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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*, v. U.S. FOREST SERVICE *Defendant*.	No. 1:16-cv-25-EJL **PLAINTIFFS' SEPARATE STATEMENT OF UNDISPUTED FACTS**

CuMo Exploration Project, Prior Litigation, and Latest Decision.

1. In February 2007, private mining company Idaho CuMo (formerly "Mosquito Gold" and "CuMoCo") submitted an application to the Forest Service seeking approval of the "CuMo Exploration Project" to explore for molybdenum and other minerals on 2,885 acres within the Boise National Forest. *See* CU080271–72. The agency first approved the Project in February 2011 through a *Decision Notice and Finding of No Significant Impact* ("DN/FONSI") based on an *Environmental Assessment* ("EA"). CU080267.

2. In July 2011, Plaintiffs challenged the Forest Service's approval of the Project. *Idaho Conservation League, et al. v. U.S. Forest Serv.*, No. 1:11-cv-00341-EJL (D. Idaho) ("*ICL*"). In August 2012, this Court held that the Forest Service violated NEPA by failing to take a hard look at impacts from drilling to groundwater hydrology and failing to provide a convincing statement of reasons that an EIS is not required. *See id.,* 2012 WL 3758161 at *14–18 (D. Idaho Aug. 29, 2012). The Court vacated and remanded to 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 *18. Prior to the Court's decision, CuMo carried out approximately one year of exploration. CU080276.

3. On remand, the Forest Service prepared the March 2015 *Supplemental Environmental Assessment* ("SEA") (CU083853–4300) to address the groundwater deficiencies and new information since the 2011 DN/FONSI and EA were issued. CU080267. On September 30, 2015, the Forest Service signed the *Supplemental Decision Notice and Finding and Finding of No Significant Impact* ("SDN/FONSI") (CU080263–471, CU080121–262), based on the SEA, approving the Project again without preparing an EIS. *See* CU080301–07 (FONSI).

4. To prepare the SEA and SDN/FONSI, the Forest Service made updates and revisions to the prior 2011 EA and DN/FONSI using red colored text. *See* CU080267–68. As

reflected in the SEA and SDN/FONSI, revisions were made throughout both documents, including changes to the SEA sections on water quality (CU083956–94) and Sacajawea's bitterroot (CU083995–4037).

5. As now approved, CuMo would clear land to build 10.2 miles of new roads, four new stream crossings, and 137 drill pads (CU080277) at the Project site 14 miles north of Idaho City in the headwaters of Grimes Creek (CU080267–68). CuMo would also reopen 4.7 miles of existing closed roads. CU080277. From the drill pads, CuMo would drill a total of up to 259 drill holes to acquire detailed geologic data. CU080278. Each drill hole would penetrate 1,500 to 3,000 deep. CU080277. At each drill pad, CuMo would construct waste pits to hold drilling fluids. *Id.* CuMo would operate between April 15 and December 15 each year. *Id.*

New Information on "Critically Imperiled" Sacajawea's Bitterroot.

6. Sacajawea's bitterroot (*Lewisia sacajaweana* or "LESA") is "the highest priority rare plant species managed by the Boise National Forest." CU084004. When the Project was previously approved in 2011, Sacajawea's bitterroot was designated by the Forest Service as a "Priority Forest Watch Species" with a ranking of global and state ranking of "GNR/S2." *Id.* Now, the plant has been elevated to a Forest Service "sensitive species" and reclassified as "Critically Imperiled" with a ranking of "G1/S1"—the highest rank possible. *Id.*

7. Sacajawea's bitterroot is a small, ground-hugging perennial herb, endemic to the mountains of central Idaho, with only 30 known occurrences. CU084009. Plants are very small and consist of a rosette of succulent leaves that emerge shortly after snowmelt, soon followed by one to a few small white flowers within the rosette. *Id.* All above-ground signs of the plant disappear during or soon after flowering. *Id.* Eighty percent of known Sacajawea's bitterroot populations are in the Boise National Forest. *Id.* The majority of populations consist of less than

2,000 plants. *Id.* Around 13,000 plants have been estimated to live at the CuMo Exploration Project site, which supports more than a third—38.3 percent—of all plants in the world. *Id.*

8. The SEA acknowledges that information regarding the size of Sacajawea's bitterroot populations at the Project site "has changed substantially" since 2011. CU084009. Previously estimated at around 1,500 plants, surveys during summer 2011 found much larger on-site populations, estimated at over 13,000 plants (the largest population in the world). *Id.*

9. Populations at the Project site have now been determined to be uniquely important to the species' long-term survival, and the Forest Service considers the site "to be a stronghold for the species' future persistence." CU084013. The population at the site is likely genetically distinct with unique alleles (CU084010) and probably contains the "majority of genetic variation for the species as compared to other sites." (CU084011). The SEA thus admits, "impacts to the CuMo population can affect the viability of the species." CU084003.

10. Multiple "threats" and "factors of decline" are now known to affect Sacajawea's bitterroot. CU084010–14. The SEA warned, "given the extremely small amount of . . . occupied habitat . . . the CuMo LESA population remains at risk of extirpation from stochastic events including human disturbance and environmental stressors in the future." CU084013.

11. The Forest Service now also recognizes the importance of protecting Sacajawea's bitterroot pollinators. *See* CU084011–12. The agency found that maintaining pollinator habitat within and adjacent to occupied and potential Sacajawea's bitterroot habitat at the Project site is "essential to the long-term persistence of the species." CU084021.

12. The SEA concedes that, at the Project site, occupied and potential Sacajawea's bitterroot habitat, as well as pollinator habitat, has already "been impacted by previous and current activities including road construction, road use, drilling, and grazing." CU084010. It

also admits constructing roads and drill pads, road maintenance, and other ground disturbance can further 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. CU084020. Plants have been found in some existing roadbeds, and continued use and maintenance of such roads could adversely impact these plants directly through soil compaction and crushing, and indirectly by dust deposition which could hinder pollination. CU084020–21.

13. Additionally, the "majority" of Sacajawea's bitterroot habitat at the Project site is "highly susceptible" to invasion by exotic (non-native) weeds. CU084014. The species' vulnerability to climate change is "high" (CU084012)—"any future rise in snowline could impact the viability of this population" (CU084013). And genetic factors related to the species' small population size and lack of genetic variation also threaten its ability to persist and recover. CU084010–11. The Forest Service found these genetic factors "further underscore the need to protect potential and occupied LESA habitat to the greatest degree possible." CU084011.

14. In July 2014, a wildfire burned through the Project site when plants were likely growing or in their very early stages of dormancy. CU084013. To fight the fire, a fire line was bulldozed and hand plowed through 1,500 feet of Sacajawea's bitterroot habitat. *Id.* The fire line cuts through the world's largest LESA population—home to over 11,000 plants. CU080404. The fire and fire line "passed through the densest LESA habitat at CuMo, which encompasses approximately 75 percent of the known LESA population." CU084013. Fire suppression also included cutting and piling vegetation, which covered 1 acre of occupied habitat. *Id.* The extent of the impact the wildfire and fire line construction had on individual plants, suitable habitat, and pollinators is unknown since the site has not been resurveyed yet. CU084014, CU084023.

15. In response to all of this new information and changed circumstances, the Forest Service designated a Plant Conservation Area ("PCA") at the Project site, encompassing all areas where Sacajawea's bitterroot plants have been identified, plus a 300-meter buffer to protect pollinators. CU084003–04. The PCA has 28 acres of occupied Sacajawea's bitterroot habitat, 172 acres of potential habitat, and additional acres of pollinator habitat. CU080404 (close-up map of PCA); CU080187 (map of Project site). The PCA includes the habitat the Forest Service "considers essential for the conservation of this species." CU084004.

16. Outside of the PCA, the Project site has nearly 225 additional acres of modeled potential Sacajawea's bitterroot habitat. CU080187. This potential habitat includes areas with similar characteristics as occupied habitat at the Project site. CU084004.

17. While new surveys have not been conducted to determine post-fire baseline conditions of plant and pollinator habitat (CU084023), CuMo did conduct a limited survey in summer 2015 (after the SEA) "focused on determining the presence of LESA plants in areas proposed to be disturbed by exploration activities, e.g., vehicle access, road building, and drill pad construction." CU062333. New populations of Sacajawea's bitterroot were discovered during the survey, and the Forest Service expanded the boundaries of the PCA to include these. CU080289. The SDN/FONSI includes new maps reflecting the expanded PCA. *See* CU080404 (close-up map of PCA); CU080187 (map of Project site).

Approving Project Activities in Sacajawea's Bitterroot Habitat, and the FONSI.

18. The Forest Service selected "Alternative B" (one of three alternatives considered in the SEA) when it approved the Project. CU080276. Under Alternative B, new road segments would be built in the PCA and in potential Sacajawea's bitterroot habitat outside the PCA. CU080187 (see roads labeled in Legend as "Alternative B Roads"). Also, CuMo would reopen,

maintain, and use a network of existing closed roads throughout much of the PCA, including roads within occupied Sacajawea's bitterroot habitat. CU080404 (see roads labeled in Legend as "Existing Unauthorized Roads"). The "Main Access Road" for the Project passes directly through the PCA and zigzags through the occupied habitat that is home to 11,054 plants. *Id*

19. While the exact location of new roads and drill pads are subject to change (*see* CU080276), CuMo proposed intended locations in its 2007 plan of operations (CU084159 (map)). In July 2014, CuMo prepared a map (CU080456) showing intended locations of 62 of the 137 drill pads (CU080454), all of which are concentrated in or near the PCA (*see* CU080456; CU080187). And the majority of the 44 proposed drill pad sites CuMo surveyed in 2015 are within the PCA. *See* CU062345 (map of 44 drill sites); CU080404 (map of updated PCA).

20. Despite all these admissions in the SEA about the importance of the site and potential adverse impacts from Project activities, plus the 2014 wildfire, the SEA concluded the Project's effects on Sacajawea's bitterroot will range from "no impact" to "may impact individuals, but would not likely contribute to a trend toward federal listing or loss of viability of populations or species." CU084036. Where it reached this conclusion in the SEA, the Forest Service did not account for the cumulative impacts of the fire and fire suppression activities. *Id.* And the FONSI did not even address cumulative impacts. CU080301–07.

21. Further, the Forest Service reached this conclusion without estimating the amount of exploration activity that would occur within the PCA and in potential Sacajawea's bitterroot habitat outside the PCA, such as the amount of new and existing roads and drill pads that would be built, opened, and maintained. *See* CU084019–24 (SEA direct and indirect effects analysis), CU084035–36 (SEA cumulative effects analysis). In contrast, the Forest Service considered this type of information (the amount of habitat that would be impacted by CuMo's roads and drill

pads) when it evaluated impacts to other sensitive species and to vegetation groups at the site. CU084061 at Table 15a (presenting acres of source habitat for each of six sensitive wildlife species and showing the acres and percent of such habitat directly impacted by Alternatives A and B); CU083997 at Table 9 (estimating acres of forest vegetation groups directly impacted).

22. The Forest Service also never considered the amount of vehicle traffic that will occur in the PCA in its effects analysis. *See* SEA CU084020–22. The SEA disclosed that traffic on the site's dirt roads is one source of dust which can harm plants and pollinators. CU084014. The SEA cited studies disclosing that a single vehicle travelling an unpaved road once daily for a year will generate one ton of dust per mile; that dust settles on plants up to 500 feet from the road edge; and that control measures can reduce dust by 30 to 80 percent. *Id.* But there is no estimate of the amount of traffic that will occur on CuMo's Main Access Road (which passes through occupied habitat in the PCA), or other roads in the PCA. *See* CU084020–22. By contrast, the SEA estimated traffic on other roads. *See* CU083886 (estimating 30 vehicle trips needed to transport workers and supplies to site per day); CU084102–03, CU084275 (estimating 976 annual fuel truck trips to the site to evaluate fuel spill risk and sediment delivery from roads).

23. To reach its conclusion that the Project will have virtually no impact to Sacajawea's bitterroot, the Forest Service relied on mitigation measures, which the agency said are "expected to reduce the risk to LESA plants and habitat through timing and/or spatial restrictions." CU084019. While the spatial restrictions require CuMo to try to avoid many harmful activities in the PCA and in occupied habitat (including building new roads and drill pads, and using existing roads and drill pads), the restrictions do not prohibit these activities and do not place any limits on the total amount of these activities that may occur in occupied habitat, in the PCA, or in potential habitat outside the PCA. *See* CU080320–30 (mitigation measures).

Groundwater Impacts And Uncertainty.

24. In response to the Court's decision in *ICL*, the Forest Service supplemented the "Water Quality" subchapter of the EA, adding new sections which purport to describe existing groundwater conditions (CU083965–77), direct and indirect effects to groundwater hydrology from CuMo's drilling (CU083986–92), and cumulative impacts to groundwater (CU083993–94).

25. The SEA acknowledged that drilling can impact groundwater hydrology in the following ways: drilling fluid can mix with groundwater (CU083986–89); drilling can cause groundwater to mix with lower quality groundwater (CU083989–90); drilling can alter groundwater flows and discharges (CU083990–91); drilling can cause groundwater and surface water to mix and encounter contaminants (CU083991–92); and drill fluids and drill cuttings can leak from mud sumps (waste pits) into groundwater (CU083992). But the Forest Service dismissed these impacts as posing no significant environmental harm. *See* CU080301–07.

26. The agency reached this conclusion even though the SEA admitted "[s]pecific information on hydrolithologic units and aquifer systems is lacking within the Project Area," and "[g]roundwater quality data from within or adjacent to the Project Area are limited." CU083974. The Forest Service 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 near-surface perched aquifers are "likely to have some connection with (thereby feeding) the surface water systems." *Id.* These surface systems include Grimes Creek and numerous tributaries that dissect the Project site, including Charlotte Gulch, Mohawk Gulch, and other streams, springs, and unnamed seeps. CU083959.

27. Shortly after the August 2012 remand, CuMo took water quality samples at four locations at the Project site on September 14, 2012 (Grimes Creek; Charlotte Gulch; Mohawk Gulch; and drill hole #12). CU066494. But over the next three years, no more water quality

samples were taken, and no mapping was done for the surface water systems at the Project site. *See* CU066488–558. Instead, CuMo will identify streams, springs, and seeps, and take water quality samples from them, while the Project is underway. *See* CU080444–70 ("QAPP").

28. On September 17, 2013, the Department of Environmental Quality (DEQ) submitted comments to the Forest Service regarding the 2013 draft of the SEA, warning "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. In response, the Forest Service said the SEA discloses the potential impacts to groundwater and pointed out that CuMo will follow the QAPP to monitor impacts. CU082246. No changes were made to the Forest Service's two-paragraph analysis of impacts to groundwater from storing and disposing of drilling fluids and drill cuttings in the unlined waste pits. *See* CU081610–11 (draft SEA), CU083992 (final SEA).

29. The Forest Service utilized its new guidance document, *Working Guide: Evaluating Groundwater Resources for Mineral Exploration Drilling* (Aug. 2014) ("*Working Guide*") (CU067604–32). *See* CU080283. 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. CU067614.

30. The *Working Guide* also states: "A description of the type of drilling proposed ..., the drilling materials/fluids that will be used, and the anticipated location, number, depth, and spacing of drill holes is essential for understanding the potential effects on groundwater." CU067609. In its effects analysis, the Forest Service assumed CuMo's drill holes will be evenly spaced across the 2,885-acre project area. CU083990. However, while the final location of each drill pad is not set, CuMo's July 2014 QAPP identified the anticipated location of 62 of its up to

137 drill pad locations (CU080658), which shows these 62 drill pads will be concentrated near each other in and near the PCA, rather than spread evenly across the larger site. CU080456. And "[m]ost drill pads will have more than one hole drilled from them." CU080278.

31. In its groundwater cumulative effects analysis, the Forest Service found there could be impacts to groundwater and water quality caused by "[c]onnected actions" to the Project, including CuMo's "drilling on private land and expansion of the support facilities located on private land." CU083993–94. However, the agency did not provide any information about the drilling CuMo may do on its private land (including the location, amount, spacing, depth, or type of drilling) or provide any information about the expansion of CuMo's support facilities. *Id.* Further, the agency never addressed cumulative impacts in the FONSI. CU080301–07.

32. In the SEA, the Forest Service determined the potential for CuMo's drilling to interact with contaminated historic mine works was low because they are 1,000 feet away from the Project boundary. CU083991. However, CuMo's private land at the Project site appears to be closer to the contaminated Enterprise Group mine workings and millsite than the Project boundary is. *See* CU084254 (map showing private lands, including land tract "1" owned by CuMo (*see* CU084252)); CU069263 (map of Enterprise Group). DEQ inspections of the historic Enterprise mine workings showed high levels of arsenic, lead, and zinc in water quality samples, and concentrations of arsenic, cadmium, and lead in soil high enough that they would generally trigger a cleanup if located closer to residences. CU069273.

Dated this 26th Day of April, 2016.

Respectfully submitted,

/s/ *Bryan Hurlbutt*
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