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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

IDAHO CONSERVATION LEAGUE, et al., Plaintiffs, vs. UNITED STATES FOREST SERVICE, Defendant, MOSQUITO MINING CORP., Intervenor-Defendant.	No. 1:11-cv-341-EJL **PLAINTIFFS' COMBINED RESPONSE/REPLY BRIEF ON CROSS-MOTIONS FOR SUMMARY JUDGMENT** (*Docket Nos. 23, 27, 29, 30*)*

*This combined brief of 36 text pages complies with the District of Idaho Local Rule page limits because it responds to Defendant's and Intervenor's summary judgment motions (*Docket Nos. 27 & 29-30*) and is a reply brief on Plaintiffs' summary judgment motion (*Docket No. 23*).

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INTRODUCTION

Defendant U.S. Forest Service and Intervenor Mosquito Gold Corp. argue in their cross-summary judgment motions and briefs (*Docket Nos. 27-36*) that the Court should simply defer to the agency's decision to approve the CuMo Exploration Project, even though the Forest Service: (a) never studied baseline hydrological conditions nor attempted to assess how drilling over 250 wells down 3,000 feet might impact groundwater and surface water hydrology of the area; (b) did not conduct surveys necessary to determine the locations of sensitive species that may be impacted by the cutting of trees, clearing of roads and drill pads, and the noise, lights, and human disturbance associated with the five-year exploration activities; and (c) never analyzed whether there is "no alternative" to road crossings of streams and location of drill pads, mud pits, and other facilities within streamside Riparian Conservation Areas (RCAs), as directed by the Boise Forest Plan.

However, a recent Ninth Circuit decision confirms that an agency violates NEPA when it fails to collect necessary baseline information to assess likely impacts upon sensitive resources, as occurred here. *See Northern Plains Resource Council v. Surface Transportation Board*, __ F.3d ___, 2011 WL 6826409, *14 (9th Cir. Dec. 29, 2011). As discussed below, *Northern Plains* expressly rejected the same type of "decide first, study later" approach, which the Forest Service employed here, as violating NEPA's basic commands. *Northern Plains* thus dictates entry of summary judgment for Plaintiffs on their NEPA claim.

Moreover, the Forest Service also violated NEPA by relying on the February 2011 EA and DN/FONSI, instead of preparing a full Environmental Impact Statement

(EIS) to analyze the likely adverse impacts of the CuMo exploration activities upon sensitive plant and wildlife species and the area's hydrology. As discussed below, the Forest Service and Intervenor wrongly claim that the agency complied with NEPA by relying on incomplete habitat-based assessments of species viability, limited pre-decision field reviews, and general information provided in the programmatic Boise Forest Plan EIS, rather than taking the site-specific "hard look" required under NEPA.

The Forest Service and Intervenor also misrepresent Plaintiffs' claim concerning the Forest Service's inadequate treatment of ground and surface water hydrology in the EA. They insist there will be no water quality contamination caused by Mosquito Gold's drilling activities, since non-toxic substances will be used for drilling and the wells will be plugged. But that is not Plaintiffs' claim. What Plaintiffs showed in their opening brief and supporting declaration of expert hydrologist Kathryn Didrickson *(Docket No. 23-4)* is that the extensive drilling may alter the hydrology of the groundwater and surface water system of the area, having various impacts including facilitating contamination from historic mining wastes. By ignoring Plaintiffs' actual claim, and attacking a straw man argument that Plaintiffs have not made, Defendant and Intervenor cannot avoid entry of summary judgment for Plaintiff on this claim.

Lastly, the February 2011 DN/FONSI represents a final agency action which Plaintiffs have properly challenged under NFMA based on the Forest Service's violations of Boise Forest Plan standards MIST08 and MIST09 in approving entries into RCAs without first determining that "no alternative" exists. Notably, the Forest Service does not agree with Mosquito Gold's assertion that Plaintiffs' NFMA claim is not justiciable. The Court should reject Mosquito Gold's confusing argument that the NFMA claim is

either not ripe or moot, when the record shows that the February 2011 EA and DN/FONSI violated NFMA as well as NEPA in approving the CuMo exploration project with RCA entries in violation of the Forest Plan standards.

ARGUMENT

I. THE FOREST SERVICE'S "DECIDE FIRST, STUDY LATER" APPROACH VIOLATED NEPA.

A. The Ninth Circuit's *Northern Plains* Decision Compels Reversal Here.

In a decision issued after Plaintiffs' opening brief was filed, but before the Forest Service and Intervenor submitted their opening briefs, the Ninth Circuit held that an agency "violated NEPA by not taking a sufficiently 'hard look' when it deferred gathering baseline data" prior to approving construction of a railroad line. *See Northern Plains Resource Council v. Surface Transportation Board*, 2011 WL 6826409, *14 (9th Cir. Dec. 29, 2011). Even though the *Northern Plains* decision is squarely on point here, neither the Defendant nor Intervenor acknowledge it in their briefs.

The agency in *Northern Plains* did not provide baseline data for certain species of wildlife and sensitive plants in its NEPA analysis. Instead it called for surveys and studies as part of post-approval mitigation measures, which included conducting "a field search to identify plant species of concern . . . and to implement appropriate mitigation measures during construction activities if such species are found," as well as performing "data reconnaissance to locate habitat areas and nesting sites for several species of animals." *Id.*, at *12–13.

In finding that the agency violated NEPA through this "decide first/study later" approach, the Ninth Circuit emphasized that "NEPA requires that the agency provide the data on which it bases its environmental analysis," and "[s]uch analyses must occur

before the proposed action is approved, not afterward." *Id.* at *12. The *Northern Plains* court also explained that the "use of mitigation measures as a proxy for baseline data does not further" NEPA's purposes to "(1) ensure that agencies carefully consider information about significant environmental impacts and (2) to guarantee relevant information is available to the public." *Id.* at *14. And the court emphasized that while the mitigation measures may be necessary, they "are not alone sufficient to meet the [agency's] NEPA obligations to determine the projected extent of the environmental harm to enumerated resources before a project is approved." *Id.* at *14.

The *Northern Plains* decision is squarely on point here, and confirms that the Forest Service violated NEPA as explained in Plaintiffs' opening brief and separate statement of facts. *See Docket Nos. 23-1 & 23-2.* The Forest Service authorized clearing land to build over 10 miles of roads and 137 drill pads, and over 250 wells to be drilled during 24/7 operations throughout most of the year within habitat for sensitive wildlife species including wolverine, great grey owl, and northern goshawk, and the rare plant Sacajawea's bitterroot. *Id.* Although the agency acknowledged that sensitive wildlife and plant species may be present in the project area, the Forest Service approved the CuMo exploration project through the February 2011 EA and DN/FONSI without having done detailed surveys to locate and analyze potential impacts on these species. *Id.* Instead, the Forest Service directed that post-decision surveys be conducted to determine whether any species would be affected by the exploration activities, for which "mitigation" measures would be implemented to try to minimize adverse impacts. *Id.* This is the same "decide first/study later" approach that violates NEPA for the reasons explained in *Northern Plains*, and accordingly must be rejected by the Court.

B. The Pre-Decision Studies And Other Documents Cited By Defendant And Intervenor Did Not Satisfy The "Hard Look" Requirement.

Although the Forest Service and Intervenor did not cite or discuss *Northern Plains* in their opening briefs, they do cite a number of pre-decision studies and other documents in the Administrative Record to contend that the Forest Service adequately examined potential impacts of the CuMo project on these sensitive wildlife and plant species. The discussion below demonstrates that these materials were not adequate to take the required "hard look" under NEPA.

1. Sacajawea's Bitterroot.

The rare plant Sacajawea's bitterroot—known to exist in only four counties, all in Idaho, and a designated Priority Forest Watch Species—inhabits the CuMo site. *Docket No. 23-2* (SOF), ¶ 4. The Administrative Record confirms that the Forest Service substituted post-approval mitigation for pre-approval baseline information in approving Mosquito Gold's extensive activities within Sacajawea's bitterroot habitat, contrary to NEPA and *Northern Plains*.

The Biological Evaluation & Botanical Specialist Report for the CuMo Exploration Project ("Botanical BE"), which is cited by the opposing briefs and served as the basis for the Forest Service's Sacajawea's bitterroot analysis in the EA, relied on three limited surveys of Sacajawea's bitterroot. Two of the surveys (each conducted on a single day in 2005 and 2006) assessed only a limited portion of the CuMo site; while the third survey (conducted over two days in 2007) did not map populations of Sacajawea's bitterroot, and used only a minimal survey intensity level for much of the CuMo site.[1]

[1] Specifically, the surveys conducted on June 22, 2005 and June 21, 2006 only assessed a portion of the CuMo project area that was already being used for earlier exploration under the 2005 Plan of Operations. *See* CU014381 (*Botanical BE*). The third survey was

The very limited nature of these pre-decision surveys demonstrates that the Forest Service did not have adequate information on even the extent of the Sacajawa's bitterroot population, much less understand and disclose likely impacts from the exploration activities. Indeed, the Botanical BE itself warned that the location of Sacajawea's bitterroot populations and habitat at the CuMo site are unknown, and that it was not understood what role the populations of Sacajawea's bitterroot that had been identified at the CuMo site might play in sustaining the species as a whole. *See* CU014402 ("Neither the entire population nor the extent of potential habitat has been documented in detail for this project area, nor has an assessment been made of how this population contributes to species viability in terms of geographic location, habitat, number of plants, etc., relative to other previously known populations"). This admission by the Forest Service alone demonstrates that the EA—which relied on the Botanical BE—did not have sufficient baseline information to take the required "hard look" at likely impacts on the plant.

Further confirming this conclusion is the Forest Service's determination to require a post-decision monitoring program for Sacajawea's bitterroot, the stated purposes of which are to: "1) Determine extent of change in population in Sacajawea's bitterroot in

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conducted in June and September of 2007, and did not count individuals but merely collected one GPS point at the approximate center of where plants were observed. *Id.* Further, the 2007 survey deemed the southern portion of the CuMo project area to be "unsuitable" habitat and only performed a minimal survey in that area. CU014389.

A post-approval survey conducted during summer 2011 pursuant to the mitigation requirements in the DN/FONSI demonstrated that these prior surveys were grossly inadequate; and counted 13,621 plants (nearly 10 times the 1,500 plants previously counted on-site), including a previously-unknown population growing in atypical locations. On February 14, 2012, Plaintiffs wrote the Forest Service and requested supplemental NEPA in light of this significant new information; and Plaintiffs intend to seek further judicial relief if the agency does not comply with its NEPA obligations to perform supplemental NEPA analysis. *See* Attachment 1 hereto (copy of letter).

proximity to minerals exploration work. 2) Determine whether changes will impact population viability." CU046254 (*DN/FONSI, Attach. A*).

Baseline data about locations of the rare plant, which are identified as missing in the Botanical BE and are the subject of the post-decision monitoring program, are precisely the type of information the Forest Service was required to obtain and consider before making its decision under NEPA and *Northern Plains*. Instead of gathering sufficient information to make an informed decision and disclose likely impacts to the public, the Forest Service here has substituted post-decision surveys and mitigation to claim "no significant impacts" will occur – the same tactic which the Ninth Circuit has rejected as violating NEPA. *See Northern Plains,* 2011 WL 6826409 at *12–14.

2. Sensitive Wildlife Species.

Similar to Sacajawea's bitterroot, the Forest Service also failed to survey for northern goshawk and great grey owl prior to approving the CuMo exploration, and instead required post-approval surveys for the presence and nesting activity of both raptors plus "mitigation" to claim there will be no significant impact on either species. *See* CU046259 (*DN/FONSI Attach. A*). Again, this approach violates NEPA, as held in *Northern Plains*.

Mosquito Gold cites *Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143 (9th Cir. 2011), to argue that such post-approval surveys do not undermine the Forest Service's analysis. However, this case is not like *Lewis*, where the Ninth Circuit explained: "The fact that agencies relied on future testing to verify the model's predictions does not invalidate the previous, rigorous evaluation the agencies conducted. Because the agencies had already satisfied NEPA's hard look requirement, the decision

to require future testing should not now be construed as undermining their evaluation of the environmental impacts of the mine expansion." *Id.* at 1150 (emphasis added). Here, by contrast, there was no "previous, rigorous" NEPA evaluation that the post-decision surveys can verify.

The Forest Service and Mosquito Gold seek to fill this NEPA gap by pointing to habitat modeling in the Administrative Record that the Forest Service did to assess population viability of these species. However, as discussed further below, such habitat-based analysis is inadequate because it focuses only on species viability and the Forest Service never identified how much habitat is necessary to maintain species viability. Moreover, after identifying numerous indirect impacts to these sensitive species from the CuMo exploration activities, the Forest Service failed to meaningfully evaluate those impacts along with the direct and cumulative impacts. These deficiencies in the Forest Service's NEPA analysis again cannot be saved by post-approval surveys and mitigation.

Mosquito Gold also argues that the programmatic Boise Forest Plan EIS (which covered three national forests, and is thus termed the "Ecogroup EIS") makes up for defects in the CuMo EA by providing extensive assessments for wolverine, great grey owl, and northern goshawk. When one NEPA document is tiered to another, as here, the Court reviews the two documents together to determine the "sufficiency of the environmental analysis as a whole." *Southern Oregon Citizens Against Toxic Sprays v. Clark*, 720 F.2d 1475, 1480 (9th Cir. 1983), *cert. denied*, 469 U.S. 1028 (1984). Unless the programmatic EIS adequately addressed site-specific impacts, such impacts must be addressed in the subsequent project-specific NEPA document. *See Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 989, 997 (9th Cir. 2004)

(agency cannot rely on general statements in EIS which do not provide site-specific information about impacts expected from vegetation treatment project); *'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1094 (9th Cir. 2006) ("A programmatic EIS must provide sufficient detail to foster informed decision-making, but an agency need not fully evaluate site-specific impacts until a critical decision has been made to act on site development").

Applying those NEPA principles here, the Court will see that the Boise Forest Plan EIS does not contain the site-specific data and analysis necessary to evaluate the potential adverse impacts of the CuMo project on sensitive wildlife species that may be in the project area, including wolverine, great grey owl, and northern goshawk. The portions of the Boise Forest Plan EIS cited by Mosquito Gold merely provide general information about the habitat needs of these species and their population trends.[2] Mosquito Gold does not indicate how any of this information even bears on Forest Service's decision in this case, much less explain how the Boise Forest EIS somehow disclosed the likely adverse impacts of the CuMo exploration activities on these species—which it did not.

Mosquito Gold also tries to equate field reviews conducted by Brown and Caldwell in June and September 2007 with the missing baseline raptor surveys that the Forest Service has required to take place post-approval. The Brown and Caldwell field reviews, which were performed in preparation of the Botanical BE and Wildlife BE, were

[2] *See* CU000826 (wolverine), CU000919 (great grey owl) CU000920 (northern goshawk), CU000922 (wolverine), CU001374 (wolverine), CU001375–76 (great grey owl), CU001378–79 (northern goshawk), CU001414–15 (great grey owl), CU001417–18 (northern goshawk), CU001426 (wolverine), CU001427 (great grey owl), CU001429 (northern goshawk).

not conducted in order to locate wildlife, but were aimed assessing general habitat conditions. *See* CU023274 (*Wildlife BE*) ("Quantitative wildlife field surveys were not performed and the impact analysis used a habitat based approach"). The June field reviews "were primarily associated with Sacajawea bitteroot and identifying the general habitat conditions on a portion of the Project Area." *Id.* "The September field review was to supplement the June work and verify vegetation and habitat conditions over a broader portion of the Project Area than was accomplished in the June surveys." *Id.* Thus, the Brown and Caldwell field reviews were not the same as the missing baseline surveys, again underscoring that the Forest Service lacked adequate information before approving the project—which it wrongly sought to correct by requiring post-decision surveys and mitigation in violation of NEPA and *Northern Plains*.

C. The Forest Service Failed To Conduct Baseline Hydrology Studies In Violation of NEPA.

The Forest Service misinterpreted Plaintiffs' claim about altered hydrology during the administrative appeal, and continues to misinterpret this issue before the Court. In their administrative appeal, Plaintiffs raised the concern that drilling 259 holes each up to 3,000 feet deep might alter groundwater and surface water hydrology at the CuMo site and at adjacent sites contaminated with hazardous waste, but that the Forest Service failed to conduct baseline groundwater hydrology studies necessary to address this concern. *See Docket 23-2* (SOF), ¶ 32. Plaintiffs also noted that Idaho DEQ found highly contaminated soil at two such adjacent mine sites, identified contaminated springs and adits flowing at the sites, and observed that water contamination could increase if hydrological conditions change. *Id.* at ¶ 34.

Without apparently understanding Plaintiffs' concern, the Forest Service issued a circular response during the administrative appeal: "No baseline groundwater studies were conducted because there are no expected impacts to groundwater . . . ." CU050755 (*Letter Affirming Forest Supervisor's Decision*). The Forest Service response went on to explain that groundwater flow mimics topography and hydrology and flows to Grimes Creek and the Boise River. *Id.* That groundwater flows generally downhill from Mosquito Gold's extensive drilling activities toward adjacent contaminated waste sites and then to Grimes Creek and the Boise River is precisely why the Forest Service should have conducted baseline groundwater hydrology studies of the area in order to meaningfully evaluate whether Mosquito Gold's activities would mobilize hazardous wastes littered throughout the area.

The Forest Service continues to misinterpret this potentially significant impact. In their briefings, both the Forest Service and Intervenor discuss the practices that Mosquito Gold would follow to prevent contaminated water generated at each drill site from polluting ground and surface waters, including the Spill Prevention Control and Countermeasure Plan and certain BMPs. But these arguments are a red-herring: they do not address the concern that extensive drilling could alter the hydrological regime and water flows, and that hazardous waste at adjacent historic mining sites could become increasingly mobilized. While Mosquito Gold may seal the wells upon completion, this does not prevent flows through the wells prior to completion, nor does it change the fact that drilling can change groundwater pressure and alter flows as documented by Mosquito Gold during past drilling. *See Docket 23-2* (SOF), ¶ 11. Yet none of these potential impacts was assessed by the Forest Service.

Where the Forest Service does mention adjacent contaminated lands in its brief, its only argument is that water quality standards were met near those sites. *Docket No. 27-1*, pp. 11-12. That water quality standards were met near these highly contaminated sites in 2008 when IDEQ performed assessments has no bearing on whether drilling up to 259 wells 3,000 feet deep at the CuMo site will alter water flows and increase contamination from these sites.

Plaintiffs brought this information to the Forest Service's attention; however, the Forest Service chose not to study baseline groundwater hydrology in violation of NEPA. *See Northern Plains*, 2011 WL 6826409 at *12–14 (finding NEPA violation where agency failed to gather baseline data). Accordingly, the Court should grant summary judgment for Plaintiffs on this NEPA claim.

II. THE FOREST SERVICE'S DISMISSAL OF POTENTIAL ADVERSE IMPACTS TO SENSITIVE SPECIES WAS ARBITRARY AND CAPRICIOUS IN VIOLATION OF NEPA.

An agency must set forth a reasoned explanation for its decision and cannot simply assert that its decision will have an insignificant effect on the environment. *Jones v. Gordon,* 792 F.2d 821, 828 (9th Cir.1986). Applying those basic principles, this Court recently ruled that the Sawtooth National Forest's travel plan EA and FONSI were arbitrary and capricious in concluding that impacts would be insignificant, because the agency failed to supply a convincing statement of reasons in support of its conclusions and failed to take a hard look at impacts to a species with a measurable population at the site. *See* Memorandum Decision and Order, *Wilderness Society v. U.S. Forest Serv.*, No. CV08-363-EJL, 2012 WL 551005, *12 (D. Idaho Feb. 21, 2012).

Despite recognizing that individual great grey owl, northern goshawk, and wolverine could be harmed due to numerous negative indirect impacts of the CuMo

exploration, and despite finding that suitable habitat that would be destroyed due to the exploration's direct impacts, the Forest Service here similarly failed to provide a convincing statement of reasons for its conclusion that impacts to each species would be insignificant. Accordingly, as in the Sawtooth case, this Court should hold that the agency violated NEPA and the APA.

A. Great Grey Owl & Northern Goshawk.

As the Forest Service and Mosquito Gold admit in their briefing, the Forest Service disclosed numerous ways in which Mosquito Gold's activities could harm great grey owl and northern goshawk. Nevertheless, the Forest Service concluded that the CuMo exploration "may impact individual owls, but [is] not likely to contribute to a trend towards federal listing or cause a loss of viability to the population or species due to" seven enumerated findings.[3] CU045923 (*EA*). And for northern goshawk, the Forest Service reached the same conclusion based on the same seven findings. *See* CU045928. However, many of these findings are flawed.

The first finding the Forest Service relies upon in reaching its conclusions for great grey owl and northern goshawk is: "Impacts represent a small portion of existing source habitat." CU045923 (great grey owl); CU045928 (northern goshawk) (emphasis added). This statement misleadingly presents that all impacts affect only a small portion

[3] The seven findings for great grey owl are: (1) "Impacts represent a small portion of existing source habitat;" (2) "Impacts would be temporary to short-term;" (3) "Minor amount of large tree and/or snag removal that may occur under either action alternative;" (4) "Potential for disruption or failure of nesting may occur, but would be localized to the modified Project Area, and the species may be able to re-nest within the same season if the disturbance ceases or wanes;" (5) "Source habitat occurs adjacent to the [CuMo site]"; (6) "Nest survey mitigation measures minimize potential to disturb breeding [at the CuMo site];" and (7) "There are no existing or reasonably foreseeable future projects in and near the [CuMo site] that would substantially add to the relatively minor impacts of [the exploration] and the impacts of past actions in the modified Project Area are likely undetectable." CU045923 (*EA*).

of existing source habitat. However, the Forest Service never quantified source habitat that would be impacted by indirect impacts (noise, light, human activity) and only quantified direct impacts (land clearing to build roads and drill pads), despite recognizing in the EA that indirect impacts to wildlife would be more extensive than direct impacts. *See* CU045893 (*EA*) ("although direct disturbance activities (i.e. temporary road and drill pad construction) are limited in extent, disturbance effects from proposed 24 hour/day drilling could displace wildlife to other habitat areas throughout the modified Project Area"). NEPA requires that agencies "present complete and accurate information" to facilitate informed and objective environmental choices. *NRDC v. U.S. Forest Serv.*, 421 F.3d 797, 813 (9th Cir. 2005). When a NEPA document is misleading rather than complete and accurate, the agency has violated NEPA. *See id.; Animal Def. Council v. Hodel*, 840 F.2d 1432, 1439 (9th Cir. 1988) *amended by* 867 F.2d 1244 (9th Cir. 1989). Here, the Forest Service misleadingly presented to the public that "Impacts"—all impacts—would affect only a small portion of source habitat, even while it recognized that indirect impacts could reach much further.

Furthermore, even if the Forest Service had been forthcoming by stating that "direct impacts represent a small portion of source habitat," the finding would be arbitrary and capricious, because the Forest Service never disclosed the amount of source habitat necessary to sustain these species. While agencies may choose to employ a habitat-based approach to considering species viability under NFMA, courts review the application of the habitat proxy approach under the arbitrary and capricious standard, and the agency "must . . . describe the quantity and quality of habitat that is necessary to sustain the viability of the species in question." *See Hapner v. Tidwell*, 621 F.3d 1239,

1247–48 (9th Cir. 2010) (quoting *The Lands Council v. McNair*, 537 F.3d 981, 998 (9th Cir. 2008) (emphasis added)). For example, in *Inland Empire Public Lands Council v. U.S. Forest Service*, 88 F.3d 754, 759 (9th Cir. 1996), the Ninth Circuit upheld a habitat-based population viability analysis against a NFMA claim where the Forest Service concluded that a species would remain viable based on whether "the threshold percentage of each type of habitat remaining in the chosen alternative [after harvesting] was greater than the percentage required for that species to survive."[4]

Nowhere here does the Forest Service describe the quantity of habitat necessary to sustain the viability of sensitive species, rendering the conclusions reached in its habitat-based analysis arbitrary and capricious. The CuMo EA merely identified for each species the percent of suitable habitat that Mosquito Gold's activities will destroy and concluded, without any basis or explanation, that these habitat losses are insignificant. CU045920–21 (Great Grey Owl), CU045926–27 (Northern Goshawk). *See also* CU045893 (explaining methodology); CU045915, Table 15a (listing percent habitat loss for all sensitive species assessed). Without identifying a threshold of suitable habitat necessary to maintain species viability, the Forest Service presented no reasonable basis for its finding in violation of NEPA and the APA.

Another finding the Forest Service relied upon for great grey owl and northern goshawk is: "Source habitat occurs adjacent to the [CuMo site]." CU045923 (great grey owl); CU045928 (northern goshawk). However, the EA provided no basis for this

[4] *See also Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1250 (9th Cir. 2005) ("Our case law permits the Forest Service to meet the wildlife species viability requirements by preserving habitat, but only where both the Forest Service's knowledge of what quality and quantity of habitat is necessary to support the species and the Forest Service's method for measuring the existing amount of that habitat are reasonably reliable and accurate").

finding. The Forest Service did not identify how much suitable habitat occurs adjacent to the site, and even if it did, as already explained, the Forest Service never identified a threshold amount of habitat necessary to sustain local populations of these species. Thus, there is no way to know whether this statement has any bearing on impacts to great grey owl and northern goshawk. Furthermore, in making this finding, the Forest Service once again ignored indirect impacts by assuming, without explanation, that impacts from noise and human activity is somehow confined to the CuMo site.

The Forest Service also found: "Potential for disruption or failure of nesting may occur, but would be localized to the [CuMo site], and the species may be able to re-nest within the same season if the disturbance ceases or wanes." CU045923 (great grey owl); CU045928 (northern goshawk). This finding also fails to account for indirect disturbances extending beyond the CuMo site. And this finding glosses over the fact that indirect disturbances, such as vehicle trips, 24/7 drilling of up to four rigs, and construction activities could continue throughout the 8-month annual exploration period, and would not cease or wane during a nesting season.

The Forest Service also relied on the following finding: "Nest survey mitigation measures minimize potential to disturb breeding [at the CuMo site]." CU045923 (great grey owl); CU045928 (northern goshawk). Surveys for nesting raptors are to take place only "as conditions allow," and if nesting raptors are located, Mosquito would relocate roads and drill pads only "when feasible" to 150 feet from the nest tree. The Forest Service offered no support for the 150-foot buffer. In fact, the only reference in the EA to a distance from a disturbing activity for these species is a study which found goshawk nest failure possibly caused by a slash cutting crew within 328 feet. CU045926. Dr.

Powers says the 150-foot buffer is "grossly inadequate" for protecting great grey owl. *See* Powers Declaration (*Docket No. 23-3*), ¶ 30. The Forest Service has failed to provide a convincing explanation as to how this mitigation measure will protect raptors.

Mosquito Gold tries to justify the 150 buffer by noting that NEPA does not prohibit the Forest Service from allowing individual raptors to be harmed. This misses the point—the Forest Service's Finding of No Significant Impact rested, in part, on the incorrect assumption that the mitigation measures "minimize" breeding disruption.

B. Wolverine.

The record shows that wolverine—particularly denning females and their young—are sensitive to human disturbances. SOF ¶ 22. The record also shows that wolverine may occupy and den at the CuMo site, over 90 percent of which provides suitable wolverine habitat, and that denning typically lasts through late April or early May. SOF ¶¶ 20–21. The Forest Service's wildlife specialist noted that Mosquito's period of active exploration (April 15 to December 15) overlaps with the wolverine's "critical denning period" of March through early May. CU023095. Nevertheless, the Forest Service concluded that Mosquito Gold's exploration "may impact individual wolverines but [is] not likely to contribute to a trend towards federal listing or cause a loss of viability to the population or species" based on six enumerated findings. CU045930 (*EA*).

As with great grey owl and northern goshawk, one finding upon which the Forest Service based its conclusion is: "Suitable habitat adjacent to the [CuMo site] is available." *Id.* As with the raptors, the EA failed to indicate any location and quantity of suitable habitat for wolverine that exists adjacent to the CuMo site; the EA failed to identify the quantity of suitable habitat necessary to sustain populations of wolverine; and

the EA failed to consider indirect impacts of Mosquito Gold's activities which extend beyond the CuMo site. Thus, the Forest Service thus failed to provide a rational basis for this finding.

The Forest Service also found: "Season of operation typically would avoid impacts between December 16 and April 14, and activities between April 15 and mid-May are unlikely to affect wolverine denning." *Id.* Nowhere did the Forest Service address the evidence that denning wolverine at the site would likely be disturbed by the noise, light, and human activity associated with the non-stop operation of up to four nearby drilling rigs, 30 one-way vehicle trips to the site daily, and construction of an extensive network of new roads and drill pads. Instead, the Forest Service relied on the disruptive nature of road and drilling activities to claim that it is unlikely that a wolverine would den at the site in the first place. *See* CU045929.

An EA's "cursory and inconsistent treatment" of an issue can "alone" raise substantial questions about the effects of an action, requiring an EIS. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213–14 (9th Cir. 1998). Here, the EA indicated that over 90 percent of the CuMo site could provide suitable habitat for wolverine denning. *Id.* In its cumulative impact analyses for wolverine, the EA found that logging, grazing, recreational use, and mineral exploration in the area has only minor impacts on wolverine. CU045930. However, in order to reach its "no significant impact" finding, the Forest Service changed its position and claimed that there is not suitable denning habitat at the site because present activities in the area—which it previously said are not significant with respect to cumulative impacts—are now so substantial that they would drive away wolverine. *See* CU045929. Saying one thing is

true, and then saying the opposite is true, is the epitome of arbitrary and capricious agency action.

C. These Deficiencies Render Impacts Highly Uncertain, And Require An EIS.

"If the EA establishes that the agency's action may have a significant effect upon the environment, an EIS must be prepared." *National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001) (emphasis added). A project may have significant environmental impacts where its effects are "highly uncertain or involve unique or unknown risks." 40 C.F.R. § 1508.27(b)(5). *See also Blue Mountains Biodiversity Project*, 161 F.3d at 1213. "Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data, or where the collection of such data may prevent speculation on potential effects." *National Parks*, 241 F.3rd at 732.

In *National Parks*, the Ninth Circuit found that the evidence presented by the agency revealed very definite environmental effects, but the intensity of those effects was highly uncertain and necessitated the preparation of an EIS. *Id.*, at 731–35. Mosquito Gold tries to distinguish *National Parks* on the ground that the EA there explicitly described the intensity or practical consequences of certain effects caused by the decision as "unknown," *see* 241 F.3d at 732; whereas here the EA does not describe effects as "unknown." However, even though the Forest Service did not label the impacts to Sacajawea's bitterroot, groundwater hydrology, and sensitive species of wildlife as "unknown," the same fatal "uncertainty manifested through the EA" is presented here as in *National Parks*. *See id.* As set forth in the preceding sections of this brief, the Forest Service does not know baseline conditions necessary to consider important impacts to water and species, rendering impacts highly uncertain.

Requiring Mosquito Gold to conduct post-decisional surveys for Sacajawea's bitterroot, great grey owl, and northern goshawk as part of mitigation efforts only confirms the high degree of uncertainty at the time the Forest Service reached its decision. *See* CU046350 (great grey owl and northern goshawk monitoring), CU046254 (Sacajawea's bitterroot monitoring) (*DN/FONSI Attach. A*). Using these subsequent monitoring programs to fill informational and analytical gaps "has the process exactly backwards." *See National Parks*, 241 F.3d at 733. "Before one brings about a potentially significant and irreversible change to the environment, an EIS must be prepared that sufficiently explores the intensity of the environmental effects it acknowledges." *Id.* Like in *National Parks*, the agency's post-decision mitigation requirements "establish both that such information may be obtainable and that it would be of substantial assistance in the evaluation of the environmental impact" of the decision. *Id.* at 732–33.

The Forest Service and Mosquito Gold argue that impacts are not uncertain because the Forest Service acknowledged that the CuMo exploration could impact individual Sacajawea's bitterroot, great grey owl, northern goshawk, and wolverine. The Ninth Circuit has rejected this attempt to avoid an EIS simply because individuals of species may be impacted, rather than the entire species. In *Anderson v. Evans*, 314 F.3d 1006 (9th Cir. 2002), the Ninth Circuit held that an EIS was required where the EA did not adequately address the highly uncertain impacts of a whale hunt on local whale populations and the local ecosystem, despite the fact that there was no disagreement over the EA's conclusion that the hunt, which would impact individual whales, would not impact the overall whale population and "[d]espite the commendable care with which the

EA addresses other questions." *Id.* at 1018, 1021. Similarly here, while the Forest Service did quantify direct habitat losses, the Forest Service failed to identify the quantity of habitat necessary to maintain local populations of these species. And while the Forest Service noted numerous indirect impacts that would harm wildlife species, the Forest Service failed to meaningfully account for indirect impacts in reaching its conclusions. Thus, it remains highly uncertain what impact the CuMo exploration would have on local populations of species.

Finally, impacts to hydrology are also highly uncertain and necessitate the preparation of an EIS, because the Forest Service declined to conduct baseline groundwater hydrology studies. In *Shoshone-Bannock Tribes v. U.S. Department of Interior*, No. 4:10-cv-004-BLW, 2011 WL 1743656 (D. Idaho May 3, 2011), the Court held impacts from a phosphate waste dump were highly uncertain where BLM failed to study groundwater flows and potential contamination. Mosquito Gold tries to distinguish *Shoshone-Bannock Tribes* on the basis that that case involved what Mosquito Gold characterizes as a 400-acre, unlined, and leaky waste dump. *Docket No. 33*, p. 21. However, the multiple contaminated sites adjacent to the CuMo site are similarly unlined and leaky. IDEQ identified various adits and springs flowing through the hazardous waste sites and noted that water flows could vary and increase water contamination; and Mosquito Gold's past drilling at the site has shown that its exploratory drilling can cause water to leak. *See Docket No. 23-2* (SOF), ¶ 34–35.

Taken individually and together, the uncertainty about the scope and severity of the direct and indirect impacts to sensitive wildlife species and groundwater hydrology from the CuMo project thus required preparation of an EIS here. Because the Forest

Service improperly relied on its inadequate EA and DN/FONSI to avoid preparing a full EIS, the Court should reverse and remand for this NEPA violation.

III. THE FOREST SERVICE VIOLATED NMFA AND NEPA IN FAILING TO ASSESS WHETHER ANY RCA ENTRIES ARE NECESSARY.

The Court should further enter summary judgment for Plaintiffs because the Forest Service violated both NFMA and NEPA in failing to assess, in the February 2011 EA and DN/FONSI, whether the CuMo exploration activities could be approved without road crossings of streams or locating drill pads, mud pits, and other structures or support facilities within Riparian Conservation Areas (RCAs).[5]

A. The Forest Service Never Analyzed Whether There Is "No Alternative" To RCA Entries, In Violation Of The Boise Forest Plan And NFMA.

As explained in Plaintiffs' opening brief, the revised Boise Forest Plan adopted two standards—MIST08 and MIST09—to protect streams and riparian habitats from impacts associated with installing roads or other mining facilities in stream-side areas. *See Docket No. 23-1*, pp. 17–20 (citing Boise Forest Plan standards). Those standards prohibit the Forest Service from authorizing roads across streams or locating support structures or facilities within RCAs, unless the Forest Service determines that such entries into RCAs are necessary because no alternative exists; and if that is the case, the standards direct the Forest Service to "minimize" such RCA entries. *Id.*

[5] This section focuses on Plaintiffs' claims that the Forest Service violated NFMA and NEPA in not analyzing whether "no alternative" exists to RCA entries under the Forest Plan standards, and does not repeat the arguments in Plaintiffs' opening brief that the Forest Service also failed to "minimize" RCA entries as required by the standards. The Court need not reach that second argument if it agrees with Plaintiffs on the first.

There is no dispute among the parties about the meaning of these two standards. The Forest Service and Intervenor Mosquito Gold both concede that these Forest Plan standards are binding, and prohibit RCA entries unless the Forest Service has determined that no alternative exists. *See* Forest Service Opening Brief (*Docket No. 27-1*), pp. 13–14 (describing the standards as "binding limitations placed on management actions" which require that "structures, support facilities, and roads . . . should be located outside [RCAs] unless no alternatives to do so exist"); Mosquito NFMA Brief (*Docket No. 30-1*), p. 4 (MIST08 and MIST09 are "binding requirements" which "prohibit the placement of certain facilities within an RCA absent a showing of no alternative").

Here, as Plaintiffs explained in their opening brief, the Forest Service's EA and DN/FONSI never addressed whether there is "no alternative" to stream crossings or locating drill pads, waste pits, and other facilities within RCAs, as required by standards MIST08 and MIST09. *See Docket No. 23-1*, pp. 17–20. And notably, the Forest Service's brief does not dispute this key point that it did not conduct any "no alternatives" analysis under the standards. *See Docket No. 27-1*, pp. 13–18.

The Forest Service instead argues that the DN/FONSI met the second part of the MIST08 and MIST09 standards by minimizing stream crossings and RCA entries, through selection of Alternative B and imposition of mitigation measures. *Id.* By focusing on how it supposedly "minimized" RCA entries, the Forest Service seeks to divert attention from the fact that neither the EA nor the DN/FONSI undertook the requisite analysis of whether "no alternative" exists for RCA entries, in compliance with standards MIST08 and MIST09. *Id.* Because those standards require the Forest Service to first determine that "no alternative" exists to RCA entries, which the agency did not

do, the fact that the Forest Service claims to have "minimized" RCA entries does not satisfy its obligations under the Boise Forest Plan standards and requires entry of summary judgment for Plaintiffs on their NFMA claim, as discussed in Plaintiffs' opening brief (*Docket No. 23-1*), pp. 17–20.[6]

B. The Forest Service's Failure To Evaluate Whether "No Alternative" Exists To RCA Entries Also Violated NEPA.

In addition to violating the Boise Forest Plan and NFMA, the Forest Service's failure to evaluate whether "no alternative" exists for RCA entries under MIST08 and MIST09 also violated NEPA, again warranting entry of summary judgment for Plaintiffs on this separate claim. *See* Complaint (*Docket No. 2*), ¶¶ 61–63 & 67(f) (alleging that Forest Service violated NEPA by failing to analyze in the EA whether there was "no alternative" to RCA entries as provided by MIST08 and MIST09).

Plaintiffs specifically advised the Forest Service that it must consider an alternative in the EA that avoided stream crossings and locating support facilities within RCAs. *See, e.g.*, Admin Appeal (CU049424), pp. 15–17, 56. Yet the EA did not consider any such alternative, limiting its evaluation to the "no action" alternative and

[6] The Forest Service also cites the "results-driven" nature of the CuMo exploration to suggest that there was no way to know where roads would be located. *See Docket No. 27-1*, pp. 15–16. This argument fails, since the Boise Forest Plan does not exempt "results-driven" exploration projects from the requirements of MIST08 and MIST09. Moreover, the record shows that the Forest Service has plenty of information about the location of the exploration roads. While "exact road locations/alignments" are subject to some change, *see* CU046231, the Forest Service prepared the EA and DN/FONSI based on specific roads proposed by Mosquito Gold and evaluated in Alternative A, and those evaluated in the selected Alternative B, which cut specifically identified segments of road from the plan. *See* CU045824 (EA) (discussing elimination of 0.62 miles of road that would have been constructed under Alternative A within 500 feet of Grimes Creek in the northeastern portion of the project site); CU045823 (EA Fig. 3) (map proposed roads for Alternative A), CU045825 (EA Fig. 4) (map of proposed roads for Alternative B).

Alternatives A and B—both of which involve substantial stream crossings and locating drill pads, mud pits, and other facilities in RCAs.

Because the Boise Forest Plan, in standards MIST08 and MIST09, directs the Forest Service to evaluate whether "no alternative" exists before approving RCA entries, the agency should have conducted such an evaluation through its NEPA process. As numerous cases establish, the scope of required NEPA analysis is guided by the particular circumstances presented and by the underlying statutes, regulations, and policies at issue. *See ONDA v. BLM*, 625 F.3d 1092, 1110–11 (9th Cir. 2010) (NEPA analysis must include "considerations made relevant by the substantive statute driving the proposed action"); *ONRC Fund v. Brong*, 492 F.3d 1120, 1132 (9th Cir. 2007) ("an agency must consider the effects of the proposed action in the context of all relevant circumstances") (emphasis added). *See also Westlands Water Dist. v. United States Dept. of Interior*, 376 F.3d 853, 866 (9th Cir. 2004) ("When an action is taken pursuant to a specific statute, the objectives of that statute serve as a guide by which to determine the reasonableness of alternatives" examined under NEPA); *National Parks & Conservation Ass'n v. BLM*, 606 F.3d 1058 (9th Cir. 2009) (finding that BLM did not follow its own NEPA Handbook when it defined the purpose and need of a project too narrowly); *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1376–80 (9th Cir. 1998) (scope of impacts to be analyzed depends on nature of agency proposal and resources affected by it, in this case old-growth dependent species); *Foundation for North American Wild Sheep v. U.S. Dept. of Agriculture*, 681 F.2d 1172, 1178 (9th Cir. 1982) (agency violated NEPA in

failing to address "certain crucial factors, consideration of which [is] essential to a truly informed decision").[7]

The Forest Service's failure to analyze in the CuMo EA whether "no alternative" exists to RCA entries under standards MIST08 and MIST09, or to evaluate any action alternatives that would not require stream crossings and/or location of drill pads, mud pits, and other facilities in RCAs, thus violated NEPA's basic command that an agency must take a "hard look" at environmental impacts and alternatives; and again requires reversal and remand of the CuMo EA and DN/FONSI. *See Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988) (reversing where agency failed to consider reasonable alternatives, which is necessary to ensure that agency decision-makers assess "all possible approaches to a particular project . . . which would alter the environmental impact and the cost-benefit balance").

IV. THE COURT SHOULD REJECT MOSQUITO GOLD'S ARGUMENTTHAT THE NFMA CLAIM IS NOT JUSTICIABLE.

In its NFMA Brief, Mosquito Gold asserts that the Court lacks jurisdiction to resolve Plaintiffs' NFMA claim here. *See Docket No. 30-1*. The Intervenor cites the Forest Service's August 2011 approval of a Plan of Operations (PoO), which does not allow road crossings of streams or the location of drill pads and mud pits in RCAs unless Mosquito Gold seeks and obtains a supplemental PoO to get approval for such RCA entries, to contend that Plaintiff's NMFA challenge to the February 2011 DN/FONSI is not justiciable. Yet Mosquito Gold cannot even make up its own mind as to whether that

[7] These cases thus refute Mosquito Gold's contention that no NEPA process is required for the Forest Service to evaluate and comply with Boise Forest Plan standards MIST08 and MIST09. *See Docket No. 30-1*, p. 4 (asserting that the standards "do not require any particular procedure, format, or documentation. Nor do they contain any sequencing requirements vis-à-vis NEPA").

is because Plaintiff's NFMA claim is unripe or it is moot. *See id.*, pp. 11–12 (asserting both that the NFMA claim is unripe or that it is mooted by the August 2011 PoO).

Notably, the Forest Service does not echo this jurisdictional objection, which the Court should reject as unfounded whether it applies ripeness or mootness principles.

A. RCA Entries Are Authorized.

In the first place, Mosquito Gold is factually wrong in contending that "no incursions into an RCA are allowed under the approved PoO. Period." *See Docket No. 30-1* (NFMA Brief), p. 9. In actuality, the August 2011 PoO is limited to excluding roads and drill pads from RCAs. *See Docket No. 26-1* (PoO), p. 29. However, the Forest Service has authorized Mosquito Gold to install new diesel-powered water pumps to pump water from Grimes Creek for use at the drill rigs, which are located within RCAs. CU046234 (DN/FONSI). These are "new structures" or "support facilities" under MIST08 which are necessary for Mosquito Gold's exploration activities; and Plaintiffs have consistently noted that the RCA entries are not confined to just roads and drill pads, but include such other support facilities and structures.[8] Thus, Mosquito Gold is incorrect in asserting that no incursions into RCAs are permitted under the PoO.

Because the Forest Service has, in fact, authorized Mosquito Gold to place such support facilities or structures within RCAs under the February 2011 DN/FONSI, then even under Mosquito Gold's reasoning that decision is ripe and properly justiciable for

[8] Plaintiffs' Administrative Appeal specifically noted that EA and DN/FONSI violate MIST08 for failing to consider alternatives to locating "roads, drill pads, structures, etc." in RCAs. See CU049424 (admin appeal); CU050748 (USFS response to appeal). The Complaint likewise asserts that the Forest Service failed to comply with MIST08 because it improperly located roads, drill pads, settling ponds, and "other facilities" in RCAs without undertaking the requisite alternatives analysis. *Docket No. 2*, ¶ 61-63, 74.

violating the Boise Forest Plan standards and NFMA under Plaintiffs' second claim for relief. Accordingly, the Court may deny Mosquito Gold's motion to dismiss this claim for lack of justiciability on this ground alone.

B. Plaintiffs' NFMA Claims Is Ripe.

This example serves to underscore the larger legal point that Plaintiffs have properly challenged the February 2011 DN/FONSI for violating NFMA and the Boise Forest Plan standards MIST08 and MIST09, because the DN/FONSI constitutes the "final agency action" by which the Forest Service chose to implement Alternative B from the EA and authorized Mosquito to locate roads, drill pads, mud pits, and other structures and facilities within RCAs at the CuMo site in violation of Boise Forest Plan Standards MIST08 and MIST09.

In the "Decision" section of the DN/FONSI, the Forest Supervisor makes this point clear, stating: "I have decided to implement Alternative B (Reduced Roads Alternative), as displayed in Figure 2. My decision includes the key features described below, along with the design features and monitoring included in Attachment A . . . ." CU046231 (emphasis added). Figure 2 is a map with locations of proposed new roads and stream crossings. CU046232. And the DN/FONSI's "key features" include, "Under my decision . . . [u]p to 10.2 miles of new temporary roads will be constructed" and a "total of 16 stream crossings will be used, including four new crossings on the new temporary roads to be constructed . . . ." *Id.*

Thus, the Forest Service's decision to implement Alternative B constituted site-specific action which authorized Mosquito to locate roads in RCAs. While the Forest Service notes that the "exact" locations of new road locations may be subject to variation,

the DN/FONSI nevertheless authorized Mosquito to locate the new roads as mapped in Figure 2, including the four new stream crossings. The DN/FONSI does not require Mosquito to seek further Forest Service approval to build new roads and stream crossings at the locations mapped in Figure 2; rather, the DN/FONSI requires approval only for any variance in road location. *See* CU046237 (explaining that in order to ensure that any variance in road or drill pad location falls within the range of environmental impacts disclosed in the EA: Mosquito must comply with the monitoring and mitigation measures set forth in Attachment A to the DN/FONSI; Forest Service staff will monitor Mosquito's implementation of the project; and "any variance in road or drill pad location" must be approved by Forest Service staff). *See also* CU046247–256 (Attachment A to the DN/FONSI) (setting forth mitigation and monitoring requirements, none of which relate to ensuring that roads are built in compliance with MIST08).[9]

Importantly, the February 2011 DN/FONSI also represents the final agency decision for the CuMo project decision-making process in which the public, including Plaintiffs, were entitled to participate through public notice, comments, and administrative appeal under the Forest Service's regulations. *See* 36 C.F.R. Part 215. The Forest Service involved the public in this decision-making process through its scoping notice, releasing a draft EA for comments, and then issuing the final EA and DN/FONSI in February 2011. The Forest Service also gave notice to the public that the

[9] Similarly, in the section of the DN/FONSI entitled "Rationale for Making This Decision," the Forest Supervisor provides: "I have decided to approve the PoO with terms and conditions necessary to protect non-mineral resources." CU0462 (emphasis added). The terms and conditions necessary to protect mineral resources are only those set forth in Attachment A. *See* CU046237 ("Attachment A describes the mitigation measures and monitoring to protect non-mineral resources that will be included with my decision and incorporated into the terms and conditions from the PoO").

February 2011 DN/FONSI is the formal agency action subject to administrative appeal under the Forest Service regulations. As the DN states: "This decision is subject to administrative appeal pursuant to 36 C.F.R. Part 215, only by those individuals and organizations who provided comments or otherwise expressed interest during the 30-day notice and comment period on the proposed action. The appeal must meet the requirements of 36 C.F.R. 215.14." CU046245.

It is difficult to understand, then, Mosquito Gold's assertion that Plaintiffs somehow filed this lawsuit prematurely in July 2011 to challenge the February 2011 DN/FONSI, after Plaintiffs adhered to the Forest Service's notice and regulations, filed their administrative appeal, and the Forest Service denied that appeal. Moreover, in asserting that Plaintiffs really should have waited until the Forest Service approved a PoO before bringing suit, Mosquito Gold ignores the critical fact that the Forest Service was not obligated under its regulations to involve the public (including Plaintiffs) in approving any PoO for the CuMo project; no public notice was given of the Forest Service's August 2011 approval of the PoO; and the public (including Plaintiffs) does not have the right to comment or pursue an administrative appeal from the agency's approval of the PoO. *See Docket No. 26-1 (PoO Approval Packet,* which was not circulated to public and does not allow administrative appeal by any member of the public).

These facts are critical in demonstrating that Plaintiffs' NFMA claim is ripe under the Supreme Court cases cited by Mosquito Gold in its NFMA brief. *See Docket No. 30-1*, p. 12, n.12. As the Supreme Court has held, the ripeness doctrine requires evaluating "(1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration." *National Park Hosp. Ass'n v. DOI,* 538 U.S. 803, 808

(2003). This requires considering "whether delayed review would cause hardship to the plaintiffs," as well as "whether judicial intervention would inappropriately interfere with future administrative action," and "whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998) (emphasis added).

Mosquito Gold's argument that Plaintiffs' NFMA challenge is unripe essentially ignores all three of these tests—but particularly fails to acknowledge that Plaintiffs would suffer hardship and prejudice if the Court declines to resolve their NFMA claim now, because there is no assurance Plaintiffs would be able to obtain timely judicial review before Mosquito Gold begins constructing roads across streams or drill pads within RCAs under a supplemental PoO – which the August 2011 PoO expressly allows Mosquito Gold to seek. *See Docket No. 26-1 (PoO Approval Packet).* Again, the Forest Service's decision to approve or amend a mining plan of operations is not subject to public notice, involvement, and administrative appeal. Under the February 2011 DN/FONSI, the Forest Service has approved RCA entries for the CuMo exploration project; and the August 2011 PoO is simply the first step in Mosquito Gold's implementation of the exploration project. The August 2011 PoO may be supplemented at the request of Mosquito Gold; and approval may be given by the Forest Service for stream crossings or building well pads and mud pits within RCAs under the February 2011 DN/FONSI. *Id.* Those steps may happen quickly and without any notice to the public or Plaintiffs before Mosquito

Gold's bulldozers begin running. Plaintiffs would thus be potentially deprived of the ability to obtain timely judicial review before irreparable damage occurs to the RCAs.[10]

This hardship to Plaintiffs thus weighs heavily in the calculus of whether the NFMA claim is ripe under the *Ohio Forestry* and *National Park* cases, above. Likewise, the Court should be troubled by Mosquito Gold's suggestion that it should bifurcate its judicial review here, by addressing only the NEPA claims now (which Mosquito Gold admits are ripe and justiciable) but resolving the NFMA claim in a second stage of the proceedings. By contrast to the burden this would place on judicial resources, resolving the NFMA claim now will not inappropriately interfere with the administrative process, since the Forest Service has already approved the RCA entries in the February 2011 DN/FONSI. Neither would the Court benefit by delaying a decision on the NFMA claim for further factual development of the issues, since again the February 2011 DN/FONSI represent the Forest Service's final analysis and decision that allowing the RCA entries comports with the Boise Forest Plan standard.

The ripeness factors from *National Park* and *Ohio Forestry* thus do not support Mosquito Gold's argument that Plaintiffs' NFMA claim is not ripe. Indeed, Ohio Forestry specifically held that a challenge to a forest plan there was not ripe, because there would be subsequent site-specific decision-making processes, providing public

[10] Mosquito Gold's own actions underscore its intention to build stream crossings and drill pads, mud pits, and other structures or facilities within RCAs under the Alternative B exploration plan approved by the Forest Service in the February 2011 EA and DN/FONSI. When Mosquito Gold contacted Plaintiffs' counsel regarding its argument that the NFMA claim is not ripe, Plaintiffs offered to dismiss the NFMA claim voluntarily if Mosquito Gold would agree not to undertake any RCA entries—which Mosquito Gold flatly refused to agree to. Obviously Mosquito Gold intends to undertake RCA entries as part of its CuMo exploration, as it sought permission to do and received approval to do in the February 2011 DN/FONSI.

notice and an opportunity for comments, conducting a NEPA analysis, and making a final decision that could be challenged through administrative appeals and the courts. *See Ohio Forestry*, 523 U.S. at 729-30with public notice and additional NEPA review. Again, none of these procedural protections for public involvement will exist here if Mosquito Gold seeks, and the Forest Service approves, a supplemental PoO allowing stream crossing and drill pads in RCAs.

San Juan Citizens Alliance v. Stiles, 654 F.3d 1038 (10th Cir. 2011) – the case Mosquito Gold claims is "on all fours" with this one – in fact is very different for the same reasons. Mosquito Gold ignores the crucial fact that, in *San Juan* as in *Ohio Forestry*, further decision-making with public notice, comment and NEPA analysis would be required before wells could be drilled. *See San Juan*, 654 F.3d at 1044. By contrast, here again the Forest Service would not be obligated to give public notice or opportunity to become involved in any further decision that the Forest Service makes to supplement the PoO and allow RCA entries by Mosquito Gold. Thus, Plaintiff's NFMA claims are now ripe, and will never be riper.

C. The NFMA Claim Is Not Moot.

Neither has Mosquito Gold carried its heavy burden of demonstrating that the Plaintiff's NFMA claim challenging the February 2011 DN/FONSI is somehow moot because of the August 2011 PoO.

"[A] case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979). "[T]he burden of demonstrating mootness is a heavy one." *Id.* at 631 (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632–33 (1953)). The party

seeking dismissal must show two things: first, that "it is **absolutely clear** that the alleged wrongful behavior could not be reasonably expected to occur," *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 49, 66 (1987) (emphasis in original); and, second, that interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. *Davis*, 440 U.S. at 631.

The Supreme Court has also held that where there is some cognizable danger of a recurrent violation—something more than the mere possibility—a case is not moot, even where defendants have disclaimed any intention to revive the illegal practice. *United States v. W. T. Grant Co.*, 345 U.S. at 633. In addition, the Court has noted that the public interest in having the legality of the practices settled can be an important factor affecting the mootness determination. *Id.* at 632.

Under these principles, numerous decisions have rejected mootness arguments where an agency may have altered a challenged decision, but has not fully renounced its action. Thus, in *Sierra Club v. Cargill*, 732 F. Supp. 1095 (D. Colo. 1990), plaintiffs challenged the Forest Service's adoption of a seven-year regeneration standard for logging as violating the Forest Plan, and the Forest Service then issued a directive requiring regeneration in five years (as mandated by the Forest Plan). The court found that the case was not moot because, *inter alia*, the Service had not repudiated the legality of the longer standard. 732 F. Supp. at 1098. Because the Forest Service still considered the seven-year standard to be legal, there was no guarantee the Forest Service would not revert to its use; and hence the claim was not moot. *Id.*

The court came to a similar conclusion in *NRDC v. EPA*, 595 F. Supp. 1255 (S.D.N.Y. 1984), where the agency withdrew a challenged notice of proposed

rulemaking. In finding the case not moot, the court stated, when an administrative agency withdraws an order while still maintaining that the legal position is justified, repetition is likely and the claim should not be considered moot. 595 F. Supp. at 1263 (citing *Doe v. Harris*, 696 F.2d 109, 113 (D.C. Cir. 1982) (when a complaint identifies official conduct as wrongful and the legality of that conduct is vigorously asserted by the officers in question, the complainant may justifiably project repetition)).

Here, the Forest Service continues to defend the validity of its February 2011 DN/FONSI against Plaintiffs' NFMA claim, asserting that the agency fully complied with Boise Forest Plan standards MIST08 and MIST09 in approving RCA entries in that decision. *See Docket No. 27-1*, pp. 13–20 (addressing NFMA claim). Moreover, as explained above, the August 2011 PoO may be supplemented by the Forest Service to allow Mosquito Gold to construct roads across streams and facilities (including drill pads and mud pits) within RCAs, pursuant to the authority of the February 2011 DN/FONSI. Where the Forest Service vigorously defends its decision, and both it and Mosquito Gold anticipate that the August PoO will be supplemented—without public notice, comment or appeal—to allow roads and drill pads within RCAs under the authority of the February 2011 DN/FONSI, Plaintiffs' NFMA claim is surely not moot just because the Forest Service has not initially authorized RCA entries in the August 2011 PoO.

Accordingly, the Court should reject Mosquito Gold's "suggestion" that the NFMA claim is not justiciable; and grant Plaintiffs summary judgment on that claim.

CONCLUSION

For the foregoing reasons, and those set forth in Plaintiffs' opening brief, the Court should grant summary judgment to Plaintiffs on their NEPA and/or NFMA claims;

and reverse and remand the February 2011 EA and DN/FONSI for the CuMo Exploration Project.

DATED this 29th day of February, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of February, 2012, I caused the foregoing **Plaintiffs' Combined Response/Reply Brief On Cross-Motions For Summary Judgment** to be electronically filed with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following opposing counsel of record:

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