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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' RESPONSE/REPLY BRIEF ON SUMMARY JUDGMENT

* This Response/Reply Brief complies with the 35-page limit in the Joint Litigation Plan, ECF No. 13 and adopted by the Court's Scheduling Order, ECF No. 17.

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INTRODUCTION

In their opening summary judgment briefs[1], the Forest Service and Excellon rely on the same unexamined assumptions and inaccurate statements from the Environmental Assessment (EA) and its supporting documents to downplay and dismiss unexamined and potentially significant effects of the Kilgore Project to water quality, Yellowstone cutthroat trout (YCT), elk, grizzly, and whitebark pine. Largely ignoring key arguments made by Plaintiffs (hereafter ICL), the Forest Service and Excellon relegate some key arguments to footnotes and fail to even address others. Simply repeating inaccurate statements from the EA and ignoring key arguments does not overcome ICL's showing that the Forest Service violated NEPA, the Organic Act, and Forest Service regulations, requiring reversal, vacatur, and remand.

For example, ICL showed that the Forest Service failed to even consider the risk that when Excellon drills 390 exploration holes, it could intercept any of the several mine tunnels, the prospect pits, and the mine waste dump at the site. *ICL Br.* at 12–14. The Forest Service's own guidance document (the "*Working Guide*") warns this can occur and "can provide conduits to groundwater flow and/or increase the risk of groundwater and surface water contamination." FS-013805. In response, Excellon does not even mention the *Working Guide*, while the Forest Service tries to brush aside its own guidance document in a footnote. But the *Working Guide* was created by the Forest Service specifically to provide guidance on how to properly evaluate the potential groundwater impacts from mine exploration drilling projects like the Kilgore Project. To do so, the *Working Guide* directs the Forest Service to consider the risk of drilling into existing mine features. Ignoring this important issue violates NEPA.

[1] The Forest Service's opening summary judgment brief (ECF No. 22) is cited herein as "*FS Br.*", Excellon's (ECF No. 25) as "*Excellon Br.*", and ICL's (ECF No. 19-2) as "*ICL Br.*" Page citations are to the internal page number of these brief (not the ECF page number).

Similarly, in showing that the Forest Service failed to take hard look at the cumulative effects of "Porcupine Lookout" (a logging project that overlaps with the Kilgore Project), ICL's brief included a map from the Kilgore Range Report, which depicts the logging units planned for Porcupine Lookout. *ICL Br.* 20–22. ICL showed that the Forest Service failed to utilize this logging unit information when it considered cumulative effects to elk, YCT, grizzly, and whitebark pine. *Id.* at 22–28. In response, neither the Forest Service nor Excellon even acknowledge the Range Report map and the logging units. Instead, they falsely insist that the Forest Service lacked specific information about Porcupine Lookout, and they use this as an excuse for the dearth of information about Porcupine Lookout provided in the Kilgore Project's cumulative effects analyses. This violates NEPA's requirement to conduct a useful cumulative effects analysis using data or other detailed information.

The Forest Service and Excellon again ignore key issues in responding to ICL's argument that the agency violated its duty under NEPA to consider a reasonable range of alternatives. For example, ICL devoted an entire subsection of its brief to the Forest Service's unreasonable decision to exclude a daylight drilling alternative from consideration in the EA. *ICL Br.* at 30–31. All the Forest Service and Excellon offer in response is a one sentence restatement of the faulty rationale the EA gave for rejecting this alternative. They never acknowledge or address ICL's arguments as to why the EA's rationale was wrong.

For these and additional reasons set forth below, the Court should grant ICL's summary judgment motion (ECF No. 19), deny the Forest Service's and Excellon's cross-motions for summary judgment (ECF Nos. 22 & 24), and should reverse, vacate, and remand for full compliance with NEPA, the Organic Act, and Forest Service mining regulations.

ARGUMENT

I. PRELIMINARY MATTERS

A. ICL's Claims Are Properly Before the Court

The Court can reject the Forest Service's repeated—but unsupported—suggestions that the Court should ignore most of ICL's claims. In its brief, the Forest Service complains that ICL is "now seeking another bite of the apple by substantially expanding the issues before the Court" and argues that this "should not be countenanced." *FS Br.* at 2. The Forest Service also states: "Rather than limiting their challenge to the Court's previous limited remand . . . , Plaintiffs now bring a host of new and old claims . . . ." *Id.* at 7. As another example, the Forest Service states that Plaintiffs "expand their claims . . . well beyond the limited remand" and argues that "the Court's review should end there" with a review of only whether the agency complied with the remand. *Id.* at 10.

The Forest Service, however, never cites any legal principle or any legal authority to support its suggestions that the Court can ignore any of ICL's claims. *See FS Br.*

While the remand of the 2018 Kilgore Project approval was "limited," the 2021 Kilgore Project approval challenged here is a new agency action. After this Court remanded and vacated the 2018 Kilgore Project: (1) Excellon submitted a new plan of operations to the Forest Service; (2) the Forest Service initiated a new NEPA process, providing notice and soliciting scoping comments; (3) the Forest Service prepared new specialist reports and a new EA, which incorporated new information, new analysis, and other differences beyond merely addressing issues specifically related to the remand order; (4) the Forest Service went through a new administrative objection process; and (5) the Forest Service issued a new DN/FONSI approving the 2021 Kilgore Project. *See ICL SOF* (ECF 19-1) ¶¶ 9–15; *FS SOF* (ECF 22-1) ¶¶ 6–7.

In fact, the Forest Service seeks credit in its brief for the fact that the 2021 EA went beyond the limited court remand to include new issues and analysis:

> Rather than limiting its review of this revised plan of operations to issues related to Dog Bone Ridge groundwater and any consequential effects to Corral Creek and Yellowstone cutthroat trout in Corral Creek, the Forest Service prepared a new EA with updated, revised, or new analyses that examined the potential effects of the proposed plan of operations on: surface water; groundwater; threatened, endangered and sensitive wildlife and plants; fisheries; and soils.

FS Br. at 5. Thus, the Forest Service pats itself on the back for expanding its review and for not limiting its new action to addressing only those issues subject to the remand, yet it faults ICL for bringing claims expanding beyond the limited remand.

Similarly, when ICL sought to reopen the prior case to challenge the new 2021 Kilgore Project approval, the Forest Service successfully argued against reopening that case precisely because the 2021 approval was a new and different agency action. There, the Forest Service explained the 2021 Kilgore Project involved a "new project and environmental analysis." *ICL v. U.S. Forest Serv.*, No. 1:18-cv-00504-BLW, ECF 62, p. 1. The Forest Service also stated that "Plaintiffs' proposed supplemental complaint is a new and distinct action challenging different final agency action that should be the subject of a separate suit" and that "the proposed supplemental complaint challenges a different EA and DN/FONSI approving a revised mining plan of operation from that involved in this action." *Id.* at 5.

In summary, the Forest Service has not cited any legal basis for its suggestion that this Court can ignore any of ICL's claims. The 2021 Kilgore Project challenged here is a new agency action, based on a new plan of operations, a new NEPA process, new public comments, and new documents and analysis. Any and all legal violations committed by the Forest Service in its approval of the 2021 Kilgore Project, such as those ICL has raised here, are fair game.

B. There Is No Basis for Striking ICL's Standing Declarations

ICL submitted the Michalski, Johnson, Rolet, and Huegel Declarations (ECF Nos. 19-3, 19-4, 19-5, 19-6) with its motion for summary judgment to demonstrate each plaintiff's organizational standing. In a footnote, Excellon "objects to the use of the Plaintiffs' Declarations . . . for anything other than the limited purpose of determining whether Plaintiffs have standing to bring this action." *Excellon Br.* at 2, n.1. Excellon does not explain how or identify where ICL supposedly seeks to use these declarations for any purpose other than to support standing. *See id.* The only reference to these declarations in ICL's opening brief is to state that the declarations demonstrate each Plaintiff's standing. *ICL Br.* at 10, n.2. These declarations are, thus, properly before the Court and can be considered, in full, for standing purposes. *See Nw. Envtl. Defense Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1527–28 (9th Cir. 1997); *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1162 (9th Cir. 2006); *Nat'l Audubon Soc. v. U.S. Forest Serv.*, 46 F.3d 1437, 1147 (9th Cir. 1993).

II. FAILURE TO TAKE A HARD LOOK IN VIOLATION OF NEPA

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

1. Failure to Consider Risk from Historical Mine Features

As shown in ICL's opening brief, the Forest Service failed to consider the risk of drilling into the existing mining features at the site, even though Forest Service guidance recognizes this risk as a factor that should be considered when evaluating projects like the Kilgore Project. *ICL Br.* at 12–14. There are existing mine features at the Kilgore Project site, including several collapsed underground adits and prospect pits, as well as a historic mine dump. *ICL SOF* ¶ 17. Existing mine features are believed to be contributing to degraded water quality at the Project

site. *Id.* And the Forest Service has authorized Excellon to drill 390 exploration holes, averaging 1,300 feet deep, from 130 different drill stations throughout the Project site. *Id.* ¶¶ 2, 4.

ICL argued that the Forest Service failed to take a hard look at the impacts of Excellon's drilling in violation of NEPA, because: "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." *Id.* at 13.

In response, the Forest Service argues that "baseline water quality data already includes any effects from past operations." *FS Br.* at 14. The Forest Service also points out that it identified the location of some existing mining features through its heritage resources surveys but that the agency elected not to disclose those locations to the public. *FS Br.* at 15. These responses miss the point and fail to show that the Forest Service even considered—let alone took the required hard look at—the important issue of whether Excellon's drilling could intercept existing mine tunnels or otherwise encounter any of the several existing mine features at the site and, thereby, alter flows and increase the risk of groundwater and surface water contamination.

As discussed in the following two sections, the Forest Service violated NEPA by failing to even consider this important issue, and further violated NEPA by failing to disclose the locations of the existing mine features.

a. Failure to Consider Whether Excellon's 390 Drill Holes Could Encounter Any of the Several Collapsed Underground Adits, the Prospect Pits, the Waste Dump, and Any Other Existing Mine Features at the Site

Even though the Forest Service identified the location of some legacy mine features through its heritage resources surveys, nothing in the DN/FONSI, the EA, or their supporting documents show that the Forest Service used that information—or any other relevant

information—to consider the risk that Excellon's 390 drill holes could intercept any of the "several" underground mine adits and prospect pits, the waste dump, or any other existing mine features at the site and, thereby, impact groundwater and surface water. This violates NEPA.

"NEPA requires agencies to consider all important aspects of a problem." *Bark v. U.S. Forest Serv.*, 958 F.3d 865, 871 (9th Cir. 2020) (citation omitted). An EA must contain a "reasonably thorough discussion of the significant aspects of probable environmental consequences." *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1376 (9th Cir. 1998). Whether Excellon's 390 drill holes might intercept any of the several underground adits and whether they might encounter and interact with the mine waste dump, prospect pits, and any other existing mine features at the Kilgore Project site is an important aspect of the Project's environmental consequences—as the Forest Service itself acknowledges in its guidance document, the *Working Guide*.

The Forest Service's July 2020 guidance, titled "Working Guide[:] Evaluating Groundwater Resources for Mineral Exploration Drilling" ("*Working Guide*") was developed to meet "the need for the Forest Service to ensure adequate analysis of potential effects on groundwater from mineral exploration drilling." FS-013789. 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. The *Working Guide* says that 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.*

Despite this explicit direction in the *Working Guide*, neither the DN/FONSI, the EA, nor their supporting documents consider whether Excellon's drilling could intercept underground workings or otherwise encounter any existing mine features at the Kilgore Project site and affect groundwater flow or increase the risk of contamination.

In its response, the Forest Service drops a footnote, arguing that that because the *Working Guide* is not binding, the agency is free to ignore it as it sees fit. *FS Br.* at 15, n.7. Whether or not the *Working Guide* is binding, the *Working Guide* is where the Forest Service used its expertise to set forth important factors to consider "to ensure adequate analysis of potential effects on groundwater from mineral exploration drilling" in NEPA analyses. FS-013789. As part of its NEPA analysis for the Kilgore Project, the Forest Service attached the *Working Guide* to the Kilgore Hydrogeology Report. FS-013786.

But the Forest Service never offered any explanation in the DN/FONSI, the EA, the Hydrogeology Report, or anywhere else in the record as to why it was deviating from the *Working Guide's* direction to identify existing mine features and consider the risk that drilling might encounter those features and impact water flows and water quality.[2] Disregarding the agency's own applicable and relevant guidance without any explanation is arbitrary and capricious and violates NEPA. *See American Wild Horse Preservation Campaign v. Zinke*, No.

[2] To be clear, the DN/FONSI never mentions the *Working Guide*, never mentions the issue of whether any of Excellon's drill holes could intercept or otherwise encounter any type of existing mine feature at the site, and offers no statement as to why this issue was not considered. *See* FS-024065–76 (DN/FONSI). The same is true of the EA. *See* FS-023998–4054 (EA). The same is true of the Surface Hydrology Report (FS-015887–97) and the Fisheries Specialist Report (FS-014858–73). And while the Hydrogeology Report (which is the basis of the EA's analysis of groundwater impacts) includes the *Working Guide* as an attachment (*see* FS-013787), the Hydrogeology Report itself (FS-013776–86) never mentions the possibility any of Excellon's drill holes intercepting or otherwise encountering any existing mine features at the site, and offers no explanations as to why this issue was not considered for the Kilgore Project.

1:16-cv-00001-EJL, 2017 WL 4349012, *11 (Sep. 29, 2017 D. Idaho) (BLM violated NEPA where a report commissioned by the BLM was "relevant to the BLM's decision and the FEIS should have considered the report and/or provided an explanation as to why it was not considered.").

Nor could the Forest Service offer any reasonable explanation for disregarding the *Working Guide* here, even if it had tried. Again, Excellon reported that there are "several collapsed underground adits" and "prospect pits" at the Kilgore Project site from mining in the 1930s. *ICL's SOF* ¶ 17. Excellon also noted the presence of "a historic mine dump" near a spring and seep at the Project site. *Id.* The record suggests that at least some of these features are located in the Crab Creek and Prospect Creek drainages. *Id.* Again, Excellon plans to drill 390 exploration holes, each averaging 1,300 feet in depth, from 130 drill stations. *ICL SOF* ¶¶ 2–5. Many of these drill stations will be located in the Crab Creek and Prospect Creek drainages. *See* FS-024007–08 (EA maps). Thus, there is a real risk of Excellon's extensive drilling intercepting existing mine features at the site, and there is no reasonable basis for the Forest Service to ignore this important issue.

This Court has found NEPA violations where, like here, NEPA documents fail to show that an agency considered an important aspect of the environmental consequences of a project. *See*, *e.g.*, Friends *of the Clearwater v. Probert*, No. 3:21-cv-00189-CWD, 2022 WL 2291246, *23 (Jun. 24, 2022 D. Idaho) (where "the Court was unable to locate [in the record] any discussion or analyses of the cumulative and synergistic impact of the two [logging] projects on old growth," the Forest Service's decision "failed to consider an important aspect of the problem, and is arbitrary and capricious"); *ICL v. U.S. Forest Serv.*, No. 1:11-cv-00341-EJL, 2012 WL 3758161, *14 (Aug. 29, 2012 D. Idaho) (by failing to consider exploration drilling impacts to

groundwater, Forest Service "failed to adequately consider this important aspect of the Project and its impact on the environment"); *ICL v. U.S. Forest Serv.*, No. 1:16-cv-0025-EJL, 2016 WL 3814021, *15 (July 11, 2016 D. Idaho) ("Forest Service failed to consider an important aspect of the problem with regard to the changed circumstances for [sensitive plant] as a result of [a fire]" when approving mine exploration in violation of NEPA).

In its response to this issue, Excellon never even mentions the *Working Guide*. *See Excellon Br.* at 11–12. Instead, Excellon argues the Forest Service took a hard look because it "note[d] that some surface water resources are located near a historic mine," and because it "contemplated historic adit discharges when establishing baseline conditions." *Excellon Br.* at 12. Other than these vague assertions that the Forest Service "noted" and "contemplated" that there are some mining features at the site and that these are currently affecting to water quality, Excellon (like the Forest Service) does not even argue that the Forest Service ever considered the risk of any of Excellon's 390 exploration holes intercepting any of the several existing mine features at the site.

By failing to consider this important issue, the Forest Service failed to take a hard look. The Court should reverse, vacate, and remand for this NEPA violation.

b. Failure to Disclose to the Public the Locations of Existing Mine Features.

To the extent that the Forest Service and Excellon do argue that the Forest Service used the information from the heritage resource surveys on the location of some legacy mine features for the purpose of considering whether Excellon's drill holes could intercept or otherwise encounter those features, the Forest Service still violated NEPA because it never disclosed that data, and it never otherwise explained the data and how it informed its decision.

NEPA requires the Forest Service to disclose the hard data supporting its expert opinions to facilitate the public's ability to challenge agency action. *See Idaho Sporting Cong. v. Thomas*,

137 F.3d 1146, 1150 (9th Cir. 1998) (*overruled on other grounds by Lands Council v. McNair*, 537 F.3d 981, 1218 (9th Cir. 2008)).

Applying this principle in *Western Watersheds Project v. Rosenkrance*, No. 4:09-cv-298-EJL, 2011 WL 39651 (2011 D. Idaho), this Court held that a Bureau of Land Management ("BLM") EA failed to take a hard look in violation of NEPA when "BLM failed to disclose essential information to the public about BLM's decisions affecting public lands," stating:

> BLM cannot make informed decisions if it does not consider all relevant information at its disposal. Nor can the public evaluate BLM's decisionmaking without being fully informed. BLM had notice of, and had ready access to information about, bull trout on Rock Creek. BLM's EA should have considered bull trout in the Rock Creek Allotment. It did not. Because BLM's EA does not take a "hard look" at the impacts of proposed action, or its alternatives, on bull trout, the EA violates NEPA.

Id. at *8. Finding another similar NEPA violation in that case, this Court explained "BLM may draw on data from its rangeland health assessments, but it must provide that data and the accompanying analysis in its EA," and added: "NEPA . . . requires BLM to disclose its data and its analysis in its NEPA documents so BLM's decisionmakers and the public can review it, critique it, and comment on it." *Id.* at *12–*13.

Likewise, in *Idaho Conservation League v. Lannom*. 200 F. Supp.3d 1077 (D. Idaho 2016), this Court held that the Forest Service violated NEPA when it approved mining company AIMMCO's drilling and mineral activities without disclosing important information and analysis to the public in writing. This Court stated: "[W]hatever calculus the Forest Service engaged in to conclude internally that AIMMCO's project reduced impacts to their minimum was not shared with the public in any written analysis. That violates NEPA." *Id.* at 1088. This Court further explained:

> Under NEPA, the agency cannot rely on material that is kept secret from the public. *Lands Council* [*v. Powell*, 395 F.3d 1019, 1027 (9th Cir. 2005)]. So the agency either must explain that it did not rely on this confidential information or,

> if it did rely upon it, describe the information and how it affected the agency's decision. But the agency did neither in the EIS and ROD. Thus, the Forest Service's decision is arbitrary and capricious because it may have relied on information withheld from the public.

Id. at 1089.

Here, the locations of the legacy mine features the Forest Service found at the site have been kept secret from the public. ICL urged the Forest Service to provide such information in its public comments and in its administrative objections. FS-006999–7000 (comments); FS-024166–77 (objections). But the Forest Service refused, depriving ICL and the public of their ability to review, critique, and comment on this important information and the Forest Service's conclusions. Furthermore, the Forest Service never describes the information, nor does it explain how it used this information to consider this issue in the DN/FONSI, EA, or their supporting documents. *See Supra* n.2. This violates NEPA, and the Court should order disclosure of this information and any analysis.

In summary, the Forest Service violated NEPA by failing to consider an important aspect of the environmental consequences of the Kilgore Project by failing to consider the risk that Excellon's drilling of 390 exploration holes might intercept any of the several underground adits or other mine features at the site. The Forest Service cannot overcome this NEPA violation by suggesting it considered the secret data it gathered but never disclosed or even described. The EA and DN/FONSI must be reversed, vacated, and remanded for these NEPA violations.

2. Inadequate Groundwater Quality Baseline Information

The Forest Service also violated NEPA's hard look requirement by failing to gather adequate baseline data on groundwater quality. *See ICL Br.* 14–16. Instead of sampling groundwater quality throughout the Kilgore Project site, the EA relies on groundwater quality sampling from a single location (a well, called "KW-3") located in one of the four target drilling

areas (the Mine Ridge area). *ICL SOF* ¶ 18. No groundwater quality sampling has occurred in any of the other three drilling areas: Prospect Ridge; Gold Ridge; or Dog Bone Ridge. *Id.* Groundwater quality is thus unknown throughout most of the Project site. As a result, there is no baseline against which to compare any groundwater contamination Excellon might cause. Also as a result, it is unknown what contaminants are present (and in what levels) in the groundwater Excellon is expected to occasionally encounter while drilling.[3] This violates NEPA.

In response, the Forest Service and Excellon point to the information and analysis provided in the EA and the Hydrogeology Report. *FS Br.* at 16–17; *Excellon Br.* at 12–13. However, this other information does not excuse the Forest Service for improperly relying on groundwater sampling data from only a single location throughout entire project site. This violates NEPA, just like the District of Oregon held in *Cascade Forest Conservancy v. Heppler*, No. 3:19-cv-00424-HZ, 2021 WL 641614 (Feb. 15, 2021 D. Oregon), and as explained in ICL's opening brief. *See ICL Br.* at 15–16. In a footnote, the Forest Service argues *Cascade Forest Conservancy* is non-binding and expresses its displeasure with that decision. *FS Br.* at 18, n.8. But the Forest Service does not point to any other authorities. Furthermore, *Cascade Forest Conservancy* is highly persuasive and is right on point.

There, like here, the court had previously reversed the Forest Service's approval of a mine exploration drilling project for failing to gather sufficient groundwater hydrology baseline information. 2021 WL 641614 at *20. Like here, the Forest Service later reapproved the exploration, with more information and analysis related to groundwater hydrology; however the only groundwater sampling data gathered was from only three locations sampled only one time

[3] During past drilling, Excellon has "encountered groundwater" in some drill holes, and the Forest Service expects Excellon to continue to encounter groundwater is some drill holes during the Kilgore Project. FS-013781.

each in 2014. *Id.* at *20. There, the project at issue was significantly smaller than the Kilgore Project, as only 63 holes would be drilled from 23 drill pads. *Id.* at *2.

The court found that "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. The court reached that conclusion even though the EA included what the court described as a "substantial discussion of the topography, geology, and hydrogeology of the Project Area, largely taken from a fifty-five page Groundwater Resources Report." *Id.* at *18. The court explained:

> But the 2017 EA fails to provide further explanation or support for its assertion that the one-time sampling of three existing drillholes located in the east-central part of the Project Area is representative of the groundwater conditions for the entire Project Area. And the Report appears to be silent on this issue. Despite the Report's extensive discussion of the topography, geologic setting, and hydrogeology of the area, the Court is unable—on its own review—to ascertain how "the flowing condition, the geological formations encountered, the proximity to proposed drillhole locations, and the topographic setting" make these samples representative.

Id. at *20.

Similarly here, the Kilgore Project EA discusses the topography, geology, and hydrogeology of the Project site, and that discussion is largely taken from the eleven-page Hydrogeology Report. *See* FS-024020–29 (EA groundwater section); FS-013776–86 (Hydrogeology Report). And like in *Cascade Forest Conservancy*, the EA and the Hydrogeology Report are silent on the issue of whether the groundwater sampling from the KW-3 well at Mine Ridge is representative of the groundwater conditions for the entire Kilgore Project area.

In response, the Forest Service emphasizes this Court's direction in the prior Kilgore case that "[i]t would have been proper for the Forest Service to use its expertise to determine whether th[e] general hydrogeology [of the area] was actually present in the Dog Bone Ridge drainage or to estimate its presence by comparison to, say, the east side hydrogeologic condition." *FS Br.* at

17. And the Forest Service argues this "is precisely what the Forest Service did in the 2021 EA." *FS Br.* at 17–18. But the Forest Service cites nothing in the EA or anywhere else in the record to support this statement. *See id.*

In truth, neither the EA nor the Hydrogeology Report even state that—let alone offer an explanation as to why—the Forest Service determined that the groundwater sampling from the KW-3 well at Mine Ridge was representative of the entire Project site. *See* FS-024020–29 (EA groundwater section); FS-013776–86 (Hydrogeology Report). In fact, the Hydrogeology Report states quite the opposite: "Groundwater levels and characteristics vary throughout the project area and are likely due to the high variability in permeability/porosity between lithologies . . . ." FS-013778 (emphasis added).[4] Thus, the Forest Service had no reasonable basis for relying on a single groundwater sampling location to represent the entire Kilgore Project site.

To downplay this lack of groundwater data, Excellon states that "[t]here is nothing particularly unusual about the water quality of groundwater in the Exploration Project area" and wrongly asserts that ICL conflated groundwater and surface water criteria. *Excellon Br.* at 12–13. As ICL accurately stated, at KW-3: "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." *ICL Br.* at 16. *See also* FS-013781 (Hydrogeology Report stating: "Elevated levels of metals have been detected in the water well (KW-3) but all have been below Idaho groundwater standards. These levels do exceed surface water standards for selenium and zinc."). Groundwater in the area is also "high in iron." *Id.* Whether or not these

[4] To be clear, the Hydrogeology Report does state: "Water quality at the three new sampling locations in the Dog Bone Ridge area showed water quality similar to the east side of the project." FS-013781. However, these new sampling locations are surface water sampling locations, not groundwater sampling locations. *See* FS-024054 (EA map depicting all monitoring locations).

elevated levels of selenium, zinc, and iron from the KW-3 well are "particularly unusual," they are concerning. And they raise questions about whether and to what degree groundwater suffers from elevated levels of metals and other harmful substances at other locations at the Project site—something the Forest Service does not know since there has been no groundwater sampling anywhere other than at the KW-3 well.

Excellon also asserts that "in order to collect the type of data that Plaintiffs would like to have, exploration drill holes will need to be drilled, the precise activity that Excellon seeks to pursue." *Excellon Br.* at 14. Drilling a single sampling well in each of the three target areas that currently lack groundwater sampling is in no way comparable to Excellon's plans to expand into these areas and drill 390 holes sitewide. Forest Service regulations include a NEPA categorical exclusion for "Short-term (1 year or less) mineral, energy, or geophysical investigations," 36 C.F.R. § 220.6(e)(8), which could be used to authorize drilling three groundwater sampling wells to collect the missing baseline data at Dog Bone Ridge, Prospect Ridge, and Gold Ridge before authorizing extensive exploration drilling in those areas.

The Court should reverse, vacate, and remand the Kilgore Project DN/FONSI and EA for this NEPA violation for failing to gather representative groundwater quality data for the site.

3. Failure to Gather Baseline Information About Hydraulic Connectivity

ICL's opening brief showed that the Forest Service similarly violated NEPA by failing to take a hard look at the impact of exploration drilling on groundwater because it lacked baseline data necessary to understand hydraulic connectivity between ground and surface waters at the Kilgore Project. *ICL Br.* at 16–17.

Because of the elevated levels of selenium and zinc in the groundwater at KW-3, the Forest Service stated in both the EA and the Hydrogeology Report, "natural and drilling induced surface/groundwater interactions are important to consider for this project." FS-024025

(emphasis added); FS-013781. But instead of gathering baseline information that could be used to understand hydraulic connectivity at the site before project approval, Excellon plans to do this post-approval. *ICL SOF* ¶ 19. Specifically, as explained in the Hydrogeology Report, Excellon will utilize up to five of its Kilgore Project drill holes to conduct "[d]rawdown tests . . . to look for hydraulic connectivity between structural elements and to define the compartmentalized nature of the local aquifer systems." FS-013778.

This approach of increasing the risk to the environment first and performing studies later "has the process exactly backwards" and violates NEPA. *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)). *See also N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1083 (9th Cir. 2011); *ICL v. U.S. Forest Serv.,* 2016 WL 3814021, *10 (D. Idaho 2016).

In response, the Forest Service does not argue that it collected baseline data on hydraulic connectivity; instead, the agency argues it did not need to, stating: "NEPA does not require an agency to 'conduct measurements of actual baseline conditions in every situation.'" *FS Br.* at 18 (quoting *Great Basin Res. Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095, 1101 (9th Cir. 2016)). The Forest Service also argues that the fact that Excellon may use up to five drill holes to gather such information later was "not part of the approved Project, has no effect on the 2021 EA's detailed discussion of the baseline . . . , and was not the basis for the [FONSI]." *FS Br.* at 18–19.

Completing the quote, which the Forest Service cut short, from *Great Basin Resource Watch*: "An agency need not conduct measurements of actual baseline conditions in every situation—it may estimate baseline conditions using data from a similar area, computer

modeling, or some other reasonable method." 844 F.3d at 1101. Critically, the Ninth Circuit held that: "whatever method the agency uses, its assessment of baseline conditions 'must be based on accurate information and defensible reasoning.'" *Id.* (quoting *Or. Nat. Desert Ass'n v. Jewell*, 840 F.3d 562, 570 (9th Cir. 2106)).

So here, what "reasonable method" instead of gathering actual baseline data did the Forest Service use to "estimate baseline conditions" on the important issue of hydraulic connectivity? Neither the EA groundwater section (FS-024020–29) nor Hydrogeology Report (FS-013776–86) demonstrate any method the Forest Service employed to estimate baseline conditions regarding hydraulic connectivity.

Again, as the Forest Service states in the Hydrogeology Report: "Groundwater levels and characteristics vary throughout the project area and are likely due to the high variability in permeability/porosity between lithologies with some acting as aquitards." FS-013778. Thus, all the Forest Service knows is that groundwater conditions vary throughout the site, and at any given location at the site, permeability and porosity could be high, or low, or anywhere in between. Without the draw-down tests Excellon plans to do post-approval, and without employing any other method for estimating these baseline conditions, the Forest Service failed to take a hard look and violated NEPA.

4. Improper Reliance on Monitoring to Detect Contamination

ICL's opening brief identified three ways the Forest Service improperly relied on the assertion in the EA 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. *ICL Br.* at 17–20 (quoting EA at FS-024029).

First, ICL argued that relying on post-approval monitoring is no excuse for failing to gather and analyze baseline data in order to determine the potential environmental harm before

approving the Kilgore Project. *Id.* at 17–18. In response, the Forest Service states that the monitoring was not used as a substitute for gathering and analyzing baseline data. *FS Br.* at 19. The Forest Service, thus, appears to agree that post-approval monitoring cannot be used as a substitute for taking a hard look during the NEPA process. *See id.* Therefore, if the Court finds that the Forest Service failed to take a hard look at drilling impacts to groundwater in any of the ways set forth in the sections above, then Forest Service cannot rely on this post-approval monitoring and mitigation to cure such NEPA violation. *See Gifford Pinchot Task Force v. Perez*, No. 03:13-cv-00810-HZ, 2014 WL 3019165, *31 (D. Or. July 3, 2014) (rejecting argument that "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"); *N. Plains Resource Council*, 668 F.3d at 1084–85 ("mitigation measures . . . are not alone sufficient to meet [agency]'s NEPA obligations to determine the projected environmental harm to enumerated resources *before* a project is approved" (emphasis in original)).

Second, ICL argued that it was arbitrary and capricious for the Forest Service to rely on monitoring to detect changes in groundwater quality, because there will not be any ongoing groundwater quality monitoring, except for occasional groundwater monitoring at the KW-3 well. *ICL Br.* at 18. Again, the KW-3 well is located in the Mine Ridge drilling area, which is just one of four drilling areas at the Kilgore Project site. *ICL SOF* ¶¶ 18, 20. Thus, any groundwater contamination in Dog Bone Ridge, Prospect Ridge, and Gold Ridge during or after Excellon's drilling will not be detected and corrected by any future groundwater monitoring. The Forest Service does not offer any response to this specific argument. *See FS Br.* at 19–21. The Court should reverse for this NEPA violation.

Third, ICL also argued that it was arbitrary and capricious for the Forest Service to rely on monitoring to detect changes in surface water quality too because even though there will be surface water quality monitoring at multiple locations throughout the site, there is no statistically reliable baseline against which to compare the monitoring data. *ICL Br.* at 18–19. At Dog Bone Ridge, surface water quality sampling data was gathered in just 2020. *ICL SOF* ¶ 21. Throughout the rest of the Project site, while surface water quality sampling data has been gathered over multiple years, Excellon's consultant nevertheless determined "the database does not contain sufficient data points to generate a statistically reliable value." FS-006519. In response, the Forest Service states that after Excellon's contractors warned about the lack of "statistically reliable" baseline surface water quality data, it was decided that the Project would follow Idaho Department of Environmental Quality's (IDEQ) guidance for determining significant changes in water quality. *FS Br.* at 20–21. However, IDEQ's guidance is not designed for NEPA compliance. Following IDEQ's guidance for post-approval monitoring of the Kilgore Project is no excuse for approving the Project without having first established a "reliable" dataset on baseline surface water quality. This again violates NEPA's requirement to take a hard look before project approval, and improperly relies on post-approval monitoring and mitigation as a substitute for an adequate surface water quality baseline. *See N. Plains*, 668 F.3d at 1084–85.

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

ICL's opening brief showed that the Forest Service failed to take a hard look at the cumulative impacts to elk, YCT, grizzly bear, and whitebark pine from the Kilgore Project when considered together with the overlapping Porcupine Lookout logging project. *ICL Br*. at 20–27.

1. Failure to Consider Available Information About the Porcupine Lookout Vegetation Treatment Project

While the Kilgore EA and supporting reports acknowledged Porcupine Lookout in their cumulative effects analyses, these analyses ignored important information about Porcupine Lookout relevant to evaluating cumulative effects and falsely claimed no such additional information was available. *ICL Br*. 20–22. In response to ICL's administrative objections asking the Forest Service to take a hard look at the cumulative effects from Porcupine Lookout, the Forest Service responded: "Each 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.

In the EA, the Forest Service noted the acreage of Porcupine Lookout logging units that overlaps with Excellon's Dog Bone Ridge drill sites ("two small harvest areas totaling 60 acres within the Dog Bone Ridge target area")—while ignoring the rest of Porcupine Lookout logging units. *See* FS-024015. The Forest Service had information on Porcupine Lookout logging units, shown in a map in the Range Report. FS-015956. The map shows that in addition to the two logging unites within Dog Bone Ridge drilling area, there are numerous other logging units throughout the Corral Creek watershed and other locations in proximity to the Kilgore Project. ICL reproduced this map in its opening brief and argued that the Forest Service failed to take a hard look at cumulative effects by ignoring the logging unit information. *ICL Br.* at 21.

In response, the Forest Service and Excellon repeat the Forest Service's response to ICL's objections, arguing that little was known about Porcupine Lookout, and that what was known was considered in the cumulative impacts analyses, namely the approximately 60 acres of Porcupine Lookout logging that overlap with Excellon's drill sites in Dog Bone Ridge. *See FS Br*. at 22–23; *Excellon Br.* at 16–17. Neither the Forest Service nor Excellon even acknowledge

the map from the Range Report and the additional information it shows the Forest Service had. And neither Excellon nor the Forest Service offer any explanation as to why these many other nearby logging units could be ignored in the cumulative effects analysis.

"[A]n agency has the discretion to determine the physical scope used for measuring environmental impacts," but only so long as its choice represents a reasoned decision and is not arbitrary. *Idaho Sporting Cong. v. Rittenhouse*, 305 F.3d 957, 973 (9th Cir. 2002). "An agency must provide support for its choice of analysis area and must show that it considered the relevant factors." *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 902 (9th Cir. 2002). The Ninth Circuit has, time and again, rejected NEPA analyses that unreasonably limit the geographic scope of a cumulative impacts analysis. *See Bark*, 958 F.3d at 871–73; *Klamath-Siskiyou Wildlands Center v. BLM*, 387 F.3d 989, 993–97 (9th Cir. 2004); *Idaho Sporting Cong.*, 305 F.3d at 973; *Kern v. BLM*, 284 F.3d 1062, 1078–79 (9th Cir. 2002); *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1313 (9th Cir. 1990).

Here, neither the EA nor its supporting documents offer any justification for limiting its cumulative effects analysis to the Kilgore Project drilling areas and excluding neighboring areas, including areas with access roads Excellon will use to reach drilling areas, and including the larger watersheds where the Kilgore Project is located. As a result of this arbitrary decision to ignore effects from vast majority of the overlapping and neighboring Porcupine Lookout project, despite having such information, the Forest Service failed to take a hard look at the Project's impacts to at-risk and special status species, each of which is discussed more below.

2. Elk

The EA and its supporting documents show that the Kilgore Project will cause declines in two important measures for protecting elk—"elk security" and "elk habitat effectiveness"—

bringing these measures down to barely above their lower acceptable limits. *See ICL Br.* at 22–23; *ICL SOF* ¶¶ 32–34. *See also* FS-024041 (EA table summarizing these declines). The Forest Service's Wildlife Report admitted "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. *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 vague and conclusory assertion is not supported by any quantified information or detailed analysis and violates NEPA.

"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).

The Forest Service argues that the Porcupine Project was only in its initial planning stages and that ICL is, thus, asking for a "full NEPA analysis for future proposed projects" and would be "entirely impractical." *FS Br.* at 24–25. But again, this ignores the fact that the Forest Service knew more about Porcupine Lookout that it acknowledged in the EA and its supporting documents, such as the data displayed in the map from the Range Report but nowhere else. *See* FS-015956. The Forest Service should have provided some quantified or detailed information and analysis—not a full NEPA analysis—on the degree to which Porcupine Lookout might further reduce elk security and elk habitat effectiveness. Yet without such information or

analysis, the Forest Service rests on its conclusory assertion that cumulative effects "would not contribute project effects in a way which is significant to elk." FS-023989. Again, these effects may indeed be significant, as the Kilgore Project is already pushing elk security and habitat effectiveness to near their bare minimum acceptable levels. Without more information or analysis, the Forest Service's assertion is irrational and violates NEPA.

3. Grizzly Bear

Like with elk, the Forest Service made the conclusory assertion in the Wildlife Report that "Cumulative effects would not contribute to project effects in a way which is detrimental to grizzly bears." FS-023962. The Forest Service made this assertion despite finding the Kilgore Project will reduce bear security by 606 acres, and despite admitting that vegetation treatment projects and their logging and roads can disturb bears and cause reductions in bear security. FS-023961. Like with elk, the Wildlife Report made no attempt to quantify or provide other detailed information about the cumulative effects to grizzly bear of Porcupine Lookout together with the Kilgore Project, such as how much bear security might be further reduced. *See ICL Br.* at 24–25. This too violates NEPA.

While the Forest Service tries to downplay the likelihood of grizzly bears in and near the Kilgore Project area, the Greater Yellowstone Ecosystem grizzly has expanded (and continues to expand) its range, distribution, and numbers. *ICL SOF* ¶ 27. And grizzly bear have been detected near the Kilgore Project site in recent years. *ICL SOF* ¶ 28.

The Forest Service also argues it took a hard look by "noting [Porcupine Lookout's] estimated size and its potential overlap with 60 acres of the Dog Bone Ridge area." *FS Br.* at 26. However, the Forest Service noted Porcupine Lookout's size and acreage of overlap in an introductory section in the EA. FS-024015. It never noted this overlapping acreage in the

Wildlife Report (FS-023941–94). The Wildlife Report also never noted the many additional Porcupine Lookout logging units displayed in the Range Report, which show logging units in grizzly bear habitat overlapping and adjacent to the Kilgore Project site. *See* FS-015956.

In fact, in the section of Wildlife Report that discusses grizzly bear (FS-023958–62), the Forest Service simply described Porcupine Lookout as follows: "The Porcupine Lookout project may occur within the analysis area." FS-023961. This vague statement does not provide the type of quantified or detailed information required to take a hard at cumulative effects (*see Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d at 993 (9th Cir. 2004)), and does not support the Forest Service's assertion that there will be no detrimental effects to threatened grizzly.

4. Yellowstone Cutthroat Trout

The Forest Service considered cumulative effects to YCT, a "sensitive species," in the Fisheries Report. There, the Forest Service noted there could be additive effects from Porcupine Lookout, and without providing any information or analysis about Porcupine Lookout, the Forest Service concluded: "The combination of these two projects is not expected to produce cumulative effects . . . to YCT." FS-024035–36. Like with elk and grizzly, this conclusory assertion about cumulative affects to YCT is unsupported by quantified or other detailed information, it ignores available information about Porcupine Lookout, and it violates NEPA.

In response, the Forest Service essentially argues there will be no cumulative effects to YCT by focusing on the area of direct overlap between the Porcupine Lookout logging units and Excellon's drill pads at Dog Bone Ridge, which are in an area "high in the Bear Cat Canyon area" where the creek "is reported to be ephemeral." *FS Br.* at 27. The Forest Service adds: "As a result, 'sediment is unlikely to be transported out of the area,' meaning '[t]he combination of

these two projects is not expected to produce cumulative effects within the AIZ or to [Yellowstone cutthroat trout]." *Id.* (citing Fisheries Report).

This response, like the Fisheries Report, wholly ignores the cumulative effects that will occur lower in the Corral Creek watershed, where streams flow year-round and where YCT may be present. *See ICL SOF* ¶ 25. While Excellon's drilling units at Dog Bone Ridge are located high in the watershed, Excellon is authorized to use, and in some instances construct and/or maintain, access roads lower in the watershed, including forest road 177 which runs along Corral Creek.[5] The map in the Range Report, depicts numerous Porcupine Lookout logging units throughout the Corral Creek watershed, including logging units along Corral Creek itself and along forest road 177. FS-015956. But the Forest Service arbitrarily constrained its cumulative effects analysis for YCT to the upper reaches of the watershed at the Dog Bone Ridge drilling sites. And thus the Forest Service ignored the cumulative effects from sediment delivery and habitat degradation lower in the Corral Creek watershed

Logging and road construction and use can degrade fish habitat, and these potential effects can be quantified or otherwise evaluated using detailed information. *See*, *e.g.*, *Blue Mountains Biodiversity Proj. v. Blackwood*, 161 F.3d 1208, 1213 (9th Cir. 1998) (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 never quantified or evaluated these effects lower in the Corral Creek watershed where Porcupine Lookout logging, log haul, and road work will overlap with Excellon's vehicle trips and any related road work. This violates of NEPA.

[5] *See* FS-024012 (EA description of project access roads, including road 177 and trail 005); FS-024008 (map showing road 177 and trail 005 accessing Dog Bone Ridge); FS-024023 (map showing road 177 runs along Corral Creek before reaching upper Bearcat Canyon).

5. Whitebark Pine

Finally, ICL showed that the Forest Service failed to provide any meaningful analysis of cumulative effects to threatened whitebark pine simply asserted that "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. ICL noted two specific problems with this conclusion. 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 will have to remove such trees. *See ICL Br.* at 26–28 (quoting FS-011233). Second, the Forest Service is making a bald assertion without any support that Porcupine Lookout logging would provide an overall benefit. *See id.* The Ninth Circuit rejected a cumulative effects analysis in *Bark* 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 its response, the Forest Service simply notes that the EA acknowledged the amount of potential overlap between Porcupine Lookout and the Dog Bone Ridge drilling sites and notes that the Forest Service stated Porcupine Lookout could benefit whitebark pine. *FS Br.* at 28–29. This response fails to even address ICL's arguments and just restates the Forest Service's faulty analysis from its whitebark pine biological assessment. FS-011234–35. This does not overcome ICL's showing that the Forest Service failed to take a hard look at cumulative effects to whitebark pine, and the Court should reverse, vacate, and remand for this NEPA violation.

III. FAILURE TO CONSIDER A REASONABLE RANGE OF ALTERNATIVES IN VIOLATION OF NEPA

ICL's opening brief showed that the Forest Service unreasonably rejected developing two alternatives in the EA—a daylight drilling alternative, and a helicopter drilling alternative—in

violation of NEPA's requirement to consider a reasonable range of alternatives. *ICL Br.* at 28–34.

A. The Forest Service Unreasonably Rejected a Daylight Drilling Alternative

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-024161–63. The Forest Service admitted that an alternative limiting drilling to daylight hours would likely benefit wildlife and other resources, but the Forest Service declined to include this alternative in the EA by asserting that drilling during daylight hours only would increase the Project's overall duration. *ICL Br.* at 30. In its brief, ICL first showed that nothing in the record supports this assertion that daylight drilling would necessarily result in a longer Project. *Id.* at 30–31. Second, ICL showed that even if daylight drilling would extend the duration of the Project, this is not a reasonable basis for refusing to develop this alternative in the EA. *Id.* at 31.

The Forest Service and Excellon barely offer any response to ICL's first point, and they do not even offer a response to the second point. They simply repeat the EA's assertions that an alternative limiting activities to only "certain parts of the day would likely be beneficial to some resources (e.g., wildlife); however, it would result in increasing the overall duration of the project." *See FS Br.* at 30–31; *Excellon Br.* at 20. In a footnote, the Forest Service adds that "it is self-evident that cutting the allowed hours of drilling operations nearly in half would substantially increase the length of the project." *FS Br.* at 31, n.10.

This is not "self-evident." It is speculation. As ICL estimated, over the next five years Excellon will have around 109 days per year, or 545 total days, to conduct its exploration. *ICL Br.* at 30–31. Even if limited to drilling during daylight, why is 545 days not enough to complete

the Project within Excellon's preferred timeframe? Neither the Forest Service nor Excellon offer any response to this point.

Next, the Forest Service and Excellon fail to even respond to ICL's second argument that even if limiting drilling to daylight hours would cause the Project to take longer to complete than what Excellon proposed, this is not a valid reason for refusing to develop this alternative in the EA. Under NEPA, the Organic Act, and other laws and regulations, the Forest Service has the authority to impose reasonable restrictions on mining operations and is not bound to accept Excellon's proposed timeline for completing the Project. *See Infra* at IV. *See also Baker v. USDA*, 928 F. Supp. 1513 (D. Idaho 1996) (upholding delay in reviewing mining plan of operations based on the need to undertake environmental review under NEPA and the Endangered Species Act).

In sum, the Forest Service's refusal to develop a daylight drilling alternative in the EA based on the assertion the Project would take longer to complete was arbitrary and capricious both because the Forest Service's assertion was based on pure speculation and because the Forest Service is not bound to Excellon's proposed timeline. The Forest Service should have developed and considered this environmentally beneficial alternative in the EA.

B. The Forest Service Unreasonably Rejected Helicopter Drilling

In its public comments and administrative objection, ICL also urged the Forest Service to consider using helicopters to access all or some of Excellon's drill sites, as a way to reduce road construction, maintenance, and use. FS-007007–08; FS-024162–63. But in response to these comments and objections, the Forest Service looked only at an all or nothing approach to helicopter drilling, and never even addressed the possibility of using helicopters to accomplish some of the drilling. *See* FS-024005 (EA); FS-007832 (Summary of Resource Impacts by Action

Alternatives). In its response brief, the Forest Service repeats the same mistake and simply restates the list of reasons in the EA and its supporting documents for rejecting a full helicopter drilling alternative, without even acknowledging ICL's argument that it failed to consider partial helicopter drilling. *FS Br.* at 31–32.

Using helicopter drilling in those locations where it would have the most benefits, but still allowing road-accessed drilling in other locations, could have significant benefits with limited downside. *See ICL Br.* at 33–34. But the Forest Service—both in the record, and in its response brief—refused to even acknowledge partial helicopter drilling. Partial helicopter drilling is viable and should have been developed as an alternative for consideration in the EA. Ignoring partial helicopter drilling in response to comments and objections recommending that it be considered is the type of unreasonable refusal to consider an alternative that violates NEPA. *See 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); *Native Fish Soc. v. Nat'l Marine Fisheries Serv.*, 992 F. Supp. 2d 1095 (D. Oregon 2014) (agency unreasonably refused to consider middle alternatives).

IV. FAILURE TO PREPARE EIS IN VIOLATION OF NEPA

ICL's final NEPA claim is that the Forest Service failed to prepare an Environmental Impact Statement (EIS) due to the potentially significant impacts of the Kilgore Project. *ICL Br.* at 34–37. Excellon argues that Plaintiffs "regurgitate" its NEPA hard look arguments here. *Excellon Br.* at 22. Indeed. For any of the reasons above that the Forest Service failed take a hard look, there "may" be significant impacts, rendering the Forest Service's finding of no significant impact arbitrary and capricious and triggering NEPA's EIS requirement.

For example, the failure to consider whether Excellon's 390 drill holes could interact with any of the several existing mine features at the site and jeopardize water flows and water quality alone raises "substantial questions" about whether the Kilgore Project may have significant environmental impacts. *See Supra* II.A.1. So too does the failure to consider the full cumulative impacts of the Porcupine Lookout project. Among other species, cumulative impacts to elk may be significant, since the Kilgore Project itself will reduce both elk security and elk habitat effectiveness to near unacceptable levels, and the Porcupine Lookout will reduce those levels even more. *See Supra* II.B.2. There are also substantial questions about whether there may be significant cumulative impacts to YCT since the Forest Service never considered the overlapping effects of both from projects lower in the Corral Creek watershed, where extensive logging and road activities from Porcupine Lookout will overlap with Kilgore Project road access to Dog Bone Ridge. *See Supra* II.B.4.

The Court should thus grant ICL's First Claim for Relief, and reverse, vacate, and remand the Forest Service's approval of the Kilgore Project for preparation of an EIS.

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

Finally, the Forest Service violated the Organic Act and its implementing regulations by authorizing the Kilgore Project without protecting fish, wildlife, and the environment. *See ICL Br.* at 37–40. ICL identified the following measures, which they urged the Forest Service to adopt in their public comments and objections, and which would reduce the adverse environmental effects of the Kilgore Project: (A) requiring additional groundwater monitoring sites beyond the one groundwater site that will be monitored during the Project to detect changes in groundwater; (B) requiring Excellon to line the sumps it will excavate at each drill pad and will use to hold drill cuttings and drilling fluids to protect water quality; (C) limiting drilling to

daylight hours and/or utilizing helicopters to access some drill areas to reduce wildlife impacts; (D) requiring Excellon to train staff regarding grizzly bears, to report any grizzly sightings, and to temporarily cease operations upon a grizzly sighting to minimize impacts to threatened grizzly; and (E) require Excellon to support whitebark seed collection efforts, as the Forest Service's biological assessment for this threatened species recommends. *See ICL Br.* at 38–40.

In response, Excellon argues: "The Forest Service is not required or authorized to impose the most environmentally restrictive or protective measures that might be feasible on a mineral exploration project under the Organic Act or the 36 C.F.R. Part 228, Subpart A regulations." *Excellon Br.* at 24. The Forest Service similarly argues that the Organic Act does not require that "environmental interests always trump mining interests." *FS Br.* at 37 (quoting *Okanogan Highlands All. v. Williams*, 236 F.3d 468, 478 (9th Cir. 2000).

"Under the Organic Act the Forest Service must …require [the project applicant] to take all practicable measures to maintain and protect fisheries and wildlife habitat." *Rock Creek All. v. Forest Serv.*, 703 F. Supp. 2d 1152, 1164 (D. Mont. 2010) (mine approval violated Organic Act and 36 CFR Part 228 regulations by failing to protect water quality and fisheries). *See* 36 C.F.R. § 228.8(e). *See also Save Our Cabinets v. U.S. Dep't of Agric.*, 254 F. Supp. 3d 1241, 1249 (D. Mont. 2017) (Forest Service approval of mining project violated duties under CWA and Organic Act to ensure compliance with water quality standards); *Hells Canyon Pres. Council v. Haines*, 2006 WL2252554, *4–5 (D. Or. 2006) (Forest Service mine approvals violated Organic Act water quality and fisheries protections).

Far from being "the most environmentally restrictive or protective measures" or requiring environmental interests to trump mining interests, these are reasonable, common-sense measures, none of which would interfere with Excellon's mining interests. For the reasons set forth in

ICL's opening brief, the Forest Service must require these measures in order to meet their legal duties to protect National Forest from destruction (16 U.S.C. § 478), and to ensure that mining operations minimize adverse environmental impacts on National Forest resources, meet water quality standards, and maintain and protect fish and wildlife (36 C.F.R. § 228.8), if it is going to authorize Excellon to explore for gold on National Forest lands.

VI. IF IT RULES IN ICL'S FAVOR, THE COURT SHOULD REVERSE, VACATE, AND REMAND THE EA AND DN/FONSI, AND NO FURTHER BRIEFING IS NECESSARY

The Forest Service argues it is difficult to address remedy in advance of any ruling on the merits and requests separate briefing if the Court finds the Forest Service committed any legal violations. *FS Br.* at 38–39. However, as this Court ruled in the prior case when it granted to ICL's motion to alter or amend the judgment to vacate the 2018 Kilgore Project DN/FONSI and EA, vacatur is the appropriate remedy for the types of NEPA violations at issue here. 1:18-cv-00504-BLW, ECF No. 53 (May 4, 2020). This Court explained that by allowing even just part of the Kilgore Project to proceed before the Forest Service completes studies required on remand, "the damage will be done and the options for the Forest Service significantly limited." *Id.* at 4. This Court quoted *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007): "[A]llowing a potentially environmentally damaging program to proceed without an adequate record of decision runs contrary to the mandate of NEPA." *Id.* at 4.

This Court added: "All of this explains why the Ninth Circuit orders remand without vacatur 'only in limited circumstances' and 'only when equity demands' doing so." *Id.* at 4 (quoting *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015)). Excellon's predecessor Otis argued that equity demanded remand without vacatur because of the potential for economic loss and layoffs, but as this Court explained: "A vacatur will certainly result in delays but that is the normal result of a full NEPA study and cannot be used to justify splitting

the project as Otis suggests." *Id.* at 5. This Court concluded that it "can find no reason in equity – or any other reasons for that matter – to avoid a vacatur." *Id.*

For the same reasons, vacatur is a proper and necessary remedy for any NEPA violations here.

CONCLUSION

For the foregoing reasons, ICL s respectfully request that the Court grant this Motion for Summary Judgment and reverse, vacate, and remand the 2021 Kilgore Project EA and DN/FONSI.

Dated this 10th day of January, 2023.

Respectfully submitted,

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