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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Grand Canyon Trust, et al.,
10 Plaintiffs,

11 v.

12 Michael Williams, et al.,
13 Defendants.
14

No. CV-13-08045-PCT-DGC

ORDER

15 Plaintiffs have filed separate motions asking the Court to issue an injunction
16 pending appeal. Docs. 169, 177. Plaintiffs also seek an expedited ruling. *Id.* No party
17 has requested oral argument. The motions are fully briefed. For the reasons that follow,
18 the Court will enter this expedited order and deny the motions.

19 **I. Background.**

20 Plaintiffs Havasupai Tribe, Grand Canyon Trust, Center for Biological Diversity,
21 and the Sierra Club brought suit against Defendants United States Forest Service and
22 Michael Williams, Supervisor of the Kaibab National Forest (the “Forest Service”),
23 challenging mining operations at the Canyon Mine under the National Environmental
24 Policy Act (“NEPA”) and the National Historic Preservation Act (“NHPA”). Canyon
25 Mine is owned and operated by Energy Fuels Resources (USA), Inc. and EFR Arizona
26 Strip, LLC (collectively, “Energy Fuels”).

27 On April 7, 2015, the Court denied Plaintiffs’ motion for summary judgment and
28 granted Defendants’ motions for summary judgment on all claims. Doc. 166. Plaintiffs

1 have appealed that decision, and now seek an injunction to prohibit mining while the
2 appeal is pending.

3 **II. Legal Standard.**

4 “[I]njunctive relief [is] an extraordinary remedy that may only be awarded upon a
5 clear showing that the plaintiff is entitled to such relief.” *Winter v. Natural Res. Defense*
6 *Council, Inc.*, 555 U.S. 7, 22 (2008). The standard for evaluating injunctions pending
7 appeal is the same as the standard for evaluating preliminary injunctions. *Lopez v.*
8 *Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). The movant “must establish that he is
9 likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence
10 of . . . relief, that the balance of equities tips in his favor, and that an injunction is in the
11 public interest.” *Winter*, 555 U.S. at 20. Alternatively, if the movant “can only show that
12 there are ‘serious questions going to the merits’ – a lesser showing than the likelihood of
13 success on the merits – then [an] injunction may still issue if the ‘balance of hardships
14 tips *sharply* in the plaintiff’s favor,’ and the other two *Winter* factors are satisfied.” *Shell*
15 *Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (quoting *Alliance*
16 *for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)) (emphasis in
17 original).

18 **III. Analysis.**

19 The Court notes that it has already denied a request for a preliminary injunction in
20 this case. Doc. 86. Plaintiffs nonetheless argue that they are likely to succeed on the
21 merits of their appeal or, alternatively, that they have raised serious questions on each of
22 their claims. Plaintiffs argue that mining will cause irreparable harm and that the balance
23 of hardships tips sharply in their favor. Defendants dispute these claims.

24 **A. Likelihood of Success and Serious Questions.**

25 The likelihood of success standard is easily understood. “Serious questions are
26 ‘substantial, difficult and doubtful, as to make them a fair ground for litigation and thus
27 for more deliberative investigation.’” *Republic of the Philippines v. Marcos*, 862 F.2d
28 1355, 1362 (9th Cir. 1988) (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d

1 738, 740 (2d Cir. 1952)). “Serious questions need not promise a certainty of success, nor
2 even present a probability of success, but must involve a *‘fair chance of success* on the
3 merits.” *Id.* (quoting *Nat’l Wildlife Fed’n v. Coston*, 773 F.2d 1513, 1517 (9th Cir.
4 1985)) (emphasis added). The question for the Court to decide, therefore, is whether
5 Plaintiffs have shown either a likelihood of success or a fair chance of success on the
6 merits of their appeal.

7 Plaintiffs’ claims are brought under the Administrative Procedure Act (“APA”),
8 which requires a plaintiff challenging an agency action to show that the action was
9 arbitrary and capricious or not in accordance with the law. “This standard of review is
10 ‘highly deferential, presuming the agency action to be valid and affirming the agency
11 action if a reasonable basis exists for its decision.’” *Nw. Ecosystem Alliance v. U.S. Fish*
12 *& Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007) (quoting *Independent Acceptance*
13 *Co. v. California*, 204 F.3d 1247, 1251 (9th Cir. 2000)).

14 **1. Claim One.**

15 Before approving the Plan of Operations for the Canyon Mine in 1986, the Forest
16 Service completed a full NEPA Environmental Impact Statement (“EIS”). A.R. 461-693.
17 On September 26, 1986, the Forest Service issued a Record of Decision (“ROD”)
18 approving a Plan of Operations for the Canyon Mine. A.R. 915-29. Administrative
19 appeals followed (A.R. 3932), and the Deputy Regional Forester and Chief of the Forest
20 Service both affirmed the ROD.

21 The Havasupai Tribe filed a lawsuit challenging approval of the Canyon Mine.
22 *See Havasupai Tribe v. United States*, 752 F. Supp. 1471 (D. Ariz. 1990). Among other
23 arguments, the tribe claimed that the EIS failed to comply with NEPA. The district court
24 granted summary judgment to the Forest Service, *id.* at 1489-1505, and the Ninth Circuit
25 affirmed, *see Havasupai Tribe v. United States*, 943 F.2d 32 (9th Cir. 1991).

26 Claim one in this case alleged, nonetheless, that the VER Determination recently
27 conducted by the Forest Service constituted a new “major federal action” and required an
28 entirely new NEPA EIS for the Canyon Mine. The Court disagreed, finding that the VER

1 Determination was not a major federal action because it was not a “required approval” for
2 operations to continue at the mine. Doc. 166 at 24-27. The Court further found that
3 NEPA obligations were not triggered by the “mere continued operation of a NEPA-
4 approved facility.” *Id.* at 27. The Court relied, among other cases, on *Center for*
5 *Biological Diversity v. Salazar* (“*CBD*”), 791 F. Supp. 2d 687 (D. Ariz. 2011), *aff’d*, 706
6 F.3d 1086 (9th Cir. 2013). Doc. 166 at 22-27.

7 In *CBD*, this Court and the Ninth Circuit found that a mining plan of operations
8 approved in 1988, with full NEPA review, did not require additional NEPA review when
9 the operator sought to resume mining nearly 20 years later. *CBD*, 791 F. Supp. 2d at 704.
10 The only distinguishing fact between this case and *CBD* is that the land on which the
11 Canyon Mine is located has been withdrawn by the Department of the Interior (“DOI”)
12 from the further location of mining claims (the “Withdrawal”). The Court found in its
13 summary judgment ruling, however, that the Withdrawal did not require completion of a
14 VER Determination before operations could continue. Indeed, the Withdrawal
15 specifically contemplated that the Canyon Mine would continue operating. A.R. 10314.

16 As the Court noted in its order, there is a difference between valid existing rights
17 and a valid existing rights determination, and neither the Withdrawal nor the Federal
18 Land Policy and Management Act (“FLPMA”) requires a VER Determination. Doc. 166
19 at 10. The fact that the Withdrawal was “subject to valid existing rights” meant only that
20 it did not extinguish valid rights in existence at the time of the Withdrawal; it said
21 nothing about when or how a review of those rights must occur. When the Withdrawal
22 did address the requirement of VER Determinations, it said they would be required only
23 for “new” Plans of Operations, not existing plans. A.R. 10314-15. The Court carefully
24 reviewed the relevant BLM and Forest Service regulations and guidance documents and
25 found no support for Plaintiffs’ contention that a VER Determination was required before
26 mining operations could resume under the previously-approved Plan. Doc. 166 at 7-11.

27 Plaintiffs could not then, and still cannot, point to any statute, regulation, guidance
28 document, or case that requires a VER Determination for a previously-approved plan of

1 operations on withdrawn land. Thus, the Forest Service reasonably found that no new
2 major federal action had occurred, and its failure to conduct a new EIS was not arbitrary
3 and capricious. Plaintiffs have not shown either a likelihood of success or a fair chance
4 of success on claim one.

5 **2. Claims Two and Three.**

6 Claim two alleged that the Forest Service was required to complete full
7 consultation under NHPA § 106. Claim three alleged that the Forest Service erroneously
8 applied the § 106 consultation process set forth in 36 C.F.R. § 800.13(b)(3). The Court
9 found that the VER Determination was not a permit, license, or approval, and that
10 resumption of mining was therefore not an “undertaking” sufficient to trigger full § 106
11 consultation under the NHPA. Doc. 166 at 28-29. The Court further found that the
12 Forest Service’s decision to apply § 800.13(b)(3) was plainly reasonable in light of the
13 clear language of the regulation and the unique situation in this case. *Id.* at 30-41.

14 Plaintiff Havasupai Tribe simply reasserts the arguments made in the summary
15 judgment briefing and argues that they raise serious questions. Doc. 170 at 5-6. The
16 Court had little difficulty with these arguments in its summary judgment ruling and does
17 not find them more persuasive now. Rather than repeat its reasoning here, the Court
18 refers the reader to pages 27-41 of the summary judgment ruling (Doc. 166). Those
19 pages explain in detail why claims two and three do not succeed on their merits and do
20 not present a fair chance for success on appeal.

21 **3. Claim Four.**

22 Claim four challenged the substance of the VER Determination. The Court found,
23 however, that Plaintiffs could not assert this claim because their interests did not fall
24 within the “zone of interests” Congress sought to protect in the Mining Law of 1872.
25 Doc. 166 at 20. The Court noted that the “obvious purpose” of the Mining Law “is to
26 protect economic interests in mineral deposits, not the environmental or historical
27 interests held by Plaintiffs.” *Id.* at 19. The Court relied on the Supreme Court’s finding
28 that the Mining Law’s “obvious intent was to reward and encourage the discovery of

1 minerals that are valuable in an economic sense.” *United States v. Coleman*, 390 U.S.
2 599, 602 (1968). Because claim four essentially challenged Energy Fuels’ rights to the
3 uranium beneath Canyon Mine and Plaintiffs did not assert a competing interest in the
4 minerals, Plaintiffs were unable to use the Mining Law to protect their environmental
5 interests. The Court noted that to hold otherwise would give environmental plaintiffs the
6 right to challenge every governmental verification of private mineral rights, which would
7 undermine the obvious purpose of the statute. Doc. 166 at 18. Plaintiffs present no
8 arguments that seriously undermine the Court’s interpretation of the Mining Law or their
9 lack of interests under that law.

10 Plaintiffs focus heavily on the FLPMA, asserting that they fall within its broad
11 statutory zone of interests. As the Court previously noted, however, the sections of the
12 FLPMA to which Plaintiffs cite are not related to VER Determinations or mineral
13 examinations. Doc. 166 at 19 n. 8. They deal with the DOI’s authority to withdraw land,
14 and do not provide the Court with any relevant law to apply in deciding claim four. *Id.*
15 Whether Plaintiffs may assert claim four “is to be determined not by reference to the
16 overall purpose of the Act in question . . . , but by reference to the particular provision of
17 law upon which the plaintiff relies.” *Bennett v. Spear*, 520 U.S. 1154, 1175-76 (1997);
18 *see also Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 940 (9th Cir. 2005)
19 (quoting *Bennett*); *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1200 (9th Cir. 2004) (the
20 court must “look ‘to the substantive provisions of the [statutes], the alleged violations of
21 which serve as the gravamen of the complaint’”) (quoting *Bennett*, 520 U.S. at 175).
22 Because the FLPMA sections cited by Plaintiffs do not provide the law to be applied in
23 claim four, those sections do not establish Plaintiff’s right to bring that claim.

24 Plaintiffs have not shown either a likelihood of success or a fair chance of success
25 on claim four.

26 **B. Balance of Hardships.**

27 Even if Plaintiffs could show serious questions going to the merits of their claims,
28 they have failed to show that the balance of hardships tips *sharply* in their favor. *See*

1 *Shell Offshore*, 709 F.3d at 1291. Plaintiffs argue that they will suffer irreparable
2 injuries, including religious and cultural damage, groundwater contamination, and other
3 irreversible environmental impacts. Energy Fuels argues that an injunction would force it
4 to shut down active mining operations, which would cost at least \$945,000, force it to lay
5 off employees, and cause it to default on contractual obligations. It also asserts that
6 mining has already been delayed for several years because of this lawsuit. “Both the
7 economic and environmental interests are relevant factors, and both carry weight in this
8 analysis.” *League of Wilderness Defenders v. Connaughton*, 752 F.3d 755, 765 (9th Cir.
9 2014).

10 The Court has previously addressed the balance of hardships in this case. In ruling
11 on Plaintiffs’ request for a preliminary injunction, the Court explained:

12 The Court notes . . . that Plaintiffs significantly delayed seeking
13 injunctive relief. The Forest Service issued a press release announcing that
14 it had completed the Mine Review on June 25, 2012. A.R. 10638-39. On
15 the same day, the Forest Service notified Plaintiffs Center for Biological
16 Diversity and Havasupai Tribe of its Mine Review decision. A.R. 10642,
17 10690-91. Plaintiffs did not file suit until March 7, 2013 (Doc. 1), and did
18 not seek a preliminary injunction until April 24, 2013 (Doc. 36). This
19 unexplained ten-month delay in seeking injunctive relief “implies a lack of
20 urgency and irreparable harm.” *Oakland Tribune, Inc. v. Chronicle Pub.
21 Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985).

22 * * *

23 The harm identified by each side of this litigation is serious.
24 Potential injuries to Plaintiffs are procedural, religious, and aesthetic, while
25 potential injuries to Defendants are financial. Although persons can differ
26 on the respective importance of these kinds of injuries, the question is not
27 which side’s potential injury is greater, but whether the balance of
28 hardships “tips sharply” in Plaintiff’s favor. *Alliance for the Wild Rockies*,
632 F.3d at 1131. Given the significant financial losses that might be
caused to Defendant-Intervenors by an injunction, as well as Plaintiffs’
delay in seeking injunctive relief, the Court cannot conclude that the
balance tips “sharply” in Plaintiffs’ favor. As a result, Plaintiffs cannot
obtain a preliminary injunction by raising serious questions; they must
show a likelihood of success on the merits.

1 Doc. 86 at 5-7.

2 In their current motion, Plaintiffs emphasize potential injuries to the environment.
3 They assert that mining will “degrade important regional springs” and “elevated uranium
4 concentrations” will contaminate groundwater. Doc. 177 at 15. The EIS for the Canyon
5 Mine, however, explained that Energy Fuels did not propose operating at the depth of the
6 Redwall-Muav aquifer mentioned in Plaintiffs’ evidence, and that the Forest Service
7 expected no effect on the springs the aquifer feeds. A.R. 773; *see* Doc. 53-5, Decl. of
8 Roger D. Congdon ¶ 5. The 2012 Mine Review reconsidered this analysis and found “no
9 new information or changed circumstance related to ground water that would indicate the
10 original analysis is insufficient.” A.R. 10624. The EIS for the DOI Withdrawal found
11 that the Canyon Mine “is not located within the protective buffer area calculated for a
12 perched aquifer spring.” A.R. 9528-21. Indeed, the Canyon Mine is located where any
13 seepage would flow away from Grand Canyon springs. A.R. 9502; Congdon Decl. ¶¶ 6,
14 8, 10.

15 Evidence cited by Plaintiffs suggests only a small likelihood of harm. *See*
16 Doc. 19-2 at 23-24 (letter from a hydrogeologist opining that “although there is *a lot of*
17 *uncertainty* in our understanding of flow . . . and how it is connected to mineralization in
18 these breccia pipes, . . . there is *potential* harm” to the regional aquifers) (emphasis
19 added); Doc. 63-1, ¶¶ 4, 7, 14-18 (affidavit from a hydrologist stating that there is a “high
20 likelihood” that the mineshaft will pierce and drain the perched aquifer, but at the same
21 time noting that “significant amounts of water *could* be lost and rerouted by piercing the
22 perched aquifers during mining operations”) (emphasis added). Moreover, in connection
23 with the Withdrawal, BLM concluded that there was only a “low potential for major
24 adverse effects” to groundwater. *See Yount v. Salazar*, No. CV-12-8038-PCT-DGC,
25 2014 WL 4904423, at *12-13 (D. Ariz. Sept. 30, 2014) (noting that BLM found a “low
26 probability of groundwater contamination” and a “low potential for major adverse
27 effects”). The evidence fails to persuade the Court that these small risks tip the balance
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1 of hardships sharply in favor of Plaintiffs.¹

2 In addition, the Tribe fails to persuade the Court that its religious and cultural
3 harms greatly outweigh those of Energy Fuels. As noted above, Plaintiffs waited more
4 than ten months before filing this lawsuit and seeking preliminary injunctive relief. In
5 addition, as the Federal Defendants note, the Tribe has declined to engage in NHPA
6 consultation for more than two years. The Forest Service acted reasonably “by providing
7 immediate notice of its decision [that §800.13(b)(3) applies], initiating consultation with
8 tribes” over the impacts of mining on Red Butte, and “planning and attending meetings to
9 discuss cultural and environmental impacts over several months.” Doc. 166 at 41. “Had
10 this lawsuit not intervened, the Forest Service and the tribes might well have executed a
11 memorandum of agreement regarding appropriate ways to minimize effects on Red
12 Butte.” *Id.* Equity is not served when the Tribe refuses to consult with the Forest Service
13 about protecting its religious interests and then seeks an injunction to protect those same
14 interests on the ground that the Forest Service has failed to consult. *See Apache Survival*
15 *Coal. v. United States*, 21 F.3d 895, 907 (9th Cir. 1994) (applying laches when “the [San
16 Carlos Apache] Tribe ignored the *very process* that its members now contend was
17 inadequate”) (emphasis in original).

18 The Tribe has submitted declarations by Havasupai elders stating that the “past
19 mining activities have ‘wounded’ the sacred site, and that future significant impacts could
20 ‘kill’ the sacred site, and by extension, the religion of the Havasupai people.” Doc. 39 at
21 27. The Court does not take these declarations lightly, but they provide little basis upon
22 which the Court can conclude that continued operations at the Canyon Mine – as opposed
23 to the substantial operations that have occurred at the site to date – will tip the balance of

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25 ¹ The undersigned judge upheld the Withdrawal in the face of challenges by
26 mining groups and similar interests. *Yount*, 2014 WL 4904423, at *27. The Court did
27 not base this holding on the fact that uranium mining would in fact harm the Grand
28 Canyon, but instead on DOI’s substantial discretion to protect a national treasure like the
Grand Canyon in the face of uncertainty. *Id.* This case presents a different question –
whether Plaintiffs have provided evidence showing that the balance of hardships tips so
strongly in their favor that the Court should enjoin mining activities subjected to full
NEPA review and approved by the Forest Service. The Court finds that Plaintiffs have
not carried that burden.

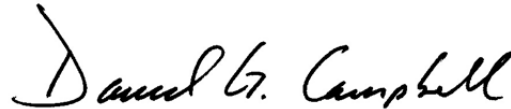
1 hardships sharply in the Tribe’s favor. This Court and the Ninth Circuit previously held
2 that the Canyon Mine has not denied the Tribe access to its religious sites or prevented
3 Tribe members from practicing their religion. *See Havasupai Tribe*, 752 F. Supp. at
4 1486, *aff’d*, 943 F.2d 32 (9th Cir. 1991). While the Court recognizes the potential
5 religious impacts that mining may cause, it cannot conclude that these harms – which the
6 Tribe has not sought to protect through consultation with the Forest Service – greatly
7 outweigh the harms alleged by Energy Fuels.

8 **C. Conclusion.**

9 Plaintiffs have failed to show serious questions on the merits of their claims or that
10 the balance of hardships tips sharply in their favor. Accordingly, the Court will not grant
11 an injunction pending appeal. *See Dahl v. HEM Pharm. Corp.*, 7 F.3d 1399, 1403 (9th
12 Cir. 1993).

13 **IT IS ORDERED** that Plaintiffs’ motions for an injunction pending appeal
14 (Docs. 169, 177) are **denied**.

15 Dated this 26th day of May, 2015.

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David G. Campbell
United States District Judge