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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; Center for Biological
Diversity; Sierra Club; and Havasupai Tribe,

10 Plaintiffs,

11 v.

12 Heather Provencio, Forest Supervisor,
13 Kaibab National Forest; and
14 United States Forest Service,
U.S. Department of Agriculture,

15 Defendants,

16 and

17 Energy Fuels Resources (USA), Inc.; and
18 EFR Arizona Strip LLC,

19 Intervenor-Defendants.
20

No. CV-13-8045-PCT-DGC

ORDER

21 This case arises from the proposed reopening of the Canyon Mine, a 17-acre
22 uranium mine located six miles south of the Grand Canyon in the Kaibab National Forest.
23 The Havasupai Tribe and three environmental groups – Grand Canyon Trust, Center for
24 Biological Diversity, and Sierra Club – brought this suit for declaratory and injunctive
25 relief against the United States Forest Service and the Supervisor of the Kaibab National
26 Forest (collectively, the “Forest Service”). Doc. 1. The Canyon Mine’s owners and
27 operators, Energy Fuels Resources (USA), Inc. and EFR Arizona Strip, LLC (together,
28 “Energy Fuels”), intervened as Defendants. Docs. 30, 31, 35.

1 The parties have filed motions for summary judgment on the only remaining claim
2 in the case – claim four – which challenges the Forest Service’s determination that Energy
3 Fuels had “valid existing rights” at the Canyon Mine when the Department of the Interior
4 (“DOI”) withdrew public lands around the Grand Canyon from new mining claims.
5 Docs. 226, 233, 234; *see* Doc. 115 ¶¶ 89-92. The Court heard oral argument by telephone
6 conference on May 11, 2020. *See* Doc. 242. For reasons stated below, the Court will grant
7 summary judgment in favor of Defendants.

8 **I. Background.**

9 The history of the Canyon Mine spans more than 30 years. In October 1984, Energy
10 Fuels submitted to the Forest Service a proposed Plan of Operations for the mine. AR
11 Doc. 2 at 193-221.¹ The Forest Service completed a Final Environmental Impact Statement
12 (“FEIS”) pursuant to the National Environmental Policy Act (“NEPA”). AR Doc. 3. In
13 September 1986, the Forest Service issued a Record of Decision (“ROD”) approving
14 construction and operation of the Canyon Mine under a modified version of the Plan (the
15 “1986 Plan”). AR Doc. 6. Several administrative appeals followed, and the Forest Service
16 affirmed the ROD. AR Doc. 188 at 3972. The Ninth Circuit rejected a challenge to the
17 ROD in August 1991. *See Havasupai Tribe v. United States*, 943 F.2d 32 (9th Cir. 1991).

18 Shortly thereafter, Energy Fuels began constructing the mine. It built surface
19 structures and sank the first 50 feet of a 1,500-foot shaft, but placed the mine on standby
20 status in 1992 because of low prices in the uranium market. AR Doc. 525 at 10487. For
21 the next 20 years, the mine was inactive but maintained under the interim management
22 portions of the 1986 Plan. AR Doc. 481 at 10314.

23 In January 2012, the Secretary of the DOI, acting under authority of the Federal
24 Land Policy and Management Act (“FLPMA”), withdrew for 20 years some one million
25 acres of public land from mineral location and entry under the Mining Law of 1872, 30

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28 ¹ Citations to the administrative record are denoted “AR,” followed by the relevant
document and page number. Citations to documents filed in the Court’s docket are denoted
“Doc.,” and pin cites are to page numbers placed at the top of each page by the Court’s
electronic filing system. For simplicity, the Court will refer to all entities that have owned
the Canyon Mine during the last 30 years as “Energy Fuels.”

1 U.S.C. § 22 (the “Withdrawal”). AR Doc. 481 at 10308-31; 77 Fed. Reg. 2563, 2012 WL
2 122658 (Jan. 18, 2012); *see* 43 U.S.C. § 1714; *Nat’l Mining Ass’n v. Zinke*, 877 F.3d 845
3 (9th Cir. 2017).² The Withdrawal covered the location of the Canyon Mine, but did not
4 disturb valid existing mining rights. 77 Fed. Reg. 2563. Before approving the Withdrawal,
5 which had been proposed in 2009, the DOI prepared an Environmental Impact Statement.
6 AR Docs. 446, 447; 74 Fed. Reg. 35,887-01, 2009 WL 2143370 (July 21, 2009). The
7 statement noted the existence of the Canyon Mine and assumed it would resume operations
8 at some point. AR Doc. 446 at 9090, 9093.

9 In August 2011, Energy Fuels notified the Forest Service that it intended to resume
10 mining under the 1986 Plan. AR Doc. 439. In response, the Forest Service decided to
11 prepare a mineral report to determine whether the Canyon Mine had “valid existing rights,”
12 and therefore was not affected by the Withdrawal (the “VER Determination”). *See* 43
13 C.F.R. § 3809.100(a). Although Energy Fuels initially asserted that additional government
14 approvals were not required before the mine reopened (AR Doc. 443), Energy Fuels agreed
15 to withhold shaft sinking until the VER Determination was finished (Doc. 123-2 at 2-3).³

16 The Mining Law of 1872 provides that citizens may acquire rights to “valuable
17 mineral deposits” on federal lands. 30 U.S.C. § 22. To determine whether Energy Fuels
18 had valid existing rights in the Canyon Mine at the time of the Withdrawal, the Forest
19 Service therefore assessed whether the rights were “valuable.” The VER Determination,
20 finished on April 18, 2012, found that a “valuable mineral deposit” existed at the Canyon
21 Mine because, “under present economic conditions, the uranium deposit . . . could be
22 mined, removed, transported, milled and marketed at a profit.” AR Doc. 525 at 10483,

23
24 ² Mineral entry refers to “the right of entry on public land to mine valuable mineral
25 deposits,” and mineral location is “the act or series of acts whereby the boundaries of a
claim are marked.” *Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745, 750 n.3
(D.C. Cir. 2007). The Withdrawal foreclosed the development of new mining claims.

26 ³ Energy Fuels resumed sinking the shaft after the VER Determination was
27 completed in 2012, and finished the shaft in March 2018. *See U.S. Dep’t of Agric., Forest*
28 *Serv., Canyon Uranium Mine*, <https://www.fs.usda.gov/detail/kaibab/home/?cid=fsm91050263> (last visited May 4, 2020). Energy Fuels advised the Forest Service that ore
production would not occur immediately due to low uranium prices, and has provided no
estimate for when ore production will begin. *Id.*

1 10506. The Forest Service concluded that Energy Fuels had “valid existing rights that were
2 established prior to the Withdrawal,” and that further operations at the mine were not barred
3 by the Withdrawal. *Id.*

4 In addition to the VER Determination, the Forest Service performed a “Mine
5 Review” before the mine reopened. AR Doc. 533. The review was conducted by a
6 13-person interdisciplinary team with expertise in minerals and geology, surface and
7 groundwater, air quality, transportation, tribal consultation, heritage resources, vegetation,
8 the NEPA, and socioeconomic issues. *Id.* at 10597. Among other matters, the team
9 evaluated the sufficiency of the 1986 Plan and the original FEIS and ROD; historical and
10 religious issues related to local tribes; the effect of resumed operations on the quality of
11 air, surface water, and groundwater; and the effect of resumed operations on wildlife and
12 any threatened, endangered, or sensitive species. *Id.* at 10592–637. The Mine Review was
13 finished on June 25, 2012, and concluded that operations could resume at the Canyon Mine
14 under the 1986 Plan. *Id.* at 10594.

15 Plaintiffs filed this lawsuit in March 2013, seeking declaratory and injunctive relief
16 under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706. Doc. 1. Plaintiffs’
17 amended complaint asserted four claims: (1) the Forest Service violated the NEPA by not
18 conducting a new environmental impact study in connection with the VER Determination
19 (Doc. 115 ¶¶ 70-77); (2) the Forest Service violated the National Historic Preservation Act
20 (“NHPA”) by failing to complete a full § 106 historic property review before approving
21 resumed operations at the mine (*id.* ¶¶ 78-83); (3) the Forest Service alternatively violated
22 the NHPA by not properly updating its original § 106 analysis (*id.* ¶¶ 79-88); and (4) the
23 Forest Service violated the Mining Law, the FLPMA, and the 1897 Organic Act by failing
24 to account for various costs in the VER Determination (*id.* ¶¶ 89-92).

25 On April 7, 2015, the Court granted summary judgment to Defendants on all claims.
26 Doc. 166. On claims one through three, the Court held that the VER Determination was
27 not a “major federal action” requiring a new environmental impact study under the NEPA
28 or an “undertaking” requiring a full § 106 consultation under the NHPA, and that the Forest

1 Service’s NHPA review under 36 C.F.R. § 800.13(b)(3) was appropriate and reasonable.
2 *Id.* at 22-41. On claim four, the Court held that Plaintiffs had Article III standing and that
3 the VER Determination was a “final agency action” subject to review under the APA, but
4 that Plaintiffs lacked prudential standing because claim four fell outside the Mining Law’s
5 “zone of interests.” *Id.* at 13-21; *see Grand Canyon Trust v. Williams*, 98 F. Supp. 3d 1044
6 (D. Ariz. 2015).

7 The Ninth Circuit initially affirmed on all grounds. *See Havasupai Tribe v.*
8 *Provencio*, 876 F.3d 1242 (9th Cir. 2017). One year later, however, the Ninth Circuit
9 withdrew its original decision and entered an amended order that affirmed the rulings on
10 claims one through three, but held that claim four fell within the FLPMA’s zone of
11 interests. The Ninth Circuit remanded claim four for consideration on the merits.
12 *Havasupai Tribe v. Provencio*, 906 F.3d 1155, 1166-67 (9th Cir. 2018).

13 The parties now move for summary judgment on claim four. Docs. 226, 233, 234.
14 Plaintiffs argue that the VER Determination is invalid because the Forest Service failed to
15 consider all relevant costs in its profitability analysis of the Canyon Mine. Doc. 228 at 13-
16 22. Defendants contend that Plaintiffs lack Article III standing and otherwise are entitled
17 to no relief because the VER Determination was not legally required. Docs. 233-1 at 8-11,
18 234-1 at 12-20. Defendants further contend that claim four fails on the merits because the
19 VER Determination included all relevant costs and must be upheld under the APA’s
20 deferential standard of review. Docs. 233-1 at 11-20, 234-1.

21 **II. Article III Standing.**

22 The Court previously held that the Forest Service’s VER Determination was not
23 required by law – that mining could have resumed at the Canyon Mine on the basis of the
24 1986 Plan. Doc. 166 at 6-11. Based on this holding, the Forest Service now contends that
25 Plaintiffs lack Article III standing to bring claim four. Doc. 234-1 at 12-20. It argues that
26 because authorization to operate the mine derives solely from the 1986 Plan approval, and
27 not from the VER Determination, Plaintiffs’ alleged injuries are traceable to the 1986 Plan
28 approval alone. *Id.* at 19. As a result, claim four fails two requirements of Article III

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