See Signature Page for List of Parties Represented

UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

SAVE THE SOUTH FORK SALMON; IDAHO CONSERVATION LEAGUE; IDAHO RIVERS UNITED; EARTHWORKS; CENTER FOR BIOLOGICAL DIVERSITY; and AMERICAN RIVERS, Plaintiffs, vs. U.S. FOREST SERVICE; U.S. FISH AND WILDLIFE SERVICE; NATIONAL MARINE FISHERIES SERVICE; U.S. DEPARTMENT OF AGRICULTURE; U.S. DEPARTMENT OF THE INTERIOR; U.S. DEPARTMENT OF COMMERCE; BROOKE ROLLINS, in her official capacity as U.S. Secretary of Agriculture; DOUG BURGUM, in his official capacity as U.S. Secretary of the Interior; JEREMY PELTER, in his official capacity as Acting U.S. Secretary of Commerce, Defendants.	Case No: 1:25-cv-86 **COMPLAINT FOR VACATUR, DECLARATORY RELIEF, AND INJUNCTIVE RELIEF**

INTRODUCTION

1. Plaintiffs, Save the South Fork Salmon, Idaho Conservation League, Idaho Rivers United, Earthworks, Center for Biological Diversity, and American Rivers, file this suit for vacatur, and for equitable, declaratory and injunctive relief under the Forest Service Organic Administration Act (Organic Act), 16 U.S.C. §§ 475, 478, 551, the Federal Land Policy Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701 *et seq.*, the National Forest Management

Act (NFMA), 16 U.S.C. §§ 1600 *et seq.*, the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et. seq.*, the Materials Act of 1947, 30 U.S.C. §§ 601–604, the Surface Resources Act of 1955 (also known as the Common Varieties Act of 1955), 30 U.S.C. § 611, the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et. seq.*, the Administrative Procedure Act (APA), 5 U.S.C. §§ 701–706; other federal laws, and their implementing regulations and policies, challenging actions taken by the United States Forest Service (Forest Service), U.S. Fish and Wildlife Service (FWS), and National Marine Fisheries Service (NMFS) in reviewing and approving the Stibnite Gold Project (Project), a large open-pit gold mine on federal public lands proposed by Perpetua Resources Corp. (Perpetua).

2. The Project is located in the headwaters of the South Fork Salmon River and adjacent to the Frank Church-River of No Return Wilderness (Frank Church Wilderness) Area in central Idaho. The majority of the Project lands are public lands administered by the Payette and Boise National Forests. Portions of the Project area already suffer from the damage and toxic legacy of mining.

3. Despite Perpetua's assertions that the Stibnite Gold Project will improve environmental conditions at the site over the long-term, the Forest Service determined in the Final Environmental Impact Statement (FEIS) it issued on September 6, 2024, that the Project would further degrade the environment and that the "no-action" alternative was the "environmentally preferred alternative."

4. Nevertheless, the Forest Service approved the Project in a Record of Decision (ROD) dated January 3, 2025. Previously, Defendants FWS and NMFS each issued a Biological Opinion for the Project on September 5, 2024, and October 7, 2024, respectively. The Biological Opinions permit the Project to go forward despite the adverse impacts it will have on Chinook

salmon, steelhead, bull trout, wolverine, and whitebark pine, each of which is protected as a "threatened" species under the ESA.

5. Instead of requiring Perpetua to finish cleaning up the damage and pollution caused by decades of mining, the Forest Service approved Perpetua's request for new and greatly-expanded mining operations. As approved, Perpetua would construct three large open mine pits, ore processing, development rock (also known as waste rock) and tailings storage facilities, miles of haul roads at the site, a completely new access road to the site, an electrical transmission line, dewatering and industrial water supply wells, worker housing, a road maintenance facility, an underground exploration decline, and other ancillary facilities.

6. The expanded mine would require deforestation of an additional 1,673 acres of public land, leaving the Stibnite area with a total of 3,266 acres of degraded forest after mining and reclamation are complete.

7. More than one-quarter of all new land disturbance will occur within important riparian areas or adjacent to streams. The Project will adversely impact approximately 111,000 linear feet of perennial, intermittent, and ephemeral streams, 145 acres of wetlands, and 5 acres of other waters.

8. The Project will directly eliminate fish and wildlife habitat, and will cause massive habitat degradation and pollution, much of which will last permanently. The flurry of industrial mining activity, with its noise, lights, and heavy truck traffic will also have devastating effects on fish and wildlife.

9. Among other NEPA violations, the Forest Service failed to take the required hard look at the Project's extensive environmental impacts, and refused to consider *any* alternatives to Perpetua's plan to mine three open pits, divert the East Fork of the South Fork Salmon River (East

Fork SFSR) into a nearly mile-long tunnel for 12 years, and permanently fill 423 acres of the pristine upper Meadow Creek valley with a 475-foot tall by 3,200-foot wide mine tailings waste dam and dump.

10. The Forest Service also violated FLPMA, NFMA, and other federal land and mining laws when, instead of requiring Perpetua to continue using the existing access road to the mine, it authorized construction of a brand-new road and associated gravel mines and industrial processing sites through pristine Forest Service-designated Roadless Areas and protected Riparian Conservation Areas.

11. This was based on the erroneous assumption that the company holds a statutory right to build a new road under the 1872 Mining Law, ignoring recent Ninth Circuit precedent and decades of other precedent to the contrary.

12. In their Biological Opinions, FWS and NMFS grossly underestimated the extent to which the Project will harm bull trout, wolverine, whitebark pine, Chinook salmon, and steelhead, and will destroy and degrade their habitat, as the agencies failed to protect these species in violation of their duties under the ESA.

13. For these and the related reasons addressed herein, Plaintiffs ask this Court to declare that the ROD, FEIS, Biological Opinions, and Project approvals and decisions by the Forest Service, FWS, and NMFS violate federal law. Plaintiffs ask this court to set aside/vacate and remand the decisions to the Forest Service, FWS, and NMFS, and enjoin any construction, operation, or development of the Project until the violations have been corrected.

JURISDICTION

14. This is a suit pursuant to the Organic Act, FLPMA, NFMA, NEPA, ESA, APA, federal mining laws, and other federal statutes, regulations and requirements. Jurisdiction over

this action is conferred by 28 U.S.C. §§ 1331 (federal question), 2201 (declaratory relief), and 2202 (injunctive relief).

15. An actual, justiciable controversy now exists between Plaintiffs and Defendants. The challenged actions are final and subject to judicial review under 5 U.S.C. §§ 702, 704, and 706. The requested relief is therefore proper under 5 U.S.C. §§ 701–706 and 28 U.S.C. §§ 2201–2202.

16. Venue is proper in the District of Idaho pursuant to 28 U.S.C. §§ 1391(b) and (e). The public lands and resources in question are located within Valley County, Idaho. The Forest Service's Payette and Boise National Forests produced the FEIS and issued the ROD and are responsible for the Project's compliance with applicable laws and regulations. FWS's Idaho State Supervisor signed its Biological Opinion. Staff in NMFS's Idaho Southern Snake Branch Office and Northern Snake Branch Office participated in preparing its Biological Opinion.

17. Some or all Plaintiffs are located and reside in Idaho.

18. The federal government has waived sovereign immunity under the APA, 5 U.S.C. §§ 701–706.

PARTIES

19. Plaintiff SAVE THE SOUTH FORK SALMON is a Valley County, Idaho, community-based non-profit organization dedicated to protecting the South Fork Salmon River watershed, its outstanding and remarkable natural values, and the economies that depend on those values. The over 500 supporters and members of Save the South Fork Salmon, a majority living in Valley County, have a strong interest in protecting the natural resources and outstanding and remarkable natural values of the South Fork Salmon River watershed, maintaining recreational opportunities and access, and ensuring future generations can enjoy and the

economies that depend on the watershed can benefit from these resources and opportunities. Since its inception, Save the South Fork Salmon has been actively engaged in researching, reviewing, commenting on, and advocating to protect the South Fork Salmon River watershed from Perpetua's Stibnite Gold Project. Members and supporters of Save the South Fork Salmon live, work, recreate, congregate, and thrive within and around the South Fork of the Salmon River watershed, including within the communities and lands and waters most immediately impacted by the proposed Stibnite Gold Project.

20. Plaintiff IDAHO CONSERVATION LEAGUE is an Idaho non-profit organization dedicated to preserving Idaho's clean water, wilderness, and quality of life through citizen action, public education, and advocacy. Founded in 1973, the mission of the Idaho Conservation League is to create a conservation community and pragmatic, enduring solutions that protect and restore the air you breathe, the water you drink, and the land and wildlife you love. Idaho Conservation League's seven strategic initiatives include confronting climate change, recovering Idaho's wild salmon and steelhead, cleaning up the Snake River, protecting public land, restoring abundance and diversity of Idaho's wildlife, safeguarding North Idaho lakes and waters, and reducing pollution. Idaho Conservation League achieves these goals through public outreach and professional advocacy. With offices in Boise, McCall, Ketchum, and Sandpoint, the organization is a consistent, statewide voice for conservation in Idaho and represents more than 8,000 members. Idaho Conservation League's members and supporters care deeply about protecting and restoring the environment.

21. Plaintiff IDAHO RIVERS UNITED is a non-profit conservation organization incorporated under the laws of Idaho with its principal place of business in Boise, Idaho. Idaho Rivers United represents over 3,500 members in its work to preserve and improve the

environmental integrity of rivers throughout Idaho. Idaho Rivers United members and supporters expect the protection of rivers for their ecological, scenic, and recreational values; accordingly, Idaho Rivers United's mission is to protect and restore the rivers and fisheries of Idaho's rivers.

22. Plaintiff EARTHWORKS is a national non-profit organization dedicated to protecting communities and the environment against the adverse effects of hard rock mining, while seeking sustainable solutions.

23. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (the Center) is a non-profit organization that is dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center is headquartered in Tucson, Arizona, with additional offices throughout the country. The Center has more than 79,000 active members, including more than 500 members in Idaho. The Center and its members have a long-standing interest in conserving native species and have consistently advocated for the conservation and protection of native species, including salmon, bull trout, and wolverine.

24. Plaintiff AMERICAN RIVERS is a national organization working to protect the natural qualities of the nation's rivers and streams, including the South Fork of the Salmon River, and other waters impacted by the Project.

25. Plaintiffs bring this action on their own behalf, and on behalf of their members.

26. Members of the Plaintiff organizations utilize the South Fork Salmon River watershed and surrounding public lands, including the lands and waters of the East Fork SFSR where the Project is proposed to be located, along with the public lands and waters to be impacted by the construction and use by the Project's new Burntlog Route, for recreational activities including camping, road-biking, wildlife observation, scenery appreciation, birding, hunting and fishing, botanizing, whitewater kayaking, rock climbing, backcountry skiing, hiking,

firewood cutting, berry and mushroom picking, mountain biking, and accessing wilderness. Plaintiffs' members derive health, recreational, inspirational, religious, spiritual, educational, and aesthetic benefits from these activities.

27. Plaintiffs' members regular use and enjoyment of the South Fork Salmon River watershed and surrounding public lands is significantly enhanced by the knowledge that imperiled fish and wildlife species such as wolverine, bull trout, Chinook salmon, steelhead, and whitebark pine remain in this watershed. Plaintiffs' members derive recreational, religious, spiritual, educational, and aesthetic benefits from using and enjoying the lands and waters of the South Fork Salmon River watershed where these threatened species remain present.

28. One example of Plaintiffs' members who regularly uses and enjoys the South Fork of the Salmon River and other lands to be affected by the Project is Zak Sears, who is a long-time member of Save the South Fork Salmon. Mr. Sears is a resident of Idaho County. Mr. Sears works as a river and steelhead fishing guide, primarily on the Middle Fork Salmon River. He also personally recreates in the South Fork Salmon River watershed, including areas in and around the Project site and the lands along the Burntlog Route approved in the ROD. Mr. Sears enjoys hiking, photographing, mushroom hunting, fishing, backcountry skiing, birding, and kayaking and snorkeling in the rivers, including the South Fork Salmon River and the East Fork SFSR. Since 2006, Mr. Sears has visited the area at and around the Stibnite Gold Project on a yearly basis, at a minimum. This includes trips, for example, in March 2020, to backcountry ski in the area where a Project mining pit would be constructed; in June 2021, to hike the area immediately adjacent to the south end of the mine site; and another trip in June 2021, to snorkel with the fish in the East Fork SFSR.

29. Another example is Will Tiedemann, who is a member of Idaho Conservation League and is employed by Idaho Conservation League as a regulatory conservation associate. Mr. Tiedemann visited the Project area on two occasions in July and August of 2024. On both occasions he spent hours fly fishing in parts of Meadow Creek, the East Fork SFSR, and Burntlog Creek. He caught trout in all three water bodies. During his August visit, Mr. Tiedeman observed the rare sight of a mating pair of Chinook salmon within Profile Creek (a tributary to the East Fork SFSR downstream from the mine site). Also during his August visit, Mr. Tiedemann camped along the East Fork SFSR fishing and enjoying time with friends.

30. As they have done for years, members of Plaintiffs intend on continuing these uses and activities within the South Fork Salmon River watershed this year, and in future years. This includes concrete and specific plans for this coming year to use and enjoy the lands and waters of the East Fork SFSR where the Project is proposed to be located, along with the public lands and waters to be impacted by the construction and use by the Project's new Burntlog Route.

31. One example of Plaintiffs' members who have plans to return again to enjoy specific areas affected by the Stibnite Gold Project is Zak Sears. For the past several years, Mr. Sears has made approximately 10 trips each year to enjoy the rivers and the natural beauty of the South Fork Salmon River watershed, including areas in and around the mine site and along the Burntlog Route. Mr. Sears intends to continue to visit these areas multiple times this year and in future years to ski, hike, fish, kayak, snorkel, take photographs, hunt for mushrooms, birdwatch, and enjoy the scenery. These plans include a backcountry ski in the Burntlog Route area, as well as a horn hunt in the coming year. Mr. Sears also plans to kayak on the South Fork Salmon River

this spring and hike from Landmark Summit north through the mountains adjacent to the Project site, continuing all the way to the Salmon River.

32. Another example is Will Tiedemann. Mr. Tiedemann plans to visit the South Fork Salmon River watershed this summer, including Burntlog Creek and the East Fork SFSR, to fish, hike, camp, and try to observe spawning salmon and other fish and wildlife.

33. These uses and activities of Plaintiffs' members, including Mr. Sears and Mr. Tiedemann, will be immediately, irreparably, and adversely affected and, in many cases, eliminated, by the Project, as reviewed and approved by the Defendants. This includes significant harm to Plaintiffs' members interests in the imperiled fish and wildlife species that depend on the South Fork Salmon River watershed and lands affected by the Project, such as Chinook salmon, steelhead, bull trout, wolverine, and whitebark pine.

34. Plaintiffs fully participated in the Forest Service's public review and appeal processes, timely submitting detailed comments and formal Objections to the agency at every opportunity, thereby exhausting all administrative remedies.

35. Plaintiffs and their members have been and will continue to be adversely affected and irreparably harmed if Defendants' ongoing violations of the federal laws noted herein continue. These are actual, concrete injuries caused by the Forest Service's, FWS's, and NMFS's violations of federal law.

36. Plaintiffs and their members' injuries will be redressed by the relief sought. If the challenged decisions are vacated, as requested, the Stibnite Gold Project will no longer be able to proceed.

37. Defendants' failure to comply with NEPA, FLPMA, NFMA, ESA, and other federal laws additionally harms Plaintiffs and their members by denying them the right to

informed decision-making and full disclosure under these laws, as well as the right to meaningfully participate in the decision-making process.

38. DEFENDANT FOREST SERVICE is a cabinet-level executive agency responsible for, among other things, managing federally-owned lands, wildlife, and public natural resources in the lands affected by the Project in the Boise and Payette National Forests. The Forest Service has the ultimate responsibility to administer, implement, and comply with, FLPMA, Organic Act, NEPA, NFMA, ESA, and all other applicable federal laws.

39. DEFENDANT BROOKE ROLLINS is the U.S. Secretary of Agriculture, and has ultimate responsibility for the administration of federal public lands and implementation of the statutes applicable thereto on Forest Service lands. She is sued in her official capacity.

40. DEFENDANT DOUG BURGUM is the U.S. Secretary of the Interior, and in that capacity is responsible for the administration of ESA responsibilities of FWS, an agency within the Department of the Interior. He is sued in his official capacity.

41. DEFENDANT FWS is an agency of Defendant Department of the Interior. FWS and its officers are responsible for administering the ESA, particularly regarding potential impacts to species that have been listed as threatened or endangered with extinction pursuant to the ESA, including bull trout, wolverine, and whitebark pine.

42. DEFENDANT NMFS (also known as NOAA Fisheries) is an agency of the Defendant Department of Commerce. NMFS and its officers are responsible for administering the ESA, particularly regarding potential impacts to species that have been listed as threatened or endangered with extinction pursuant to the ESA, including Chinook salmon and steelhead.

43. DEFENDANT JEREMY PELTER is Acting U.S. Secretary of Commerce, and in that capacity is responsible for the administration of ESA responsibilities of NMFS, an agency within the Department of Commerce. He is sued in his official capacity.

FACTUAL BACKGROUND

The Stibnite Gold Project.

44. "The Stibnite Gold Project is located within the Stibnite Mining District. Mining in the Stibnite area began in 1919, and over time included underground and open pit mining, mineral concentrating, and heap leaching operations until 1992, when all operations in the Stibnite area ceased. Since 2001, multiple projects have been conducted under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) authority." ROD at 1–2.

45. "In September 2016, Perpetua submitted a proposed Plan of Operations to the Payette National Forest for the development and operation of a large-scale mine. The proposed Plan of Operations sought authorization for surface disturbance on National Forest System lands for mining operations and processing of gold, silver, and antimony. The Forest Service determined that the proposed Plan of Operations was complete in December 2016. In June 2017, the Project Notice of Intent to prepare an EIS was published. A revised Plan of Operations, also known as ModPRO, was submitted to the Forest Service in 2019. In August 2020, the draft EIS (DEIS) was released for a public comment period. In 2021, subsequent to public comment on the DEIS, the 2021 Modified Mine Plan (also referred to as ModPRO2) was submitted. In October 2022, a Supplemental DEIS was released for a comment period." *Id.* at 2.

46. "The actions proposed under the 2021 Modified Mine Plan will take place over a period of approximately 20 to 25 years, not including the long-term, post-closure environmental

monitoring or potential long-term water treatment. The phases of the Stibnite Gold Project are described in subsequent sections and include:

> Construction (approximately 3 years; Mine Years -3 through -1);
>
> Mining and Ore Processing Operations (approximately 15 years; Mine Years 1 through 15);
>
> Surface and Underground Exploration (approximately 17 years, beginning during construction and continuing concurrent with operations; Mine Years -2 through 15); and Closure and Reclamation (Mine Year 16+)."

Id. at 4.

47. The initial phase "will require the construction of surface facilities, haul roads, and water management features. Supporting infrastructure will include transmission lines, substations, communication sites, and access roads. Additionally, the removal of some features from past mining activities (legacy mining features) will be initiated during the construction phase." *Id.*

48. "Prior to site preparation and construction of surface facilities, vegetation will be removed from operating areas. Any merchantable timber on National Forest System lands will be purchased from the Forest Service through a timber sale. Access to the mine site during the construction period will be from Cascade, Idaho via the County Road 10-579 (Warm Lake Road), to County Road 10-413 (Johnson Creek Road), and then to County Road 50-412 (Stibnite Road)." *Id.* at 5.

49. "As part of the Stibnite Gold Project construction, a new access route, the Burntlog Route, will be constructed to connect the Warm Lake Road to the mine site. The new Burntlog Route will be used during the operating and closure periods and will be reclaimed as part of closure. The Burntlog Route will be used by Perpetua and its contractors for mine access. Restricted public use of the route will be allowed as described in the Burnt Log Route Public

Access Restriction mitigation measure in Part 2.3.10. The Johnson Creek Road and Stibnite Road will only be used for alternative site access in case of emergency or unplanned closure of the Burntlog Route." *Id.*

50. During the mining phase, "The Selected Alternative includes a total of approximately 3,266 acres of new and re-disturbance of surface resources through the creation or expansion of three open-pits, an ore processing area, a tailings storage facility and buttress, an access roads, a transmission line, dewatering and industrial water supply wells, a worker housing facility, a road maintenance facility, an underground exploration decline, and other ancillary facilities." *Id.*

51. "General mine operations will include drilling, blasting, loading, and hauling using excavators, dozers, and a fleet of trucks. Ore will be hauled to the on-site mill facility, and overburden will be placed as a buttress to the tailings storage facility embankment or backfilled into the mined-out pits (Figure 2). Reclamation will take place concurrently with mining operations, as feasible, and will be completed during the closure and post-closure periods." *Id.*

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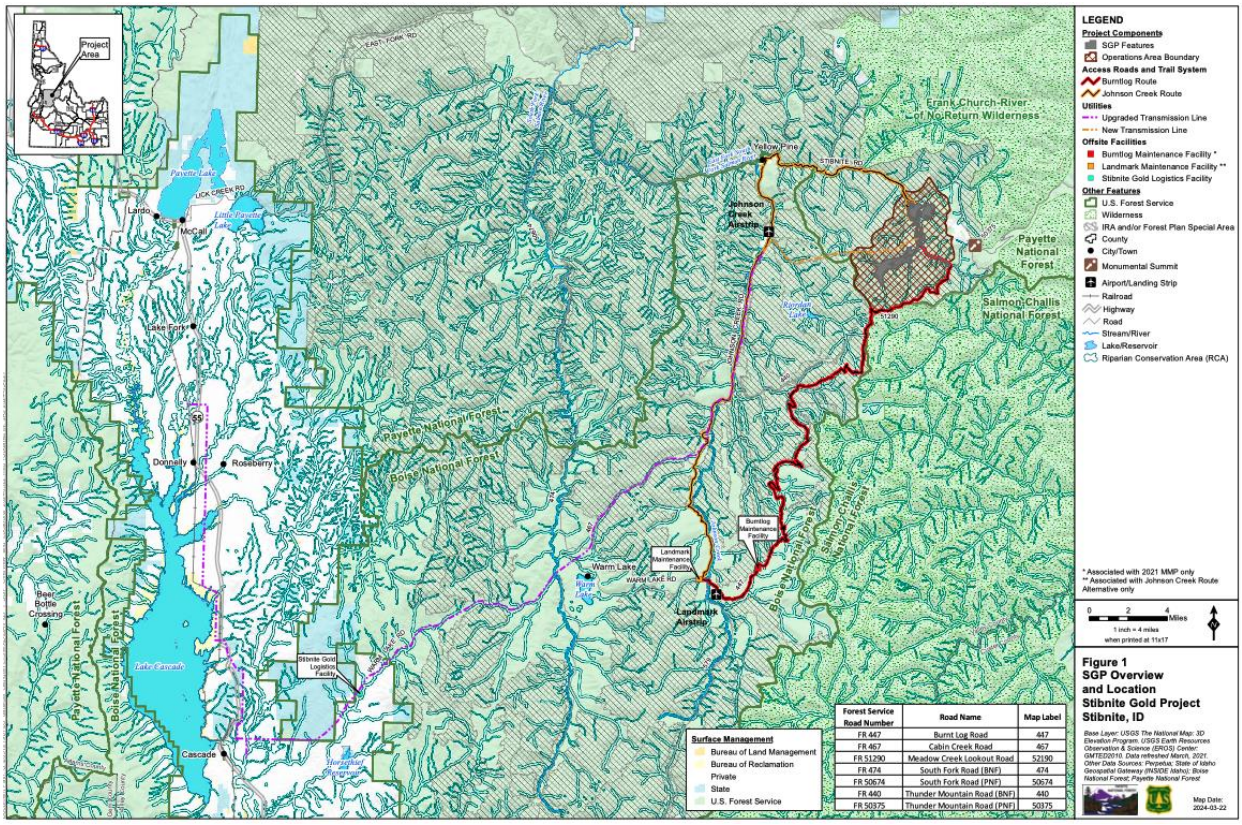
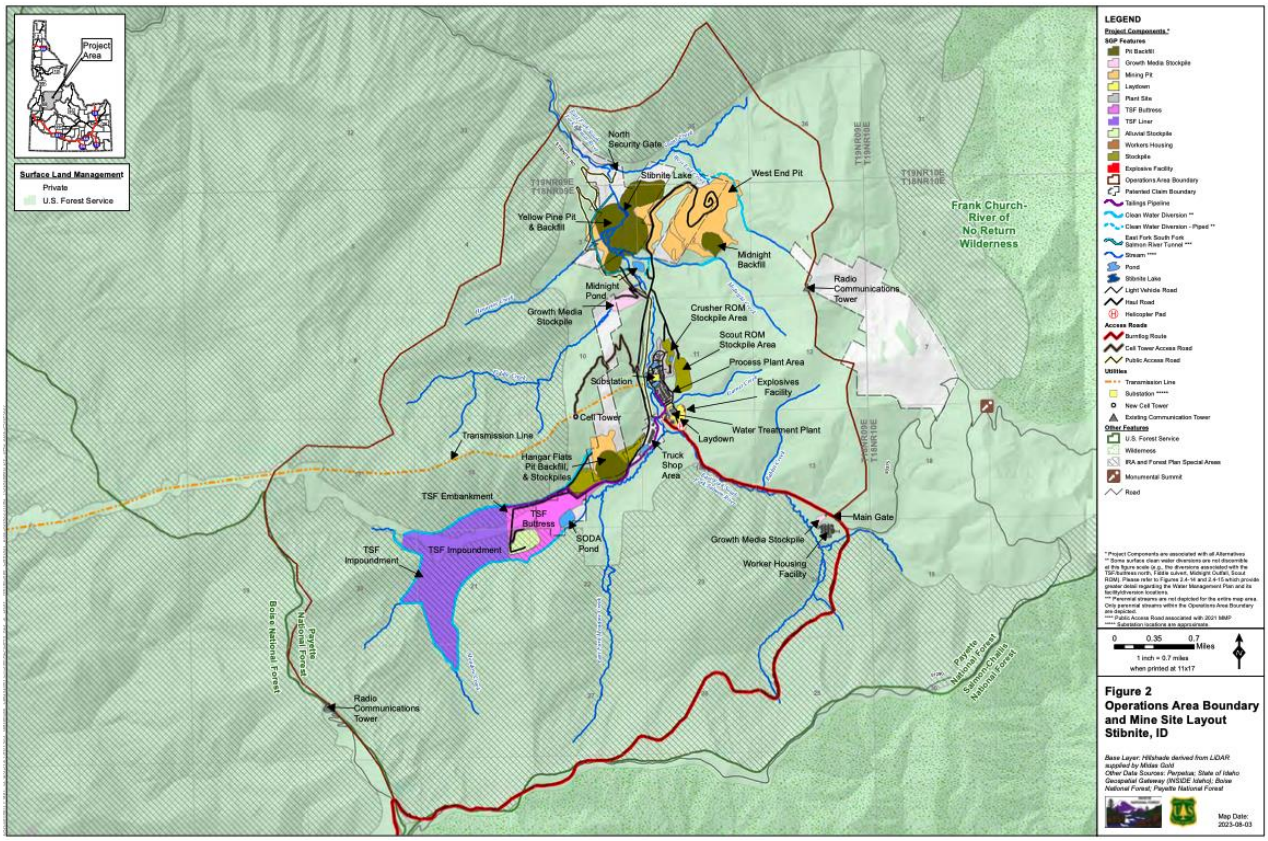
52. Figure 1 of the ROD shows the overall location of the Project access routes, electrical transmission line, and mine site:



53. "The Stibnite Gold Project will consist of mining three primary mineral deposits and the re-mining of historical tailings using conventional open pit mining methods. Ore from three open pits (Yellow Pine, Hangar Flats, and West End pits) will be sent to either the crusher, located near the processing plant, or one of several ore stockpiles in various locations within the operations area boundary. Ore will be stockpiled and processed at a future time during extended periods when the ore tonnage or ore type from the pits exceed the availability of the ore processing plant. Pre-stripping or removing the overlying soil and development rock (also known as waste rock) to access the mineral deposit, will commence during the construction phase in Mine Year 2. Ore removal and processing will begin in Mine Year 1 (operations phase) and continue year-round for approximately 15 years. Mine operations will occur in the area of two

historical open pit mined areas (Yellow Pine and West End) and one new open pit (Hangar Flats) that includes the sites of former underground mining and mineral processing facilities. Development [(waste)] rock will be hauled to the tailings storage facility embankment or placed in one of four destinations: the tailings storage facility buttress or the Yellow Pine, Hangar Flats, or West End open pits once they are mined out." *Id.* at 5.

54. Figure 2 of the ROD shows a detailed view of the Project mine site and facilities:



Defendants' Approval of the Stibnite Gold Project.

55. Plaintiffs timely submitted extensive, detailed comments, accompanied by numerous expert reports on the August 2020 DEIS and October 2022 Supplemental DEIS. Plaintiffs detailed how the Forest Service was impermissibly relying on the Mining Law of 1872 to justify approving the Project. Plaintiffs also urged the Forest Service to consider alternatives to Perpetua's mining plan and highlighted the many ways the Forest Service had thus far failed

to properly study and protect against the Project's adverse environmental impacts and otherwise failed to follow applicable laws, regulations, and policies. Many of Plaintiffs' comments echoed comments from others, such as the Nez Perce Tribe, about the Forest Service's failure to take a hard look at the adverse environmental consequences of the Project.

56. In July 2024, the Forest Service prepared its Biological Assessment for the Stibnite Gold Project, which it submitted to FWS and NMFS for ESA consultation. In the Biological Assessment, the Forest Service determined the Stibnite Gold Project is likely to adversely affect Snake River Spring/Summer Chinook salmon (Chinook salmon), Snake River Basin steelhead (steelhead), Columbia River bull trout (bull trout), and the designated critical habitat of each of these species of fish. The Forest Service also determined the Project is likely to adversely affect North American wolverine (wolverine) and whitebark pine. On September 5, 2024, FWS issued its Biological Opinion for the Stibnite Gold Project, covering bull trout, wolverine, whitebark pine, and other species, completing consultation. On October 7, 2024, NMFS issued its Biological Opinion for the Stibnite Gold Project, covering Chinook salmon and steelhead, and other species, completing consultation.

57. In September 2024, the Forest Service released the Final EIS and Draft ROD. Other than the "No Action Alternative," the FEIS included just two action alternatives: Perpetua's proposal (the revised ModPRO2); and the "Johnson Creek Alternative." The only difference between the two action alternatives is the access route to the mine site during operations (the existing access route, the Johnson Creek Route, would be used for access during the initial years of project construction under ModPRO2). There is no difference in the actual mining, processing, waste rock and tailings storage facilities, and reclamation of the mine site. In

the Draft ROD, the Forest Service identified the "No Action Alternative" as the "environmentally preferred alternative"; nevertheless, it proposed selecting Perpetua's proposal.

58. Plaintiffs timely filed objections to the FEIS and Draft ROD. Plaintiffs again warned the Forest Service that it was impermissibly relying on the Mining Law of 1872 to justify approving the Project; urged the Forest Service to consider alternatives to Perpetua's mine plan; and detailed the many ways the Forest Service had still failed to properly study and protect against the Project's adverse environmental impacts and otherwise failed to follow applicable laws, regulations, and policies.

59. Plaintiffs also noted that the U.S. Department of Defense had awarded funding to Perpetua, including up to $24.8 million in 2022, $15.5 million in 2023, and $34.6 million in 2024, for the Stibnite Gold Project in ways not disclosed to the public and not addressed by the Forest Service in the FEIS and Draft ROD.

60. On December 20, 2024, the Forest Service's objection reviewing officer issued written responses to objections, rejecting the objections, but instructing the Forest Service to provide some clarifications before approving the Project.

61. Two weeks later, on January 3, 2025, the Forest Service signed the final ROD authorizing the Stibnite Gold Project based on the FEIS, which now includes an Errata intended to address the objection reviewing officer's instructions. The ROD states that the Forest Service will implement the decision by approving Perpetua's Plan of Operations upon receipt of: (1) a final Plan of Operations; (2) receipt of an acceptable actual-cost estimate for reclamation; and (3) receipt of financial assurance(s) for reclamation.

62. Initial Project ground-disturbance and construction activities, which might begin as soon as the three above conditions are satisfied, include removing surface vegetation and other

site preparation work and constructing access roads, haul roads, water management features, transmission lines, substations, communications sites, and surface facilities. ROD at 4–5.

The Severe and Permanent Impacts from the Stibnite Gold Project.

63. As approved by the Forest Service, the Stibnite Gold Project involves constructing and operating a massive gold mine for the next 20 to 25 years (or more), including constructing three open pits with depths up to 720 feet below the existing ground surface, a 423-acre mine waste tailings facility with a 475-foot high dam capable of holding 120 million tons of waste, several development rock storage facilities to hold the over 394 million tons of waste rock, a gold processing facility, and extensive infrastructure of roads, including 55 miles of haul roads and 8 miles of new road construction in designated Roadless areas, and transmission lines mostly on National Forest land. The mine site and infrastructure routes include river corridors supporting ESA-listed bull trout, Chinook salmon, and steelhead in the South Fork Salmon River watershed, as well as mountainous forest habitat, including designated roadless areas adjacent to the Frank Church-River of No Return Wilderness, supporting ESA-listed wolverine and whitebark pine.

64. Mining and waste storage for 280 million tons of tailings waste will bury and eliminate streams containing ESA-listed fish and designated beneficial water quality uses. The ROD also approves the rerouting and tunneling of streams around open mine pits and tailings and waste rock storage facilities. Instead of protecting these waters and the aquatic life in them, the ROD allows Perpetua to either eliminate or reconstruct these streams as artificial channels.

65. In addition to the extensive on-site destruction and reworking of the watershed, the ROD approved miles of new access roads and utility corridors in designated and protected roadless areas and ESA-recognized critical habitat.

66. The Project will impact at least approximately 111,000 linear feet of perennial, intermittent and ephemeral streams, 145 acres of wetlands, and 5 acres of other waters (Yellow Pine Pit Lake). These resources would be adversely impacted by overall mining operations that includes pit excavation, development rock storage facilities, a tailings storage facility, ore processing and support facilities, road construction, and transmission line construction. This includes impacts to over 917 acres of riparian areas, and the removal of 3,266 acres of wildlife habitat.

ESA-Protected Species Adversely Affected by the Stibnite Gold Project.

67. Among other native species, the Stibnite Gold Project will cause lasting adverse impacts to numerous species which are listed as "threatened" under the ESA due to their risk of becoming endangered.

68. The Stibnite Gold Project is located primarily in the South Fork Salmon River watershed, which supports ESA-listed Chinook salmon, steelhead, bull trout, wolverines, and whitebark pine.

69. Bull trout was listed as a "threatened" species under the ESA in 1998, due to combined effects of habitat degradation, fragmentation, and alterations due to adverse impacts caused by dewatering, roads, mining, livestock grazing, dams and diversions, poor water quality, and other factors. 63 Fed. Reg. 31647 (Jun. 10, 1998).

70. Local populations of bull trout currently use spawning and rearing habitat in Burntlog Creek, Trapper Creek/Lake, Riordan Lake, Upper East Fork SFSR, and Sugar Creek, each of which will be adversely impacted by the Stibnite Gold Project.

71. The Snake River spring/summer Chinook salmon was listed as a "threatened" species under the ESA in 1992. 57 Fed. Reg. 14653 (Apr. 22, 1992). Historically, the Salmon

River system may have supported more than 40% of the total return of spring and summer Chinook salmon to the Columbia River system. However, annual returns of adult Chinook to the Snake River tributaries have dropped from estimates of more than 1.5 million historically, to roughly 100,000 by the late 1960s, to a low of 1,797 in 1995.

72. Today, the South Fork Salmon River and East Fork SFSR populations of Chinook salmon that occupy the action area and will be affected by the Project are both classified at "high risk" of extinction within the next 100 years.

73. The Snake River Basin steelhead was listed as a "threatened" species under the ESA in 1997. 62 Fed. Reg. 43937 (Aug. 18, 1997).

74. Steelhead occupy the South Fork Salmon River watershed, including the East Fork SFSR downstream of the Yellow Pine Pit and Project site and will be affected by the Project.

75. Surface disturbance and mine activities for the Stibnite Gold Project will also occur throughout habitat for wolverine and whitebark pine.

76. In November 2023, FWS listed the distinct population segment of the North American wolverine occurring in the contiguous United States as a threatened species under the ESA due to impacts of climate change, and habitat degradation and fragmentation, which can exacerbate effects from other stressors such as roads, backcountry winter recreation, and human development. 88 Fed. Reg. 83726 (Nov. 30, 2023). In general, wolverines use areas at high elevations, with steeper terrain, more snow, fewer roads, and reduced human activity. Female wolverines often give birth in dens where snow cover persists at least until April.

77. The Project area includes suitable wolverine habitat, including denning habitat, which will be affected by the Project. Wolverine have been consistently documented in and

adjacent to the Project area from surveys conducted from 2010 to 2017, including a resident reproductive female in the mine site boundary, and will be affected by the Project.

78. In December 2022, the Defendant FWS listed whitebark pine as a threatened species under the ESA. 87 Fed. Reg. 76882 (Dec. 15, 2022). Whitebark pine is typically found in cold, windy, high-elevation or high-latitude sites, usually on steep slopes at alpine tree lines and in subalpine areas. Whitebark pine is recognized as a keystone species in the ecosystems where it is found due to its function as habitat and food for wildlife, its ability to colonize after fire and other disturbances, its ability to survive on harsh, high-elevation sites, and its function in regulating snowmelt and reducing soil erosion. Whitebark pine populations are declining due to blister rust disease, mountain pine beetle infestations, and climate change.

79. Whitebark pine is found in the mine site and along the transmission right of way and the Burntlog Route, and will be affected by the Project.

Adverse Impacts of Mining, Processing, and Permanent Waste Storage at the Mine Site.

80. The Project will substantially alter the East Fork SFSR, Meadow Creek, West End Creek, and other streams and lands at the mine site in ways that adversely affect fish in the East Fork SFSR watershed.

81. The Forest Service admitted Project construction would have a "major, short-term" direct impact and mining would have "a major, long-term" direct impact on local Chinook salmon, steelhead, bull trout, and cutthroat trout. To excavate mine pits, develop the tailings storage facility, and other activities at the mine site, approximately 17 kilometers of stream channel will be dewatered.

82. The East Fork SFSR will be rerouted into a 0.9-mile-long tunnel for approximately 12 years, and numerous mine site tributaries will be diverted or piped from their existing channels during construction and mining.

83. Meadow Creek will be permanently buried with millions of tons of toxic mine tailings, eliminating the Creek's designated beneficial uses for aquatic life.

84. In the clearing of land, mining, storing waste and other water impacts, the Project will cause increased temperature, sediment, and contaminants, including arsenic, antimony, and mercury, in some mine site stream segments during some stages of mining. Water quality degradation will be permanent for some streams. In other streams, projections that water quality will eventually return to baseline levels, or even to improved levels, depend on speculative and unproven plans to restore the mine site and ignore the realities of climate change.

85. The Project will reduce stream flows, which harms fish. The Forest Service found the Project would cause major, long-term stream flow reductions in Meadow Creek and in portions of the East Fork SFSR at the mine site.

86. The tailings waste facility will eliminate, and bury, portions of Meadow Creek, and its state-designated beneficial uses of Aquatic Life, Domestic Water Supply, Salmonid Spawning, and other uses.

87. The Project will impact about 259 acres of occupied whitebark pine habitat and remove about 1,278 individual trees resulting in localized, long-term and permanent, moderate impacts.

88. The Project will directly remove 2,342 acres of wolverine habitat, reduce habitat connectivity, and result in high levels of displacement, particularly from the breeding and winter range. Year-round vehicle traffic and noise and light disturbance from the mine site will displace

individuals from potential denning sites and cause den abandonment and risk vehicle collisions causing injury and mortality to wolverines.

89. Despite these extensive and long-lasting impacts, the Forest Service approved the Project without analyzing any alternatives to Perpetua's preferred plan for mining, processing, and waste storage. The only alternative the FEIS and ROD analyzed in detail was to use a different access route to the mine site during operations (the existing Johnson Creek Route) versus the access route proposed by Perpetua, and approved in the ROD—the Burntlog Route.

Immediate and Permanent Impacts from Construction and Use of the Burntlog Route.

90. The construction of the new Burntlog Route would result in significant and additional impacts from the mine itself in violation of federal law. The new Burntlog Route would occur in inventoried Roadless Areas, adjacent to the Frank Church-River of No Return Wilderness, within a Wild & Scenic River Corridor, and along protected riparian areas along streams and wetlands in the headwaters of Johnson Creek, a tributary to the South Fork Salmon River, which has been deemed suitable for Wild and Scenic River designation.

91. Burntlog Creek, an eligible Wild and Scenic River, is designated under the ESA as critical habitat for bull trout, steelhead, and Chinook salmon. The Forest Plan identifies the lower and upper Burntlog Creek sub-watersheds as important to the recovery of ESA-listed fish species and as high-priority areas for restoration. The Forest Plan also has an objective to reduce sediment pollution in the upper South Fork Salmon River watershed. Five of Perpetua's test sites are located in the riparian area adjacent to Trapper Creek, which is designated critical habitat for bull trout.

92. The Burntlog Route would occur within Riparian Conservation Areas, which are lands along streams and wetlands designated by the Boise and Payette Forest Plans and governed by specific protection standards, which the Burntlog Route would violate.

93. The Burntlog Route includes eight gravel mines (described as "borrow pits") that will be improperly located in the designated Riparian Conservation Areas along the route. "Eight borrow sources along the Burntlog Route would also be constructed." FEIS at 4-36. It will also result in over 11 acres of cut/fill in the Riparian Conservation Areas.

94. The Burntlog Route area contains Tier 1 Priority Conservation Area for wolverines in Idaho, which is based on potential wolverine use, cumulative threats, and amount of unprotected habitat. The Burntlog Route area is predicted to have high use by wolverines. Wolverines have been sighted in areas that will be impacted by the Burntlog Route. The Burntlog Route will degrade and fragment this important wolverine habitat, and cause disturbance and increased mortality from mining vehicle traffic.

95. The Burntlog Route area contains occupied habitat for whitebark pine. Construction of the Burntlog Route will remove whitebark pine habitat, remove individual trees and result in reductions in seed production and dispersal, and have long-term negative consequences for the species in the analysis area.

96. The Burntlog Route will be constructed in occupied bull trout habitat: "The construction of the access roads (including the Burntlog Route) and the transmission line will occur along and over bull trout occupied streams (i.e., Cabin Creek [tributary to Warm Lake Creek], Burntlog Creek, Trapper Creek, and Riordan Creek)." FWS Biological Opinion at 152.

97. The U.S. EPA, in comments to the Forest Service raised serious concerns with the environmental impacts from the Burntlog Route:

> The material summarized in the Executive Summary and in Table 2.8.1 Alternative Comparison and Impact Summary indicate that the Burntlog Route may result in greater impacts on several environmental and economic indicators, than as generally presented for the 2021 MMP Alternative (which includes the Burntlog Route). Examples include more greenhouse gas (GHG) emissions, soil impacts, stream crossings, forest disturbance, wetland loss, wildlife habitat disturbances, new roads, ground disturbance, impact on historical properties, higher inconsistency with designated Recreation Opportunity Spectrum, and lower contributions to employment trends. Further, the 2021 MMP Alternative will likely: impact roadless characteristics in three inventories roadless areas; increase non-native plant species spread; and create construction noise into the Frank Church River of No Return Wilderness.

U.S. EPA letter Jan. 10, 2023 at p. 3.

98. The Burntlog Route will result in significantly more adverse impacts to wildlife:

> The important differences among the alternatives lie in the acres of habitat loss, the amount and location of the disturbance from noise and human activity, new access roads, and the location of the facilities. The Johnson Creek Route Alternative would have 170 fewer acres than the 2021 MMP due to the elimination of the Burntlog Route which also would reduce the magnitude and extent of impacts on most wildlife, especially wolverine, big game, and migratory birds.

FEIS at ES-22.

99. "Overall, the 2021 MMP-related vegetation clearing would impact 3,564 acres, including primarily undisturbed areas for the Burntlog Route where an increase in the potential for non-native plant establishment and spread would be more deleterious." *Id.* at ES-18.

100. The Burntlog Route will also result in substantially more negative impacts on recreation:

> The Burntlog Route under the 2021 MMP [the alternative approved in the ROD] would offer new motorized access where such access does not currently exist and could increase recreation use in areas surrounding these facilities. These facilities also may displace wildlife-based and non-

> motorized recreation opportunities and would alter the recreation setting for the [Frank Church Wilderness] and two dispersed camping areas. Due to its closeness to the [Frank Church Wilderness] border, a portion of the Burntlog Route would result in additional change to the recreation setting for wilderness activities, potentially induce increased use of the Black Lake area and [Frank Church Wilderness], and potentially result in unauthorized motorized use of the [Frank Church Wilderness]. The Burntlog Route may have an increased impact on the ability of the two permitted outfitters to provide permitted activities due to the impacts on wilderness activities.

Id. at ES-28.

101. "Under the 2021 MMP, construction and use of the Burntlog Route near the [Frank Church Wilderness] boundary could increase noise and lights in adjacent wilderness areas." *Id.* at ES-31–32.

102. The Burntlog Route will occur in Inventoried Roadless Areas (IRA), including the Burnt Log, Black Lake, and Meadow Creek IRAs. These areas are managed for backcountry restoration under the Idaho Roadless Rule, 36 C.F.R. Part 294.

103. "Construction and operation of the [Stibnite Gold Project] under the 2021 MMP [the alternative approved in the ROD] would directly impact the Meadow Creek, Horse Heaven, Black Lake, Burnt Log, Caton Lake, and Reeves Creek IRAs." FEIS at ES-32.

104. The Burntlog Route is within the Wild and Scenic corridor of Burntlog Creek. Burntlog Creek is considered eligible for Wild and Scenic River status because of its outstandingly remarkable fisheries value. Proposed activities will have effects on bull trout, Chinook salmon, steelhead, and westslope cutthroat trout that reside in Burntlog Creek, and will impermissibly encroach on Riparian Conservation Areas that are also designated as critical habitat.

105. In March of 2024, the Forest Service approved Perpetua's proposal to gather baseline information regarding geophysical, environmental, and other site conditions along the

proposed Burntlog Route. However, before any data gathering began, the agency withdrew its approval later in 2024. Despite this acknowledged need for baseline data and analysis, the ROD approved the new Burntlog Route without this required information.

106. Despite these significant impacts from the Burntlog Route, the Forest Service's ROD nevertheless authorized the Burntlog Route as a new access route to the mine site.

107. The existing access route, and the route that the ROD approves for access during the construction period (the Johnson Creek Route), has been, and is currently being, used by Perpetua to access the mine site.

108. The Johnson Creek Route (as described in the FEIS and ROD), is a reasonable and feasible alternative access route to the mine site.

LEGAL BACKGROUND

Standard of Review Under the Administrative Procedure Act (APA).

109. The APA provides for judicial review of federal agency actions for persons adversely affected or aggrieved by the agency action. 5 U.S.C. § 702. Agency action made reviewable by statute and final agency action for which there is no other adequate remedy are subject to judicial review. *Id.* § 704.

110. The APA requires a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed" and "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706.

111. Under the APA, the Court will "engage in a substantial inquiry," and conduct a "thorough, probing, in-depth review." *Or. Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1125 (9th Cir. 2007). The agency's decisions must be "fully informed and well-considered."

Save the Yaak Comm. v. Block, 840 F.2d 714, 717 (9th Cir.1988). "An agency's action is arbitrary and capricious if the agency fails to consider an important aspect of the problem, if the agency offers an explanation that is contrary to the evidence, … or if the agency's decision is contrary to the governing law." *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005). *See also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The Forest Service Organic Act of 1897.

112. 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. The Organic Act 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.

113. The Forest Service's mining regulations govern "operations authorized by the United States mining laws (30 U.S.C. 21-54)." 36 C.F.R. § 228.1. Operations not specifically "authorized by the mining laws" are not governed by any statutory rights under the mining laws. *Ctr. for Biological Diversity v. U.S. FWS*, 33 F.4th 1202 (9th Cir. 2022) (Rosemont Mine decision). There, the court affirmed the district court decision that vacated and remanded the Forest Service's approval of a large copper mine due to the agency's erroneous interpretation and application of the 1872 Mining Law, related federal public land law, and NEPA.

114. For those operations that have been determined to have statutory rights under the 1872 Mining Law, the Forest Service's rules 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. § 228.4(c)(3). The regulations also require the Forest Service "to maintain and protect fisheries and wildlife which may be affected by the operations." 36 C.F.R.

§ 228.8(e). The Forest Service can and must reject an unreasonable mine plan and prohibit mining activity until appropriate evaluation of the plan is completed and reasonable mitigation measures are in place to protect public resources.

The Federal Land Policy and Management Act of 1976 (FLPMA).

115. In FLPMA, Congress declared that it is the policy of the United States to manage the public lands "in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values" and that, "where appropriate, will preserve and protect certain public lands in their natural condition." 43 U.S.C. § 1701(a)(8).

116. Among other provisions, FLPMA governs the issuance of Rights-Of-Ways and Special Use Permits to cross federal land. The Forest Service's authority to permit powerlines, access roads, and other ancillary infrastructure is found in FLMPA Title V. Rights-of-ways may be "granted, issued or renewed . . . consistent with . . . any other applicable laws." *Id.* § 1764(c). A right-of-way that "may have significant impact on the environment" requires submission of a plan of construction, operation, and rehabilitation of the right-of-way. *Id.* § 1764(d). Under Title V, Section 504, the agency may grant a Right-of-Way for such infrastructure only if it "(4) will do no unnecessary damage to the environment." 43 U.S.C. § 1764(a)

117. A Title V right-of-way "shall contain terms and conditions which will . . . (ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment." *Id.* § 1765(a). *See also* § 1765(b) (additional environmental protection requirements). The terms of this section do not limit "damage" specifically to the land within the right-of-way corridor, but to all lands and resources that may be affected by the right-of-way (here, the Project and all its impacts).

118. The Forest Service may grant a right-of-way only if it "protect[s] the public interest in the lands traversed by the right-of-way or adjacent thereto." 43 U.S.C. § 1765(b). FLPMA requires that any right-of-way contain terms and conditions "necessary" to protect federal property and economic interests. *Id*.

119. FLPMA also requires that "the United States receive fair market value of the use of the public lands and their resources." 43 U.S.C. §1701(a)(9). "The holder of a right-of-way shall pay in advance the fair market value thereof, as determined by the Secretary granting, issuing, or renewing such right-of-way." *Id*. § 1764(g).

120. The Forest Service's right-of-way and special use permit regulations are found at 36 C.F.R. Part 251 (Land Uses). In particular for the situation here, Subpart D deals with "Access to Non-Federal Lands." These regulations require that "the landowner must apply for and receive a special-use or road-use authorization" to cross federal land. 36 C.F.R. § 251.110(d).

121. In the situation where a person already has adequate and reasonable access across federal land, such as Perpetua's existing and future uses of the Johnson Creek Route, there is no right of access via another route (such as the Burntlog Route). "Where there is existing access or a right of access to a property over non-National Forest land or over public roads that is adequate or that can be made adequate, there is no obligation to grant additional access through National Forest System lands." 36 C.F.R. § 251.110 (g).

122. The burden is on the person seeking access across federal lands to show that another existing route is not available: "The authorizing officer, prior to issuing any access authorization, must also ensure that: (1) The landowner has demonstrated a lack of any existing rights or routes of access available by deed or under State or common law." 36 C.F.R. § 251.114(f).

The National Forest Management Act (NFMA).

123. Congress enacted NFMA in 1976 to establish a legal framework for managing natural resources on National Forest lands. Among other requirements, NFMA requires the Forest Service to prepare a land and resource management plan, or "forest plan," for each National Forest. 16 U.S.C. § 1604(a). Each plan must include standards and guidelines for how the forest shall be managed. 16 U.S.C. §§ 1604(c), (g)(2), and (g)(3).

124. Once a forest plan is adopted, all resource plans, permits, contracts, and other instruments for use of the lands must be consistent with the plan. 16 U.S.C. § 1604(i). "It is well-settled that the Forest Service's failure to comply with the provisions of a Forest Plan is a violation of NFMA." *Native Ecosystems Council v. Forest Serv.*, 418 F.3d 953, 961 (9th Cir. 2005). *See also Idaho Conservation League v. U.S. Forest Serv.*, No. 1:16-cv-0025-EJL, 2016 WL 3814021 at *17 (D. Idaho, Jul. 11, 2016) (Forest Service violated NFMA by approving mine exploration without following Boise Forest Plan standard and guideline to identify sensitive plant occurrences and habitat and conduct up-to-date surveys); *Save Our Cabinets v. U.S. Dep't. of Agric.*, 254 F. Supp. 3d 1241, 1258–59 (D. Mont. 2017) (Forest Service approval of mining project that would not meet the Forest Plan's "desired conditions" protecting water quality violated the NFMA).

125. The Forest Plans for the Payette and Boise National Forests that apply to the Stibnite Gold Project set forth numerous standards, guidelines, goals, and objectives to protect the environment and cultural resources.

The National Environmental Policy Act (NEPA).

126. "NEPA's purpose is twofold: (1) to ensure that agencies carefully consider information about significant environmental impacts and (2) to guarantee relevant information is

available to the public." *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1072 (9th Cir. 2011). NEPA imposes procedural requirements directing agencies to take a "hard look" at environmental consequences, including direct, indirect, and cumulative impacts to all potentially affected resources. *Idaho Sporting Cong. v. Rittenhouse*, 305 F.3d 957, 973 (9th Cir. 2002).

127. NEPA requires federal agencies to prepare a detailed Environmental Impact Statement (EIS) for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). An EIS must include a full and adequate analysis of environmental impacts of a Project and alternatives and take a "hard look" at the direct, indirect, and cumulative impacts of the Project and its alternatives, resulting from all past, present, and reasonably foreseeable future actions. *See id.*

128. The Forest Service's NEPA regulations require that the Forest Service perform an effects analysis, which "begins with the consideration of the direct and indirect effects on the environment that are expected or likely to result from the alternative proposals for final agency action," and where the "final analysis documents an agency assessment of the cumulative effects of the actions considered (including past, present, and reasonable foreseeable future actions) on the affected environment." 36 C.F.R. § 220.4(f).

129. NEPA review must be supported by detailed data and analysis; unsupported conclusions violate NEPA. *See Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998); *N. Plains*, 668 F.3d at 1075 (conclusions must be supported by reliable studies).

130. A "critical" part of the "hard look" required under NEPA involves "[e]stablishing appropriate baseline conditions[.]" *Great Basin Res. Watch v. BLM*, 844 F.3d 1095, 1101 (9th Cir. 2016). "Without establishing the baseline conditions . . . 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*. (quoting *Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988)); *see also Or. Natural Desert Ass'n v. Jewell*, 840 F.3d 562, 568 (9th Cir. 2016).

131. NEPA requires that the Forest Service fully analyze mitigation measures as part of the NEPA process—not in some future decision shielded from public review. *Great Basin Res. Watch*, 844 F.3d at 1107. Under NEPA, the Forest Service cannot rely on purported future mitigation measures to comply with environmental protection standards when those mitigation measures have not been subject to public review. "[A] post-EIS analysis—conducted without any input from the public—cannot cure deficiencies in an EIS." *Id*. at 1104.

132. NEPA requires the agency to include a "detailed statement by the responsible official on— … (iii) a reasonable range of alternatives to the proposed agency action…." 42 U.S.C. § 4332(2)(c)(iii). "The EIS shall document the examination of all reasonable alternatives to the proposed action." 36 C.F.R. § 220.5(e). The FEIS must "rigorously explore and objectively evaluate all reasonable alternatives" to the proposed action. *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1310 (9th Cir. 1990).

The Endangered Species Act.

133. Congress enacted the Endangered Species Act "to halt and reverse the trend toward species extinction, whatever the cost." *TVA v. Hill*, 437 U.S. 153, 184 (1978). The ESA's stated purpose is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such . . . species." 16 U.S.C. § 1531(b). One of the Act's stated policies is "that all Federal . . . agencies shall seek to conserve [ESA-listed] species." *Id.* § 1531(c)(1). The Supreme Court

described the ESA as "a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." *Hill*, 437 U.S. at 185.

134. The "heart of the ESA" is the section 7 consultation requirement. *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011). Section 7 imposes a substantive duty on each federal agency to "insure that any action . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2). "Action" is defined broadly to mean "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies." 50 C.F.R. § 402.02.

135. The first step in complying with Section 7 is to obtain "a list of any listed or proposed species or designated or proposed critical habitat that may be present in the action area." 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c). If listed species "may be present" in the area of agency action, the action agency must prepare a Biological Assessment (BA) to determine whether the proposed action directly and indirectly "may affect" the listed species. *See* 16 U.S.C. § 1536(c)(1); 50 C.F.R. §§ 402.02, 402.12(f), 402.14(a). If the agency determines the proposed action "may affect" any listed species, then it must consult with FWS and/or NMFS (collectively hereinafter the "Services"). 50 C.F.R. § 402.14(a)–(b). If the agency determines in a BA that the action "may affect" and is "likely to adversely affect" any listed species, it must engage in "formal consultation" with the Services. *Id.* If the agency determines in a BA that the action "may affect" but is "not likely to adversely affect" any listed species, then it can engage in "informal consultation" with the Services. *Id.*

136. The purpose of consultation is to ensure the action at issue "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in

the destruction or adverse modification of [designated critical] habitat of such species." 16 U.S.C. § 1536(a)(2). As defined by the ESA's implementing regulations, an action will cause jeopardy to a listed species if it "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02. Destruction or adverse modification of critical habitat is defined as "a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species." *Id.*

137. During formal consultation, the Services must "[r]eview all relevant information" regarding the action area, whether provided by the action agency or not. 50 C.F.R. § 402.14(g)(1). The Services must evaluate both the current status of listed species and critical habitat in the action area, as well as the effects of the proposed action and cumulative effects on listed species and critical habitat. *Id.* § 402.14(g)(2)–(3). Then, after adding "the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species and critical habitat," the Services must reach an "opinion as to whether the action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." *Id.* § 402.14(g)(4). In carrying out the consultation process, "each agency shall use the best scientific . . . data available." 16 U.S.C. § 1536(a)(2).

138. After formal consultation is completed, the Services must provide the action agency with a "biological opinion" explaining how the proposed action will affect the listed species or habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. If the biological opinion concludes that the action will not result in jeopardy, the Services must provide an "incidental take statement" specifying the impact of such incidental taking on the species, specifying any

"reasonable and prudent measures" that the Services consider necessary to minimize such impact, and setting forth the "terms and conditions" that must be complied with by the agency to implement those measures. 16 U.S.C. § 1536(b)(4). The incidental take statement must specify the impact of incidental taking "as the amount or extent of such taking" or by using a surrogate that "sets a clear standard for determining when the level of anticipated take has been exceeded." 50 C.F.R. § 402.14(i)(1)(i).

139. The measures in an incidental take statement are non-discretionary and must be undertaken by the action agency so that they become binding conditions of any grant or permit issued, as appropriate, for the exemption in section 7(o)(2) to apply. *Id.* §§ 402.14(i)(1)(ii), (iv). If the action agency adopts such measures and implements their terms and conditions, the resulting level of incidental take authorized in the incidental take statement is excepted from the ESA's ban on take. *Id.* § 402.14(i)(6). If the action agency (1) fails to assume and implement the terms and conditions, (2) fails to require the applicant to adhere to the terms and conditions of the incidental take statement through enforceable terms that are added to the permit or grant document, or (3) exceeds the level of incidental take, the protective coverage of section 7(o)(2) may lapse. *Id* §§ 402.14(i)(1), (5)–(6). To monitor the impact of incidental take, the action agency must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. *Id.* § 402.14(i)(4).

140. The term "take" is defined broadly to include "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect." 16 U.S.C. § 1532(19). The Services have further defined "harass" to include "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, which include but are not limited to breeding, feeding, or sheltering." 50 C.F.R. § 17.3.

In addition, "harm" is defined to "include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." *Id.*

141. Under ESA Section 7(a)(2), the action agency, like the Forest Service here, also must independently ensure that its actions do not result in jeopardy or adverse modification of critical habitat. *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987); *Defenders of Wildlife v. Martin*, 454 F. Supp. 2d 1085, 1096–99 (E.D. Wash. 2006) (holding that Forest Service failed to comply with ongoing obligation under ESA § 7(a)(2) to insure against jeopardy). As the Ninth Circuit has held: "Consulting with the Service alone does not satisfy an agency's duty under the Endangered Species Act. An agency cannot 'abrogate its responsibility to ensure that its actions will not jeopardize a listed species; its decision to rely on a Service biological opinion must not have been arbitrary or capricious.'" *Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1993) (quotation omitted). Thus, an action agency cannot meet its substantive obligations under Section 7 of the ESA by relying on a biological opinion that is legally flawed. *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1127–28 (9th Cir. 2012).

142. Without a legally adequate biological opinion and incidental take statement in place, any activities likely to result in incidental take of members of listed species are unlawful. 16 U.S.C. § 1538(a)(1)(B). Accordingly, anyone who undertakes such activities, or who authorizes such activities, *id.* § 1538(g), may be subject to criminal and civil federal enforcement actions, as well as civil actions by citizens or others for declaratory and injunctive relief. *See id.* § 1540.

143. If Section 7 consultation is completed, but later becomes inadequate, the action agency must reinitiate consultation. 50 C.F.R. § 402.16. Reinitiation is required if the amount or

extent of taking specified in the incidental take statement is exceeded or if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered. *Id*. § 402.16(a).

Federal Mining Laws, Including the 1872 Mining Law, 1947 Materials Act, and the 1955 Common Varieties Act.

144. The Mining Law of 1872 (Mining Law) gives to United States citizens free of charge, except for small filing and other fees, mining rights upon discovery of certain "valuable minerals" on federal land. 30 U.S.C. §§ 21–54. Under the Mining Law, U.S. citizens may claim and occupy any federal lands which contain a "valuable mineral deposit" for mining purposes, *id.* § 22. *See Ctr. for Biological Diversity*, 33 F.4th at 1208–09.

145. A "valuable mineral deposit" is "mineral [that] can be 'extracted, removed and marketed at a profit.'" *United States v. Coleman*, 390 U.S. 599, 600 (1968). In the absence of a discovery of a valuable mineral deposit, Section 22 of the Mining Law gives a miner no right to occupy the claim beyond the temporary occupancy necessary for exploration. *Ctr. for Biological Diversity*, 33 F.4th at 1209.

146. The Mining Law also allows the owner of a valid mining claim on lands containing a valuable mineral deposit to obtain occupation rights to a valid millsite claim, which is defined as "nonmineral land not contiguous" to the valuable mineral deposit claim, "for mining or milling purposes." 30 U.S.C. § 42(a). The Mining Law limits individual millsites to five acres. *See* 30 U.S.C. § 42.

147. Under the Mining Law, "no right arises from an invalid claim of any kind" because the contrary holding would "work an unlawful private appropriation in derogation of the rights of the public." *Cameron v. United States*, 252 U.S. 450, 460 (1920). The mere filing of a mining claim does not provide any rights to occupy and remove minerals, absent the discovery of

a valuable mineral deposit on the claim. "If no valuable minerals have been found on the land, Section 22 gives no right of occupation beyond the temporary occupation inherent in exploration." *Ctr. for Biological Diversity*, 33 F.4th at 1219.

148. The 1872 Mining Law initially applied to most minerals found on the western public lands (coal being a notable exception). Federal policy towards the disposition of western minerals evolved over the years. In 1920, for example, Congress removed oil, gas, and other fuel minerals from coverage under the Mining Law. *See* 1920 Mineral Leasing Act, 30 U.S.C. §§ 181 *et seq.*

149. After World War II, Congress became increasingly concerned about abuses of public land under the auspices of mining claims, and enacted two laws further aimed at limiting the types of minerals that could be claimed and removed under the statutory rights flowing from the discovery of a valuable mineral deposit under the 1872 Mining Law.

150. "Because certain very common minerals, such as common earth and common clay, were never disposable under either the mining law or the mineral leasing acts, Congress enacted the Materials Act of 1947, 61 Stat. 681 (1947) (codified as amended at 30 U.S.C. § 601 et seq.), to provide a method for their disposal." *Copar Pumice Co. v. Tidwell*, 603 F.3d 780, 785 (10th Cir. 2010)(citations omitted). "Congress later amended the Materials Act when it enacted the Surface Resources Act of 1955 (also known as the Common Varieties Act), 69 Stat. 367 (1955) (codified at 30 U.S.C. § 601 et seq.)." *Id.*

151. "Congress has declared that some mineral deposits are not 'valuable mineral deposits' within the meaning of the Mining Law. *See, e.g.*, Surface Resources and Multiple Use Act of 1955, ch. 375, § 3, 69 Stat. 368 (codified at 30 U.S.C. § 611) (sand, gravel, and pumice

are not valuable minerals under the Mining Law).” *Ctr. for Biological Diversity*, 33 F.4th at 1209.

152. “Together, these Acts provide that the Secretary of the Interior and the Secretary of Agriculture, ‘under such rules and regulations as [they] may prescribe, may dispose of mineral materials (including but not limited to common varieties of the following: sand, stone, gravel, pumice, pumicite, cinders, and clay) … on public lands of the United States.’ 30 U.S.C. § 601 (emphasis added).” *Copar Pumice*, 603 F.3d at 785–86. (citations omitted). “Generally, the disposal of these mineral materials occurs ‘by contract let through competitive bidding.’” *Id*. at 86.

153. “Disposal of these ‘common varieties’ was now ‘permissible only under the Materials Act of 1947.’ *Watt v. W. Nuclear*, 462 U.S. 36, 57 (1983).” *Copar Pumice*, 603 F.3d at 786.

154. In this case, the Forest Service has allowed/authorized the disposal of the common variety minerals from the gravel mines along the Burntlog Route without compliance with, or consideration of, the 1947 Materials Act or the 1955 Common Varieties Act.

155. In addition to the statutory distinctions between “valuable minerals” and “common varieties,” the disposition and use of the two different types of mineral deposits are subject to very different regulatory structures.

156. The Forest Service regulates the exploration, mining, and removal of “valuable mineral deposits” pursuant to 36 C.F.R. Part 288 Subpart A. Those regulations govern only “locatable” minerals (i.e., those types of minerals that can be claimed under the 1872 Mining Law). In contrast, common variety rock and stone—the materials to be excavated from the gravel

mines along the Burntlog Route—are regulated under the "mineral material" regulations at Subpart C, 36 C.F.R. §§ 228.40–67.

157. One distinction between locatable minerals under the 1872 Mining Law and common variety minerals is that locatable minerals "are free and open to exploration and purchase," 30 U.S.C. § 22, whereas common variety minerals are considered "salable minerals," which can only be removed by an operator under a sales contract with the Forest Service. The Forest Service's review and approval of non-locatable common variety mineral operations is entirely discretionary, meaning that the Forest Service is free to limit or deny any proposal to mine and remove common variety minerals as a matter of complete discretion.

158. As the Interior Department has stated, the "location of a mining claim encompassing a deposit of a common variety [mineral] establishes no right to develop the common variety [mineral] on the claim." *John Steen*, 166 IBLA 187, 190 (2005), 2005 WL 3072880, **WL2.

159. Despite this clear distinction between common variety gravel mines and "locatable" mineral projects, the Forest Service nevertheless approved the gravel mines under its 228 Subpart A "locatable" mineral regulations, instead of applying the Subpart C "common variety" regulations.

CLAIMS FOR RELIEF

First Claim for Relief

Violation of FLPMA, the Organic Act, and Implementing Regulations: Failure to Require a Right-of-Way and Properly Regulate the Burntlog Route.

160. Plaintiffs hereby incorporate by reference all preceding paragraphs.

161. The ROD and FEIS are based on the erroneous assumption that Perpetua has a statutory right under the 1872 Mining Law to construct the Burntlog Route to access the mine

site, because the agency considers the Burntlog Route to be part of a mining "operation" under its 36 C.F.R. Part 228A regulations. These regulations only apply to "operations authorized by the United States mining laws (30 U.S.C. 21–54)."

162. The Forest Service did not require Perpetua to apply for any FLPMA right-of-way or special use permit approvals:

> The Burntlog Route access road is solely proposed to provide a year-round surface access route to the [Stibnite Gold Project] which is a mining operation authorized under the 1872 Mining Law and regulated under the 36 CFR 228 Subpart A rules. The definition of mining "operations" in 36 CFR 228.3(a) includes "mining or processing of mineral resources and all uses reasonably incident thereto, including roads and other means of access on lands subject to the regulations of this part, regardless of whether said operations take place on or off mining claims." The Forest Service believes the proposed Burntlog Route would be correctly regulated under the 228 Subpart A regulations and not the 36 CFR 251 rules.

FEIS at B-8—B-9.

163. The agency admits that although Perpetua has filed mining claims along the Burntlog Route, there is no evidence that those claims are valid under the Mining Law.

> Based on discussions with Perpetua staff, the lode claim locations along portions of the Burnt log route were made to protect their exploration interests on lands within this well documented mineralized district but also to protect their interests along the proposed Burnt Log route against rival locators in places more distant to the immediate project area. As such, mineral resource information specific to the lode claim locations is largely based on historic reports that provide limited information on mineralization.

Mineral Report at 6–7.

164. The Mineral Report admits that Perpetua did not apply for a right-of-way for the Burntlog Route. "We are not aware of Perpetua submitting any applications for access to the proposed Stibnite mine area under other authorities including, but not limited to, special use permit, Federal Land Management and Policy Act right-of-way or easement, or access under Section 1323(a) of the Alaksa National Interest Lands Conservation Act (ANILCA)." *Id.* at 7.

165. "Perpetua's 2021 MMP [the alternative approved under the ROD] and documentation in the project record indicate it is asserting a right of reasonable access under the mining laws and 36 CFR 228A in connection with their proposed MMP." *Id.* at 6–7.

166. But Perpetua has no statutory right under the Mining Law and under 36 C.F.R. Part 228A, or any federal law, to the additional Burntlog Route, as the Forest Service acknowledges that the existing Johnson Creek Route is a reasonable and adequate access route to the mine site. While the Mining Law arguably gives Perpetua "the right of reasonable access to the claim," ROD at 44, the record shows that Perpetua **already has** such reasonable access (Johnson Creek), which mining companies, including Perpetua, have been using for decades.

167. Because Perpetua has no statutory right of access under the Mining Law (or any other law), for the second access route (Burntlog Route), the Part 228A regulations do not apply, as the second access route is not "authorized by the mining laws." As such, the Forest Service can only consider reviewing the Burntlog Route as a discretionary right-of-way under FLPMA – which it admits it did not do.

168. Relatedly, by authorizing the Burntlog Route under the erroneous assumption that the Burntlog Route was "authorized by the mining laws" and not subject to the agency's discretionary authorities, the ROD and FEIS violate the Forest Service's duty under the Organic Act to "to regulate [the] occupancy and use [of national forests] and to preserve the forests thereon from destruction." 16 U.S.C. § 551.

169. Under FLPMA, "no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress." 43 U.S.C. §1732(b). But, here, because Perpetua already has a "right of ingress and egress" using the Johnson Creek

Route, there is no "right" to another access route. Thus, access via the Burntlog Route is governed by FLPMA's right-of-way provisions and the 36 C.F.R. Part 251 regulations—not the Mining Law and the Part 228A regulations.

170. The Forest Service's actions and omissions noted herein regarding its review and approval of the Project violate FLPMA and the Organic Act, and their implementing regulations. The FEIS and ROD are arbitrary, capricious, an abuse of discretion, not in accordance with FLPMA and the Organic Act, without observance of procedure required by law, and in excess of statutory jurisdiction, authority, or limitations, within the meaning of the judicial review provisions of the APA. 5 U.S.C. §§ 701–706; 5 U.S.C. § 706(2)(A). The FEIS and ROD should be held unlawful, set aside, vacated, and remanded to the Forest Service.

Second Claim for Relief

Violation of the Idaho Roadless Rule and the Organic Act.

171. Plaintiffs hereby incorporate by reference all preceding paragraphs.

172. As part of its Organic Act mandate "to preserve the forests thereon from destruction." 16 U.S.C. § 551, the Forest Service promulgated the Idaho Roadless Rule, (36 C.F.R. Part 294, Subpart C, §§ 294.20–29). The Idaho Roadless Rule, issued in 2008, amended the national Roadless Rule, promulgated in 2001.

173. As stated in the preamble to the Idaho Roadless Rule:

> The 2001 roadless rule was the product of a national process and established management direction at the national level with limited focus on state or local issues. The 2001 roadless rule (66 FR 3244, Jan. 12, 2001) proposed to ensure that inventoried roadless areas sustain their values for this generation and for future generations. By sustaining these values, a continuous flow of benefits associated with healthy watersheds and ecosystems was expected.
>
> The Forest Service identified timber cutting and road construction or reconstruction as having the greatest likelihood of altering and fragmenting

> landscapes and the greatest likelihood of resulting in an immediate, long-term loss of roadless area values and characteristics. Therefore, the 2001 Rule prohibited these activities with certain exceptions in each roadless area.

73 Fed. Reg. 61456, 61459 (Oct. 16, 2008). New roads, such as the Burntlog Route, are thus prohibited in designated roadless areas.

174. There is an exception to this prohibition, however, as "Nothing in this subpart [Part 294, Subpart C] shall affect mining activities conducted pursuant to the General Mining Law of 1872." 36 C.F.R. § 294.25(b). "7.18 Idaho Roadless Rule. Per 36 C.F.R. § 294.25(b), the Idaho Roadless Rule does not affect mining activities conducted pursuant to the General Mining Law of 1872. Idaho Roadless Area characteristics affected by the Stibnite Gold Project have been disclosed in the FEIS." ROD at 50.

175. Relying on the Idaho Roadless Rule's exception for mining activities conducted pursuant to statutory rights under the Mining Law, the Forest Service improperly determined that Perpetua had a statutory right of access for the mine, and approved the Burntlog Route, and its associated activities, as an "operation authorized by the mining laws."

176. But, as detailed herein, the Burntlog Route is not the only reasonable access route, as there is a "reasonable" access route in the Johnson Creek Route Alternative. The ROD admits that "The Johnson Creek Route Alternative (Section 2.5 of the FEIS) was developed to avoid or reduce certain impacts to Idaho Roadless Areas, sensitive plant species, and wetlands." *Id.* at 37. Using the Johnson Creek Route avoids constructing approximately 15 miles of new road along the Burntlog Route and thereby avoids impacts to the Black Lake, Burnt Log, and Meadow Creek IRAs.

177. Thus, the Burntlog Route and its associated activities, cannot be approved as an "activit[y] conducted pursuant to the General Mining Law of 1872" and cannot be exempt from the Idaho Roadless Rules' prohibition on new roads.

178. In addition, the construction of the new transmission line, which the Forest Service does not argue is covered or approved under the 1872 Mining Law, would also bisect designated Roadless Areas. "Within the boundaries of Caton Lake, Horse Heaven, Reeves Creek, and Meadow Creek IRAs approximately 44 acres would be within the 100-foot-wide right-of-way for the 138 kV powerline service." Surface Use Determination at 18.

179. The ROD does not explain how the new transmission line, along with its associated road, complies with the Idaho Roadless Rule preclusions.

180. The Defendants' review and approval of the Project, including the review and approval of the gravel mines/pits/infrastructure, violates the Roadless Rule and federal law.

181. The Forest Service's actions and omissions noted herein regarding its review and approval of the Project violate the Idaho Roadless Rule and the Organic Act, and their implementing regulations. The FEIS and ROD are arbitrary, capricious, an abuse of discretion, not in accordance with the Idaho Roadless Rule and the Organic Act, without observance of procedure required by law, and in excess of statutory jurisdiction, authority, or limitations, within the meaning of the judicial review provisions of the APA. 5 U.S.C. §§ 701–706; 5 U.S.C. § 706(2)(A). The FEIS and ROD should be held unlawful, set aside, vacated, and remanded to the Forest Service.

Third Claim for Relief

The Project Does Not Comply with the Boise and Payette Forest Plans, in Violation of the National Forest Management Act.

182. Plaintiffs hereby incorporate by reference all preceding paragraphs.

183. "The Forest Service's failure to comply with a forest plan violates NFMA." *Save Our Cabinets*, 254 F.Supp.3d at 1258 (The Forest Service's approval of mining operation violated forest plan standards and desired conditions).

184. The ROD, including the approval of the Burntlog Route, violates the Payette and Boise Forest Plans, standards and requirements, including MIST08 (PNF/BF Forest Wide):

> Locate new structures, support facilities, and roads outside riparian conservation areas (RCAs). **Where no alternative to siting facilities in RCAs exists**, locate and construct the facilities in ways that avoid or minimize degrading effects to RCAs and streams, and adverse effects to threatened, endangered, proposed, or candidate (TEPC) species. **Where no alternative to road construction in RCAs exists**, keep roads to the minimum necessary for the approved mineral activity.

Stibnite Gold Project Land and Resource Management Plan Consistency Review (included in FEIS/ROD support docs), at 38 (emphasis added).

185. Here, because there is a reasonable alternative to constructing and using the Burntlog Route, support facilities, and associated structures—e.g., the Johnson Creek Route—the Forest Service's approval of the Burntlog Route, support facilities, and associated structures in Riparian Conservation Areas violates the MIST08 standards of the Boise and Payette Forest Plans, and thus the NFMA. *See Hells Canyon Pres. Council v. Haines*, No. CV 05-1057-PK, 2006 WL2252554, **7–10 (D. Or. 2006) (Forest Service approval of roads, structures and mine support facilities violated essentially the same Forest Plan standard in Oregon).

186. As shown on the project map at the end of the ROD (Figure 1), the Burntlog Route will cross numerous Riparian Conservation Areas. That figure also shows the Landmark, and Burntlog, Maintenance Facilities within Riparian Conservation Areas. *See also* FWS Biological Opinion Table 36 (listing 50+ activities in Riparian Conservation Areas, with various acreages).

187. The same is true for numerous structures, roads, and support facilities at the mine site itself. *See* FEIS at 4-333—4-337 ("Table 4.11-1, 2021 MMP Permanent Impacts to Wetlands, Streams, and RCAs – Mine Site Focus Area").

188. Also, the "New Transmission Line" and other "off-site" structures, roads and facilities will cross numerous Riparian Conservation Areas. *See Id.* at 4-338—4-339 ("Table 4.11-2, 2021 MMP Permanent and Temporary Impacts to Wetlands, Streams, and RCAs – Off-site Focus Area"); ROD Figure 1 (map).

189. For all of these roads, structures, and facilities in the Riparian Conservation Areas, the Forest Service did not conduct the alternatives analysis, nor minimize impacts, required by MIST08, NFMA, and NEPA.

190. The Forest Plans also include standard MIST09, which prohibits locating "solid and sanitary waste facilities" in RCAs unless "no alternative exists." "[I]f no alternative to locating mine waste (waste rock, spent ore, tailings) facilities in [Riparian Conservation Areas] exists," then the Forest Service must take specifically listed steps to prevent, monitor, and mitigate potential impacts.

191. The Project's tailings storage facility will be placed in the Meadow Creek valley Riparian Conservation Area, and some tributary Riparian Conservation Areas. But the Forest Service did not conduct the alternatives analysis, nor impose prevention, monitoring, and mitigation measures, required by MIST09, NFMA, and NEPA.

192. The Payette and Boise National Forests also have a "no new roads" standard, which states that "Road construction may only occur where needed: … (b) To respond to statute or treaty." Stibnite Gold Project Land and Resource Management Plan Consistency Review (included in FEIS/ROD supporting documents), at 17 (Boise NF), at 1 (Payette NF).

193. But again, the agency justifies its approval of the Burntlog Route on its erroneous assumption that the Burntlog Route is authorized by the 1872 Mining Law. "The project is consistent based on item b), since the project-related work would be associated with statute (General Mining Law of 1872)." *Id.*

194. But simply because the Burntlog Route may arguably be "associated with" the Mining Law, without any rights under the Mining Law, does not exempt the Burntlog Route from the Forest Plan standards and other requirements.

195. The ROD also allows various Forest Plan Guidelines to be violated (what it calls a "Deviation"). ROD at 9–14. The ROD says this is allowable: "As per the Boise and Payette Forest Land and Resource Management Plans, 'deviation from compliance [with a guideline] does not require a land and resource management plan amendment (as with a standard), but rationale for deviation must be documented in the project decision document' (Boise and Payette National Forest Land and Resource Management Plans p. III-3)." *Id.* at 9.

196. But here, that "rationale for deviation" misinterprets and misapplies federal public land and mining law. As one example, the Forest Service admits the "no roads" Recreation Guideline will be violated, but again, rely on Perpetua's assumed "right of access" for the Burntlog Route under the Mining Law: "The deviation is required to meet statutory and regulatory requirements associated with locatable mineral mining operations." *Id.* at 14. As shown above, the Burntlog Route is not "required" for access to "meet the" Mining Law," due to the existing Johnson Creek Route.

197. The Forest Service's actions and omissions noted herein regarding its review and approval of the Project violate the NFMA, and its implementing regulations. The FEIS and ROD are arbitrary, capricious, an abuse of discretion, not in accordance with the NFMA, without

observance of procedure required by law, and in excess of statutory jurisdiction, authority, or limitations, within the meaning of the judicial review provisions of the APA. 5 U.S.C. §§ 701–706; 5 U.S.C. § 706(2)(A). The FEIS and ROD should be held unlawful, set aside, vacated, and remanded to the Forest Service.

Fourth Claim for Relief

Approval of the Gravel Mines (Borrow Pits) Violates the 1947 Materials Act, the 1955 Common Variety Act, and the Organic Act.

198. Plaintiffs hereby incorporate by reference all preceding paragraphs.

199. The ROD and FEIS reviewed and approved the (at least) 8 gravel mines along the Burntlog Route as "operations authorized by the mining laws" under its 36 C.F.R. Part 228 Subpart A mining regulations.

200. Yet these gravel mines are governed by 36 C.F.R. Part 228, Subpart C ("Disposal of Mineral Materials)—not Subpart A, which only applies to operations "authorized by the mining laws [1872 Mining Law]." 36 C.F.R. § 228.1.

201. Under the Subpart C Mineral Material Disposal regulations, no disposal is authorized by the statute where it would be "detrimental to the public interest." 36 C.F.R. § 228.43(c). These Subpart C rules, unlike the Subpart A rules governing locatable/hardrock minerals, preclude the Forest Service from authorizing any activity/sale without meeting the "public interest" standard. Neither the ROD nor FEIS analyzed this distinction, or determined that the gravel mines/borrow pits served the public interest and met the other Subpart C requirements.

202. The 2020 Surface Use Determination asserted that the gravel/borrow sites along the Burntlog Route would be established "as needed," and permitted under the Subpart C regulations, 36 C.F.R. § 228.62(d). Surface Use Determination at 12 n.8.

203. Yet the agency changed its position and now approved the gravel/borrow mines under the Subpart 228A locatable mineral regulations. "The Burntlog Route proposed borrow areas follow the requirements of 36 CFR 228.3 and 16 USC Section 477. The Forest Service response to comments, as referenced in the objection, that borrow sites would be permitted under 36 CFR 228.62(d), is incorrect." Forest Service Response to Plaintiffs' Objections at 15.

204. But "[d]isposal of these 'common varieties' was now 'permissible only under the Materials Act of 1947.' *Watt v. W. Nuclear*, 462 U.S. 36, 57 (1983)." *Copar Pumice*, 603 F.3d at 786. In this case, the Forest Service has allowed/authorized the disposal of the common variety minerals from the gravel mines along the Burntlog Route without compliance with, or consideration of, the 1947 Materials Act, the 1955 Common Varieties Act, the Organic Act, and its applicable mineral regulations.

205. At a minimum, the Subpart C rules, unlike the Subpart A rules, preclude the Forest Service from authorizing any activity/sale without meeting the "public interest" and other standards at 36 C.F.R. § 228.43. In addition, the Forest Service must, after a qualified appraisal, obtain fair market value for all borrow/roadbase materials: "Mineral materials may not be sold for less than the appraised value. The authorized officer may assess a fee to cover costs of issuing and administering a contract or permit." *Id.* § 228.43(b).

206. The gravel/borrow pit will have significant impacts. At a minimum, "[t]he majority of occupied whitebark pine habitat and individual tree removal will occur at three of the six Burntlog route borrow sources and along the Burntlog route itself (Forest Service 2024, p. 523)." FWS Biological Opinion at 286.

207. The Forest Service's actions and omissions noted herein regarding its review and approval of the Project violate the 1947 and 1955 Acts, as well as the agency's duties under the

Organic Act, and their implementing regulations. The FEIS and ROD are arbitrary, capricious, an abuse of discretion, not in accordance with these laws, without observance of procedure required by law, and in excess of statutory jurisdiction, authority, or limitations, within the meaning of the judicial review provisions of the APA. 5 U.S.C. §§ 701–706; 5 U.S.C. § 706(2)(A). The FEIS and ROD should be held unlawful, set aside, vacated, and remanded to the Forest Service.

Fifth Claim for Relief

Violation of FLPMA, the Organic Act, and Implementing Regulations: Failure to Apply the right-of-way Requirements to the Electrical Transmission Line.

208. Plaintiffs hereby incorporate by reference all preceding paragraphs.

209. The ROD states that the Forest Service is requiring a special use permit for the transmission line upgrades and new construction, but does not mention FLPMA or the other requirements which provides the authority for such an approval. The Forest Service states: "The power transmission line meets the special uses screening criteria at 36 CFR 251.53(l)(4) and considerations put forth at 36 CFR 228 Subpart A for uses in connection with operations under the mining laws." ROD at 50.

210. But FLPMA Title V, 43 U.S.C. §§1761–1771, requires that conveyances across public land can only be authorized by a right-of-way. Perpetua never requested a right-of-way from the Forest Service for the transmission line, and the ROD approved the transmission line without requiring or granting any right-of-way.

211. The FEIS, Table 1.7-2, says that a special use permit is required, but the ROD does not specifically issue a special use permit. Even if a special use permit is considered a right-of-way, the ROD does not discuss the various FLPMA special use permit or right-of-way requirements in FLPMA Title V and the 36 C.F.R. Part 251 regulations. For example, among

other requirements, a grant of a special use permit or right-of-way requires the applicant to pay the "fair market value" for use of public lands. *See* 43 U.S.C. §1701(a)(9); 43 U.S.C. §1764(g).

212. In addition, the Forest Service fails to show how the construction of the transmission line complies with the Idaho Roadless Rule and the NFMA Forest Plan requirements, as noted above. "Within the boundaries of Caton Lake, Horse Heaven, Reeves Creek, and Meadow Creek IRAs approximately 44 acres would be within the 100-foot-wide right-of- way for the 138 kV powerline service." Surface Use Determination at 18.

213. The Forest Service's actions and omissions noted herein regarding its review and approval of the Project violate FLPMA and the Organic Act, and their implementing regulations. The FEIS and ROD are arbitrary, capricious, an abuse of discretion, not in accordance with the FLPMA and the Organic Act, without observance of procedure required by law, and in excess of statutory jurisdiction, authority, or limitations, within the meaning of the judicial review provisions of the APA. 5 U.S.C. §§ 701–706; 5 U.S.C. § 706(2)(A). The FEIS and ROD should be held unlawful, set aside, vacated, and remanded to the Forest Service.

Sixth Claim for Relief

Forest Service Violations of the Organic Act.

214. Plaintiffs hereby incorporate by reference all preceding paragraphs.

215. The Forest Service's failure to protect water quality, streams, water quality standards and beneficial uses, species and the habitat of the wolverine, bull trout, Chinook salmon, lynx, steelhead, whitebark pine, and other wildlife, species and plants violates the Organic Act and its implementing regulations.

216. Under the Organic Act and Part 228A regulations, the agency must "maintain and protect fisheries and wildlife which may be affected by the operations." 36 C.F.R. § 228.8(e).

These impacts also violate the Forest Service's duties to "minimize adverse environmental impacts on National Forest surface resources." 36 C.F.R. § 228.8.

217. The Organic Act and Part 228A regulations "further require that mining operators comply with applicable state and federal water quality standards including the Clean Water Act; [and] take all practicable measures to maintain and protect fisheries and wildlife habitat." *Save Our Cabinets*, 254 F. Supp. 3d at 1249–50 (D. Mont. 2017). "The operator also has a separate regulatory obligation to 'take all practicable measures to maintain and protect fisheries and wildlife habitat which may be affected by the operations.' 36 C.F.R. § 228.8(e)." *Rock Creek All. v. Forest Serv.*, 703 F. Supp. 2d 1152, 1164 (D. Mont. 2010) (mine approval violated Organic Act and 228 regulations by failing to protect water quality and fisheries). "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." *Id*. at 1170. *See also Hells Canyon Pres. Council v. Haines*, 2006 WL2252554, *4–5 (D. Or. 2006) (Forest Service failed to protect fisheries and ensure compliance with water quality standards).

218. The Forest Service's actions and omissions noted herein regarding its review and approval of the Project violate the Organic Act and its implementing regulations. The FEIS and ROD are arbitrary, capricious, an abuse of discretion, not in accordance with the Organic Act, without observance of procedure required by law, and in excess of statutory jurisdiction, authority, or limitations, within the meaning of the judicial review provisions of the APA. 5 U.S.C. §§ 701–706; 5 U.S.C. § 706(2)(A). The FEIS and ROD should be held unlawful, set aside, vacated, and remanded to the Forest Service.

Seventh Claim for Relief

The Forest Service Violated NEPA.

219. Plaintiffs hereby incorporate by reference all preceding paragraphs.

Failure to Take the Required Hard Look at Project Impacts.

220. "NEPA's purpose is twofold: (1) to ensure that agencies carefully consider information about significant environmental impacts and (2) to guarantee relevant information is available to the public." *N. Plains*, 668 F.3d at 1072. NEPA imposes procedural requirements directing agencies to take a "hard look" at environmental consequences, including direct, indirect, and cumulative impacts to all potentially affected resources. *Idaho Sporting Cong.*, 305 F.3d at 973. *See also* 36 C.F.R. § 220.4(f). This includes the duty to fully analyze mitigation measures to minimize or prevent these impacts. *See Great Basin Res. Watch v. BLM*, 844 F.3d 1095, 1107 (9th Cir. 2016).

221. The FEIS failed these NEPA mandates.

222. For many of the Project impacts, such as for water pollution and treatment, and the Forest Service's duty to analyze and ensure compliance with all state and federal environmental requirements, the Forest Service merely defers to future state permitting. But the Forest Service cannot rely on current or future state or other agency permitting processes or approvals as a substitute for the Forest Service's NEPA duties. "'A non-NEPA document ... cannot satisfy a federal agency' obligations under NEPA'. … and the reference to the Project's Clean Air Act permit did nothing to fix that error." *Great Basin Res. Watch*, 844 F.3d at 1104 (9th Cir. 2016) (quoting *S. Fork Band Council v. Dep't. of Interior*, 588 F.3d 718, 726 (9th Cir. 2009). "[N]or have we allowed federal agencies to rely on state permits to satisfy review under NEPA." *Envtl. Def. Ctr. v. Bureau of Ocean Energy Mgt.*, 36 F.4th 850, 874 (9th Cir. 2022).

223. The Forest Service also erroneously relies on numerous future plans and other Project details that have yet to be developed and/or never been reviewed by the public during the NEPA process. And it relies on speculative, uncertain, and unproven mitigation and reclamation measures to downplay the adverse effects of the Project.

224. Finally, as detailed in Plaintiffs' comments and objections, the Forest Service also failed to take a hard look and failed to use the best available science when assessing the numerous ways in which the Stibnite Gold Project will adversely impact air and water quality; fish, wildlife and plants and their habitat; and protected areas including wilderness, roadless areas, and wild and scenic rivers.

Failure to Analyze Reasonable Project Alternatives.

225. "The EIS shall document the examination of reasonable alternatives to the proposed action." 36 C.F.R. § 220.5(e). The failure to examine a reasonable range of alternatives renders an EIS inadequate. *See Idaho Conservation League v. Lannom*, 200 F. Supp. 3d 1077, 1090–91 (Payette National Forest violated NEPA by failing to discuss any alternatives that reduced ground disturbing mining activities while still meeting purpose and need). A failure to consider a reasonable range of alternatives or "present complete and accurate information to decision makers and to the public" regarding the alternatives will violate NEPA. *See Natural Res. Def. Council v. Forest Serv.*, 421 F.3d 797, 813–14 (9th Cir. 2005).

226. "NEPA requires that an agency's purpose and need statement briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." *City of Los Angeles v. Fed. Aviation Admin.*, 63 F.4th 835, 843 (9th Cir. 2023). "[T]he statement must not unreasonably narrow[ ] the agency's consideration of alternatives so that the outcome is preordained." *Id.*

227. Here, the Forest Service defined the purpose and need in unreasonably narrow terms, resulting in failure to consider other reasonable alternatives.

228. The FEIS only analyzed two Project alternatives: the Johnson Creek and Burntlog Routes. The FEIS failed to analyze *any* alternative regarding construction, operation, and reclamation at the mine site itself.

229. The FEIS acknowledges that all of the major project facilities were never examined for alternative locations, designs, or other means that may have reduced their environmental impact, avoided Riparian Conservation Areas and other requirements. "The following mine components would be common to the two action alternatives:" FEIS at 2-3 (listing 14 facilities).

230. This failure is especially egregious regarding the siting of structures and facilities in over 618 acres of in designated Riparian Conservation Areas at the mine site, and over 299 acres in Riparian Conservation Areas at the offsite locations. *See* FEIS at 4-335–4-339 (Tables 4.11-1 and 4.11-2) (where no alternative locations were considered, or any alternative that may have reduced locations within Riparian Conservation Area, as required by the Boise and Payette Forest Plan standards, e.g., MIST08 and MIST09 discussed above).

231. Plaintiffs submitted detailed comments to the Forest Service describing reasonable alternatives regarding ways to reduce the environmental impacts from mine operations, such as alternative tailings and waste methods, alternative locations for Project facilities, and alternative mineral extraction and backfilling methods, pit dewatering, surface water management, and water treatment among other reasonable alternatives. These are major, controversial issues with huge and lasting environmental implications; yet the FEIS does not consider any alternatives with any difference when it comes to these issues.

232. In response, the Forest Service relies on Section 2.6 of the FEIS, "Alternatives Considered But Eliminated from Detailed Study," to assert that it "considered a broad range of alternatives" though it admits those "were ultimately dismissed from further detailed study for the reasons cited in section 2.6." FEIS at B-100. But merely considering the possibility of studying alternatives in an EIS but then declining to actually develop and study any of those alternatives does not count toward meeting the Forest Service's duty to consider a reasonable range of alternatives under NEPA.

233. In addition, as detailed above regarding the Burntlog Route alternative and other Project Facilities including the new transmission line, the Forest Service failed to conduct the alternatives analysis required by Forest Plan standard MIST08 (roads, structures, and support facilities cannot be located in Riparian Conservation Areas unless there are "no alternatives") and MIST09 (similar for waste).

Failure to Obtain Adequate Baseline Information on Affected Resources.

234. A "critical" part of the "hard look" required under NEPA involves "[e]stablishing appropriate baseline conditions[.]" *Great Basin Res. Watch*, 844 F.3d at 1101. "Without establishing the baseline conditions . . . 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*.

235. The FEIS lacks adequate baseline data and analysis for critical resources that will be impacted at, and downstream, from the mine site, as set forth in Plaintiffs' comments and objections.

236. The same is true for the many affected resources, such as the land, water, habitat, wildlife and plants along the 150-foot width of the Burntlog Route, the Johnson Creek Route, and along the transmission line construction and reconstruction.

237. The Forest Service's actions and omissions noted herein regarding its review and approval of the Project violate NEPA and its implementing regulations. The FEIS and ROD are arbitrary, capricious, an abuse of discretion, not in accordance with NEPA, without observance of procedure required by law, and in excess of statutory jurisdiction, authority, or limitations, within the meaning of the judicial review provisions of the APA. 5 U.S.C. §§ 701–706; 5 U.S.C. § 706(2)(A). The FEIS and ROD should be held unlawful, set aside, vacated, and remanded to the Forest Service.

Eighth Claim for Relief

FWS Violations of the ESA and APA.

238. Plaintiffs hereby incorporate by reference all preceding paragraphs.

239. FWS violated the ESA and APA in preparing the September 5, 2024 Biological Opinion for the Stibnite Gold Project, and the Biological Opinion is arbitrary, capricious, and contrary to the ESA (16 U.S.C. § 1536, 5 U.S.C. § 706(2)(A)) for a number of reasons, including but not limited to those reasons noted herein.

Wolverine.

240. In the Biological Opinion, FWS acknowledges that wolverines are likely to be disturbed and displaced from the main mine site area, and that the extensive access routes (including 15 miles of new road construction through roadless areas for the Burntlog Route), the 10.8 mile Cabin Creek over-snow vehicle trail, and the utility corridors approved by the Forest Service that cut through important wolverine habitat.

241. In the Incidental Take Statement, FWS determined that the proposed action will result in take of wolverine through the direct land disturbance (clearing) of a total of 779.3 acres of denning habitat, and provided that if the Project exceeds 779.3 acres of disturbance in denning habitat, then the Forest Service will need to reinitiate consultation. But FWS acknowledged in the Biological Opinion that modeled denning habitat "is available on some portions, but not all of, the action area," and the take trigger is not tied to any form of monitoring and reporting of disturbance acres, rendering the take trigger arbitrary, capricious, and unlawful.

242. In the Incidental Take Statement, instead of developing any of its own reasonable and prudent measures and corresponding terms and conditions to minimize the numerous ways in which FWS determined the Project will take wolverine, FWS relied on the Project's Environmental Design Features that are "essential to minimizing the impact of incidental take of wolverine." But FWS does not identify or require Perpetua to implement these "essential" aspects of the Project or its Environmental Design Features, which is arbitrary, capricious, and contrary to the ESA.

243. In the Incidental Take Statement, FWS requires the Forest Service to notify FWS if it happens to observe a wolverine in the action area. However, FWS failed to require proactive surveying or monitoring of wolverines and wolverine dens. FWS also failed to require any type of protective measures in the event that a wolverine or den is observed. This passive notification in the Incidental Take Statement is arbitrary, capricious, and contrary to the ESA.

244. FWS's Incidental Take Statement is also arbitrary, capricious, and unlawful because it authorizes incidental take of wolverine associated only with impacts related to the footprint of new disturbance, while failing to authorize any other incidental take likely to be caused by the Stibnite Gold Project, and failing to include reasonable and prudent measures,

terms and conditions, and monitoring to minimize such take. This includes grooming a new 10.8-mile trail for winter recreation utilizing the existing Cabin Creek Road, which will facilitate increased winter recreation in wolverine habitat.

245. In its Biological Opinion, FWS failed to adequately consider or analyze: increased potential for wolverine to be incidentally trapped and harmed or killed due to increased year-round access of trappers to remote areas made accessible due to the Project; baseline information about existing wolverine habitat fragmentation; Project-caused fragmentation and the effects of such fragmentation on wolverine; and additional fragmentation caused by climate change during the multi-decades duration of the Stibnite Gold Project.

246. FWS admitted that there are likely wolverine dens in and around the Project area, that denning habitat will be disturbed by the Project's footprint, and noise and light and human activity could cause den abandonment. But FWS failed not impose any reasonable and prudent measures, terms and conditions, or monitoring requirements related to identifying, reporting, or protecting den sites, rending the Biological Opinion arbitrary, capricious, and contrary to the ESA.

Bull Trout.

247. FWS's assessment of the adverse effects of increased stream temperatures to bull trout in the Biological Opinion is arbitrary, capricious, and contrary to the ESA because it: improperly discounts temperature increases projected to occur for the next 27 years, including in streams that are already at "unacceptable risk" for high temperature; erroneously concludes stream temperatures increases will merely "disturb" some bull trout, but will not injure or kill them; wrongly relies on vague assurances of speculative and uncertain temperature reductions

that could occur after year 27; and fails to asses Stibnite Gold Project's temperature effects to bull trout together with the added climate change impacts.

248. In the Biological Opinion, FWS identifies numerous ways, in addition to water temperature increases, that the Stibnite Gold Project will destroy and degrade bull trout habitat and harm bull trout in Upper East Fork SFSR, Sugar Creek, Burntlog Creek, Trapper Creek, and Riordan Creek local populations. But FWS never puts these combined effects together; brushes each off, relying on speculative future improvements after the mine is reclaimed; and downplays any harm as only affecting these five local populations. FWS also arbitrarily concludes that massive changes to streams at the Project area (including putting the East Fork SFSR in a tunnel for 12 years, and burying Meadow Creek deep under mine waste) and impacts occurring over a quarter century or longer will result in the take (including injury and mortality) of only a total of 402 bull trout in the Project area. This conclusion is not supported by the facts or best available science.

249. FWS also relied on insufficient, vague, speculative, and highly uncertain mitigation measures during Project operations and plans for reclaiming the mine site and improving fish habitat conditions post-mining over the long-term to reach its no jeopardy conclusion in the Biological Opinion.

250. FWS also failed to use best available science and failed to adequately consider adverse effects and take caused by the 12-year diversion of the East Fork SFSR through a 0.9-mile tunnel, and the adverse effects of ending trap and haul practices after the operational period, but before restoration is completed.

251. FWS's Incidental Take Statement is arbitrary, capricious, and contrary to the ESA in multiple ways. For temperature, FWS failed to set a sufficient take trigger, because it applies

only at mine years 6, 12, and 18, and post-closure years 22, 27, 32, 52, and 112, and does not address harmful hot temperatures that could occur between these long gaps. For expected take caused by temperature increases, flow depletions, sediment delivery, and contaminant concentrations (copper, arsenic, antimony, and mercury), FWS's terms and conditions are inadequate and too vague and uncertain to occur.

Whitebark Pine.

252. The FWS Biological Opinion also fails to adequately analyze, and protect against, the Project's significant adverse impacts to the whitebark pine, listed as threatened under the ESA.

253. In the Biological Opinion, FWS determined impacts of blister rust combined with other stressors "will reduce the ability of whitebark pine stands to regenerate following disturbances." FWS also acknowledged blister rust infects about one quarter of whitebark pine in the greater area where the Project is located. And FWS determined the Stibnite Gold Project will cause extensive disturbance to whitebark pine. Yet in assessing affects, FWS never acknowledged or considered how impacts to whitebark pine from blister rust will combine with the Project's extensive disturbance footprint that, among other impacts, will reduce or destroy seed banks essential to regeneration. Instead, FWS relies on unrealistically optimistic hope that stands will regenerate to reach its no jeopardy determination. It was arbitrary and capricious, and contrary to the ESA to rely on these uncertain mitigation measures, and to fail to consider the synergistic effects of the Project together with blister rust.

254. Similarly, while FWS acknowledged climate change poses significant threats to whitebark pine, it failed to account for the combined effects of climate change together with the effects of the Project to whitebark pine in and around the Project area. Beyond noting climate

change as a major threat, the Biological Opinion does not include any information or analysis of the ways and degree to which climate change is currently and will in the future affect whitebark pine and its habitat in the Project area.

255. In its jeopardy analysis, FWS also failed to account for the fact that whitebark pine in and around the Project area are in a particularly precarious situation. Of 2,069 acres of surveyed whitebark pine habitat in the action area, nearly all of it—1,902—acres have been affected by wildfire (92%), mountain pine beetles (27%), or blister rust (42%). FWS's reliance on mitigation measures to reduce impacts and foster recovery of whitebark after the Project takes a further toll fails to account for the dire situation the species is already in, which may significantly prevent it from recovering in the ways FWS assumes it will.

256. FWS also lacked sufficient baseline information on the number of live and cone producing whitebark pine located in areas that will be removed or disturbed by the Stibnite Gold Project. FWS relied on a coarse scale analysis that could grossly underestimate the number of actual trees impacted.

257. For the above reasons, and others, FWS failed to use the best available science (16 U.S.C. § 1536(a)(2)), and the Biological Opinion is arbitrary, capricious, and otherwise contrary to the ESA. FWS's actions and omissions noted herein regarding its review of the Project and its issuance of the Biological Opinion violate the ESA and its implementing regulations. The FWS Biological Opinion is arbitrary, capricious, an abuse of discretion, not in accordance with the ESA, without observance of procedure required by law, and in excess of statutory jurisdiction, authority, or limitations, within the meaning of the judicial review provisions of the APA. 5 U.S.C. §§ 701–706; 5 U.S.C. § 706(2)(A). The Biological Opinion should be held unlawful, set aside, vacated, and remanded to FWS.

Ninth Claim for Relief

NMFS Violations of the ESA and APA.

258. Plaintiffs hereby incorporate by reference all preceding paragraphs.

259. NMFS violated the ESA and APA in preparing the October 7, 2024 Biological Opinion for the Stibnite Gold Project, and the Biological Opinion is arbitrary, capricious, and contrary to the ESA (16 U.S.C. § 1536, 5 U.S.C. § 706(2)(A)) for a number of reasons, including but not limited to those reasons noted below.

260. In the Biological Opinion, NMFS failed to account for the Project's adverse effects considered together with climate change, improperly relied on Perpetua's temperature models that do not factor in climate change when it assessed affects to Chinook salmon and steelhead during and after operations; and failed to account for climate change impacts together with operational impacts, and failed to adequately consider how water withdrawals will further reduce available habitat for all life stages.

261. NMFS also relied on insufficient, vague, speculative, and highly uncertain mitigation measures during Project operations and plans for reclaiming the mine site and improving fish habitat conditions post-mining over the long-term to reach its no jeopardy conclusion in the Biological Opinion.

262. NMFS also failed to use best available science and failed to adequately consider adverse effects and take caused by the 12-year diversion of the East Fork SFSR through a 0.9-mile tunnel, and the adverse effects of ending trap and haul practices after the operational period, but before restoration is completed.

263. For the above reasons, and others, NMFS failed to use the best available science (16 U.S.C. § 1536(a)(2)), and the Biological Opinion is arbitrary, capricious, and otherwise

contrary to the ESA. NMFS's actions and omissions noted herein regarding its review of the Project and its issuance of the Biological Opinion violate the ESA and its implementing regulations. The NMFS Biological Opinion is arbitrary, capricious, an abuse of discretion, not in accordance with the ESA, without observance of procedure required by law, and in excess of statutory jurisdiction, authority, or limitations, within the meaning of the judicial review provisions of the APA. 5 U.S.C. §§ 701–706; 5 U.S.C. § 706(2)(A). The Biological Opinion should be held unlawful, set aside, vacated, and remanded to NMFS.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Declare that the Forest Service's FEIS, ROD, and approval of the Project are arbitrary, capricious, and contrary to the Organic Act, FLPMA, NFMA, NEPA, Idaho Roadless Rule, the federal mining laws noted above, and their implementing regulations;

B. Declare that the FWS Biological Opinion is arbitrary and capricious and violates the ESA;

C. Declare that the NMFS Biological Opinion is arbitrary and capricious and violates the ESA;

D. Pursuant to the APA, vacate the ROD, FEIS, Biological Opinions, and Project approvals;

E. Enjoin any further implementation of the Project;

F. Award to Plaintiffs their costs, expenses, expert witness fees, and reasonable attorney fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 and other applicable law; and

G. Grant Plaintiffs such further relief as may be just, proper, and equitable.

Dated February 18, 2025

Respectfully submitted,

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