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' COMBINED RESPONSE/REPLY BRIEF ON CROSS MOTIONS FOR SUMMARY JUDGMENT*

*This 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
EMMP	Environmental Monitoring and Management Plan
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 reply to the Federal Defendants' response brief (ECF No. 35, hereafter "Fed. Resp.") and Perpetua's response brief (ECF No. 42, hereafter "Perpetua Resp."), and ask the Court to grant Plaintiffs' motion for summary judgment (ECF No. 31).

ARGUMENT

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

The Forest Service erroneously assumed that Perpetua has a statutory right under the 1872 Mining Law to construct the new Burntlog Route across public lands, even though the existing Johnson Creek Route already provides reasonable access to the mine site. The Mining Law gives no right to a *second* access route; any second route across public lands requires a discretionary Right-of-Way under the Federal Land Policy and Management Act (FLPMA), a later-enacted statute with provisions expressly designed to cover such conveyances. *See* ECF 32-1 ("Opening Br.") at 16–20.[1] The Forest Service relatedly approved eight gravel mines under an erroneous assumption that they were "authorized by the mining laws," and failed to treat gravel as a "common variety" mineral to which the 1872 Mining Law does not apply. *Id.* at 20–21. By contrast, Defendants admit that the Project transmission line requires a FLPMA permit; yet the agency jumped the gun and approved one in the ROD without completing the FLPMA permitting process.

For the Burntlog Route and the gravel mines, Defendants argue that the Forest Service "properly applied its regulations." Fed. Resp. at 17. But as confirmed by the Ninth Circuit, the agency cannot rely on an overly broad interpretation of its mining regulations to create statutory rights not found in the underlying Mining Law, as discussed more below. They also try to re-frame the issue as a disagreement over the "best" route by misleadingly characterizing the new Burntlog

[1] All pincites to documents in this case docket refer to the Court's ECF pagination at top.

Route, after its construction, as the "sole" access to the mine. Fed. Resp. at 18. But they ignore the fact that the Johnson Creek Route already exists, and that even after Burntlog is constructed, there would still be *two* access routes: the Johnson Creek Route, which Perpetua would continue to use and which would continue to cross streams, impact riparian areas, and present avalanche risks; *plus* the new Burntlog Route cutting through protected public lands and wildlife habitat.

Moreover, any purported benefits of adding the Burntlog Route are not relevant. The crux of Plaintiffs' argument is that—whatever the best route to the mine site may be—the Forest Service must follow the law as written, including the 1872 Mining Law, FLPMA, the Common Varieties Act, and others discussed below. And while the Mining Law gives Perpetua a limited implied right to access its mine site, the company already has such access via the Johnson Creek Route. There is no entitlement to a *second* or *preferred* access route. It was, thus, unlawful to approve the new Burntlog Route and its gravel mines as "entitlements" "authorized by the mining laws," in contradiction to the Mining Law and other governing statutes.

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

1. The "Reasonably Incident" Language in the Part 228A Rules Cannot Create a Right to a Second Access Road Under the Mining Law.

Neither Defendants nor Perpetua point to anything in the 1872 Mining Law that bestows upon Perpetua a right to build a second route across undisturbed public lands that the company prefers over the existing Johnson Creek Route. Instead, they rely extensively on the Forest Service's regulations for mining plans at 36 C.F.R. Part 228A (the "Part 228A Rules"). Those regulations define mining "operations" to include:

> All functions, work, and activities in connection with prospecting, exploration, development, mining or processing of mineral resources and all uses reasonably incident thereto, including roads and other means of access on lands subject to the regulations in this part, regardless of whether said operations take place on or off mining claims.

36 C.F.R. § 228.3(a). Seizing upon this regulatory definition, Defendants argue that because the

Burntlog Route is "reasonably incident to" (or "in connection with") Perpetua's mine, the Route is "authorized by the mining laws" and governed solely by the Part 228A Rules, not requiring FLPMA permitting. Fed. Resp. at 17; Perpetua Resp. at 16, 20. But courts have interpreted this "reasonably incident" phrase (and similar "in connection with" language) as creating *limitations* on miners, not as granting extra-statutory rights to mining companies, as the agency did here.

The "reasonably incident" phrase is not found in the 1872 Mining Law. Its statutory origin is the Surface Resources-Multiple Use Act of 1955, 30 U.S.C. § 612(a), which Congress enacted to limit claims-holders' use of the surface of valid mining claims to actual mining activities. The "reasonably incident" provision served to *narrow*—rather than expand—mining law rights, as it "does not grant rights beyond those granted by the Mining Law[.]" *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 33 F.4th 1202, 1218 (9th Cir. 2022) (hereafter, "*Rosemont Appeal*"). The provision "was specifically passed to curb abuses of the Mining Law (i.e., individuals and companies using fraudulent mining claims to monopolize federal land at no cost for non-mineral extraction purposes)." *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 409 F. Supp. 3d 738, 749 (D. Ariz. 2019), *aff'd* 33 F.4th 1202 (hereafter, "*Rosemont*").

Without a showing of valid rights on public lands, "a miner has no right, possessory or otherwise, in connection with the land." *Rosemont Appeal*, 33 F.4th at 1210 (citing *Cameron v. United States*, 252 U.S. 450, 460 (1920) (stating that a contrary holding would "work an unlawful private appropriation in derogation of the rights of the public")). Thus, the Ninth Circuit in *Rosemont* rejected Defendants' basic assertion in this case, that wherever a company conducts activity "reasonably incident" to mining, it has "a self-executing right to use and occupy federal lands." Perpetua Resp. at 13.

In *Rosemont*, the Forest Service had argued it could authorize dumping mine waste on

thousands of acres of public lands because it was "reasonably incident to" mining on mineral claims elsewhere. *Rosemont,* 409 F. Supp. 3d at 748–49. The court rejected that argument. It confirmed that rights to land use are confined to "the specific parameters of the Mining Law of 1872." *Id.* at 749. Other district courts have followed suit, noting that the permitting agency cannot "skirt the Mining Law requirement that valuable mineral deposits must be found in order to occupy the land." *See Great Basin Res. Watch v. U.S. Dept. of the Interior*, No. 3:19-cv-00661-LRH-CSD, 2023 WL 2744682, at *5 (D. Nev. Mar. 31, 2023) (applying the *Rosemont Appeal* to vacate a Bureau of Land Management decision based on similar rules to the Forest Service's).

So too here, as Defendants argue that building a new access route cutting through miles of pristine public lands is "reasonably incident" to mining. But by authorizing the Burntlog Route under the Mining Law, instead of through the discretionary FLPMA permitting process, the Forest Service manufactured rights under the Mining Law, making an "unlawful private appropriation" to Perpetua in derogation of the public's rights in public lands. *Rosemont Appeal*, 33 F.4th at 1210.

On appeal in *Rosemont*, the Forest Service "abandoned" its reliance on the "reasonably incident" language, and the Ninth Circuit affirmed that the agency had "improperly relied" on that statutory phrase. *Rosemont Appeal,* 33 F.4th at 1215. Defendants now attempt to distinguish *Rosemont* on the basis that the appeal then focused on the presence of valid rights at the proposed waste dumping sites, evading implications for other "reasonably incident" activities, such as a second access road, gravel mines, and transmission lines. Fed. Resp. at 21–22; Perpetua Resp. at 17–18. But the ruling remains on point. As noted above, the Ninth Circuit explained that the "reasonably incident" statutory language could not "change the lands to which the Mining Law applied or specify where mining operations may or may not occur" and did not "authorize uses of mining claims beyond those authorized by the Mining Law." *Rosemont Appeal,* 33 F.4th at 1218.

This same reasoning applies to the "reasonably incident" language relied on here. As the *Rosemont* district court observed, "the Forest Service's application of its regulations to mining operations cannot grant rights outside the bounds of the Mining Law of 1872." *Rosemont*, 409 F. Supp. 3d at 763. "[I]t 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.

Thus, Perpetua cannot use the Mining Law to acquire rights to off-site public lands simply because the Burntlog Route may be "reasonably incident" to mining the distant ore body. Nor can Defendants use the Part 228A Rules to create statutory rights not found in the Mining Law, as those Rules are by their own express terms limited to "operations authorized by the mining laws." *See* 36 C.F.R. § 228.1. They only apply to activities governed as valid rights under the Mining Law, as explained in *Rosemont*—not to a second access road extending dozens of miles beyond the mine site. Defendants cannot ignore statutory limitations to issue decisions "inconsistent with a statutory mandate" or that "frustrate the congressional policy underlying a statute." *Bureau of Alcohol, Tobacco & Firearms v. F.L.R.A.*, 464 U.S. 89, 97 (1983).

2. The Part 228A Rules' Access Provision Cannot Create Rights to a Second Route.

Finding nothing in the Mining Law that establishes a right to a second access road, the Forest Service and Perpetua then rely on the "access" provision in the Part 228A Rules to justify approval of the Burntlog Route. *See* Fed. Resp. at 19–21; Perpetua Resp. 16–18. This provision states that "[a]n operator is entitled to access in connection with operations," directs the operator to submit with its plan of operations "a map showing the proposed route of access," and directs the agency to "specify the location of the access route" if approved. 36 C.F.R. § 228.12. Yet this rule supports Plaintiffs' argument that Perpetua is not "entitled" to build a second route, as the rule specifies a singular "proposed route," not multiple routes. It says only that Perpetua is entitled to

access, not that it is entitled to multiple access routes or entitled to its preferred access route.

This is in accord with other relevant sources of authority on access rights. As Plaintiffs have shown, for property-holders with access rights that traverse public lands, it is well-settled that no such rights extend to multiple means of access or to new and second roads. *See* Opening Br. at 17–19. For example, under the Organic Act, the Forest Service may not preclude national forest entry for mining or a road "necessary" for access, *subject to regulation*. *See* 16 U.S.C. § 478. Courts have made clear that the availability of statutory or regulatory means of securing access (i.e., permitting under FLPMA) preempts assertions of generalized or implied rights to access, such as through easements. *See Fitzgerald Living Trust v. United States*, 460 F.3d 1259, 1267 (9th Cir. 2006); *United States v. Jenks*, 129 F.3d 1348, 1353–54 (10th Cir. 1997). Moreover, "necessity may be defeated by alternative routes or modes of access—no matter how inconvenient." *McFarland v. Kempthorne*, 545 F.3d 1106, 1111 (9th Cir. 2008).

Indeed, the Forest Service's regulations confirm that where a person already has adequate and reasonable access across federal land, access via another route is a matter of discretion and not an entitlement. "Where there is existing access or a right of access to a property over non-National Forest land or over public roads that is adequate or that can be made adequate, there is no obligation to grant additional access through National Forest System lands." 36 C.F.R. § 251.110(g). Yet here, the Forest Service dodged such regulations and treated the Burntlog Route as a Mining Law entitlement, not subject to the discretionary FLPMA permit process, despite the presence of existing adequate access.

Try as they might, Defendants cannot credibly argue that the existing Johnson Creek Route does not provide reasonable access. Perpetua has been using the Johnson Creek Route for years, as have other mining companies for decades. FS-111260, 344178–80, 358378. Moreover, Perpetua

would use the Johnson Creek Route exclusively during the initial years of mine construction and would continue to use it through the life of the Project during any emergency or unplanned closures of the Burntlog Route. FS-420774; SOF ¶¶ 15, 25. In fact, the Forest Service found in the FEIS and ROD that the Johnson Creek Route provides valid and reasonable access in the absence of the new Burntlog Route. FS-243647.

Contrary to Defendants' framing, Plaintiffs do not assert that the Forest Service lacks "authority to . . . select an access route" or that "operators be restricted to only existing access routes." Fed. Resp. at 21; Perpetua Resp. at 18. In its proposed plan of operations, Perpetua is free to propose the Burntlog Route as its desired access route, instead of the existing Johnson Creek Route. Plaintiffs argue simply that, where there is already an access route, the Forest Service must follow FLPMA Title V and the Part 251 Rules to consider approving the construction of an additional industrial road across public lands.

There is nothing novel about this. The mere fact that Perpetua submitted a proposed plan of operations for a mine does not mean that each and every aspect of that plan is "authorized by the mining laws" and is thus exclusively regulated under the Part 228A Rules. In addition to the Burntlog Route, Perpetua's proposed plan of operations includes other components that trigger regulation under other authorities, including, for example: the Project logistics facility, which requires local land use approvals (FS-358383–84); a new winter recreation trail, which is subject to Forest Service travel management regulations (FS-358381; FS-243752–53); and the Project transmission line, which requires a FLPMA special use permit (FS-358382–83; Fed. Resp. at 24–25; Perpetua Resp. at 18–19). Requiring the proper permit for the Burntlog Route—even though the route is described within Perpetua's proposed plan of operations—would be no different.

3. Whatever Its Purported Benefits, a Second Access Route Across National Forest Lands Requires Authorization Under FLPMA.

Defendants argue that the Forest Service approved the Burntlog Route because of its purported benefits, rather than as an entitled "right." Fed. Resp. at 19; Perpetua Resp. at 16. To the contrary, the Forest Service approved this second route as a right, concluding Perpetua "is entitled" to that route under the Part 228A rules. FS-420804. *See also* FS-245443–44. In fact, the agency argues it can bypass the Idaho Roadless Rule because the new Burntlog Route would be "conducted pursuant to the General Mining Law of 1872." Fed. Resp. at 25; Perpetua Resp. at 28.

Moreover, the fact that both routes have costs and benefits underscores the applicability of FLPMA's Title V right-of-way process. Indeed, Perpetua admits that the agency should "recognize[] its discretion to select the best route for the public and the environment." Perpetua Resp. 16. Plaintiffs agree. That is exactly what FLPMA envisions. For the Burntlog Route, the Forest Service should apply FLMPA's discretionary Title V permitting regime to determine whether the second access route "will do no unnecessary damage to the environment," 43 U.S.C. § 1764(a), and serves the "public interest." 36 C.F.R. § 251.56(a). "FLPMA *requires* all land-use authorizations to contain terms and conditions which will protect resources and the environment." *Trout Unlimited v. U.S. Dept. of Agric.*, 320 F. Supp. 2d 1090, 1108 (D. Colo. 2004) (emphasis in original), *appeal dismissed as moot*, 441 F.3d 1214 (10th Cir. 2006); *see also County of Okanogan v. NMFS*, 347 F.3d 1081, 1085–86 (9th Cir. 2003).

Defendants also argue that the Part 251 rules do not apply because those regulations do not include uses "authorized by the regulations governing . . . minerals (part 228)." Fed. Resp. at 20, (quoting 36 C.F.R. § 251.50(a)). But again, Defendants base their case on their misguided view of the law, that any activity "reasonably incident to" or "in connection with" mining the distant ore body is automatically "authorized by the mining laws," and thus only the Part 228A rules govern.

As detailed above, though, the agency cannot interpret its regulations to create statutory rights that do not exist, as *Rosemont* holds.[2]

Similarly, Perpetua argues that FLPMA's Title V requirements should not apply because that would "unreasonably circumscribe[]" or "amount to a prohibition" on its mining, and would "impair the rights of any locators or claims under [the 1872 Mining Law], including but not limited to, rights of ingress and egress." Perpetua Resp. at 13–14, 18 (quoting 43 U.S.C. § 1732(b)). But requiring a FLPMA permit for a second access route does not unreasonably impair or prohibit Perpetua's "rights of ingress and egress," since the company *already* has reasonable, feasible access via the Johnson Creek Route.[3]

This case is not about Perpetua's right under the Mining Law to access its claims. That access has long been satisfied by the Johnson Creek Route. Rather, this case concerns the laws that apply to approving a *new, second* road like the Burntlog Route on public lands. Here, the agency should have applied the only available statutory authority through which to authorize a second access route: FLPMA Title V permitting. The Court must reject the Forest Service's attempt to bypass FLPMA's statutory and regulatory requirements by approving the Burntlog Route only under the Mining Law and Part 228A rules, thus giving away free occupation of public lands.

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[2] Despite elsewhere describing the Part 251 Rules as "covering permits . . . under FLPMA for rights-of-way," Fed. Resp. at 24, Defendants confusingly and incorrectly assert that FLPMA's public lands provisions are inapplicable to the Forest Service, Fed. Resp. at 20 n.3. Yet the Forest Service's regulations expressly state they are implementing FLPMA. The Part 251 "special uses" provisions cite as their statutory basis 43 U.S.C. §§ 1740 and 1761–1771, which are FLPMA provisions that direct the Forest Service to "carry out the purposes of this Act" and which cover the special use/right-of-way requirements relevant to this case.

[3] Perpetua's assertion that the Forest Service cannot regulate the mine if that would "endanger or materially interfere" with Perpetua's desired proposal is completely unfounded. That language is from the Surface Resources-Multiple Use Act, 30 U.S.C. § 612 (b). The Ninth Circuit has clearly held that this language does *not* apply to Forest Service regulation of the mine proposal, but rather only to "activities by third parties on the surface of mining claims," which is not at issue here. *Rosemont Appeal*, 33 F.4th at 1211.

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

The Forest Service made the same error when it relied upon the Part 228A Rules to approve eight gravel mines along the Burntlog Route, erroneously asserting they are "operations authorized by the mining laws." FS-243749, 244504, 404062. The Forest Service originally—and correctly—determined that these gravel mines could be approved only under the 36 C.F.R. Part 228C "common variety mineral" rules, not the 228A mining regulations. FS-111247.[4]

It was only after Plaintiffs submitted comments urging the Forest Service to comply with all relevant parts of those Part 228C regulations that the agency abruptly changed course and instead addressed the gravel mines under the Part 228A rules in the FEIS and ROD. In doing so, the agency relinquished its discretionary authority and bypassed the requirements to protect the public interest and other duties under Part 228C. Defendants selectively ignore the language of the governing statutes and the facts, relying largely on word games.

First, Defendants argue that "Perpetua has not proposed to mine . . . gravel" at these eight "borrow pits." Fed. Resp. at 24. Yet at each "borrow pit," Perpetua will in fact *mine gravel* to use to construct the Burntlog Route. Labeling the material as "borrowed" does nothing to change the fact that it will be extracted from the ground and processed via "crushing and screening facilities." FS-111247–48. To characterize this activity as something other than mining gravel is absurd.

Second, Defendants argue that the Part 228C rules concern the "disposal" of common variety materials, and that authorizing Perpetua to extract, process, and use the gravel does not constitute "disposal." Fed. Resp. at 23–24; Perpetua Resp. at 20. According to Defendants, since the Forest Service is not "selling" the gravel to Perpetua (or Perpetua is not selling it to a third

[4] Perpetua attempts to downplay the Forest Service's statement that the Part 228C regulations apply in the Surface Use Determination by calling that document a "draft." Perpetua Resp. at 21. But this Surface Use Determination was never revised.

party), it is not "disposing" of the materials. This argument contradicts the common meaning of that word, and the agency provides no support for its illogically-narrow definition.[5]

Defendants' position also contradicts its regulations, which describe "disposal" of common variety minerals as including the approval of the permittee's mining. The Part 228C rules itemize one "type[] of disposal" as a "free use" permit for mineral materials/gravel for uses "other than … resale." 36 C.F.R. § 228.62(d). That is exactly what the Forest Service previously acknowledged was its intended permitting vehicle for the eight gravel mines at issue here. FS-111247.

Third, Perpetua argues that it is only "borrowing" the gravel by excavating, processing, and using it on the Burntlog Route, and then putting it back later during reclamation (albeit in a different location). To the company, this is not one of the "uses of gravel on federal lands" covered by the Common Varieties Act. Perpetua Resp. at 20. Perpetua admits that the Common Varieties Act and Part 228C Rules cover extraction of these materials for "commercial sale and *other purposes*." *Id.* (emphasis added). But it then asserts that "borrowing" gravel is somehow not one of those "other purposes." Perpetua points to no statutory or regulatory text that carves out an exception for mining common-variety minerals based on promises to put them back elsewhere, sometime after their commercial use. In short, Perpetua is not "borrowing" the gravel—it will *mine* the gravel for its own purposes, free of charge as approved the agency.

Perpetua relies on *Copar Pumice Co. v. Tidwell*, 603 F.3d 780, 789–90 (10th Cir. 2010), to argue that a mining claimant may use common variety minerals as part of its operations.

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[5] The relevant usage of "dispose" or "disposal" means "to transfer to the control of another" or "the act or action of presenting or bestowing something." *See Dispose*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/dispose (last visited Oct. 9, 2025); *Disposal*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/disposal (last visited Oct. 9, 2025). Here, the Forest Service is absolutely "bestowing" and "transferring control" of that material to Perpetua.

Perpetua Resp. at 21. But *Copar Pumice* involved the use of common pumice rocks extracted from the *same mine pit* as the locatable mineral claim. Here, the eight gravel pits are *miles away* from Perpetua's gold mining pits/claims. Contrary to Perpetua's framing, Plaintiffs have not argued that common minerals cannot be used when incidentally extracted on the same mining claim as a locatable minerals operation. In fact, the Project includes using common variety minerals extracted from the main mine site, which Plaintiffs have not challenged (*see* FS-243806).

Perpetua also relies on *United States v. Doremus,* 888 F.2d 630, 633 (9th Cir. 1989), to argue that any activity "reasonably incident" to mining in the pit is "authorized by the mining laws" and subject to the Part 228A rules. This argument suffers the same flaw explained above—as the restriction to "reasonably incident" mining activities applies only to activities the mining law actually authorizes, like those on the surface of locatable and valuable mineral claims. In *Doremus*, the Forest Service cited miners for cutting trees and digging trenches that were within the mining claims but beyond the scope of the approved mining plan. Although the miners contended that the additional trenches were "reasonably incident" to the approved mining, the court upheld the agency's citation on the grounds that the plan had reasonably constrained the scope of permissible incidental activity.

In no way does *Doremus* stand for Perpetua's erroneous assertion that common-variety mineral activities far away from the site of mining claims become governed by the Mining Law regulations as "incidental" entitlements. Indeed, any such assertion was put to rest by *Rosemont*. *See supra* pp. 3–6; *see also Great Basin Res. Watch*, 2023 WL 2744682, *5 (D. Nev. 2023) (rejecting the proposition that a company was entitled to other "lands for uses that are 'reasonably incident' to mining the minerals in the pit," as that was "foreclosed by *Rosemont*").

In summary, Defendants approved the eight gravel mines under the wrong statute and

wrong regulations (the Mining Law and Part 228A Rules), ignoring the directly applicable statutory and regulatory requirements of the Common Varieties Act and Part 228C regulations. In doing so, the Forest Service again manifested a nonexistent statutory entitlement to free use of materials on public lands, bypassing its discretionary authority and the public-interest requirements of the Part 228C regulations.

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

The Forest Service's approval to construct a new power transmission line, which would cut through protected roadless and riparian areas en route to the mine site, was also unlawful. Opening Br. at 21–23. While the Forest Service admitted the new transmission line requires a right-of-way under FLPMA Title V and the Part 251 Rules, the agency nevertheless issued its "approval of a special use authorization" for the transmission line in the ROD, without going through the required FLPMA right-of-way process and without requiring Perpetua to pay to occupy public lands or to meet other FLPMA requirements for special use authorizations.

Recognizing this error, Defendants now try to walk back the ROD's clear approval of the transmission line. The Forest Supervisor's ROD expressly stated as follows:

> 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 (emphasis added). Despite this unequivocal language in the ROD, Defendants' litigation position is that the Forest Service did not actually approve the transmission line; they characterize this instead as language that "might inadvertently suggest . . . a final decision." Fed. Resp. at 25. Defendants promise that review of a right-of-way for the transmission line is "forthcoming" through a separate special use authorization process. *Id.*[6]

[6] Plaintiffs reserve the right to challenge such special use authorization, if it ever occurs.

But it is well-established that courts must reject "counsel's post-hoc rationalizations for agency action." *Nat. Res. Def. Council v. U.S. Env't Prot. Agency*, 31 F.4th 1203, 1207 (9th Cir. 2022); *see also California Pub. Utilities Comm'n v. FERC*, 879 F.3d 966, 975 (9th Cir. 2018). Here, the ROD is the final agency action being challenged. The Court must take the ROD at its word and must declare unlawful and vacate its approval of the transmission line.

Tellingly, even though it has been ten months since Idaho Power submitted its special use application (FS-421637), the Forest Service has not notified the public or taken public comment on the application, as required under FLPMA (*see* 36 C.F.R. § 251.54(g)(2)). *See* Tiedemann Decl. ¶¶ 15–19. Yet Perpetua has proceeded to pursue activity under the plan of operations approved by the Forest Service that *includes* work on the transmission line project. *See* ECF No. 40 at 4 (stipulation regarding construction activities this fall). Contrary to Defendants litigation position, the company and agency are acting as though the transmission line approval occurred in the ROD.

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

The Court must also declare unlawful and set aside the ROD for violating the Idaho Roadless Rule. Defendants do not deny that the Burntlog Route and the new segment of transmission line (which is accompanied by access roads) would be constructed through multiple Inventoried Roadless Areas—wild areas protected under the Idaho Roadless Rule. *See* Opening Br. at 24. Yet Defendants again erroneously assert that the new road is "authorized by the mining laws" and thus exempt from the Rule's prohibition against new roads in these protected areas. *See* Fed. Resp. at 25–26; Perpetua Resp. at 28. While the Idaho Roadless Rule exempts activities "authorized by the mining laws," there is no "entitlement" or "right" under the Mining Law for a second access route when one already exists, as detailed above. Thus, the Burntlog Route cannot be lawfully authorized under the Mining Law and cannot fall within the Roadless Rule exception.

Neither can the transmission line and its associated roads. Defendants admit this requires

special use authorization for a FLPMA right-of-way. Fed. Resp. at 24–25. Therefore, it too is not authorized by the Mining Law and cannot benefit from the Roadless Rule exception.

Defendants also argue that since the Idaho Roadless Rule contains an exception allowing mining in roadless areas, it must also necessarily include an exception allowing access roads and utilities to mines. Fed. Resp. at 26; *see also* Perpetua Resp. at 28–29. This argument might hold weight when it comes to a mining site found *within* or entirely surrounded by roadless areas, i.e., if there is no way to access the mine site other than going through a roadless area. But Perpetua's mine site is not within or entirely surrounded by roadless areas; it is in fact already served by existing roads and utility routes outside of roadless areas. The Roadless Rule does not contain any exception to allow unnecessary fragmentation and degradation of protected roadless areas just because Perpetua would prefer to cut through those areas even though it has other options.

II. THE FOREST SERVICE VIOLATED NFMA.

A. Defendants Mischaracterize the Nature of Plaintiffs' Claims.

Defendants concede that "NFMA requires a project to be consistent with the forest plan, 16 U.S.C. § 1604(i), and Forest Service regulations call for project consistency to be documented in the decision. 36 C.F.R. § 219.15(d)." Fed. Resp. at 27. But Defendants argue that "agencies need not 'analyze and show' such consistency in NEPA documents," relying on *Oregon Natural Desert Association v. U.S. Forest Serv.*, 957 F.3d 1024, 1033 (9th Cir. 2020). Fed. Resp. at 27–28.

This mischaracterizes Plaintiffs' claim. Plaintiffs do not, like in *Oregon Natural Desert Association*, raise a procedural claim about NFMA's overlap with NEPA. Rather, Plaintiffs challenge *substantive* noncompliance with binding Forest Plan standards MIST08 and MIST09. The Forest Service violated NFMA by authorizing roads, structures, facilities, and mine waste in over 900 acres of protected riparian conservation areas (RCAs) "despite mandatory Forest Plan standards prohibiting RCA incursions unless there is no alternative." Opening Br. at 24–25.

Defendants similarly fail to distinguish the directly on-point decision in *Hells Canyon Preservation Council v. Haines*, CV-05-1057-PK, 2006 WL 2252554 (D. Or. 2006), which held that the Forest Service violated NFMA by authorizing mining road and settling pond construction without first showing no alternative to siting in riparian areas. *Hells Canyon* enforced the *substantive* requirements of Forest Plan standards essentially identical to those here, and Defendants cite no case that contradicts its analysis and holdings. Here, the Forest Service committed the same error. Rather than substantiate "no alternative" to locating 56 different project components in RCAs, as required by MIST08 and MIST09, as explained below, the agency only made vague statements that MIST08 and MIST09 are or would be "incorporated" into the Project.

B. Authorizing Roads, Structures, and Facilities in RCAs Violated Forest Plan Standard MIST08.

MIST08 prohibits the Forest Service from authorizing the construction of mining "structures, facilities, and roads" in RCAs unless "no alternative exists." FS-1328, 3304. The FEIS identifies 39 different Project components, including roads, facilities, and structures, that would occupy 618.9 acres in RCAs at the main mine site and another 14 Project components occupying 299.5 off-site acres of RCAs elsewhere. FS-244803–07. Yet when it signed off on the Project, the Forest Service never meaningfully addressed whether there were alternatives to locating these roads, facilities, and structures in RCAs.

To try to get around this, Defendants point to a few documents in the record. For example, they point to an alternatives report from the Draft EIS stage (FS-262581) and assert that this report considered and rejected Project alternatives which had varying effects on riparian areas. Fed. Resp. at 29–30. While that report lists some alternative options for various Project components, the substance of its consideration of "wetland and riparian impacts" was only to slap a generalized categorical label (a number "3") on about 25 proposed components to denote that they bore broad

relevance to the subject. Nowhere does this document mention MIST08, and nowhere does it contain any analysis or conclusion as to whether there is "no alternative" under MIST08 to locating the numerous mine components noted above in RCAs. And few of the components are even a match for the numerous components noted above that were ultimately approved in RCAs.

Next, the Forest Service points to tables in the FEIS that show the large number of Project components it authorized in RCAs, as if the mere fact that the Forest Service acknowledged these RCA incursions somehow shows that there was no alternative to authorizing them. Fed. Resp. at 29; FS-244803–07. It does not.

Finally, the Forest Service points to its NFMA "consistency review" document. Fed. Def. at 31. In that document, the Forest Service asserts that it complied with MIST08 by "incorporat[ing it] as an environmental design feature/mitigation measure" which "is achieved by identifying reasonable locations for access, processing, and disposal facilities outside of RCAs, wherever possible." FS-403996. But this vague, general statement does not show that the agency ever considered and determined there was no alternative to the dozens of RCA incursions it approved. That review cites to a FEIS section that merely provides, with no substantive explanation, a list of standards and regulations purportedly "incorporated into the action alternatives by reference" or that "would be applied to reduce and minimize impacts." *See* FS-243826.

Defendants also point to reports addressing alternatives for a couple Project components, namely the worker housing facility and roads to access the main mine site. *See* Fed. Resp. at 30. But they point to nothing similar for the processing plant (impacting 34 RCA acres), the truck shop (14.5 RCA acres), the many internal mine site roads, or the numerous other structures and facilities the Forest Service authorized in RCAs. *See* FS-244803–07.

Perhaps recognizing this failure, Defendants and Perpetua also argue that MIST08's "no

alternative" requirement applies only to the Project as a whole and need not be applied at the level of individual structures, facilities, and roads. Fed. Resp. at 28–29; Perpetua Resp. at 24. This contradicts the actual language of MIST08, which applies to mining "structures, facilities, and roads," not to projects. FS-1328, 3304. It also contradicts the holding in *Hells Canyon*, which applied the same standard to individual project roads, facilities, and structures. *See Hells Canyon*, 2006 WL 2252554, at *7–9. Moreover, interpreting MIST08 as an all-or-nothing proposition is patently unreasonable and undermines its RCA protections. Under Defendants' approach, as long as there was no alternative to locating *some* small amount of a mining project in an RCA, then the Forest Service would be free to approve any vast amount unnecessary RCA damage.

Substantive compliance with a binding Forest Plan standard under NFMA requires more than it be "incorporated by reference" or deferred to future implementation as the Forest Service did here. NFMA requires that the public and reviewing courts be "able reasonably to ascertain from the record that the [Forest Service] is in compliance with [a Forest Plan] standard." *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 963 (9th Cir. 2005). A record that lacks "adequate explanation and reasoning [] is insufficient to meet the mandates of the . . . NFMA." *Kettle Range Conservation Grp. v. U.S. Forest Serv.*, No. 2:21-CV-00161-SAB, 2023 WL 4112930, at *11 (E.D. Wash. June 21, 2023). The agency must demonstrate "reasonable and reasonably explained" action. *Ohio v. EPA*, 603 U.S. 279, 280 (2024). Here, the Forest Service cannot show that the Project complies with MIST08.

C. Authorizing Waste Facilities in RCAs Violated Forest Plan Standard MIST09.

Another binding forest plan standard that applies to the Project is MIST09, which prohibits locating mine waste facilities in RCAs unless there is "no alternative." FS-3305. The Project's Tailings Storage Facility would store 120 million tons of mine waste, filling 166.6 acres of RCAs, plus another 60 acres of RCAs from its associated buttress. *See* Opening Br. at 27. Yet the Forest

Service never substantiated a lack of alternative, as the record shows.

Defendants initially dispute Plaintiffs' interpretation of one clause in MIST09 (pertaining to solid and sanitary waste facilities), using this to distract from the underlying error committed. Fed. Resp. at 32–33; Perpetua Resp. at 27. Although Plaintiffs have pointed out that Defendants' response to public comment provided an inaccurate deflection on the "solid waste" distinction, *see* Opening Br. at 27–28, that clause is not the material restriction at issue. The material clause in MIST09 states that "if no alternative to locating mine waste (waste rock, spent ore, tailings) facilities in RCAs exists," then the Forest Service must take specifically listed steps to prevent, monitor, and mitigate potential impacts. FS-3305. Like MIST08, MIST09 thus requires that the Forest Service first determine whether there is an actual lack of alternative to locating the Tailings Storage Facility in an RCA, and *only then* move to the next step of preventing, monitoring, and mitigating impacts. The Forest Service skipped the first step, in violation of MIST09.

Again, Defendants point out that the Forest Service analyzed the impacts the Project would have on RCAs. Fed. Resp. at 29–30. Perpetua offers that the agency "repeatedly acknowledged that portions of the [tailings storage facility] would be located within RCAs." Perpetua Resp. at 25. But acknowledgment or even mitigation of impacts is not the same as first demonstrating there was "no alternative" to locating the tailings storage facility atop 226.6 RCA acres.

Finally, Defendants argue they complied with MIST09 because the Forest Service considered three potential locations for the tailings storage facility, and considered the riparian impacts of each. Fed. Resp. at 30. But each of these alternatives involved storing waste in RCAs, and there is no indication that Forest Service sought out any non-RCA options. FS-243863–64. As noted below regarding NEPA, Plaintiffs urged the Forest Service to meaningfully analyze an off-site ore processing alternative, but the Forest Service summarily dismissed the idea based on the

obviously erroneous assumption that an off-site facility would have "all the same" environmental impacts (ignoring the unique context of the on-site facility, such as occupying riparian areas that support ESA-listed species). *See* FS-243862–63; *infra* p. 22. Had the Forest Service meaningfully addressed an off-site processing alternative, which would entail storing mine tailings off-site too, then the agency could have considered a non-RCA alternative to comply with MIST09.

But the Forest Service did not do so. Instead, like with MIST08, the agency attempted to obscure the MIST09 standard as something vaguely "incorporated into the action alternatives by reference." FS-243826. At bottom, the Forest Service violated MIST09 by approving the Project and its mine waste locations without substantively demonstrating that there is "no alternative" to dumping the waste in RCAs.

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

The Forest Service violated binding Forest Plan standards adopted to protect inventoried roadless areas. Opening Br. at 28. Defendants provide no additional responsive argument on this point except to double-down on the notion that a mere "association" with mining creates an entitlement that trumps the Forest Plan. *See* Perpetua Resp. at 28–29. But this misses the point. While the Forest Plan includes an exception for new roads in roadless areas, the exception applies only if a road is "<u>needed</u> . . . to respond to statute or treaty." FS-3247 (emphasis added). While constructing the new Burntlog Route might be *preferred* by Perpetua, there is no statutory *need* to damage or eliminate roadless areas when existing roads already reach the mine site. *See* Supra I.A.

III. THE FOREST SERVICE VIOLATED NEPA

A. Failure to Consider a Reasonable Range of Alternatives.

NEPA requires an EIS to consider "a reasonable range of alternatives" to the proposed action. 42 U.S.C. § 4332(2)(C)(iii). Yet the FEIS analyzed only Perpetua's proposal and one action alternative: the Johnson Creek Alternative. *See* Opening Br. at 30–33. That alternative differs only

in the mine access route, and the agency refused to consider any alternatives to the vast majority of Perpetua's proposal, including mining three open pits, permanently burying 423 acres of the pristine upper Meadow Creek valley under hundreds of feet of mine tailings, and conducting other extraction, processing, and mine waste storage activities throughout the Project site. *See id.* Neither Defendants nor Perpetua provide a persuasive argument that the Forest Service properly eliminated every one of the many viable alternatives to Perpetua's proposal.

Defendants rely on *Seven County Infrastructure Coalition v. Eagle County, Colo.*, 605 U.S. 168 (2025), to assert that courts must simply defer to the Forest Service's "range of alternatives determination." Fed. Resp. at 35; Perpetua Resp. at 29. But *Seven County* does not relieve the agency from meeting the APA's "arbitrary and capricious" standard, which asks whether the agency failed to consider the relevant factors, failed to consider an important aspect of the problem, offered an explanation that runs counter to the evidence, or reached an implausible result that cannot be ascribed to a difference of opinion or agency expertise. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

While "a court asks not whether it agrees with the agency decision," it must still consider "whether the agency action was reasonable and reasonably explained." *Seven County*, 605 U.S. at 180 (citing *Motor Vehicle Mfrs.*, 463 U.S. at 43). "The fact that an agency has broad discretion . . . does not establish that the agency may justify its choice on specious grounds." *Waterkeeper Alliance v. U.S. EPA*, 140 F.4th 1193, 1217 (9th Cir. 2025) (internal citation omitted). Here, the Forest Service acted unreasonably and without reasonable explanation when eliminating from detailed study every alternative, other than an access route, that deviated from Perpetua's proposal.

To start, the Forest Service rejected developing an off-site ore processing alternative because it allegedly would not reduce environmental effects. *See* FS-243862. But this conclusion

rested on the erroneous assumption that a new off-site mill and tailings storage facility would have to be constructed and would produce "all the same associated environmental impacts" as the mill and tailings storage facility proposed for the Project. *Id.* This assumption was unsubstantiated and unreasonable. First, the Project's proposed milling and tailings storage would permanently destroy the pristine upper valley of Meadow Creek, a protected riparian area inhabited by ESA-listed bull trout as well as wolverine. FS-243784, 244803–05; FWS-138–144, 319. The Forest Service failed to consider whether any off-site locations for milling and tailings storage would be less damaging, stating with no discernable basis that any off-site impacts must be as bad as Perpetua's proposal.

Second, Defendants' assumption rests on the lack of a commercial milling facility that could economically process the ore off-site. Fed. Resp. at 37. Yet the record indicates otherwise, identifying an active gold processing facility in Nevada that could be used. FS-344776. The Forest Service ignored this evidence when it rejected this reasonable alternative. In fact, construction of an on-site ore processing plant is projected to be the Project's single largest initial capital expenditure. FS-344202. According to Perpetua's feasibility study, processing off-site would "significantly decrease capital costs and, notably, could" eliminate the cost and environmental impact of constructing a new tailings storage facility. FS-344776. Had it developed an off-site processing alternative in the FEIS, the Forest Service could have taken a hard look at and disclosed to the public the relative environmental and economic costs and benefits. But instead, the agency summarily rejected this alternative based on unsupported speculation about Perpetua's bottom line.

Next, Defendant's brief—just like the FEIS and ROD and their supporting documents—wholly mischaracterizes the antimony-focused alternative Plaintiffs proposed, falsely claiming that this alternative was considered and rejected. *See* Fed. Resp. at 37–38. Plaintiffs' suggested alternative would have included mining gold, but with a focus only on ore also rich in antimony.

FS-228516. Ignoring this alternative, the Forest Service concocted a strawman *antimony-mining-only* alternative and rejected that as economically unviable. FS-245536. Aiming to characterize the record as showing their consideration of Plaintiffs' true antimony-*emphasis* alternative, Defendants deceptively quote language from Plaintiffs' comments and attempt to attribute that language to their own explanation. *Compare* Fed. Resp. at 37 *with* FS-245536 (containing original comment and agency response). By mischaracterizing and failing to address the alternative, the Forest Service demonstrates unreasoned decision-making.

Finally, Defendants point to various ideas that were "eliminated from detailed analysis" to argue "the FEIS considered 18 other alternatives." Fed. Resp. at 36, 38; Perpetua Resp. at 31. But merely *considering* whether to analyze a number of alternatives, then electing not to, cannot satisfy the agency's burden to include a reasonable range of alternatives in its hard look at environmental impacts under NEPA. "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). Here, arbitrarily rejecting several reasonable alternatives for detailed consideration creates a critical flaw that violates NEPA.

In *Seven County*, the Supreme Court reiterated that the term "alternatives" is "not self-defining" and that "common sense should be brought to bear." *Seven County*, 605 U.S. at 181–82 (cleaned up) (citation omitted). Here, common sense dictates that for such a massive and impactful mining Project, there are at least some viable alternatives to giving Perpetua exactly what it wants for every aspect of its extensive mine plan, other than just a different access route.

B. Failure to Take a Hard Look

1. Air Emissions

Defendants contend that the Forest Service was not required to analyze air quality impacts at the Project's maximum potential production rate of 180,000 tons per day, even though this is

the production rate authorized by the Idaho Department of Environmental Quality ("DEQ") when it issued the air quality permit for the mine. Fed. Resp. at 39; Perpetua Resp. at 32–33. This is inconsistent with NEPA's "hard look" requirement and undermines NEPA's core purpose of informed decision-making. *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (aim of NEPA is to "ensure[ ] that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process").

DEQ authorized Perpetua to haul up to 180,000 tons of material per day. FS-101467. This haul rate falls within the Project's operational and design capacity, making it not only legally permissible but practically achievable too. Moreover, nothing in Perpetua's proposal, the FEIS, the ROD, or any other state or federal permit imposes a lower haul rate. Defendants' assertion that 99,500 tons per day represents the "highest realistic" production rate is misleading. To derive this number, the Forest Service simply took an estimated annual production rate and divided it by 365. FS-244497. This averaged out all days when Perpetua would haul more than 99,500 tons per day.

By restricting its analysis to 99,500 tons per day, the Forest Service artificially deflated its assessment of the air quality impacts that are lawfully permitted to and practically can occur under the Project's air quality permit and the ROD. The analysis thus precluded informed decision-making and public participation, undermining NEPA's core purpose, and was arbitrary and capricious. *See Great Basin Res. Watch v. U.S. Bureau of Land Mgmt.*, 844 F.3d 1095, 1103–04 (9th Cir. 2016) (vacating mine approval and FEIS that relied on unsupported air quality analysis).

2. Risk of Fuel and Other Hazardous Material Spills

Relying again on *Seven County*, Defendants urge the Court to defer to the Forest Service based on the length and purported complexity of the FEIS's analysis of spill risk from trucks transporting hazardous substances. Fed. Resp. at 39–41; Perpetua Resp. at 33–36. This side-steps

Plaintiffs' central argument: the agency failed to respond to comments pointing to substantive errors in that spill risk analysis. *See* Opening Br. at 34–35. Failing to respond to comments is a procedural error that violates NEPA, not a technical judgment entitled to substantial deference under *Seven County*, and such a failure weighs strongly in favor of finding that the Forest Service did not take the requisite "hard look." *See WildEarth Guardians v. U.S. APHIS*, 135 F.4th 717, 738 (9th Cir. 2025) (finding NEPA violation for failure to "adequately consider[ ] opposing points of view, and failure to respond to the evidence . . . weighs in favor of remand") (internal citations omitted); *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1167 (9th Cir. 2003).

Hazardous spill risk along the two access routes, which traverse and cross streams with ESA-listed fish species, is integral to the environmental analysis. *See* FS-244602 (FEIS acknowledging risks "could include degraded soil and water quality, fish and wildlife habitat contamination, and toxicity, injury, or mortality to fish and other aquatic organisms"). Yet as Plaintiffs' comments and objections showed, the FEIS never estimated the number of spills that could occur and severely underestimated the risk of a spill to be *100 times less* than the risk that expert agencies have assessed for other projects. *See* Opening Br. at 34–35; FS-404778–79. Although the Forest Service's ultimate "choice of spill rates" to apply to the Project might fall "within its technical expertise" and deserve some degree of deference, *see* Fed. Resp. at 41 n.8, simply ignoring substantive points from public comment and failing to consider evidence to the contrary is arbitrary and capricious and violates NEPA's "hard look" mandate.

IV. FWS AND THE FOREST SERVICE VIOLATED THE ESA.

Defendants mischaracterize Plaintiffs' claims and the Court's role under the ESA. Plaintiffs are not asking the Court to second-guess scientific judgment, nor are their arguments "generic," "abstract," or mere "critiques," as Defendants suggest. Fed. Resp. at 41, 43. Rather, the

ESA imposes concrete, legally enforceable requirements that Defendants have failed to meet. Specifically, the ESA requires that the agency rely on the best available science; evaluate the current baseline, including relevant local and broader population sizes; consider the additive effects of the proposed action and existing stressors such as climate change; and ensure that any incidental take statement ("ITS") includes clear, enforceable reasonable and prudent measures ("RPMs") and terms and conditions. *See* Opening Br. at 35–37. Additionally, any surrogate take trigger must include a defined, measurable standard for exceedance and a corresponding monitoring plan. Yet the U.S. Fish and Wildlife Service ("FWS") failed to include or comply with these basic requirements in its Biological Opinion ("BiOp") and ITS. Defendants cannot substitute speculation or assumptions for the rigorous analysis the ESA demands.

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

1. FWS's Wolverine Jeopardy Analysis Violates the ESA and APA.

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

Plaintiffs challenge FWS's arbitrary conclusion that the Project would not have "long-term" impacts on wolverine (FWS-337) despite evidence in the record to the contrary. Opening Br. at 39. In response, Defendants attempt to justify their conclusion by asserting that "accounting for scaling" and considering mitigation measures somehow rationalize the agency's claim there would not be any long-term effects from the decades-long, massive Project in an area where numerous threatened wolverine have been observed. Fed. Resp. at 44. Not only are these impermissible post-hoc rationalizations, but they do not overcome the obvious error FWS made.

Earlier in the BiOp, FWS itself acknowledged the Project's adverse effects would occur over *65 or more* years. FWS-326. And in the FEIS, the Forest Service found the Project would have long-term, decades-long adverse effects to wolverine. FS-244897, 244959. Yet later in the BiOp, FWS arbitrarily and capriciously ignored this to reach the opposite conclusion.

Defendants contend that Plaintiffs "cherry-pick" language from the FEIS that stated that the Project's adverse impacts to wolverine and its habitat will be "long-term," may take "long periods of time (decades)" to undo, and may be "irreversible." Fed. Resp. at 44; Opening Br. at 39. Far from cherry-picking, these are the very conclusions the Forest Service reached. FS-244897, 244959. Defendants fail to identify other portions of the FEIS that reach a different conclusion.

Defendants also argue that the Forest Service found "site-level impacts" would be long-term; whereas the BiOp found no long-term impacts at the larger "population-scale." Fed. Resp. at 35. This misreads the BiOp, where FWS concluded: "Long-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 (emphasis added). FWS's conclusion that long-term effects are not expected "in the action area" directly contradicts the Forest Service's findings that there will be "long-term" adverse impacts on wolverine, which may take decades to undo, and which could be "irreversible." *See* FS-244897, 244959.

Simply disregarding these long-term effects is not the type of expert scientific judgment which is entitled to deference. Rather, FWS failed to use the best science, 50 C.F.R. § 402.14(d), and made a conclusion of no long-term effects that is not rationally connected to the facts in the record, rendering the BiOp unlawful. *See Ctr. For Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1121 (9th Cir. 2012) (BiOp violates the ESA if it "fails to consider[ ] the relevant factors and articulate a rational connection between the facts found and the choice made").

b) Ignoring Wolverine Population Size.

Plaintiffs showed that FWS's BiOp failed to account for the fact that there are only an estimated 318 remaining wolverine in the lower 48. Opening Br. at 40–41. Defendants argue that they adequately considered this fact by reviewing "occurrence data" and "population metrics."

Fed. Resp. at 44–45. But these phrases are misleading, and neither correct FWS's fundamental error: ignoring the significance of local wolverine populations to the species' population as a whole. Courts routinely invalidate BiOps for this error. *See*, *e.g.*, *American Rivers v. FERC*, 895 F.3d 32 (D.C. Cir. 2018); Opening Br. at 41 (citing three more cases holding the same).

First, the "occurrence data" FWS points to is the documentation of 16 wolverine in the Project area, including four in the mine site. Plaintiffs agree that this occurrence data is in the BiOp. *See* Fed. Def. at 44. The problem, however, is that the BiOp never considered the significance of these 16 wolverine compared to the national population. This single Project could adversely affect 5% of threatened wolverine (16/318 x 100). Yet the BiOp never considers the implications of the Project affecting 5% of the population. In fact, the BiOp does not even mention the agency's existing 318-wolverine estimate, or any other estimate of the total population.

Second, FWS's so-called "population metrics" relate only to the amount of denning habitat affected by the Project, not to population numbers. *See* Fed. Resp. at 44–45. Plaintiffs agree that FWS considered the percent of denning habitat the Project will affect. FWS compared habitat loss in the Project area to all potential wolverine habitat in the lower 48, which results in small values of less than 1% that the agency could dismiss as insignificant. *See* Opening Br. at 40. But focusing on habitat loss—while ignoring these larger population impacts—misleadingly downplays the Project's true effects.

Finally, Perpetua notes that the administrative record includes a document which contains the national wolverine population estimate of 318. Perpetua Resp. at 39. The mere existence of this estimate somewhere in the record does not, however, demonstrate that FWS considered it to reach its jeopardy determination in the BiOp. Again, the BiOp never references the national wolverine population, even though 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). And again, the BiOp never assesses the significance of the local wolverine population relative to that national population. This is arbitrary and capricious. *See American Rivers*, 895 F.3d at 48 (finding no-jeopardy determination arbitrary and capricious where BiOp determined take at 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").

c) Failure to Consider Climate Change Effects

Defendants mischaracterize Plaintiffs' argument as claiming "the project causes additional climate impacts." Fed. Resp. at 46–47. Yet Plaintiffs' point is different: over coming decades, both the Project and ongoing climate change will harm wolverine, but FWS failed to consider these combined effects. Opening Br. at 41–43. A BiOp's jeopardy determination must rely on 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). Courts in the Ninth Circuit have routinely invalidated BiOps that pay only lip service to climate change but fail to add the impacts future climate change will have on a species to the impacts a proposed action will have on the species. *See*, *e.g.*, *W. Watersheds Proj. v. McKay*, No. 22-35706, 2023 WL 7042541 at *2 (9th Cir. Oct. 26, 2023); Opening Br. at 42–43 (identifying five more cases holding the same). FWS made this same exact error here.

Defendants point to FWS's use of persistent spring snow cover, a "climate-sensitive variable," to model wolverine habitat in the BiOp as evidence of a "climate-aware jeopardy analysis." Fed. Resp. at 45–46. This is a red herring. Plaintiffs take no issue with FWS's use of persistent snow cover to model *current* wolverine habitat in the Project area. The problem is that the BiOp fails to assess *future* climate impacts. The BiOp lacks any analysis of how snow cover

in the Project area and surrounding region may shrink due to climate change in coming decades.

The BiOp admits the Project will eliminate and fragment wolverine habitat. FWS-335–36. And FWS identifies climate change—including from declining snowpack—as the species' "primary threat" in the future because it will shrink and fragment wolverine habitat. FWS-336. The ESA requires FWS to "add" these cumulative climate change effects to Project effects in considering whether the project may jeopardize the continued existence of the species. 50 C.F.R. § 402.14(g)(4). But the BiOp never did this. FWS's failure to consider this factor is not a matter of scientific disagreement. It is a clear violation of the ESA, ESA regulations, and the APA, consistent with the overwhelming case law cited by Plaintiffs.

2. FWS's Wolverine Incidental Take Statement Violates the ESA and APA.

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

FWS set the take limit as the acres of ground disturbance in wolverine denning habitat. *See* Opening Br. at 43–44. Defendants admit that the ITS must include monitoring and reporting of the Project's take limit. Fed. Resp. at 47; 50 C.F.R. § 402.14(i)(4). Yet Defendants identify nothing in the ITS actually requiring monitoring and reporting of these acres of ground disturbance. Fed. Resp. at 47–48. Defendants instead contend that the BiOp's referenced Environmental Monitoring and Management Plan ("EMMP") incorporates disturbance in denning habitat as something "inherently measurable." *Id.*

Plaintiffs do not dispute that the acres of Project disturbance in wolverine denning habitat are measurable. The problem is that neither the wolverine ITS, nor the EMMP, require the Forest Service or Perpetua to monitor or report these disturbance acres. Although the ITS contains a monitoring and reporting section, none of the measures there relate to acres of disturbance in denning habitat, and this section nowhere mentions the EMMP. FWS-339–40. And while the BiOp

does discuss the EMMP (FWS-117–18, 130), it expressly notes that the EMMP is just a "draft" document. Moreover, Defendants cite to no provision in the draft EMMP that requires monitoring or reporting to FWS the acres of disturbance in wolverine denning habitat.[7]

This fails to comply with ESA regulations, which require the ITS to "set[] a clear standard for determining when the level of anticipated take has been exceeded," 50 C.F.R. § 402.14(i)(1)(i), and require that either Perpetua or the Forest Service "must report the progress of the action and its impact on the species to the [FWS] as specified in the incidental take statement." *Id.* § 402.14(i)(4). As the Ninth Circuit has explained, these ESA "regulation[s] make[] clear that [FWS] 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) (emphasis added). The wolverine ITS, at FWS-337–40, contains no such monitoring and reporting of acres of disturbance in denning habitat, in violation of the ESA.

b) Failure to Account for Forms of Take other than Habitat Loss.

ESA regulations require 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). While ground disturbance in denning habitat may be a suitable surrogate for some of the incidental take caused by the Project, it does not cover all forms of take. Yet FWS failed to specify the amount of and failed to set any additional take limits or surrogate limits to account for take caused by industrial activity, human presence, noise, or light that will disturb wolverine over decades of operations. *See* Opening Br. at 45–46.

[7] Drafts of the EMMP in the record merely mention wolverine once where they identify various terrestrial wildlife species of interest; none of those documents specify any monitoring or reporting of wolverine denning habitat disturbance. *See* FWS-2117–79 (May 2021 EMMP); *see also* FS-207740 (Sept. 2021 EMMP).

In response, Defendants assert that the Project includes measures to "minimize the impact of potential instances of take" from these non-habitat loss forms of take, pointing to measures Perpetua will follow during mining operations. Fed. Resp. at 48–49. But minimizing these non-habitat-loss forms of take does not satisfy FWS's duty to quantify and limit such take in the ITS.

Moreover, Defendants and Perpetua completely ignore Plaintiffs' specific argument about take the Project will cause by grooming and opening up a new 10.8-mile trail on Cabin Creek Road for winter recreation. Opening Br. at 45–46. Because Cabin Creek Road already exists, grooming and opening it in winter would not cause any "new" ground disturbance—meaning this part of the Project is not captured by the ITS. And this take has not been minimized to discountable levels.

The BiOp clearly explains how this part of the Project will harm and harass wolverine: "the associated increased recreational activity (e.g., snowmobiling, skiing, etc.) will likely cause impacts to wolverines due to noise from and presence of [motorized vehicles] in an area where they were not previously as this will be a new winter route." FWS-330. FWS admitted that this would likely cause wolverines to avoid this area and that human presence near den sites could cause female wolverines to shift or abandon dens. *Id.* FWS also acknowledged the winter 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.*

To be clear, Plaintiffs neither dispute FWS's use of surrogate take limits for wolverine, nor the use of ground disturbance in denning habitat as one such limit. The problem is that this is the only take limit FWS established for wolverine. And while new ground disturbance might be causally connected to some forms of take the Project will cause, it does not cover other forms, like harming and harassing females and kits by opening Cabin Creek Road for winter recreation.

Defendants cite *Grand Canyon Trust v. U.S. Bureau of Reclamation*, No. CV-07-8164-

PHX-DGC, 2011 WL 1211602 (D. Ariz. Mar. 30, 2011). While that case upholds the surrogate take limit at issue there, it does not support Defendants' argument. Rather, that case reiterates that a surrogate take limit "'must be able to perform the functions of a numerical limitation,' must 'contain measurable guidelines to determine when incidental take would be exceeded,' and must be 'linked to the take of the protected species.'" *Id.* at. *7 (quoting *Oregon Natural Res. Council v. Allen*, 476 F.3d 1031, 1038 (9th Cir. 2007)).

Here, the ITS sets no take limit related to grooming and winter use of Cabin Creek Road. Thus, regardless of how extensively the new route is used, or how many wolverine are disturbed, harmed, harassed, or killed, the Project escapes any take limit, because no such limit exists. This violates the ESA. *See Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 749 (9th Cir. 2020) (holding that, even though one type of take is covered by ITS, the failure to "quantify the amount of *other* types of incidental take that the [] project may cause" violates the ESA) (emphasis added).

c) Failure to Include RPMs and Terms and Conditions.

Defendants again attempt to rely on other Project-related documents to satisfy what the ESA regulations require FWS to do in the ITS itself. 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).

Defendants argue that the ITS "incorporated as RPMs the required and enforceable environmental design features included in the proposed action" and that the ITS "set forth concrete T&Cs for how the Forest Service must implement the RPMs through monitoring and reporting." Fed. Resp. at 49–50. These assertions are belied by the ITS itself.

The wolverine ITS has a two-paragraph section "7.6.3 Reasonable and Prudent Measures," which states:

> The Service finds that compliance with the proposed action outlined in the Assessment, including proposed environmental design features, is essential to minimizing the impact of incidental take of wolverines. If the proposed action, including EDFs, is not implemented as described in the Assessment and this Opinion, there may be effects of the action that were not considered in this Opinion, and reinitiation of consultation may be warranted.
>
> The Service believes the measures proposed by the Forest are sufficient to minimize potential impacts to North American wolverine caused by the proposed action.

Id. FWS does not "specify" any RPMs here. Rather, it simply concludes that the Project's design features are sufficient and that it therefore need not develop any RPMs. This mirrors the ITS invalidated in *Ctr. for Biological Diversity v. Culver*, No. 21-cv-07171-SI, 2024 WL 4505468, at *64–65 (N.D. Cal. Oct. 22, 2024), where the Court confirmed that RPMs and terms and conditions are not "optional," even if the proposed action includes sufficient measures to avoid jeopardy.

Notably, the ITS skips from section "7.6.3 Reasonable and Prudent Measures" to section "7.6.5 Reporting and Monitoring Requirement." FWS-339. The missing section 7.6.4 would be the "Terms and Conditions" section, had FWS indeed developed any RPMs. Its absence confirms that FWS chose not to include any RPMs, because the ESA regulations require that an ITS set forth terms and conditions for implementing RPMs. 50 C.F.R. § 402.14(i)(1)(iv).

Defendants attempt to recast section "7.6.5 Reporting and Monitoring Requirement" as actually being a terms and conditions section, but this conflates two distinct regulatory requirements. ESA regulations separately require FWS to specify terms and conditions to carry out RPMs (50 C.F.R. § 402.14(i)(1)(iv)) and also to specify monitoring and reporting of impacts to the species (*Id.* § 402.14(i)(4)).

The wolverine ITS stands in stark contrast to the bull trout ITS, which clearly specifies

RPMs, specifies terms and conditions for each RPM, and also specifies separate monitoring and reporting requirements. FWS-275–78. The bull trout ITS includes section "4.6.3 Reasonable and Prudent Measures," that, like the wolverine ITS RPM section above, includes a nearly identical paragraph stating compliance with the proposed action and its conservation measures is essential to minimizing impacts. FWS-275. The bull trout ITS section on RPMs then adopts and specifies *nine* RPMs to minimize impacts to bull trout. FWS-275–76. The bull trout ITS also includes section "4.6.4 Terms and Conditions" that lays out one to four terms and conditions for *each* of the nine RPMs. FWS-276–77. Finally, the bull trout ITS includes section "4.6.5 Reporting and Monitoring" that specifies three categories of reporting and monitoring, separate and apart from the terms and conditions. FWS-278.[8]

By contrast, the wolverine ITS specifies no RPMs and entirely fails to provide any section on "Terms and Conditions," showing that FWS did not actually adopt any RPMs or terms and conditions. Defendants attempt to recast the wolverine monitoring and reporting as being RPMs and terms and conditions is not supported by the ITS, and is counter the ESA regulations which require ITSs to separately specify RPMs, terms and conditions, *and* monitoring and reporting.

3. FWS's Whitebark Pine Jeopardy Analysis Violates the ESA and APA.

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. § 402.14(g)(4). "This step is critical to ensure the action is not analyzed in a vacuum." *Appalachian Voices v. U.S. Dep't of Interior*, 25 F.4th 259, 278 (4th Cir. 2022) (quotation omitted). "Thus, for obvious reasons, simply reciting the activities and impacts that constitute the baseline and cumulative effects and then separately

[8] To be clear, while the bull trout ITS does include these purported RPMs, with corresponding terms and conditions, and monitoring and reporting, the bull trout RPMs themselves are not adequate under the ESA, as shown *infra* Part IV.A.5.a.

addressing only the impacts of the particular agency action in isolation is not sufficient." *Id.* (cleaned up). Here, the BiOp commits this very error: it simply recites the primary threats to whitebark pine, including climate change, blister rust, pine beetle, and altered fire regimes (FWS-299, 306), but then assesses the Project's impacts in isolation from those threats (FWS-314–15). This violates the ESA.

In response, Defendants highlight how the BiOp considered baseline conditions (FWS-300–06), cumulative effects, (FWS-314), and Project-specific impacts (FWS-306–14). Plaintiffs do not dispute this. Plaintiffs also do not dispute that when modeling *current* whitebark habitat in the Project, FWS factored in existing and recent past information on occurrences of blister rust, pine beetle, and fire, and that past climate change effects might be captured in this modeling. But like its error with the wolverine analysis, here too FWS never factored into its analysis *future* declines in whitebark pine and its habitat in the action area due to ongoing blister rust, pine beetle, altered fire regimes, and climate change over the multi-decade life of the Project.

As the Project removes whitebark pine and degrades its habitat over decades, the agency should have analyzed the additive future effects from blister rust, pine beetle, altered fire regimes, and climate change over those same decades. FWS's ESA listing rule for whitebark pine cites Forest Service data showing that "51 percent of all standing whitebark pine trees in the United States are now dead, with over half of that mortality occurring approximately in the last two decades alone." 87 Fed. Reg. 76,882, 76,885 (Dec. 15, 2022) (citation omitted). In another two decades, as the Project approaches full buildout, whitebark pine will likely be in an even more perilous situation. Yet the BiOp never considers this. The "Summary of Effects" section (FWS-313–14) and "Conclusion" (FWS-314–15) focus solely on the Project's toll on whitebark in isolation, basing these losses on existing habitat and trees while ignoring how reasonably

foreseeable future declines in trees or habitat in the area due to blister rust, pine beetle, fire, and climate change during this lengthy Project will compound the Project's impacts.

4. FWS's Bull Trout Jeopardy Analysis Violates the ESA and APA.

a) Ignoring Full Extent of Impacts to Bull Trout.

The FWS offers the following rationale for its "no jeopardy" conclusion for bull trout:

> The proposed action is expected to result in injury and mortality of 629 bull trout (402 in the Stibnite project area and 227 in the Lemhi restoration project area). In Idaho, it is estimated that there are 1.13 million bull trout within all recovery units (High et al. 2008, p. 1687). The potential loss of 629 bull trout represents 0.06% of bull trout in the State.

FWS-262. As Plaintiffs explained, both the numerator and denominator in this calculation and conclusion are fundamentally flawed. Opening Br. at 49–50. For the numerator, FWS's figure of 402 bull trout injured or killed only included one out of the five categories of take ("fish handling") the Project will cause. *Id*. Significantly, FWS's BiOp provided no explanation as to why its key calculation supporting its no-jeopardy conclusion rests on just one of five types of Project impacts.

Defendants now assert that for the other four categories of impacts, "science did not exist to allow FWS to identify mortality with the same precision." Fed. Resp. at 53. But even if this were true, that excuse cannot justify the agency's unexplained decision to ignore them. Moreover, FWS's own record flatly contradicts Defendants' claim: elsewhere in the BiOp, FWS stated that it *could* estimate additional sources of take. *See e.g.*, FWS-214 (estimating "a potential loss of 111 bull trout" from a barrier in Meadow Creek); FWS-264 (temperature increase in Meadow Creek "will result in the estimated take of 32 bull trout"); FWS-265 (temperature increase in EFSFSR "will result in the estimated take of 155 bull trout").

Defendants further insist, without citation, that "FWS accounted for and analyzed the anticipated mortality of bull trout from all expected activities." Fed. Resp. at 53. Similarly,

Perpetua argues that "the agency did not ignore fish mortality from other sources." Perpetua Resp. at 46. Neither Defendants nor Perpetua dispute, however, that FWS failed to include other sources of mortality in its no-jeopardy calculation. By pointing to portions of the ITS where additional sources of bull trout mortality were purportedly "accounted for," Defendants' and Perpetua's arguments only underscore that FWS could have included these sources within the no-jeopardy calculation, but did not. Fed. Resp. at 53–54; Perpetua Resp. at 46. Instead, FWS ignored these and relied on an artificially low count of bull trout killed to reach its no jeopardy determination.

The denominator is also improper, as FWS used the entire state of Idaho to minimize the result. FWS-262. The Ninth Circuit has rejected precisely this tactic, holding that agencies are not allowed to "dilute to insignificance" the impacts of a site-specific project in a jeopardy determination by utilizing an overly broad scope of analysis. *Pac. Coast Fed'n of Fishermen's Ass'n v. Nat'l Marine Fisheries Serv*., 265 F.3d 1028, 1036–37 (9th Cir. 2001). Although FWS acknowledged that the Project would adversely impact bull trout in "5 out of 27 local populations (18.5%) in the core area" within the 338,100-acre South Fork Salmon River Core Area, FWS-262, it nevertheless summarily concluded that it did "not anticipate effects" at the core area level. *Id*. This conclusion and the conclusion that the mine would "maintain population size" are unsupported by the record, especially given: (1) the already significantly degraded site conditions, including stream temperatures that exceed bull trout requirements (*see* FWS-148) and persistent chemical pollution (*see* FWS-156–57); and (2) the Project's substantial additional impacts, such as the permanent loss of upper Meadow Creek (*see* FWS-257), the unprecedented diversion of the East Fork South Fork Salmon River into a nearly mile-long tunnel around the mine site (*see* FWS-94), and long-term increases in stream temperatures of up to 6.8 ºC (*see* FWS-178).

b) Failure to Consider Climate Change Effects to Bull Trout

FWS failed to consider how the additive combination of climate change effects and Project effects on stream temperature will harm bull trout over the next century. As Plaintiffs showed, FWS admits that cold stream temperatures are essential for bull trout; that temperatures within the Project area are already too high and thus designated as "impaired;" that the Project will further increase those temperatures; and that climate change will do so as well. *See* Opening Br. at 51–52. Yet FWS failed to address climate change together with other Project effects in its jeopardy analysis. Plaintiffs cited analogous cases in which courts have overturned BiOps where the agency failed to add climate change effects to a project's effects in the jeopardy analysis. *Id*. at 52–53.

In response, Defendants claim that the BiOp incorporated "climate-change forecasts" in its jeopardy analysis, Fed. Resp. at 54, but the cited pages contradict this claim. In fact, FWS admits:

> [T]he temperature predictions in Table 24 *do not account for changes to stream temperatures caused by changing climate conditions*. This means that modeled future water temperatures (e.g., Mine Year 112) assumed that without the proposed action, stream temperatures will be similar to the historic water temperature data. 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.

FWS-175 (emphasis added) (citations omitted).

Defendants have not put forth any reasonable argument justifying this failure. Point blank, the ESA requires agencies to *evaluate* combined effects. *See Wild Fish Conservancy v. Irving*, 221 F. Supp. 3d 1224, 1234 (E.D. Wash. 2016) ("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."); *Willamette Riverkeeper v. Nat'l Marine Fisheries Serv.*, 763 F. Supp. 3d 1203, 1237 (D. Or. 2025) (holding unlawful a BiOp that had evaluated the "serious negative implications" of

climate change on steelhead, but then did not analyze the effects of the proposed project "on top of" the climate change effects).

Instead, FWS merely acknowledged that climate change would likely lead to higher stream temperatures; it did not evaluate it. Failure to evaluate climate change impacts is evident in the section of the BiOp referenced by Defendants and Perpetua, where FWS simply made general predictions about expected warming without making the critical impacts assessment. Fed. Resp. at 55; Perpetua Resp. at 48. This is precisely the deficiency that courts have held unlawful: failing to *apply* climate change considerations and to assess the *combined effects* of both the proposed action and climate change on the listed species and its critical habitat. *Wild Fish Conservancy*, 221 F. Supp. 3d at 1234; *Willamette Riverkeeper*, 763 F. Supp. 3d at 1237. Defendants' reference to measures that FWS will require during the closure and reclamation phases of the Project also does nothing to remedy this defect in the BiOp's jeopardy analysis. Fed. Resp. at 55.

While Defendants ignore the analogous cases Plaintiffs cite, Perpetua's half-hearted attempt to distinguish them fails. *See* Perpetua Resp. at 48–49. That "no modeling is perfect," *see id.*, does not excuse the agency's failing to meaningfully incorporate additional scientific information that was plainly available to it. Even assuming that reliance on a significantly flawed model was permissible, Defendants' acknowledgement of climate change now only highlights and underscores that FWS could, and should, have explained its conclusions about harm to bull trout by integrating *both* the model results *and* the climate change dynamics within its knowledge. FWS erred as a matter of law by not doing so.

The issue Plaintiffs raise is not a matter of scientific disagreement, but one of legal obligations under the ESA and APA and of critical importance to bull trout. ESA regulations require FWS to "[a]dd" the effects of the action, cumulative effects, and the environmental baseline

to assess jeopardy. 50 C.F.R. § 402.14(g)(4). Cold stream temperatures are among the most critical habitat requirements for bull trout. The Project and climate change will further elevate already high stream temperatures in the Project area. The agency cannot acknowledge that climate change has additive effects yet decline to incorporate those effects into the substance of its jeopardy analysis. By doing so here, FWS made the same legal error other courts have identified before.

5. FWS's Bull Trout Incidental Take Statement Violates the ESA and APA.

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

An ITS must include RPMs that FWS considers necessary to minimize take, and mandatory "terms and conditions" to implement the RPMs. *See* Opening Br. at 53; 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1)(ii). In the ITS for bull trout, however, FWS identifies nine RPMs, eight of which make a mockery of this requirement by merely directing the Forest Service only to "minimize the potential" for take from the various sources of impacts, with no direction as to how that must be accomplished. FWS-275–76. The corresponding "terms and conditions" for baseflow depletions, stream temperatures, sediment delivery, and chemical pollutants merely require development of a monitoring plan, which by itself does nothing to minimize take. FWS-276–77. Thus, at least for these four sources of impacts, the ITS violates the ESA by omitting RPMs or "terms and conditions" that actually minimize incidental take.

Defendants' response obscures these shortcomings. They assert that the Terms and Conditions "require the Forest Service to develop and implement plans" addressing baseflow reductions, stream temperatures, and sediment delivery. *See* Fed. Resp. at 56. But Defendants repeatedly and misleadingly omit that the BiOp specifies only "monitoring" plans. *See Id.*; FWS-275–77. Monitoring plans themselves do nothing to actually minimize take, and Defendants seek to recast these limited obligations as more substantial than the record supports.

Defendants also rely on the final RPM, which requires the Forest Service to ensure compliance with Appendix B of the Biological Assessment. *See* Fed. Resp. at 56; FWS-276. However, FWS failed to include a corresponding Term and Condition to implement that RPM. FWS-276–77. Defendants further cite design features and best management practices discussed elsewhere in the BiOp, but none are incorporated into the RPMs or Terms and Conditions. Fed. Resp. at 57. Similarly, the Terms and Conditions that require annual project reports do not relate to the vast majority of the anticipated take of bull trout from baseflow reductions, stream temperature increases, sediment delivery, and chemical contaminants resulting from the Project; they regard compliance with just one Idaho water quality standard (turbidity) and goals for "post-construction" revegetation. *See id*.

Perpetua's argument that monitoring alone satisfies the ESA is equally misplaced. *See* Perpetua Resp. at 53. The ESA explicitly requires FWS to specify measures "to minimize" the impact of incidental take. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1)(ii). FWS's regulations further recognize that RPMs are intended to "avoid or reduce the amount or extent of incidental taking anticipated to occur." 50 C.F.R. § 402.14(i)(3). And a separate and distinct regulation pertains to monitoring incidental take, apart from the RPMs. *Id*. § 402.14(i)(4). Perpetua's broad discussion of additional monitoring, "adaptive management," and "design features" merely distracts from the fact that these measures lie outside the ITS and are not incorporated into the required RPMs and mandatory "terms and conditions." Perpetua Resp. at 53–54.

b) Inadequate Temperature Take Limit.

The ITS relies on stream temperatures as one of its incidental take surrogates for bull trout. FWS states that authorized take will be exceeded (and thus reinitiation of consultation required) if measured water temperature exceeds the predicted temperature in any stream reach set forth in

Table 24. FWS-265; FWS-178 (displaying the predictive output of the stream temperature model). As Table 24 reports, however, modeled temperature predictions were made only for years 6, 12, 18, 22, 27, 32, 52, and 112, leaving major gaps between take limit checkpoints. FWS-178. As Plaintiffs explained previously, this approach does not establish a clear, legally adequate re-consultation trigger, and these major gaps allow unlawful take to occur for years or even decades before remedial action would be required. Opening Br. at 54–55.

Defendants now assert that stream temperature monitoring will apply as a "continuous trigger," with readings taken in 15-minute increments, to cure the gaps in the checkpoints. Fed. Resp. at 57. But nowhere does the BiOp articulate such a continuous monitoring obligation, violating the regulatory requirement that FWS "specif[y]" a "clear standard." 50 C.F.R. § 402.14(i)(1)(i), (i)(4). More fundamentally, Defendants' response raises more questions than it answers, showing that this post-hoc attempt to fix this error in the BiOp is both unworkable and nonsensical. Among other flaws, neither the BiOp nor Defendants explain whether Perpetua's continuous monitoring must meet the stream temperature value of the preceding checkpoint or of the next future checkpoint listed in Table 24 during each of the many gap periods. Since the stream temperature changes predicted in Table 24 include both *increases* and *decreases* over different gap periods, either approach could have major adverse consequences for bull trout.

Consider, for example, the summer season in Meadow Creek "upstream from EF Meadow Creek." FWS-178. The model predicts initial post-construction stream temperatures about 1.6 ºC below the baseline, then an 8.4 ºC *increase* during the initial reclamation period, and thereafter an 85-year *decrease* (spread over just three additional checkpoints) back toward 1.1 ºC above baseline. *Id.* Defendants now assert that any crossing of a benchmark would require reinitiation. Fed. Resp. at 58. But this simply would not work. For example, Table 24's year-22 limit of 12.4 ºC

jumps abruptly to the year-27 limit of 20.8 ºC. A continuous trigger would either demand an impossibly instantaneous temperature increase, or the trigger's application would need to be void during this five-year gap to account for the run-up—neither of which the BiOp explains.

The problem compounds over longer intervals during the 85 years of reclamation work that allegedly will bring streams back down to temperatures suitable for bull trout.[9] If reclamation fails and temperatures remain closer to 20 ºC after year 27, the lack of adequate temperature decreases would not be caught until the year-32 checkpoint. And after that, it gets worse. If stream restoration failed to achieve needed temperature decreases beginning just after mine year 32, FWS's ITS will fail to address the problem for up to *twenty years*. Even with the "continuous" monitoring that Defendants now offer, the trigger would be pegged to the larger, preceding model benchmark until the next expectation is enforced at mine year 52. This problem repeats itself, with the next checkpoint being even further away at *sixty years*, allowing harmful trends in temperature conditions to persist without triggering reinitiation. And an ultimate promise of re-consultation around the year 2140, to address the Project's construction today, is hollow relief.

Thus, FWS's methodology for this surrogate take trigger is incoherent and irrational, failing to meet the legal mandates of the ESA and APA. The agency's decision cannot be sustained by unworkable monitoring methods not explained in the record and invented for litigation only. *See Nat. Res. Def. Council*, 31 F.4th at 1210 (agency action must be reversed if based on "post-hoc rationalizations which [courts] do not consider and which suffer from obvious flaws").

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[9] Problematically, FWS's BiOp credits the Project with *maintaining* this stream reach as bull trout habitat even though it will exceed suitable bull trout temperatures during the Project, and even though after the Project's impacts, it is not predicted to return to temperatures barely suitable for bull trout until mine year 112, or around calendar year 2140. *See* FWS-264. Moreover, this predicted temperature at mine year 112 was calculated without accounting for climate change (FWS-175), making it a gross underestimate of the likely temperature in 2140.

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

Defendants did not contest Plaintiffs' points regarding the legal standards for the Forest Service's ESA liability. Plaintiffs reiterate that the Court must apply judgment and relief to both agencies for legal violations in the BiOp. *See* Opening Br. at 55.

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

Defendants admit that enforceable terms and conditions from the 2003 Forest Plan BiOp "require" the agency to "demonstrate during consultation that similar projects avoided and minimized sediment delivery." Fed. Resp. at 58. *See also* Opening Br. at 55–57. Yet in response to Plaintiffs' claim that the agency failed to provide this demonstration, Defendants point only to a handful of references in the record to one prior mining exploration project, called Golden Meadows. These scattered mentions of a small mineral exploration are a far cry from meaningful engagement with the BiOp's requirements. None of the agency's references mention the relevant BiOp term and condition, and none demonstrate successful avoidance of sediment delivery in that project. *See* NMFS-45378–79 (regarding only growth media and "overburden"); *see also* FS-150855–56, 153320 (regarding only questions about winter road gate closures); FS-153473 (regarding only a general question about exploratory drilling methods).

V. REMEDY

Seeking the default remedy in Administrative Procedure Act ("APA") cases like this one, Plaintiffs ask the Court to set aside (vacate) Defendants' unlawful approval of the Project to prevent mine construction in protected roadless areas, RCAs, and ESA-listed species' habitat unless and until Defendants correct their errors and issue a new, lawful approval of the Project. Opening Br. at 57–58. Perpetua asks the Court to depart from the default remedy and to instead remand without vacatur. According to Perpetua, its mine is so "urgent" that, even if the Court finds

Defendants' approvals unlawful, it should nonetheless allow the company to proceed. Perpetua mischaracterizes the law, overstates the Project's urgency, and fails to meet its burden to overcome the presumption of vacatur.

Remand without vacatur is a highly disfavored exception that is granted only in "rare" and "limited" circumstances. *Nat'l Family Farm Coal. v. U.S. EPA*, 960 F.3d 1120, 1144 (9th Cir. 2020); *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015); *Humane Soc'y v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010). Defendants bear the burden to show equities strong enough that they "overcome the presumption of vacatur." *All. for the Wild Rockies v. U.S. Forest Serv*., 907 F.3d 1105, 1122 (9th Cir. 2018). In evaluating the equities, courts evaluate two factors: "the seriousness of the [agency's] deficiencies" and "the disruptive consequences" of vacatur. *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993). Defendants must show that "vacatur would cause serious and irremediable harms that significantly outweigh the magnitude of the agency's error.'" *W. Watersheds Project v. Zinke*, 441 F. Supp. 3d 1042, 1083 (D. Idaho 2020), *aff'd in part, rev'd in part, Mont. Wildlife Fed'n v. Haaland*, 127 F.4th 1 (9th Cir. 2025).

The Court must also weigh the risk of environmental harm from leaving an unlawful decision in place. In environmental cases, the "rare circumstance" supporting non-vacatur occurs when leaving the unlawful agency action in place will prevent serious environmental harm—the opposite of the situation here. *See Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (leaving flawed ESA listing rule in place to protect imperiled snail until new listing rule is completed); *Ctr. for Food Safety v. Regan*, 56 F.4th 648, 668 (9th Cir. 2022) ("Remand without vacatur here maintains the enhanced protection of the environmental values."). *See, also*, *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 80 (D.D.C. 2010) ("vacatur is appropriate in

order to prevent significant harm resulting from keeping the agency's decision in place").

Remand without vacatur is appropriate only when the agency could correct its error on remand and likely end up in the same place in terms of on-the-ground implementation. But where "fundamental flaws 'foreclose [the agency] from promulgating the same [action] on remand,'" vacatur is required. *N. Carolina v. EPA*, 531 F.3d 896, 929 (D.C. Cir. 2008) (quoting *Nat. Res. Def. Council v. EPA*, 489 F.3d 1250, 1261–62 (D.C. Cir. 2007)). Plaintiffs' claims here expose such fundamental flaws.

First, Plaintiffs have shown how the Forest Service approved extensive off-site industrial activity without following the substantive permitting requirements of FLPMA and other applicable laws—including construction of the Burntlog Route, eight gravel mines, and a new transmission line through protected roadless and riparian areas and fish and wildlife habitat. If it applied the correct statutes and regulations on remand, the agency could not simply ratify the same decisions. The process would require new analyses of different economic, environmental, and public interest factors; require payment (instead of free use), among other different conditions; and require entirely different permits *before* Perpetua could lawfully occupy public lands. The Forest Service would thus, at a minimum, have to significantly change any new approvals on remand (if not reject them), precluding the possibility of simply ratifying the actions challenged here.

Second, Defendants failed to show there were no alternatives to locating dozens of mine components in protected riparian areas, in violation of NFMA and NEPA. Allowing Perpetua to build roads, structures, and waste facilities in RCAs now, while the Forest Service looks for alternatives to these RCA incursions, would nullify the Court's ruling on the merits and render the remedy meaningless. *See, e.g., Nat'l Wildlife Federation v. Lohr*, Case No. 19-cv-2416, 2024 WL 4443687, at *2 (D.D.C. Oct. 8, 2024) (remand without vacatur inappropriate where "wetlands may

be improperly destroyed in the interim . . . in which there would be no apparent way to restore the status quo ex ante") (cleaned up); *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 740 (9th Cir. 2020) (vacating drilling project based on NEPA and ESA violations, and noting with regard to NEPA that the agency "may well approve another alternative.").

Third, Plaintiffs raised significant NEPA violations including a failure to assess meaningful mine alternatives to Perpetua's mine plan or take a hard look at air pollution and hazardous material spill risks. The default vacatur remedy must precede any remand to the agency here "[b]ecause remand without vacatur or injunction would incentivize agencies to rubber stamp a new approval, rather than take a true and informed hard look" at the consequences of their decisions. *WildEarth Guardians v. Bernhardt*, 423 F. Supp. 3d 1083, 1105 (D. Colo. 2019). Indeed, "where an agency's NEPA review suffers from a significant deficiency, refusing to vacate the corresponding agency action would vitiate the statute." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1052 (D.C. Cir. 2021) (quotations omitted). To fix the NEPA violations on remand, instead of rubber stamping the Project again, the Forest Service could impose new conditions or limitations to reduce air pollution and spill risks, and could adopt an alternative mine plan.

Finally, Plaintiffs raised significant ESA violations. In the words of the Supreme Court, the ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation," affording "endangered species the highest of priorities." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174, 180 (1978). Yet Perpetua seeks to make its immediate mine construction the highest priority. Despite the harm the Project would cause to ESA-listed species, Defendants approved it without following the strictures of the ESA and its implementing regulations for protecting against take and ensuring no species is jeopardized. Remand without vacatur is inappropriate in such circumstances because it would permit exactly the unlawful take and risk of

jeopardy the ESA is designed to prevent. *See Center 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. Jun. 29, 2017) (vacating BiOps).

Trying to meet its burden to overcome the presumptive and highly favored remedy of vacatur, Perpetua offers a self-serving and hyperbolic portrayal of "disruptive consequences" from on-the-ground accountability for the legal violations Plaintiffs raised. The company's attempt to cast the Project as primarily motivated by national security (as an antimony supplier) or environmental restoration is misleading. This Project is a large-scale *gold mine*. *See* FS-344205 ("The contribution to the Project economics, by metal, is approximately 96% from gold, 4% from antimony, and less than 1% from silver."). And as the Forest Service concluded, leaving the Project area as-is (i.e., the "no action alternative") is better for the environment than allowing the mine plus its supposed restoration components to proceed. FS-243540.

Moreover, Perpetua's assertions about the urgency and degree to which the Project could address any national security needs are overblown. The Project's antimony is not enough to put a meaningful dent on our dependence on foreign antimony. Tiedemann Decl. ¶¶ 12–14. And despite Perpetua's suggestions, the Project is not the only game in town. Multiple domestic antimony sources have recently been identified and invested in by the Department of Defense. *Id.* ¶¶ 6–11. Plus, even if the Project advanced, Perpetua would spend the first three years constructing the mine before it might then start mining and producing any unrefined antimony concentrate. FS-243742 (Project timeline). That concentrate would then need to be smelted and refined, which might require shipping it to another country (since there are currently no suitable facilities for doing this in the United States) and then re-importing it before the antimony could be used domestically. FS-358404. Thus, with or without vacatur, a period of years stands in the way of any useable antimony.

Perpetua's economic interests do not overcome the presumption of vacatur. Lost profits or economic inconvenience are "the nature of doing business, especially in an area fraught with bureaucracy and litigation." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 104 (D.D.C. 2017). Courts have repeatedly held that even serious economic consequences are insufficient to withhold vacatur. *See New Jersey Conservation Found. v. FERC*, 111 F.4th 42, 64 (D.C. Cir. 2024) (upholding vacatur despite "severe and disruptive consequences" to pipeline operations and natural gas supply); *Standing Rock Sioux Tribe*, 985 F.3d at 1051 (vacating pipeline easement despite "significant economic harm" to developer and other entities); *Pub. Emps. For Env't Resp. v. U.S. Fish & Wildlife Serv.*, 189 F. Supp. 3d 1, 3 (D.D.C. 2016) (vacating despite "significant impacts" to industry); *Friends of the Cap. Crescent Trail v. Fed. Transit Admin.*, 218 F. Supp. 3d 53, 60 (D.D.C. 2016) (vacating light-rail project approval despite "significant financial costs and logistical difficulties on the public and private entities involved in its construction").

Ultimately, Perpetua seeks a disfavored remedy that would elevate its private business interest over this Court's authority under the APA, over Plaintiffs' rights, and over the public's interest in lawful agency decision-making and protecting the environment. But the APA establishes a strong presumption that "the offending agency action should be set aside," *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1094 (9th Cir. 2020), and, indeed, that is the express statutory mandate of the APA. *See* 5 U.S.C. § 706(2)(A) ("The reviewing court *shall* hold unlawful and set aside agency action" held unlawful.) (emphasis added).

CONCLUSION

This Court should grant Plaintiffs' Motion for Summary Judgment and deny Defendants' and Perpetua's, and should vacate the ROD, FEIS, and BiOp.

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Respectfully submitted,

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