No. 15-15857, 15-15754

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

v.

HEATHER PROVENCIO* and UNITED STATES FOREST SERVICE,
Defendants-Appellees

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

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

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

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INTRODUCTION

The Valid Existing Rights Determination (or "Determination") for the Canyon Uranium Mine does not comply with the National Environmental Policy Act (NEPA) and the Federal Land Policy and Management Act (FLPMA). Based on a statutory exemption for "valid existing rights," this Forest Service decision permits Energy Fuels Resources (Energy Fuels) to develop mining claims located on national forest lands that have been withdrawn from the 1872 Mining Law (the "Withdrawal"). It allows Energy Fuels to reopen a uranium mine that was partially constructed when it closed in 1992, with no new analysis of environmental impacts and no opportunity for public comment on the Mine's impacts to lands and resources found to be deserving of special protection.

The Forest Service's defenses lack merit. The agency's primary strategy is to pretend that the Withdrawal does not exist. The agency asserts that the Valid Existing Rights Determination was not prepared due to the Withdrawal, but instead was part of a Mining Law "claim contest."[1] That

[1] Underscoring its strategy, the Forest Service now refers to the Valid Existing Rights Determination as a "Mineral Report," but had identified the same document as the Determination before the district court. *See* ER 227 (cover page reads: "Valid Existing Rights determination for mining claims at Canyon Mine"). A Valid Existing Rights Determination is the terminology used to assess mining claims on withdrawn lands and a Mineral Report is prepared to initiate a "claim contest." ER 554 (agency's discovery responses

contention distorts the facts. Nothing in the record even hints that the Determination was part of a "claim contest." The sole and explicit purpose of the Determination was to determine whether to allow Energy Fuels to develop its mining claims pursuant to FLPMA's exception for "valid existing rights."

Consequently, the agency's "final agency action" argument and reliance on the "zone-of-interest" test fail. The Valid Existing Rights Determination is a "license" and "relief," within the Administrative Procedure Act's (APA) definition of "agency action," because it provided Energy Fuels with an approval under FLPMA for its mining claims. The Determination was "final" both because it was the Forest Service's last word on the subject and because it determined that Energy Fuels had valid existing rights, exempted Canyon Mine from the Withdrawal, and allowed Energy Fuels to reopen the closed Mine. Further, the zone-of-interest test does not preclude Appellants Grand Canyon Trust *et al.*'s (the "Trust") substantive challenge to the Determination (Claim 4) for violating FLPMA's withdrawal provisions because those provisions protect and relate to the Trust's interests.

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explaining "the term 'mineral report,' rather than 'valid existing rigths determination' is used when no withdrawal is at issue").

The Forest Service's NEPA argument – the Valid Existing Rights Determination is not a "major federal action" – is flawed for many of the same reasons. The Determination provided a new approval for Canyon Mine, made necessary by the Withdrawal. Before the Withdrawal, the agency had never reviewed the mining claims under FLPMA or the Mining Law: not when it approved a plan of operations for Canyon Mine in 1986 and not thereafter. The Determination is a "major federal action" because it allowed mining to occur on lands that otherwise could no longer be developed under the Mining Law.

ARGUMENT

I. The Forest Service Should Have Complied With NEPA Before Issuing The Valid Existing Rights Determination

A. The Valid Existing Rights Determination Is Reviewable Under The APA

As the District Court twice concluded, the Trust's NEPA claim is reviewable because the Valid Existing Rights Determination is a "final agency action." *See* ER 59-73; ER 20-21. The Forest Service conceded to the District Court that the Determination is an "agency action." However, the agency now argues on appeal that this approval decision is neither "final" nor an "agency action."

1. The Determination Meets The Definition Of Agency Action

a) The Agency Conceded The Issue

The Forest Service expressly conceded, both in briefing and at oral argument before the District Court, that the Valid Existing Rights Determination is an "agency action" under the APA. ER 63 ("counsel for the government agreed at oral argument that the [Valid Existing Rights] Determination is an agency action"). Agreeing with the Forest Service, the District Court held the Determination meets the APA definition of "relief" because it constitutes a "recognition of valid mineral rights and of a valid claim to such rights at the Canyon Mine." *Id*.

On appeal, the Forest Service reverses itself. USFS Br. 21. But judicial admissions "are binding upon the party making them" and "may not be controverted . . . on appeal." *Keller v. United States*, 58 F.3d 1194, 1198 n.8 (7th Cir. 1995). Moreover, as a general rule, courts do not consider issues a party does not raise in the district court. *Scott v. Ross*, 140 F.3d 1275, 1283 (9th Cir. 1998); *see e.g.*, *O'Guinn v. Lovelock Correctional Center*, 502 F.3d 1056, 1063 n.3 (9th Cir. 2007). Here, not only did the Forest Service not raise the "agency action" issue, it conceded that the Determination was an agency action. ER 63. The Court should not accept the Forest Service's new assertion.

The ability to make this new argument is not saved by the agency's contention that final agency action under the APA is a jurisdictional requirement. USFS Br. 21, n.7. At times, the Ninth Circuit has stated without analysis that final agency action is jurisdictional. *See e.g., id*. (citing cases).[2] However, this is incorrect under Supreme Court precedent, which provides "the APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action." *Califano v. Sanders,* 430 U.S. 99, 107 (1977); *see also Palomar Medical Ctr. v. Sebelius*, 693 F.3d 1151, 1167 (9th Cir. 2012) ("APA is not an independent grant of subject-matter jurisdiction").[3] Subject-matter jurisdiction instead is provided by 28 U.S.C. § 1331, not the APA. *Califano*, 430 U.S. at 106; *Idaho Watersheds Project v. Hahn,* 307 F.3d 815, 830 (9th Cir. 2002) ("[T]he Supreme Court settled a long standing controversy by holding that 28 U.S.C. § 1331, rather than the APA, confers jurisdiction on federal courts

[2] Such "drive-by jurisdictional rulings" should be afforded no precedential effect. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006).

[3] Further, "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Arbaugh*, 546 U.S. at 515-16. The text of the APA "nowhere contains an explicit grant of jurisdiction to challenge agency action in federal court." *Califano*, 430 U.S. at 105-06.

to review agency action.").[4]

b) The Determination Is A License and Relief

If considered at all, the Court should reject the Forest Service's agency action argument on its merits. The APA defines "agency action" to include a "license" and "relief." 5 U.S.C. § 551(13). Through the Valid Existing Rights Determination, the Forest Service issued "an agency permit, [] approval, [or] statutory exception," satisfying the definition of "license." *See* 5 U.S.C. § 551(8). It is also, as the District Court held (ER 68), a "recognition of a [mining] claim" and an "exemption or exception" from FLPMA, and thus is "relief." *See id*. § 551(11)(B); ER 231; ER 251; ER 179 (USFS letter stating it "determined that Canyon Mine has valid existing rights").

The Forest Service offers two distractions in response.

[4] Recognizing an intra-circuit split, a concurring opinion called for the Ninth Circuit to "fully examine[] the jurisdictional status of § 704." *Pebble Ltd. P'ship v. E.P.A.*, 604 F. App'x 623, 626 (9th Cir. 2015) (Waterford, J. concurring). Other circuits, including the D.C. Circuit, have followed *Califano*. *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 183-185 (D.C. Cir. 2006); *Jama v. Dep't of Homeland Sec.*, 760 F.3d 490, 494 n.4 (6th Cir. 2014); *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 33 (1st Cir. 2007).

c) The 1986 Plan Of Operations Did Not Address Claim Validity

First, the agency argues that the Valid Existing Rights Determination is not a "license" for Canyon Mine because mining operations were authorized by the 1986 plan of operations approval and the Determination "did not approve operations." USFS Br. 21. This is a red herring.

Energy Fuels needed both the Valid Existing Rights Determination and an approved plan of operations to develop uranium at Canyon Mine. The plan-of-operations approval was required under Forest Service surface-mining regulations (36 C.F.R. § 228 *et seq*.) and established how operations will occur. *See id*. The Forest Service promulgated these regulations under the authority of the agency's 1897 Organic Act (16 U.S.C. § 551) for the purpose of "regulat[ing] activities related to mining ... in order to preserve the national forests." *Clouser v. Espy*, 42 F.3d 1522, 1530 (9th Cir. 1994).

The Determination addressed an entirely different issue – whether operations are permissible at all on withdrawn lands. It was required by the Withdrawal and authorized by FLPMA's "statutory exemption" for "valid existing rights." 43 U.S.C. § 1701 Note (h) ("All actions taken by the Secretary concerned under this Act [FLPMA] shall be subject to valid existing rights."). At no time prior to the Determination were "valid existing rights" established or determined under FLPMA.

Accordingly, both agency actions provided a necessary authorization under separate legal requirements. Both are a "*part* of an agency … license." *See* 5 U.S.C. § 551(13) (emphasis added); *see also* ER 731 (USFS Manual stating plan of operations approval does not substitute for finding of claim validity); ER 591 ("Those are separate actions and treated as such under the Forest Service's locatable mineral regulations at 36 C.F.R. 228").

The agency contends that "[the Withdrawal] did not …invalidate previously approved plans [of operations]" for Canyon Mine. *See* USFS Br. 27. This is true, but beside the point. Nothing in FLPMA grandfathers in those mines with an existing plan of operations but lacking a valid existing rights determination. FLPMA only authorizes an exemption for mining claims found to have valid existing rights. 43 U.S.C. § 1701, Note (h); *see* ER 267, 269, 272. Mines without a validity determination cannot proceed on withdrawn lands, whether or not they have an approved plan.

d) The Determination Was An Agency Action Taken Under FLPMA, And Was Not Part Of A Mining Law Claim Contest

The Forest Service's second argument asserts the Valid Existing Rights Determination was part of a Mining Law "claim contest" that sought to "declare mining claims invalid." USFS Br. 20-21. But there has never been a claim contest at Canyon Mine and the administrative record shows the Determination was not an agency action taken under the Mining Law.

The Mining Law permits the development of located mining claims on available public lands provided there has been a discovery of a "valuable mineral deposit." 30 U.S.C. § 22; *Cole v. Ralph*, 252 U.S. 286, 295-96 (1920). Contrary to the agency and Energy Fuels' assertion, there is no presumption that mining claims are valid simply by their location. *See* USFS Br. 27-28; EF Brief 13. There must be a discovery. Indeed, as the Supreme Court ruled: "To make the claim valid, or to invest the locator with a right to the possession, it was essential that the land be mineral in character and that there be an adequate mineral discovery within the limits of the claim as located." *Cameron v. U.S.*, 252 U.S. 450, 456 (1920); ER 743 (USFS Manual stating: "Prior to a discovery, a claim cannot be valid….[I]t remains a legal fact that a claim is not …valid prior to the discovery of a valuable mineral deposit"); *see Freeman v. Dep't of Interior*, 37 F.Supp.2d 313, 320-21 (D.D.C. 2014) (absent discovery, there is also no property right for Fifth Amendment takings lawsuit).

Nonetheless, the Forest Service never determined whether the mining claims at Canyon Mine contained a "valuable mineral deposit" when it approved the plan of operations in 1986, or at any other time. Nor did the agency ever initiate contest proceedings under the Mining Law.

The Withdrawal changed things however. It closed public lands previously open under the Mining Law from mineral "location" and "entry." ER 267.[5] Consequently, the mining claims at Canyon Mine are no longer "subject to the statutory rights enumerated in the General Mining Law." *Kosanke v. Dep't of Interior*, 144 F.3d 873, 874 (D.C. Cir. 1998); *cf. Pathfinders Mines v. Hodel*, 811 F.2d 1288, 1291 (9th Cir. 1987) ("Lands in the public domain which have not been withdrawn from mineral entry are open to entry under the General Mining Law …").

In order to mine the withdrawn lands, "valid existing rights" at the time of the Withdrawal are required, pursuant to FLPMA's exception. 43 U.S.C. § 1701 Note (h); *see Hjelvik v. Babbitt*, 198 F.3d 1072, 1074 (9th Cir. 1999) ("Where a claim is located on land withdrawn from mineral entry pursuant to the Wilderness Act, a claim must be supported by a discovery of a valuable mineral deposit at the time of withdrawal[.]"); *Clouser*, 42 F.3d at 1524-25 ("[T]he national forest land in which the mining claims are located … was subsequently withdrawn from mineral entry under the Wilderness Act or Wild and Scenic Rivers Act, so that only persons establishing that

[5] "Location" means establishing new claims. *Cole*, 252 U.S. at 296. "'Mineral entry' refers to '[t]he right of entry on public land to mine valuable mineral deposits.'" *Mt. Royal Joint Venture v. Kempthorne*, 477 F.3d 745, 750 n.3 (D.C. Cir. 2007).

they discovered a valuable mineral deposit prior to the withdrawal possess a valid right to mine claims there (a 'valid claim').").

The Withdrawal thus sparked the Forest Service into action. Under FLPMA, the agency evaluated whether Energy Fuels had "valid existing rights" at its Canyon Mine claims. The Determination itself makes clear it was necessary "[d]ue to the withdrawal." ER 234 ("all locatable operations within this area must have valid existing rights (VER) in order to be able to operate on these claims"); ER 179. The Forest Service explained to Energy Fuels that "[t]his [Valid Existing Rights Determination] is a requirement for any public domain lands managed by the Forest Service that have been withdrawn from mineral entry." ER 290. The Forest Service also reported to regional tribes that the Determination was required for Canyon Mine because of the Withdrawal:

> - "the minerals exam will need to be completed before they start work at Canyon Mine" (ER 469);
>
> - "is the Canyon Mine subject to valid existing rights per the recent mineral withdrawal? [] Yes, subject to VER, mineral exam is currently in progress" (*id.*);
>
> - "they would no[t] be able to move forward without VER under the mineral withdrawal" (ER 466);
>
> - "Denison [Energy Fuels predecessor-in-interest] will need to show existing rights" (ER 464).

Accordingly, the Valid Existing Rights Determination was not an action initiated under the Mining Law as part of a contest proceeding. Notably, the Forest Service must make its argument in the abstract, citing generally to the process for claim contests. But there is absolutely no evidence showing the Determination had anything to do with a claim contest or was a discretionary monitoring exercise under the Mining Law. *See* USFS Br. 22-23.[6] And because it was a precondition to mining due to the Withdrawal, the Determination is completely unlike (*see id*. at 23) the U.S. Department of Transportation's failure to require a compliance with a federal law (*Clear Sky Car Wash v. City of Chesapeake*, 743 F.3d 438, 445 (4th Cir. 2014)), the day-to-day implementation of a harbor-maintenance project (*Village of Bald Head Island v. Army Corps of Eng'rs*, 714 F.3d 186, 194 (4th Cir. 2013)), or trail-maintenance activities (*Montana Wilderness Ass'n v. U.S. Forest Serv.*, 314 F.3d 1146, 1150 (9th Cir. 2003).

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[6] The agency cites two documents to argue the Determination represents agency monitoring and discretionary review activities. ER 179, 599-600. Neither relates to the Determination. The first is a letter concerning Energy Fuels' obligation to perform wildlife mitigation by the 1986 EIS. ER 599-600. The second – the June 2012 "Canyon Mine Review" – was not only prepared after the Determination, but addressed whether NEPA required additional environmental review of the 1986 plan approval. ER 181 ("*In addition to the mineral validity examination*, the Forest undertook a review of the 1986 Environmental Impact Statement and Record of Decision, and associated documents.") (emphasis added).

In sum, the Valid Existing Rights Determination established rights under a statutory exemption that allowed Energy Fuels to develop mining claims on withdrawn public lands. It constitutes a license and relief.

2. The APA's Finality Conditions Are Met

The finality requirement (5 U.S.C. § 704) is based on two conditions – the agency action (1) marks the consummation of a decision-making process and it (2) determines rights, has legal consequences, or directly impacts the parties. *Bennett v. Spear*, 520 U.S. 154, 178 (1997); *Or. Natural Res. Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 984 (9th Cir. 2006).

The first condition is satisfied. The Valid Existing Rights Determination was "completed on April 18, 2012" (ER 181), providing the agency's "last word" on whether Energy Fuels' mining claims contain "valid existing rights" – the "matter in question." *See Or. Natural Res.*, 465 F.3d at 984; ER 546 (agency's discovery response: "neither the Forest Service nor any other federal agency has engaged in decision-making relating to the validity of mining claims at Canyon Mine after the April 2012 VER Determination.").

The Determination was not the first step in a contest proceeding. *See* USFS Br. 24.[7] Although the Forest Service presents a hypothetical scenario

[7] For this reason, the agency's reliance on *Pebble Ltd. P'ship* fails, because there, the Environmental Protection Agency "merely indicated that [it] was beginning a review process to decide" whether to "veto" a project under the Clean Water Act.

involving a claim contest challenging whether a miner has discovered a "valuable mineral deposit" under the Mining Law, the agency did not bring a claim contest here. And the fact that the Department of Interior, through the Bureau of Land Management (BLM), has the final say during a claim contest is off the mark for the same reason. USFS Br. 24. At bottom, the claim contest process is wholly irrelevant to whether the Determination is final.[8]

The Forest Service's appeal brief tries to muddy what was previously crystal clear to the agency. The Determination itself states that it was issued "[d]ue to the Withdrawal…," not the Mining Law. ER 234. The agency's "technical expert," who prepared the Determination, explained:

> [I]f a [mining] claim has valid existing rights, then … the claims can be explored and developed even though they are within a withdrawn area. A Mineral Withdrawal does not negate a mining claimant's rights if valid existing rights are established by the claimant prior to the date of the Withdrawal.

ER 589. The Forest Service's own Manual provides: "the use of validity determination[s] should be limited to situation[s] where valid existing rights must be verified where the lands in questions have been withdrawn from mineral entry." ER 742. Like the Manual, the agency's discovery responses reveal that a Valid Existing Rights Determination is prepared only when

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[8] The mere possibility that the Forest Service or BLM may contest mining claims at some later date (USFS Br. 24, 25) is not material to finality. *See Bell v. New Jersey*, 461 U.S. 773, 779–80 (1983); *Alaska v. EPA*, 244 F.3d 748, 750 (9th Cir. 2001).

there is a withdrawal, and "the term 'mineral report' … is used when no withdrawal is at issue." ER 554.

The second finality condition – that the agency action determines rights or has legal consequences – is also met. The Forest Service's rebuttal – that the Determination had no legal consequences, even if it was "a practical necessity" (USFS Br. 25-26 (*citing* ER 11-12, 20-21; ER 65-68) – ignores that there are "several avenues for meeting the second finality requirement." *Or. Natural Desert*, 465 F.3d at 986.

As its name reveals (*see* ER 227), the Forest Service determined valid rights existed on Energy Fuels' mining claims at the time of the Withdrawal. Recognizing as much, the District Court found:

> [t]he VER Determination seems to fall within the actual language of *Bennett*. One of the circumstances identified by *Bennett* as satisfying the second prong is when 'rights or obligations have been determined.' 520 U.S. at 178. The purpose of the VER Determination was to determine rights – the existence of valid mineral rights at the Canyon Mine site. The VER Determination thus appears to come within the express language of *Bennett*.

ER 68. The second *Bennett* requirement is satisfied also because, as the District Court concluded, the Determination:

> had 'a direct and immediate effect on the day-to-day operations of the subject party' – once issued, it allowed mining operations to resume under the original Plan of Operations.

Id; *see Or. Natural Desert Ass'n*, 465 F.3d at 982. Notwithstanding the agency's contention that the Determination had no legal consequences, this finality requirement is satisfied based on these other "avenues."

Moreover, the Determination has "legal consequences." Valid existing rights were legally necessary to develop mining claims due to the Withdrawal. *See Clouser*, 42 F.3d at 1530 (recognizing "only persons establishing that they discovered a valuable mineral deposit prior to the withdrawal possess a valid right to mine claims there"); *Wilderness Soc'y v Dombeck*, 168 F.3d 367, 375 (9th Cir. 1999) ("[I]n order for mining to continue …, a claim must have contained a discovery of a valuable mineral deposit that would survive the closure of the wilderness areas to mineral exploration"). The Forest Service agreed, as the Determination reveals:

> These [Secretary of Interior] actions described above withdrew the lands within the area from location under the general mining laws for twenty years. Prior to this, the subject lands were open to mineral entry and mining claims have been staked on portions of the Kaibab NF. *Due to the Withdrawal, all locatable operations within this area must have valid existing rights (VER) in order to be able to operate on these claims*.

ER 234 (emphasis added). And its recognition of the Withdrawal's legal effect and the valid existing rights requirement persisted even though there remained an approved plan of operations for Canyon Mine. ER 232, 234.

To the extent the Forest Service contends that *it* was not legally required under FLPMA to determine valid existing rights (USFS Br. 27-28), the agency is misapplying *Bennett*. *Bennett* asks whether the Determination

has "legal consequences," not whether the Forest Service is the entity required to make the Determination. *Or. Natural Desert*, 465 F.3d at 986 (action that "fix[es] *some* legal relationship" sufficient) (emphasis in original). Valid existing rights are legally necessary under FLPMA to develop mining claims on withdrawn lands. There is no evidence showing that Energy Fuels had otherwise established "valid existing rights" prior to the Determination. The Determination, therefore, has "legal consequences" because Energy Fuels is now compliant with FLPMA's "valid existing rights" exemption. Accordingly, the company's rights in relation to FLPMA and the Withdrawal have changed with the Determination. *See id.*; *cf. Fairbanks North Star Borough v. Army Corps of Engineers*, 543 F.3d 586, 593 (9th Cir. 2008) (finding "Fairbanks' rights and obligations remain unchanged by the approved jurisdictional determination").[9]

In any case, the Forest Service does, in fact, have to determine whether Energy Fuels had valid existing rights. Miners cannot make these assessments themselves. The prudent-person and marketability tests are based on objective standards. Trust Opening Br. 28-29; *Independence Mining v. Babbitt*, 105 F.3d 502, 509 n.8 (9th Cir. 1997) (affirming validity

[9] The action at issue in *Fairbanks North Star Borough* – a determination that the subject property is located within 'waters of the United States' and thus subject to the Clean Water Act – is analogous to a Forest Service finding that Canyon Mine is located on withdrawn lands and FLPMA now applies as a result.

determinations based on objective tests). The assertion that "valid existing rights" are simply presumed, and no "determination" is necessary (USFS Br. 27-28; EF Br. 13, 23), cannot be squared with application of these objective standards. *See Freeman*, 37 F.Supp.2d at 321 ("rejecting plaintiff's argument that in the absence of a challenge to validity, the court must take at face value their assertion that claims are supported by an adequate mineral discovery"). It is also irreconcilable with the requirement that claimants have valid existing rights "at the time of the Withdrawal." *See Hjelvik*, 198 F.3d at 1074. Finally, the actions taken by the agency and Energy Fuels contradict the alleged presumption: the Forest Service issued the Determination based in part on evidence submitted by Energy Fuels.

B. The Valid Existing Rights Determination Is A Major Federal Action

The Forest Service contends that the Valid Existing Rights Determination is not a "major federal action" under NEPA because it did not authorize mining operations at Canyon Mine; only the agency's 1986 approval of a plan of operations did. USFS Br. 31. And because the plan approval remains in effect, the agency argues, the Determination did not change the status quo. *Id*.

Again, the Valid Existing Rights Determination and 1986 approval of the plan of operations are distinct Forest Service authorizations taken under

different laws for different purposes. Both are necessary to lawfully mine at Canyon Mine now that the area has been withdrawn.

The agency's status quo argument is mistakenly premised on how operations occur under the plan of operations. While the manner in which Energy Fuels may develop its mining claims remains unchanged, the Determination certainly affected whether these mining claims could be developed at all after the Withdrawal.

The Withdrawal closed the region surrounding and including Canyon Mine to mining – public lands previously open under the Mining Law for exploration and development are no longer available. But, in the Determination, the Forest Service found that Canyon Mine was exempt from the Withdrawal under FLPMA's "valid existing rights" exemption, changing the status quo. Never before had the Forest Service evaluated these claims under FLPMA's "valid existing rights" exemption or even under the Mining Law, including when the agency approved the 1986 plan of operations. And had there been a prior determination, it would not have been sufficient because valid existing rights must be established "at the time of [the] Withdrawal." *See Hjelvik*, 198 F.3d at 1074. The Determination thus changed the status quo at Canyon Mine.

The Ninth Circuit's ruling in *Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768 (9th Cir. 2006), is instructive. There, absent the agency's discretionary decision to extend geothermal leases, the leases would have expired and the project could not continue under the Geothermal Leasing Act. 469 F.3d at 784. As the court reasoned, "[w]ithout the affirmative re-extension of the 1988 leases, Calpine would have retained no rights at all to the leased property and would not have been able to go forward with the Fourmile Hill Plant." *Id*. At Canyon Mine, the Withdrawal had the same effect as the expiration of the geothermal leases in *Pit River*. The Withdrawal meant Energy Fuels could not develop its mining claims absent the valid existing rights. The Determination changed the status quo as it existed after the Withdrawal.

The agency's citation (USFS Br. 32-33) to *Ctr. Biological Diversity v. BLM*, 706 F.3d 1085 (9th Cir. 2013), is equally misplaced. *Ctr. Biological Diversity* involved a different NEPA claim, one alleging that an EIS – prepared for a prior BLM approval of a plan of operations – had to be supplemented. There, NEPA supplementation was not required because BLM's approval had been completed and was not "ongoing." *Ctr. Biological Diversity*, 706 F.3d at 1095 (also finding NEPA supplementation not triggered by other agency actions because "none of those actions affected the

… completeness of the 1988 approval"). Here, the Trust is not arguing that the 1986 EIS, which accompanied the approval of the plan of operations, must be supplemented. Rather, a new and different major federal action (the Determination) requires NEPA compliance. *Ctr. Biological Diversity* did not address whether a Valid Existing Rights Determination is a major federal action; no validity determination had been prepared in that case because there were no withdrawn lands.[10]

The Forest Service next argues NEPA does not apply because the agency lacks discretion in reviewing Canyon Mine's claims. USFS Br. 34-35. NEPA applies when the agency possesses some discretion to influence the outcome of the action. *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.,* 538 F.3d 1172, 1213 (9th Cir. 2008).

As an initial matter, the Forest Service undermines its own lack-of-discretion argument by contending that the Determination is akin to a discretionary enforcement action, wherein the agency decides "whether to request that BLM institute a contest" under the Mining Law. USFS Br. 32.

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[10] The agency's citation (USFS Br. 31) to *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581 (9th. Cir. 2014) fails. *Jewell* ruled that a Fish and Wildlife Service "biological opinion" served only as a recommendation to the Bureau of Reclamation and thus was not a major federal action. *Id.* at 642-43. Here, the Determination was not a recommendation in a contest proceeding, as the agency claims, but a FLPMA determination that allowed mining operations to occur.

Moreover, to the extent the agency maintains that it is not legally required to determine "valid existing rights" for Canyon Mine (USFS Br. 29), it necessarily follows that the Forest Service exercised its discretion to review Energy Fuels' mining claims for compliance with FLPMA's exemption.[11] In both scenarios, therefore, the Forest Service had discretion relating to Canyon Mine.

The agency also possessed discretionary authority in the decision-making process to consider environmental values and could, based on the NEPA analysis, account for additional environmental costs in the profitability determination. FLPMA's "valid existing rights" exemption is reviewed based on the "prudent-person" and "marketability" tests. *Hjelvik*, 198 F.3d at 1074. The Determination applied these tests. ER 228 (asking whether "claims could be mined, removed, transported, milled and marketed at a profit"), 231, 251. Reviewing mining claims for validity under the

[11] The agency cites a BLM regulation at 43 C.F.R. § 3809.100 to contend that Determinations are only required on withdrawn lands upon approving a new plan of operations. USFS Br. 28. Aside from the fact the distinction embodied in this regulation makes no sense (Trust Opening Br. 30-31), the Forest Service chose to ignore this BLM regulation for Canyon Mine, and instead reviewed the Mine for "valid existing rights" despite the 1986 approved plan of operations.

'prudent-person' and 'marketability' tests involves "considerable discretion and judgment." *Independence Mining*, 105 F.3d at 506-07, 509.[12]

This discretion extends to environmental factors because environmental costs must be considered when determining the profitability of mining claims. *Independence Mining*, 105 F.3d at 506-07; *Clouser*, 42 F.3d at 1530; *Barrick Goldstrike Mines v. Babbitt*, 1994 WL 836324, *4 (D. Nev. Jan. 14, 1994) ("mitigation costs for the protection of threatened and endangered species will be highly relevant to the value of the [mineral] deposits"). The Forest Service thus uses its judgment in deciding how environmental costs are considered and valued, and also has the authority to impose additional costs by modifying a plan of operations. 36 C.F.R. § 228.4(e) (plan modifications intended to "minimiz[e] any unforeseen significant disturbance of surface resources"); *see also Independence Mining*, 105 F.3d at 509, n.8 ("IMC [the plaintiff] argues that the validity determination itself is non-discretionary because it involves an objective test. In doing so, IMC confuses two different concepts. Specifically, merely

[12] The agency's discretion argument relies on non-controlling cases that predate *Independence Mining*. *See* USFS Br. 34, 35 (*citing South Dakota v. Andrus* and *Wilderness Soc'y v. Robertson*). Further, the cited cases are predicated on decisions holding that if a mining claim is determined to be valid, the subsequent act of issuing a patent is ministerial. *Independence Mining,* 105 F.3d at 508. The Determination here was not part of a patent process.

because a task involves an "objective" standard of review does not mean that it is a ministerial act."); *see also Ctr. for Biological Diversity,* 538 F.3d. at 1195 ("The [statute] clearly requires the agency to consider these four factors, but it gives [agency] discretion to decide how to balance the statutory factors.").

The Forest Service's contention that the plan of operations is the only "legally relevant cause" of mining and mining impacts suffers from the same problem discussed above. *See* USFS Br. 31, *citing*, *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004). That is, the Determination is as much a legal cause of developing mining claims as the approved plan of operations – both are needed to mine in withdrawn areas. *See Ocean Advocates v. Army Corps of Engineers*, 402 F.3d 846, 868 (9th Cir. 2004) (finding both market forces and Army Corps permit were legal causes of "increased vessel traffic"). Because the Withdrawal requires "valid existing rights" for Energy Fuels to develop mining claims at Canyon Mine, there is a "reasonably close causal relationship" between the Determination and the Mine's environmental effects. *See Public Citizen*, 541 U.S. at 767.

Lastly, the agency's lawyers point to various documents (*e.g.*, 1986 EIS) to suggest a NEPA analysis is unnecessary here. USFS Br. 35-36.[13] The Court should reject counsel's *post hoc* rationalization. *See Motor Vehicles Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 50 (1983). At no point did the Forest Service consider the Valid Existing Rights Determination under NEPA and so these documents could not provide the basis for the agency to forego NEPA compliance for the Determination. Indeed, because the June 25, 2012 Canyon Mine Review, for example, was produced after the Determination was completed, it did not inform the agency nor provide a mechanism for public comment on the Determination. In its zeal to find that Energy Fuels' claims were exempt from the Withdrawal's effect, the Forest Service ignored the right of the public to be involved in such a major and significant decision.

II. APA Zone-Of-Interest Principles Do Not Bar The Trust's FLPMA Claim Against The Valid Existing Rights Determination

As set forth in the Trust's Claim 4, the Forest Service's Valid Existing Rights Determination does not comport with FLPMA's "valid existing rights" exemption – and consequently the FLPMA Withdrawal – because the

[13] The sufficiency of the referenced documents is not before the Court. Nonetheless, the Trust notes that the 1986 EIS is stale and does not contain information from the last 30 years or reveal conditions when the Determination was prepared.

agency failed to fully account for the costs of complying with laws that protect environmental and cultural resources.

The Forest Service maintains that the Trust cannot challenge the Determination in this fashion due to the APA's zone-of-interest test. Ignoring the fact that the Determination was prepared solely to comply with the Withdrawal promulgated under FLPMA and was issued under the authority of FLPMA's "valid existing rights" exemption, the Forest Service argues nonetheless the Trust's claim is rooted only in the Mining Law. USFS Br. 46-48. The agency then contends that the Mining Law's purpose does not protect the Trust's interests (USFS Br. 49-53), even though the Mining Law limits development on public lands to mining claims containing a "valuable mineral deposit."

A. FLPMA Is The Statute In Question

The zone-of-interest test asks whether "the statute in question" relates to plaintiffs' interests. *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust*, 522 U.S. 479, 489 (1998); *Bernhardt v. Cty. of Los Angeles*, 279 F.3d 862, 870 (9th Cir. 2002) (looking for "rough correspondence").

FLPMA is the statute in question. As detailed, the Valid Existing Rights Determination was prepared in response to a FLPMA Withdrawal, to comply with FLPMA's "valid existing rights" exemption. All the evidence,

including the Determination itself, explicitly reference the Withdrawal as the reason the Forest Service reviewed Energy Fuels' mining claims. ER 234; ER 231; ER 290; ER 262, 631.

While arguing that the Mining Law is the law in question (USFS Br. 49), the agency presents no evidence from the administrative record or elsewhere showing that the Forest Service prepared the Determination to comply with the Mining Law. Notably, although the Mining Law governed the claims for years before the Withdrawal was promulgated, the agency never assessed the claims for compliance with the Mining Law, including when approving Canyon Mine's plan of operations in 1986. It may be true that, hypothetically, the Forest Service could have evaluated the mining claims as part of a "claim contest" under the Mining Law, but that is not what happened here.

Valid existing rights under FLPMA are determined based on the same tests used to evaluate whether, under the Mining Law, there has been a discovery of a valuable mineral deposit. ER 588 ¶ 4 (USFS Mineral Examiner explaining valid existing rights under FLPMA and valuable mineral deposit under the Mining Law "basically address the same question"); *Cameron*, 252 U.S. at 456; *Hjelvik*, 198 F.3d at 1074. The Forest Service tries to capitalize on any confusion that might arise because

the tests are the same. But the Mining Law is not the law in question simply because it, like FLPMA, employs the "prudent-person" and "marketability" tests to ensure mining claims contain a "valuable mineral deposit."[14] The only purpose of the Determination was to evaluate whether "valid existing rights" were established on the lands withdrawn under FLPMA. That the tests are the same does not transform the Trust's FLPMA claim into a Mining Law claim.

B. FLPMA's Withdrawal Provisions Protect And Regulate The Trust's Interests

The Trust has demonstrated its interests in the lands and resources at issue are environmental, recreational, aesthetic and cultural. Trust Opening Br. 42, n.20. The Forest Service does not dispute the Trust's interests, but maintains FLPMA's withdrawal provisions are unrelated to these interests. USFS Br. 47-48.

The Forest Service is wrong. FLPMA's land withdrawal authority and valid-existing-rights exemption unquestionably protect and relate to the

[14] Citing a supplemental brief filed in the District Court, the Forest Service claims that "the Trust expressly relied on the Mining Law as requiring the discovery of a valuable mineral deposit." USFS Br. 47, n. 22. If the agency is implying that the Trust had not relied on FLPMA, the brief – including the complete sentence from which the agency only partially quotes – shows otherwise. As here, the Trust in the District Court argued that, in addition to FLPMA, the Mining Law's zone-of-interest test is satisfied, in the event the court finds that Claim 4 is rooted in the Mining Law.

Trust's interests. A FLPMA withdrawal is promulgated "for the purpose of limiting activities under those laws in order to maintain public values in the area." 43 U.S.C. § 1702(j). "Public values" under FLPMA include environmental and cultural values. *Id*. § 1701(8). Thus, a withdrawal adopted under FLPMA, 43 U.S.C. § 1714, protects environmental and cultural resources by removing lands previously available for mining under the Mining Law. And this Withdrawal specifically provides protection for over one million acres of public lands surrounding Grand Canyon National Park.

The agency questions the relevance of FLPMA sections 1702(j) and 1701(8). USFS Br. 48. However, these provisions are properly considered because they provide context for the overall scheme of FLPMA land withdrawals. *See Clarke v. Securities Industry Ass'n,* 479 U.S. 388, 403 (1987) ("In considering whether the 'zone of interest' test provides or denies standing [], we first observe that the Comptroller's argument focuses too narrowly on 12 U.S.C. § 36 and does not adequately place § 36 in the overall context of the National Bank Act.").

FLPMA authorizes land managing agencies to exempt certain mining claims from a withdrawal if there are "valid existing rights" on such claims. *See* 43 U.S.C. § 1701 Note (h); ER 267 & 271. This FLPMA provision,

including the requirement valid claims must exist at the time of the withdrawal, relates to the Trust's interest in conserving one million acres of public lands surrounding Grand Canyon National Park. If the Determination is found unlawful, these lands will be protected by the Withdrawal. *See Clarke*, 479 U.S. at 401 (finding zone-of-interest test evaluated based on statute's general rule and its exception).

How "valid existing rights" are determined also relates to the Trust's interests. It is undisputed that the Determination had to consider the costs of complying with environmental and cultural protection laws. *Independence Mining,* 105 F.3d at 506-07; *Clouser*, 42 F.3d at 1530; *see also* USFS Br. 51 (Forest Service acknowledging "the question of claim validity requires consideration of costs of complying with environmental and other statutes"). FLPMA's process for assessing valid existing rights account for and relate to the Trust's interests.

C. Even Under The Mining Law, The Trust Satisfies The APA Zone-Of-Interest Test

The Forest Service argues the Mining Law was enacted to promote mining and the Trust has no interest in mining; therefore, the Trust fails the zone-of-interest test. USFS Br. 49. Even assuming Claim 4 could be characterized as a Mining Law claim, the agency's argument fails for several reasons.

1. The Underlying Law Need Not Benefit A Plaintiff

The Forest Service misstates zone-of-interest law. According to the agency, the zone-of-interest test is met only if the relevant underlying law was intended to *protect* plaintiffs' interests. USFS Br. 46, 49; *see e.g.*, *id*. at 50 ("The Trust does not claim that it has adverse property interests protected by the Mining Law").[15] The zone-of-interest test under the APA is not so limited.

Whether the Mining Law benefits the Trust's interests is not dispositive. The Forest Service ignores years of controlling precedent holding the zone-of-interest test does not turn solely on whether a law was intended to benefit a particular plaintiff. "[W]e do not ask whether, in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff." *Nat'l Credit Union*, 522 U.S. at 492; *Match-E-Be-Nah-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 2210 (2014) ("We do not require any indication of congressional purpose to benefit the would-be plaintiff.")

> [W]e would have to reformulate the 'zone of interests' test to require that Congress have specifically intended to benefit a particular class of

[15] The agency cites *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 883 (1990) for this contention. Yet, other than reciting the basic tenets of the zone-of-interest test, *Lujan* is not helpful, as it addressed only whether the affidavits submitted provided sufficient evidence of plaintiffs' alleged interests. *Lujan*, 497 U.S. at 886.

> plaintiffs before a plaintiff from that class could have standing under the APA to sue. We have refused to do this in our prior cases, and we refuse to do so today.

Nat'l Credit Union Admin, 522 U.S. at 498; *see Clarke,* 479 U.S. at 399-400 ("[T]here need be no indication of congressional purpose to benefit the would-be plaintiff."); *see Patchak*, 132 S.Ct. at 2210, n.7 ("The question is not whether § 465 seeks to benefit Patchak").[16]

2. The Trust's Interests Relate To, And Are Protected By, The Mining Law's 'Valuable Mineral Deposit' Requirement

To the extent the Mining Law benefits or favors one class of public land users, such as miners, any limit imposed on miners necessarily benefits other public land users. The Mining Law restricts mining to claims with a "valuable mineral deposit." 30 U.S.C. § 22; *Coleman*, 390 U.S. at 602 (explaining, to mine on public lands, "it *must be shown* that the mineral can be 'extracted, removed and marketed at a profit'") (emphasis added). This limitation has real consequences. *See Cameron*, 252 U.S. at 463 (finding Mining Law allows voiding of mining claims to "recognize the rights of the public"); *Clouser*, 42 F.3d at 1535, n.15 (holding "the property right in an unvalidated claim ... may permissibly be restricted pending determination of

[16] Several cases the Forest Service cites on this issue are not on point, in part because they did not assess the zone-of-interest test under the APA. *See Air Courier Conf. v. Am. Postal Workers*, 498 U.S. 517 (1991); *City of Los Angeles v. Kern*, 581 F.3d 841 (9th Cir. 2009).

validity, in order to guard against damage to the claim and surrounding land"). It benefits the Trust and its interests in the values and resources found in the Kaibab National Forest and Grand Canyon National Park. *See Cameron*, 252 U.S. at 460 (valuable mineral deposit requirement ensures "…the rights of the public [are] preserved"); *id*. at 463 (public interest served by nullifying mining claims found invalid).

In this respect, the "valuable mineral deposit" limitation plays a role analogous to the Endangered Species Act (ESA) requirement to "use the best scientific and commercial data available." In *Bennett*, the Supreme Court interpreted the best-available-science limitation as an ESA objective, in addition to the ESA's primary goal of "species preservation." *Bennett*, 520 U.S. at 176 (finding limitation ensures "ESA not be implemented haphazardly, on the basis of speculation or surmise"). The court thus ruled that plaintiffs' economic interests were within the ESA's zone of interests because this limit serves to "avoid needless economic dislocation produced by agency officials … pursing their environmental objectives." *Id*. at 176-77. Here, even if the Mining Law is understood to promote mineral development, the "valuable mineral deposit" limitation serves to protect public lands from overzealous and ill-advised mineral development.

Judicial rulings demonstrate that the Mining Law relates to a far broader array of interests than just miners, including, for example, ranchers, environmental groups and railway companies. *See, e.g.*, *Cameron*, 252 U.S. at 456 (referencing protest challenging mining claims by railway company); *Wilderness Soc'y*, 168 F.3d at 375 (environmental groups' challenge to valid existing rights determination in withdrawn area); *Thomas v. Morton*, 408 F. Supp. 1361, 1370 (D. Ariz. 1976), *aff'd Thomas v. Andrus*, 552 F.2d 871, 872 (9th Cir. 1977) (public-land rancher challenging validity determination).[17]

Subsequent legislation and regulations also show that the Mining Law is not only interested in miners. The Mining Law was partially amended by the Surface Resources and Multiple Use Act of 1955, whereby claimants no longer have "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations" 30 U.S.C. § 26 and instead other users of public lands, including recreational users, have interests where unpatented mining claims arise. 30 U.S.C. § 612(b); *U.S. v. Curtis-Nevada Mines*, 611 F.2d 1277, 1283 (9th Cir. 1980) (finding 1955

[17] The Forest Service attempts to distinguish *Thomas v. Morton* by claiming the plaintiff, unlike the Trust, was a "surface owner." USFS Br. 52. In fact, plaintiffs were ranchers who had used the public lands adjacent to their homestead for grazing livestock and would be harmed by mining activities on those public lands. *Thomas v. Morton*, 408 F. Supp. at 1363, 1369.

Act "permits[s] the multiple use of the surface resources" on mining claims); *see also* ER 716 (USFS Manual states "claimant must recognize the lawful rights of other users of the National Forest"). And the Department of Interior's "private contest" proceedings, which the Forest Service cites (USFS Br. 50), do not restrict challenges under the Mining Law to miners, but are available also to grazing lessees, holders of public highway easements, proponents of land exchanges, and Forest Service special use permittees. *See* 43 C.F.R. § 4.450-1; SER 469; *see Clouser*, 42 F.3d at 1525, n.2 ("unpatented claim …may be contest by the government or a private party").[18]

Moreover, as courts have ruled, plaintiffs may enforce laws intended to benefit their competitors or those with adverse interests. *See Patchak*, 132 S.Ct. at 2210, n.7 (where statute affected use of neighboring property, plaintiffs "complaining about such use may sue to enforce the statute's limits" even though statute intended to benefit local tribe and not plaintiff); *Nat'l Credit Union Admin.*, 522 U.S. at 492-94. Here, the Trust's interests

[18] The Forest Service cites (USFS Br. 49) to *High Country Citizens Alliance v. Clarke*, 454 F.3d 1177 (10th Cir. 2006), but that Tenth Circuit decision involved sovereign immunity, not the zone-of-interest test. The APA, 5 U.S.C § 702, waives the sovereign immunity to authorize declaratory and injunctive relief, while maintaining immunity against "money damages." Further, *High Country* reviewed a challenge to a decision to "patent" a mining claim, and not a Valid Existing Rights Determination on lands that had been withdrawn. 454 F.3d at 1189-90.

in public lands compete with Energy Fuels. Absent a lawful Determination, the Trust's enjoyment of these lands and resources affected by Canyon Mine would not be injured.

Energy Fuels tries to distinguish this line of cases by artificially narrowing the market in which there is competition. EF Br. 48, n.33. The company claims that the Trust and mining companies are not competitors in "the use of public lands *for mining*." *Id*. (emphasis added). But the relevant market here is all public land uses, not just one use (mining). In *Nat'l Credit Union Admin.*, the Federal Credit Union Act favored one type of institution (credit unions) that provides financial services over another (commercial banks). 522 U.S. at 493-94 ("As competitors of federal credit unions, respondents [commercial banks] certainly have an interest in limiting the markets that federal credit unions can serve, and the NCUA's interpretation has affected that interest by allowing federal credit unions to increase their customer base."). Even though the statute at issue concerned credit unions, the relevant market was consumers who used financial institutions and both commercial banks and credit unions competed in that market. Here, although the Mining Law focuses on one type of public land user, the applicable market is all users of public land.

In sum, for an APA claim to fail the zone-of-interest test, there must be evidence that Congress intended to *preclude* the claim. *Clarke*, 479 U.S. at 399; *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150, 156-58 (1970) (asking "whether judicial review of the Comptroller's action has been precluded"); *Am. Chiropractor Ass'n v. Leavitt*, 431 F.3d 812, 815 (D.C. Cir. 2005) ("The question at this stage is whether Congress meant to exclude this class of plaintiffs from those who may sue to enforce their view of the Act"). Nothing in the Mining Law prohibits challenges to a Determination by parties, like the Trust, who wish to use public lands for purposes other than mining. Accordingly, even if Claim 4 is deemed a Mining Law claim, the zone-of-interest test is satisfied, for the Trust's interests are both protected and regulated by the Mining Law.

CONCLUSION

The Valid Existing Rights Determination should be vacated until the Forest Service completes a NEPA process. The Court should also reverse the District Court and find the Trust's challenge to the Determination under FLPMA satisfies the zone-of-interest test.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a), the undersigned hereby certifies that the foregoing brief complies with typeface requirements, was prepared using Microsoft Times New Roman 14-point font, and contains 8,372 words.

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2016, I filed APPELLANTS GRAND CANYON TRUST, CENTER FOR BIOLOGICAL DIVERSITY AND SIERRA CLUB'S REPLY BRIEF using the Ninth Circuit's ECF system for filing and transmittal of a Notice of Electronic Filing.

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