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League, Idaho Rivers United, and  
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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO**

IDAHO CONSERVATION LEAGUE,	)	No. 1:11-cv-341
IDAHO RIVERS UNITED, and	)	
GOLDEN EAGLE AUDUBON SOCIETY,	)	
	)	<b>COMPLAINT</b>
Plaintiffs,	)	
	)	
vs.	)	
	)	
UNITED STATES FOREST SERVICE,	)	
	)	
_____ Defendant.	)	

## INTRODUCTION

1. This action challenges the United States Forest Service's violations of the National Environmental Policy Act ("NEPA") and the National Forest Management Act ("NFMA") in approving the CuMo Exploration Project, a mining exploration project located on Grimes Creek in the Boise River watershed, within the Boise National Forest. The Forest Service approved the CuMo Exploration Project through a Decision Notice and Finding of No Significant Impact ("DN/FONSI") issued by the Boise National Forest Supervisor on February 11, 2011, based on an Environmental Assessment ("EA") also issued in February 2011.

2. As approved in the DN/FONSI, the CuMo Exploration Project will include extensive road construction and around-the-clock drilling activities over much of the next five years within habitat for sensitive wildlife species, including wolverine, northern goshawk, and great grey owl, as the applicant Mosquito Gold drills hundreds of exploration holes to evaluate whether it can develop the CuMo site into the world's largest open pit molybdenum mine. Despite the scale and disruptive impacts of the proposed exploration activities, the Forest Service approved the CuMo Project utilizing the EA and FONSI, rather than preparing a full Environmental Impact Statement ("EIS") as required by NEPA.

3. The Forest Service has not evaluated how sensitive species in the area may be impacted by the road construction and drilling activities, and even approved the project before necessary wildlife surveys were completed. Yet the noise, disturbance, and human presence from the mining exploration may disturb these and other wildlife species, and impair their reproductive success – potential adverse impacts which the Forest Service failed to study, quantify, or fully disclose, in violation of NEPA.

4. The Forest Service also has no idea how groundwater may be impacted by the CuMo exploration drilling, even though the extensive drilling may alter groundwater hydrology and allow groundwater and/or surface water to become contaminated with arsenic and other hazardous substances, again violating NEPA.

5. The CuMo Exploration Project will also degrade riparian habitat along Grimes Creek and tributaries. Contrary to the requirements of the Boise Forest Plan, the Forest Service approved constructing roads, drill pads, settling ponds, and other structures within Riparian Conservation Areas, in violation of the “consistency” requirement of NFMA and implementing regulations.

6. Based on these and other violations of law, Plaintiffs request that the Court reverse and remand the CuMo EA and DN/FONSI, and enter other relief as prayed for below.

#### **JURISDICTION AND VENUE**

7. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 because this action arises under the laws of the United States, including NEPA, 42 U.S.C. § 4321, *et seq.*; NFMA, 16 U.S.C. § 1601 *et seq.*; the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.* (“APA”); the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*; and the Equal Access to Justice Act, 28 U.S.C. § 2412, *et seq.*

8. An actual, justiciable controversy now exists between Plaintiffs and Defendant. The requested relief is therefore proper under 28 U.S.C. §§ 2201-2202 and 5 U.S.C. §§ 701-06.

9. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because all or a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial district, and the affected public lands and resources are located in this judicial district.

10. Plaintiffs have exhausted all required administrative remedies; and the federal government waived sovereign immunity in this action pursuant to 5 U.S.C. § 702.

**PARTIES**

11. Plaintiff IDAHO CONSERVATION LEAGUE (“ICL”) is an Idaho non-profit corporation with its principal place of business in Boise, Idaho. ICL was founded in 1973 and is dedicated to protecting Idaho’s environment. ICL and its members enjoy and work to protect Idaho’s water, air, wilderness, and public lands. ICL has more than 20,000 supporters, many of whom have a deep personal interest in protecting and restoring wildlife and water quality throughout the Boise River watershed.

12. Plaintiff IDAHO RIVERS UNITED (“IRU”) is an Idaho non-profit corporation with its principal place of business in Boise, Idaho. IRU is a membership-based conservation organization representing those who love the freedom, adventure, and solitude of Idaho’s rivers. IRU’s mission is to protect and restore the rivers of Idaho, and it has become a powerful force for safeguarding Idaho’s imperiled wild fish populations, protecting and enhancing stream flows and riparian areas, and defending and promoting the wild and scenic qualities of Idaho’s rivers.

13. Plaintiff GOLDEN EAGLE AUDUBON SOCIETY is a non-profit corporation with its principal place of business in Boise, Idaho. Golden Eagle Audubon is southwestern Idaho’s chapter of the National Audubon Society. Golden Eagle Audubon’s members are avid birdwatchers dedicated to building an understanding and appreciation of the natural world.

14. Plaintiffs have members, supporters, and staff who work, live, study, and recreate, throughout Idaho, including areas of the Boise National Forest that will be impacted by the mining exploration that is the subject of this action. Plaintiffs’ staff, members and supporters use and enjoy the public lands and waters at and around the CuMo project site for recreational,

conservational, scientific, aesthetic and other uses, and these uses will be harmed or eliminated by the project. Moreover, the Forest Service's violations of NEPA, as alleged herein, injure Plaintiffs and their staff, members, and supporters, by denying them the ability to adequately participate in the public review process and denying them information concerning environmental impacts and other issues that NEPA requires the agencies to disclose, analyze, and seek public review of prior to approving the plan of operations, issuing the DN/FONSI and EA.

15. Defendant UNITED STATES FOREST SERVICE is an agency or instrumentality of the United States. The Forest Service is vested with the authority and duty to manage and protect the public lands and resources of the Boise National Forest.

16. Defendant's violations of law, as alleged herein, injure the aesthetic, commercial, conservation, scientific, recreational, educational, wildlife preservation and/or other interests of Plaintiffs and their staff, supporters, and members. These are actual, concrete injuries caused by Defendant's violations of law, and the judicial relief sought would remedy, in whole or in part, Plaintiffs' injuries.

### **LEGAL BACKGROUND**

#### **NATIONAL ENVIRONMENTAL POLICY ACT**

17. NEPA is America's basic "charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA serves two purposes: (1) "it ensures that the agency, in reaching its decision, ... will carefully consider[ ] detailed information concerning significant environmental impacts," and (2) it "guarantees that the relevant information will be made available" so that the public may play a role in the decisionmaking process. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). By focusing agencies' attentions on the environmental consequences

of their actions, NEPA “ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.” *Id.*

18. NEPA requires federal agencies to take a “hard look” at the environmental consequences of their actions. *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n.21 (1976); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998). This “hard look” must occur *before* the agency takes action. *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1313 (9th Cir. 1990); *LaFlamme v. FERC*, 842 F.2d 1063, 1071 (9th Cir. 1988).

19. To take this “hard look,” federal agencies must prepare environmental impact statements (“EIS”) for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). An agency may avoid an EIS only if it finds, after preparing an EA, that the action will have “no significant impact,” in which case the agency may issue a FONSI. 40 C.F.R. §§ 1508.9(a), 1508.13. The standard for when an agency must prepare an EIS is a “low standard.” *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006).

#### **NFMA AND BOISE FOREST PLAN**

20. Under NFMA, the Forest Service must develop and follow Land and Resource Management Plans – commonly called Forest Plans – for each National Forest. 16 U.S.C. §§ 1604(a), (e) & (g)(3)(B). NFMA and its implementing regulations require that all management actions approved by the Forest Service must be consistent with the applicable Forest Plan. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.10(e).

21. The Boise National Forest has adopted a revised Forest Plan which contains standards for managing mineral resources. *See Boise Forest Plan* at III – 49, III – 50. These

standards place “binding limitations” on the Forest Service’s management actions. *Boise Forest Plan* at III – 3.

22. The Boise Forest Plan’s eighth and ninth standards for managing mineral resources – termed the “MIST08” and “MIST09” standards – prohibit the Forest Service from permitting facilities, support structures, roads, or solid waste facilities within Riparian Conservation Areas<sup>1</sup> (“RCAs”) unless “no alternative” exists. *Boise Forest Plan* at III – 49, III – 50; *see also Hells Canyon Preservation Council v. Haines*, 2006 WL 2252554 at \*8, No. CV 05-1057-PK (D. Or. Aug. 4, 2006) (interpreting an essentially identical provision in the mineral resources standards of a nearby Forest Plan). This requires the Forest Service to fully evaluate alternatives to locating such structures within RCAs under NEPA; and if there is no alternative to locating a solid waste facility in an RCA, MIST09 requires an extensive analysis of the materials and strict technological limitations on the placement of the materials. *Id.*

### **STATEMENT OF FACTS**

23. On February 14, 2007, a private mining exploration company, Mosquito Gold Corp. (“Mosquito”), submitted an application to the Forest Service seeking approval to explore for copper and molybdenum on approximately 2,885 acres of land in the Boise National Forest. *See CuMo EA* at 15. Mosquito’s minerals exploration project (the “CuMo Exploration Project”) would occur in the Grimes Creek sub-basin of the Boise River watershed, approximately 14 miles north of Idaho City in Boise County, Idaho. *Id.* at 11.

24. In response to Mosquito’s proposal, the Forest Service undertook a NEPA analysis of the CuMo Exploration Project, and issued the final DN/FONSI and EA in February 2011, which are the decision documents challenged here. In the DN/FONSI, the Forest Service

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<sup>1</sup> Riparian Conservation Areas are zones 300 feet either side of perennial streams and 150 feet either side of intermittent streams. *CuMo EA* at 103.

decided to allow Mosquito to construct 10.2 miles of new roads, 4 new stream crossings, 137 drill pads and settling ponds, and 259 drill holes in the project area. *CuMo DN/FONSI* at 4. The proposed exploration could last as long as 5 years. *Id.*

25. The mining exploration would involve four separate drill rigs operating simultaneously in the project area. *CuMo EA* at 24. These four drill rigs could each operate 24 hours a day between April 15<sup>th</sup> and December 15<sup>th</sup> during each of the five years for which the exploration activities have been approved by the Forest Service. *CuMo DN/FONSI* at 6.

26. There would be continuous and substantial human presence in the project area whenever the drill rigs are operating. Each of the four drill rigs would be attended by three people, and two supervisory staff could also be on site. *CuMo EA* at 24; *CuMo DN/FONSI* at 7. According to the USFS, this means that there would often be 15 people in the project area. *Id.*

27. Moving supplies and people to and from the drill rigs would require frequent vehicle trips. The *CuMo EA* estimates 30 one-way trips each day to and from the project area. *Id.* For exploration conducted continuously from April 15<sup>th</sup> to December 15<sup>th</sup>, there could be as many as 7,350 one-way vehicle trips to the project area each year.

38. The around-the-clock drilling would be noisy. The drills, gas- or diesel-powered water pumps, and generators that would be used at each drill site would cause an undisclosed amount of noise. *CuMo DN/FONSI* at 7. The drilling areas are also brightly lit, to allow drilling to continue at night. *CuMo EA* at 157.

39. Plaintiffs have submitted extensive comments to the Forest Service, including on the draft EA, and timely filed an administrative appeal which was denied by the Forest Service's regional office.



40. Pursuant to the DN/FONSI, Plaintiffs are informed and believe, and allege thereon, that Mosquito and/or its subcontractors either already have begun surveying drill pad locations and bulldozing roads and drill pads in the project area, or will imminently commence such activities on the federal lands of the Boise National Forest.

### **SENSITIVE SPECIES**

41. The noise, light, vehicle traffic, human presence, and habitat fragmentation associated with the mining exploration activities threaten to disturb and displace wildlife—including several sensitive species—from some or all of the project area.

42. Although the above-mentioned aspects of the mining exploration may be extremely disruptive, the CuMo EA does not analyze or disclose how the noise, light, vehicle traffic, human presence, and habitat fragmentation associated with the exploration would impact sensitive species such as great grey owl, northern goshawk, and wolverine.

### **Great Grey Owl and Northern Goshawk**

43. The project area contains “source habitat”<sup>2</sup> and nesting habitat for great grey owl and northern goshawk, which are sensitive species in the Forest Service’s Intermountain Region. *CuMo EA* at 101; *Wildlife Specialist Report and Biological Evaluation* (Project Record #0215) at 75–76, 80.

44. Both great grey owl and northern goshawk may currently use the project area. The Forest Service admits that “it is reasonable to anticipate that [great grey owls] could be present” and that multiple nesting pairs of great grey owls could be using the project area. *CuMo*

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<sup>2</sup> Source habitat is defined as “Characteristics of macrovegetation (i.e., cover types and structural stages) that contribute to stationary or positive population growth for a species in a specified area and time.” *CuMo EA* at 166.

EA at 103. In 2009, a male northern goshawk was observed within a mile of the project area, indicating that it had a territory adjoining or encompassing the project area. *CuMo EA* at 103.

45. The Forest Service admits that great grey owls are “sensitive to human disturbance” and that their nesting density is strongly influenced by land use and human activity. *CuMo EA* at 124. Similarly, the CuMo EA acknowledges that northern goshawks avoid human presence and that human activity and disruption can cause nest abandonment. *CuMo EA* at 130.

46. The CuMo EA does not include any baseline data on the presence of great grey owls and northern goshawks or their nesting locations within the project area. Instead, the Forest Service opted to issue the DN/FONSI first and conduct surveys for these sensitive species later. *CuMo EA* at 124.

47. Though the Forest Service recognizes that great grey owls and northern goshawks are sensitive to human disturbance, the CuMo EA provides no detailed or quantifiable analysis of how the noise, light, human presence, vehicle traffic, and habitat fragmentation associated with the proposed exploration may impact great grey owls and northern goshawks. The Forest Service admits that the proximity to and intensity of disturbance that would negatively impact great grey owls, or cause nest failure, is “not known.” *CuMo EA* at 124. Instead, the Forest Service has made only general statements about how the project “could” and “might” impact these sensitive species. *CuMo EA* at 124, 130.

48. The Forest Service’s “Finding of No Significant Impact” misrepresents the likely disruptions to great grey owls and northern goshawks, and their habitat, from the approved exploration activities. In truth, the Forest Service never evaluated the impacts of the lights, noises, human presence, and vehicle traffic on these sensitive species; and the CuMo EA admits

that the degree of disturbance and the proximity of disturbance which impacts great grey owl behavior and nesting are “not known.” *CuMo EA* at 124.

48a. Moreover, the Forest Service did not evaluate likely impacts upon the habitats of these sensitive species around the project area. Table 15a in the *CuMo EA* shows the total acres of source habitat for great grey owl and northern goshawk in the project area, and purports to describe the number of acres of source habitat, and the percentage of source habitat, that would be “impacted” under Alternatives A and B. *CuMo EA* at 119. However, the Forest Service only considered areas to be “impacted” if those areas would be physically cleared for road or drill pad development. *CuMo EA* at 119. The Forest Service thus failed to assess impacts to great grey owl and northern goshawk within the much larger area impacted by the noise, light, human presence, and vehicle traffic associated with road construction, exploratory drilling, and other approved activities.

### **Wolverine**

49. The *CuMo* project area also contains source habitat and potential breeding habitat for wolverine, a sensitive species in the USFS’s Intermountain Region. *CuMo EA* at 101. The U.S. Fish and Wildlife Service recently concluded that the wolverine “warrants” listing as “threatened” or “endangered” under the Endangered Species Act, but proceeding with a listing proposal is “precluded” by other priorities. *See* 12-Month Finding on a Petition To List the North American Wolverine as Endangered or Threatened, 75 Fed. Reg. 78,030 (Dec. 14, 2010) (wolverine “warranted but precluded” determination).

50. The *CuMo EA* reveals that two wolverines have been identified within a few miles of the project area, one as recently as 2007. *CuMo EA* at 104. Given that wolverines are

exceptional travelers and have home ranges covering hundreds of square miles, it is likely that wolverines use the project area. *Id.*

51. Wolverines need snow cover remaining until mid-May in order to reproduce, and roughly 91 percent of project area is covered by snow into May. *CuMo EA* at 104; 75 Fed. Reg. at 78,031. The project area provides habitat for wolverine denning and reproduction. *CuMo EA* at 104.

52. Denning wolverines are sensitive to human disturbance. 75 Fed. Reg. at 78,046. Female wolverines select den sites based, in part, on how well the den site and the surrounding foraging area are protected from human disturbance. *Id.* If female wolverines are disturbed, they often abandon their dens, resulting in the incidental death of young wolverines; and impairing the reproductive success of the species. *Id.*

53. The project record contradicts the Forest Service's assertion in the EA that mining exploration "between April 15 and mid-May [is] unlikely to affect wolverine denning." *CuMo EA* at 134. The Forest Service's own wildlife specialist commented that the approved window for exploration (April 15 through Dec. 15) overlaps with the "critical denning period" and thus potentially impacts denning wolverines. *See Forest Service Wildlife Specialist's Mike Feiger's Comments* (Project Record #1727). The Forest Service offers no support for its assertion that the noise, light, human presence, and vehicle traffic associated with the proposed exploration in April and May are "unlikely to affect" wolverine denning and reproduction; and the Forest Service failed to assess these potential impacts in the EA and DN/FONSI.

54. The *CuMo EA*, Table 15a, also misrepresents that only a tiny fraction of the wolverine habitat in the project area would be "impacted" by the exploration. *CuMo EA* at 119. Again, the Forest Service only considered "impacts" to wolverine habitat that would be

physically cleared for roads or drill pads, ignoring the adverse impacts that the noise, lights, human presence, and vehicle traffic associated with the exploration drilling and other activities pose for wolverines, and creating the false impression that only 2 or 3% of the wolverine habitat in the project area would be impacted.

### **GROUNDWATER**

55. The exploratory drilling may increase the level and volume of arsenic and other hazardous substances in the groundwater and surface water in the vicinity of the project area. Arsenic and other hazardous substances are present in the project area geology, and these substances are currently found in the historic mine tailings, waste dumps and surface water flowing from mine adits directly adjacent to the project area.

56. The drilling will impact the groundwater hydrology in and around the project area; the only question is how severe the impacts will be. Exploratory drilling can fracture rock and pressurize groundwater, causing temporary and/or permanent changes in groundwater flow and connectivity. Observations made during earlier drilling operations show that drilling in the project area has at least some impact on groundwater hydrology. *See Correspondence of Shawn Dykes, Mosquito Gold* (Project Record #2256). Anecdotal evidence also suggests that the rock through which the drilling would occur is especially susceptible to fracturing. *Appeal of EA, Decision Notice, and FONSI for the CuMo Exploration Project*, at 38.

57. When exploratory drilling fractures the rock, deposits of hazardous substances that were previously contained within rocks can become exposed to and dissolved in groundwater. Additionally, new fractures can allow more groundwater to flow over deposits of hazardous substances that were already exposed, increasing the amount of these substances that become dissolved and mobilized. Finally, drill holes and fractures can increase connectivity

between different areas of groundwater, allowing contaminated groundwater to mix with previously uncontaminated groundwater.

58. In approving the CuMo EA and DN/FONSI, the Forest Service failed to study the baseline levels of arsenic or other hazardous substances in groundwater or in the surface water at springs and mine adits in and around the project area. It also failed to study the baseline level of groundwater flow and connectivity in the project area. Without these baseline data, it will be impossible to know whether and how the exploratory drilling impacts groundwater hydrology and chemistry.

59. The Forest Service further failed to present any quantifiable or detailed analysis on how exploratory drilling will impact groundwater hydrology and chemistry. Despite a lack of analysis in the EA, the Forest Service maintains that “no groundwater impacts are expected as a result of this proposed exploration.” *CuMo DN/FONSI*, Attachment B at 63.

#### **RIPARIAN CONSERVATION AREAS**

60. The Forest Service’s decision permits road construction in RCAs. *See CuMo DN/FONSI* at 28 (explaining that the proposed alternative would result in new stream road crossings, which necessarily means that roads will be in RCAs); *Forest Plan Consistency Documentation* (Project Record #822) at 21 (stating that roads will go through RCAs perpendicularly).

61. The DN/FONSI and EA also contemplate the construction of drill pads, settling ponds, and other facilities inside RCAs. The Forest Service has so far not identified the precise locations where drill pads and settling ponds will be located, but its approval clearly envisions that Mosquito will construct such facilities in RCAs. For instance, the CuMo EA states that “[w]ithin Riparian Conservation Areas (RCAs), Mosquito would implement BMPs to ensure that

sediment generated by *drilling activities* would be minimized ... .” *CuMo EA* at 37 (emphasis added). This statement shows that Mosquito will be allowed to drill—and therefore construct drill pads and settling ponds—within RCAs. Additionally, the Forest Service stated that “[w]here structures, facilities, and roads *were proposed within RCAs*” effects on RCAs would be minimized. *Response to Appeal # 11-04-00-030 A215* at 2 (emphasis added). Again, this statement shows that the Forest Service has approved locating roads and structures like drill pads and settling ponds in RCAs.

62. Nowhere in the CuMo project record, the EA, or the DN/FONSI does the Forest Service explain why there is ‘no alternative’ to locating roads, drill pads, settling ponds, and other facilities inside RCAs, as required by the Boise Forest Plan standards cited above. No such alternatives were evaluated in the EA.

63. Plaintiffs’ administrative appeal brought this deficiency to the attention of the Forest Service. *Appeal of EA, Decision Notice, and FONSI for the CuMo Exploration Project*, at 11. Rather than explaining why there was ‘no alternative’ to locating facilities inside RCAs, the Forest Service stated that impacts to RCAs would be minimized. *USFS Response to Appeal # 11-04-00-030 A215* at 2.

64. The Forest Service appeal response also represented that two documents in the project record—“*Geologic Hazards and Soil Resources Technical Report*” and the “*Forest Plan Consistency Documentation*”—show that the proposed alternative is consistent with Boise Forest Plan’s ‘no alternatives’ standard. *Response to Appeal # 11-04-00-030 A215*, at 2. Neither of these two documents, however, explains why there are ‘no alternatives’ to locating facilities in RCAs. The *Geologic Hazards and Soil Resources Technical Report* asserts, without justification or discussion, that “Forest Management Plan Standards for Mineral and Geology Resources ...

MIST08 [and] MIST09 are supported.” *Geologic Hazards and Soil Resources Technical Report* (Project Record #820) at 37, 38. The *Forest Plan Consistency Documentation* states that Alternative B will minimize impacts in RCAs, but never explains why there is ‘no alternative’ to placing facilities in RCAs. *Forest Plan Consistency Documentation* (Project Record #822) at 21.

**FIRST CLAIM FOR RELIEF:**  
**NEPA Violations**

65. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

66. This First Claim for Relief challenges the Forest Service’s violations of the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, and NEPA’s implementing regulations, in approving the CuMo Exploration Project based on the Project Record, DN/FONSI, and EA. Plaintiffs bring this claim pursuant to the judicial review provisions of the APA, 5 U.S.C. § 706.

67. The Forest Service’s EA and DN/FONSI for the CuMo Exploration Project violated NEPA’s “hard look” requirement in numerous respects, including but not limited to the following:

- a. Failing to determine the presence and locations of sensitive species habitats and/or individuals in the project area, before deciding to permit the project;
- b. Failing to collect or present any baseline data on the flow rate, flow pattern, connectivity, and chemical composition of groundwater resources in and around the project area;
- c. Failing to present any quantifiable or detailed information on how the light, noise, vehicle traffic, human presence, and habitat fragmentation associated with the construction and exploration will impact sensitive species, including great grey owl, northern goshawk, and wolverine;



- d. Failing to present any quantifiable or detailed information explaining how exploratory drilling would impact flow rate, flow pattern, connectivity, and chemical composition of groundwater in and around the project area;
- e. Deferring surveys for great grey owl and northern goshawk presence and nesting until *after* the decision was made and the project is underway;
- f. Failing to analyze whether there is “no alternative” to locating roads and mining structures within RCAs; and/or
- g. Concluding that allowing exploration activities to begin as early in the spring as April 15<sup>th</sup> is “unlikely to affect wolverine denning.” *CuMo EA* at 134.

68. The Forest Service further violated NEPA by misrepresenting the amount of sensitive species habitat that would be “impacted” under each alternative by excluding from its analysis habitat that would be affected by light, noise, vehicle traffic, human presence, and habitat fragmentation. *See CuMo EA*, Table 15a.

69. The Forest Service further violated NEPA by approving the CuMo Exploration Project based on the EA and DN/FONSI, rather than preparing a full EIS to examine potentially significant impacts of the approved exploration activities upon sensitive species and their habitats, groundwater, and surface water and riparian conservation areas. The project’s potential impacts are “significant” within the meaning 40 C.F.R. § 1508.27(b), and therefore require an EIS, for numerous reasons including but not limited to the following:

- a. The possible impacts from the exploration are “highly uncertain or involve unknown risks” because the Forest Service presented (1) no baseline data on how the sensitive species at issue use the project area and no baseline data on groundwater hydrology or chemistry and (2) no detailed information on how the light, noise, vehicle traffic, human presence, and

habitat fragmentation associated with the exploration will impact sensitive species and no detailed information on how the exploratory drilling will impact groundwater. 40 C.F.R. § 1508.27(b)(5);

b. The project's impacts on the environment "are likely to be highly controversial" because the Forest Service has (1) incorrectly decided that that project is not likely to impact wolverine denning and reproduction, (2) misrepresented the amount of sensitive species habitat that would be impacted, and (3) arbitrarily stated that no groundwater impacts are expected to result from the exploratory drilling. 40 C.F.R. § 1508.27(b)(4); and/or

c. The "proposed action affects public health or safety" by potentially causing groundwater and surface water to become contaminated with arsenic and other hazardous substances. 40 C.F.R. § 1508.27(b)(2).

70. The Forest Service's approval of the CuMo Exploration Project is therefore arbitrary, capricious, and not in accordance with law under NEPA; and must be held unlawful and set aside pursuant to the APA, 5 U.S.C. § 706.

WHEREFORE, Plaintiffs pray for relief as set forth below.

**SECOND CLAIM FOR RELIEF:**  
**NFMA Violations**

71. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

72. This Second Claim for Relief challenges the Forest Service's violations of NFMA and implementing regulations in approving the CuMo Exploration Project based on the Project Record, DN/ FONSI, and EA. Plaintiffs bring this claim pursuant to the judicial review provisions of the APA, 5 U.S.C. § 706.

73. The Forest Service has authorized Mosquito to construct roads, drill pads, and settling ponds in RCAs. Drill pads and settling ponds are "facilities" and/or "support structures"

within the meaning of the Boise Forest Plan standard “MIST08.” Settling ponds are also solid waste facilities within the meaning of Boise Forest Plan standard “MIST09.”

74. The Forest Service violated the Boise Forest Plan standard for mineral exploration “MIST08” by allowing Mosquito to place facilities, structures, and roads within RCAs without establishing that there is ‘no alternative’ to placing these structures in RCAs.

75. The Forest Service also violated the Boise Forest Plan standard for mineral exploration “MIST09” by allowing Mosquito to place solid waste facilities—specifically, settling ponds—within RCAs without determining that there is ‘no alternative’ to placing these solid waste facilities within RCAs. Had the Forest Service performed the required alternatives analysis, it also would have been required to evaluate the characteristics of the waste materials, limitations on the placement of the materials, and other factors, as required by “MIST09,” but the Forest Service has again failed to perform such analysis.

76. By approving the CuMo Exploration Project in violation of the Boise Forest Plan’s standards for mineral exploration, the Forest Service has violated NFMA’s “consistency” requirement. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.10(e); *Neighbors of Cuddy Mountain v. USFS*, 137 F.3d 1372, 1377 (9th Cir. 1998).

77. Accordingly, the Forest Service’s approval is arbitrary, capricious, an abuse of discretion, and not in accordance with law under NFMA, and must be held unlawful and set aside pursuant to the APA, 5 U.S.C. § 706.

### **REQUEST FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that this Court grant the following relief:

A. Order, adjudge, and declare that the CuMo EA and DN/FONSI violate NEPA, NFMA, and/or the APA;

- B. Reverse and remand the EA and DN/FONSI;
- C. Enter such temporary, preliminary, or permanent injunctive relief as Plaintiffs may hereinafter seek;
- D. Award Plaintiffs their reasonable costs, litigation expenses, and attorney's fees associated with this litigation and the related administrative proceedings pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq.*, and/or all other applicable authorities; and/or
- E. Grant such further relief as the Court deems necessary or appropriate to redress the Forest Service's legal violations and protect the public lands and resources within and surrounding the CuMo Exploration Project area.

Dated this 27<sup>th</sup> day of July, 2011.

Respectfully submitted,

/s/ Laird J. Lucas  
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