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

IDAHO CONSERVATION LEAGUE,)
IDAHO RIVERS UNITED, and)
GOLDEN EAGLE AUDUBON SOCIETY,)
)
Plaintiffs,)
)
vs.)
)
UNITED STATES FOREST SERVICE,)
)
Defendant,)
)
MOSQUITO MINING CORP.,)
)
Intervenor-Defendant.)

No. 1:11-cv-341-EJL

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

INTRODUCTION

Plaintiffs Idaho Conservation League, Idaho Rivers United, and Golden Eagle Audubon Society seek summary judgment reversing and remanding the Forest Service's February 2011 approval of the CuMo Mine Exploration Project, in the upper Grimes Creek watershed of the Boise National Forest.

The Forest Service has authorized more than 10 miles of roads and 137 drilling pads to be bulldozed within sensitive species habitat and riparian areas; and over 250 wells to be drilled during 24/7 operations most of the year, with attendant noise, lights, and human activities that disturb wildlife and recreational users alike. Yet the agency approved these exploration activities without preparing an Environmental Impact Statement (EIS), as required by the National Environmental Policy Act (NEPA); and without conducting the surveys necessary to evaluate and disclose to the public what the adverse impacts may be upon rare and sensitive species in the area – including great grey owl, wolverine, northern goshawk, and Sacajewa's bitterroot – again violating NEPA.

Likewise, the Forest Service did not conduct any studies before determining that the exploratory drilling would have “no impact” on groundwater – a conclusion that a recently-retired Bureau of Reclamation hydrogeologist explains has no sound basis, and which again violates NEPA. *See* accompanying Didrickson Declaration. Because roads, waste pits, and other structures are approved to be located within Riparian Conservation Areas, which are protected under the Boise Forest Plan, the Forest Service's decision also violates the National Forest Management Act (NFMA).

The Court should thus grant summary judgment for Plaintiffs on the NEPA and NFMA violations explained below; and reverse and remand the Forest Service's decision approving the CuMo Exploration Project.

STATEMENT OF RELEVANT FACTS¹

Procedural Background

The CuMo Mine site is located in the headwaters of Grimes Creek, approximately 5 miles upstream of Pioneerville and 14 miles north of Idaho City. *See* SOF, ¶¶ 1–4. A molybdenum deposit was first discovered there in 1963. *See* CU045806–07 (CuMo Environmental Assessment (“EA”)) (describing history of CuMo site).

In February 2007, intervenor Mosquito Gold (which had just taken over the prospect) proposed to conduct expanded exploration, including construction of over 13 miles of new roads and 132 drill pads. *Id.* The Forest Service conducted “scoping” on this proposal, in response to which Plaintiffs and many other members of the public voiced concerns about impacts of the exploration and of a major open-pit mine within the Boise River watershed. *See* SOF, ¶ 5. But the Forest Service rejected their calls to prepare a full EIS under NEPA, and instead contracted with Mosquito Gold for private consultants to prepare an EA. *Id.*

After taking comments on a draft EA in 2010, the Forest Service issued its final CuMo EA in February 2011 and approved a modified exploration plan with a Decision Notice and Finding of No Significant Impact (“DN/FONSI”). CU046228–246; SOF, ¶ 5. As approved by the Forest Service, Mosquito Gold may conduct active exploration between April 15 and December 15 over the next five years. CU046231. It is authorized to construct 10.2 miles of new roads, 4 new stream crossings, 137 drill pads each with an associated mud pit, and 259 drill holes at the CuMo site. CU046231, CU046233. Four

¹ Plaintiffs’ Separate Statement of Facts (“SOF”), submitted herewith under Local Rule 7.1(b)(1), contains a more detailed description of the CuMo exploration project and Forest Service decision process approving it. Administrative Record documents are cited according to the Forest Service’s designation “CU” before the page number.

diesel-powered drill rigs may operate around-the-clock, drilling the exploratory holes down 3,000 feet. CU046234. Up to 15 Mosquito staff could be working on-site at any one time. *Id.* Mosquito may make 30 one-way vehicle trips every day to the site to transport staff and supplies from Garden Valley and/or Centerville. *Id.*

Plaintiffs filed a timely administrative appeal of the Forest Service's February 2011 decision, CU049413, which the Forest Service denied. CU050744.

Forest Service's Failure To Study Affected Resources.

Despite some past logging and mining in upper Grimes Creek, the CuMo "project area consists of predominately forested vegetation with few existing disturbances," according to the Forest Service. SOF, ¶ 2. Numerous riparian areas dissect the site along the streams feeding upper Grimes Creek. *Id.* See also Conley, Paul, Robison, Finley Declarations, filed herewith (describing area).² As the Forest Service admits, the CuMo project area provides suitable habitat for many bird and wildlife species, including Forest Service-designated "sensitive species" such as wolverine, northern goshawk, and great grey owl. SOF, ¶ 3. Sacajawea's bitterroot – a rare plant known to exist in only four Idaho counties – has also been observed at the CuMo site. SOF, ¶ 4.

As detailed in the accompanying Statement of Facts, however, the Forest Service did not conduct surveys for all the sensitive species at the CuMo site before it approved the exploration project. See SOF, ¶¶ 27, 31. Instead, the DN/FONSI calls for surveys to be conducted for great grey owls, goshawks, and Sacajawea's bitterroot after the Forest

² The accompanying declarations are submitted to demonstrate Plaintiffs' Article III standing and/or environmental impacts the Forest Service failed to consider in its NEPA process. They are properly considered by the Court for these purposes. See *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 168-69 (2000) (standing declarations); *National Audubon Soc. v. U.S. Forest Serv.*, 46 F.3d 1437, 1447 (9th Cir. 1993) (extra-record declarations appropriate to show impacts agency did not consider under NEPA).

Service gave its approval to the project in February 2011. *Id.* Likewise, the Forest Service did not require groundwater studies to be conducted prior to approving the drilling of over 250 exploratory wells, based on its summary assertion that they would pose “no impact” to groundwater water in the area. SOF, ¶ 36.

ARGUMENT

I. THE FOREST SERVICE VIOLATED NEPA.

A. NEPA’s Requirements.

Under NEPA, federal agencies must conduct a comprehensive study of alternatives and environmental impacts for every proposed major federal action. 42 U.S.C. § 4332(C). As the Supreme Court has emphasized, NEPA requires federal agencies to take a “hard look” at likely environmental impacts before approving an action, not afterward. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (“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”); *Baltimore Gas & Electric v. NRDC*, 462 U.S. 87, 97 (1983) (NEPA requires “that the agency take a ‘hard look’ at the environmental consequences before taking a major action”).³

Taking a “hard look” under NEPA requires the agency to provide “a reasonably thorough discussion of the significant aspects of the probable environmental consequences.” *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982). The hard look doctrine bars “[g]eneral statements about ‘possible effects’ and ‘some risk’ . . . absent a

³ Likewise, the Council on Environmental Quality has adopted regulations implementing NEPA, which spell out that “NEPA procedures **must** insure that environmental information is available to public officials and citizens **before** decisions are made and before actions are taken.” *See* 40 C.F.R. § 1500.1(b) (emphasis added). The Supreme Court has held that “CEQ’s interpretation of NEPA is entitled to substantial deference.” *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

justification regarding why more definitive information could not be provided.”

Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1380 (9th Cir. 1998).

See also Conner v. Burford, 848 F.2d 1441, 1446 (9th Cir. 1988) (“purpose of an EIS is to apprise decisionmakers of the disruptive environmental effects that may flow from their decisions at a time when they retain a maximum range of options”).

To fulfill the NEPA “hard look” requirement, agencies must prepare an EIS for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). As a preliminary step, an agency may prepare an EA to determine whether the environmental impact of a proposed action is significant enough to warrant preparing an EIS. 40 C.F.R. § 1508.9. An EA is a “concise public document” that “briefly provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.” *Id.*

In reviewing an agency’s decision not to prepare an EIS, courts employ the APA’s arbitrary and capricious standard, which requires determining whether the agency: (1) took a hard look at the environmental consequences of the action; (2) based its decision on a consideration of all relevant factors; and (3) provided a convincing statement of reasons to explain why the project’s impacts are insignificant. *Native Ecosystems Council v. U.S. Forest Service*, 428 F.3d 1233, 1239 (9th Cir. 2005). An agency must prepare an EIS when there are substantial questions about whether a project “may” significantly degrade the environment. *Id.* (emphasis in original). “[T]his is a low standard.” *California Wilderness Coalition v. U.S.*, 631 F.3d 1072, 1097 (9th Cir. 2011).

When deciding if substantial questions exist about whether a project may significantly affect the environment, courts turn to the NEPA regulations defining “significantly.” *Native Ecosystems Council*, 428 F.3d at 1239. The NEPA regulations

list ten “intensity” factors for evaluating whether a project’s impacts are significant. 40 C.F.R. § 1508.27(b). The presence of any one factor may be sufficient to require an EIS. *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 865 (9th Cir. 2005).

B. The Forest Service Violated NEPA By Not Preparing An EIS.

As noted above, the Forest Service did not prepare any EIS to evaluate impacts of the proposed CuMo exploration activities – even though they entail logging trees, bulldozing miles of new roads, building over a hundred drill pads in relatively intact forested habitat, and drilling up to 259 exploratory holes down 3000 feet in areas of unknown groundwater hydrology; and even though the noise, lights, and human activities associated with the exploration will occur within habitat for numerous sensitive species. *See* SOF, ¶¶ 2, 3, 9, 36. The Forest Service’s refusal to prepare an EIS violates NEPA, particularly because the Forest Service has not taken a “hard look” at potential impacts on sensitive species and water resources.

The potential adverse impacts on sensitive species alone required an EIS. The CuMo EA acknowledged that wolverine, great grey owl, and northern goshawk are among the “sensitive species” of the Boise National Forest with suitable habitat at the CuMo site. *See* CU045897 (EA). These admissions triggered heightened duties for the Forest Service to analyze likely impacts upon the sensitive species, and ensure that adverse impacts do not contribute to their decline. *See* SOF, ¶¶ 3, 16 (describing and quoting Forest Service guidance on sensitive species). Yet the Forest Service still did not undertake a full EIS to study potential impacts on sensitive species.

As the Ninth Circuit has repeatedly held, such refusal to prepare an EIS to take a “hard look” at potential adverse impacts on sensitive species violates NEPA. *See Nat’l Parks & Conservation Ass’n*, 241 F.3d 722, 731–32 (9th Cir. 2001) (EIS required where

impacts of proposed action on sensitive species are uncertain or controversial); *ONRC v. Goodman*, 505 F.3d 884, 892–93 (9th Cir. 2007) (agency violated NEPA in not analyzing impacts on sensitive species habitat and populations); *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 937 (9th Cir. 2010) (Forest Service violated NEPA in not analyzing impacts to sensitive sage-grouse habitat and populations).

Moreover, environmental impacts are “highly uncertain” and require an EIS when an agency approves a project without enough information to understand and reasonably predict its environmental impacts. *See Jones v. Gordon*, 792 F.2d 821, 827, 829 (9th Cir. 1986) (removing orcas from wild populations involved uncertain impacts and unknown risks requiring an EIS because agency had no information on how the removals would impact wild orca populations); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213–14 (9th Cir. 1998) (impacts of salvage logging were “highly uncertain” and required EIS where the Forest Service lacked information about how it may affect sediment input into streams); *Anderson, v. Evans*, 314 F.3d 1006, 1018–21 (9th Cir. 2002) (impacts of tribal whale hunt were “uncertain” and required EIS because agency had no information on how whaling would impact the local population of whales).

Impacts to great gray owl and northern goshawk are highly uncertain here, in part because the Forest Service failed even to survey for these species and their nests at the site prior to approving the exploration. SOF ¶ 27. As discussed in the accompanying Declaration of Dr. Leon Powers, an ornithologist and great grey owl expert, the lack of raptor surveys underscores that “the Forest Service has failed to meaningfully analyze or discuss” potential impacts on great grey owl. *See Powers Decl.*, ¶¶ 28–29. Without surveys, the extent to which great grey owl and northern goshawk populate the site and nest in trees in or near planned exploration areas is unknown. *Id.*

Dr. Powers also identifies important factors bearing on the impact of the CuMo exploration on great grey owl which have not been considered by the Forest Service. The physical footprint of the CuMo exploration activities “will extensively fragment the area’s forested habitat” and “pose a formidable fragmentation threat to Great Grey Owl habitat,” especially during the post-fledging period; but the Forest Service failed to assess habitat fragmentation. *Id.* at ¶¶ 33, 35. Hunting habitat “must be undisturbed for successful hunting” which is “critical to the owls’ survival year-round,” but the Forest Service again did not address impacts to hunting. *Id.* at ¶ 34. And the Forest Service failed to consider human-caused mortality, such as collisions with automobiles and shooting by hunters, which Dr. Powers describes as an “almost certain endangerment to Great Grey Owls posed by the project.” *Id.* at ¶ 36.

Similarly, impacts to Sacajawea’s bitterroot – a rare plant found only in limited parts of Idaho – are highly uncertain because the Forest Service failed to conduct comprehensive population mapping and counts to determine baselines at the site prior to approving Mosquito Gold’s exploration activities. SOF ¶ 31. The stated objectives of the Forest Service’s post-decision monitoring program for Sacajawea’s bitterroot – to determine the extent that exploration may harm populations of the plant and whether population viability will be impacted, *see* CU046254 (DN/FONSI, Attach. A) – indicate the Forest Service’s high level of uncertainty about impacts when it approved the DN/FONSI. While the Forest Service directed Mosquito Gold to avoid Sacajawea’s bitterroot to the “greatest extent practicable,” CU046251, without knowing the extent of the species in and near areas where roads and drill pads will be constructed, there is no way to evaluate the extent of impacts to the rare plant species. Again, conducting comprehensive Sacajawea’s bitterroot surveys would reduce this uncertainty.

Potential impacts to hydrology from the drilling of over 250 exploratory holes – and potential contamination of water by hazardous mining wastes known to be adjacent to the CuMo site – are also highly uncertain, and again required an EIS. According to Kathryn Didricksen, an expert hydrogeologist who recently retired after a career with the Bureau of Reclamation, drilling exploratory wells “can impact local groundwater conditions if the drilling fluid leaves the borehole through bedrock fractures or through unconsolidated geologic material.” *See* Didricksen Decl., ¶ 5. “When many exploratory holes are drilled in one area, it is possible that there could be cumulative impacts in that area.” *Id.* However, determining the impacts “depends on many details, including the drilling procedures and the geologic and hydrologic character of the site.” *Id.* at ¶ 6.

Nevertheless, the Forest Service never conducted any baseline studies on groundwater hydrology, leaving these impacts highly uncertain. *See* CU050755 (Letter Affirming Forest Supervisor’s Decision). Didricksen explains that the Forest Service could have conducted hydrogeologic studies to reduce the uncertainty:

[T]he Forest Service should have, at a minimum, required a baseline hydrogeologic study that would have examined the existing data to determine the density and extent of bedrock fractures, the hydraulic conductivity of the local geologic formations, and measured the local groundwater levels to estimate groundwater flow directions before making a determination of no impact. This information would have given the Forest Service some basis for considering whether drilling might impact groundwater hydrology at and near the site.

Didricksen Decl. at ¶ 12.

In an analogous case, Chief Judge Winmill of this Court recently decided that groundwater impacts were sufficiently uncertain to require an EIS. *See Shoshone-Bannock Tribes of Fort Hall Reservation v. U.S. Dept. of Interior*, No. 4:10-cv-004-BLW, 2011 WL 1743656, at *10 (D. Idaho May 3, 2011). There, the impact of a new

phosphate waste dump was “highly uncertain” because BLM permitted it without studying groundwater “flows and potential contamination,” even though there was evidence indicating the possibility of groundwater impacts (a previous waste dump in the same area leaked toxic pollutants into the groundwater). *Id.* Similarly here, the uncertainty of potential impacts to groundwater required the Forest Service to conduct necessary studies and prepare an EIS disclosing potential adverse impacts. The Forest Service’s refusal to do so thus violated NEPA.

C. The Forest Service’s “Approve First, Study Later” Approach Also Violated NEPA.

Moreover, the Forest Service did not take the required “hard look” at potential impacts on sensitive species in the CuMo EA, because it decided to approve the exploration before even conducting surveys for great grey owl and northern goshawk in the project area, again in violation of NEPA. *See* SOF, ¶ 27.

The monitoring plan set forth by the Forest Service calls for post-approval surveys of the presence and nesting activity of both great grey owls and northern goshawks to be done “as conditions allow” prior to road construction and drilling activities each year. CU046250 (DN/FONSI Attach. A). Without conducting these studies prior to making its decision, the Forest Service lacked basic information concerning these sensitive species – including if and where great grey owl and northern goshawk nests are located at the site – necessary to make an informed decision as required by NEPA.

The Ninth Circuit and other courts have rejected similar agency actions which approved a project before necessary surveys or studies were completed in order to determine what the potential adverse impacts might be. In *National Parks &*

Conservation Association, supra, 241 F.3d at 731–32, the Ninth Circuit reversed an agency decision approving increased tours within sensitive whale habitat which required after-the-fact studies of potential impacts. The Ninth Circuit strongly rejected that “approve first, study later” approach, saying:

The Parks Service proposes to increase the risk of harm to the environment and then perform its studies. It has in fact already implemented the first part of its [project]. This approach has the process exactly backwards. *See Sierra Club*, 843 F.2d at 1195. 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. . . . The point is, however, that the “hard look” must be taken before, not after, the environmentally-threatening actions are put into effect.

Id. at 733.⁴ The Court should reject the Forest Service’s similarly flawed “approve first, study later” approach here.

D. The Forest Service’s Dismissal Of Potential Impacts To Sensitive Species Was Also Arbitrary And Capricious.

Despite finding that wolverine, great grey owl, and northern goshawk had habitat at the CuMo site, may use the site, and that individuals could be impacted by the exploration activities, the Forest Service concluded that the CuMo Exploration Project is not likely to cause or contribute to a trend toward federal listing under the ESA or cause a loss of viability of either species. CU045930, CU045923, CU045928. However, as discussed below, the Forest Service failed to take a hard look, consider the relevant factors, and offer convincing reasons for these conclusions, again requiring reversal.

⁴ *See also LaFlamme v. FERC*, 852 F.2d 389, 400 (9th Cir. 1988) (issuance of conditional license for hydroelectric plant requiring “post-licensing” study of environmental impacts “violates NEPA’s very letter and purpose”); *Protect Key West v. Cheney*, 795 F. Supp. 1552, 1561-62 (S. D. Fl. 1992) (Navy could not satisfy NEPA by conducting traffic impact study after decision was approved, because this “commit first, act questions later” approach “would render the EA/FONSI process a mere formality. . . . In the NEPA context, *post hoc* compliance by *definition* does not accord with the congressional mandate”).

1. Wolverine.

Wolverine are elusive mammals that range through much of Idaho and the northern Rockies, with suitable habitat (including for denning) in the CuMo project area and sightings of individuals in nearby areas. *See* SOF, ¶¶ 19–21. Because of threats posed by global climate change and human intrusions into wolverine habitat the U.S. Fish and Wildlife Service recently found that wolverine “warrant” listing as an endangered or threatened species. *See* Robison Decl., ¶¶ 40-44; 75 Fed. Reg. 78030 (Dec. 14, 2010).

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’s “activities between April 15 and mid-May are unlikely to affect wolverine denning.” CU045930 (EA). Nowhere did the Forest Service rebut 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.

This explanation ignores the critical fact that wolverine denning begins during the winter period in which exploration is not allowed at the site. *See* SOF ¶ 21; Robison

Decl., ¶¶ 46–48. Thus, wolverine could begin denning between mid-December and mid-April, only to be disturbed and driven from their dens when Mosquito Gold commences exploration after April 15th. *Id.* By claiming that wolverine denning would not be impacted, the Forest Service’s conclusion runs counter to the facts in the record, and hence is arbitrary and capricious. *See Motor Vehicle Mfrs. Ass’n. v. State Farm*, 463 U.S. 29, 43 (1983) (decision is arbitrary and capricious when agency “offer[s] an explanation for its decision that runs counter to the evidence”).

The Forest Service also claims that “given the large range of wolverine and generally low population densities, the likelihood of proposed roads . . . directly impacting a wolverine den [at the CuMo site] is low.” CU045929 (EA) (emphasis added). However, this explanation does not account for the other impacts the Forest Service identified as critical to assessing impacts to species – including direct impacts of building drill pads and mud pits, and indirect disturbance impacts from noise, light, and human activity resulting from Mosquito’s activities. *See* CU045893 (EA) (setting forth methodology for evaluating impacts to wildlife); SOF ¶¶ 17–18.

The Forest Service also suggests that even if Mosquito does disturb denning wolverine, this will not have an impact because wolverine can move their kits when disturbed and there is suitable wolverine habitat adjacent to the CuMo site. CU045929 (EA). However, the Forest Service ignored the fact that driving a wolverine and her kits from their dens has been documented to kill wolverine kits. *See* 75 Fed. Reg. at 78046. And nothing in the record shows that the Forest Service considered the cumulative impacts that 24/7 drilling, road and drill pad construction, and 30 daily vehicle trips to the site will have on areas adjacent to the CuMo site which otherwise provide suitable habitat for highly sensitive denning wolverine.

2. Great grey owl and northern goshawk.

The EA acknowledged that 34 percent and 45 percent of the CuMo site provide suitable habitat for great grey owl and northern goshawk, respectively. CU045898 (EA). The Forest Service also determined that it is “reasonable to anticipate” that great grey owl use the site, and multiple nesting pairs may inhabit the roughly four-square mile site. CU045920. A northern goshawk was detected within one mile of the site in 2009. CU045899. But despite these facts, the Forest Service relied on the post-decision monitoring and mitigation program to contend no impacts will occur, which is illogical and violates NEPA for the reasons above.

The Forest Service also failed to assess and disclose the impacts that noise, light, and human presence associated with the exploration activities may have on great grey owl and northern goshawk. When discussing its methodology for assessing impacts to sensitive species, the Forest Service explained that the CuMo exploration would have both: (1) direct habitat effects, including habitat destruction caused by clearing land to make roads, drill pads, and mud pits; and (2) indirect disturbance effects, including disturbances from noise, light, and human activity. CU045893 (EA).

The Administrative Record is replete with evidence that grey owl and northern goshawk at the CuMo site would suffer indirect disturbance impacts. *See* SOF ¶ 26. The Forest Service noted that nesting density of great grey owl “is strongly influenced by the intensity of the land use, including human activity.” CU045920 (EA). And the Forest Service found that Mosquito’s construction activities might temporarily deter great grey owl from using portions of the CuMo site and that noise from construction and drilling can disturb breeding and cause nest failure. *Id.* Similarly, the Forest Service recognized

that noise and human presence from Mosquito's construction and drilling activities might deter northern goshawk from using the site and could cause nest failure. CU045926.

However, the Forest Service ignored indirect disturbance effects in concluding that neither species would be significantly affected, saying: "Impacts represent a small portion of existing source habitat." CU045923, CU045928. This statement is misleading and inaccurate, because it is based solely on the direct habitat impact from clearing land for new roads and drill pads, which the Forest Service found would destroy 2.8 and 2.6 percent of suitable habitat for great grey owl and northern goshawk, respectively. *See* CU045899. The statement ignores the Forest Service's findings that indirect disturbance impacts can extend throughout the entire CuMo site, CU045893, and that both species are sensitive to indirect disturbance impacts from the construction and drilling. SOF ¶ 26.

Furthermore, the mitigation plan calls for a 150-foot buffer in the event that Mosquito identifies a nest and deems it is feasible to relocate a road or drill pad, yet the Forest Service offers no support for such a 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, ¶ 30.

E. The Forest Service Erroneously Found There Would Be No Impacts To Groundwater Hydrology.

Plaintiffs alerted the Forest Service to the fact that by allowing Mosquito to drill up to 259 drill holes, each of which may be up to 3,000 feet deep, the CuMo Exploration could alter groundwater hydrology in the area, which could increase the flow of springs and seeps emanating from areas contaminated with historic mining waste adjacent to the

CuMo site. *See* SOF ¶¶ 32. The Forest Service responded: “No baseline groundwater studies were conducted because there are no expected impacts to groundwater” CU050755 (Letter Affirming Forest Supervisor’s Decision).

The Administrative Record shows that there are historic mine sites adjacent to the CuMo property on the south banks of Grimes Creek which are littered with contaminated soils. *See* SOF ¶¶ 33–34. The Idaho Department of Environmental Quality (IDEQ) identified springs and adits flowing from these sites near and through soils contaminated with hazardous substances, and noted that water contamination could increase under different hydrological conditions. SOF ¶ 34.

Past experience at the CuMo site shows that drilling can impact hydrology. Shaun Dykes, Project Manager for Mosquito Gold, reported that drilling activities in 2010 increased flows from a stand pipe located at a lower elevation than the drilling. *See* CU015944. In another instance, Mosquito employees reported that the site’s rock is highly fractured, allowing drilling fluid and groundwater to escape from the drill hole and flow in response to drilling. *See* CU049450.

Despite this evidence in the Administrative Record, the Forest Service refused to acknowledge that drilling could impact groundwater hydrology, CU046319 (DN/FONSI Attach. B), and thus violated NEPA. As geohydrologist Didrickson explains, this conclusion has no basis and hence is arbitrary and capricious given the facts in the record. *See* Didrickson Decl., ¶¶ 7–11.

For all the reasons above, the Forest Service’s reliance on the CuMo EA and DN/FONSI to approve the CuMo Exploration Project without adequate information, and without preparing an EIS, was arbitrary and capricious and violated NEPA; and hence the Court should enter summary judgment for Plaintiffs on these grounds.

II. THE FOREST SERVICE ALSO VIOLATED NFMA.

The Court should also grant summary judgment on Plaintiffs' claim that the Forest Service violated NFMA by locating roads, drill pads, and mud pits in Riparian Conservation Areas (RCAs) without first determining that no alternatives exist and without minimizing road construction in RCAs, as required by the Boise Forest Plan.

A. NFMA's "Consistency" Requirement.

NFMA requires that all Forest Service management decisions must be "consistent" with the applicable Forest Plan. *See* 16 U.S.C. § 1604(i); 36 C.F.R. § 219.10(e); *Native Ecosystems Council v. U.S. Forest Service*, 428 F.3d 1233, 1249 (9th Cir. 2005). Site-specific actions which do not conform to the governing Forest Plan violate this NFMA consistency requirement. *Neighbors of Cuddy Mountain v. United States Forest Service*, 137 F.3d 1372, 1377 (9th Cir. 1998). "Specific projects . . . must be analyzed by the Forest Service and the analysis must show that each project is consistent with the plan." *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1062 (9th Cir. 2002).

B. The Forest Service Violated NFMA By Approving Roads, Drill Pads, And Mud Pits in RCAs, Contrary To The Boise Forest Plan.

The Boise Forest Plan sets goals, objectives, standards, and guidelines for managing mineral resources that are applicable here. *See* CU000173–76. It emphasizes that the "standards" are "binding limitations placed on management actions. . . . A project or action that varies from a relevant standard may not be authorized unless the Forest Plan is amended to modify, remove, or waive application of the standard." CU000128.

Recognizing the ecological complexity and importance of riparian zones, as well as their vulnerability to land management activities, the Boise Forest Plan establishes

“Riparian Conservation Areas” (RCAs), which extend 300 feet to either side of a forested stream or 150 feet to either side of an intermittent forested stream; and affords RCAs certain protections. *See* SOF ¶ 11–12. Boise Forest Plan standards MIST08 and MIST09 apply to mineral resource projects and prohibit locating “new structures,” “support facilities,” “roads,” and “solid and sanitary waste facilities” in RCAs unless “no alternative” exists. *Id.*; CU000174–75.

The Forest Service authorized Mosquito to construct new roads with four stream crossings. CU046231 (DN/FONSI). These are “roads” subject to MIST08, and the stream crossings will necessarily cross RCAs. SOF ¶ 14.

The Forest Service also authorized the construction of 137 drill pads, each with a corresponding settling pond (also referred to as a “mud pit”). CU046233 (DN/FONSI). While the Forest Service never identified the location of each drill pad and settling pond, it authorized Mosquito to locate them in RCAs. SOF ¶ 15. The Forest Service’s Answer admits that drill pads and settling ponds are “facilities” and/or “support structures” subject to MIST08, and settling ponds are also “solid waste facilities” subject to MIST09. *See Answer (Docket No. 17), ¶ 73, admitting Corrected Complaint (Docket No. 2), ¶ 73.*

Despite authorizing Mosquito to locate roads, drill pads, and settling ponds in RCAs, there is no evidence in the Administrative Record that the Forest Service considered whether alternatives exist, as required by the Boise Forest Plan standards.

However, in denying Plaintiffs’ administrative appeal, the Forest Service claimed that two documents demonstrate compliance with MIST08 and MIST09: (1) Geologic Hazards and Soil Resources Technical Report, CU018446 *et seq.*; and (2) Forest Plan Consistency Documentation, CU043661 *et seq.* *See* Letter Affirming Forest Supervisor’s Decision, CU050748, CU050749–50. While these documents baldly assert that the

Forest Service complied with MIST08 and MIST09, and provide limited analyses mitigating some of the impacts of locating roads, drill pads, and settling ponds in RCAs, neither document includes a consideration of whether alternatives exist, and neither document even asserts that no alternatives exist. The Forest Service thus violated the Boise Forest Plan and NFMA in approving the roads, drill pads, and mud pits within RCAs without evaluating whether any alternatives exist.

Aside from its failure to consider alternatives, the Forest Service further violated standard MIST08, which mandates that the Forest Service “keep roads to the minimum necessary for the approved mineral activity.” CU000174 (Boise Forest Plan) (emphasis added). Again, there is no evidence in the record that the Forest Service minimized roads located in RCAs.

The U.S. District Court for Oregon addressed a nearly identical situation in *Hells Canyon Preservation Council v. Haines*, 2006 WL 2252554 (D. Or. 2006), and held that the Forest Service violated the Wallowa-Whitman Forest Plan when it approved the construction of mining roads and settling ponds within Riparian Habitat Conservation Areas (RHCAs) without performing a thorough analysis of whether there were no alternatives and without providing specific assurances that new road construction was limited to the minimum amount necessary.

At issue in *Hells Canyon* was the MM-2 Standard, which according to the court, “provides that structures, support facilities, and roads should be located outside of RHCAs unless no alternative exists, and where no alternative to road construction exists, such construction must be limited to the minimum necessary for the approved mineral activity.” *Id.*, at *8. The plaintiffs argued that the MM-2 Standard required the Forest Service to analyze whether alternatives existed to locating roads within RHCAs and

whether roads located in RHCAs were limited to the minimum necessary but that the record contained no evidence of such analyses. *Id.* The court agreed, ruling that when roads will be constructed in RHCAs, “the Forest Service is responsible for analyzing the necessity of these new roads, whether alternatives exist, and providing more specific assurances that new road construction will be limited to the minimum amount necessary to comply with MM-2.” *Id.*

MIST08 and MM-2 are virtually identical standards. As in *Hells Canyon*, there is no evidence in the record here that the Forest Service analyzed the necessity of locating roads, drill pads, and mud pits in RCAs; and the record lacks specific assurances that the Forest Service minimized road construction in RCAs. Thus, the Forest Service violated Boise Forest Plan and NFMA, requiring reversal by this Court.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs’ motion for summary judgment; and reverse and remand the Forest Service’s February 2011 CuMo EA and DN/FONSI as violating NEPA, NFMA and the APA.

DATED this 15thth day of December, 2011.

Respectfully submitted,

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