claim may be invalid if mining would yield "a profit below the return for a commercial venture").

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[11] $8,200,000 * 1.1^24.

The upshot is that, depending on the total amount of pre-2012 costs, the methods and rates used to account for the time value of money could be determinative of the agency's profitability forecast. And that additional uncertainty precludes a finding that the agency's error *clearly* had *no bearing* on the result it reached. *Cal. Wilderness Coal.*, 631 F.3d at 1090; *Shinseki*, 556 U.S. at 414 (declining to find error harmless "[g]iven the uncertainties"); *Savage*, 897 F.3d at 1036 (rejecting harmless-error defense "in light of the ambiguity in the record"); *SW Gen., Inc. v. Nat'l Labor Relations Bd.*, 796 F.3d 67, 80 (D.C. Cir. 2015) ("Our uncertainty is sufficient to conclude that [the petitioner] has carried its burden of demonstrating that the [statutory] violation is non-harmless….").

B. The district court's harmless-error analysis was flawed.

The district court's harmless-error analysis went astray on multiple counts, with a common theme running throughout: a heightened expectation about what the Trust needed to prove, coupled with an absence of acknowledgment about the evidence the Trust put forward and about the unreasonable evidentiary burden the court's approach put up.

First, the court overstated the Trust's burden of proof. The court recited the correct legal standard in an earlier section of its order. *See* 1-ER-27. Yet it framed its sunk-costs analysis differently, concluding that the Trust had not shown that pre-2012 costs "would" render the mine unprofitable had they been considered. 1-ER-37. The clearly-had-no-bearing standard, however, does not require a plaintiff to show that the government's decision "would" change. The logical corollary of this standard is that an error is not harmless if it "may" or "could" have changed the decision reached. *See Cal. Wilderness Coal.*, 631 F.3d at 1093 (holding that error was not harmless when the court had "substantial doubt" about whether the outcome would change on remand); *Savage*, 897 F.3d at 1036 (holding that "ambiguity in the record" precluded harmless-error finding); *Shinseki*, 556 U.S. at 414 (holding that error could not be deemed harmless where, among other things, examination of additional evidence "might" have revealed further injury); *PDK Labs. Inc. v. U.S. Drug Enf't Agency*, 362 F.3d 786, 799 (D.C. Cir. 2004) (holding that error was not harmless when it was "entirely possible" that the outcome would change on remand).

Second, the court took no account of the 1987 declaration

asserting that $8.2 million would be spent mining by the end of that year. 1-ER-37. The Trust stressed the importance of this declaration at oral argument, responding to the court's *sua sponte* order days earlier placing harmless error into issue. *See* 2-ER-98; 2-ER-55 ("I … want to stress that, … if you don't do what you suggested and rule against us on [sunk] costs, that number is very significant."). And yet the court did not mention this declaration in its ruling on harmless error. 1-ER-37.

Third, the court did not consider whether pre-2012 costs combined with the expense of post-2012 environmental-conservation measures that the Forest Service left out of its analysis may have cumulatively changed the agency's profitability forecast. *Id.*

Fourth, the court misconstrued the Forest Service's financial model when it treated the agency's post-2012 cash flow forecasts as equivalent to profits of $29 million. 1-ER-20, 29–30, 37. That amount represented future cash flows, without adjustment for when funds would be spent and received. *See* 2-ER-231. While the Forest Service explained that undiscounted cash flows indicate *whether* a profit or loss could be expected, it did not treat those cash flow as a *measure* of profit. *Id.* ("The sum of cash flows shows whether the proposed mining

operation would result in a profit or loss."). Instead, the agency assessed the mine's economic viability by calculating the net present value of future cash flows and the associated internal rate of return. *Id.* (treating the internal rate of return as a measure of whether mining would be "profitable"). That makes sense, given that an insufficient rate of return could make a claim invalid by "promise[ing] a profit below the return for a commercial venture." *Garcia*, 184 IBLA at 270.

And finally, the court's analysis took no account of how the government's error was to blame for the gap in the administrative record hindering the proof the court expected the Trust to make. 1-ER-37. Instead, the court restricted its analysis to the administrative record while calling on the Trust to adduce record evidence about pre-2012 costs that the Forest Service had purposely omitted or redacted.

The court concluded, for example, that it could not consider the $6 million cost estimate in Energy Fuels' 2013 declaration because that declaration was not part of the administrative record. 1-ER-37 n.20. The court further reasoned that, if the declaration were considered, pre-2012 costs of "*more* than $6 million … would not render the Canyon Mine unprofitable." *Id.* (emphasis added). Yet the court did not

acknowledge that there was no basis for reaching that conclusion without evidence in the record of precisely *how much more* than $6 million those costs were. *Id.* This is especially true given that the Trust had pointed to evidence that the costs were at least $16 million more. 2-ER-55 (citing Doc. 215, which appears at 3-ER-340–59).

The district court likewise took no account of the earlier ruling it had made affirming the Forest Service's redaction in the administrative record of Energy Fuels' estimate of "sunk costs." 1-ER-37. That estimate appeared in a letter that Energy Fuels wrote to the Forest Service in March 2012 to convey the company's cost estimates for use in the validity determination:

- The [redacted] in sunk costs at the Canyon Mine are excluded from the NPV analysis. Sunk costs are not relevant to the decision process for determining the economic viability of the Canyon Mine at this time.

See 2-ER-101.

When the Trust objected to this redaction, the district court declined to order its removal, reasoning that the amount of pre-2012 expenses was not relevant if the law allowed the Forest Service to disregard "sunk costs." 1-ER-40. Yet when the court later put harmless error into issue, 2-ER-98, it did not revisit its redaction ruling, despite

having characterized it as provisional, *id.* Instead, the court reasoned that the Trust had "not met [its] burden," even though the court had denied the Trust access to the kind of information it faulted the Trust for failing to produce. 1-ER-37.

By limiting its review to the administrative record while expecting the Trust to point to evidence that the record lacked—evidence missing from the record because of the government's error, evidence that the Trust had no chance to put into the record for want of a comment period when the validity determination was prepared, evidence that in any event was primarily in defendants' possession, and evidence that the Trust was given no chance to acquire through discovery and to submit to the court—the district court put up an unreasonable evidentiary burden. And that is precisely one of the problems the Supreme Court warned against in *Shinseki*, 556 U.S. at 408.

Examined as a whole, the record shows that mining costs through 1987 were substantial, that over two decades' worth of additional costs were unaccounted for, and that the profitability determination therefore may have come out the other way had all pre-2012 costs been considered. The record does not support a finding 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.

C. The district court's redaction order should be reversed.

For the reasons set out above, pp. 39–50, Energy Fuels' redacted estimate of "sunk costs," though relevant, need not be considered to conclude that the Forest Service's error was not harmless. It is enough to weigh the available record evidence and gaps together to conclude that the error was not harmless. If the Court believes, however, that the administrative record's insufficiencies do not allow the Court to conclude that the Forest Service's error was not harmless, the district court's redaction order, 1-ER-40, should be reversed, and the case should be remanded to the district court to reconsider the question of harmless error.

Because it was not lawful for the Forest Service to disregard pre-2012 costs, *see* above at pp. 15–25, the district court erred when it approved of Energy Fuels' redaction of its "sunk costs" estimate. 1-ER-40.[12] And regardless, once the court put the question of harmless

[12] Because resolution of a legal issue drove the lower court's relevancy ruling, review here is de novo. *See United States v. Fryberg*, 854 F.3d 1126, 1130 (9th Cir. 2017).

error into issue, there was no longer any possible question that Energy Fuels' estimate of sunk costs was "relevant" and thus improperly withheld under the stipulated protective order. *See* 2-ER-128 (allowing for redactions that are "not relevant to the claims in dispute"); Fed. R. Evid. 401. After all, that estimate is precisely the sort of information the district court expected the Trust to marshal. 1-ER-37.

If the current administrative record is deemed inadequate to conclude that the government's error was not harmless, moreover, it necessarily follows that extra-record evidence may be necessary to determine whether the amount of pre-2012 costs was a "relevant factor" that the Forest Service should have considered. *See Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988). A remand under those circumstances, therefore, should instruct the district court to afford the Trust an opportunity to seek leave to conduct discovery, so that the Trust may learn the basis of Energy Fuels' redacted cost estimate and gather additional evidence about pre-2012 costs that is in the defendants' possession but was omitted from the record. *Id.*

CONCLUSION

The Forest Service erred by disregarding pre-2012 mining costs, and that error was not harmless. Had the agency considered those costs, it may have determined that the Canyon Mine claims were invalid. The district court's summary-judgment order should be reversed, the validity determination should be vacated, and the matter should be remanded to the Forest Service to correct its error in a new validity determination. 5 U.S.C. § 706(2).

If the Court concludes, however, that the administrative record does not allow for a finding that the Forest Service's error was not harmless, the Court should reverse the district court's summary-judgment order, reverse the court's redaction order, and remand to the district court to allow the Trust an opportunity to request discovery and offer extra-record evidence on the subject of pre-2012 mining costs.

Respectfully submitted this 22nd day of December 2020.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ADDENDUM

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Mining Law of 1872

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

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

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

The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. Nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

30 U.S.C. § 29. Patents, etc.

A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title and section 661 of Title 43, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title, and section 661 of Title 43, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the Director of the Bureau of Land Management, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the Director of the Bureau of Land Management that $500 worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the

claim during such period of publication. If no adverse claim shall have been filed with the register of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of $5 per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title and section 661 of Title 43. Where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits.

Administrative Procedure Act

5 U.S.C. § 706. Scope of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Federal Land Policy and Management Act of 1976

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

(a) Authorization and limitation; delegation of authority

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

* * *

(c) Congressional approval procedures applicable to withdrawals aggregating five thousand acres or more

(1) On and after October 21, 1976, a withdrawal aggregating five

> thousand acres or more may be made (or such a withdrawal or any other withdrawal involving in the aggregate five thousand acres or more which terminates after such date of approval may be extended) only for a period of not more than twenty years by the Secretary on his own motion or upon request by a department or agency head. * * *

Pub. L. 94-579 § 701. Effect on existing rights.

* * *

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

* * *