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

IDAHO CONSERVATION LEAGUE, and  
GREATER YELLOWSTONE COALITION

*Plaintiffs,*

v.

U.S. FOREST SERVICE,

*Defendant,*

and

EXCELLON IDAHO GOLD, INC., an Idaho  
corporation,

*Defendant-Intervenor.*

Case No. 1:22-cv-225-BLW

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

\* This Opening Brief complies with the 40-page limit in the Parties’ Joint Litigation Plan, ECF No. 13 and adopted by the Court’s Scheduling Order, ECF No. 17.

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## **INTRODUCTION**

This action challenges the U.S. Forest Service’s November 2021 approval of the Kilgore Gold Exploration Project (“Kilgore Project”). This Court issued decisions in 2019 and 2020 reversing, remanding, and vacating the Forest Service’s prior approval of the Kilgore Project for violating the National Environmental Policy Act (“NEPA”) because the Forest Service failed to take a “hard look” at the risks of exploration drilling to groundwater and to Yellowstone cutthroat trout (“YCT”), a native, “sensitive species” which is barely hanging on in the area.

The project proponent, formerly Otis Gold Corp. and now Excellon Idaho Gold, Inc. (“Excellon”), has continued to seek Forest Service approval for the Kilgore Project, a five-year exploration drilling proposal on public land in the Caribou-Targhee National Forest. The Kilgore Project is in the Greater Yellowstone Ecosystem and in the Centennial Mountains along Idaho/Montana border—a critically-important area for grizzly bear, wolverine, lynx, bighorn sheep, whitebark pine, and Yellowstone cutthroat trout.

Even though this Court previously reversed and remanded for the Forest Service to collect baseline information and fully analyze potential impacts of exploration drilling on water quality and fish, the Forest Service re-approved the Kilgore Project in November 2021, still without adequate baseline information, monitoring, or protective measures, again violating NEPA. Among other failures, the Forest Service has collected groundwater samples at only one location, and still has not sampled groundwater in three of the Project’s four drilling areas—including in the Dog Bone Ridge drilling area, which was the subject of this Court’s remand. The Forest Service also refused to disclose the location of historical mining features—features known to contribute contamination to Project area streams—and refused to consider whether and how Excellon’s drilling might interact with these features and cause more contamination.



Also, during remand the Forest Service announced a new logging project, the “Porcupine Lookout Vegetation Project.” Porcupine Lookout will occur in Dog Bone Ridge and the Corral Creek watershed, but the Forest Service failed to properly assess and misleadingly downplayed the potentially significant adverse cumulative effects of Porcupine Lookout together with the Kilgore Project to elk, grizzly bear, YCT, and whitebark pine, in violation of NEPA.

Despite its potentially significant and highly uncertain effects, the Forest Service approved the Kilgore Project through an Environmental Assessment (“EA”) and Decision Notice and Finding of No Significant Impact (“DN/FONSI”), refusing to prepare an Environmental Impact Statement (“EIS”), in violation of NEPA. The Forest Service also violated NEPA by refusing to consider alternatives to Excellon’s proposal, even though Plaintiffs proposed feasible alternatives that would allow Excellon to complete its drilling with less environmental damage.

Finally, the Forest Service also violated the Forest Service Organic Act of 1897 (establishing the National Forest system) and applicable mining regulations by failing to adopt prudent, feasible measures to minimize harm to fish, wildlife, and water quality.

### **STATEMENT OF RELEVANT FACTS**<sup>1</sup>

#### **The Centennial Mountains & the Beaver-Camas Watershed**

The Kilgore Project is a five-year program to explore for minerals on public lands in the Dubois Ranger District of the Caribou-Targhee National Forest. SOF ¶ 1. The Project site is located in the Centennial Mountains, five miles northwest of Kilgore, Idaho, in Clark County in the Beaver and West Camas watersheds. *Id.*

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<sup>1</sup> Plaintiffs’ Statement of Undisputed Facts (SOF), filed herewith, is based on the Forest Service’s Administrative Record (AR) (ECF No. 16) and Supplemental Administrative Record (SAR) (ECF No. 18). AR documents are cited as “FS-[page #].” SAR documents are cited by their ECF document number and ECF page number.

The Centennials are an east-west trending mountain range on the Continental Divide along the Idaho-Montana border. SOF ¶ 4. The Centennials are recognized as critical wildlife habitat and a key ecological corridor. *Id.* The Centennials provide an east-west path linking dispersing and migrating wildlife in Yellowstone National Park and the Greater Yellowstone Ecosystem (GYE) with the wild lands of central Idaho and other key ecosystems in the Northern Rockies. *Id.* The forested, mountainous Project site is home to individuals and habitat for numerous special-status and at-risk terrestrial species of wildlife and plants, including grizzly bear, wolverine, lynx, elk, whitebark pine, and others. SOF ¶ 5.

The Beaver-Camas watershed is part of the Upper Snake River Basin and is the easternmost in a series of five sink drainages there, which recharge the Eastern Snake Plain Aquifer. FS-014896, 014928. Camas Creek and Beaver Creek both flow south from near the Kilgore Project area to irrigated agriculture lands and through the Camas National Wildlife Refuge to Mud Lake on the Snake River Plain. *See* Complaint (ECF 1) at Fig. 1.

The Camas National Wildlife Refuge was established in 1937 to provide habitat for nesting waterfowl and resting and feeding habitat for spring and fall migrating ducks, geese, and other waterfowl. FS-014938–39. Camas Creek flows for eight miles through the Refuge and provides water to the many lakes and ponds located within the refuge boundaries. FS-014939. Mud Lake is a designated state Wildlife Management Area established primarily to preserve and improve nesting habitat for waterfowl. *Id.*

Native Yellowstone cutthroat trout (YCT) inhabit streams on the west side of the Project area in the Corral Creek drainage. *See* FS-024029–33. YCT used to inhabit streams on the other side of the Project area too, including West Camas Creek and many of its tributaries; however, YCT have not been documented in those streams in recent surveys. *Id.*

### **This Court’s Decisions to Remand and Vacate the Forest Service’s 2018 Approval**

In 2017, Otis Gold submitted a Plan of Operations for the Kilgore Project to the Forest Service, which the Forest Service approved in August 2018 through an EA and DN/FONSI. SOF ¶ 9. The approval authorized Otis Gold to construct over 10 miles of road and 140 drill stations (and cause approximately 23 acres of surface disturbance) to drill up to 420 exploratory holes over five years on National Forest lands. ECF No. 18-5, pp. 4–8.

The Kilgore Project is larger than other previous exploration projects at the site. In 2014, the Forest Service approved through an EA and a DN/FONSI Otis Gold’s plan to construct less than a mile (3,919 feet) of road to access 16 drill sites in the Mine Ridge area, disturbing 7.1 acres. ECF No. 18-2, pp. 1–4. In 2017, the Forest Service approved through a NEPA “categorical exclusion” Otis Gold’s proposal for 0.5 acres of disturbance to construct timber platforms and use helicopters to drill at 34 stations in Gold Ridge and Mine Ridge. ECF No. 18-3, pp. 1–2.

Plaintiffs Idaho Conservation League (“ICL”) and Greater Yellowstone Coalition filed their initial suit challenging the Forest Service’s approval of the Kilgore Project in this Court on November 13, 2018, under NEPA and other laws. *See ICL v. U.S. Forest Serv.*, No. 1:18-cv-504-BLW (D. Idaho). Otis Gold intervened as a defendant. *See id.* During this pending litigation, in the fall of 2019, Otis Gold completed 1,876 feet of road construction and conducted drilling at 10 sites, causing nearly 8 acres of surface disturbance. SOF ¶ 9.

On December 18, 2019, the Court granted summary judgment for Plaintiffs, in part, holding that the Forest Service failed to take a “hard look” in violation of NEPA and remanding to “consider the impact of the Project on (1) groundwater in the Dog Bone Ridge area and (2) how that groundwater from Dog Bone Ridge drainage will impact Corral Creek and the Yellowstone cutthroat trout in Corral Creek.” *ICL v. U.S. Forest Serv.*, 429 F. Supp. 3d 719, 723

(D. Idaho 2019). With respect to groundwater, the Court stated: “[T]he Forest Service does not know how groundwater will drain from Dog Bone Ridge to Corral Creek. That is troubling given the lack of monitoring on the west side and the potential for groundwater contamination caused by drilling.” *Id.* at 731. With respect to YCT, the Court concluded: “Because the Forest Service did not do a baseline study on the Dog Bone Ridge area, and is not requiring any monitoring there, the agency does not know whether drilling will cause contaminated groundwater to flow into Corral Creek, habitat for the Yellowstone cutthroat trout, a sensitive species.” *Id.* at 732.

After the Court’s December 2019 ruling, Otis Gold indicated that it intended to proceed with exploration outside of Dog Bone Ridge during remand. *See ICL v. U.S. Forest Serv.*, No. 1:18-CV-504-BLW, 2020 WL 2115436, \*2 (D. Idaho May 4, 2020). In May 2020, the Court granted Plaintiffs’ motion to amend the judgment, vacating the Forest Service’s approval of the Kilgore Project and confirming that Otis Gold could not proceed with exploration activities during remand. *See id.* Around this time, Otis Gold became Excellon Idaho Gold, an Idaho corporation and a wholly-owned subsidiary of Excellon Resources, Inc. *See* FS-024001.

### **2021 Forest Service Re-Approval of the Kilgore Project**

In July 2020, Excellon submitted a revised Plan of Operations to the Forest Service, again including operations in the Dog Bone Ridge area. SOF ¶ 10. The revised plan was mostly the same as the previous one, seeking a five-year authorization to construct 10.2 miles of road and 130 drill stations, and to drill up to 390 exploration holes, each to an average depth of 1,300 feet underground. *See* SOF ¶¶ 2–4; ECF No. 18-5, pp. 4–8.

In January 2021, the Forest Service released a Draft EA and took public comment. SOF ¶ 10. Plaintiffs submitted comments, warning that the Forest Service failed to comply with Court’s remand order because the Draft EA relied on minimal and inadequate new data from Dog Bone

Ridge. SOF ¶ 11. They also warned that the Forest Service failed to consider contamination risk from drilling near historical mine adits, tunnels, and waste at the site, and that it failed to include important information about a new logging project—the Porcupine Lookout Vegetation Project—which the agency admitted would have negative cumulative environmental effects. *Id.*

Plaintiffs also identified reasonable action alternatives for the Forest Service to consider that would allow Excellon to conduct its full exploration but with potentially much less environmental impact. SOF ¶ 12. These included using helicopter-supported drilling to limit the mileage of new roads, as well as limiting drilling to daylight hours only to reduce wildlife disturbance. *Id.* Plaintiffs also urged the Forest Service to prepare an EIS based on the large scale of the Kilgore Project and its potentially significant effects to water quality, fish, and wildlife, and to impose feasible mitigation measures to reduce adverse impacts. *Id.*

Instead of preparing an EIS, the Forest Service released a Final EA on June 7, 2021. SOF ¶ 13. In the EA, the Forest Service considered only the “Action Alternative” (Excellon’s proposal) and the “No Action Alternative,” refusing to consider any other alternatives, including the reasonable alternatives Plaintiffs proposed in their comments. *Id.* On June 7, 2021, the Forest Service also released the draft DN/FONSI, initiating a 45-day administrative objection period. *Id.* The draft DN/FONSI proposed approving Excellon’s proposal based on the EA’s conclusion that the Kilgore Project will have no significant effects. *Id.*

Plaintiffs filed a timely administrative objection, again raising concerns that the Forest Service: failed to comply with the remand order; failed to disclose, evaluate, and mitigate against adverse impacts of Excellon’s activities; unreasonably rejected viable action alternatives that would avoid, minimize, or mitigate impacts while allowing Excellon to complete its full drilling proposal; and should prepare an EIS, among other concerns. *See* FS-024157–75.

Following an objection resolution meeting, Plaintiffs submitted a proposal to remedy their objections. Johnson Decl., Ex. A. Plaintiffs' proposal would have allowed Excellon to proceed with some of the exploration upon Project approval, while waiting on the rest of the exploration until the Forest Service could gather more information and consider additional alternatives and mitigation. *Id.* The Forest Service rejected this proposal, and on November 1, 2021, the Forest Service's Objection Reviewing Officer denied Plaintiffs' objections. SOF ¶ 14. The Objection Reviewing Officer did direct the Forest Service to provide, in its final decision, more rationale for rejecting the alternatives Plaintiffs had proposed. *Id.*

On November 12, 2021, the Forest Service issued the final DN/FONSI, approving the Kilgore Project based on the 2021 Final EA. SOF ¶ 15.

### **LEGAL BACKGROUND**

#### **The Forest Service Organic Act of 1897**

The Organic Act requires the Forest Service "to regulate [the] occupancy and use [of national forests] and to preserve the forests thereon from destruction." 16 U.S.C. § 551. It also requires that those persons "prospecting, locating, and developing the mineral resources [on a national forest] . . . must comply with the rules and regulations covering such national forests." 16 U.S.C. § 478. Forest Service mining regulations require that "all [mining] operations shall be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest resources," 36 C.F.R. § 228.8, and require the Forest Service "to maintain and protect fisheries and wildlife habitat which may be affected by the operations." *Id.* § 228.8(e).

#### **The National Environmental Policy Act**

NEPA requires federal agencies to take a "hard look" at the environmental consequences of their proposed actions. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976); *Blue Mountain*

*Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998). To take this “hard look,” agencies must prepare an EIS for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). The standard for when an agency must prepare an EIS is a “low standard.” *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006).

The Council on Environmental Quality (CEQ) establishes NEPA regulations, which are binding on every federal agency. 40 C.F.R. § 1500.3(a) (2020). The original regulations implementing NEPA were published by CEQ in 1978. *See* 40 Fed. Reg. 55,978 (Nov. 29, 1978). In 2020, the Trump administration published new CEQ NEPA regulations. *See* 85 Fed. Reg. 43,304 (July 16, 2020) (codified at 40 C.F.R. Part 1500). The Biden administration has since revised the regulations and is making further revisions. *See* 87 Fed. Reg. 23,453 (April 20, 2022). The Forest Service says it applied the 2020 regulations to the Kilgore Project. Answer (ECF No. 14) ¶ 5. In this brief, Plaintiffs cite to both the 1978 regulations (as amended pre-2020), and the short-lived 2020 regulations. In any event, Plaintiffs note that the Forest Service must comply with NEPA and with Forest Service NEPA regulations, which Plaintiffs also cite.

Under NEPA, if an agency is unsure whether a proposed action may have significant environmental effects, it may prepare a shorter “environmental assessment” to determine whether an EIS is necessary. 40 C.F.R. § 1501.4(c) (1978); 40 C.F.R. § 1501.5 (2020). Under the 1978 regulations, to avoid preparing an EIS, the agency’s EA and FONSI must provide a “convincing statement of reasons” why a project’s impacts are insignificant. 40 C.F.R. §§ 1501.4, 1508.9, 1508.13 (1978). Under the 2020 regulations, an agency can avoid preparing an EIS if it concludes the project “will not have significant effects.” 40 C.F.R. § 1501.6(a) (2020).

The scope of NEPA review is broad. Under the 1978 regulations, a federal agency must evaluate and disclose the direct, indirect, and cumulative effects of the proposed action and its alternatives on ecological, aesthetic, historic, cultural, economic, social, and health interests. 40 C.F.R. §§ 1508.7–1508.8 (1978). Under the 2020 regulations, the term “cumulative impacts” and “cumulative effects” are no longer used, and agencies are directed to “[i]dentify environmental effects and values in adequate detail so the decision maker can appropriately consider such effects and values alongside economic and technical analyses.” 40 C.F.R. § 1501.2(b)(2) (2020). However, CEQ stated that NEPA itself requires cumulative impacts to be reviewed and that the 2020 revisions to the regulations did not “did not absolve agencies from evaluating reasonably foreseeable cumulative effects.” 87 Fed. Reg. 23,453, 23,463 (Apr. 20, 2022).

The Forest Service’s NEPA regulations state that the agency can “discuss the direct, indirect, and cumulative impact(s) of the proposed action and any alternatives” in an EA. 36 C.F.R. § 220.7(b)(3)(iv). These NEPA regulations also require that the “final analysis documents an agency assessment of the cumulative effects of the actions considered (including past, present, and reasonabl[y] foreseeable future actions) on the affected environment.” *Id.* § 220.4(f).

NEPA also requires the agency to fully analyze the baseline conditions of the affected environment. Establishing baseline conditions is a fundamental to the NEPA process, because an inadequate environmental baseline precludes an accurate assessment of an action’s environmental impacts. *Or. Nat. Desert Ass’n v. Jewell*, 840 F.3d 562, 568 (9th Cir. 2016).

Lastly, considering alternatives is at the heart of NEPA, which directs agencies to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(E). *See also* 40 C.F.R. § 1502.14(a)–(c) (1978); 40 C.F.R. § 1501.2(b)(3) (2020).



## **The Administrative Procedure Act**

The APA empowers federal courts to hold unlawful and set aside any final agency action which is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). Under the APA, “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfgs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation omitted).

The Court reviews the Forest Service’s EA and DN/FONSI under the APA. *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005). This requires a “thorough, probing, in-depth review.” *Id.*

## **ARGUMENT**<sup>2</sup>

### **I. FAILURE TO TAKE A HARD LOOK IN VIOLATION OF NEPA**

Plaintiffs first seek summary judgment on their Third Claim for Relief, which challenges the Forest Service’s violations of NEPA and NEPA’s implementing regulations by authorizing the Kilgore Project based on the defective EA without taking a “hard look” at potential environmental effects. Complaint (ECF No. 1), ¶¶ 111–15. Specifically, the Forest Service failed to gather baseline information necessary to understand the potential adverse impacts to surface water and groundwater from Excellon’s drilling and failed to properly consider the cumulative effects the Porcupine Lookout Vegetation Project will have on at-risk and special status species.

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<sup>2</sup> Plaintiffs’ Article III standing is demonstrated by their comments (FS-006988–7047) and objections (FS-024157–75) and by the accompanying declarations of Joshua Johnson, Allison Michalski, Anthony A. Huegel, and Xavier R. Rolet. Each is a staff person, board member, member, and/or supporter of Plaintiffs and attests to their personal knowledge and uses of the area harmed by the Kilgore Project and whose injuries will be redressed by a favorable decision. *See Nw. Env’tl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1527–28 (9th Cir. 1997).

**A. NEPA’s Hard Look Requirement**

Again, NEPA requires agencies to take a hard look at the direct, indirect, and cumulative effects of its proposed action and all alternatives in an EA. 40 C.F.R. § 1508.7, 1508.8 (1978); 40 C.F.R § 1501.2(b) (2020); 85 Fed. Reg. 43,304 (Sep. 14, 2020); 36 C.F.R. §§ 220.4 & 220.7. The purpose of NEPA “is to obviate the need for speculation by insuring that available data is gathered and analyzed prior to implementation of the proposed action.” *LaFlamme v. FERC*, 852 F.2d 389, 400 (9th Cir. 1988).

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) (quotation omitted). The hard look doctrine bars “[g]eneral statements about ‘possible’ effects and ‘some risk’ . . . absent a justification regarding why more definitive information could not be provided.” *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998). “[C]onclusory statements, based on vague and uncertain analysis, . . . are insufficient to satisfy NEPA’s requirements.” *Bark v. U.S. Forest Serv.*, 958 F.3d 865, 872 (9th Cir. 2020) (quotation omitted).

**B. Failure to Take a Hard Look at the Impacts of Drilling on Groundwater and Surface Water**

Exploration drilling can affect groundwater and surface water quality in a variety of ways. SOF ¶ 16. Drilling fluid and water mixing with drill cuttings can overflow into surface water, or can infiltrate into groundwater, and cause contamination. *Id.* Groundwater can mix with other groundwater of differing chemical composition through aquifer crossflow caused while drilling, thereby cross-contaminating an aquifer. *Id.* Surface water and groundwater of differing chemical composition can mix as a result of drilling and cause cross contamination. *Id.*

The preface to the Forest Service’s July 2020 guidance, titled “Working Guide[:] Evaluating Groundwater Resources for Mineral Exploration Drilling” (hereafter “*Working Guide*”) states: “Growing recognition of the ecological and socio-economic importance of groundwater and groundwater-related resources (springs and groundwater-supported wetlands and streams) has emphasized the need for the Forest Service to ensure adequate analysis of potential effects on groundwater from mineral exploration drilling . . . .” FS-013789.

But in the Kilgore Project EA, the Forest Service ignored its own guidance, claimed contamination is unlikely, and asserted during drilling “any significant changes to field parameters, water quality constituents, or spring discharge would be reported to FS personnel.” FS-024029. These conclusions, however, are not supported due to multiple flaws, each of which violate NEPA’s hard look requirement as discussed next.

1. Failure to Consider Risk of Contamination from Historical Mine Features

The *Working Guide* directs the Forest Service, when evaluating potential effects of exploration drilling like the Kilgore Project, to answer: “Are there any abandoned or active mine features in the area? Will drilling intercept underground workings? Are there any known natural or anthropogenic sources of water quality contamination in the project area?” FS-013805.

Answering these questions is important, because: “These features can provide conduits to groundwater flow and/or increase the risk of groundwater and surface water contamination.” *Id.*

At the Kilgore Project site, gold mining and mineral exploration have occurred since at least the 1930s. SOF ¶ 17. Excellon has reported “several collapsed underground adits” and “prospect pits” from mining in the 1930s. *Id.* Excellon also noted the presence of “a historic mine dump” near a spring and seep at the Project site. *Id.*

In public comments and objections, Plaintiffs urged the Forest Service to identify the locations of these and any other similar mining features, and to consider whether Excellon’s

drilling might interact with these features to alter flows or cause pollution. FS-006999–7000; FS-024166. In response, the Forest Service admitted that poor water quality in at least one stream at the site (Crab Creek<sup>3</sup>) is influenced by historical mining features. FS-007625. But the Forest Service refused to provide further information, stating it would not disclose historical mining features to the public and asserting—in direct contradiction to the *Working Guide*—that the effects these features might have is beyond the scope of the EA’s analysis. *Id.*

In the end, neither the DN/FONSI, the EA, nor their supporting documents identify the locations of legacy mining features, evaluate their contribution to baseline water quality, or consider the effects Excellon’s drilling near these features could have—such as by providing conduits to groundwater flow or increasing the risk of groundwater and surface water contamination, as the *Working Guide* warns they could. By failing to identify the location of the “several collapsed underground adits,” “prospect pits,” “historic mine dump”, and any other mine features in the area, the Forest Service failed to follow its own guidance and failed to take a hard look, in violation of NEPA.

NEPA was enacted with two purposes in mind, or “twin aims.” *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983). First, NEPA “places upon [a federal] agency the obligation to consider every significant aspect of the environmental impact of a proposed action.” *Id.* (quotation omitted). “Second, [NEPA] ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.” *Id.* (citation omitted). Without disclosing and considering the location of legacy mining features,

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<sup>3</sup> Because this information was never gathered or disclosed, it is not known which watersheds in addition to Crab Creek and Prospect Creek (*see* SOF ¶17) have historical mine features. But the existence of such features in Crab and Prospect Creeks alone is concerning, as these watersheds include the Mine Ridge and Prospect Ridge target drilling areas, which are where Excellon plans to do the most, and the most concentrated, of its drilling. *See* FS-024007–08 (maps).

which the *Working Guide* admits can alter groundwater flows and can “increase the risk of . . . contamination”, the Forest Service has frustrated the twin aims of NEPA. It failed to consider a significant aspect of the environmental impact of the Kilgore Project, and it failed to inform the public that has indeed considered these environmental concerns in its decisionmaking process. *See also Found. for N. American Wild Sheep v. US Dept. of Agriculture*, 681 F.2d 1172, 1178 (9th Cir. 1982) (agency violated NEPA in failing to address “certain crucial factors, consideration of which was essential to a truly informed decision”).

The Forest Service, thus, failed to consider an important aspect of the problem and failed to take a hard look, and the EA and DN/FONSI must be reversed, remanded, and vacated.

## 2. Inadequate Groundwater Quality Baseline Information

Despite this Court’s previous finding that the Forest Service is required to fully review the baseline groundwater conditions, the new EA again fails to meet this requirement. “Establishing appropriate baseline conditions is critical to any NEPA analysis.” *Great Basin Res. Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095, 1101 (9th Cir. 2016). “Without establishing the baseline conditions which exist . . . before a project begins, there is simply no way to determine what effect the project will have on the environment and, consequently, no way to comply with NEPA.” *Id.* (quotation omitted). “The [agency] ha[s] a duty to assess, in some reasonable way, the actual baseline conditions in the [project area].” *Oregon Natural Desert Ass’n v. Rose*, 921 F.3d 1185, 1190 (9th Cir. 2019) (quotation omitted). “[W]ithout [baseline] data, an agency cannot carefully consider information about significant environment impacts” and “the agency fail[s] to consider an important aspect of the problem, resulting in an arbitrary and capricious decision.” *N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011) (quotation omitted).

Courts, including this one, have held that the Forest Service violates NEPA when it approves a mine exploration project without first gathering sufficient baseline groundwater hydrology information needed to assess impacts of drilling. *ICL*, 429 F. Supp. 3d at 730–32 (prior Kilgore Project approval); *Cascade Forest Conservancy v. Heppler*, No. 3:19-cv-00424-HZ, 2021 WL 641614, \*17–20 (D. Oregon Feb. 15, 2021); *Gifford Pinchot Task Force v. Perez*, No. 03:13-cv-00810-HZ, 2014 WL 3019165, \*25–33 (D. Or. July 3, 2014); *ICL v. U.S. Forest Serv.*, No. 1:11-cv-00341-EJL, 2012 WL 3758161, \*14–17 (D. Idaho Aug. 29, 2012).

Yet when it approved the Kilgore Project, the Forest Service had no information on background groundwater quality for the vast majority of the site. SOF ¶ 18. Throughout the entire Project area, groundwater quality sampling has occurred at only a single location in just one of the four target drilling areas: an existing water well, called “KW-3,” in a corner of the Mine Ridge drilling area. *Id.* No groundwater quality sampling has occurred in the Prospect Ridge area. No groundwater quality sampling has occurred in the Gold Ridge area. No groundwater quality sampling has occurred in the Dog Bone Ridge area—even after this Court’s 2019 remand to gather adequate baseline groundwater information there.<sup>4</sup> Groundwater quality is thus unknown throughout most of the Project site, and there is no baseline against which to compare any groundwater contamination Excellon’s drilling might cause.

This violates NEPA, just like the District of Oregon found in *Cascade Forest Conservancy*. There, like here, the court had previously reversed the Forest Service’s project approval for failing to gather sufficient groundwater hydrology baseline information. 2021 WL 641614 at \*2. Like here, the Forest Service reapproved the exploration, but it had very limited

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<sup>4</sup> After this Court’s prior decision, some surface water sampling has occurred in Dog Bone Ridge (SOF ¶ 21), but no groundwater sampling has occurred (SOF ¶ 18).

baseline groundwater data: sampling from three historical drillholes, one time each in 2014. *Id.* at \*20. There—unlike here—only 63 holes would be drilled from 23 drill pads. *Id.* at \*2, \*18. The court found, “the EA fails to explain why the three historical drillholes sampled once in 2014 are sufficient to establish an adequate baseline for the entire Project Area.” *Id.* at \*20. “Without more, the Court cannot conclude on this administrative record that the method utilized for establishing baseline conditions was ‘based on accurate information and defensible reasoning.’” *Id.* (quoting *Great Basin Res. Watch*, 844 F.3d at 1101).

Here, Excellon would drill up to 390 holes from 130 drill pads spanning different mountainsides and watersheds. SOF ¶¶ 2–4, 7. Yet only a single groundwater well has ever been sampled. SOF ¶ 18. This too violates NEPA’s requirement to gather adequate baseline information, and the Court should vacate, reverse, and remand the Forest Service’s approval of the Project, like the court in *Cascade Forest Conservancy*.

### 3. Failure to Gather Baseline Information About Hydraulic Connectivity

At the single location where groundwater has been sampled at the Kilgore Project site, Excellon found elevated levels of hazardous metals. FS-024025. While the metals concentrations found there were below Idaho groundwater standards, the concentrations of selenium and zinc were high enough to exceed surface water quality standards. *Id.* Because of these elevated levels of selenium and zinc, the Forest Service acknowledged in its Hydrogeology Report, “natural and drilling induced surface/groundwater interactions are important to consider for this project.” *Id.*

Yet, the Forest Service approved the Project without the information about hydraulic connectivity between structural elements at the site needed to define the compartmentalized nature of the local aquifer systems. SOF ¶ 19. Instead of gathering this before approving the Project, Excellon will try to do it later by retaining up to five of its exploration drill holes for an

extra year or two. FS-013778. At these five drill holes, Excellon will do multiple drawdown tests during different seasons to gather hydrological characterization information. *Id.*

Gathering this important data later runs afoul of NEPA’s core tenet of getting information first, before making a decision: “Such analyses must occur before the proposed action is approved” because “[o]nce a project begins, the pre-project environment becomes a thing of the past, and evaluation of the project’s effects becomes simply impossible.” *N. Plains Res. Council*, 668 F.3d at 1083 (quotation omitted). Where an agency “proposes to increase the risk of harm to the environment and then perform its studies,” the agency “has the process exactly backwards.” *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 733 (9th Cir. 2001) *abrogated on other grounds by Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010).

This Court found a NEPA violation for another mine exploration project in Idaho where “instead of compiling and analyzing that data up front [on the presence of a sensitive plant species], the Forest Service has incorporated those NEPA steps into the Project itself.” *ICL v. U.S. Forest Serv.*, 2016 WL 3814021, \*10 (D. Idaho 2016). The project there “anticipate[d] conducting a new baseline study during the Project and then monitoring and mitigating to protect the [the sensitive plant].” *Id.* As this Court admonished: “This approach puts the cart before the horse by prematurely asking for approval of the Project before the necessary baseline data and analysis are conducted. NEPA demands that the Forest Service analyze a project’s impacts before it is approved; not as part of the Project itself.” *Id.*

For the same reasons here, the Forest Service’s reliance on post-approval baseline hydrological characterization violates NEPA.

#### 4. Improper Reliance on Monitoring to Detect Contamination

Again, the Forest Service asserted that during drilling “any significant changes to field parameters, water quality constituents, or spring discharge would be reported to FS personnel”



and appropriate steps would then be taken to address the problem. FS-024029. This reliance on future monitoring of the impacts from exploration drilling as a substitute for gathering and analyzing pre-project baseline data was expressly rejected in *Gifford Pinchot Task Force*: “I reject Defendants’ and Ascot’s arguments that a baseline groundwater analysis is not required before the issuance of the EA because the sampling and monitoring are being used to confirm that no significant impacts are occurring rather than addressing an issue of insufficient data.” 2014 WL 3019165 at \*31. *See also N. Plains Resource Council*, 668 F.3d at 1084–85 (“mitigation measures, while necessary, are not alone sufficient to meet the Board’s NEPA obligations to determine the projected environmental harm to enumerated resources *before* a project is approved”).

Moreover, the Forest Service is wrong in asserting significant changes will be reported and resolved, and therefore cannot rely on this assertion to claim there will not be significant impacts from drilling to groundwater or surface water. First, relying on monitoring to detect and report changes in groundwater quality is arbitrary and capricious because there will not be any groundwater monitoring during the Project, except for occasional groundwater monitoring in a single location (the KW-3 well at Mine Ridge). SOF ¶ 21; FS-024054 (monitoring map). No groundwater monitoring will occur in Dog Bone Ridge, Prospect Ridge, or Gold Ridge during or after drilling. *Id.* Thus, any groundwater contamination (beyond any in one limited portion of Mine Ridge) will not be detected—let alone reported and then corrected.

Second, relying on monitoring to detect and report changes in surface water quality is also arbitrary and capricious. To be clear, in stark contrast to groundwater—which will be monitored at only one location—Excellon will monitor surface water at around a dozen locations in the Project area. *See* FS-024050–FS-024054; SOF ¶ 20.

However, at Dog Bone Ridge—the subject of this Court’s remand—the Forest Service relies exclusively on surface water quality data from just one summer, 2020. SOF ¶ 21. Were the 2020 surface water results typical and representative for Dog Bone Ridge? This is unknown. Sampling from summer 2020 is not a sufficient baseline against which to monitor future changes from drilling at Dog Bone Ridge.

At Mine Ridge, Prospect Ridge, and Gold Ridge, surface water sampling has occurred over multiple years. However, there too the data gathered fails to provide a reliable baseline for detecting changes to surface water caused by drilling because pollutant levels have fluctuated significantly from year to year. *See* SOF ¶ 21. In October 2020, Excellon’s consultant at Klepfer Mining Services (KMS) reported to the Forest Service that for 2020—even though no drilling occurred—surface water quality sampling showed significantly higher concentrations of heavy metals, and other pollutants and parameters at the site, compared to prior years. *See* FS-006516–20. Based on these large variations in 2020, KMS warned, “the range of natural background variability has likely not be[en] fully defined by the current data set” (FS-006516), and concluded “the database does not contain sufficient data points to generate a statistically reliable value” (FS-006519). Without reliable baseline values, the Forest Service cannot rely on future monitoring to detect pollution caused by drilling. Contamination caused by Kilgore Project drilling could be dismissed as natural variation and go unreported, with no steps taken to resolve the problem.

In summary, the Forest Service’s conclusion that any changes in ground or surface water caused by drilling will be detected is unreasonable, and the Forest Service failed to offer a convincing explanation why the impacts of drilling will not be significant, rendering the EA and DN/FONSI arbitrary and capricious under *ICL*, 429 F. Supp. 3d at 730–32, *Cascade Forest*

*Conservancy*, 2021 WL 641614 at \*17–20, *Gifford Pinchot Task Force*, 2014 WL 3019165 at \*25–33, and *ICL*, 2012 WL 3758161 at \*14–17 (D. Idaho Aug. 29, 2012).

**C. Failure to Take a Hard Look at Cumulative Effects of the Porcupine Lookout Vegetation Treatment Project**

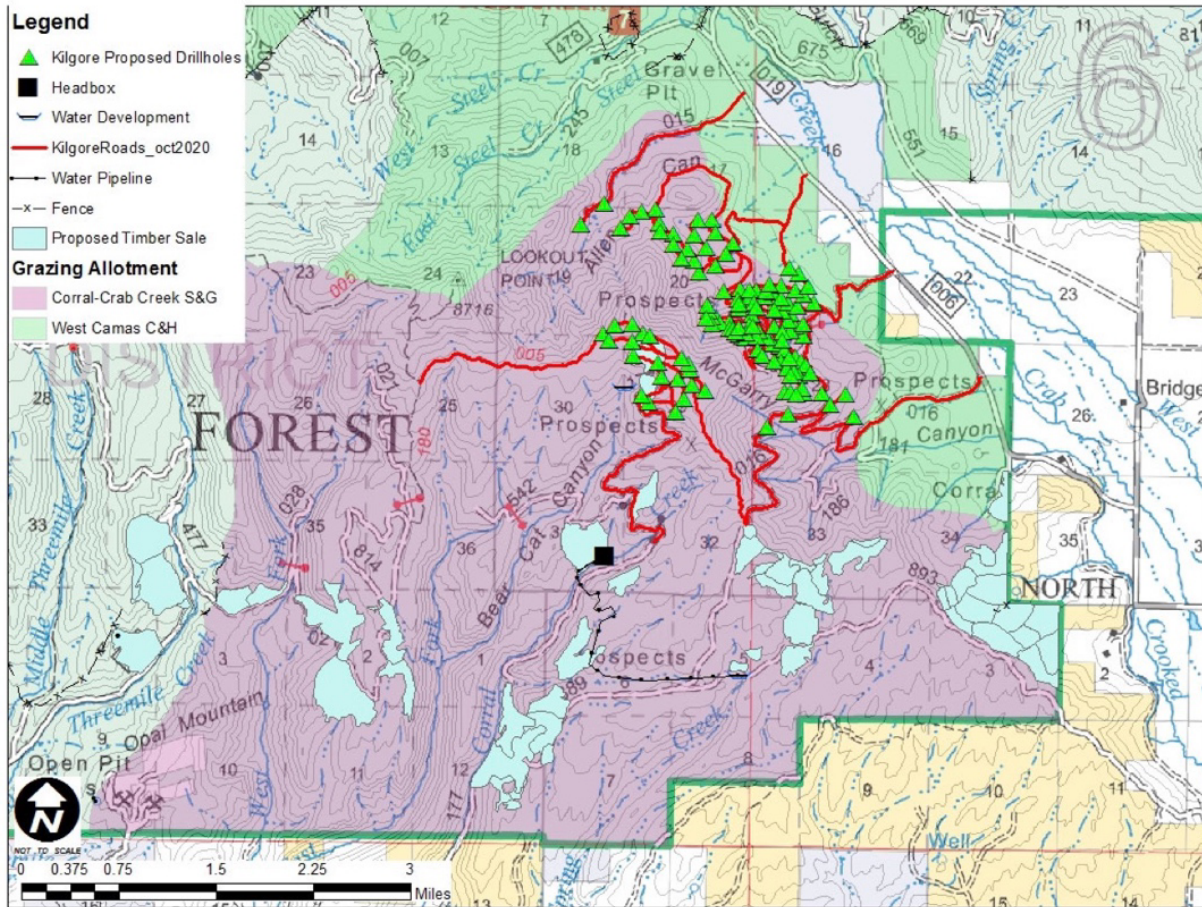
Under NEPA, Forest Service NEPA regulations, and CEQ regulations, the Forest Service must take a hard look at cumulative effects. *See Supra* I.A. Cumulative effects are the impacts on the environment that result from incremental impacts of the action when added to all other past, present, and reasonably-foreseeable future actions regardless of what agency or person undertakes such other actions. *Id.* § 1508.7 (1978).

To take a hard look, a cumulative impact analysis “must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of past, present, and future projects.” *Kern v. BLM*, 284 F.3d 1062, 1075 (9th Cir. 2002) (quotation omitted). “A proper consideration of the cumulative impacts of a project requires some quantified or detailed information.” *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 993 (9th Cir. 2004) (quotation omitted). “The cumulative impacts analysis cannot merely consist of conclusory statements, because general statements about ‘possible’ effects and ‘some risk’ do not constitute a ‘hard look’ absent a justification regarding why more definitive information could not be provided.” *Sierra Club v. Bosworth*, 510 F.3d 1016, 1029–30 (9th Cir. 2007) (quotation omitted).

**1. The Porcupine Lookout Vegetation Treatment Project**

There is no dispute that the Porcupine Lookout Vegetation Treatment project is a reasonably foreseeable project, which will overlap temporally and physically with the Kilgore Project. As shown in Figure 1 below, logging in the Porcupine project would occur as early as 2023 and would overlap with the Kilgore Project area. FS-024015. Porcupine Lookout could result in a total land disturbance of 4,000 acres, including 60 acres at Dog Bone Ridge. *Id.*

Fig. 1. Showing Kilgore Exploration and Proposed Timber Sale Areas for Porcupine Lookout Project (Reproduction of Map 1 in the Range Report, FS-015956)



Throughout the DN/FONSI, the EA, and supporting reports, the Forest Service admitted Porcupine Lookout will have cumulative impacts with the Kilgore Project to at-risk fish, wildlife, and plants. *See* FS-024015 (EA); FS-024070 (DN/FONSI); FS-013871 (Fisheries Report); FS-023961, 023965, 023968, 023972, 023978, 023983, 023987 (Wildlife Report); FS-011234 (Whitebark Pine BA). However, the Forest Service failed to provide the quantified or detailed information, and meaningful analysis, required to take a hard look at these cumulative effects and instead rested on unsupported and conclusory assertions to dismiss such effects.

In response to Plaintiffs' objection raising this concern, the agency stated that Porcupine Lookout "is in its infancy" and "[e]ach resource addresses what is currently known about the

[Porcupine Lookout project] and the potentially affected environment (potential cumulative impacts) with Kilgore Gold Exploration Project.” FS-024183. This statement is wrong. The Forest Service had more information about Porcupine Lookout than simply the total logging acreage and acreage within Dog Bone Ridge.

As revealed in Figure 1 above, the Forest Service had information about the locations and boundaries of proposed timber sale areas for Porcupine Lookout. But these timber sale areas are buried in the Kilgore Project record, presented in only the Range Report (FS-15948–57). These timber sale areas were not disclosed in the DN/FONSI, EA, or other reports, and were not utilized—nor was any other quantified or detailed information—to meaningfully evaluate impacts to elk, grizzly bear, YCT, and whitebark pine, as discussed for each species next.

## 2. Elk

Elk are regarded by the Idaho Department of Fish and Game (IDFG) as “Idaho’s premier big game animal,” are a Forest Service Management Indicator Species (“MIS”), and are found in the Kilgore Project area, which is in the Island Park Elk Zone. SOF ¶ 31. In this Zone, bull elk numbers are currently below objectives, and IDFG calls for improving key summer, winter, and transitional elk habitats on public and private lands, among other measures. *Id.* The Kilgore Project’s road and drill pad construction and use, however, will degrade elk habitat, and Porcupine Lookout will only make it worse.

To assess Kilgore Project affects to elk, the Forest Service considered two indicators: “security” and “habitat effectiveness.” SOF ¶ 32. Elk security is a measure of vulnerability during hunting season (which depends on the density of motorized routes), and the Forest Service has determined that at least 30% of an analysis unit should be secure in order to support elk. SOF ¶ 33. Currently, there are six elk security areas in the Project’s elk analysis area, and the

analysis area is 33 percent secure. *Id.* But the Kilgore Project will reduce the number of secure areas to five and cause a drop in elk security to 31%—barely above the 30% threshold. *Id.*

Elk habitat effectiveness is determined by the motorized road density in summer elk range. SOF ¶ 34. To benefit elk summer range, the Forest Service has determined that habitat effectiveness should be at least 70%, and where elk are a primary resource consideration, habitat effectiveness should be at least 50%. *Id.* Currently, habitat effectiveness is almost 60% in the Kilgore Project analysis area. *Id.* The Kilgore Project will cause habitat effectiveness to drop to 50%. *Id.*

In the Wildlife Report, the Forest Service admitted that the “Porcupine Lookout timber harvest project has the potential to impact security and habitat effectiveness.” FS-023987. But beyond this general statement, it provided no further information about Porcupine Lookout, including any information about the degree to which security and habitat effectiveness could be reduced, stating such analyses would occur later as part of that project. *Id.* Nevertheless, the Forest Service asserted: “Cumulative effects would not contribute to project effects in a way which is significant to elk.” FS-023989.

This bare assertion violates NEPA. Considering the Kilgore Project alone will reduce elk security and elk habitat effectiveness to the bare minimum acceptable levels, further reductions caused by Porcupine Lookout may indeed be significant. Further, the Forest Service must provide a detailed, “quantified” analysis of combined environmental impacts from projects, and “identify and discuss the impacts that will be caused by each successive project . . . [i]ncluding how the combination of those various impacts is expected to affect the environment” within the area. *Great Basin Res. Watch*, 844 F.3d at 1105. In *Great Basin Resource Watch*, the BLM violated NEPA when it “made no attempt to quantify” cumulative impacts. *Id.* The Forest

Service made the same mistake here. Its conclusion is not backed by any quantification or detailed information about how much secure habitat or habitat effectiveness could be reduced from Porcupine Lookout. This violates NEPA.

3. Grizzly Bear

The Greater Yellowstone Ecosystem (GYE) grizzly bear is designated a “threatened” species under the Endangered Species Act (ESA). SOF ¶ 27. As the GYE grizzly has expanded its range, distribution, and numbers since ESA listing in 1975, more grizzly have been documented in and near the Kilgore Project site, including in recent years. SOF ¶¶ 27–28.

As the Forest Service acknowledged in the Wildlife Report, the amount of secure habitat (habitat greater than 500 meters from a motorized route) within a grizzly bear’s home range is likely the most important determinant of grizzly bear survival. FS-023958. The Kilgore Project will eliminate 606 acres of secure habitat, thereby decreasing the chance of grizzly survival in the area. *Id.* In the Wildlife Report, the Forest Service also acknowledged that grizzly can be disturbed or displaced by noise from 24/7 drilling, plus road construction and vehicle travel, from July 15 to (potentially) December 15 each year under the Kilgore Project. *Id.*

In the Wildlife Report, the Forest Service also admitted that vegetation treatment (including logging and roads) can impact grizzly bears by causing disturbances and by reducing secure habitat. FS-023961. The Forest Service stated in the cumulative effects section for grizzly, “[t]he Porcupine Lookout project may occur within the analysis area.” *Id.* But the Forest Service failed to provide any further information or analysis—such as how many acres of secure habitat could be lost, or the area or degree of noise disturbance or habitat degradation that could occur from Porcupine Lookout. *See id.* And the Forest Service failed to disclose and utilize information about the proposed timber sale areas for Porcupine Lookout shown in Figure 1 above.

Nevertheless, the Forest Service concluded: “Cumulative effects would not contribute to project effects in a way which is detrimental to grizzly bears.” FS-023962.

This conclusory assertion that the Porcupine Lookout Vegetation Treatment Project will not contribute any adverse effects to grizzly is flat out wrong. Undoubtedly, the reductions in secure habitat and the increased disturbances—things the Forest Service admitted Porcupine Lookout will cause—will add to the Kilgore Project’s adverse effects to grizzly from decreased secure habitat and increased disturbances. *See, e.g., Native Ecosystems Council v. Kruger*, 946 F. Supp. 2d 1060, 1078–81 (D. Mont. 2013) (holding Forest Service’s conclusion that logging would have no effect on grizzly was arbitrary and capricious, even where there were no grizzlies living in the area and grizzlies might only pass through the area, because disturbance effects and secure habitat loss from logging and roads, even if short term, have at least some effects).

Yet, the Forest Service “made no attempt to quantify” these cumulative effects, failed to utilize information it had about Porcupine Lookout, and thus failed to take a hard look. *See Great Basin Res. Watch*, 844 F.3d at 1105.

#### 4. Yellowstone Cutthroat Trout

Yellowstone cutthroat trout are a sensitive species found in streams in the Kilgore Project area. SOF ¶ 23. Corral Creek is one of the only drainages in the Beaver-Camas subbasin where YCT are still holding on. SOF ¶ 25. DEQ considers YCT as “the native species and the species of greatest concern” in the Beaver-Camas subbasin. FS-014930. IDFG identifies a primary goal for this area to: “Protect isolated native cutthroat trout populations in the Medicine Lodge, Beaver Creek, and Camas Creek drainages and identify opportunities to restore additional cutthroat trout populations within their native range.” FS-014667.



In the Fisheries Report, the Forest Service acknowledged the Kilgore Project could alter flows and degrade water quality, including by road construction in the aquatic influence zone for Bearcat Canyon and drilling in the Dog Bone Ridge area. SOF ¶ 26. With respect to cumulative impacts from Porcupine Lookout, the Forest Service noted there could be additive effects, but without providing any information or analysis about Porcupine Lookout asserted: “The combination of these two projects is not expected to produce cumulative effects . . . to YCT.” FS-024035–36.

This conclusory statement is arbitrary and violates NEPA. Nowhere in the DN/FONSI, EA, Fisheries Report, or Fisheries BE did the Forest Service disclose or consider quantified or detailed information about the logging, road construction, and road use that is expected to occur for Porcupine Lookout and how that could impact YCT. The map in the Range Report (Fig. 1 above) depicts numerous logging units throughout the Corral Creek watershed, but information about these specific logging units was ignored and never factored into any analysis of impacts to YCT. Logging and associated road construction and use can degrade fish habitat, and these potential effects can be quantified or otherwise evaluated with detailed information. *See, e.g., Blue Mountains*, 161 F.3d at 1213 (holding Forest Service failed to take hard look when it never “estimated sediment that would result from the logging and accompanying roadbuilding or the impacts of increased sediment on fisheries habitat”). But the Forest Service again “made no attempt to quantify” cumulative impacts and failed to take a hard look. *See Great Basin Res. Watch*, 844 F.3d at 1105.

#### 5. Whitebark Pine

The Project site supports whitebark pine, an important grizzly food source, and a species proposed for listing as “threatened” under the Endangered Species Act. SOF ¶ 36. Most

whitebark pine at the site is located in the Dog Bone Ridge area. *Id.* Excellon’s road and drill pad construction in the Dog Bone Ridge area will require removing whitebark pine, and might allow weeds to establish which would have a negative impact on whitebark pine. SOF ¶ 37.

Where it considered cumulative effects to whitebark pine, the Forest Service admitted that Porcupine Lookout would overlap. FS-011234–35. But without any quantified or detailed information or analysis, including without considering the locations of logging units depicted in Figure 1 in relation to whitebark pine habitat, the Forest Service simply asserted that because whitebark pine “in not a merchantable tree . . . it is expected that the Porcupine [p]roject would include a design feature of leaving whitebark pine providing an overall benefit to the species where it occurs within the Porcupine Lookout Vegetation Project.” FS-011235.

First, this conclusion ignores any road construction for Porcupine Lookout, which—like Kilgore Project road construction at Dog Bone Ridge—will presumably encounter a “relatively large number of whitebark pine” and have to remove trees. *See* SOF ¶¶ 36–37. But the Forest Service “made no attempt to quantify” or otherwise provide information about Porcupine Lookout roads and the whitebark pine that would be removed to accommodate them and, thus, failed to take a hard look. *See Great Basin Res. Watch*, 844 F.3d at 1105.

Second, the Forest Service is making a bald assertion without any support that Porcupine Lookout logging would provide an overall benefit. In *Bark*, the Ninth Circuit rejected a cumulative effects analysis that simply asserted logging would improve forest stand conditions where the Court found “no meaningful analysis of any of the identified projects.” 958 F.3d at 872. In *Bark*, the Forest Service’s assertions that a logging project would “would have a beneficial effect on the stands by moving them toward a more resilient condition that would allow fire to play a vital role in maintaining stand health, composition and structure” were “the

kind of conclusory statements, based on vague and uncertain analysis, that are insufficient to satisfy NEPA’s requirements.” *Id.* Here too, the Forest Service provide “no meaningful analysis” of Porcupine Lookout’s effects to whitebark pine, and the agency rests on a conclusory statement that Porcupine Lookout will benefit whitebark pine, in violation of NEPA.

For the reasons above, the Court should grant Plaintiffs’ Third Claim for Relief, and reverse, vacate, and remand the Forest Service’s approval of the Kilgore Project.

## **II. FAILURE TO CONSIDER A REASONABLE RANGE OF ALTERNATIVES IN VIOLATION OF NEPA**

Plaintiffs also seek summary judgment on their Second Claim for Relief, challenging the Forest Service’s failure to consider a reasonable range of alternatives in the EA. *See* ECF No. 1, ¶¶ 107–110. Plaintiffs urged the Forest Service to consider daytime drilling and helicopter drilling alternatives, each of which would allow Excellon to conduct its full exploration while reducing adverse environmental impacts, particularly to threatened, sensitive, and at-risk species in the Project area. But the Final EA considered only Excellon’s proposal against a no action alternative, arbitrarily and capriciously refusing to consider any other alternatives.

### **A. Consideration of Alternatives Is Critical to NEPA**

NEPA, CEQ regulations, and Forest Service regulations require considering alternatives when there are unresolved conflicts concerning the resources at issue. 42 U.S.C § 4332(E); 40 C.F.R. § 1502.14 (1978); 40 C.F.R. § 1501.2(b)(3) (2020); 36 C.F.R. § 220.7(b)(2)(i).

“[C]onsideration of alternatives is critical to the goals NEPA.” *Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988). “The consideration of alternatives requirement . . . guarantee[s] that agency decisionmakers have before them and take into proper account all possible approaches to a particular project . . . which would alter the environmental impact and the cost-benefit balance.” *Id.* (quotation omitted).

Whether an agency prepares an EIS or an EA, NEPA requires an agency to study, develop, and describe appropriate alternatives. *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008). While an agency's obligation to discuss alternatives is less in an EA than in an EIS, the "agency must still give full and meaningful consideration to all reasonable alternatives in an environmental assessment." *W. Watersheds Proj. v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013) (quotation omitted). "The existence of a valid but unexamined alternative renders an EA inadequate." *Id.* (quotation omitted).

As Ninth Circuit recently reiterated, "NEPA requires agencies to give full and meaningful consideration to all viable alternatives in the environmental assessment." *Env'tl. Def. Ctr. v. Bureau of Ocean Energy Management*, 36 F.4th 850, 877 (9th Cir. 2022) (quotation omitted). When an agency fails to do so, courts will reverse. *Id.* at 878. See also *Citizens for Clean Energy v. U.S. Dep't of the Interior*, 4:17-cv-00030-BMM, 2022 WL 3346373 (D. Montana Aug. 12, 2022) (limiting EA to two alternatives was arbitrary and capricious); *W. Watersheds Project v. Bernhardt*, 543 F. Supp. 3d 958 (D. Idaho 2021) (BLM violated NEPA by failing explain refusal to consider alternatives offered by plaintiffs in EA); *WildEarth Guardians v. BLM*, 457 F. Supp. 3d 880 (D. Montana 2020) (BLM failed to sufficiently explain why alternatives were not considered); *Conservation Congress v. U.S. Forest Serv.*, 235 F. Supp. 3d 1189 (E.D. Cal. 2017) (Forest Service impermissibly refused to consider in detail alternative for timber sale); *Native Fish Soc. v. Nat'l Marine Fisheries Serv.*, 992 F. Supp. 2d 1095 (D. Oregon 2014) (agency unreasonably refused to consider middle alternatives).

There is no dispute that the Forest Service refused to give detailed consideration to two alternatives recommended by Plaintiffs, and that it only considered Excellon's proposal against a no action alternative in the EA. See FS-024004-05. As explained below, the agency failed to

give any reasonable explanation for this refusal to consider any other alternative, in violation of NEPA.<sup>5</sup>

**B. The Forest Service Unreasonably Rejected a Daylight Drilling Alternative**

The Forest Service admitted the Kilgore Project will cause, or at least poses a risk of, adverse effects to “threatened” wildlife (lynx and grizzly), “sensitive species” of wildlife (American three-toed woodpecker, boreal owl, gray wolf, great grey owl), elk, and migratory birds. *See* FS-023945–49 (Wildlife Report summary table). In public comments and objections, Plaintiffs urged the Forest Service to develop an alternative that would limit drilling to daylight hours only, to reduce disturbance impacts to wildlife. FS-006993–94; FS-024161–62.

In both the DN/FONSI and EA, the Forest Service admitted that limiting exploration activities to certain parts of the day “would likely be beneficial to some resources,” including specifically “wildlife.” FS-024067; FS-024005. But the Forest Service declined to study this alternative, asserting that this would increase the Project’s overall duration. *Id.* There are two flaws with the Forest Service’s rationale for rejecting a daylight drilling alternative.

First, neither the DN/FONSI, EA, nor any supporting documents explain why Excellon would not be able to complete its proposed drilling activities within the proposed three to five years even if activities are limited to daylight hours. While drilling 24 hours a day might allow project completion to occur sooner, the Forest Service does not provide any information or explanation to show that Excellon’s drilling could not be completed during daylight hours over the proposed three to five years. Excellon is authorized to conduct activities from July 15 into

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<sup>5</sup> In another case challenging the Forest Service’s authorization of mine exploration activities, this Court noted that a no action alternative “was never a serious option because it would have precluded [the mining company] from doing any work.” *ICL v. Lannom*, 200 F. Supp.3d 1077, 1091 (D. Idaho 2016). Similarly here, the No Action Alternative is not a serious option. The only serious option Forest Service considered here was Excellon’s proposal.

November, and potentially longer, every year depending on conditions. SOF ¶ 2. Just counting July 15 through October 31, this is 109 days per year. Is 109 days of operations per year, totaling 545 days over five years, enough? If not, why not? The Forest Service cannot simply rest on its unsupported assertion that daylight drilling would extend the project duration as an excuse to reject a viable alternative that will reduce wildlife impacts.

Second, even if limiting activities to occur during daylight would extend the duration of the Project, this is not a reasonable basis for refusing to consider this alternative. Just because Excellon proposed completing the Project over the next 3 to 5 years does not mean that time frame is essential or required or that something different would conflict with the Project's purpose and need. The Forest Service is required to comply with NEPA and has authority to restrict or limit mining plans, even if that extends the Project's duration beyond Excellon's preferred timeframe.

Had the Forest Service actually developed this alternative and considered it in detail in the EA, the Forest Service and the public would be informed about the costs and benefits of this reasonable alternative, including the degree to which it would benefit wildlife and the downsides—if any—to Excellon's plans. But because the Forest Service unreasonably refused to analyze this alternative, those benefits and costs are unknown. This violates NEPA.

**C. The Forest Service Unreasonably Rejected a Helicopter Drilling Alternative**

Plaintiffs also urged the Forest Service to develop an alternative that would utilize helicopters to access all or some of the drilling areas in order to reduce new road construction. FS-006993–94, 007008; FS-024161–63. Road construction and use have short-term and long-term adverse impacts to water quality, fisheries, wildlife, and forest, including adverse impacts to YCT, Columbia spotted frog, grizzly bear, lynx, elk, whitebark pine, and other species of

concern. *See* FS-023949 (lynx), FS-023958 (grizzly), FS-023962–3 (woodpecker), FS-023966 (boreal owl), FS-023969–70 (Columbia spotted frog), FS-023976 (great gray owl), FS-023980 (migratory birds), FS-023984–85 (elk), FS-011234 (whitebark pine), FS-014870–71 (YTC).

Reducing the amount of road construction would reduce these impacts. One way to reduce road construction is helicopter-supported drilling: using helicopters to access drill pads, instead of building new roads. The Forest Service previously approved Otis Gold’s proposal to use helicopter supported drilling during earlier stages of exploration activities at Kilgore. ECF No. 18-3, pp. 1–2 (Decision Memo for “Kilgore Gold Ridge and Mine Ridge Project”).

The Forest Service rejected helicopter drilling as an alternative to study in the EA based on a document in the record titled “Summary of Resource Impacts by Action Alternatives.” FS-024005; FS-007832. In the Summary, the Forest Service admitted helicopter drilling: meets the project purpose and need; reduces surface disturbance; reduces habitat fragmentation; and reduces visual impacts, all by reducing the amount of roads constructed compared to Excellon’s proposal. FS-007834. The Forest Service went on to list various disadvantages of helicopter drilling as well. *Id.* The Forest Service’s use of this Summary as its basis for rejecting consideration of a helicopter alternative is flawed for multiple reasons.

First, the pros and cons briefly listed in the Summary are exactly the types of issues the Forest Service should have considered in full by developing a helicopter drilling alternative in the EA. For example, while the Forest Service admitted that helicopter drilling would reduce surface disturbance and habitat fragmentation, it also warned that helicopter drilling “may” have a larger spatial extent of wildlife disturbance and “may” create a larger area of wildlife displacement due to flights and noise. *Id.* Uncertainty about whether and to what degree helicopter drilling “may” increase some wildlife impacts is no excuse for dismissing this

alternative. Rather, by considering a helicopter alternative in the EA, the Forest Service could have taken a hard look at the effects of Excellon's proposal compared to helicopter drilling and made an informed decision. Instead, the Forest Service rejected this alternative based on speculation and unknowns.

Second, like with daylight only drilling, the Forest Service claimed helicopter supported drilling would lengthen the duration of the Exploration. *Id.* But beyond making this bare assertion, the Forest Service failed to explain why this would even be true, and it failed to explain why the Project must be completed within Excellon's proposed 3 to 5 year timeframe. As already explained, this is an unsupported and unreasonable excuse.

Third, when it rejected studying a helicopter drilling alternative, the Forest Service considered using helicopters for the entire Project, instead of considering Plaintiffs' proposal: strategically using helicopter drilling in areas where it makes the most sense, while still using roads to access other areas, which would reduce the costs and logistical challenges of helicopter drilling, while maximizing the environmental benefits. Specifically, Plaintiffs noted that new roads might be more appropriate in the Mine Ridge area and parts of the Prospect Ridge area where Excellon seeks to locate many densely clustered drill pads in proximity to existing road networks; whereas drilling in Dog Bone Ridge, Gold Ridge, and part of Prospect Ridge is much less dense and could be fully or partially accomplished by helicopter drilling, which could significantly reduce the miles of road that Excellon would construct. *See* FS-007008; FS-024162.

Particularly in Dog Bone Ridge—where there are the most and healthiest whitebark pine, where the only remaining populations of YCT reside, and where exploration impacts would overlap with Porcupine Lookout logging—switching to helicopter drilling could have significantly less environmental impact. *See id.* But the Forest Service ignored these points, and



rejected helicopter drilling considering only an all or nothing approach. *See* FS-007622 (response to comments regarding alternatives); FS-024184 (response to objection regarding alternatives); FS-024005 (EA section rejecting alternatives); FS-007832–35 (Summary).

In sum, the Forest Service’s rationales for refusing to even consider daylight drilling and helicopter supported drilling alternatives in the EA are arbitrary and capricious. Each of these alternatives is viable, could meaningfully reduce Excellon’s environmental impacts, and should have been fully considered in the EA. The Court should grant Plaintiffs’ Second Claim for Relief, and reverse, vacate, and remand the Forest Service’s approval of the Kilgore Project.

#### **IV. FAILURE TO PREPARE EIS IN VIOLATION OF NEPA**

Plaintiffs further seek summary judgment on their First Claim for Relief, which challenges the Forest Service’s failure to prepare an EIS for the Kilgore Project in violation of NEPA and NEPA’s implementing regulations. *See* ECF No. 1, ¶¶ 102–06. NEPA requires federal agencies to prepare an EIS for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). “If an agency decides not to prepare an EIS, it must supply a convincing statement of reasons to explain why a project’s impacts are insignificant.” *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 937 (9th Cir. 2010) (quotation omitted).

It is well established in the Ninth Circuit that an “EIS must be prepared if substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor.” *Blue Mountains*, 161 F.3d at 1212 (quotation omitted). “Thus, to prevail on a claim that the [agency] violated its statutory duty to prepare an EIS, a plaintiff need not show that significant effects will in fact occur.” *Id.* (quotation omitted). “It is enough for the

plaintiff to raise substantial questions whether a project may have a significant effect on the environment.” *Id.* (quotation omitted).

The Ninth Circuit has regularly described the bar for whether significant effects may occur as a “low standard.” *See, e.g., League of Wilderness Defenders v. Connaughton*, 752 F.3d 755, 760 (9th Cir. 2014); *Cal. Wilderness Coal. v. U.S. Dep’t of Energy*, 631 F.3d 1072, 1097 (9th Cir. 2011); *Klamath Siskiyou Wildlands Center v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006). Applying these principles, the Ninth Circuit has ordered EISs where plaintiffs raise substantial questions as to whether there may be significant impacts. *See, e.g., Blue Mountains*, 161 F.3d at 1212–16; *Nat’l Parks*, 241 F.3d at 732; *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 868 (9th Cir. 2005); *Bark*, 958 F.3d at 873; *Envtl. Def. Ctr.*, 36 F.4th at 882.

Contrary to the Forest Service’s Finding of No Significant Impact, the Kilgore Project “may” have significant impacts because of the likely, highly controversial, unknown, and/or uncertain direct, indirect, and cumulative impacts to water quality, YCT, whitebark pine, grizzly bear, elk, other special-status species, and their habitat, which will be adversely affected by Excellon’s 24-7 drilling, drill station construction, and road construction and use, as well as the additive and unexamined effects of the Porcupine Lookout Vegetation Treatment Project. *See* SOF ¶¶ 16–37.

Courts have ordered an EIS where cursory analysis in an EA—like the Forest Service’s analysis of drilling impacts to groundwater and surface water here—renders effects highly controversial, unknown, or uncertain and, thus, potentially significant. Recently, the Ninth Circuit held that an EA with “data gaps” and “lack of data” concerning potential effects of offshore well stimulation fluids required an EIS. *Envtl. Def. Ctr.*, 36 F.4th at 880–81. *See also National Parks*, 241 F.3d at 733 (an agency’s “lack of knowledge does not excuse the

preparation of an EIS; rather it requires the [agency] to do the necessary work to obtain it.”); *Blue Mountains*, 161 F.3d at 1212–16 (lack of supporting data and cursory treatment of environmental effects in EA warranted preparation of EIS). Similarly, in *Hausrath v. U.S. Dep’t of the Air Force*, 491 F. Supp. 3d 770 (D. Idaho 2020), this Court found effects were controversial and required preparation of an EIS where plaintiffs “identified serious gaps in the USFAF’s analyses concerning the effects of noise from the proposed action” to the community and wildlife. *Id.* at 802. This Court found also found an EIS was required because the action in *Hausrath* had uncertain effects due to “the absence of baseline noise data actually measuring the ambient noise levels in the affected communities.” *Id.* at 802–03. Here too, the Forest Service’s lack of data and analysis about legacy mining features that pose a risk of contamination, its lack of groundwater quality data from anywhere except one location in the Project site, and the other ways it failed to take a hard look at risk drilling poses to groundwater and surface water (*see* *Supra* I.B.1–4) creates the possibility of significant effects that require assessment in an EIS.

Courts have also ordered EISs for Forest Service projects based on potentially significant cumulative effects of nearby logging projects. This Court recently ordered the Forest Service to prepare an EIS for a logging project where, together with a neighboring logging project, there was a “potential, cumulatively significant impact to old growth.” *Friends of the Clearwater v. Probert*, No. 3:21-cv-00189-CWD, 2022 WL 2291246, \*25 (D. Idaho Jun. 24, 2022). Similarly in *Bark*, the Ninth Circuit ordered the Forest Service to prepare an EIS for a logging project where the Forest Service’s “failure to engage with [] other [logging] projects . . . leaves open the possibility that several small forest management actions will together result in a loss of suitable owl habitat.” 958 F.3d at 873. Likewise, in *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1193–95 (9th Cir. 1988), based on evidence that logging and roads associated with multiple

timber sales would alter wildlife habitat and increase stream sedimentation in fish habitat, the Ninth Circuit found “substantial questions as to whether the timber sales may significantly [a]ffect the human environment” and concluded that due to these cumulative effects “an EIS should have been prepared.” *Id.* at 1194–95.

Here, like in *Friends of the Clearwater, Bark, and Sierra Club*, the Forest Service’s failure to adequately analyze the cumulative effects of the Kilgore Project together with Porcupine Lookout logging—including the cumulative loss and degradation of elk, grizzly, YCT, and whitebark pine habitat—creates the potential for significant impacts and requires an EIS. The Court should thus grant Plaintiffs’ First Claim for Relief, and reverse, vacate, and remand the Forest Service’s approval of the Kilgore Project for preparation of an EIS.

#### **IV. FAILURE TO MINIMIZE IMPACTS AND PROTECT FISH, WILDLIFE, AND WATER QUALITY IN VIOLATION OF THE ORGANIC ACT**

Finally, Plaintiffs seek summary judgment on their Fourth Claim for Relief, which challenges the Forest Service’s violations of the Organic Act and implementing regulations by authorizing the Kilgore Project without protecting fish, wildlife, and the environment. *See* ECF No. 1, ¶¶ 116–19. The Organic Act requires the Forest Service “to regulate [the] occupancy and use [of national forests] and to preserve the forests thereon from destruction.” 16 U.S.C. § 551. Those persons “prospecting, locating, and developing the mineral resources [on a national forest] . . . must comply with the rules and regulations covering such national forests.” 16 U.S.C. § 478.

The Forest Service’s mining regulations require that “all [mining] operations shall be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest resources.” 36 C.F.R. § 228.8. The regulations also require the Forest Service to ensure operations will meet applicable water quality standards, and “to maintain and protect fisheries and wildlife which may be affected by the operations.” 36 C.F.R. §§ 228.8(b) & (e). As

explained below, the Forest Service here violated each of these duties, requiring reversal. *See Rock Creek Alliance v. U.S. Forest Serv.*, 703 F. Supp. 2d 1152, 1170 (D. Montana 2010) (stating “Forest Service must . . . require [project applicant] to take all practicable measures to maintain and protect fisheries and wildlife habitat” but failed to do, and requiring reversal where Forest Service failed to require feasible mitigation measures); *Save Our Cabinets v. U.S. Dept. of Agric.*, 254 F. Supp. 3d 1241, 1253–55 (D. Mont. 2017) (reversing where Forest Service approval of a mining project failed to ensure compliance with water quality standards); *Hells Canyon Pres. Council v. Haines*, No. CV 05–1057–PK, 2006 WL 2252554, \*4–5 (D. Or. May 30, 2006) (same).

#### **A. Additional Groundwater Monitoring Sites**

As discussed at Supra I.B.2 & 4, without adequate analysis of baseline groundwater data and monitoring, there is no way the Forest Service can ensure that Excellon’s drilling operations will not impair groundwater and will meet applicable water quality standards. As noted, monitoring groundwater at only a single site throughout the entire Project area fails to reasonably ensure protection of water resources. *See Supra I.B.2*. It is feasible to monitor groundwater in additional locations, but the Forest Service failed to require this.

#### **B. Liners for Drilling Sumps**

Each of Excellon’s drill pads will have an excavated sump for holding drill cuttings and drilling fluids. SOF ¶ 4. In comments and objections, Plaintiffs urged the Forest Service to require lining all (or at least some) sumps, since past monitoring showed elevated levels of contaminants in groundwater and surface water at the site, meaning sump water—especially after any leaching from drill cuttings—could cause contamination. FS-006995, FS-007021–23; FS-024163. Moreover, based on the lack of adequate baseline information and inadequate

monitoring already discussed (Supra I.B.1–4), such contamination could go undetected and uncorrected. But the Forest Service rejected this feasible mitigation measure, and drilling fluids in Excellon’s sumps will be allowed to evaporate and infiltrate the ground. SOF ¶ 4.

**C. Daylight Drilling and/or Helicopter Drilling**

As already discussed, limiting drilling to daylight and/or utilizing some helicopter drilling is feasible and would minimize impacts to wildlife (Supra II), but the Forest Service is not requiring either.

**D. Reporting Grizzly Sightings and Taking Reasonable Safety Precautions**

Despite the continued growth and expansion of the GYE grizzly population, including increasing grizzly presence near the Project area (SOF ¶¶ 27–28), the Forest Service is requiring only one mitigation measure to protect grizzly bears: requiring Excellon’s on-site workers to follow the forest-wide food storage order (FS-024009, 024039, 024047–08). This requirement applies to anyone camping in the area, and was not specifically designed for this Project. *See id.* In public comments and objections, Plaintiffs urged the Forest Service to require Excellon to report grizzly sightings, to temporarily cease operations in the event that a grizzly is encountered, to require on-site workers to take Living in Bear Country training, and to carry bear spray. FS-006995, 007028–29; FS-024163, 024169. But the Forest Service refused to adopt any of these common sense and reasonable measures, without any explanation beyond asserting Project design features are “adequate in minimizing potential impacts” to grizzly and other species. FS-024184–85 (response to objections).

**E. Whitebark Pine Seed Collection**

Road and drill pad construction in Dog Bone Ridge will remove whitebark pine, a species proposed for listing as “threatened” under the Endangered Species Act, and Porcupine Lookout

will include road work and logging in this area. SOF ¶¶ 36–37. In response to Plaintiffs’ objection stating more mitigation should be required, the Forest Service again claimed that the Project’s design features are “adequate in minimizing potential impacts” to whitebark pine. FS-024184–85.

However, the Forest Service’s Biological Assessment for whitebark pine identified an “Additional Recommendation” to reduce impacts and to “promote a net gain of whitebark pine at the landscape scale.” FS-011235. That measure is: “Continue to support Forest Service efforts in collecting whitebark pine seeds from blister rust resistant individuals to enhance conservation efforts.” *Id.* This protective measure is feasible, as Excellon agreed to do this in the past. ECF No. 18-5, p. 24 (2018 Kilgore EA). But this “Additional Recommendation” is not required as part of the Project. Without requiring this feasible mitigation measure, the Forest Service failed to minimize impacts, requiring reversal. *See Rock Creek Alliance*, 703 F. at 1170; *Save Our Cabinets*, 254 F. Supp. at 1253–55 (D. Mont. 2017); *Hells Canyon Pres. Council* 2006 WL 2252554 at \*4–5.

The Court thus should grant Plaintiffs’ Fourth Claim for Relief, and reverse, vacate, and remand the Forest Service’s approval of the Kilgore Project.

### **CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that the Court grant this Motion for Summary Judgment and reverse, vacate, and remand the Kilgore Project EA and DN/FONSI.

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Dated this 1<sup>st</sup> day of November, 2022.

Respectfully submitted,

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