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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

IDAHO CONSERVATION LEAGUE,)
IDAHO RIVERS UNITED, and)
GOLDEN EAGLE AUDUBON SOCIETY)
Plaintiffs,)
)
vs.)
)
U.S. FOREST SERVICE)
)
Defendant.)

No. 1:16-cv-25-EJL

**PLAINTIFFS’ OPENING BRIEF
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

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INTRODUCTION

The CuMo Exploration Project (“Project”) will cause extensive ground disturbance in the heart of the world’s largest population of Sacajawea’s bitterroot—a “critically imperiled” plant that is “the highest priority rare plant species managed by the Boise National Forest,” according to the Forest Service’s March 2015 *Supplemental Environmental Assessment* (“SEA”). The SEA presents substantial new information about the species, including that populations at the Project site are much larger than previously known; and that a 2014 wildfire and fire control line went through the main population area. Yet the scope of their impacts is still unknown, because necessary studies have not been conducted.

The SEA also admits that Project activities (constructing roads and drill pads, vehicle traffic, and others) pose adverse impacts to Sacajawea’s bitterroot plants, and that “impacts to the CuMo population can affect the viability of the species.” CU084003. Yet despite all the new information and scale of adverse impacts presented in the SEA, the Forest Service has again approved the Project without preparing a full Environmental Impact Statement (“EIS”) as required by NEPA, instead asserting there will be no significant impacts to the rare plant in the *Supplemental Decision Notice and Finding and Finding of No Significant Impact* (“SDN/FONSI”). See CU080301–07. Because this finding is contradicted by the new evidence showing potentially significant Project impacts to this rare imperiled plant, and is based on an inadequate SEA as shown below, the Court should grant summary judgment to Plaintiffs, vacate, reverse, and remand the SEA and SDN/FONSI, and order a full EIS.

The Court should also rule for Plaintiffs on the Forest Service’s failure to conduct a full analysis of the Project’s potential groundwater impacts, despite the Court’s prior reversal and remand on this same basis. See *Idaho Conservation League v. U.S. Forest Serv.*, 2012 WL 3758161, at *16–17 (D. Idaho, 2012) (“*ICL*”). In the SEA, the agency failed to provide baseline

information and analysis it concedes are needed to understand the extent of potential impacts to groundwater and surface water. In addition, despite admitting that CuMo's drilling and related operations on its private land adjacent to the Project site can further impact groundwater, the SEA fails to analyze the cumulative impacts from these activities, in violation of NEPA.

STATEMENT OF RELEVANT FACTS

Because the Court is familiar with the CuMo Project from the prior litigation, Plaintiffs provide a brief overview here of more recent development and new information from the SEA and SDN/FONSI. Plaintiffs' Separate Statement of Undisputed Facts ("SOF"), filed herewith, provides more factual details and citations to the Administrative Record.

A. New Information On Critically Imperiled Sacajawea's Bitterroot.

Sacajawea's bitterroot ("LESA") is a ground-hugging herb endemic to the mountains of central Idaho, with only 30 known occurrences. SOF ¶ 6–8. As the SEA admits, knowledge of plant populations at the Project site "has changed substantially." *Id.* Previously estimated at 1,500 plants, new surveys found much larger populations at the site, estimated at over 13,000 plants—or nearly 40 percent of the entire species. *Id.* The species is now deemed "critically imperiled," has been elevated to a Forest Service "sensitive species," and "is the highest priority rare plant managed by the Boise National Forest." *Id.* The Forest Service has further acknowledged that the Project site is uniquely important to the long-term survival of the species, and considers it "to be a stronghold for the species' future persistence." SOF ¶ 9. The SEA even admits that "impacts to the CuMo population can affect the viability of the species." *Id.*

Yet despite finding larger populations at the Project site than previously estimated, the SEA painted a bleak picture for the survival of Sacajawea's bitterroot—both at the Project site and across the species' range—due to multiple threats and factors of decline now known to affect the plant. SOF ¶ 10. "[G]iven the extremely small amount of actual occupied habitat . . . the

CuMo LESA population remains at risk of extirpation from stochastic events including human disturbance and environmental stressors in the future.” *Id.* The agency also now recognizes the importance of protecting the plant’s pollinators. SOF ¶ 11. The SEA found that maintaining pollinator habitat at the site “is essential to the long-term persistence of the species.” *Id.*

At the Project site, occupied and potential *Sacajawea*’s bitterroot habitat “has been impacted by previous and current activities including road construction, road use, drilling, and grazing.” SOF ¶ 12. The SEA admitted that constructing new roads, drill pads, and other ground disturbance can destroy and degrade habitat and plants by crushing or uprooting plants, depositing slash or debris on plants, spreading exotic weeds, changing hydrology and exposure, causing mortality from soil disturbance and compaction, and depositing dust on plants and pollinator habitat. *Id.* Plants have been found in some existing roadbeds at the site, so continued use and maintenance of such roads may adversely impact the plants through soil compaction and crushing, and indirectly by dust deposition which could hinder pollination. *Id.*

In July 2014, a wildfire burned through the Project site. SOF ¶ 14. A fire line was bulldozed and hand plowed through the site. *Id.* The fire and fire line “passed through the densest LESA habitat at CuMo, which encompasses approximately 75 percent of the known LESA population.” *Id.* Vegetation was cut and piled within occupied and potential habitat, covering approximately one acre of occupied habitat. *Id.* Yet the extent of adverse impacts on *Sacajawea*’s bitterroot is unknown since the site has not been resurveyed. *Id.*

B. Approval of Exploration Activities in *Sacajawea*’s Bitterroot Habitat.

Despite all the new information, the acknowledged vulnerability of *Sacajawea*’s bitterroot populations at the site, and the unknown and potentially adverse cumulative impacts of the Grimes Fire and fire line construction, the SDN/FONSI again found the Project would have no significant impacts; and thus determined not to prepare a full EIS for the Project. SOF ¶ 6.

To reach this conclusion, the Forest Service relied on mitigation measures that are “expected to reduce the risk to LESA plants and habitat through timing and/or spatial restrictions.” SOF ¶ 23. These mitigation measures center on establishment of a Plant Conservation Area (“PCA”) and project design features. *Id.* The PCA includes all areas where plants have been identified at the site plus a 300-meter buffer to protect pollinators. SOF ¶ 15. The PCA is habitat the Forest Service “considers essential for the conservation of this species.” *Id.* (emphasis added). Yet the agency did not impose any restrictions on CuMo’s activities to protect this essential habitat; rather, the mitigation merely instructs CuMo to try to avoid harmful activities in the PCA, without prohibiting new roads and drill pads and other activities in the PCA (or in potential habitat outside the PCA). *Id.* No areas are placed off-limits, and there are no limits to the total amount of road and drill pad construction and vehicle traffic. *Id.*

Moreover, CuMo’s operations will concentrate in and near the PCA. SOF ¶ 18–19. While road and drill pad locations may change, Figure 10e in the SEA (revised in the SDN/FONSI) shows many new and existing roads that CuMo will build, open, maintain, and use within the PCA or in potential habitat. *Id.* Vehicle traffic would occur in the PCA to access drill sites in the PCA and other areas, as the Project’s “Main Access Road” passes directly through the PCA and zigzags through the largest population of the plant in the world. *Id.* Yet the agency concluded there would be virtually no impact without even estimating the amount of exploration activity that will occur in occupied habitat, the PCA, and potential habitat. SOF ¶ 21–22.

C. The Forest Service’s Treatment Of Drilling Impacts To Groundwater.

In the prior case, the Court found the Forest Service failed “to address the issue regarding the impact the drilling itself will have on the hydrology of the groundwater.” *ICL*, 2012 WL 3758161 at *14. “Boring down to 3,000 feet over 200 times into the subsurface of the area undoubtedly warrants some analysis and consideration of the impact of the drilling itself.” *Id.* at

*14. Because the 2011 EA and DN/FONSI failed to “address concerns regarding the lack of baseline data, analysis, and monitoring of groundwater,” the Court reversed and remanded for the Forest Service “to undertake further analysis concerning groundwater and determine whether to issue a supplemental EA or if a full EIS is required.” *Id.* at *17–18.

On remand, the Forest Service declined to prepare an EIS, electing instead to supplement the “Water Quality” subchapter of the EA. SOF ¶ 24–25. The SEA acknowledged that drilling can impact groundwater hydrology in the following ways: drilling fluid can mix with groundwater; drilling can cause groundwater to mix with lower quality groundwater; drilling can alter groundwater flows and discharges; drilling can cause groundwater and surface water to mix and encounter contaminants; and drill fluids and drill cuttings can leak from mud sumps (waste pits) into groundwater. *Id.* Yet the SDN/FONSI dismissed these impacts as posing no significant impacts, and thus the Forest Service again refused to prepare a full EIS. *Id.*

The agency reached this conclusion despite admitting that it was “lacking” information about aquifers at the site, and had only “limited” groundwater quality data. SOF ¶ 26–27. Instead of gathering site-specific information to fill in these gaps, the agency cut corners. *Id.* A month after the August 2012 remand, CuMo took water quality samples on one day at only four locations. *Id.* Over the next three years while the Project was being reviewed, no more water quality samples were taken. *Id.* Further, the agency failed to map and sample the site’s numerous streams, springs, and seeps. *Id.* Based on available information, the agency posited that the site has near-surface perched aquifers in the upper 200 to 300 feet of bedrock, and may have deeper aquifers. *Id.* The SEA noted that the sites’ near-surface perched aquifers are “likely to have some connection with (thereby feeding) the surface water systems.” *Id.* But instead of mapping and sampling this surface water system first, the SDN/FONSI directs CuMo to identify these sources and take water quality samples later, while the Project is underway. *Id.*

The Forest Service failed to follow its own guidance document, *Working Guide: Evaluating Groundwater Resources for Mineral Exploration Drilling*, adopted in August 2014 following the Court’s remand order. SOF ¶ 29–30. The *Working Guide* explains the importance of inventorying springs, wetlands, and streams in and adjacent to the project area to help analyze the potential for dewatering or contamination of these features from drilling; but these have not been inventoried here. *Id.* The *Working Guide* also underscores that “the anticipated location, number, depth, and spacing of drill holes is essential for understanding the potential effects on groundwater.” *Id.* Yet the SEA simply assumed CuMo’s drill holes will be evenly spaced across the 2,885-acre Project area, when in reality they will be clustered closer to each other. *Id.*

The Forest Service also never addressed the warning from the Idaho Department of Environmental Quality (“DEQ”) that the proposed drilling and associated activities “have the potential to degrade ground water quality,” especially disposal of drilling fluids and drill cuttings in unlined waste pits. SOF ¶ 28. The agency declined to discuss DEQ’s concern with the unlined waste pits in the SEA, stating merely that CuMo will monitor water quality. *Id.*

The agency also cut corners in its brief cumulative effects analysis. SOF ¶ 31–32. The SEA admitted there could be cumulative impacts to groundwater and water quality caused by CuMo’s “drilling on private land and expansion of the support facilities located on private land.” *Id.* However, the SEA did not provide further information or any analysis of this drilling and expansion, and cumulative impacts were not even addressed in the FONSI. *Id.*

ARGUMENT

I. THE AGENCY’S REFUSAL TO PREPARE AN EIS VIOLATES NEPA.

NEPA requires a federal agency to prepare an EIS whenever a project “may” have significant environmental impacts. *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1239 (9th Cir. 2005) (emphasis in original). “[T]his is a low standard.” *California*

Wilderness Coal. v. U.S. Dep't of Energy, 631 F.3d 1072, 1097 (9th Cir. 2011). To decide if an EIS is required, courts turn to the CEQ NEPA regulations defining “significantly.” *Native Ecosystems*, 428 F.3d at 1239. These require agencies to consider a proposed action in light of its “context” and “intensity.” 40 C.F.R. § 1508.27. Context considers an action’s significance in context of American society as a whole as well as the affected region, interests, and locality. *Id.* § 1508.27(a). Intensity “refers to the severity of the impact.” *Id.* § 1508.27(b). The regulations list ten “intensity” factors for evaluating whether a project’s impacts are significant. *Id.* The presence of any one factor may be sufficient to require an EIS. *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 865 (9th Cir. 2005).

A. Potentially Significant Impacts to Sacajawea’s Bitterroot Require An EIS.

The significance of the Project and whether an EIS is required must be assessed, first, in the context of LESA’s “critically imperiled” classification and vulnerability to adverse impacts from exploration activities. LESA is extremely rare, and its long-term survival is in question due to wildfire, climate change, motor vehicle travel, logging, and mining. SOF ¶ 6–14. As underscored in the accompanying declaration of a recently-retired federal agency botanist who has monitored the species for years, the CuMo Exploration Project poses numerous adverse impacts that could further imperil the species. *See* Decl. of Roger Rosentretter.

1. Adverse Impacts of the Project Will Be Significant.

The SEA and SDN/FONSI show that the Project poses significant adverse impacts to Sacajawea’s bitterroot, requiring preparation of an EIS. *See* 40 C.F.R. § 1508.27(b)(1). The SEA determined the PCA is “essential to the conservation of the species” and “impacts to the CuMo population can affect the viability of the species.” SOF ¶ 9, 15. The SEA disclosed that Project activities in the PCA and in potential habitat outside the PCA are likely to destroy and/or degrade individual plants and pollinators and their habitat. SOF ¶ 12.

These are significant impacts, and the agency cannot rely on the Project's mitigation measures to avoid preparing an EIS, because those measures have limited and uncertain effectiveness. When evaluating the sufficiency of mitigation measures relied upon to forego preparing an EIS, courts "consider whether they constitute an adequate buffer against the negative impacts that may result" and "examine whether the mitigation measures will render such impacts so minor as to not warrant an EIS." *National Parks & Conserv. Ass'n v. Babbitt*, 241 F.3d 722, 734 (9th Cir. 2001).

In *National Parks*, the Ninth Circuit held that an EA/FONSI violated NEPA where there was "a paucity of analytic data" and only "speculative and conclusory statements" to support the agency's conclusion that mitigation measures rendered impacts so minor as to not warrant an EIS. 241 F.3d at 734–35. Similarly here, the Forest Service concluded impacts would be insignificant based on measures it said are "expected to reduce the risk to LESA plants and habitat" (SOF ¶ 23) without any data or analysis on the amount risks are expected to be reduced, in violation of NEPA.¹

Additionally, the mitigation measures are not an adequate buffer against the Project's negative impacts. As explained above, the spatial restrictions (which aim to avoid harmful exploration activities like building roads and drill pads in the PCA) are merely aspirational. The measures direct CuMo to try to avoid some harmful activities in the PCA, but nothing prohibits building and using each and every road and drill pad proposed under Alternative B—including those planned in the PCA and in occupied habitat. SOF ¶ 23. Furthermore, even after these measures were adopted in the March 2015 final SEA (CU083902–09), CuMo has continued to target the PCA with its exploration plans. SOF ¶ 19.

¹ See also *Gifford Pinchot Task Force v. Perez*, 2014 WL 3019165, *38–39 (D. Or. 2014) (EA violated NEPA for not fully analyzing mitigation effectiveness for mining exploration project).

2. The Project Has Cumulatively Significant Impacts On The Species.

An agency must consider not only the proposed action but also “whether the action is related to other actions with individually insignificant but cumulatively significant impacts.” 40 C.F.R. § 1508.27(b)(7). In order to satisfy NEPA, the agency must “enumerate the environmental effects of those projects,” and analyze how the impacts of the various actions will interact and affect the environment. *ONRC Fund v. Brong*, 492 F.3d 1120, 1133 (9th Cir. 2007).

The SEA disclosed that the 2014 Grimes Fire and related fire line construction had cumulative impacts (CU083995), but failed to explain why they are not significant. In fact, the SEA omits any discussion of the fire in its cumulative impact conclusion for Sacajawea’s bitterroot, and the FONSI does not address cumulative impacts at all. SOF ¶ 20. This violates NEPA. *See Ocean Advocates*, 402 F.3d at 870 (finding substantial question as to significance due to “perfunctory” cumulative impacts analysis).

The information disclosed in the SEA shows the fire and fire suppression activities may have had severe impacts. SOF ¶ 14. The fire burned through “the densest LESA habitat at CuMo, which encompasses approximately 75 percent of the known LESA population” when plants were likely growing or in very early stages of dormancy. *Id.* To construct the fire line, a 1,500 foot swath of land was bulldozed and hand plowed through plant habitat, cutting through the world’s largest LESA population—home to over 11,000 plants. *Id.* Additionally, vegetation was cut and piled, covering over 1 acre of occupied habitat. *Id.* Thus, Project impacts when added to these potentially devastating cumulative impacts from the fire again require an EIS.

3. Impacts Are Highly Uncertain.

An EIS is also required where “[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.” 40 C.F.R. § 1508.27(b)(5). *See National Parks, supra; Blue Mountains Biodiversity Proj. v. Blackwood*, 161

F.3d 1208 (9th Cir. 1998). Here, Project impacts are highly uncertain and involve unknown risks because the Forest Service failed to provide any documentation analyzing the amount of activity CuMo may perform in Sacajawea's bitterroot habitat, or what the resulting impacts might be. The SEA acknowledged that constructing and using roads and drill pads can adversely impact LESA in multiple ways, including by directly destroying plants, fragmenting plant and pollinator habitat, and further degrading habitat by generating dust and fostering the spread of weeds. SOF ¶ 12. But the agency never quantified, let alone estimated, the amount of activity CuMo will undertake or the resulting impacts within the PCA, within occupied habitat, and within potential habitat. SOF ¶ 21–22. Without such information, the Forest Service had no basis for concluding CuMo's extensive exploration will have no significant impact to this critically imperiled species.

Blue Mountains is squarely on point. The Forest Service there decided to salvage log several thousand acres of burned forest land without preparing an EIS. 161 F.3d at 1210. The Ninth Circuit mandated an EIS because there was “no documentation of the estimated sediment that would result from the logging and accompanying road building or the impacts of increased sediment on fisheries habitat.” *Id.* at 1213. Similarly here, there is no documentation of the estimated amount of direct plant and habitat destruction, habitat fragmentation, or any of the other adverse impacts the agency acknowledged would occur to LESA, so an EIS is required.

Cumulative impacts are also highly uncertain and have unique or unknown risks, requiring an EIS, because the Grimes Fire had unknown but potentially significant impacts. The agency admitted that it does not know the impacts of the fire and fire suppression activities and that the Sacajawea's bitterroot baseline needs to be re-established. SOF ¶ 14. The agency wrongly chose to approve the Project without gathering that critical information. As the Ninth Circuit has explained, “lack of knowledge does not excuse the preparation of an EIS; rather it requires [the agency] to do the necessary work to obtain it.” *National Parks*, 241 F.3d at 733.

4. Significant Impacts to Unique and Ecologically Critical Areas.

Impacts may also be significant, requiring an EIS, if they adversely affect “[u]nique characteristics of the geographic area” including “ecologically critical areas.” 40 C.F.R. § 1508.27(b)(3). See *Cascadia Wildlands v. U.S. Forest Serv.*, 937 F.Supp.2d 1271, 1281 (D. Or. 2013) (ordering EIS where timber project “may” have significant impacts to “unique attributes” of potential wilderness area). The PCA is a unique and ecologically critical area, because it is home to more Sacajawea’s bitterroot than anywhere else in the world and its health is essential to the survival of this vulnerable species. SOF ¶¶ 6–14. Project activities in the PCA will adversely affect this unique and critical area (SOF ¶¶ 12, 18–23), therefore requiring an EIS.

B. Potential Groundwater Impacts Also Require An EIS.

An EIS is similarly required here because of the potentially significant impacts to groundwater hydrology. There are numerous uncertainties about potential water quality impacts, which the SEA left unanswered because the Forest Service never mapped groundwater and connected surface water systems at the site, even though its *Working Guide* highlights the importance of identifying streams, springs, and seeps to assess effects. SOF ¶¶ 26–27, 29.

Further, in finding drilling will insignificantly impact groundwater flow and discharge, the Forest Service simply assumed CuMo’s 259 drill holes would be evenly spaced and, thus, far from each other throughout the large 2,885-acre Project site. SOF ¶¶ 30. This is contradicted by the record, which shows CuMo plans to concentrate its drill pads in and around the PCA, and that most drill pads will have multiple drill holes. *Id.* Thus, drill holes will likely be much closer together than the agency assumed, but the impacts of concentrated drilling were not evaluated.

Moreover, the record demonstrates that cumulative impacts of the Project with CuMo’s private land drilling may be significant, again requiring an EIS. As explained more fully below in the “hard look” discussion, the SEA failed to fully analyze cumulative impacts from these

operations on adjacent private land as required by NEPA. 40 C.F.R. § 1508.7. The SEA admits that CuMo’s drilling and expansion of support facilities on adjacent private land are “connected actions” that may have “cumulative effects” to groundwater. SOF ¶¶ 31–32. But the SEA never even identifies the number or location of the private land drilling and other facilities. *Id.* These private land activities may have significant cumulative impacts, particularly since they are closer to the contaminated Enterprise mine workings than other Project drilling would be. *See id.*

In short, even after remand from this Court to evaluate groundwater hydrology and determine whether an EIS is needed, the Forest Service has again cut corners and evaded gathering the information and analysis its own *Working Guide* says are needed. The Court should thus reverse and remand again, and order the agency to prepare an EIS.

II. THE AGENCY ALSO VIOLATED NEPA’S “HARD LOOK” REQUIREMENT.

Aside from whether an EIS was required, the SEA and SDN/FONSI must also be reversed for violating NEPA’s “hard look” requirement regarding potential impacts on Sacajawea’s bitterroot and groundwater hydrology. Taking a “hard look” requires the agency to provide “a reasonably thorough discussion of the significant aspects of the probable environmental consequences.” *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982). The hard look doctrine bars “[g]eneral statements about ‘possible effects’ and ‘some risk’ . . . absent a justification regarding why more definitive information could not be provided.” *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998).

NEPA requires such a “hard look” at likely environmental impacts before approving an action, whether an agency uses an EA or EIS, and even if the action includes mitigation measures. *See, e.g., N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1084 (9th Cir. 2011) (holding EA mitigation measures are not alone sufficient to meet an agency’s NEPA obligations

to “determine the projected extent of the environmental harm to enumerated resources before a project is approved” (emphasis in original)).

The decision to forego preparation of an EIS cannot stand if the SEA failed to take the required hard look. “[I]f the EA is deficient under NEPA ... then the [agency’s] DN/FONSI is necessarily arbitrary and capricious because it relied on the 2012 EA.” *Gifford Pinchot*, 2014 WL 3019165 at *40. *See also Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1223–24 (9th Cir. 2008) (where EA fails to take hard look at the environmental consequences of the action as required by NEPA, “the FONSI is arbitrary and capricious.”).

A. Failure To Take A Hard Look At Impacts On Sacajawea’s Bitterroot.

1. Failure to Fully Review Project Impacts.

As already discussed, the SEA failed to disclose the extent of impacts to Sacajawea’s bitterroot that might occur, since the agency never quantified the amount of activity CuMo will undertake within occupied habitat, the PCA, or potential habitat outside the PCA. Moreover, neither the SEA nor SDN/FONSI include any quantified or detailed information about the extent of impacts from these activities, such as how many acres of habitat, or of the PCA, would be directly impacted under Alternative B. Similarly, there are no estimates of how many plants would be destroyed, how much habitat fragmentation would occur, or how much dust would be generated. The agency simply claimed there would be little to no impact without any of this information, and without justifying why this information could not be provided. *See* SOF ¶ 20–22. This is the kind of general, unsupported assertion barred by the hard look doctrine and NEPA. *See Neighbors of Cuddy Mountain*, 137 F.3d at 1380.

The agency failed to provide a justification why this information could not be provided. By contrast, the agency considered precisely this type of information—the amount of habitat that would be impacted by road and drill pads—when it evaluated impacts to other sensitive species

and to vegetation groups. SOF ¶ 21. Similarly, the Forest Service considered CuMo vehicle traffic information to assess other impacts, but not in its analysis of effects to Sacajawea's bitterroot. SOF ¶ 22. The Forest Service thus had no excuse for failing to consider any quantified or detailed information about the extent of potential impacts to Sacajawea's bitterroot.

2. Inadequate Baseline Due to Fire.

Instead of taking a hard look at the impacts of the Grimes Fire and fire line construction by first determining how many Sacajawea's bitterroot plants and how many acres of plant and pollinator habitat were destroyed and degraded by the fire, the fire line, and the piles of cut vegetation, the Forest Service simply approved the Project now and plans to look into this later. SOF ¶ 14. The agency violated NEPA by relying on only the obsolete pre-fire baseline population and habitat data. *See Seattle Audubon Soc'y v. Espy*, 998 F.2d 699, 703–05 (9th Cir. 1993) (overturning decision where “EIS rests on stale scientific evidence”); *Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005) (stale baseline fish population data); *N. Plains Res. Council.*, 668 F.3d at 1085–86 (stale baseline wildlife population data). Without reestablishing the baseline, the Forest Service had no way to evaluate the potential impacts.

3. Failure to Take a Hard Look at Cumulative Impacts from Fire.

The SEA violated NEPA by failing to provide any quantified or detailed information on the cumulative impacts from the fire, or any other cumulative impacts to Sacajawea's bitterroot. *See Neighbors of Cuddy Mountain*, 137 F.3d at 1379 (“quantified or detailed information is required” to take a hard look at cumulative impacts). The SEA admitted the fire and fire line pose cumulative impacts (CU083995), and they passed through the site's densest populations of plants. SOF ¶ 14. But the extent of these impacts is unknown, and was not estimated. The Sacajawea's bitterroot cumulative impacts section of the SEA does not mention the fire and fire line. SOF ¶ 20. The FONSI also made no finding regarding cumulative impacts. *Id.*

B. Failure To Take A Hard Look At Groundwater Impacts.

Instead of preparing an EIS on remand from the Court's 2012 decision, the Forest Service simply updated the "Water Quality" subsection of the SEA and tried to get away with the bare minimum. The information and analysis the SEA is general, incomplete, and inaccurate; and again violates the agency's NEPA obligation to take a "hard look" at CuMo's extensive drilling.

1. Inadequate Baseline; Improper Reliance on Future Monitoring.

The Forest Service improperly deferred gathering baseline groundwater hydrology information, in violation of NEPA. Although full groundwater information at the Project site is lacking, the site is expected to have near-surface, perched aquifers that are connected and flow to the surface water systems at the site. SOF ¶ 26. The site's surface water systems consist of numerous streams, springs, and seeps that dissect the Project site. *Id.* The agency's *Working Guide* explains the importance of mapping these surface water features to understand the potential for dewatering and contamination. SOF ¶ 29. But the agency never inventoried and mapped these streams, springs, and seeps that are connected to the groundwater system. SOF ¶ 27. Instead of gathering this site-specific information during the last 3 years, the agency relied on the general and limited available information, plus water quality samples taken from 4 locations on one day in September 2012. *Id.* The agency deferred further identification and water quality sampling to occur post-approval, while the Project is underway. *Id.*

The situation here is like that in *Gifford Pinchot Task Force v. Perez*, 2014 WL 3019165 (D. Oregon 2014), where the court found BLM and the Forest Service violated NEPA by failing to gather sufficient baseline groundwater hydrology information before approving a mineral exploration project. *Id.* at *25–33. Even though the EA contained a "substantial discussion about the Project's impacts on groundwater," mitigation measures, and post-approval monitoring, the court held that "without baseline data, the impact to groundwater remains

uncertain because there is no information as to the current conditions of the actual Project area.” *Id.* at 33. Similarly here, the Forest Service lacks adequate baseline data and has insufficient information to assess potential impacts and has violated NEPA.

2. The SEA Fails To Address DEQ’s Concerns About Unlined Waste Pits & Fails to Consider Impacts of Concentrated Drilling.

The SEA admitted CuMo’s drilling 259 holes up to 3,000 feet deep in the headwaters of Grimes Creek can impact groundwater hydrology and water quality in multiple ways. SOF ¶ 25. But the Forest Service improperly dismissed these potential impacts as insignificant.

DEQ’s comments on the draft SEA warned that “the proposed drilling and associated activities, especially the disposal of drilling fluids and drill cuttings in unlined waste pits, [] have the potential to degrade ground water quality.” CU058950. Ignoring DEQ’s concern, the Forest Service made no changes to its analysis in the SEA of the potential for contaminants to leak through the unlined waste pits, and failed to discuss DEQ’s opposing view. SOF ¶ 28.

Furthermore, the SEA’s two-paragraph discussion of this issue relied on speculative assertions that violate NEPA. The SEA assumed “the bentonite in the drill fluid, when circulated through the mud sump portion of the drill fluid system, would seal the bottom of the mud sump and limit the amount of water that would seep from the sump,” without indicating how much water will still seep from the unlined sump or otherwise analyzing the effectiveness of this mitigation measure. CU083992. To further downplay potential impacts, the SEA stated that groundwater is expected to be 100 feet below the sumps located outside of drainages, but never estimated the travel time for water to seep 100 feet. *Id.* And the SEA admitted sumps located in drainages will usually be closer to groundwater, but asserted that Project design features ensure “sumps have an adequate separation from the water table” without any explanation. *Id.*

An EA must be based on professional and scientific integrity; and it must disclose and discuss any responsible opposing views. *See* 40 C.F.R. §§ 1500.1(b), 1502.9(b) & 1502.24.

NEPA’s “hard look” must be taken “objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made,” and must include a “discussion of adverse impacts that does not improperly minimize negative side effects.” *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 491 (9th Cir. 2010). A federal agency violates NEPA when it disregards the informed comments of sister agencies in asserting that a proposed action will not have significant impacts. *Id.* at 491–93. *See also Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157 (9th Cir. 2003) (failure to disclose opposing scientific opinion violates NEPA). By disregarding DEQ’s comments about unlined waste pits, and summarily insisting there will be no adverse impacts to water quality, the Forest Service violated NEPA.

The Forest Service also violated NEPA by mistakenly assuming CuMo’s 259 drill holes would be spaced evenly across the Project site, and thus far from each other, when in reality CuMo plans to cluster the drill holes closer together. SOF ¶ 30. Once again, the agency failed to follow its own *Working Guide*. The *Working Guide* emphasizes that the anticipated location and spacing of drill holes (and other information about the drilling) “is essential for understanding the potential effects on groundwater.” *Id.* But the agency got this essential information wrong in its effects analysis and, thus, never considered the potential impacts of concentrated drilling.

3. Failure to Evaluate Cumulative Impacts and the Connected Action of CuMo’s Drilling and Related Operations on Adjacent Private Land.

The SEA admitted CuMo’s drilling and expansion of support facilities on adjacent private land are “connected actions” that may have “cumulative effects” to groundwater: “Connected actions would include drilling on private land and expansion of the support facilities located on private land.” CU083993. Yet the SEA fails to even identify the number and location of such drill holes, describe the support facilities, or provide any quantified information or detailed discussion of these facilities and potential water quality impacts, in violation of NEPA.

Under NEPA, the agency must consider the impacts of connected actions. 40 C.F.R. § 1508.25. “Connected actions . . . are closely related and therefore should be discussed in the same impact statement.” *Id.* § 1508.25(a)(1).

Separately under NEPA, the agency has a duty to review all “cumulative impacts,” which are defined as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” *Id.* § 1508.7 (emphasis added). See *Sierra Club v. U.S. Dep’t. of Energy*, 255 F.Supp.2d 1177, 1185 (D. Colo. 2002) (agency must review impacts from “reasonably foreseeable” mine on private land when preparing NEPA document for federal land easement related to the future mine); *Colorado Env’tl. Coal. v. Office of Legacy Mgmt.*, 819 F.Supp.2d 1193, 1212 (D. Colo. 2011) (EA for mineral leasing invalid for failing to review operations on private land).

Thus, whether they are connected actions or reasonably foreseeable actions with cumulative impacts, the impacts of CuMo’s neighboring private land activities must be considered in the SEA. But the Forest Service did not provide any quantified or detailed information about these activities and their potential impacts to groundwater in the SEA. SOF ¶ 31. This violates NEPA. See *Neighbors of Cuddy Mountain*, 137 F.3d at 1379 (“quantified or detailed information is required” to take a hard look at cumulative impacts). See also *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 971–974 (9th Cir. 2006) (requiring “mine-specific . . . cumulative data,” a “quantified assessment of their [other projects] combined environmental impacts,” and “objective quantification of the impacts” from other existing and proposed mining operations in the region); *Te-Moak Tribe of Western Shoshone v. U.S. Dept. of Interior*, 608 F.3d 592, 603 (9th Cir. 2010) (rejecting EA for mineral exploration that had failed to include detailed analysis of impacts from nearby proposed mining operations).

The Forest Service cannot use the fact that CuMo’s private land drilling may be subject to permits and standards as an excuse not to review the impacts here. *See* CU083993 (“Drilling on private land by CuMo would be conducted in conformance with all applicable federal and State requirements...”). The Ninth Circuit has specifically rejected this argument:

A non-NEPA document – let alone one prepared and adopted by a state government – cannot satisfy a federal agency’s obligations under NEPA. *Klamath-Siskiyou Wildlands Center v. BLM*, 387 F.3d 989, 998 (9th Cir.2004).

S. Fork Band Council v. Dept. of Interior, 588 F.3d 718, 726 (9th Cir. 2009). *See also Klamath-Siskiyou*, 387 F.3d at 998 (rejecting as “without merit” argument that agency may avoid NEPA where a “facility operates pursuant to a state permit”); *Great Basin Mine Watch*, 456 F.3d at 973 (rejecting argument that requirements or limits in other permits satisfy NEPA’s mandate to provide the “quantified analysis” of impacts). Having failed to take the required NEPA “hard look,” the SEA and SDN/FONSI must be reversed and remanded.

III. THE FOREST SERVICE VIOLATED SUBSTANTIVE REQUIREMENTS TO PROTECT SACAJAWEA’S BITTERROOT.

On top of these NEPA violations, the Forest Service violated substantive duties to protect Sacajawea’s bitterroot and its habitat, again requiring reversal and remand. First, the agency failed to “minimize adverse environmental impacts” to the extent feasible as required by its Organic Act mining regulations. 36 C.F.R. § 228.8. While CuMo may have some rights to explore for minerals, it is not entitled to free reign through a critically imperiled plant’s habitat. The agency made no showing that it would be infeasible to place some critical areas off limits, or to impose some limits on the amount of activities in the PCA—which includes the habitat the agency “considers essential for the conservation of this species.” SOF ¶ 15.

Second, the agency failed to comply with its sensitive species policy, which requires it to avoid or minimize impacts to sensitive species. *See* Forest Serv. Manual, 2670.32. The agency must analyze “the significance of potential adverse effects on the population or its habitat within

the area of concern and on the species as a whole.” *Id.* Then, “the decision must not result in the loss of species viability or create significant trends toward federal listing.” *Id.* Contrary to these requirements, the agency here did not avoid impacts, analyze the significance of unavoidable impacts, and ensure the Project will not result in the loss of viability or contribute to listing.

Finally, the agency failed to comply with “BTST01”—a binding standard in the Boise Forest Plan to protect sensitive plants—in violation of the National Forest Management Act (“NFMA”) and its implementing regulations, which require management actions to be consistent with the Forest Plan. 16 U.S.C. §1604(i); 36 C.F.R. §219.10(e). *See Hells Canyon Pres. Council v. Haines*, 2006 WL 2252554, *7–10 (D. Or. 2005) (mining violated Forest Plan standards). BTST01 mandates: “Management actions that occur within occupied sensitive plant species habitat must incorporate measures to ensure habitat is maintained where it is within desired conditions, or restored where degraded.” CU053832. The Forest Service failed to even identify which LESA habitat is degraded and which is within desired conditions. Further, the agency failed to incorporate any measures to restore degraded habitat, as BTST01 requires, or measures to ensure the Project maintains plant habitat that meets desired conditions. Instead, the Forest Service allowed further degradation, violating the Forest Plan and NFMA.

CONCLUSION

For these reasons, the Court should grant Plaintiffs’ Motion for Summary Judgment and vacate, reverse, and remand the CuMo Exploration Project SEA and SDN/FONSI.

Dated this 26th Day of April, 2016.

Respectfully submitted,

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