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; HOWARD LUTNICK, in his official capacity as U.S. Secretary of Commerce,

Defendants,

and

PERPETUA RESOURCES IDAHO, INC.

Intervenor-Defendant.

Case No: 1:25-cv-00086-AKB

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

*This Opening Brief complies with the 50-page limit provided by the Court's scheduling order in this matter (ECF No. 25 at 3).

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GLOSSARY OF TERMS

Term	Definition
APA	Administrative Procedure Act, 5 U.S.C. §§ 701–706
BA	Biological Assessment
BiOp	Biological Opinion
DEIS	Draft Environmental Impact Statement
DOI	United States Department of the Interior
ESA	Endangered Species Act, 16 U.S.C. §§ 1531 et seq.
FEIS	Final Environmental Impact Statement
FLPMA	Federal Lands Policy and Management Act, 43 U.S.C. §§ 1701 et seq.
FWS	United States Fish and Wildlife Service
ITS	Incidental Take Statement
MIST08	Standard for Management Direction for Mineral and Geology Resources, as defined by Payette and Boise National Forest Plans
MIST09	Standard for Management Direction for Mineral and Geology Resources, as defined by Payette and Boise National Forest Plans
MMP/ModPro2	Modified Mine Plan, as submitted in 2021 for the Stibnite Gold Project
NEPA	National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq.
NFMA	National Forest Management Act, 16 U.S.C. §§ 1600 et seq.
NMFS	National Marine Fisheries Service
Organic Act	Forest Service Organic Act of 1897, 16 U.S.C. § 475
Project	The Stibnite Gold Project
RCA	Riparian Conservation Area (as defined in Payette and Boise National Forest Plans)
ROD	Record of Decision
RPM	Reasonable and Prudent Measure (see 16 U.S.C. § 1536(b)(4))
SDEIS	Supplemental Draft Environmental Impact Statement
SFSR	South Fork of the Salmon River
USDA	United States Department of Agriculture
USFS	United States Forest Service

INTRODUCTION

Plaintiffs respectfully seek summary judgment holding unlawful Defendants' approvals of the Stibnite Gold Project (the Project), a massive open-pit gold mine proposed in the headwaters of the South Fork Salmon River in central Idaho, located mostly on federal public lands. The Project—building an extensive network of access roads and other infrastructure, excavating three large open pits, storing millions of tons of mine waste rock and tailings, and burying and re-routing streams—would cause large-scale, long-lasting environmental damage to this remote, ecologically sensitive area. In their approvals, Defendants violated the law in four key respects:

First, the Forest Service fundamentally misconstrued the 1872 Mining Law. While Intervenor-Defendant (Perpetua) may have some rights under that law to mine valuable minerals at its valid claim sites, the Forest Service erroneously extended Perpetua's mining rights to allow construction of a web of infrastructure across National Forest lands, including a second access road (the Burntlog Route), a new electric transmission line, and multiple gravel mines. By wrongly assuming the 1872 Mining Law authorizes this web of infrastructure, the Forest Service violated the permitting processes and environmental protections required by statute and regulation.

Second, the Forest Service failed to follow requirements from its own "Forest Plans," in violation of the National Forest Management Act (NFMA). The Forest Plans include mandatory standards to protect riparian areas, and the fish and other species that depend on them, by prohibiting building new mining roads, structures, and waste facilities there, unless there is no alternative. Without demonstrating a lack of alternative, the agency authorized roads, mine waste dumps, and other facilities in over 900 acres of protected riparian areas.

Third, the Forest Service violated America's fundamental charter for environment, the National Environmental Policy Act (NEPA), by refusing to analyze any alternatives to Perpetua's massive and damaging mining, processing, and waste storage plans at the mine site; and by

improperly discounting the risk of hazardous spills and extent of dangerous air pollution.

Fourth, both the Forest Service and the Fish and Wildlife Service (FWS) failed to comply with their duties under the Endangered Species Act (ESA) to protect "threatened" species. The Project will harm and in some instances kill wolverine, whitebark pine, bull trout, Chinook salmon, and steelhead, and will destroy, degrade, and fragment their habitat. FWS's Biological Opinion for the Project fails to use the best available science, is riddled with errors, and fails to provide required protections for wolverine, whitebark pine, and bull trout. For its part, the Forest Service failed to follow binding requirements in a pre-existing Biological Opinion for the Payette National Forest to protect Chinook salmon and steelhead from threats like this Project.

For each reason below, Defendants' approvals of the Project are arbitrary, capricious, and not in accordance with law in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2). The Court should thus grant summary judgment to Plaintiffs, and hold unlawful, vacate, and remand the challenged actions.

FACTUAL BACKGROUND

In 2016, Perpetua submitted a proposed Plan of Operations to the Forest Service, and later submitted revised plans, seeking approval of the Project. SOF ¶ 1.[1] The Project would occur in and around the Stibnite site on the East Fork of the South Fork Salmon River (East Fork SFSR), on the edge of the Frank Church-River of No Return Wilderness. SOF ¶ 2.[2] The Project would involve constructing three large-scale open pits for extracting ore, an ore processing facility, a massive mine waste rock and tailings dump, and a sprawling web of roads and other infrastructure across

[1] Plaintiffs' Separate Statement of Facts ("SOF"), filed herewith under Local Rule 7.1(b), provides detailed facts and citations to the three administrative records regarding the Project, explaining its environmental impacts, and Defendants' approval processes, which are summarized here.
[2] Exhibits A and B, *infra*, display Project maps as found at FS-420912–13.

public national forest lands. SOF ¶¶ 3, 12–17. After three years of initial construction, 15 or so years of active mining would process about 115 million tons of ore from the pits and then dump 120 million tons of mine waste. SOF ¶¶ 4, 13–14. One mine pit would be excavated under the East Fork SFSR, requiring that the river be diverted into a nearly mile-long artificial tunnel for 12 or more years. SOF ¶ 12. The mine waste, dumped behind a 475-foot-tall tailings dam, would permanently bury 423 acres of the upper Meadow Creek valley, eradicating bull trout that live there. SOF ¶¶ 14, 36. Beyond the Project site, the new Burntlog Route, gravel mines, and the new transmission line would cut through protected Idaho roadless areas. SOF ¶¶ 18–20.

To accomplish all this, Perpetua would cause surface disturbance—including clearing and deforestation—on over 3,266 acres of land, and in over 900 acres of riparian areas. SOF ¶ 3. The Project would fill in and eliminate or degrade some 111,000 linear feet of streams, 145 acres of wetlands, and 5 acres of other waters. Id. During 20 to 25 years of construction, mining, and reclamation, Perpetua would frequently transport hazardous materials to the site, generate arsenic-laden dust, deplete and re-route streams, and cause increases in temperature, sediment, mercury, and other pollutants in streams throughout the Project area. See SOF ¶¶ 24–28, 36. Following reclamation, Perpetua would engage in decades of restoration; however, many impacts would be permanent, and those impacts Perpetua will try to undo may not attenuate for decades, if ever. See SOF ¶¶ 12, 14–15, 18, 31, 36.

In September 2024, the Forest Service issued a Final Environmental Impact Statement (FEIS) under NEPA that analyzed the environmental impacts of taking no action (i.e., denying Perpetua's proposal) and of two action alternatives: (1) approving Perpetua's proposal (called the 2021 MMP or ModPRO2); or (2) approving Perpetua's proposal with just one modification, to have Perpetua continue using the existing Johnson Creek Route to access the mine site instead of

constructing the new Burntlog Route. See SOF ¶¶ 5–7.

Contrary to Perpetua's repeated assertions that the Project will improve conditions at the mine site over the long-term, the Forest Service concluded that the "no-action" alternative was the "environmentally preferred alternative," and that the Project would degrade the environment, even with restoration. See SOF ¶ 7; FS-420806. Nevertheless, on January 3, 2025, the Forest Service issued the Record of Decision (ROD), choosing to approve Perpetua's proposal, and asserting that the Project complies with all applicable public lands and environmental laws. See SOF ¶ 8.

As part of the approval process, the Forest Service engaged in ESA consultation with FWS and with the National Marine Fisheries Service (NMFS) because it found the Project was "likely to adversely affect" multiple threatened species including wolverine, bull trout, whitebark pine, Chinook salmon, and steelhead. SOF ¶ 9. NMFS prepared a Biological Opinion (BiOp), allowing the Project to proceed but only if major additional conditions are followed, including maintaining strict minimum streamflows and installing additional water pollution treatment, to reduce the harm the Project would cause to salmon and steelhead. SOF ¶ 10. FWS also prepared a BiOp allowing the Project to proceed with some minimal monitoring, but without imposing robust conditions to minimize harm to wolverine, whitebark pine, or bull trout. SOF ¶¶ 10–11.

The Project would cause significant harm to Plaintiff organizations and their members, whose use and enjoyment of the Project area and its surrounds, including the South Fork Salmon River watershed, would suffer from the Project's adverse impacts to water, land, air, fish, wildlife, plants, habitat, and recreation, as detailed in the attached declarations.[3]

[3] The accompanying Akland, Armstrong, Gestring, Kiethly, Kunath, Laidlaw, Ronald, Schmidt, Sears, and Tiedemann declarations establish Plaintiffs' Article III standing. *See W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 484–86 (9th Cir. 2011).

STANDARDS OF REVIEW

Summary judgment is appropriate if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Plaintiffs' claims arise under causes of action established by the APA and the ESA.

The APA authorizes judicial review of federal agency actions, including Defendants' issuance of the ROD, EIS, and BiOp. 5 U.S.C. § 702. The APA requires courts to hold unlawful and set aside agency decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). In applying 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 a problem, if the agency offers an explanation for the decision 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). "An agency action qualifies as 'arbitrary' or 'capricious' if it is not reasonable and reasonably explained." Ohio v. EPA, 603 U.S. 279, 280 (2024) (quotation omitted). An agency "must offer 'a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made' and cannot simply ignore 'an important aspect of the problem.'" Id. (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).[4]

[4] Plaintiffs' Eleventh Claim for Relief (*infra* 4.F) is an ESA citizen suit claim, 16 U.S.C. § 1540(g). However, "[b]ecause the ESA contains no internal standard of review," the APA's standards of judicial review apply to this claim too. *W. Watersheds Project*, 632 F.3d at 496.

ARGUMENT

I. THE FOREST SERVICE UNLAWFULLY APPROVED THE PROJECT'S EXTENSIVE WEB OF INFRASTRUCTURE.

The Court should first reverse the FEIS and ROD because the Forest Service erred as a matter of law in approving the Project's extensive web of off-site infrastructure that will cut through roadless and riparian areas, and destroy, degrade, and fragment wildlife habitat miles beyond the mine site. This infrastructure includes the new Burntlog Route that Perpetua prefers over the existing access route, as well as eight gravel mines, and a new high-capacity transmission line. See SOF ¶¶ 15–17. The Forest Service was wrong to give Perpetua a free pass under the 1872 Mining Law rather than following the governing public land laws and regulations.

A. Applicable Law.

The 1872 Mining Law, 30 U.S.C. §§ 21–54, confers upon U.S. citizens and companies rights to mine "valuable minerals" that they discover on federal lands. Upon locating a "valuable mineral deposit," citizens may validate, occupy, and develop a mining claim. Id. §§ 22, 26; Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 33 F.4th 1202, 1208 (9th Cir. 2022). The 1872 Mining Law also authorizes, to accompany a mining claim, the occupation of a maximum five-acre "millsite," i.e., nonmineral land used to support mining or milling purposes. See 30 U.S.C. § 42. However, it is only through valid discovery of so-called "locatable" minerals that a proprietary interest in occupation and development of a site occurs. See Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 409 F. Supp. 3d 738, 747–48 (D. Ariz. 2019), aff'd, 33 F.4th 1202 (9th Cir. 2022) (hereafter, "Rosemont") ("If there is no valuable mineral deposit beneath[,] . . . no property rights attach to those invalid unpatented mining claims."). Importantly, the text of the 1872 Mining Law only describes rights to land use for mineral extraction activities upon the surface of the claim area or millsite. Id. at 757–63.

Forest Service regulations at 36 C.F.R. Part 228, Subpart A (§§ 228.1–228.15) (the Part 228A rules) cover "operations authorized by the United States mining laws." Id. § 228.1. For such operations, the agency disclaims discretion to deny or significantly curtail mining plans and focuses only on efforts to "minimize adverse impacts" while respecting the applicant's economic aims. Id. By contrast, activities not covered by valid mining rights are not governed by mining laws, as the "mere location of the mining claim 'confers no right in the absence of discovery'." Ctr. for Biological Diversity, 33 F.4th at 1210 (quoting Cole v. Ralph, 252 U.S. 286, 296 (1920)).

For mining on National Forests, the Forest Service must also comply with numerous statutes enacted after the 1872 Mining Law. These include the 1897 Organic Act, which 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 requires that 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. In furtherance of its Organic Act obligation to preserve national forests, the Forest Service has promulgated important regulations like the Idaho Roadless Rule, discussed below. See infra I.E.

The agency must also comply with the Federal Land Policy and Management Act (FLPMA), which requires public lands to be managed to protect "ecological, environmental, air and atmospheric, water resource" values, and that the lands be preserved "where appropriate . . . in their natural condition." 43 U.S.C. § 1701(a)(8). Particularly relevant here, FLPMA Title V governs the issuance of rights-of-way and special use permits for infrastructure like access roads and powerlines to cross federal land. Id. §§ 1761–1771. Any right-of-way that "may have a significant impact on the environment" requires submission of a plan for construction, operation, and rehabilitation. Id. § 1764(d). The federal government may grant a right-of-way for such

infrastructure only if it "will do no unnecessary damage to the environment," id. § 1764(a), and includes environmentally-protective conditions, id. § 1765(a)–(b). The right-of-way holder must pay fair market value for this use of public lands and resources. Id. § 1764(g).

Forest Service regulations implementing FLPMA Title V, at 36 C.F.R. Part 251 (the "Part 251" rules), establish processes and requirements for authorizing special uses (like rights-of-way). These rules require protecting the environment and public interest. See, e.g., id. § 251.56(a) (requiring conditions that "minimize damage to scenic and esthetic values and fish and wildlife habitat," "require siting to cause the least damage to the environment," and "otherwise protect the public interest"). To develop infrastructure across federal land to access non-federal property, the Part 251 rules require that "the landowner must apply for and receive a special-use or road-use authorization." Id. § 251.110(d). The agency has "no obligation to grant additional access" if there is existing access "that is adequate or that can be made adequate." 36 C.F.R. § 251.110(g).

It makes a critical difference whether the Forest Service reviews a proposed use of public lands through the lens of the 1872 Mining Law (and the Part 228A rules) or instead through the lens of its other statutory obligations such as under FLPMA Title V (including the Part 251 rules). The Forest Service approaches its Part 228A rules from the perspective that the activities covered are a "statutory right" over which the agency lacks significant discretion, whereas it retains significant discretionary authority—and significant obligations to the public and the environment—under the other statutes and regulations.

B. It Was Unlawful to Approve the Burntlog Route Under the 1872 Mining Law.

Instead of using the existing Johnson Creek Route to access the remote mine site, the Forest Service granted Perpetua's request to build a second route: the Burntlog Route. Perpetua would upgrade and widen existing roads and construct approximately 15 miles of new road through protected roadless and riparian areas adjacent to the Frank Church-River of No Return Wilderness.

SOF ¶ 15. This new route would be used to haul fuel, transport workers, and make a flurry of other regular vehicle trips to and from the mine site for at least 20 years. See SOF ¶¶ 19, 24, 26.

The Burntlog Route would result in significant adverse impacts. In the FEIS, the Forest Service found that by selecting the Johnson Creek Route, 170 fewer acres of habitat would be lost, which would "reduce the magnitude and extent of impacts on most wildlife, especially wolverine, big game, and migratory birds," compared to the Burntlog Route. FS-243663. The majority of whitebark pine trees removed for the Project are along the Burntlog Route. SOF ¶ 33. Further, the Burntlog Route would cross 37 streams, including in bull trout habitat. SOF ¶¶ 26, 35. The EPA stressed the Burntlog Route's "greater impacts on several environmental and economic indicators . . . includ[ing] more greenhouse gas (GHG) emissions, soil impacts, stream crossings, forest disturbance, wetland loss, wildlife habitat disturbances, new roads, ground disturbance, impact on historical properties, . . . impact[ing] roadless characteristics in three inventoried roadless areas; increas[ing] non-native plant species spread; and creat[ing] construction noise into the Frank Church River of No Return Wilderness." FS-243160.

The Forest Service erroneously asserted that Perpetua simply had the right under the 1872 Mining Law to build this second access road, instead of applying FLPMA Title V and its Part 251 rules governing rights-of-way in National Forests. According to the agency, it approved the Burntlog Route under the Part 228A mining regulations because the route is "in connection with" mining activity (FS-243708), and it would provide "sufficient access to allow mining operations to proceed" while "recogniz[ing] the access to National Forest System lands afforded by the mining laws" (FS-420804). See also FS-245443–44. This was unlawful.

First, nothing in the Mining Law confers upon a mining claim-holder like Perpetua the right to construct a second access route over federal lands. Indeed, the Mining Law itself is silent

about any rights of access. Thus, access rights to mining claims are the same as access rights to other inholdings surrounded by federal land, which are governed by an easement-by-necessity analysis. See, e.g., McFarland v. Kempthorne, 545 F.3d 1106, 1111 (9th Cir. 2008); Mont. Wilderness Ass'n v. U.S. Forest Serv., 496 F. Supp. 880, 885 (D. Mont. 1980) (discussing easements by necessity on federal lands).

An "easement by necessity does not exist if the claimant has another mode of access to his property. In fact, necessity may be defeated by alternative routes or modes of access—no matter how inconvenient." McFarland, 545 F.3d at 1111 (citations omitted). See also Holden v. U.S., 38 Fed. Cl. 732, 737–38 (1997) (finding no "compensable property interest" in closure of mining access road, which was not "the only possible access route to the plaintiffs' mining claims," and noting "there is no federal statutory or regulatory requirement that mandates that the Federal Government provide access roads to individuals with unpatented mining claims").

Here, Perpetua already has reasonable and adequate access along the Johnson Creek Route. In fact, Perpetua has been using the Johnson Creek Route for over a decade, as have other mining companies for many decades. FS-111260, 344178–80, 358378. Moreover, through its NEPA analysis, the Forest Service acknowledged that using Johnson Creek for the entire Project was a feasible alternative to constructing the Burntlog Route. FS-243647. Even under the approved Project, Perpetua would still use the Johnson Creek Route for the initial years of construction, as well as for project access in case of emergency or unplanned closure of the Burntlog Route. FS-420774; SOF ¶¶ 15, 25. Perpetua, thus, has no rights to the Burntlog Route based on any easement by necessity over federal land, or based on any statutory text in the Mining Law.

Secondary access routes, like the Burntlog Route, which are not subject to any such "necessary" easement or any statutory right, are governed by FLPMA special-use permitting—the

statutory scheme Congress enacted in 1976 specifically to control special uses of public lands for infrastructure like roads. But Perpetua has not applied for a right-of-way under FLPMA Title V.

Moreover, the Forest Service cannot approve a secondary access route under the Part 228A rules, on the basis that the route is simply "in connection with" Perpetua's mining, without complying with FLPMA Title V and the right-of-way regulations. Contrary to the agency's assumption, activities not specifically "authorized by the mining laws" are not conferred statutory rights under the mining laws, even if they are "in connection with" mining operations, as the Rosemont mine litigation has confirmed. See Ctr. for Biological Diversity, 33 F.4th at 1221.

In Rosemont, the Forest Service used the Part 228A regulations to authorize a mining company to dump its mine waste on thousands of acres of public lands. The district court held this to be unlawful, finding that even though disposing of the mine waste was connected to mining operations, "the Forest Service's application of its regulations to mining operations cannot grant rights outside the bounds of the Mining Law of 1872." 409 F. Supp. 3d at 763. The court added, "it does not follow that the Forest Service must use these Part 228 regulations merely because an action falls within the regulation's definition of operations." Id. at 764.

In upholding the district court, the Ninth Circuit expressed concern about the Forest Service assuming Mining Law rights where none existed because this would give away, "essentially free of charge," rights over public lands. Ctr. for Biological Diversity, 33 F.4th at 1218. The court held that by overextending assumptions about the company's Mining Law-based rights, the agency "de facto amended the . . . Mining Law to give [the company] what it wants." Id. at 1224.

Here too, the Forest Service used its Part 228A mining regulations to grant a right outside the bounds of the Mining Law of 1872 and give Perpetua what it wants: a new, secondary, access route preferred by Perpetua. But neither the Mining Law, nor inholding law that applies to mine

access, gives Perpetua this right. And because the Burntlog Route is not "authorized by the mining laws," it cannot be approved under the Part 228A rules. Instead, it should have been regulated under the more robust and protective right-of-way approval process in FLPMA Title V and the agency's Part 251 rules. That did not happen here, rendering the FEIS and ROD contrary to law.

C. It Was Unlawful to Approve Gravel Mines Under the 1872 Mining Law.

The Forest Service also unlawfully used the 1872 Mining Law and Part 228A regulations to approve eight gravel mines ("borrow sources") along the Burntlog Route, erroneously asserting they are operations authorized by the mining laws. FS-243749, 244504, 404062. Gravel mines are not authorized by the Mining Law and thus cannot be approved under the Part 228A regulations. See Ctr. for Biological Diversity, 33 F.4th at 1221. The Mining Law applies to "locatable minerals" including gold. Gravel, by contrast, is a "common variety" material governed by separate regulations that apply separate statutes. See 36 C.F.R. Part 228, Subpart C. By approving the gravel mines using the wrong regulations (Part 228A), the Forest Service erroneously bypassed the proper regulations (Part 228C), rendering the approval arbitrary, unreasonable, and contrary to law. 5 U.S.C. § 706(2)(a).

Congress has made clear, and the Supreme Court has recognized, that the disposal of common variety materials like gravel is permissible only under the Materials Act of 1947 and the Common Varieties Act of 1955—and not under the 1872 Mining Law. Watt v. W. Nuclear, Inc., 462 U.S. 36, 57 (1983); see also Ctr. for Biological Diversity, 33 F.4th at 1209 ("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.")

The Forest Service promulgated the Part 228C rules specifically to cover common variety materials like gravel, separate from the Part 228A rules that apply to mining locatable minerals like gold. The Part 228C rules define covered materials as including "sand, gravel, stone, . . . and

other similar materials." 36 C.F.R. § 228.42. They establish a process for the Forest Service to contract for the sale of such materials and for assuring "reasonable protection of, or mitigation of effects on, other resources." Id. § 228.43. They also include a "public interest" standard. Id. § 228.43. Common variety materials "may not be sold for less than the appraised value." Id. § 228.43(b). Moreover, the Forest Service's review and approval of common variety mineral operations is entirely discretionary, meaning the agency may limit or deny any proposal to mine and remove them. As the Department of the Interior 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.

Notably, the Forest Service's initial "Surface Use Determination" for the Project stated that that the gravel mines along the Burntlog Route would be established "as needed" following the Part 228C rules. FS-111247. But in the FEIS and ROD, the Forest Service changed course and approved the gravel mines under the more permissive Part 228A rules. In doing so, the Forest Service relinquished its discretionary authority and bypassed the requirements to sell the gravel for at least fair market value and protect the public interest under the Part 228C rules. This failure to apply the correct laws and regulations requires reversal of the ROD and FEIS.

D. It Was Unlawful to Approve the Transmission Line in the ROD.

The Forest Service also approved constructing a new power transmission line, which would cut through protected roadless and riparian areas en route to the mine site. SOF ¶¶ 17–18, 20, 22–23. Unlike its treatment of the Burntlog Route and gravel mines, the Forest Service admitted the new transmission line requires a right-of-way under FLPMA Title V and the Part 251 rules. FS-243712, 420819. Yet the Forest Service never applied the FLPMA right-of-way process, and never issued an actual special use permit; instead, the agency simply granted its "approval of a special use authorization" for the transmission line in the ROD. FS-420773. This too was unlawful.

FLPMA's right-of-way provisions apply to "systems for generation, transmission, and distribution of electric energy" that would traverse public lands, like the new transmission line. 43 U.S.C. § 1761(a)(4). Indeed, in adjudicative matters within the Department of the Interior, the government has recognized that conveyances as described in § 1761(a), even if for mining purposes, are not "encompassed in the implied rights of access which a mining claimant possesses under the mining laws." Desert Survivors, 96 IBLA 193, 196 (1987) 1987 WL 110528. Desert Survivors involved a water pipeline, a conveyance listed in § 1761(a) in parallel with transmission lines. Before the Interior Board of Land Appeals (IBLA), the Bureau of Land Management had argued that its mining-specific regulations (similar to the Forest Service's Part 228A rules) for reviewing a plan of operations should obviate the need to apply FLPMA's right-of-way procedures. But the IBLA saw "no conflict" between getting a plan of operations approved for the mine and securing a right-of-way for the off-site infrastructure under FLPMA. Id. at 197.

In the FEIS, the Forest Service acknowledged it was deciding whether to give its "authorization of a new transmission line ROW" (FS-244977) and that this would occur "under the regulations governing special use authorizations at 36 CFR 251.53(l)(4)" (FS-243644). And in the ROD, the Forest Service asserted it was approving this special use:

> My decision also includes approval of a special use authorization for Idaho Power Company to upgrade portions of the existing power transmission line, install a new power transmission line from the Johnson Creek substation to the mine area and install upgraded and new substations and support infrastructure for the power transmission line.

FS-420773. Later in the ROD, the Forest Service asserts, without any explanation, that the transmission line "appears consistent with the special use authorization regulations." FS-420805.

This mere assertion that the transmission line "appears consistent" with the special use regulations falls far short of complying with the procedural and substantive requirements under

FLPMA Title V and the Part 251 rules. Again, the regulations lay out detailed requirements for applying for, reviewing, and issuing, denying, or conditionally issuing special uses. See, e.g., § 251.54 ("application requirements and procedures"); § 251.56 ("terms and conditions"); § 251.57 ("the payment in advance of an annual rental fee"). Nowhere in the ROD does the Forest Service show how it complied with FLPMA and the Part 251 rules.

Notably, on February 5, 2025, Idaho Power submitted a right-of-way application for the transmission line. See FS-421637–38. But this was a month after the Forest Service already issued its "approval" in the ROD. In the ROD, the Forest Service illegally jumped the gun and approved the special use authorization for the transmission line right-of-way before it even had an application, without following the prescribed procedures, and without explaining or showing how the transmission line complies with FLPMA and its special use regulations. This kind of unreasoned and unsupported approval is arbitrary, capricious, and unlawful under the APA.

E. The Burntlog Route and Transmission Line Violate the Idaho Roadless Rule.

The Forest Service's approvals of the Burntlog Route and the new transmission line (with its accompanying road) are also illegal because they violate the Idaho Roadless Rule. 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. §§ 294.20–29, to build upon the 2001 national Roadless Rule. As stated in the Idaho Roadless Rule preamble:

> 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, and 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. 61,456, 61,459 (Oct. 16, 2008). The Rule "ensure[s] 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." Id.

To accomplish these aims, the Idaho Roadless Rule generally prohibits new roads in Inventoried Roadless Areas (IRAs). 36 C.F.R. § 294.23. It does include an exception, however, stating: "Nothing in this subpart shall affect mining activities conducted pursuant to the General Mining Law of 1872." Id. § 294.25(b).

The Forest Service admitted that constructing the Burntlog Route and new transmission line would "remove vegetation, alter topography, and modify fish and wildlife habitat" within five IRAs. FS-224914, 243673, 245153. The Burntlog Route would cut through three of these IRAs, and the 100-foot-wide corridor for the new transmission line and associated road would cut through two IRAs. FS-245152–54, 245159; SOF ¶¶ 15, 17–20. In the ROD, the Forest Service asserted that the Project's incursions into IRAs comply with the Idaho Roadless Rule because of the Rule's exception for activities conducted pursuant to the 1872 Mining Law. See FS-420819.

Yet, as explained above, the 1872 Mining law does not authorize extensive off-site infrastructure like the Burntlog Route or the new transmission line. No text in that Act conveys any rights to secondary access routes or power transmission lines. Construction and use of the Burntlog Route and transmission require approval under FLPMA Title V and the right-of-way regulations discussed above, not the Mining Law and 228A rules. The Idaho Roadless Rule's Mining Law-based exception is inapplicable to these roadless incursions. Thus, the Forest Service's approval of the Burntlog Route and transmission line violates that Rule, again rendering the FEIS and ROD unlawful under the APA. See Los Padres ForestWatch v. U.S. Forest Serv., 25 F.4th 649, 654–60 (9th Cir. 2022) (vacating and remanding approval of logging project where conclusion that project was consistent with roadless rule was arbitrary and capricious).

II. THE FOREST SERVICE VIOLATED NFMA.

Plaintiffs are also entitled to summary judgment because the Forest Service further violated NFMA and the APA by allowing Perpetua to construct and locate Project roads, structures,

facilities, and mine waste in over 900 acres of protected "riparian conservation areas" (RCAs) (SOF ¶¶ 23–25), despite mandatory Forest Plan standards prohibiting these RCA incursions unless there is no alternative. And the agency violated NFMA by authorizing roads in roadless areas despite Forest Plan standards prohibiting doing so.

A. Applicable Law.

The National Forest Management Act (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 managing the forest. 16 U.S.C. §§ 1604(c), (g)(2), and (g)(3). 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. U.S. 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) (approval of mine exploration without following Forest Plan standard to protect rare plants violated NFMA); Save Our Cabinets v. U.S. Dep't. of Agric., 254 F. Supp. 3d 1241, 1258–59 (D. Mont. 2017) (approval of mining project that would not meet the Forest Plan's "desired conditions" for water quality violated NFMA).

The applicable Forest Plans for the Payette and Boise National Forests include provisions to protect RCAs. The Forest Service defines RCAs, in part, as including:

> traditional riparian corridors, perennial and intermittent streams, wetlands, lakes, springs, reservoirs, and other areas where proper riparian functions and ecological processes are crucial to maintenance of the RCA's water, sediment, woody debris, nutrient delivery system, and associated biotic communities and habitats.

FS-3648. RCAs include buffers of land extending to 300 feet on either side of perennial streams, and 150 feet on intermittent streams. See FS-244165. Among other standards to protect RCAs,

Forest Plan mining standards MIST08 and MIST09 prohibit locating roads, structures, facilities, and waste facilities in RCAs unless there is no alternative. FS-1328–29, 3304–05. The Forest Plans also include provisions to protect roadless areas, mirroring the Idaho Roadless Rule's prohibitions on new roads. FS-1273, 3247, 3340–41, 3518–19.

B. Authorizing Roads and Structures in RCAs Violated the Forest Plans.

Forest Plan standard MIST08 requires that the Forest Service "[l]ocate new structures, support facilities, and roads outside RCAs." FS-1328, 3304. However, "[w]here 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 "[w]here no alternative to road construction in RCAs exists, keep roads to the minimum necessary for the approved mineral activity." Id.

The Forest Service approved locating numerous road segments, gravel mines, and other structures and support facilities in RCAs throughout the Project area. The FEIS identifies 39 different Project "components" occupying 618.9 acres at the main mine site and another 14 Project components occupying 299.5 acres of RCAs elsewhere in the Project area. FS-225843–47. Yet when it signed off on the Project, the Forest Service never specifically considered whether there were alternatives to locating each of these many component roads, facilities, and structures in RCAs, and never showed that there was no alternative as required by MIST08.

The Forest Service made this same error in Hells Canyon Pres. Council v. Haines, No. CV 05-1057-PK, 2006 WL 2252554, **7–10 (D. Or. 2006), by authorizing mining road and settling pond construction in RCAs without showing there was no alternative. Like MIST08, the relevant Forest Plan standard prohibited new roads, structures, and support facilities in RCAs (called "RHCAs" in that plan) "unless no alternative exists." Id. at *8. The Forest Service argued that its analyses of riparian road incursions could be fleshed out later during project implementation and that settling ponds did not count as structures or facilities. Id. The court rejected these arguments,

holding that to comply with the Plan standard, "the Forest Service is responsible for analyzing the necessity of these new roads, whether alternatives exist, and providing more specific assurances that new road construction will be limited to the minimum amount necessary," and that it "must provide a more thorough analysis." Id. It also held that settling ponds, since they are constructed or built, count as structures or support facilities, so the "Forest Service must perform the required analysis . . . as to whether alternatives exist to locating settling ponds in RHCAs." Id. at *9.

Here too, the Forest Service violated NFMA when it failed to analyze whether alternatives exist to siting each of the many dozens of road segments, structures, and facilities in RCAs. It simply approved all of Perpetua's proposed RCA incursions.

C. Authorizing Waste Facilities in RCAs Violated the Forest Plans.

The Forest Service also failed to comply with Forest Plan standard MIST09, which prohibits locating "solid and sanitary waste facilities" in RCAs unless there is no alternative. FS-3305. "[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. Id.

In its NFMA consistency review document, the Forest Service states that the Project complies with MIST09 because "no solid or sanitary waste facilities are proposed within RCAs." FS-403997. This is patently false. The main mine waste facility for the Project—the massive Tailings Storage Facility, which would hold 120 million tons of mine tailings—is centered on and fills the upper Meadow Creek valley. SOF ¶ 14. The Tailings Storage Facility is so large that not only would it bury the Meadow Creek RCA in mine waste, it would also bury portions of multiple inflowing tributaries to Meadow Creek and their RCAs. See FS-225769 (map). In total, as the Forest Service admits, the Tailings Storage Facility would fill 166.6 acres of RCAs, plus another 60 acres from its associated buttress. FS-244803–05. See also FWS-221.

An agency violates the APA when it offers an explanation that "runs counter to the evidence before the agency." Motor Vehicle Mfrs., 463 U.S. at 43. By resting its decision on the blatantly false assertion that no waste subject to MIST09 was proposed in RCAs, the Forest Service violated NFMA and the APA. To comply, the Forest Service must consider whether there are alternatives to locating the Tailings Storage Facility on top of 226 acres of RCAs; and if not, it must follow MIST09's explicit requirements for preventing, monitoring, and mitigating impacts.

D. Approving the Burntlog Route in Roadless Areas Violated the Forest Plans.

Similar to the Idaho Roadless Rule, the Payette and Boise Forest Plans include standards prohibiting new roads in IRAs with the exception that "road construction or reconstruction may only occur where needed to provide access related to reserved or outstanding rights, or to respond to statute or treaty." FS-3247.[5] The Forest Service repeatedly asserted that approving the Burntlog Route complies with these standards because this "project-related work would be associated with" the 1872 Mining Law. See FS-403959–61, 70–71, 78–80 (emphasis added). But simply asserting the Burntlog Route is "associated with" the Mining Law is not the same as showing it is "needed," as the Forest Plans require. As shown above, Perpetua does not have a right under the Mining Law to the Burntlog Route. Moreover, the Burntlog Route is not "needed," since the Johnson Creek Route already provides access. Thus, the agency's action was arbitrary and violated NFMA.

III. THE FOREST SERVICE VIOLATED NEPA

A. Applicable Law.

The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4370(h), was enacted "to ensure that agencies carefully consider information about significant environmental

[5] Areas in which the road prohibition applies overlap with the proposed Burntlog Route, as specified in the Boise and Payette Forest Plans. *See* FS-1645, 1664 (Boise National Forest); FS-3511 (Payette National Forest); FS-1651, 1663–64, 3340–41, 3518–19 (reiterating standard).

impacts" and "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). For actions like the Project, NEPA requires federal agencies to prepare an EIS, which must include a "detailed statement" on the "reasonably foreseeable environmental effects" of the proposed action and on "a reasonable range of alternatives" to the proposed action. 42 U.S.C. § 4332(2)(C).

Consideration of alternatives "is the heart of the [EIS]," and agencies should "[r]igorously explore and objectively evaluate all reasonable alternatives" that relate to the purposes of the project and briefly discuss the reasons for eliminating any alternatives from detailed study. Alaska Survival v. Surface Transp. Bd., 705 F.3d 1073, 1087 (9th Cir. 2013). 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 violates NEPA. See Natural Resources Def. Council v. U.S. Forest Serv., 421 F.3d 797, 813–14 (9th Cir. 2005).

An agency derives alternatives from the EIS's "purpose and need" section, which defines "the underlying purpose and need to which an agency is responding in proposing the alternatives including the proposed action." City of Carmel-by-the-Sea v. U.S. Dep't of Trans., 123 F.3d 1142, 1155 (9th Cir. 1997). An agency violates NEPA when it "define[s] its objectives in unreasonably narrow terms." Nat'l Parks & Conservation Ass'n v. U.S. Bureau of Land Mgmt., 606 F.3d 1058, 1072 (9th Cir. 2010). While the Forest Service may take the applicant's purposes into consideration, it cannot draft a narrow purpose statement that restricts alternatives to ones motivated by private interests. Nat'l Parks & Conservation Ass'n, 606 F.3d at 1072.

NEPA requires agencies to take a "hard look" at environmental consequences of each alternative, including direct, indirect, and cumulative impacts to all potentially affected resources. Idaho Sporting Cong. v. Rittenhouse, 305 F.3d 957, 973 (9th Cir. 2002). The purpose of NEPA "is

to obviate the need for speculation by insuring that available data is gathered and analyzed prior to implementation of the proposed action." LaFlamme v. FERC, 852 F.2d 389, 400 (9th Cir. 1988).

B. Failure to Consider a Reasonable Range of Alternatives.

The Forest Service violated NEPA here by refusing to include in the FEIS any alternatives to the mining component of Perpetua's proposal, including its proposal to mine three open pits, divert the East Fork SFSR into a nearly mile-long tunnel for 12 or more years, permanently bury 423 acres of the pristine upper Meadow Creek valley under hundreds of feet of mine tailings, and conduct other extraction, processing, and mine waste storage activities. See SOF ¶¶ 12–17.

The FEIS evaluated just two action alternatives: Perpetua's proposal (the ModPRO2 or 2021 MMP); and the "Johnson Creek Alternative." FS-243733–34.[6] The main difference between these is vehicle access. Under the Johnson Creek Alternative, Perpetua would use the existing Johnson Creek Route to access the mine site instead of building the Burntlog Route. FS-243647. As the FEIS admits of the Johnson Creek Alternative, "[t]he mining portion of this alternative would be the same as" under Perpetua's proposal. FS-243734 (emphasis added). Yet "the mining portion" of Perpetua's proposal is the majority of the proposal (see FS-243734–37), and will have the most severe and lasting impacts. See, e.g., FS-243650–675 (FEIS summary of impacts).

Refusing to include any alternatives to "the mining portion" of Perpetua's proposal in the FEIS violates NEPA. See W. Watersheds Proj. v. Abbey, 719 F.3d 1035, 1050 (9th Cir. 2013) (agency violated NEPA by considering only all-or-nothing livestock grazing and failed to include any reduced grazing alternatives); see also Idaho Conservation League v. Lannom, 200 F. Supp. 3d 1077, 1090–91 (D. Idaho 2016) (Forest Service violated NEPA by failing to develop any

[6] The Forest Service also evaluated a "No Action Alternative," which it said it could not legally select, but which it was using for purposes of comparing effects of the action alternatives.

alternatives that reduced ground-disturbing mining activities).

Earlier in the NEPA process, the Forest Service issued a Draft EIS that included Perpetua's proposal, the Johnson Creek Alternative, and two more alternatives to "the mining portion" of Perpetua's proposal. See FS-243699–700. But the Forest Service abandoned those two other alternatives, and never developed and included them or any others as alternatives in the FEIS.

Throughout the NEPA process, Plaintiffs proposed alternatives, including: off-site processing; underground mining; mining focused on deposits with antimony; and avoiding RCA incursions. FS-221088–96, 228514–23, 404665–73. The Nez Perce Tribe proposed alternatives to protect treaty rights; avoid Forest Plan amendments; use project life phases; mine no antimony; and close the mine early. FS-228088–93. But none of these were included in the FEIS.

To be sure, the Forest Service briefly discussed some of these proposed alternatives in the FEIS section "Alternatives Considered but Eliminated from Further Detailed Study." See FS-243860–67. But the agency refused to include any as actual alternatives in the FEIS. By jettisoning its prior DEIS alternatives and rejecting every single alternative proposed by the public, the Forest Service rested on arbitrary and capricious rationales that do not comply with NEPA.

For example, when it rejected Plaintiffs' proposed off-site ore processing alternative, the Forest Service speculated that the environmental impacts would be the same as under Perpetua's proposal, making it not worthwhile to consider. FS-243862. But the very purpose of including alternatives in an EIS is to perform a "detailed" study of their impacts and compare them. "The touchstone for our inquiry is whether an EIS's selection and discussion of alternatives fosters informed decision-making and informed public participation." California v. Block, 690 F.2d 753, 767 (9th Cir. 1982). Instead of pre-judging that on-site and off-site impacts might be the same (an inherently unreasonable assumption given the uniqueness of the Project area), the Forest Service

should have fully developed and taken a hard look at this as an alternative in the FEIS.

Similarly, in response to Plaintiffs' comments proposing an alternative to avoid locating roads, structures, and facilities in RCAs, the Forest Service responded by asserting it considered "nineteen alternatives" that were "analyzed or considered thoroughly [that] addressed RCA impacts" but which were ultimately eliminated from detailed study. FS-246110. Merely considering the possibility of alternatives, but then rejecting them and not including them in an EIS, does not count toward as considering a reasonable range of alternatives under NEPA.

As another example, when it rejected the antimony mining emphasis alternative proposed by Plaintiffs, the Forest Service completely misconstrued the alternative. The agency explained that pursuing "only the antimony production would severely impact the economics." FS-245536 (emphasis added). Plaintiffs, however, did not propose abandoning gold and silver production; rather, they proposed targeting only the gold and silver deposits that also contain antimony. Yet the Forest Service never considered this reasonable alternative, instead rejecting a strawman antimony-only alternative.

The Forest Service also rejected many alternatives on economic grounds, dismissing alternatives that might cost more to undertake or might generate less revenue, such as for the off-site processing alternative, FS-243862, and the antimony emphasis alternative, FS-245536. In each instance, the Forest Service ignored the actual feasibility of each alternative, and instead conflated feasibility with Perpetua's interest in maximizing profit. Repeatedly throughout its response to comments, the Forest Service stated that it rejected alternatives based on a desire not to "disregard Perpetua's purpose and need.". See, e.g., FS-245336–37, 245545–47 (emphasis added). This was wrong. Maximizing Perpetua's profit is not the Forest Service's purpose and need for action. And NEPA requires agencies to include "viable" alternatives in their NEPA documents—not just those

alternatives that would be the most advantageous to industry. Abbey, 719 F.3d at 1050 ("The existence of a viable but unexamined alternative renders [a NEPA document] inadequate.").

In sum, the Forest Service cannot reasonably argue that there is not a single viable alternative to giving Perpetua everything it wants at the mine site. Failing to include any such alternatives in the FEIS violates NEPA.

C. Failure to Take a Hard Look

1. Air Emissions

The Forest Service violated NEPA's "hard look" mandate by grossly underestimating potential air pollution from the Project. Project construction, blasting, and haul road traffic would generate harmful particulate matter (dust). SOF ¶ 27. That dust would include arsenic, a known hazardous pollutant and carcinogen. Id. Most dust would be generated by haul road traffic. Id.

The air quality "Permit to Construct" that the Idaho Department of Environmental Quality issued to Perpetua allows haul road traffic to handle up to 180,000 tons per day. FS-101467. Yet when it assessed particulate and arsenic air emissions, the Forest Service assumed Perpetua would haul only about 55% that amount: 99,500 tons per day. FS-244497, 393664–65. According to the Forest Service, 99,500 tons per day is more "realistic" than 180,000 tons per day. FS-393664–65. Yet nothing in the ROD limits Perpetua to hauling only 99,500 tons per day.

The FEIS, thus, ignored nearly half the particulate matter and arsenic emissions that the Project's haul traffic could cause. This ignores an important aspect of the problem, is irrational, and fails to take a hard look at the Project's air emissions, in violation of the APA and NEPA.

2. Risk of Fuel and Other Hazardous Material Spills

Perpetua will frequently transport hazardous materials to and from the remote mine site using the Burntlog Route. Annually, Perpetua would transport "[s]ubstantial quantities" of fuels, lubricants, and chemicals via large trucks to and from, as well as around, the Project site. SOF

¶ 24. This includes 5.8 million gallons of diesel fuel, 100 tons of explosives, and 4,000 tons of sodium cyanide, among dozens of other "hazardous materials." Id. During the initial construction period of two to three years, hazardous materials—mostly diesel—would be transported to and from the mine site using the existing Johnson Creek Route. SOF ¶ 25. After initial construction, hazardous materials would be transported using the new Burntlog Route, which crosses 37 streams and includes 9 total miles that are within 0.5 mile of surface water resources. SOF ¶ 26. The Burntlog Route would be a high-elevation, remote mountain road that can have ice and snow in winter. Id. The Route would have steep grades, switchbacks with reduced turning radii, and no emergency truck ramps. Id. The Route would cross 26 landslide and rockfall areas and 38 avalanche paths, which could increase the potential for truck accidents resulting in spills. Id.

Material transportation would also occur beyond the Johnson Creek and Burntlog Routes, using the 119-mile "major transportation corridor throughout Valley County" on State Highway 55, passing through the communities of Donnelly, McCall, New Meadows, Cascade, Smith's Ferry, Banks, and Horseshoe Bend. FS-244984, 395557, 395595. Highway 55 also runs adjacent to the North Fork of the Payette River for many miles and has 23 stream crossings. FS-395558.

In the FEIS, the Forest Service determined that the Project poses a "low risk of spills." FS-244619. This conclusion was arbitrary and capricious and fails to take a hard look, in violation of NEPA, in two ways. First, the Forest Service failed to perform a quantitative spill risk assessment along the transportation corridors. See FS-244604–20. Plaintiffs' comments, and accompanying reports by expert Susan Lubetkin, pointed out that for other mining and industrial projects, agencies often calculate the number of spills per truck mile ("N") by multiplying the number of truck-miles driven ("T") by the spill rate ("R"). FS-228582, 241995–96; FS-404778–79. The FEIS presented a spill rate based on national data for large trucks carrying hazardous materials on

national highways (corresponding to the "R," above). FS-244616. But the FEIS analysis stops there, never identifying a T and never calculating an N—the number of potential spills. See id. Without estimating the number of potential spills, the Forest Service ignored Plaintiffs' comments, and its "low risk of spills" conclusion is arbitrary and violates NEPA's hard look mandate.

Moreover, the R (rate of spills) used by the Forest Service is a gross underestimate. The FEIS lists spill rates ranging from only 1.4×10^{-9} spills per large truck mile (345 spills over 275.01 billion miles driven) to 1.9×10^{-9} spills per large truck mile (552 spills over 275.01 billion miles driven). See FS-244616. But as Plaintiffs pointed out in their comments and accompanying reports by expert Susan Lubetkin, other mining EISs have used spill risk values that are about 100 times greater or more (R values of 1.87×10^{-7} and 4.95×10^{-6}). FS-228582, 241996. The Forest Service failed to respond to these comments and stuck with its 100-times-lower spill risk value in the FEIS. This was arbitrary and capricious and violates NEPA. See Ctr. for Biological Diversity v. U.S. Forest Serv., 349 F.3d 1157, 1169 (9th Cir. 2003) (failure "to disclose and discuss responsible opposing scientific viewpoints in the final [EIS]" violated NEPA).

IV. FWS AND THE FOREST SERVICE VIOLATED THE ESA

A. Applicable Law.

Congress enacted the Endangered Species Act (ESA) "to halt and reverse the trend toward species extinction, whatever the cost." Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184 (1978). The "heart of the ESA" is its "Section 7" consultation requirement. W. Watersheds Project v. Kraayenbrink, 632 F.3d at 495. 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). Under Section 7, after preparing a Biological Assessment to assess effects on listed species present in an area of proposed action, a federal agency like the

Forest Service must formally consult with FWS and/or the National Marine Fisheries Service (NMFS) if it determines that the proposed action is likely to adversely affect listed species. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(f), 402.14(a). FWS completes its consultation process by providing a "biological opinion" (BiOp) explaining how the proposed action will affect the listed species or habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14.

When preparing a BiOp, FWS must use the "the best scientific and commercial data available" and make a jeopardy determination to ensure that the proposed action is not likely to jeopardize protected species or adversely affect designated critical habitat. 16 U.S.C. § 1536(a)(2). During consultation, FWS must: "(1) Review all relevant information provided by the Federal agency or otherwise available"; "(2) Evaluate the current status and environmental baseline of the listed species"; "(3) Evaluate the effects of the action and cumulative effects on the listed species"; and "(4) Add the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species [and] formulate the Service's opinion as to whether the action is likely to jeopardize the continued existence of listed species." 50 C.F.R. § 402.14(g).

If, as here, FWS issues a "no jeopardy" and "no adverse modification of critical habitat" opinion, but determines that the action may incidentally "take" individual members of a listed species, FWS must issue an incidental take statement ("ITS"). 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). A "take" occurs if the species will be harassed, harmed, pursued, hunted, shot, wounded, killed, trapped, captured, or collected, or there will be an attempt to engage in any such conduct, as a result of the action. 16 U.S.C. § 1532(19). The ITS must articulate: (1) the amount or extent of the incidental take on the species, (2) "reasonable and prudent measures" (RPMs) needed to minimize the amount or extent of take, and (3) the "terms and conditions" that the action agency must follow to implement the RPMs. 16 U.S.C. § 1536(b)(4)(i)–(iv). Take is permissible

if it complies with the ITS terms and conditions and is within the incidental take limit. Id. § 1536(o)(2). If not, the action agency must reinitiate ESA consultation. 50 C.F.R. § 402.14(i)(5).

An ITS must "set forth a 'trigger' that, when reached, results in an unacceptable level of incidental take, invalidating the safe harbor provision, and requiring the parties to re-initiate consultation." Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife, 273 F.3d 1229, 1249 (9th Cir. 2001). Preferably, the trigger is a numerical measure of individuals taken, but FWS may use a surrogate, such as changes in ecological conditions affecting the species. Id. at 1250. A surrogate may be used "to express the amount or extent of anticipated take" as long as the ITS (a) "[d]escribes the causal link between the surrogate and take of the listed species," (b) "explains why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species, and" (c) "sets a clear standard for determining when the level of anticipated take has been exceeded." 50 C.F.R. § 402.14.

ESA compliance cannot be based "on speculation or surmise." Bldg. Indus. Assoc. of Superior Calif. v. Norton, 247 F.3d 1241, 1247 (D.C. Cir. 2001) (citation omitted). A biological opinion violates the ESA if it "fails to consider[ ] the relevant factors and articulate a rational connection between the facts found and the choice made." Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., 698 F.3d 1101, 1121 (9th Cir. 2012) (cleaned up).

B. FWS's Biological Opinion Is Arbitrary, Capricious, and Contrary to Law.

The Forest Service prepared a Biological Assessment, finding the Project was likely to adversely affect multiple ESA-listed "threatened" species including wolverine, bull trout, and whitebark pine. SOF ¶ 9. FWS issued a BiOp on September 5, 2024, finding the Project would adversely affect these species, but concluding the Project would not jeopardize their continued existence. Id. ¶¶ 10–11. Because the Project would cause the take of wolverine and bull trout, the BiOp included ITSs for those species. Id. The BiOp and its ITSs are deficient in numerous ways.

1. The Wolverine Jeopardy Analysis Violates the ESA and APA.

The wolverine was listed as threatened in November 2023, due primarily to the ongoing and increasing impacts of climate change and associated habitat degradation and fragmentation. FWS-316. Wolverines generally use areas at high elevations, with steeper terrain, more snow, fewer roads, and reduced human activity. FWS-317. "Wolverines are . . . particularly sensitive to disturbances such as anthropogenic presence. One of the primary effects of human presence to wolverines is habitat displacement." FWS-326. "Females with kits are extremely sensitive to human disturbance and may abandon den sites if disturbed[.]" Id.

One study "identified at least 16 individual wolverines in or adjacent to the [Project] area from 2010 to 2015," four of them "within the mine site boundary, including a resident reproductive female, which likely indicates a den in the general area." FWS-319. In its BiOp, FWS admitted the Project would harm wolverine throughout the life of the Project. Constructing the mine, the Burntlog Route, and utility corridors would harm wolverine, including potentially denning females, through habitat loss. See FWS-322–25. Noise, light, and other aspects of human and industrial presence from the Project would cause harm by disturbing wolverine. See FWS-325–33.

Nevertheless, the FWS BiOp concluded: "After reviewing the current status of North American wolverine, the environmental baseline in the action area, effects of the proposed action, and cumulative effects, it is the Service's biological opinion that the proposed action is not likely to jeopardize the continued existence of wolverine." FWS-336–337. FWS's subsequent "rationale for this conclusion," see FWS-337, consists of only three paragraphs, which are riddled with errors, omissions, unsupported assumptions, and contradictions. Each of these flaws render FWS's no-jeopardy determination arbitrary and capricious and contrary to the ESA.

a) Arbitrarily Asserting No Long-term or Measurable Effects.

One error in FWS's jeopardy analysis is the conclusory statement that "[l]ong-term effects are not expected to wolverines in the action area or statewide nor are measurable effects expected to the conservation or recovery of the species." FWS-337. This statement is contradicted by the record. Earlier in the BiOp, FWS itself admitted: "Noise and light from operations may disturb wolverine foraging or denning behavior throughout the life of the proposed action (approximately 20-25 years for construction and mining activities, up to 40 or more for monitoring and water treatment)." FWS-326. Sixty to 65 or more years is not short-term.

The Forest Service similarly concluded that the Project will have long-term adverse impacts on wolverine, which may take decades to undo, and which could be irreversible:

> The 2021 MMP would impact the most habitat overall, reduce habitat connectivity, and result in the highest level of displacement (particularly from breeding and winter range), based on direct and indirect impacts. Therefore, based on the impact analysis for the wolverine and its habitat, the 2021 MMP would result in localized, long-term, and moderate impacts to the wolverine, particularly the local population (part of larger Central Idaho sub-populations).

FS-244897 (emphasis added).

> Reclamation of high-value habitats for wildlife species such as Canada lynx, wolverines and migratory bird species may require long periods of time (decades). Impacts to populations of threatened or endangered species, or species with low populations, such as Canada lynx or wolverine, would be considered irreversible, because recovery may take a long period of time or not occur at all. The direct mortality of wildlife also would be an irreversible impact.

FS-244959 (emphases added).

Simply asserting that effects will not be long-term in the face of the Forest Service's and FWS's own findings to the contrary fails to use the best available science, 50 C.F.R. § 402.14(d), and is not rationally connected to the facts in the record, rendering the BiOp unlawful under the APA and ESA. See Ctr. For Biological Diversity, 698 F.3d at 1121.

b) Ignoring Wolverine Population Size.

Another error in its jeopardy analysis is that FWS wholly ignored wolverine population size. See FWS-336–37. Instead, FWS downplayed the Project's adverse effects to wolverine by focusing on direct habitat loss compared to all wolverine habitat in the Project area and Idaho, and by asserting that "the number of individuals occupying the action area is expected to be small." Id. Strikingly absent from the BiOp, however, is any analysis of how important the Project site is to wolverine populations or how even loss of a few individuals might affect local, regional, and even national populations. In fact, the BiOp never even mentions the total population of wolverine.

FWS's wolverine listing rule cited research estimating that only 318 remaining wolverines inhabit the lower 48 states. 88 Fed. Reg. 83,726, 83,761 (Nov. 30, 2023). A map in an appendix to the BiOp showing wolverine habitat, observations, and dens demonstrates that the Project would occupy a hot spot of wolverine activity, compared to other areas of wolverine habitat throughout the lower 48 states. See FWS-423. Confirming this, as noted above, a recent study identified at least 16 individual wolverines in or adjacent to the Project area from 2010 to 2015, including a resident reproductive female in the Project area, "which likely indicates a den in the general area." FWS-319. But by focusing on habitat, and ignoring the fact that only 318 wolverines remain in the lower 48, FWS never analyzed this best available science, and never considered how directly or indirectly harming 16 wolverines could affect local, regional, or national populations.

ESA regulations require BiOps to include a "detailed discussion of the environmental baseline of the listed species," and to use that baseline to evaluate jeopardy. 50 C.F.R. § 402.14(h). If FWS fails to properly analyze the environmental baseline, "its no-jeopardy conclusions . . . are necessarily arbitrary." Appalachian Voices v. U.S. Dep't of Interior, 25 F.4th 259, 278 (D.C. Cir. 2022). In American Rivers v. FERC, 895 F.3d 32 (D.C. Cir. 2018), a no-jeopardy determination

was arbitrary and capricious because the BiOp determined take would occur at the local level but failed to explain "as a basis for its finding of no jeopardy that the local populations are insignificant to the larger populations." Other courts have similarly held BiOps unlawful when they fail to properly account for population size. See Sierra Club v. Nat'l Marine Fisheries Serv., No. DLB-20-3060, 2024 WL 3860211, at *17 (D. Md. Aug. 19, 2024) (NMFS "fail[ed] to take proper account of evidence of population decline"); Defenders of Wildlife v. Jewell, 176 F. Supp. 3d 975, 1005–06 (D. Mont. 2016) (FWS failed to consider harm in relation to small population size); Northwest Env'tl. Advocates. v. EPA, 855 F. Supp. 2d 1199, 1222–23 (D. Or. 2012) ("scant analysis" of how action would affect species with different population sizes). Here too, the BiOp failed to considered population and is "necessarily arbitrary." Appalachian Voices, 25 F.4th at 278.

c) Failure to Consider Climate Change Effects.

FWS's jeopardy analysis is also unlawful because it failed to consider the effects of climate change when added to the effects of the Project. See FWS-336–337. A BiOp jeopardy determination must use the best available science, 16 U.S.C. § 1536(a)(2), and must "[a]dd the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species." 50 C.F.R. § 402.14(g)(4). To do so, FWS must adequately address climate change impacts on ESA-listed species in a BiOp. Appalachian Voices, 25 F. 4th at 271.

In the wolverine section of the BiOp, FWS mentioned climate change on only two pages. On the first, FWS acknowledged that wolverine are listed as threatened "due primarily to the ongoing and increasing impacts of climate change and associated habitat degradation and fragmentation." FWS-316 (emphasis added). This is because wolverines are highly dependent on snow, including persistent spring snow cover. See FWS-317–19. FWS also warned: "Climate change has the potential to exacerbate effects from other stressors such as multi-lane roads,

backcountry winter recreation, and human development, all of which could then impact genetic diversity and small population dynamics[.]" FWS-316. FWS then mentioned climate change only once more, 20 pages later, in a passage downplaying the effects of the Project by asserting it would not rise to the same "primary threat" level that climate change poses to wolverine. FWS-336.[7]

Yet nowhere in the BiOp does FWS discuss the implications of climate change on wolverine habitat in and around the Project area. And nowhere in the BiOp does FWS add these climate effects to the habitat loss, degradation, and fragmentation it admits the Project will cause. In the no-jeopardy determination part of the BiOp, FWS does not even mention climate change. FWS-336–37. This is a major omission for a snow-dependent species whose biggest threat is climate change, and for a Project that will amplify adverse effects to wolverine for many decades.

Courts routinely strike down BiOps that pay only lip service to climate change but fail to add climate change effects to those from the proposed action. See, e.g., Willamette Riverkeeper v. Nat'l Marine Fisheries Serv., 763 F. Supp. 3d 1203, 1237 (D. Or. 2025) (BiOp admitted "effects of climate change are 'detrimental' and contribute to worsening the existing key limiting factors" but failed to "assess whether [steelhead] can sustain impacts from the [proposed action] on top of climate change effects"); W. Watersheds Proj. v. McKay, No. 22-35706, 2023 WL 7042541 at *2 (9th Cir. Oct. 26, 2023) (BiOp climate change discussion was "deficient" because it failed to consider "whether the small frog population could sustain grazing-related impacts on top of potential climate change effects"); Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 184 F. Supp. 3d 861, 874 (D. Or. 2016) (BiOp "analysis does not apply the best available science, overlooks important aspects of the problem, and fails properly to analyze the effects of climate

[7] The BiOp's Appendix D, on the "status of the species," provides a general overview of the threat climate change poses to wolverine, but it does not address effects related to the Project.

change, including its additive harm"); see also Wild Fish Conservancy v. Irving, 221 F. Supp. 3d 1224, 1234 (E.D. Wash. 2016); Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., No. 2:21-cv-01527-DJC-DMC, 2025 WL 1993612 at *8–*9 (E.D. Cal. July 17, 2025); S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv., 723 F. Supp. 2d 1247, 1273–74 (E.D. Cal. 2010).

3. The Wolverine Incidental Take Statement Violates the ESA and APA.

In the BiOp, FWS determined that the Project was reasonably certain to cause incidental take of wolverine through injury and mortality from den abandonment due to increased energy expenditure, reduced condition of adult females, and increased offspring vulnerability and loss of kits. FWS-338. "Some females with kits are reasonably certain to be harmed[.]" Id. Instead of providing a numerical take limit on individual wolverines, FWS chose to use a surrogate take limit, as ESA regulations allow. Id. FWS found the Project would cause 779.3 acres of ground disturbance in denning habitat, and it decided to use that acreage figure as the take limit. FWS-336, 339. This acreage represents habitat that would be cleared to construct the mine, access roads, and utility corridors. FWS-322. FWS's use of this surrogate was unlawful for multiple reasons.

a) Failure to Include Monitoring and Reporting Tied to the Take Limit.

First, the wolverine ITS fails to include any monitoring and reporting related to the take limit, in violation of ESA regulations which require that a surrogate take limit must "set[] a clear standard for determining when the level of anticipated take has been exceeded." 50 C.F.R. § 402.14(i)(1)(i). "In order to monitor the impacts of incidental take, the Federal agency or any applicant 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) (emphasis added).

As the Ninth Circuit has explained, these ESA "regulation[s] make[] clear that the Service is responsible for specifying in the statement how the action agency is to monitor and report the

effects of the action on listed species." Wild Fish Conservancy v. Salazar, 628 F.3d 513, 531–32 (9th Cir. 2010). There, the Ninth Circuit invalidated an ITS, even though it "provide[d] a clear numerical cap on take—twenty bull trout prevented from spawning", because the "twenty bull trout limit [was] not accompanied by a monitoring and reporting requirement" and thus "failed to establish a meaningful trigger for renewed consultation after the take exceeded authorized levels." Id. at 531–32; see also WildEarth Guardians v. U.S. Fish & Wildlife Serv., 342 F. Supp. 3d 1047, 1065 (D. Mont. 2018) (finding that "[i]n the absence of a connection between reporting and take," these requirements "are like two ships passing in the night" and are "arbitrary and capricious").

Here, the wolverine ITS includes a few miscellaneous monitoring and reporting requirements, but none of them require the Forest Service to monitor or report the acres of wolverine denning habitat that the Project disturbs. FWS-339–40. Thus, if the Project caused surface disturbance in more than 779.3 acres of denning habitat—exceeding the ITS take limit—FWS and the Forest Service would never know. The monitoring FWS required is not in any way connected to the take limit. This violates the ESA just like in Wild Fish Conservancy.

b) Failure to Account for Forms of Take Other Than Habitat Loss.

Second, the wolverine take limit (779.3 acres of ground disturbance in denning habitat), accounts only for take caused by habitat loss. It fails to account for other forms of take that FWS determined the Project will cause. This violates ESA regulations requiring that an ITS "[s]pecif[y] the impact of incidental taking as the amount or extent of such taking," and that it describe "the causal link between the surrogate and take of the listed species." 50 C.F.R. § 402.14(i)(1)(i).

The Ninth Circuit has held that an ITS violates the ESA if the take limit quantifies some types of incidental take but fails to "quantify the amount of other types of incidental take that the [] project may cause" when "FWS contemplated these [other] types of nonlethal take [will occur]

in its biological opinion." Ctr. for Biological Diversity v. Bernhardt, 982 F.3d 723, 749 (9th Cir. 2020); see also Sovereign Inupiat for a Living Arctic v. U.S. Bureau of Land Mgmt., 555 F. Supp. 3d 739, 802 (D. Alaska 2021) (holding ITS unlawful that failed to account for non-lethal bear disturbance when "FWS contemplated that at least some . . . would occur"); Defenders of Wildlife v. U.S. Dep't of Interior, 931 F.3d 339, 364–65 (4th Cir. 2019) (holding ITS unlawful that accounted for take in only part of area impacted by project, and not take in other areas too).

Like in Bernhardt, here FWS quantified some types of take (denning habitat loss) in the ITS but failed to quantify or otherwise specify limits on any other types that would occur. See FWS-338–39. For example, in the BiOp, FWS explained how wolverine would "face adverse effects from habitat loss . . . and displacement due to human activities" from the Project. FWS-335 (emphasis added). FWS admitted "noise and light from construction and operations may disrupt wolverine behavior within 1-2 miles of the mine site, causing habitat displacement and fragmentation, interfering with communication, increasing stress, and potentially affecting reproductive success and survival rates." Id. "Continuous noise during operations, including the denning season may cause females to abandon den sites, risking increased energy expenditure and offspring vulnerability." Id. "Increased public and proposed action use on roadways may increase vehicle collision risks." Id. But FWS failed to account for these types of take related to human presence, noise, light, and collisions in the ITS. See FWS-338–39. It only addressed habitat loss.

Additionally, as part of the Project, the Forest Service authorized grooming a 10.8-mile winter recreation trail on the existing Cabin Creek Road in wolverine habitat. FWS-330. FWS admitted: "the associated increased recreational activity (e.g., snowmobiling, skiing, etc.) will likely cause impacts to wolverines due to noise from and presence of OSVs in an area where they were not previously as this will be a new winter route." Id. FWS found that this was likely to cause

wolverines to avoid this area and could result in human presence near den sites causing female wolverines to shift or abandon dens. Id. FWS also acknowledged the trail may adversely affect "foraging, sheltering, and denning behaviors of reproductive females and kits during a time period when food resources are limited and environmental conditions are harsh." Id. But these impacts are not captured by the ITS and its take limit. See FWS-338–39.

Thus, the ITS failed to specify "the amount or extent of" take and failed to describe the "causal link" between the take limit and the take that would occur under the Project in violation of ESA regulations. 50 C.F.R. § 402.14(i)(1)(i).

c) Failure to Include RPMs and Terms and Conditions.

Third, the ITS failed to include any reasonable and prudent measures (RPMs), and associated terms and conditions, to minimize take. See FWS-339. The ESA and its regulations require that an ITS "specifies those reasonable and prudent measures that [FWS] considers necessary or appropriate to minimize such impact." 16 U.S.C. § 1536(b)(4)(C)(ii); 50 C.F.R. § 402.14(i)(1)(ii). Further, the ITS must "[s]et[] forth the terms and conditions . . . that must be complied with by the Federal agency . . . to implement the [RPMs]." Id. § 402.14(i)(1)(iv).

FWS did not include any RPMs, or any terms and conditions, to minimize take of wolverine. Instead, in the RPM section of the ITS, FWS states that "compliance with the proposed action outlined in the [Forest Service's Biological] Assessment, including proposed environmental design features, is essential to minimizing the impact of incidental take of wolverine" and simply states that FWS "believes the measures proposed by the Forest are sufficient." FWS-339. FWS never identified these "sufficient" measures and "essential" aspects of the Project, and it failed to provide any explanation as to why they are sufficient to minimize take. See id.

FWS made the same error in Ctr. for Biological Diversity v. Culver, 2024 WL 4505468,

No. 21-cv-07171-SI, at *64–65 (N.D. Cal. Oct. 22, 2024), where the court held an ITS without any RPMs is "arbitrary and capricious and otherwise contrary to law." There, like here, FWS asserted it "need not issue any RPMs to minimize impact based on the FWS's assessment that the action agency was taking sufficient action not to jeopardize the species." Id. The court disagreed, concluding that it is not "optional" for an ITS to include RPMs and terms and conditions. Id. Like in Culver, FWS's refusal here to develop any RPMs and terms and conditions is arbitrary, capricious, and violates the ESA and its implementing regulations.

4. The Whitebark Pine Jeopardy Analysis Violates the APA and ESA.

In 2022, FWS listed whitebark pine as a threatened species. See 87 Fed. Reg. 76,882 (Dec. 15, 2022). Whitebark pine is 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. FS-244135. Whitebark pine are found in the Project area. SOF ¶¶ 33–34. FWS estimated that construction and habitat loss from the Project may impact 337.5 acres of occupied whitebark pine habitat and 1,278 individual trees, including 27 observed to be cone bearing, with the majority of tree removal on the Burntlog Route and its gravel mines. Id.

In its BiOp, FWS stated that whitebark pine faces four primary threats: "altered fire regimes, white pine blister rust (a disease caused by an introduced fungus), mountain pine beetle, and climate change." FWS-299. FWS found that three of these threats have already taken a toll on whitebark pine in the Project area. Of 2,069 acres of surveyed whitebark pine habitat in the action area, nearly all of it—1,902 acres—has been affected by wildfire (92%), mountain pine beetles (27%), or blister rust (42%). FWS-306. Yet FWS failed to add the Project's effects to the effects from these primary threats to whitebark pine when it assessed jeopardy. In fact, the no-jeopardy

determination section of the BiOp fails to even mention climate change, fire, or mountain pine beetle. See FWS-314–15. And although that section includes a single reference to blister rust, it does not acknowledge that blister rust will have adverse additive effects. Id.

Again, the ESA requires FWS to "[a]dd" the effects of the action, cumulative effects, and the environmental baseline to assess jeopardy. 50 C.F.R. § 402.02. "This step is critical to ensure the action is not analyzed in a vacuum." Appalachian Voices, 25 F.4th at 278 (quotation omitted). "Thus, for obvious reasons, simply reciting the activities and impacts that constitute the baseline and cumulative effects and then separately addressing only the impacts of the particular agency action in isolation is not sufficient." Id. (cleaned up). Here, the BiOp suffers from this very error: it simply recites information about the primary threats to whitebark pine (FWS-299, 306), but then assesses the Project's impacts in isolation from them (FWS 314–15). This violates the ESA.

5. The Bull Trout Jeopardy Analysis Violates the APA and ESA.

Bull trout are a threatened species that inhabit streams throughout the action area, including the upper East Fork SFSR "priority watershed." SOF ¶ 34–35. The Project would cause drastic changes to streams at the mine site, including diverting streams around the site into "constructed surface water channels," with certain diversions piped underground; the complete draining of Yellow Pine Pit Lake, which contains bull trout; and the extirpation of bull trout in upper Meadow Creek. FWS–92–93, 101, 260. The diversions include moving the East Fork SFSR into a 0.9-mile long tunnel for 12 years or more. SOF ¶ 12.

FWS admitted in its BiOp that the Project would further impair bull trout and its critical habitat by creating major physical changes to the area, and causing additional increases in stream temperatures, toxic pollution, increases in sediment and turbidity, decreased stream flows, and physical barriers to fish movement. SOF ¶ 36; FWS-256–59, 284. FWS concluded, however, that

the extensive 20-plus years of mining, with some adverse impacts to bull trout habitat lasting over a century, would result in only insignificant impacts to bull trout. FWS-261–62. This conclusion was arbitrary and capricious and unlawful under the APA and ESA, for reasons detailed below.

a) Ignoring Full Extent of Impacts to Bull Trout.

Where FWS presented the rationale for its no-jeopardy determination in the BiOp, it stated that the Project is expected to result in the injury or mortality of 402 bull trout in the Project area. FWS-261–62. FWS then brushed this off as "negligible" at the population scale. Id. There are two problems with this, each of which render the BiOp arbitrary, capricious, and contrary to the ESA.

First, this 402 number represents only the number of bull trout that FWS estimated would be injured or killed during "fish handling" (electrofishing, electroshocking, block nets, dewatering, and trap and haul operations). See FWS-268–70. But fish handling was just one of five categories of take identified in the ITS. FWS also found the Project would cause take through: "Habitat Loss" due to flow reductions and temperature increases (FWS-263–65); "Sediment Delivery" (FWS-265–66); "Chemical Contaminants" (FWS-266–67); and "Physical Barriers" (FWS-267–68). These categories are not insignificant. For example, elsewhere in the BiOp, FWS estimated that burying Meadow Creek in mine waste would cause habitat loss that would extirpate 111 bull trout. FS-214. And 187 bull trout would be taken due to stream temperature increases. See FS-264–65. These are just two examples, and may be gross underestimates. See infra IV.B.5.b (temperature).

It was misleading and irrational for FWS to ignore four of five categories of take in its jeopardy analysis. "An agency's action is arbitrary and capricious if the agency fails to consider an important aspect of the problem." Lands Council, 395 F.3d at 1026 (9th Cir. 2005). Here, FWS ignored not just "an important aspect of the problem," it ignored four important aspects.

Second, when FWS claimed injuring or killing 402 bull trout would be "negligible," it

failed to properly consider impacts to local bull trout populations. FWS calculated that 402 bull trout represent only a tiny fraction of the total number of bull trout in Idaho. FWS-262. But the number of bull trout in Idaho has no meaningful biological significance under the ESA. And while the BiOp also mentions the more localized "South Fork Salmon" bull trout core area (which does have biological significance), FWS does nothing more than make the conclusory statement that it does not expect the loss in bull trout from the Project to "measurably" affect them. Id. ESA regulations require biological opinions to include a "detailed discussion of the environmental baseline of the listed species," and to use that baseline to evaluate jeopardy. 50 C.F.R. § 402.14(h). Here, FWS failed to analyze detailed information about the South Fork Salmon core area populations, rendering its jeopardy analysis arbitrary. Appalachian Voices, 25 F.4th at 278.

In summary, by relying on a fictitious assertion that only 402 bull trout will be impacted, and by arbitrarily comparing that number to the state-wide bull trout population, FWS has failed to articulate a rational connection between the facts in the record—showing major impacts from the Project on bull trout and bull trout habitat (see SOF ¶ 36)—and its conclusion that the Project would result in only insignificant harm to the fish. Wild Fish Conservancy, 628 F. 3d at 525.

b) Failure to Consider Climate Change Effects to Bull Trout.

FWS failed to consider the additive effects of climate change in its bull trout jeopardy analysis. Cold water is one of the most critical parameters for bull trout habitat: the species cannot tolerate constant temperatures above 16 ºC and requires temperatures of 4–9 ºC for spawning. FWS-147; see also FWS-279 ("[w]ater temperatures ranging from 2 to 15 ºC" required). "Strict cold water temperature requirements make bull trout particularly vulnerable to activities that warm spawning and rearing waters." 64 Fed. Reg. 58,910, 58,921 (Nov. 1, 1999).

Stream temperatures in the Project area are already designated as "impaired" due to

elevated stream temperatures. FWS-146. The East Fork SFSR contains 26.21 kilometers of available bull trout habitat, and "none of its temperatures are within optimal thresholds for spawning, and incubation/emergence, and less than 20% is suitable for rearing" habitat. FWS-148. Similarly, within Meadow Creek, which is also designated as critical habitat, stream temperatures are "functioning at unacceptable risk" for bull trout spawning habitat. Id. And the temperature of Sugar Creek is also "functioning at unacceptable risk" for bull trout spawning. FWS-148–49.

FWS admits that the Project will further increase these already high stream temperatures. "[R]eductions in stream flow, draining of [Yellow Pine Pit lake], and loss [of] riparian vegetation during construction and operation will result in increased temperatures in some streams within the action area," including the East Fork SFSR. FWS-177; see also FWS-291 ("Mining operations will increase stream temperatures by increasing the surface to volume ratio."). While FWS claims that the project would "improve water temperature in the long-term" (FWS-177), the record shows that temperatures in some streams would remain elevated for over 100 years. FWS-178 (table), 179 ("By Mine Year 112, summer maximum water temperatures in the [East Fork] SFSR . . . are about 0.2º C higher than baseline conditions."); see also NMFS-352 (finding that the mine "will alter temperatures of streams within the mine site in perpetuity").

Moreover, the additional increases would be extreme in some streams, with temperatures 6.8º C warmer in Meadow Creek at 27 years following the start of mining operations, resulting in a stream temperature of over 20º C (FWS-178), which far exceeds the bull trout's needs. By 52 years, Meadow Creek would still be over 3.0º C warmer, with water temperature continuing to exceed 17º C. Id. FWS thus admits that "bull trout will experience a significant reduction in thermally suitable habitat caused by proposed action activities." FWS-181.

But the above-described impacts are an underestimate of the harm: the predicted stream

temperature increases admittedly do not factor in climate change. The BiOp admits that climate change is expected to result in "drier dry extremes," "decreased minimum flows," and "increased water temperature," "which will significantly decrease the quality of bull trout habitat over time." FWS-165. FWS also acknowledges climate change will further increase stream temperatures during the course of the 20-plus year Project:

> In reality, water temperatures would likely be higher, and modeled water temperatures would have been higher, if climate change had been incorporated into the model. Climate change will be expected to increase water temperatures from baseline estimates to the end of the mine operations by as much as 0.1 ºC to 2.0 ºC based on forecasts for 2030-2059.

FWS-175.

Yet the temperature modeling FWS utilized in the BiOp does not factor in climate change and instead assumes stream temperatures will remain steady into the future. Id. And where FWS presents the rationale for its no-jeopardy determination in the BiOp, it does not even mention climate change. FWS 261–62. This is particularly concerning since bull trout are highly sensitive to water temperature, and since FWS admits some of the Project's stream temperature impacts would extend beyond 100 years. FWS-178, 179.

Again, numerous courts have overturned BiOps like this which acknowledge climate change effects but fail to add them to project effects in the jeopardy analysis. See, e.g., Willamette Riverkeeper, 763 F. Supp. 3d at 1237–38 (BiOp failed to consider whether endangered fish could sustain project impacts "on top of climate change effects."); Wild Fish Conservancy, 221 F. Supp. 3d at 1234 ("Because NMFS failed to consider the potential effects of climate change on stream flows . . . in connection with its analysis of the [project's] operations . . . on listed [fish], NMFS failed to consider an important aspect of the problem, and the BiOp is arbitrary and capricious."). FWS's failure to incorporate climate change into the stream temperature assessment and in its

jeopardy analysis for bull trout was arbitrary, contrary to the best available science, and failed to "add" all effects. 5 U.S.C. § 706(2)(A); 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02.

6. The Bull Trout Incidental Take Statement Violates the APA and ESA.

Because FWS concluded that the Project was likely to result in the taking of bull trout, FWS included an ITS with the BiOp. The ITS is unlawful for each reason below.

a) Failure to Include RPMs and Terms and Conditions to Minimize Take

As already discussed (supra IV.B.3.c), the requirement to include reasonable and prudent measures to minimize take, and terms and conditions to implement the measures, is mandatory—not optional. Ctr. for Biological Diversity v. Culver, 2024 WL at **64–65 (citing 16 U.S.C. § 1536(b)(4)(C), 50 C.F.R. § 402.14(i)(1)(ii)). In addition to fish handling and passage barriers, FWS found the Project would also take bull trout due to habitat loss caused by stream baseflow reductions and increases in stream temperature (FWS-263–65), sediment delivery (FWS-265–66), and chemical contaminants (FWS-266–67). Yet for these other categories of take (baseflow, temperature, sediment, and contaminants), the ITS fails to include any measures to minimize take.

To be clear, the bull trout ITS includes what FWS labels as RPMs and terms and conditions related to baseflow, temperature, sediment, and contaminants. Those RPMs, however, merely include the bald statement that take be minimized without providing any direction for how to do so. FWS-275–76. And the corresponding terms and conditions, which are required to implement the RPMs, do nothing to minimize take: they merely require monitoring these factors. FWS-276–77. Monitoring, by itself, does nothing to minimize take. Monitoring—detached from any requirement to take corrective action or other minimization measures—simply allows the Project to affect flows, temperature, sediment, and contaminants, and thereby cause whatever take they may. The ITS is therefore deficient. Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.,

422 F. Supp. 2d 1115, 1141 (N.D. Cal. 2006) (finding ITS deficient for failing to include any requirements to minimize incidental take caused by off road vehicles).

b) Inadequate Temperature Take Limit

The bull trout ITS is also inadequate because it fails to set a meaningful take limit. As already discussed (supra IV.B.5.b), cool stream temperatures are critical for bull trout, some stream temperatures in the Project area are already too high and will only get worse with climate change, and the Project will cause additional temperature increases in many of these streams, with some increases extreme and others lasting over 100 years.

In the ITS, FWS set a surrogate take limit for temperature impacts to bull trout: the take limit will be exceeded if increases in water temperature exceed the modeled increases in each of the affected stream reaches for the Project in Table 24 of the BiOp. See FWS-178 (Table 24), 265, 276. Temperature modeling for the Project, however, was done for only a handful of years: mine years 6, 12, and 18; and post-closure years 22, 27, 32, 52, and 112. Thus, there are major gaps between take limit checkpoints, ranging from 5-year gaps to as long as a 60-year gap. This means that during the Project, if stream temperature rises above acceptable levels soon after the Project starts or soon after one of the checkpoints, it would not trigger the take limit for nearly another 5, 6, 7, 20, or even 60 years. All the while, bull trout would be harmed by high water temperatures.

This is not a legally sufficient take limit. An ITS must "set forth a 'trigger' that, when reached, results in an unacceptable level of incidental take, invalidating the safe harbor provision, and requiring the parties to re-initiate consultation." Ariz. Cattle Growers' Ass'n, 273 F.3d at 1249. A surrogate trigger must "[d]escribe[] the causal link between the surrogate and take of the listed species" and "set[] a clear standard for determining when the level of anticipated take has been exceeded." 50 C.F.R. § 402.14. FWS has not—nor can it—describe the causal link between

temperature increases that could occur at any point of the Project and its decision to set a take limit that applies only every 5, 6, 7, 20, or 60 years. This is arbitrary and capricious and violates the ESA. See Defenders of Wildlife, 931 F.3d at 365 (take limit violated the ESA when FWS "failed to establish a causal link between the surrogate and take of the listed species") (quotation omitted).

C. The Forest Service Violated the ESA by Relying on FWS's Flawed BiOp.

Relying on a legally flawed BiOp violates the action agency's substantive duties under the ESA to ensure against jeopardy and adverse modification of critical habitat. See Wild Fish Conservancy, 628 F.3d at 532. "An agency cannot meet its Section 7 duties by relying on a legally flawed biological opinion or failing to discuss information that might undercut the opinions conclusions." Ctr. for Biological Diversity v. Bernhardt, 982 F.3d at 751. Here, FWS's BiOp was legally flawed for each of the reasons described in Part IV.B above. The Forest Service's reliance on FWS's BiOp thus violates Section 7 of the ESA, 16 U.S.C. § 1536.

D. The Forest Service Violated the ESA by Breaching Terms in its Forest Plan BiOp.

In 2003, the Forest Service initiated ESA consultation with NMFS over its proposed revision of the Forest Plans for the Boise, Payette, and Sawtooth National Forests, and NMFS issued a BiOp to cover the Forest Plans revision (hereafter the "Forest Plan BiOp"). FS-235. Because NMFS found that the Forest Plans revision was reasonably certain to result in incidental take of threatened Chinook salmon and steelhead, the Forest Plan BiOp includes an ITS with reasonable and prudent measures and terms and conditions to minimize take of those species. FS-325–330. These include terms and conditions the Forest Service must comply with when authorizing future projects in these national forests, including terms and conditions 1.E, 3.B.3.a, 3.B.3.c, which apply to the Project. See FS-327–30.

The terms and conditions in an ITS are non-discretionary. 50 C.F.R. § 402.14(i)(1)(iv) (ITS "terms and conditions . . . must be complied with"). If during the course of the action the amount

or extent of take as specified in the ITS is exceeded, the action agency "must reinitiate consultation immediately." Id. § 402.14(i)(v). See also § 402.16(a). Applying these regulations in Alliance for the Wild Rockies v. Marten, 585 F. Supp. 3d 1252, 1278–82 (D. Mont. 2021), the court held that the Forest Service violated the ESA and was required to reinitiate consultation when it approved a project but failed to comply with a term and condition in the ITS of the governing forest plan BiOp.

The Forest Service made the same error here. When it approved the Project, it wholly ignored the Forest Plan BiOp and its binding terms and conditions. The Biological Assessment for the Project (which the Forest Service prepared and submitted to NMFS and FWS to initiate ESA consultation) never mentions the Forest Plan BiOp or the terms and conditions in the ITS. See, e.g., FS-153822–847 (Biological Assessment references). Neither does the ROD. See, e.g., FS-420811–12 (NFMA compliance), FS-420813–14 (ESA compliance), FS-420905–906 (references). Neither does the FEIS. See, e.g., FS-245274–5333 (references). And neither does the BiOp which NMFS issued for the Project. See, e.g., NMFS-391–420 (references).

Term and condition 3.B.3.a, for example, applies to actions like the Project which would occur in upper portions of the South Fork Salmon River basin and would have more than a negligeable likelihood of adverse effects on ESA-listed fish or their habitat. FS-329. For such actions, 3.B.3.a requires the Forest Service to "demonstrate (e.g. from monitoring results of projects below main spawning areas) during planning or consultation that similar projects have been implemented and sediment delivery to streams was avoided or minimized." Id. But in its assessment of the Project, the Forest Service never demonstrated how similar projects were implemented and successfully avoided or minimized sediment delivery. Again, the Forest Service never even mentioned 3.B.3.a—or any other terms and conditions from the Forest Plan BiOp—in the ROD, FEIS, or Biological Assessment for the Project.

By failing to comply with the mandatory ITS terms and conditions of the Forest Plan BiOp, including 3.B.3.a, the Forest Service is in violation of the ESA and must reinitiate consultation over the Forest Plan BiOp. Alliance for the Wild Rockies, 585 F. Supp. at 1282.

V. REMEDY

Under the APA, "[t]he reviewing court shall 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." 5 U.S.C. § 706(2)(A) (emphasis added). "There is a presumption . . . in APA cases that the offending agency action should be set aside." Innovation Law Lab v. Wolf, 951 F.3d 1073, 1094 (9th Cir. 2020). Here, because of the APA violations explained above, the Court should hold unlawful and set aside the Forest Service's FEIS and ROD, and FWS's Biological Opinion, which are the agency actions challenged herein.

Courts routinely vacate unlawful agency actions like those challenged here. For example, the FEIS and ROD misapplied the 1872 Mining Law and violated the Idaho Roadless Rule to permit construction of the Burntlog Route and other infrastructure, and these actions must be vacated to prevent unlawful industrialization and degradation of important fish and wildlife habitat and Idaho Roadless areas. See Los Padres ForestWatch, 25 F.4th at 653–60 (vacating project violating roadless rule). Similarly, the Forest Service violated NFMA by approving riparian and roadless incursions contrary to Forest Plan standards, and vacatur to protect such resources is a standard remedy in this context. Alliance for the Wild Rockies v. U.S. Forest Serv., 907 F.3d 1105, 1121–22 (9th Cir. 2018) (vacating approval of project that was not consistent with Forest Plan); Save Our Cabinets v. U.S. Dep't of Agric., No. CV-16-56-M-DWM, 2017 WL 2829681 (D. Mont. June 29, 2017) (vacating ROD and FEIS for mining operations due to NFMA violation).

Furthermore, as many courts have held, an inadequate "hard look" and failure to evaluate reasonable alternatives under NEPA—violations the Forest Service committed here—are exactly

the type of "fundamental flaws" that demand vacatur. See Se. Alaska Conservation Council v. U.S. Forest Serv., 468 F. Supp. 3d 1148, 1152 (D. Alaska 2020) (lack of site-specific analysis and adequate alternatives are "serious" NEPA errors that "strongly weigh in favor vacatur"); Ctr. for Food Safety v. Vilsack, 734 F. Supp. 2d 948, 953 (N.D. Cal. 2010) (disagreeing that NEPA violations are "minor or insignificant"); Idaho Conservation League v. U.S. Forest Serv., No. 1:18-CV-504-BLW, 2020 WL 2115436 (D. Idaho May 4, 2020) (vacating approval of mine exploration where Forest Service failed to take hard look at impacts). And FWS's and the Forest Service's ESA violations also warrant vacatur to prevent harm to threatened species and their habitat. See Ctr. for Biological Diversity v. Haaland, 87 F.4th 980 (9th Cir. 2023) (vacating flawed BiOp); Save Our Cabinets v. U.S. Fish & Wildlife Serv., No. CV-15-69-M-DWM, 2017 WL 2829679 (D. Mont. June 29, 2017) (vacating BiOps).

Finally, regarding the Forest Service's failure to comply with the terms and conditions of the Forest Plan BiOp (supra IV.D), the Forest Service is currently in violation of its reinitiation duty. See 50 C.F.R. §§ 402.14(i)(5), 402.16(a). To remedy this ESA citizen suit claim, 16 U.S.C. § 1540(g), the Court must order the Forest Service to reinitiate ESA consultation.

CONCLUSION

For the reasons above, Plaintiffs respectfully request that the Court grant summary judgment to Plaintiffs; hold unlawful, vacate, and remand the Forest Service's FEIS and ROD and FWS's Biological Opinion for the Stibnite Gold Project; and order the Forest Service to reinitiate consultation with NMFS over the Forest Plan for the Payette National Forest.

Dated August 15, 2025.

Respectfully submitted,

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EXHIBIT A: Project Area Overview Map from Administrative Record

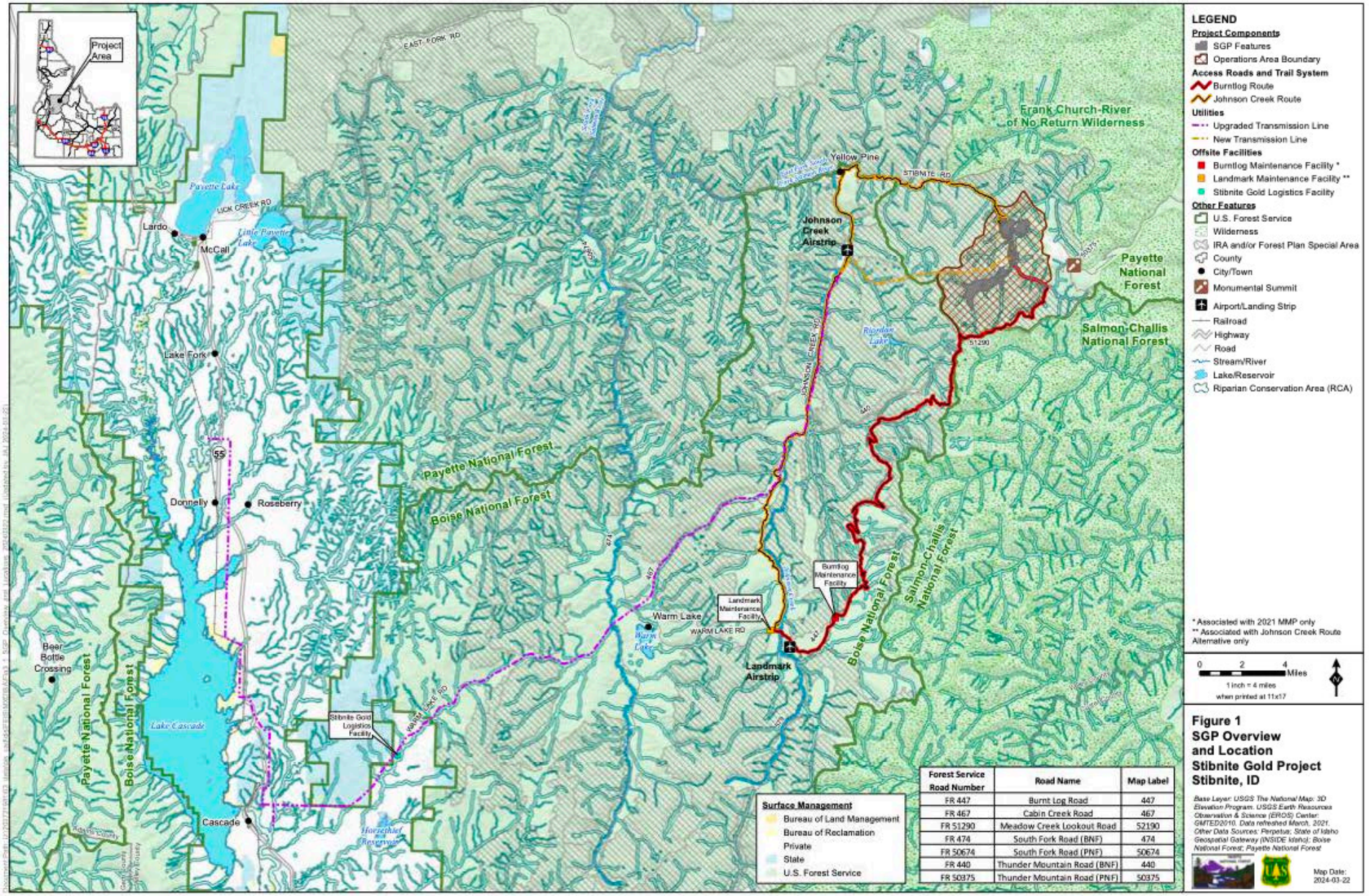

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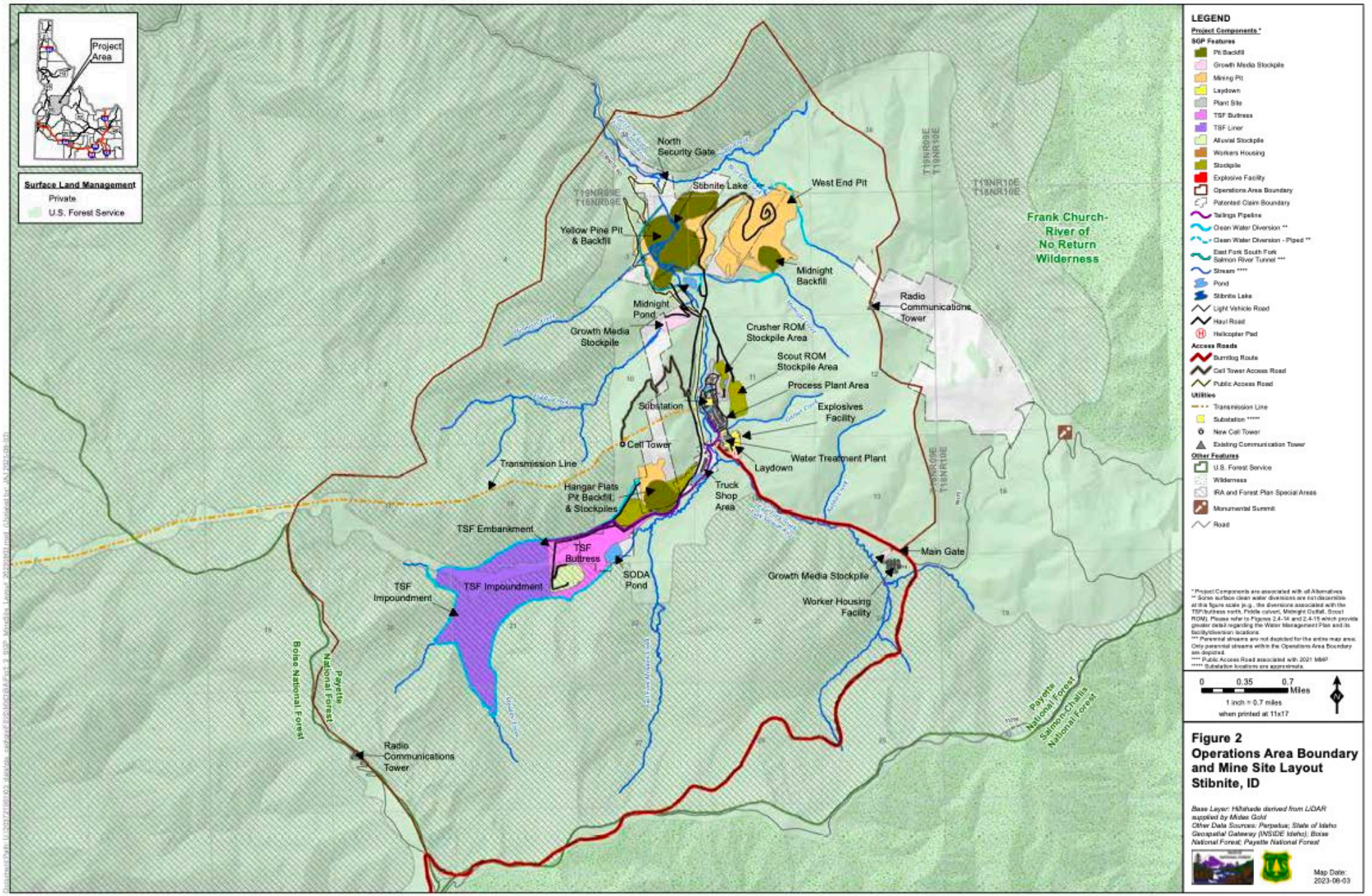
EXHIBIT B: Operations Area Map from Administrative Record



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