Access Fund * American Rivers * American Whitewater * Clark-Skamania Flyfishers * Conservation Northwest * Earthrise Law Center * Gifford Pinchot Task Force * Mazamas * Native Fish Society * Sierra Club Washington Chapter * The Mountaineers * The Wilderness Society * Vancouver Audubon * Vancouver Wildlife League * Washington Wild * Washington Wildlife Federation * Washington Trails Association * Western Mining Action Project * Willapa Hills Audubon Society

February 4, 2016

U.S. Bureau of Land Management
Oregon/Washington State Office
Attn: Goat Mountain Project (OR-936.2)
P.O. Box 2965
Portland, OR 97208

Cowlitz Valley Ranger District
Gifford Pinchot National Forest
P.O. Box 670
Randle, WA 98377

RE: Goat Mountain Hard Rock Prospecting Permit Applications Modified EA

VIA E-Mail: BLM_OR_Prospecting_EA@BLM.gov and Certified Mail 7015 0640 0001 2169 4686.

To Whom This May Concern:

These comments respond to the Goat Mountain Prospecting Modified Environmental Assessment (MEA) issued by the agencies on January 5, 2016.[1]

This letter is signed by 19 organizations, which represent hundreds of thousands of citizens dedicated to protecting and restoring Northwest ecosystems and our iconic fish and wildlife populations. All previous comments submitted by any of these groups to either the U.S. Bureau of Land Management (BLM) and the U.S. Forest Service (USFS) regarding the Goat Mountain Project, including but not limited to all documents related to the project approvals and reviews associated with the previous two lawsuits brought by the Gifford Pinchot Task Force, as well as the previously proposed leasing of the area by the federal government, are hereby adopted and incorporated into these comments as part of the administrative record for this case.

The following comments detail our concerns (and supplement our previous comments and concerns) regarding this project, the environmental review process, and the specific issues that we would like more fully addressed in a final Environmental Impact Statement (EIS).

Overall, the purpose of an environmental assessment (EA) is to "provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact[FONSI]."[2] EAs must "include brief discussions of the need for the proposal, of

[1] GOAT MOUNTAIN PROSPECTING MODIFIED ENVIRONMENTAL ASSESSMENT (MEA) (2016), https://eplanning.blm.gov/epl-front-office/projects/nepa/52147/66795/72638/Goat_Mountain_MEA_20151217_FINAL.pdf (accessed February 3, 2016).
[2] 40 C.F.R. § 1508.9 (2012).

alternatives…, of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted."[3] An EIS must be completed if, based on the EA, the proposed federal project will "significantly affect[] the quality of the human environment."[4] "Effects" for purposes of the National Environmental Policy Act (NEPA) include "ecological [], aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative."[5] We believe that the BLM should not issue a permit for exploratory drilling, nor should the USFS consent to the drilling, because of the environmental and human effects the drilling will have. However, should the BLM/USFS move forward we believe that this project warrants the development of an EIS.

Additionally, we are concerned that comments submitted in response to the EA will not be adequately considered in the decision making process because of the need to meet Ascot's desired timeframe. The very minimal public comment period for the MEA allowed by BLM and USFS does not satisfy NEPA's public review mandates. We are concerned that this particular EA may not be in draft form and that comments made on this EA are not going to be fully considered. Although we recognize that working in timeframes is important, we cannot short-change the NEPA process. The public must be given every benefit to comment on a potential project in a meaningful way and the agencies should consider the information in the final decision. We request that all public comments be fully considered and addressed.

The Ninth Circuit has held that "'[t]he public must be given an opportunity to comment on draft EAs and EISs.'"[6] The court explained "[w]e have determined that an environmental plaintiff was 'surely… harmed [when agency action] precluded the kind of public comment and participation NEPA requires in the EIS process'…. The same can be said for failure to allow any public input in the EA/FONSI process, which is, after all, the threshold step for determining whether to prepare an EIS in the first place."[7]

The BLM and USFS published newspaper notices regarding the availability of this EA for public comment in early January, resulting in the minimum 30-day public comment period ending on February 4, 2016. Neither agency however made any attempt to directly contact representatives of the Gifford Pinchot Task Force (GPTF) and many of the other organizations signing this letter. The GPTF did not learn that the new modified EA was available until mid-January when they were contacted by the press. The agencies' failure to provide the GPTF with direct and actual notice is especially problematic here where the sole reason for the agencies preparing this modified EA was the district court litigation filed by the GPTF. One of the GPTF's attorneys did receive a postcard regarding the new modified EA, but not until January 22, 2016. (Copy attached) Allowing the public only a few weeks to comment on the new modified EA is wholly insufficient. The agencies' changes to that document are scattered throughout the much longer EA, resulting in many confusing sections and inconsistencies. For example, Table 1.3-1 listing the supplemental legal authorities consulted does not list the LWCFA or the Reorganization Plan No. 3 of 1946, even though those

[3] *Kern v. U.S. Bureau of Land Mgt.,* 284 F.3d 1062, 1076 (9th Cir. 2002).
[4] 42 U.S.C.A. § 4332(2)(C) (2012); *see Kern,* 284 F.3d at 1067, *supra* n. 3 ("NEPA requires federal agencies to prepare an EIS prior to taking major Federal actions significantly affecting the quality of the environment.") (Internal quotations omitted)).
[5] 40 C.F.R. § 1508.8(b) (2012).
[6] *Citizens for Better Forestry v. U.S. Dept. of Agric.*, 341 F.3d 961, 970 (9th Cir. 2003) (quoting *Anderson v. Evans,* 314 F.3d 1006, 1016 (9th Cir. 2002)).
[7] *Id.* at 971 (quoting *West v. Secretary of Dept. of Transp.,* 206 F.3d 920, 930 n. 14 (9th Cir. 2000)).

two laws are the main reason for the changes to the EA. Then, despite the absence of those laws from the table, a section addressing them appears a few pages later. See MEA at 13-14. The only way to properly comment on these confusing modifications to the EA is to carefully review the entire document, which, as a practical matter is simply not possible in the two weeks the commenting groups had to actually review the document. Additionally, the MEA points to a project file in regards to specific documents used to justify some of the analysis in the MEA. To fully participate in the NEPA process the public should be given access to documents of importance to the analysis. At a minimum, this analysis should be made available on the agencies' websites[8], which did not occur.

For these and other reasons, most of the organizations submitting these comments requested in writing on January 22, 2016 that the agencies extend the comment period to the full 90 days allowed by federal regulations. U.S. Senator Patty Murray also requested an extension. As of today, the agencies have not responded in any way to those requests. Refusing to extend the comment period under these circumstances, and indeed not even responding to the written requests to do so, is arbitrary and capricious and directly contrary to the express requirements and underlying purpose of NEPA.

I. The Development of a Mine is not Speculative in Nature and Should Have Been Considered in the Cumulative Impacts Analysis.

Although we understand that this project is different from General Moly, Inc.'s lease application in 2005, this application could open the door to a mining proposal that does not meet the requirements for the purpose for acquisition of this area. Citizens of the Pacific Northwest and users of the Goat Mountain area and the Mount St. Helens National Volcanic Monument already overwhelmingly rejected a mine lease in this area, submitting over 33,000 public comments in opposition. In addition, a mine clearly does not fall into the category for which the land was acquired. Continued applications for mineral exploration and mining in this area are wasting valuable public time and public resources that could be better spent on meeting the countless number of challenges still facing us in Gifford Pinchot National Forest (GPNF) and Mount St. Helens National Volcanic Monument.

The fact that the EA or Ascot Resources Inc. has labeled future mine development "speculative" is not determinative. Under NEPA:

> While "foreseeing the unforeseeable" is not required, an agency must use its best efforts to find out all that it reasonably can: It must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject

[8] *See*, https://eplanning.blm.gov/epl-front-office/eplanning/projectSummary.do?methodName=renderDefaultProjectSummary&projectId=52147 (accessed February 3, 2016)

> any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as "crystal ball inquiry."[9]

In determining the scope of the required NEPA analysis, a federal agency must consider not only the proposed action, but also other types of related actions including "cumulative actions" and "connected actions."[10] A future hard rock mine within the Goat Mountain project area is a reasonably foreseeable future action. The common purpose for exploratory drilling is to identify, quantify, and value the minerals present in an area that may be extracted in the future. Public materials and comments from Ascot have made it clear that future development of a mine is the desired outcome. Thus, BLM should have considered a future mine within the scope of its NEPA analysis as a cumulative action and/or connected action. BLM's failure to do so was arbitrary and capricious and contrary to law, in violation of NEPA and the Administrative Procedure Act.

A. A future hard rock mine is a reasonably foreseeable future action in the project area that should be considered within NEPA's required cumulative impacts analysis.

"Cumulative actions" are those "which when viewed with other proposed actions have cumulatively significant impacts."[11] To determine the significance of a proposed action, an agency must consider "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts."[12] Cumulative impacts are those "impact[s] on the environment which result[] from the incremental impact of the action when added to other past, present, and *reasonably foreseeable future actions* regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from *individually minor but collectively significant actions taking* place over a period of time."[13]

In the Goat Mountain EA, BLM/USFS avoided their responsibility under NEPA to consider the potential cumulative impacts of a reasonably foreseeable future mine in the project area. Indeed, the agencies claim that a mine at Goat Mountain is "only speculative" and that only a "proposed" action can constitute a "reasonably foreseeable future action;" until then, it is "speculative" and need not be accounted for in a NEPA cumulative effects analysis.[14]

This conclusion runs contrary to Ninth Circuit case law. The conclusion is also contrary to case law cited by BLM from the Fifth and Tenth Circuits, law which in any case is not binding in the Ninth

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[9] *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975) (quoting *Scientists' Institute for Pub. Info. v. Atomic Energy Commn.*, 481 F.2d 1079, 1092 (D.C.C. 1973). *See also Kern*, 284 F.3d at 1072, *supra* n. 3; *Sierra Club v. Sigler*, 695 F.2d 957, 970 (5th Cir. 1983); *Sierra Club v. Marsh*, 769 F.2d 868, 879 (1st Cir. 1985) ("The agency has the responsibility to make an informed judgment, and to estimate future impacts on that basis… The agency cannot ignore these uncertain, but probable, effects of its decisions." (citing Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026, 18031 (Mar. 23, 1981) (internal citations omitted)).

[10] 40 C.F.R. § 1508.25(a) (2012); *Kern*, 284 F.3d at 1075, *supra* n. 3.

[11] 40 C.F.R. § 1508.25(a)(2).

[12] 40 C.F.R. § 1508.27(b)(7) (2012). *See also Churchill County v. Norton,* 276 F.3d 1060, 1072 (9th Cir. 2001).

[13] 40 C.F.R. § 1508.7 (2012) (emphasis added).

[14] MEA Appendix D.

Circuit. Gifford Pinchot Task Force and other signing organizations specifically cited binding Ninth Circuit case law to the BLM in its scoping comments and this EA intentionally ignores that controlling case law.

In the Ninth Circuit, an agency must engage in "reasonable forecasting" to determine the scope of its NEPA analysis.[15] In this forecasting, agencies are expected to engage in speculation; courts are wary of agency attempts to shirk their NEPA responsibilities by "labeling any and all discussion of future environmental effects as 'crystal ball inquiry.'"[16] According to the Environmental Protection Agency (EPA), NEPA requires that agencies "develop scenarios that predict which future actions might reasonably be expected as a result of the proposal [at issue]." This includes reasonably foreseeable future actions "even if they are not specific proposals" or "finalized [projects]."[17]

Here, mining development in the Goat Mountain project area is a reasonably foreseeable future action that may be expected as a result of the proposed prospecting. Indeed, the point of the proposed exploratory drilling is to detect minerals for removal, which would require a mine. Statements and actions from BLM, Ascot, and Ascot's predecessors belie the fact that mining development in this area is more than speculative and is indeed contingent upon exploratory drilling. First, the area has been the subject of significant mineral prospecting since the early 1900s.[18] Second, both BLM and Ascot acknowledge that significant mineral deposits exist in the project area to be evaluated with the proposed project.[19] Ascot's Chief Financial Officer Robert Evans has eagerly quoted this same fact.[20] Third, Ascot has committed significant financial resources to mineral exploration of the Margaret Deposit; as of October 2011, Ascot had spent $2 million on exploration in the area and planned to spend another $3 million in 2012.[21] Fourth, Ascot's public outreach regarding its exploration activities to date show that the company intends to move full steam ahead to capitalize on its rich reserves.[22] Ascot Resources Inc. also sent out a pamphlet to select residents of Lewis, Skamania, and Cowlitz County.[23] On the third page, this pamphlet tells residents to "join the conversation to help create a state-of-the-art 21st century mine." This pamphlet is clearly developed to indicate that Ascot Resources Inc. intends to develop a mine in this location. Ascot's recent comments in the press about this new modified EA suggest that it is making similar assertions to the public regarding the likelihood of a future mine in order to encourage comments supporting its application for a prospecting permit. Because of the unreasonably short comment period, we have not been able to determine exactly what Ascot is saying to its local supporters. However, the BLM and USFS cannot credit comments based on the possibility or likelihood of a

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[15] *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 962 (9th Cir. 2003).
[16] *Id.* (noting that "speculation is… implicit in NEPA").
[17] *Id.*; *N. Plains Resource Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1079 (9th Cir. 2011).
[18] *See* 2012 EA at 2.
[19] *See* 2012 EA at 2 (indicating that the Margaret Deposit under the Goat Mountain site may be "one of the largest copper-molybdenum-silver-gold calc-alkaline porphyries of Miocene age known in Washington State").
[20] Marqise Allen, *Company to Continue Exploratory Drilling Near Mount St. Helens*, The Daily News (October 19, 2011) (available at http://tdn.com/news/local/article_11d7a34c-fac2-11e0-a1be-001cc4c002e0.html) (see Exhibit A).
[21] *Id.*
[22] *Id* (indicating that Ascot estimates a mine could create 2,000 direct jobs and another 4,000 indirect jobs); Ascot Resources, *July 25, 2011 Ascot Resources Ltd. Mt Margaret 2011 Drill Program*, http://www.ascotresources.ca/s/NewsReleases.asp?ReportID=468608&_Title=Ascot-Resources-Ltd.-Mt-Margaret-2011-Drill-Program (accessed July 30, 2012) (quoting Mr. Evans as saying that Ascot "look[s] forward to restarting [its] drill program again to expand upon the *excellent* results [it] ha[s] achieved so far") (emphasis added) (see Exhibit B).
[23] Ascot Resources, An Opportunity for Your Consideration (2011). See attached Exhibit D.

future mine to support their ultimate decision and at the same time refuse to consider the impacts of such a mine in this EA.

Purposefully excluding any discussion of mining development from this EA does not allow for a full and complete understanding of the exploratory project at hand. In fact, the EA is inadequate because it does not provide a complete analysis of the cumulative impacts of this project.

Indeed, all signs indicate that a future mine is far more than speculative. While it is possible that the claimed deposit "does not exist," and mining would thus be infeasible,[24] it is *also* possible that the deposit *does* indeed exist and mining *would be* feasible. Both BLM and Ascot seem to think that a mineral deposit does exist, and that it is likely feasible for development – hence the exploratory drilling. Consequently, a future mine is reasonably foreseeable. If Ascot is able to forecast the number of potential jobs from a mine, it is also possible and reasonably foreseeable for the BLM to include the environmental impacts from that mine in the EA.

The agencies' decision not to analyze the cumulative effects of a future mine is also contrary to the out-of-circuit case law cited in the EA. For instance, in the Tenth Circuit, the BLM addresses "speculative" estimates and other related information as a "potential foreseeable action[]… in the [cumulative effects] analysis."[25] In the Fifth Circuit, "a court [may] prohibit segmentation or require a comprehensive EIS for two projects, *even when one is not yet proposed*, if an agency has egregiously or arbitrarily violated the underlying purpose of NEPA."[26] Thus, though improper segmentation is "usually" concerned with projects that have reached the proposal stage, courts in the Fifth Circuit still acknowledge the importance under NEPA of considering two inter-related and connected actions together *even when one action has not yet been proposed*. By segmenting its NEPA analysis of the proposed prospecting and the reasonably foreseeable – and, apparently, likely – future mine, BLM has violated NEPA and its underlying purpose.

B. A future hard rock mine is a reasonably foreseeable future action in the project area that should be analyzed as a connected action under NEPA.

Connected actions are those which:

(i) Automatically trigger other actions which may require environmental impact statements.
(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
(iii) Are interdependent parts of a larger action and depend on the lager action for their justification.

40 C.F.R. § 1508.25(a)(1).

"The purpose of this requirement is to prevent an agency from dividing a project into multiple [smaller] actions, each of which individually has an insignificant environmental impact, but which

[24] MEA at 26.

[25] *Wilderness Workshop*, 531 F.3d at 1229 (BLM included the potential number of wells that *could* be serviced by a proposed pipeline in a NEPA cumulative effects analysis, even though there were "too many variables to predict future activities with any certainty").

[26] *O'Reilly*, 477 F.3d at 237 (quoting *Envtl. Def. Fund v. Marsh,* 651 F.2d 983, 999 n. 19 (5th Cir. 1981) (emphasis added).

collectively have a substantial impact."[27] To determine whether actions are connected, the Ninth Circuit applies an "independent utility" test: if the projects "would have taken place with or without the other, each has 'independent utility' and the [projects] are not considered connected actions."[28] If the projects have "independent utility," they do not require the same EIS.[29]

Under Ninth Circuit law, the proposed exploratory drilling and a hard rock mine in the Goat Mountain area are connected actions under NEPA. The BLM should have considered the impacts of a hard rock mine within its NEPA analysis of the proposed prospecting. Exploratory drilling must occur prior to mineral removal. Ascot could not proceed with plans to develop a hard rock mine without having previously conducted exploratory drilling in the proposed area. Exploratory drilling has no independent utility when removed from its connection with a future mine – Ascot is investing millions of dollars in exploring the area just to "share information" about the underlying minerals. Thus, a mine in the proposed project area is a "connected" action under the Ninth Circuit's independent utility test.

The proposed exploratory drilling and a future hard rock mine also fail the independent utility test under the Tenth Circuit case law cited by BLM. In *Wilderness Workshop*, plaintiffs challenged a BLM and USFS decision authorizing a company to construct, operate, and maintain a natural gas pipeline through roadless national forest land.[30] The plaintiffs alleged that the agencies, in issuing their Record of Decision (ROD), violated NEPA by failing to "consider the impacts of future natural gas development [i.e. the installation of additional gas wells] as a connected action."[31] The court concluded that a proposed natural gas pipeline had independent utility from "future natural gas development [i.e. the installation of additional gas wells]" because installing the pipeline and using it solely on existing gas wells to transport stranded gas would result in a net income stream of fourteen million dollars per year, and would allow natural gas to be delivered to the national energy markets.[32] In contrast, the exploratory drilling proposed by Ascot has no independent utility – the possibility of a future mine is what gives the exploratory drilling any sort of utility. Ascot will derive no profits from the exploratory drilling – exploration will serve no purpose but to inform Ascot's decisions about the feasibility of future mining. Thus, a future mine is a connected action that BLM must consider at this exploratory drilling stage.

II. Drilling is not Compatible with the Primary Purpose for Which the Land Was Acquired.

The MEA notes that all or most of the land subject to the Application was acquired under the authority of the Weeks Act, Act of March 1, 1911, chapter 186, 36 Stat. 961. In 1917, Congress authorized the Secretary of Agriculture to permit limited mineral development of lands acquired under the Weeks Act. Act of March 4, 1917 (codified in 16 U.S.C. § 520). This authority was

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[27] *N. Plains Resource Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1087 (9th Cir. 2011) (quoting *Great Basin Mine Watch v. Hankins,* 456 F.3d 955, 969 (9th Cir. 2006); *see also N.W. Resource Info. Ctr., Inc. v. Natl. Marine Fisheries Serv.,* 56 F.3d 1060, 1067–68 (9th Cir. 1995); *Thomas v. Peterson,* 753 F.2d 754, 758 (9th Cir. 1985).

[28] *Native Ecosystems Council v. Dombeck,* 304 F.3d 886, 894 (9th Cir. 2002).

[29] *Wetlands Action Network v. U.S. Army Corps of Engineers,* 222 F.3d 1105, 1118 (9th Cir. 2000) (abrogated on other grounds by *Wilderness Socy. v. U.S. Forest Serv.,* 630 F.3d 1173 (9th Cir. 2011)).

[30] 531 F.3d at 1222.

[31] *Id.* at 1228.

[32] *Id.* at 1231.

transferred to the Interior Department in 1946 by section 402 of the Reorganization Plan No. 3 of 1946, 5 U.S.C. App. 1.[33]

Land acquisition under the Weeks Act is for limited purposes. Specifically, only lands "necessary to the regulation of the flow of navigable streams or for the production of timber" are to be recommended for purchase.[34] Further, such acquisition is authorized only if it "will promote or protect the navigation of streams on whose watersheds they lie."[35]

In addition, the federal government acquired these lands with funds from the Land and Water Conservation Fund (LWCF), pursuant to the Land and Water Conservation Fund Act of 1965.[36] Congress later amended the LWCF Act to further recognize the recreation, open space, and wildlife preservation aspects of LWCF funding. In 1976, Congress specifically stated that lands purchased by the Forest Service with LWCF funds be "primarily of value for outdoor recreation purposes."[37]

The project area lands were acquired in 1986 via purchase and donation from the Trust for Public Land (TPL), a nonprofit organization dedicated to land protection. In the LWCF Act, Congress stated its purpose in allocating funds for the purchase of lands such as the proposed lease parcels:

> The purposes of this part are to assist in preserving, developing, and assuring accessibility to all citizens of the United States of America of present and future generations… such quality and quantity of outdoor recreation resources as may be available and are necessary and desirable for individual active participation in such recreation and to strengthen the health and vitality of the citizens of the United States by (1) providing funds for and authorizing Federal assistance to the States in planning, acquisition, and development of needed land and water areas and facilities and (2) providing funds for the Federal acquisition and development of certain lands and other areas.[38]

If exploratory drilling is considered at all, it must be done pursuant to the provisions of the 1946 Reorganization Plan No. 3, which requires:

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[33] There is debate as to whether the Interior Department may permit or lease hardrock minerals under these authorities. According to a leading treatise:

> Given the long-term distinction between acquired and other federal lands, the Department's implicit designation of hardrock minerals on acquired lands as leasable appears to be beyond the statutory purview. Reliance on the nonsubstantive Reorganization Plan No. 3 of 1946 seems inadequate to support such a substantive change in the law. In 1947, the House Committee commented that hardrock minerals on acquired lands should be dealt with in separate legislation, but Congress has never done so.

George C. Coggins & Robert L. Glicksman, *Public Natural Resources Law* vol. 3, § 24:31 (C. Boardman, 2007) (internal citations omitted). Thus, at the outset, it is questionable as to whether the hardrock minerals in this case can be leased at all.

[34] *Weeks Act*, 16 U.S.C.A. § 515 (2012) (hereinafter *Weeks Act*).

[35] *Id.*

[36] 16 U.S.C.A. § 460*l*-4–11 (2012).

[37] Pub. L. No. 94-422, §101(4), 90 Stat. 1313 (1976) (codified in 16 U.S.C. § 460*l*-9(a)(1)(b)). *See also* 16 U.S.C. §1534 (a primary purpose of LWCF expenditures are for the acquisition of lands for the protection of wildlife).

[38] 16 U.S.C.A. § 460*l*-4.

> That mineral development on such [acquired] lands shall be authorized by the Secretary of the Interior only when he is advised by the Secretary of Agriculture that **such development will not interfere with the primary purposes for which the land was acquired** and only in accordance with such conditions as may be specified by the Secretary of Agriculture **in order to protect such purposes**.[39]

As such, no permit, or any authorization to develop these acquired lands can occur if such an action would "interfere with the primary purposes for which the land was acquired" and only if such an action would "protect such purposes."

The Goat Mountain area was *not* acquired to lease minerals. Under the authority of the Weeks Law of 1911, the Forest Service could acquire these and other lands *for the regulation of the flow of navigable streams or for the production of timber*.[40] As stated in the EA, the Forest Service told Congress that land acquisition in the Goat Mountain area would "aid in the preservation of the integrity of the Green River prior to its entering the National Volcanic Monument, and [would] also aid in the preservation of the scenic beauty of this area which is to become an important Monument portal."[41] It is these primary purposes: timber production, natural water flow restoration, and preservation of the integrity of the Green River and the area's "natural scenic beauty" that have shaped historic and current use of the area.[42] Now, the agencies propose to permit mineral prospecting activities that interfere with these purposes.

The prospecting activities and associated potential future mine (especially an open pit mine) would impede timber management and natural water flow objectives. Such activities and the associated roads destroy forested acres, impair future productivity of the land, and could disturb the natural water regime. An open pit mine would remove substantial timber resources from the vicinity, withdrawing the area from timber production. The detrimental environmental effects of mines – open pit and otherwise – are well documented, especially the adverse impacts on water resources. Such effects are hardly consistent with the Forest Service's statutory purpose for acquiring the land.

The proposed prospecting activities will also interfere with the "scenic beauty" of the area, creating visual and noise disruptions to areas used heavily for recreation.[43] Labeling such adverse impacts as "temporary" or "minimal" does not change the fact that they interfere with the land's primary purpose. Saying that recreation would not be affected "in the vicinity," but would be affected at and near the drill sites and roads is not consistent with protecting the recreational purposes of all of the lands.[44] Prospecting – and mining – activities at the Green River's portal to the National Volcanic

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[39] 5 U.S.C.A. app. § 1 (2012) (emphasis added). *See also* Memorandum M-36993, at 3.
[40] MEA at 13; 16 U.S.C.A. § 552 (2012).
[41] MEA at 13.
[42] *Id.*; *see also 2012* EA at 98–100 (noting that "[c]urrent uses of Goat Mountain and headwaters of the Green River are primarily for recreation and timber management," discussing the many popular recreational activities in the vicinity, and noting that the Green River is a candidate for designation under the National Wild and Scenic Rivers Act).
[43] MEA at 150 (noting that "the naturalness of areas in the immediate vicinity of the surface disturbance would be temporarily affected during operations" and that "[n]oise from exploration activities could reduce the opportunity for solitude in the immediate vicinity of each individual drill pad during periods of active operations.").
[44] "[R]ecreation would continue to exist throughout the vicinity of the GPNF." MEA at 150.

Monument would severely impact the area's natural scenic beauty and one of the current primary uses of the land.

The scenic beauty of this area is incredibly important to backcountry users of Mount St. Helens. Goat Mountain is less than ½ mile from Ryan Lake and the Green River Horse Camp, an area used frequently by the public. Drilling and mining are not compatible with maintaining the "scenic beauty" of this area. Drilling operations use heavy machinery and need a vast network of roads all of which is incompatible with scenic beauty.[45] Mining would essentially destroy all scenic beauty of Goat Mountain and limit public use of this area.[46]

In this case, hard rock mineral exploration and/or development, as proposed by Ascot Resources Inc., would "interfere with the primary purposes for which the land was acquired." As stated above, in the Weeks Act, Congress' primary purpose in authorizing the acquisition was for "the regulation of the flow of navigable streams" and to "promote or protect the navigation of streams on whose watersheds they lie."[47] Such purposes are certainly "interfered with" by, and not consistent with, mineral exploration and development and are not "protected" by such actions.

The EA also attempts to argue that Congress specifically contemplated mineral development of these lands and thus exploration may be appropriate.[48] The statements included in paragraph 2, "Nothing in this Act shall be construed as authorizing… buffer zones… for… precluding activities outside the Monument boundary," and that "monument boundary was specifically drawn to exclude what was believed to be the '…most potentially productive of the [former] copper mining claims,'" are extremely misleading and disingenuous.[49] The EA seems to argue that Congress' creation of the Mount St. Helens National Volcanic Monument in 1982 somehow created a preference for mineral development on these lands by excluding the area in question from the monument.[50] However, the EA fails to include important historical information surrounding the development of the monument, including an important discussion centered on the mining claims north of the area.

After the eruption of Mount St. Helens in 1980, there was continued interest in mineral exploration in this area. This interest complicated the discussion around the Mount St. Helens National Volcanic Monument designation. Despite the eruption, Duval continued to make plans to open a full scale open mine to extract the low-grade ore for copper. The Reagan administration feared that the monument bills being proposed would cost the government millions of dollars to buy out copper mining claims and threatened to veto the bills.[51] As the conversation dragged on, copper prices fell and Duval was quoted as saying that "even if the company were ready to mine, the price of copper is

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[45] See Exhibit E to the groups' previous comments submitted in August of 2012. Exhibit E is a printout of the Gifford Pinchot Task Force website at http://gptaskforce.org/our-work/conservation/mount-st.-helens/visiting-the-drilling-on-goat-mountain-in-2010. This webpage has photographs of the Task Force visit to the 2010 drilling operation. Also included in Exhibit E are photographs taken by the Gifford Pinchot Task Force on a site visit July 13, 2012.

[46] See Exhibit F to previous 2012 comments. Exhibit F is a photograph of the Thompson Creek Mine in Idaho.

[47] *Weeks Act* § 6, *supra* n. 34.

[48] *See* MEA at 12-13.

[49] MEA at 12-13.

[50] MEA at 12-13 (arguing that the lack of any "buffer" around the Monument automatically translates into a preference for mineral development).

[51] Andre Stepankowsky, *Peak Monument Near OK*, The Daily News (Mar. 13, 1982) (attached Exhibit G to 2012 comments).

too low to justify going ahead."[52] Duval at that time opposed any national monument or park because they had "invested a hell of a lot of money in the area."[53] After repeated Congressional conversation, Mount St. Helens became a national volcanic monument in 1982, leaving outside its boundaries the mining claims that might have provoked a veto.

Neglecting to include an area in a monument for political reasons and/or cost concerns regarding mineral buyout does not automatically create a preference for mining in this area. In fact, there is a much more detailed history surrounding the acquisition of this area which begs the question in regards to whether mining was actually favored here. The Forest Service acquired the project area lands from the Trust for Public Land in 1986 – four years after this supposed congressional statement regarding "these lands." In short, the lack of a "buffer" around the Monument in no way means that the Congressional purposes inherent in the Weeks Act and the LWCF Act are overridden.

The lands in question have a long and storied history of use and acquisition. It is the acquisition of this land, the means by which it was acquired, and the reasons for acquisition that are of primary concern for the GPTF and other signing organizations. Although the EA points out that the Forest Service will use the information to make a determination of compatibility, the Forest Service has already essentially made that call by issuing agreements in 2010, 2011 and 2012 for essentially the same drilling project. This is of concern because the lands were acquired for very specific purposes that will be directly affected by the drilling in question.

There is no one document that states the primary purpose for which the lands were acquired, but there are four pieces of correspondence from which one can surmise the purpose of the acquisition. The first document is a letter from Trust for Public Land to Bob Starke, USFS Lands and Minerals staff, dated November 9, 1984. This letter states that TPL intended to donate "approximately 730 acres in patented minerals located near the Mount St. Helens National Volcanic Monument to the United States…. The *purpose* of TPL's involvement *was to preserve the integrity of the Green River* which transverses our property before entering the Monument."[54]

The second document is a letter dated January 16, 1986, which accompanied a purchase option from TPL to USFS for Gifford Pinchot lands, including the Mineral Survey No. 708 (MS 708). This letter stated, "[i]t is our understanding that these donations will be accepted under the Act of October 10, 1978 (P.L. 95-442, 92 Stat. 1065; 7 U.S.C. 2269). Thus under the Act of September 2, 1958, these interests would have Weeks Law status and would be removed from entry under the General Mining Laws."[55] Weeks Law states that "[t]he Consent of the Congress… is given… to enter into any agreement or compact… *for the purpose of conserving the forests* and the water supply of the States

[52] Rick Seifert, *Peak Use Theories Debated*, The Daily News (Feb. 5, 1981) (attached Exhibit H to 2012 comments).
[53] *Id.*
[54] Ltr. from Kim Miller, N.W. Regl. Manager, Trust for Public Lands to Bob Starke, USDA-Forest Service Lands and Minerals (Nov. 9, 1984) (emphasis added) (attached Exhibit I).
[55] Ltr. from Ralph W. Benson, Vice President and General Counsel, Trust for Public Lands to Gary E. Cooper, Leader, Land Adjustments, U.S. Forest Service, Pacific N.W. Region (Jan. 16, 1986) (attached Exhibit J to 2012 comments).

entering into such agreement or compact."[56] Therefore, it was TPL's understanding that it was donating MS 708 to USFS for the purpose of conserving the forests and the water supply.

The third document is several copies of the same letter to elected officials on or about February 3, 1986. This letter informs the recipients "TPL intends to donate one-half interest in 217.27 acres of mineral rights and full interest in 166.59 acres of mineral rights to the United States…. Acquisition of this property by the United States will *aid in the preservation of the integrity of the Green River* prior to its entering the National Volcanic Monument, and will also *aid in the preservation of the scenic beauty of this area* which is to become an important Monument portal."[57]

The fourth document is dated February 4, 1986, and summarizes the government's ownership rights after TPL's donation. The U.S. owns the surface rights as well as one-half interest in any proposed mining activities. This one-half interest gives the U.S. the right to receive one-half of the net income generated from any mining activity in the area.[58]

The lands were originally classified as general forest with an emphasis on timber production. However, the Northwest Forest Plan of 1994 changed the designation of the lands to "matrix" lands. However, "[t]he Forest Service can entertain additional leasing activities on the Forest Service owned minerals **as long as there is a finding that activities can occur in a way that do not damage the primary purpose for which the lands have been acquired.**"[59] Although the designation of the MS 708 lands were changed to "matrix" lands, that designation is not the same as the "primary purpose for which the lands have been acquired," which were:

(1) protecting the integrity of the Green River (stated purpose to Congress, stated purpose in required title record Digest, and stated intent to donor/seller);
(2) scenery of the Mt. St. Helens Monument portal (stated purpose to Congress, state purpose in required title record Digest, and stated intent to donor/seller);
(3) outdoor recreation (LWCF appropriation authority);
(4) habitat needs of local wildlife or local threatened or endangered species (LWCF appropriation authority) or;
(5) timber production and preservation of the watershed (the Weeks Law acquisition authority, affecting both purchased property and associated donated proprieties).[60]

The USFS will therefore need to prove that exploratory drilling on the lands does not damage the primary purpose for which the lands were acquired.

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[56] *Weeks Act* 16 U.S.C.A. § 552, *supra* n. 34 (emphasis added).
[57] Ltrs. from Robert W. Williams, Forest Supervisor, U.S. Dept. of Agric. to Congressman Sid Morrison; Senator Slade Gorton; Senator Dan Evans; and Board of County Commissioners (Feb. 3, 1986) (emphasis added) (attached Exhibit K to 2012 comments).
[58] Ltr. from Robert W. Williams, Forest Supervisor, U.S. Dept. of Agric. to Regional Forester, R–6 (Feb. 4. 1986) (attached Exhibit L to 2012 comments).
[59] Memo. from NJ Erickson, Group Leader Land Adjustments to Kimberly Bown, Director Recreation, Lands, and Mineral Resources (Mar. 1, 2006) *Summary of title information associated with the 1986 land acquisitions involving the Trust for Public Land (Duval) estate, located just north of the Mt. St. Helens National Volcanic Monument Boundary* (emphasis included) (attached Exhibit M to 2012 comments).
[60] *Id.*

Exploratory drilling is incompatible with the primary purpose for which the lands were acquired because the drilling will: (1) harm the integrity of the Green River; (2) interfere with outdoor recreation; (3) interfere with the habitat of local wildlife and endangered species, as detailed in our comments below; and (4) interfere with the scenic beauty of the area.

The MEA provides a succinct version of the history of this area, but makes several unverified statements that are of concern to the GPTF and below signed organizations. First, the MEA states, "Some existing public domain reports suggest that this might be one of the largest copper-molybdenum-silver-gold calc-alkaline porphyries of Miocene age known in Washington State."[61] This statement has no citation and does not provide the existing reports either in an appendix or elsewhere in the EA. In fact, the history that is readily available online and cited in the scoping comments submitted on March 16, 2012 by GPTF and other signing organizations states that no property was ever developed into a major mine because the low grade ore proved unprofitable.[62] It is certainly true that this deposit could potentially prove to be a large valuable deposit, but without citations to the reports in the discussion, inclusion of that statement in an EA and reliance on that statement by the agency to make a decision is not based on the best available information. Additionally, the MEA states without citations that there is not a proper understanding of the Margaret deposit to prove sufficient for current economic resource evaluation and cites to three needs.[63] However, the MEA fails to cite to or mention historical information provided by Duval in regards to their assessment of mining in this area and fails to explain why that information was not sufficient to meet the three needs of Ascot Resources.[64]

In the 1980s, Duval approached TPL to divest its holdings in the Green River area.[65] TPL obtained this land from Duval. The purpose behind TPL's involvement was "to preserve the integrity of the Green River."[66] The Forest Service then purchased the land from TPL in 1986 using Land and Water Conservation Fund dollars, which are allocated by Congress for acquiring land for the purpose of conservation and recreation. Some of the land was also donated to the Forest Service. The Forest Service's purchase of the area using Land and Water Conservation Fund dollars was meant "to aid in the preservation of the integrity of the Green River prior to its entering the National Volcanic Monument, and… aid in the preservation of the scenic beauty of this area."[67]

Prior to acquisition, the USFS had management concerns about what to do regarding the mineral estate. For example, one of the concerns was "[w]hat are the opportunities to protect area from mineral entry if acquired by FS? Mineral withdrawal? Monument boundary extension?"[68] Mineral development of the area was thought to be of low potential because of the value of the mineral

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[61] MEA Appendix C summary of 2012 comments/responses at 3.

[62] United States Geological Survey, *Mining History Around Mount St. Helens* "Southern Washington Cascades," http://vulcan.wr.usgs.gov/Volcanoes/MSH/MineralResources/msh_mining_history.html (accessed July 30, 2012). The total value of minerals from this area between 1910–74 amounted to $26,538.

[63] MEA at 3.

[64] See attached Exhibit N (from 2012 comments) information on Duval Corporation (Duval) Reserve/Resources Evaluation Status. Duval was a major copper producer out of Arizona and drilled approximately 105 holes throughout the area. Duval had proposed a mining plan for copper in the area, but never succeeded in opening a commercial open pit copper operation, not because it lacked information on the mineralization but because of other economic reasons.

[65] Ltr. from Trust For Public Lands to Bob Starke, USDA-Forest Service Lands and Minerals (Apr. 26, 1984).

[66] Ltr. from Kim Miller, *supra.*

[67] USDA Proposed Land Purchase, January 16, 1986; Correspondence to Ralph Benson, Jan. 13, 1986.

[68] Trust for Public Lands, Correspondence, Apr. 26, 1984.

market and the fact that the reserves appeared to be too deep, making it uneconomical to mine. After this transaction was completed, very little is known about any potential mining in this area until 2005.

The mine lease area site considered at that time is the same area we are looking at today and would directly impact water, timber lands, and the Mount St. Helens National Volcanic Monument. The mineral area is situated near the headwaters of the Green River. A late successional forest, approximately 276 years old according to a Forest Service geographic survey, is also in the vicinity. In addition, a mid-successional forest stand exists in MS 708, 1330, and 774. The area also enters the Tumwater Inventoried Roadless Area, an area intended for protection under the 2001 Roadless Rule. In 2008, BLM issued a "no action" decision on the lease application based on the public interest criteria. At that time, BLM received over 33,000 public comments. The majority of parties commenting opposed a mining operation because of the effects a mining operation would have on the Green River and the surrounding area.

In sum, hard rock mineral exploration and development, Ascot Resources Inc.'s intended use for the lands, is **not** one of the purposes for which the agency acquired and purchased the lands. Mineral exploration and development certainly would interfere with the legitimate Congressional purposes for such acquisition and purchase. Thus, based on the fact that mineral exploration and development would "interfere with" the watershed, recreation, wildlife, and conservation purposes for which Congress authorized the acquisition and purchase of these lands, the Interior Department and the Department of Agriculture cannot legally issue the permit(s).

If exploration is completed on the current proposed project, Ascot will still be required to apply for a permit for actual mine development, triggering another environmental review. However, the government is wasting valuable resources by investing time and money into this exploration proposal after the public already overwhelmingly rejected a mine similar to the one that potentially will be proposed in the future. In addition a mine is clearly incompatible with the reason for land acquisitions. The federal government would be abusing the public's trust by allowing exploration to continue and leasing any of this land for mining. To act ethically and responsibly, the federal government should refuse to issue the requested permit for exploration in this area. Indeed allowing any prospecting in an area where the agencies clearly could never permit an actual mine is essentially allowing a futile act that has adverse impacts on the environment generally and recreation specifically. Even in the context of liberal federal pleading rules, the courts do not allow for amended pleading where the amendments would be futile.[69] A similar rule should apply when the futile act has actual on the ground impacts.

The MEA's description of the history of Ascot's specific proposal at issue is also quite incomplete.[70] Although the MEA discusses Ascot's 2010 prospecting, the MEA fails to acknowledge that the USFS violated NEPA and NFMA when it allowed those activities on a National forest without providing any notice to the public or NEPA compliance. When Ascot sought permission from the USFS to resume that prospecting in early 2011 the USFS again gave such permission without prior notice to the public or NEPA compliance. The GPTF then immediately sued the Forest Service in

[69] See *Wetterman v. Monoca Coach Corp.,* 141 F.Supp. 2d 1263, 1264(D.Or. 2001)(denying proposed amendment because of futility).
[70] See MEA at 5-6.

the Federal District Court for the Western District of Washington, seeking a preliminary injunction. [71] The USFS withdrew its permission for the 2011 prospecting by Ascot before the district court could rule on GPTF's motion. Thus if it had been up to the Forest Service, it would have allowed Ascot, in violation of clearly applicable federal law, to conduct this prospecting without any prior notice to the public and without any public NEPA analysis.

III. The Proposed Project Would Negatively Impact Water Resources.

GPTF and the signing organizations are concerned about the impact that the proposed project will have on the quantity and the quality of surface and ground water resources. Drilling operations such as the proposed project use significant amounts of water up to and potentially more than 5,000 gallons of water per day (gpd). The EA fails to adequately analyze the consequences of the high water use on the integrity of the Green River and fails to clearly delineate for the public the trigger points for trucking in water from a nearby town. We remain highly concerned about the project's impact on the Green River and other nearby water bodies.

A. The EA fails to adequately consider effects of water use on aquifer levels and surface stream flows.

Under Washington State law, a permit is required to withdraw more than 5000 gallons of water per day (gpd) for an industrial purpose. [72] In addition, both permit and permit-exempt uses are subject to the prior appropriation doctrine, also known as "first in time, first in right", which prohibits younger (or "junior") water rights from impairing older (or "senior") water rights. [73] Although the administration of some aspects of water law (e.g., adjudications) are separated between ground and surface water sources, new groundwater water uses may not impair existing water rights, which may include senior surface water diversion rights, federal reserved rights, and instream flow rights.[74] The use of permit-exempt wells has exploded over the last few decades, and the issue of using permit-

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[71] *GPTF v. USFS,* No. 3:11-CV-05510-BHS, Dkt. No. 19.

[72] RCW 90.44.050, Permit to withdraw:

> After June 6, 1945, no withdrawal of public groundwaters of the state shall be begun, nor shall any well or other works for such withdrawal be constructed, unless an application to appropriate such waters has been made to the department and a permit has been granted by it as herein provided: EXCEPT, HOWEVER, That any withdrawal of public groundwaters for stock-watering purposes, or for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, or for single or group domestic uses in an amount not exceeding five thousand gallons a day, or as provided in RCW 90.44.052, or for an industrial purpose in an amount not exceeding five thousand gallons a day, is and shall be exempt from the provisions of this section, but, to the extent that it is regularly used beneficially, shall be entitled to a right equal to that established by a permit issued under the provisions of this chapter: PROVIDED, HOWEVER, That the department from time to time may require the person or agency making any such small withdrawal to furnish information as to the means for and the quantity of that withdrawal: PROVIDED, FURTHER, That at the option of the party making withdrawals of groundwaters of the state not exceeding five thousand gallons per day, applications under this section or declarations under RCW 90.44.090 may be filed and permits and certificates obtained in the same manner and under the same requirements as is in this chapter provided in the case of withdrawals in excess of five thousand gallons a day.

[73] RCW 90.44.020; See also *Rettkowski v. Department of Ecology,* 122 Wash.2d 219, 226 n.1, 858 P.2d 232 (1993).

[74] RCW 90.44.030; See also *An Introduction to Washington Water Law*, Office of Attorney General, Gregoire, Christine; Pharris, James K.; McDonald, P. Thomas; (p. V:29-30) January 2000

exempt wells for high-volume industrial uses is incredibly controversial due to the lack of water available to support the new use.

In this case, we are concerned that the MEA did not perform a thorough analysis to adequately address the water resource impacts from exploratory drilling. The MEA also fails to ensure that senior downstream water rights will not be impaired by groundwater. The analysis in the MEA acknowledges that confined and unconfined aquifers are within the project area, and water from the unconfined aquifer likely flows toward the Green River, a major tributary in the Toutle subbasin.

In 2006, the Lower Columbia Fish Recovery Board developed and adopted a watershed plan that included information on water quantity and quality in four Water Resource Inventory Areas (WRIA), including the Cowlitz (WRIA 26). The Toutle subbasin is included in the WRIA 26 watershed plan. According to the plan, "the mainstem Toutle, North Fork, South Fork, and the Green River are designated as Tier 1 or Tier 2 in the Salmon Recovery Plan and as such, the entire Toutle River watershed is recommended for closure."[75] In other words, no new consumptive water rights and uses should be allowed on rivers like the Green given the salmon recovery goals and existing flow levels in the river. We remain highly concerned about the project's impact on the Green River and other nearby water bodies, especially considering the Green River's value for salmon and steelhead recovery as a wild steelhead gene bank and the fact that rivers, lakes, and tributaries in the broader watershed rely on the flows and water quality of headwater streams upstream.

Although the language in the watershed plan appears to focus on surface waters, a recent instream flow rulemaking process in WRIA 26 found that there was no reliable water available in surface water sources or groundwater aquifers for new consumptive water uses.[76] The most recent version of the draft WRIA 26 instream flow rule found that "there is a high likelihood that future ground water withdrawals would capture water that affects closed surface waters. Therefore, the basin is closed to new withdrawals of ground water (including any new permit-exempt withdrawals) that would affect closed surface waters, except as provided in WAC 173-526-080."[77] Therefore, we believe the Department of Ecology may have information on the hydrologic conditions in the Toutle subbasin on the connections between ground and surface waters. Any information from the Department of Ecology, the lead manager of water resources in Washington State, on hydraulic connectivity in the area should be included in an assessment as well as a more robust analysis of potential impacts to flows and senior water rights, which may include federal reserved rights associated with the national monument and off-reservation tribal fishing rights.

Even though Ascot plans to use a permit-exempt well to supply up to 5000 gallons of water per day (gpd) for its industrial use, similar exploratory drilling operations use significant amounts of water, potentially more than 5,000 gpd. The EA fails to adequately analyze the consequences of the high

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[75] http://www.lcfrb.gen.wa.us/w25/WRIA%2025-26%20Watershed%20Management%20Plan.pdf (p. 4-53) (The plan defines Tier 1 and Tier 2 reaches as "Tier 1 Reaches include all high potential reaches for one or more primary populations. Tier 2 Reaches include all reaches not included in Tier 1 and which are medium potential reaches for one or more primary species and/or all high potential reaches for one or more contributing populations.")

[76] WAC 173-526-070, p. 8-9 (available at: http://www.ecy.wa.gov/laws-rules/wac173526/p0504a.pdf). (Note that the Green River is a tributary to the Toutle River and the closure in the draft rule includes the entire Toutle drainage, including headwater areas like the Green.)

[77] WAC 173-526-070(2)

water use on the aquifer levels and stream flows in nearby streams, like the Green River. The MEA does not have sufficient information to guarantee that senior surface and ground water rights will not be impaired and analyze the impacts and process for trucking in water from a nearby town if the drilling requires more than 5000 gallons per day. For example, how can the amount of water used by a permit-exempt well be adequately monitored if the well is not metered? In addition, it is unclear whether trucked in water will come from an existing permit or another permit-exempt source, which may raise serious questions about senior water rights and whether the exploratory drilling project actually needs to apply for a permit of its own.

The information provided in the MEA is lacking discussion and analysis of the impacts or effects to the stability of the water table, the surface, and underground flow regime from the drilling, extraction, and leaching back into the groundwater table of the 5,000 gallons they intend to use per day. The EA simply points out "since most water used during drilling would be discharged back into the watershed, the effects of water withdrawal are expected to be negligible."[78] However, the MEA provides no information on the impacts from altering the hydrologic processes and timing of recharge, nor the impacts if the point of withdrawal is some distance from the point at which the water returns to streams in the watershed. Without information on the movement and flow of the water table and the recharge regime, the MEA cannot provide the agency with enough information to make an appropriate decision.

The following are questions that an EIS should address in relation to water use in this area: What is the status of surface and groundwater availability in the Toutle subbasin, and if no water is available for new uses, what is the mitigation plan for new water withdrawals? What is the extent and nature of hydrologic connections between groundwater aquifers and surface streams? What senior water rights exist that may be impacted or impaired by new water withdrawals? What methods will Ascot Resources Inc. use to determine consumptive water use for the drilling project? What is the process for notifying the public and water managers if and when the drilling project requires more water to be trucked in from other location(s)? If the project requires that water be brought into the area, what effect will adding water to this system and altering recharge regimes or other processes have on the surrounding water bodies? The MEA claims that it will have a negligible effect on the system, but increasing the water table could potentially impact soil stability, filtration efficiency, and result in other negative consequences.

B. The MEA fails to adequately consider impacts to the water system from additives and drilling activities.

Drilling in this site is being conducted to retrieve rock cores to determine mineral content. Contamination of the water and site can occur from improper use of casing material, improper sealing of the bore holes and sediment sloughing of the grout or cement, and reactions with drilling additives that will be added to the bore holes.

According to the MEA, Ascot Resources Inc. intends to use "fluids… to keep the holes open, cool the drill bit, and be circulated to the ground surface to remove drill cuttings."[79] However the MEA does not include a comprehensive list of the additives to be used (i.e. AQUAGUARD, BENSEAL,

[78] MEA Appendix C at 6.
[79] MEA at 30.

PEL_PLUG, Quick-Gel, EZ-Mud, Torkease), rather it states that "[t]hese fluids would consist primarily of water with bentonite and polymer drilling additives…"[80] To better understand the effects of the additives on the environment, the MEA should include a list of the actual additives to be used.

There are many commercial additives including EZ-Mud and Penetrol that include labels warning of their toxicity to waterways. According to the Material Safety Data Sheets, EZ-Mud is toxic at concentrations exceeding 1000mg/L for fish and 16.7 mg/L for Algae.

The MEA does say that Bentonite and polymer-drilling additives will be used.[81] Different bentonites have high concentrations of sodium, potassium, calcium, and/or aluminum. Although a natural product, bentonite can be toxic to plants due to its high salt content and high shrink and swell properties. There is no discussion of potential toxicity of bentonite use on plant, animals, or fisheries in the project area. Bentonite can get into the larger water table if drilling and closing of the borehole is improper. Without an adequate discussion of the use of additives and the potential for contamination, the MEA fails to properly analyze the consequences of drilling on our environment. An EIS should include a section on potential contamination based on the actual drilling mud to be used.

The MEA does not consider where the excess water, if water is trucked in, will be discharged. Adding water to the watershed could increase instability and cause erosion. The Washington Department of Ecology recently fined Crown Resources Corp., a subsidiary of Kinross Gold Corp.,[82] for failure to comply with water quality requirements at the Buckhorn Mountain gold mine near Chesaw in Okanogan County, Washington. Crown Resources "fail[ed] to maintain its groundwater capture zone… allowing water discharges causing slope instability and erosion…. The mine is required to capture contaminated groundwater from around mine excavations and tunnels and under surface stockpiles, and pump it to a treatment plant."[83] However, the current MEA only proposes that the "Most of the water used would be infiltrated back into the substrate primarily by infiltration into drill sumps."[84] The MEA does not indicate how large these sumps will be. The sumps are specifically included to contain drilling fluids, not to contain potentially all the contaminated excess water the drilling might require. If the sumps are not large enough to contain excess water that Ascot may truck in, this excess water might flow down the surface of the mountain, causing erosion and carrying used drilling fluids along with it.

This is especially problematic due to the admission that excess water under artesian pressure would simply be discharged onto the ground.

> If water entry from the bedrock aquifer into the borehole is significant enough to result in artesian flow at the surface, then the well would be promptly abandoned as described below in the Borehole Abandonment Section. During the time it takes to abandon the hole,

[80] MEA at 30.
[81] *See* MEA at 30.
[82] Kinross, *Kinross Completes Acquisition of Crown Resources*, http://www.kinross.com/news-articles/2006/kinross-completes-acquisition-of-crown-resources.aspx (last updated Aug. 31, 2006).
[83] Department of Ecology State of Washington, *Buckhorn mine fined $395,000 for water quality violations*, http://www.ecy.wa.gov/news/2012/240.html) (last updated July 20, 2012).
[84] MEA Appendix C at 10.

> artesian flow at the surface would be routed into the mud sump. Should there be enough flow to exceed the sump capacity, emergency measures would entail routing any overflow to portable tanks, to the ground surface in a hand dug trench, or to an area away from active waterways or wetlands with the most available obstructions to flow (e.g. embedded logs, thick grass or brush).[85]

This water will likely contain elevated and unsafe levels of arsenic, as the arsenic-laden waters will be brought to the surface by the drilling operations. "Several of baseline groundwater samples detected elevated arsenic, which would likely be encountered during the Proposed Action. The water would not be allowed to discharge directly into surface water and therefore would not impact the related water quality."[86] This is of serious concern for a number of reasons. First, the MEA fails to determine how much water would be discharged from the excess flow. Second, simply because the polluted water would not "discharge directly into surface water" does not adequately protect public land resources. Third, there is no discussion of how the elevated levels of arsenic, and other pollutants brought to the surface, will affect soils, wildlife, ground and surface water, downstream drinking water supplies, and other resources.

As noted above, this is a major problem not only here, but at other mine operations approved by the Forest Service. Crown Resources failed to contain the water "primarily because the mine didn't have adequate capacity to capture the contaminated water generated by the underground mine workings."[87] The Final EIS should ensure that the proposed sumps will have the capacity to hold all discharge water from the drilling.

Recently, Echo Bay Exploration, Inc., another subsidiary of Kinross Gold Corp., applied for exploratory drilling permits on 10,000 acres of land around Buckhorn Mountain.[88] Environmental groups are concerned that this could further impact water resources in the area. Rock the Earth is also concerned that "Crown has been operating the Buckhorn Mountain Mine for only about three years and has violated their permit at least 125 times for water quality issues and non-reporting violations."[89] There is a very real potential that Ascot's drilling operations could have unanticipated consequences, including water quality violations. The Final EIS should consider the possibility of Ascot's failure to contain all water and drilling fluid waste and how that failure could affect the soil.

The MEA also fails to mention what is to be done with the cores that are brought up to the surface for analysis. In some instances, drill cores, if left on site, could potentially react, producing effects similar to acid rock drainage (ARD). If that were to occur, toxic chemicals could leach into the aquifers and the larger water systems nearby, including the Green River, via sediment and runoff from the reconstructed and compacted roads. The Final EIS should include a section detailing what is to be done with the drill cores.

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[85] MEA Appendix G (water study) at 44.
[86] *Id.* at 49.
[87] *Buckhorn mine fined $395,000*, *supra.*.

[88] *Washington Wild,* Buckhorn Mine Fined for Water Quality Violations*,* *http://www.wawild.org/index.php?option=com_content&task=view&id=622&Itemid=1 (accessed Aug. 9, 2012); Rock the Earth,* Target: Needlessly Destructive Ore Mining*,* *http://rocktheearth.org/joomla/index.php?option=com_content&task=view&id=65&Itemid=40 (accessed Aug. 9, 2012).*
[89] Rock the Earth*, supra.*

The damage to critical riparian areas from the drilling also violates the USFS's own requirements for riparian and wetland protection. For example, the agency's overriding Objective for riparian areas that may be affected by a project requires the agency: "1. **To protect, manage, and improve riparian areas** while implementing land and resource management activities. 2. To manage riparian areas in the context of the environment in which they are located, recognizing their unique values." Forest Service Manual (FSM) § 2526.02 (emphasis added). The agency's policy requires it to:

> 1. Manage riparian areas in relation to various legal mandates, including, but not limited to, those associated with floodplains, wetlands, water quality, dredged and fill material, endangered species, wild and scenic rivers, and cultural resources.
> 2. Manage riparian areas under the principles of multiple-use and sustained-yield, while **emphasizing protection and improvement of soil, water, and vegetation, particularly because of their effects upon aquatic and wildlife resources. Give preferential consideration to riparian-dependent resources when conflicts among land use activities occur.**
> 3. Delineate and evaluate riparian areas prior to implementing any project activity. Determine geographic boundaries of riparian areas by onsite characteristics of water, soil, and vegetation.
> 4. Give attention to land along all stream channels capable of supporting riparian vegetation (36 CFR 219.27e).
> 5. Give special attention to land and vegetation for approximately 100 feet from the edges of all perennial streams, lakes, and other bodies of water. This distance shall correspond to at least the recognizable area dominated by the riparian vegetation (36 CFR 219.27e). **Give special attention to adjacent terrestrial areas to ensure adequate protection for the riparian-dependent resources.**
>
> FSM § 2526.03 (emphasis added). *See also* FSM 2527.02 (requiring the USFS "To preserve and restore the natural and beneficial values of floodplains and wetlands.").

Due to the severe adverse impacts to riparian and wetland areas, the USFS cannot approve any of the action alternatives that involve drilling and other activities in these areas (i.e., alternatives 2 and 3).

IV. The EA Fails to Adequately Analyze the Proposed Project's Effect on Soils.

Drilling operations have significant direct and indirect impacts on the surrounding land and soils. Although soil and soil productivity are fundamental aspects of forested ecosystems, the MEA does not adequately analyze the project's total impacts on soils nor make these impacts known. These are significant defects in the MEA because soil conditions strongly influence long-term forest productivity, the composition and condition of vegetation, rates of vegetative recovery after disturbance, sediment flux, and the quantity, timing, and quality of water produced by major watershed, which in turn affect aquatic population and habitats.[90] We are concerned that the proposed project will negatively affect the current road network through the area and further compact the soil conditions under and around the drill pads. In addition to the undetermined and

[90] Beschta et al. 2004.

potentially severe impacts from discharging arsenic-laded waters onto the soil noted above, the following additional problems must be addressed.

A. The MEA fails to provide an adequate analysis of soil compaction.

We are concerned about the effects of the project on soil conditions at or near the drill sites. Former GPTF Conservation Director, Jessica Schafer, along with an intern, photographed sites of heavy compaction from drilling that occurred in this area in 2010.[91] The MEA lacks analysis on the effects of this compaction from drilling equipment on soil productivity.

The drill pads will have a significant negative effect on soil conditions under the drill pads due to soil compaction. It is well established that soil compaction causes long-term losses in soil productivity and is a major soil productivity problem on public lands that have been subjected to logging and other high impact uses.[92] Soil compaction reduces the ability for plant roots to develop successfully and access subsoil moisture and nutrients, thus increasing stress on the plant and lowering its chances of survival.[93] Although it is not adequately discussed in the MEA, it is well documented that logging machinery and other high intensive equipment significantly compacts soil.

The MEA provides no credible assessment of the total areas of soil that are likely to be compacted. The only discussion of compaction is a small paragraph in the MEA which states that "proposed action is expected to be relatively minor considering that FS Road 2612 is already well compacted."[94] However, this statement ignores the areas off of the main FS Road 2612 on the steeper slopes where the majority of vegetation will be removed and the soil compacted from project activities including reactivated roadbeds and drilling pads. The final EIS should include a discussion of the compaction of these soils, the effects of that compaction on the reactivated roadbeds, and the length of time for reclamation to improve soil compaction issues.

B. The MEA fails to adequately consider road reconstruction on soil and sediment delivery.

Road reconstruction and construction increases erosion and sediment delivery for several years, even if some of the constructed roads are decommissioned and/or subsoiled subsequent to construction.[95] The MEA fails to account for these persistent increases in erosion and sediment delivery. As noted in Beschta et al., 2004:

> Accelerated surface erosion from roads is typically greatest within the first years following construction although in most situations sediment production remains elevated over the life of a road (Furniss et al. 1991; Ketcheson & Megahan 1996). Thus, even 'temporary' roads can have enduring aquatic impacts. Similarly, major reconstruction of unused roads can increase erosion for several years and potentially reverse reductions in sediment yields that occurred with non-use (Potyondy et al.

[91] See Exhibit O to 2012 comments. Photographs taken on July 13, 2012.
[92] CWWR, 1996; Beschta et al., 2004.
[93] M. Peterson, P. Ayers, & D. Westfall, *Soil: Managing Soil Compaction*, 1, 1 (available at http://mining.state.co.us/TechnicalBulletins/ManagingSoilCompaction.pdf).
[94] MEA at 75.
[95] Potyondy et al. 1991; Menning et al., 1996, Beschta et al. 2004; Foltz et al., 2007

> 1991)… Furthermore, the assumption that road obliteration or [Best Management Practices] BMPs will offset the negative impacts of new road and landing construction and use is unsound since road construction has immediate negative impacts and benefits of obliteration [or decommissioning] accrue slowly.

The MEA has no analysis of the magnitude and duration of elevated erosion caused by the construction of so-called "temporary" roads.

V. The MEA Fails to Adequately Analyze Road Usage and Effects from Increased Road Usage.

In our previous comments, we noted concerns about the increased use of Forest Service roads by heavy machinery and traffic. The soil in the area is susceptible to erosion. Landslides are evident on several faces of smaller mountains in the area and on the roads leading into the area as evidenced by field observations. Heavy traffic on the road network in this area could increase erosion and further destabilize the area. We asked in our scoping comments for a thorough analysis of the road usage, but the MEA lacks a complete analysis of the effects of increased traffic on wildlife, sedimentation into streams, the costs to maintain and decommission these roads after use, and who will be responsible for those costs. In fact, GPTF and other signing organizations found very limited information in the MEA on the costs to maintain the road system and the costs for reopening and decommissioning the roads.

Heavy traffic on Forest Service roads leading into this area will also have a large effect on the already deteriorating road system. All vehicle and heavy equipment transit to and from the drilling site will likely be by Forest Service roads 26 and 2612. Forest Service road 26 is located on the steep, unstable (blast) side of Strawberry Mountain and is already failing badly in several places. A major bridge on this road was totally replaced due to a large slide several years ago. Erosion and runoff from this failing road system will impact both Quartz Creek, which lies below FS road 26, and the Green River, below FS road 2612. Quartz Creek flows north and has the potential to contaminate water in the Cispus River/Cowlitz River drainage. The Green River flows west and carries the same potential to contaminate both the Cowlitz and Toutle Rivers. There was very little discussion of the effects of increased traffic on these roads in the MEA.

The Forest Service has limited funds to maintain roads on our public lands. Ascot should be responsible for the costs of maintaining the roads and repairing damage caused by the proposed drilling operation's heavy traffic. We would like to see a detailed analysis in the Final EIS of the effects of heavy machinery on Forest Service roads leading into this area, including an analysis of slide potential and sedimentation. Finally, heavy machinery and construction vehicles should be prohibited from using Forest Service road 26 from the north because it is a one-way road and this traffic would endanger other forest visitors using the road.

VI. The MEA Does Not Adequately Consider the Project's Effects on Recreation, in Violation of NEPA, the LWCF Act, and Related Laws.

The Multiple-Use Sustained-Yield Act of 1960 requires the Secretary of Agriculture to "administer

the renewable surface resources of the national forests for multiple use."[96] "Multiple use" is defined as "[t]he management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people."[97] In particular, the land on which the drill pads will be placed is on areas considered to be "Administratively Withdrawn as Unroaded Recreation without Timber Harvest UD."[98] "The purpose of an Unroaded Recreation area is to 'provide a variety of dispersed recreation opportunities in a semi-primitive or undeveloped setting.'"[99]

The MEA rightly points out that the area provides a wide variety of recreational opportunities, but fails to adequately analyze the real impacts to recreation in this area. The project area is home to several significant trails that are used by hikers, backpackers, backcountry horsemen, birders, mushroom foragers, and other recreational uses. The area also provides access to the Green River for fishing, is a popular area for hunting, and contains the Green River Horse Camp—the only campground in the near vicinity for recreation uses. In addition, whitewater kayakers recreate on the Green River a few miles downstream (Green River to South Fork Toutle confluence) and the quality of their recreation experience could be reduced if water quality is negatively impacted by this project. The MEA fails to discuss many of the significant impacts on recreation, instead dismissing effects as localized and temporary. "The naturalness of areas in the immediate vicinity of the surface disturbance would be temporarily affected during operations; however, these impacts would be spatially and temporally limited."[100] The MEA inadequately analyzes the impacts to recreation by dismissing the use of the actual drill locations without due consideration.

The EA never clearly defines or explains how the proposed drilling operations would actually restrict access to the area for recreational purposes. The EA uses vague terms such as the "immediate vicinity" to describe where access would be restricted. Ascot's application indicates they want access restricted within 150 feet of each drill pad. In light of the number of pads and their scattered locations, that may require a total closure of the area. However, even if it does not the EA cannot dismiss the impacts of the prospecting on recreation without much more clearly defining and explaining: 1) where and how access could be restricted, 2) whether the USFS intends to issue a formal closure order, and 3) if it does, for which areas and for how long. The EA also suggests that such restrictions would only last for a few months during one year, but there is nothing in Ascot's application that requires them to complete the proposed prospecting in such a short time frame. Again, the EA cannot minimize impacts on recreation by choosing to only discuss the shortest possible time frame for impacts to recreation from the proposed drilling. Indeed, NEPA requires that the EA disclose and consider the longest possible time frame for such adverse impacts on recreation.

Even without a formal closure order, the adverse impacts from the proposed prospecting will as a practical matter close the entire area to most, if not all, recreational uses during the entire duration of the drilling. To be clear, Ascot is proposing to engage in extended industrial operations using large industrial machinery that causes noise, exhaust, dust, light pollution, and visual impairments. Almost

[96] 16 U.S.C.A. § 529 (2012).
[97] 16 U.S.C.A. § 531(a) (2012).
[98] The Gifford Pinchot National Forest Land and Resource Management Plan (GPNF LRMP).
[99] MEA at 149, quoting GPNF LRMP.
[100] MEA at 150.

all recreational visitors to a national forest would not want to see or experience such impacts when they are in the forest for the express purposes of recreating in area of great natural beauty and without the usual incidents of industrial operations. Because of the nearby Mount St. Helens National Monument, some visitors to this adjoining area are one time or infrequent visitors, meaning that the so-called "temporary" impacts of Ascot's prospecting are essentially permanent for them in terms of their ability to use the area for recreation when they are actually using these LWCF lands. There is simply no way for the BLM and USFS to rationally claim that the prospecting will not directly interfere with the use of the entire prospecting area for most types of recreation and during the entire duration of the prospecting. There is nothing in the applicable laws that creates some exception for interference that is not permanent or lasts for only specific periods of time or an exception indicating that interference to outdoor recreation has not occurred because, technically, the public can still hike through or around the area so long as they are willing to ignore the industrial prospecting that is occurring immediately around them. LWCF dollars were used to purchase the precise land where Ascot intends to prospect and the fact is that no one will want to recreate on those lands while Ascot is prospecting. Under any common sense definition of interference and outdoor recreation, Ascot's prospecting will in fact directly and indirectly interfere with the very outdoor recreation purpose for which these lands were purchased.

Although some of the roads have been decommissioned, the project area still provides opportunities to hike, hunt, fish, and observe wildlife. One does not need a road in order to enjoy the recreational opportunities that stem from the area. The area in question is directly accessible by foot off FS road 2612 and the MEA inappropriately dismisses the recreational opportunities in the area without due consideration. Drilling in this area would essentially prohibit use of the entire area beyond the gate for hiking, hunting, and wildlife and bird watching due to direct prohibition, as well as the noise and air pollution in the direct vicinity of the drilling. Beyond that, recreation on a wider scale will be severely impacted by noise, dust, exhaust fumes, lights, and the physical presence of drill equipment.

We are disappointed that there was merely a terse discussion of the real impacts from noise, dust, lights, and vehicular traffic on recreation opportunities in the project area, with these issues being brought up in the MEA in only a rudimentary way. On July 13, 2012, former GPTF Conservation Director Jessica Schafer visited the site along with her intern and documented the use of the area. We found four carloads of people using trails in the area, one horse trailer at the horse camp with two horses, and several other hikers near Ryan Lake. Craig Lynch, a GPTF member, visited the Green River Horse Camp on July 16, 2012, a weekday, and found the campground half full, with three of six sites occupied.[101] In addition, GPTF Policy Director Laurele Fulkerson visited the site on September 12, 2015 and observed seven cars at the Goat Mountain trailhead, multiple people hiking and bow hunting in the vicinity, and found four of the six campsites occupied in the Green River Horse Camp.

The Biological Assessment accompanying the 2012 EA states that the drill pad sites will take up to 20 x 20 feet at a maximum.[102] If the drill pad sites do take up the maximum amount of space, and these drill pad sites are placed on the road, it will be impossible for Horse Camp users to transport a horse trailer to and from the camp, essentially shutting the Horse Camp down for the entire time

[101] Email from Craig Lynch, ctflyfish@aol.com to Darcy Nonemacher, Associate Director Washington Conservation Programs American Rivers, DNonemacher@americanrivers.org *Recreation Inventory for Green River* (July 19, 2012).
[102] 2012 EA at Appendix E: Biological Assessment 2 [hereinafter BA].

drilling occurs on pads 15, 14, 1, 2, 3, 4, and 5. In addition, these pads, along with drill pads 6 and 7, will produce excessive noise that could potentially spook horses, effectively driving users away from the Horse Camp. This does not allow for a "variety of dispersed recreation opportunities" but rather prohibits use while drilling occurs. This directly conflicts with the purpose of an unroaded recreation area and the Multiple-Use Sustained-Yield Act of 1960.

The Green River Horse Camp is only used for a limited time during the year. "The use season is July through late October, primarily based on practical accessibility of local trails. This equates to approximately 35 weekend days and 90 weekdays."[103] Ascot expects to complete the drilling project between late May and late October. This time period covers the entire time period the Horse Camp is available. The first action alternative could disrupt the Horse Camp for the entire season. The second action alternative limits the drilling on pads 6 and 7 the week before, the weekend of, and after Labor Day. Labor Day will be on September 5, 2016. This limitation would clear the Horse Camp of drilling during that time, which only amounts to one-fourth of the usage period, but does not address the drilling of the pads on the road to the Horse Camp.

Importantly, under Alternative 4, which eliminates drilling operations at pads 6 and 7 because they would be located within the protected Riparian Reserve, the MEA asserts that direct impacts to recreation associated with the Horse Camp would be eliminated:

> By eliminating operations at Pads 6 and 7 under this alternative, direct effects on recreation associated with horse camp described under Alternative 3 would not occur.[104]

At a minimum, to comply with the LWCF Act and related laws noted above, the agency must choose this alternative in order for the project to protect critical recreation resources. Further, as detailed below, failure to choose this alternative violates the MM-2 Forest Plan/Northwest Forest Plan standard for Riparian Reserves. Of course, even Alternative 4 allows for direct interference with recreational opportunities outside of the Riparian Reserves in violation of the LWCF's intent and purpose, including in the proposed Wild and Scenic River corridor. Despite this, the MEA stated that: "the project is not expected to disturb the recreation experience to the extent that it would interfere with recreation as a primary purpose for the lands acquired through LWCF."[105] As shown herein, that assertion is unsupported as both a legal and factual matter.

The agencies need to consider the comments in regards to recreation in more depth and include an adequate analysis of the project's effects on recreation in the MEA or an EIS and decision. Recreationists do not need to prove that there will be a significant impact on their activities to override a FONSI; they simply need to show that there is a possibility that there will be an impact on activities. "[A]s the Ninth Circuit has noted, in challenging an agency's decision to issue a FONSI, a plaintiff need not show that significant effects *will in fact occur*[;] raising substantial questions whether a project may have a significant effect is sufficient."[106] In *Anglers*, two environmental groups challenged the USFS's and BLM's consideration of recreational effects from

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[103] MEA at 148.
[104] MEA at 154.
[105] MEA at 154.
[106] *Anglers of the Au Sable v. U.S. Forest Service*, 565 F.Supp.2d 812, 825 (E.D. Mich. 2008) (quoting *Idaho Sporting Congress v. Thomas,* 137 F.3d 1146, 1150 (9th Cir. 1998)) (internal quotation marks omitted; emphasis included).

exploratory gas and oil drilling on a parcel of land within the Huron-Manistee National Forest. They also contended that USFS improperly issued a FONSI for the drilling project. The Magistrate Judge "identified four effects that amounted to significant environmental impacts: (1) the effect on visual aesthetics; (2) emission of odor; (3) noise levels; and (4) disruption of protected wildlife and old growth forest."[107] Specifically, plaintiffs were concerned that "the drilling site… is home to unique human recreational experiences that will be significantly affected by the proposed action, and that the Forest Service failed to consider the effect of the proposed drilling on recreational tourism in the region and in the State."[108] However, "[w]hen the issue was repeatedly raised again during the public comment period, the Forest Service responded with references to the mitigation measures adopted (regarding noise and visual quality)."[109] The court found that "the defendants 'entirely failed to consider an important aspect of the problem,' rendering their decision arbitrary and capricious."[110]

Similarly, the mitigation measures proposed in the second action alternative of the Ascot proposal only affect noise and visual quality – that is, the second action alternative proposes adding a drill shack with baffles to reduce noise and aiming lights towards the drill. These actions are similar to the Forest Service's response to the comments in *Anglers*, which only offered noise and visual mitigation measures. The BLM should consider the scarcity of horse camps and backcountry camps in this area of the Gifford Pinchot National Forest and how the drilling will affect the Green River Horse Camp. If users cannot reach the Horse Camp, the drilling will limit the ability of recreationists in the area, which violates the spirit of the Multiple-Use Sustained-Yield Act of 1960.

Additionally, the MEA inadequately analyzes the effects of this proposal on hunting. The Margaret elk are extremely important for quality hunting. "The elk herds associated with Mount St. Helens comprise the largest complex of elk in the Washington Cascades…. [T]hey are largely migratory, summering in the high country on the Gifford Pinchot National Forest and the Mount St. Helens National Monument. The lower elevation areas of the Lewis River, Marble, Margaret, Winston and Toutle units are popular wintering areas for the elk."[111] There are archery, muzzleloader, and modern firearm hunting permits available.[112] A basic elk hunting license costs $497 for a non-resident, $50.40 for a resident, and $21.80 for a youth or disabled person, and a deer license is similar.[113] The Mount St. Helens Herd Management Plan states that "approximately 30.4 million dollars is generated annually either directly or indirectly by hunters in the area encompassed by the Mount St. Helens Herd."[114] According to a member of the Vancouver Wildlife League (the oldest sports group in the area), there are normally about 5 to 10 dispersed elk camps with two to four people per camp at various places along FS roads 26 and 2612, while the Green River Horse Camp is the only established camp site in the area that is open during elk season. If access to this Horse Camp is

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[107] *Id.* at 820.
[108] *Id.* at 825.
[109] *Id.* at 826.
[110] *Id.* at 827 (quoting *Motor Vehicle Mfrs. Assn. of the U.S., Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)).
[111] Doug Rose, *Cascade Mountains Elk*, http://www.gameandfishmag.com/2010/09/29/hunting_elk-hunting_wo_aa105502a/ (last updated Sept. 29, 2010).
[112] Washington Dept. of Fish & Wildlife, *Hunting*, **"**Summary of General Hunting Season Dates," http://wdfw.wa.gov/hunting/regulations/summary_ hunting_dates.html (accessed July 31, 2012).
[113] Washington Dept. of Fish & Wildlife "Information: License Fees: Big Game," https://fishhunt.dfw.wa.gov/wdfw/licenses_fees.html (accessed February 2, 2016).
[114] Patrick Miller & Scott McCorquodale, *Washington State Elk Herd Plan: Mount St. Helens Elk Herd* 12 (Washington Dept. of Fish & Wildlife Nov. 2006) (available at http://wdfw.wa.gov/publications/00771/).

blocked, there will be no established campsite in the area during elk season. The EA does not discuss the revenue from these hunting licenses or the effect drilling would have on the number of elk that remain in the area.

The MEA does recognize that the elk season runs from September 1 to November 31, but does little to analyze the direct impact to the elk and hunters seeking big game in this area. The noise alone from drilling and mining activities would keep deer and elk out of the area. It is unclear how soon after drilling is completed that elk would return to the area. If the project does not end until late October, and the elk take more than one month to return to the area, the drilling could eliminate hunting in the area for an entire season. This could reduce the revenue to the state from elk and other hunting permits, and clearly reduce the recreational opportunities that should be preserved under the Land and Water Conservation Fund Act.

The MEA also inadequately analyzes affects to tourists using Mount St. Helens. Mount St. Helens is a popular destination for tourists. People come from around the world to climb and see the volcanic crater, spurring tourism in the area.[115] Currently there is only one climbing route, but because it is so popular, "[t]here is some discussion of establishing a second route… that could increase capacity a little."[116] Permits to climb the volcano cost $22 each, and the 100-person per day limit is often sold out from early spring until the fall. In 2011, more than 13,851 permits to climb Mount St. Helens were sold, producing revenue for the state of $304,722.[117] It is imperative that the area surrounding the Mount St. Helens National Volcanic Monument does not deteriorate, especially considering the sheer number of visitors to the pristine environment each year. The MEA does little to address any effects to visitors' experience of Mount St. Helens and the scenic value of Goat Mountain for climbers, other recreationists, and tourists.

The State Comprehensive Outdoor Recreation Planning (SCORP), published by the Washington State Recreation and Conservation Office, raw data indicates that 449,290 people from southwest Washington went to a scenic area to sightsee; 156,498 people hiked a mountain or forest trail; and 11,485 people went horseback riding on a mountain or forest trail. An Interagency Committee for Outdoor Recreation report entitled *Estimates of Future Participation in Outdoor Recreation in Washington State* from March 2003 estimated that hunting and fishing activities would decline in the state, but all other outdoor activities would increase over both a 10– and 20–year period, starting in 2003.[118]

Hikers, like horseback riders, often prefer, and generally expect, to be surrounded by natural sounds when they visit national monuments and forest. Drilling on this land would essentially prohibit enjoyable use of this area for primitive recreation and may block complete use of the Green River Horse Camp while drilling is being conducted. Drilling in this location will not "provide a variety of dispersed recreation opportunities" as required by the GPNF Land and Resources Management Plan. Rather, it prohibits some activities, including horseback riding, hunting, wildlife watching and hiking, in favor of other activities – exploratory drilling.

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[115] Evan Caldwell, *Coveted Mount St. Helens summer hiking permits tough to come by*, The Daily News (July 19, 2012) (available at http://tdn.com/news/local/coveted-mount-st-helens-summer-hiking-permits-tough-to-come/article_92c4b434-d200-11e1-afe8-001a4bcf887a.html?).

[116] *Id.*

[117] *Id.*

[118] Interagency Comm. for Outdoor Recreation, *Estimates of Future Participation in Outdoor Recreation in Washington State* 4 (Salmon Recovery Funding Board 2003).

VII. The MEA Does Not Adequately Address the Socio-Economics of the Region and Fails to include Economic Impacts to Recreation and Tourism.

The MEA lacks an adequate analysis of the impacts of recreation on the economic climate. In fact, the MEA does not include anything on the value of recreation for Washington State and the region because of tourism, recreation, and other economic drivers for the area. Without this analysis, the MEA can't provide a complete picture of the project's economic impact on the region.

Tourism in Washington State is a multi-billion dollar industry. Travel alone in the state produced $1,820 million in revenue for the government.[119] During 2010, "travel spending in Washington directly supported 143,000 jobs with earnings of $4.3 billion."[120] Forty-two point seven percent of Washington residents sightsee, while 27.8 percent of Washington residents specifically sightsee in scenic areas.[121]

The MEA claims that the exploratory drilling will provide jobs. However, the number of jobs created by this project pales in comparison to the jobs based on tourism. The Project "would require a crew of approximately eighteen people."[122] These jobs consist of one drill foreman, up to four drillers, up to four drill assistants, two to three geologists, two to three core technicians, two local trail and pad contractors, and one security employee.[123] If a water truck is used, Ascot may employ one or two additional persons to transport water.[124] However, Ascot has said that while it attempts to hire local personnel when appropriate, some jobs require specialists.[125] Ascot assumes that it will hire people from out of the area and have those people temporarily relocate for the duration of the project. In fact, Ascot CFO Robert Evans has already stated that one third of the jobs created by the project will go to Canadians.[126] This means that a maximum of 12 jobs will be created for local residents. That number is an upper estimate.

Ascot does not indicate how long the jobs themselves will last, but one can presume that the majority of the jobs will only last as long as the project lasts, with the only possible exceptions being the security employee and geologists. Geologists require training, and so even if the geologist positions last longer than the drilling itself, it is likely that out-of-area personnel will hold those positions. The only possible long-lasting job for local residents is one security employee, but the length of time of this job is unclear. Both proposed action alternatives are expected to take approximately five months.[127] Drilling would start as early as late May and be completed, including reclamation, by late October.[128] Therefore, the jobs will be temporary and it is unlikely that any local socioeconomic benefits would occur. The out-of-area employees will likely stay in motels or in

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[119] Dean Runyan Assocs., Inc. *Washington State Travel Impacts: 1991-2010* 8 (Department of Commerce, 2011) (available at http://www.experiencewa.com/industry/Research/Pages/Economic-Impact-Studies.aspx "Statewide Travel Impacts").
[120] *Id.* at 6.
[121] SCORP regional data.
[122] MEA at 157.
[123] *Id.* at 32.
[124] *Id.* at 158.
[125] MEA at 32.
[126] Natalie St. John, *Public Hearing on Exploratory Drilling Near Volcano Draws About 125 People*, The Daily News (Feb. 15, 2012) (available at http://tdn.com/news/local/public-hearing-on-exploratory-drilling-near-volcano-draws-about-people/article_1ebab6cc-5877-11e1-b732-001871e3ce6c.html).
[127] MEA at 158.
[128] *Id.* at 24.

private residences.[129] This expectation reconfirms the intention that these jobs will only be temporary.

The 2012 EA stated, "Ascot *may* choose to rent an office space and/or building to process the drill cores in the greater Lewis, Cowlitz, and Skamania County areas."[130] This rental would only be temporary, so any socioeconomic benefit from this rental would be temporary. However, even this temporary socioeconomic benefit is speculative, as Ascot has not committed to renting space.

The MEA fails to adequately compare the job creation to the value in loss to recreational opportunities. Recreation and tourism is a clear driving factor in this area and should be accounted for in the MEA. (See Recreation Section above). Without this analysis it would be difficult for the permitting agencies to understand the associated impacts of the drilling project.

The Ninth Circuit has held that an agency's failure to adequately consider information in an EIS violates NEPA. "NEPA's goal [is to] 'focus[] agency attention' to 'ensure[ ] that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.'"[131]

In *Center for Biological Diversity v. U.S. Forest Service*, the Ninth Circuit stated that when a "Final EIS fails to disclose responsible scientific opposition to the conclusion upon which it is based, as required by 40 C.F.R. § 1502.9(b)," the agency fails to follow the requirements of NEPA.[132] In Center for Biological Diversity, nonprofit organizations brought suit against the U.S. Forest Service for an EIS that failed to consider scientific data showing northern goshawks were not habitat generalists. In October 1990, the Forest Service created the Northern Goshawk Scientific Committee, whose purpose was to review the goshawk's habitat management needs. The Committee found that the goshawk was a "habitat generalist."[133] In June 1992, the Forest Service published notice of its intent to prepare an EIS "amending forest land and management plans in the Southwestern Region to incorporate guidelines for habitat management of the northern goshawk."[134] The Forest Service received comments from various groups, including the Arizona Game and Fish Department and the U.S. Fish and Wildlife Service challenging the Northern Goshawk Scientific Committee's finding on goshawk habitat needs. The Forest Service then published a draft EIS. Another round of comments continued to challenge the Committee's findings. The Forest Service then published the Final EIS, but failed to respond to the concerns surrounding the goshawk. The court found that "[a]lthough the Service responded to each group of comments, the Service did not mention or respond to comments challenging the agency's conclusion that goshawks are habitat generalists."[135] The court held that "[t]he agency here has not satisfied its regulatory obligations simply by including Alternative D[, based on comments,] into the final statement. The applicable regulations require the Service to disclose and discuss the responsible opposing views in the final

[129] *Id.* at 157.
[130] 2012 EA at 106 (emphasis added).
[131] *Price Rd. Neighborhood Assn., Inc. v. U.S. Dept. of Transp.*, 113 F.3d 1505, 1510 (9th Cir. 1997) (quoting *Marsh v. Oregon Nat. Resources Council*, 490 U.S. 360, 371 (1989)).
[132] 349 F.3d 1157, 1160 (9th Cir. 2003).
[133] *Id.* at 1160–61.
[134] *Id.* at 1161.
[135] *Id.* at 1164–65.

impact statement. Because the agency did not make such a disclosure, the final statement violates NEPA and its implementing regulations."[136]

The agency needs to consider all comments from interested parties before making a final decision. The Forest Service needs to consider both scientifically opposing viewpoints and opposing socioeconomic viewpoints. Because tourism is a substantial industry in Washington State, the agencies should consider information based on tourism as well as the environmental effects from the project.

VIII. The MEA Fails to Adequately Analyze Effects on Wildlife and Fish.

The proposed drilling project is likely to have a significant effect on fish and wildlife in the area. Our organizations remain troubled about the effects of increased roads and vehicular traffic, noise, and possible soil and groundwater contamination on wildlife, amphibians, birds and aquatic organisms.

A. The MEA does not adequately consider effects on important wildlife species.

The MEA's discussion of the impacts to wildlife is flawed because it fails to adequately analyze effects to wildlife, including significant impacts from noise, lights and road reconstruction in this area. Rather than analyze the issues, the MEA simply states without supporting documentation that certain species simply do not exist in this area, or that if they exist, the project will only be short term so effects will be temporary at best.

The MEA fails to look at significant impacts to wildlife from road and road reconstruction. One of the largest threats to biological diversity is fragmentation of habitat into smaller and smaller patches.[137] Roads, even if temporary in nature, can have lasting impacts on wildlife habitat, isolating species into smaller areas and decreasing connectivity between important core habitats for feeding, breeding, and wintering.[138] For example, elk are greatly impacted by roads and road use, avoiding areas where there is more noise and road infrastructure.[139] The MEA simply discounts impacts from roads and assumes without reference to scientific literature that elk and other species will return to the area after the activity ceases.

The MEA also fails to adequately analyze impacts to species from noise. There are many studies that show that birds, amphibians, bats, and small and large mammals are greatly affected by any increase in noise in their habitats, not only from drilling or other industrial uses, but also from added traffic into and out of their habitat. A study conducted in 2001 analyzing the impacts of transportation noise on the listening area of animals showed a significant decrease in the listening area for birds and

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[136] *Id.* at 1168.

[137] Harris 1984; Wilcove et al. 1986; Saunders et al. 1991 *in* Meffe et al. 1997

[138] *See* Noss and Cooperrider 1994.

[139] Rost and Bailey (1979) found that deer and elk in Colorado avoided roads, particularly areas within 200 meters of a road; Berry and Overly (1976) found that roads reduce big game use of adjacent habitat from the road edge to over 0.5 miles away. Leege (1976) found that logging and road-building activity along major migration routes changed the winter distribution of elk. Thiessen (1976) found that elk occurred in greater densities in roadless area compared to roaded areas. Hunter success was higher in roadless areas compared to roaded areas in Unit 39 in west central Idaho. Lyon (1979) found that elk in Montana avoided habitat adjacent to open forest roads, and that road construction creates habitat loss that increases impacts to elk as road densities increase.

wildlife with just a small noise increase of 3db (a noise level identified as just perceptible to humans). Listening areas are critical for overall health and survival of wildlife that depend on sounds for feeding, mating, and signaling. Again the MEA dismisses these concerns stating that impacts will be temporary in nature.[140]

Additionally, the MEA never analyzes the presence of black bear in the area. Black bear are a valuable big game species and do occur in this area. Bear activity in the area will be adversely affected by exploratory drilling activities. Effects to this species should be analyzed.

B. The MEA does not adequately analyze effects to fisheries.

Road building and drilling will result in sediment loading into rivers, streams, and other water bodies within close to the proximity of the drilling site, detrimentally impacting aquatic species. The Green River, which is in the vicinity of drilling activities, is home to a vast array of aquatic species, including native fish and invertebrates. The Green River has a healthy population of cutthroat and brook trout, as well as several species of aquatic insects including mayflies, caddis, stoneflies, and midges.[141] The Green River also contains important current and potential habitat for winter steelhead, fall Chinook, and coho populations.[142] Increased sediment in watersheds can have severe effects on the aquatic habitat and spawning areas needed for fish survival and recovery.

Additionally, as mentioned above in the section on water concerns, some polymers and other drilling materials used for cooling and stabilizing the drilling bits can have detrimental effects on aquatic systems if used in high concentrations. The MEA states that Ascot will use minimal amounts, but fails to include any limit on the amount of additives. These chemical substances could have adverse effects on fish populations and other aquatic species. As such, those effects should be analyzed in the MEA.

In addition, the Washington Department of Fish and Wildlife designated the Green River as a "Wild Stock Gene Bank" in 2014 to protect and restore wild winter steelhead populations and their habitat. The MEA merely provides a cursory review of the impacts of drilling on this wild steelhead populations, writing off impacts to fish because the project would not include hatchery fish introduction.[143] In doing so, the MEA ignores one of the primary purposes of the gene bank designation—habitat protection and restoration. Reductions in instream flow due to withdrawal of water that is hydraulically connected to surface waters, as well as pollution from chemicals and sedimentation, can adversely impact salmon and steelhead populations and degrade their habitat. The MEA does not adequately address this issue. Rather, the MEA simply states that there is a fish barrier that limits the reach of anadromous fish.[144] Even if that is true, the upper limit of spawning is only a few miles downstream and any significant effects to temperature due to high sediment or

[140] *See* Barber et al 2010.
[141] *See Goat Mountain Prospecting Environmental Assessment* comments submitted by Clark-Skamania FlyFishers and Vancouver Wildlife League, 30 July 2012 and attached photographs in Exhibit P to 2012 comments.
[142] See WRIA 26 watershed plan (p. 2-17) available at http://www.lcfrb.gen.wa.us/w25/WRIA%2025-26%20Watershed%20Management%20Plan.pdf.
[143] See MEA at 111.
[144] MEA at 110.

effects to water quality from chemical substances can harm fish downstream and must be adequately analyzed.

IX. The MEA is Based on an Inadequate NEPA Analysis and a FONSI Cannot Be Issued.

In addition to the herein-noted deficiencies, the MEA further violates NEPA, and thus a FONSI cannot be issued. An agency prepares an environmental assessment to provide "sufficient evidence and analysis for determining whether to prepare an [EIS] or [FONSI]."[145] The analysis must consider the direct, indirect, and cumulative environmental effects of the proposed action with past, present, and future agency and private activities.[146] In determining whether a project will have significant impact on the environment, an agency must consider "[whether] the action is related to other actions with individually insignificant but cumulatively significant impacts."[147] Under NEPA, "significance exists if it is reasonable to anticipate cumulatively significant impacts on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts."[148] NEPA requires that agencies take a "hard look" at the environmental consequences of proposed actions on the project environment.[149] The Goat Mountain MEA fails to satisfy these requirements because it lacks discussion of some of the project's potential direct, indirect, and cumulative environmental effects. Further, the MEA makes effects-related conclusions based on scientifically unsupported assumptions. Such cursory, piecemeal discussion, does not comply with NEPA's requirement to comprehensively consider environmental effects, even at the MEA stage. To the extent that the FONSI's conclusions rely on the deficient MEA, the FONSI is arbitrary and capricious and contrary to law.

As the federal court in this case held: "[I]f the EA is deficient under NEPA in one of the ways Plaintiff has previously argued, then the [agency's] DN/FONSI is necessarily arbitrary and capricious because it relied on the 2012 EA." Gifford Pinchot, 2014 WL 3019165, *40. This follows a line of well-established Ninth Circuit precedent. *See* Native Ecosystems Council v. Tidwell, 599 F.3d 926, 937 (9th Cir. 2010) (USFS violated NEPA in issuing FONSI based on inadequate analysis); Ctr. for Biological Diversity v. NHTSA, 508 F.3d at 1223-24 (When an EA fails to comply with NEPA requirements, it "do[es] not constitute a 'hard look' at the environmental consequences of the action as required by NEPA. Thus, the FONSI is arbitrary and capricious.").

A. The MEA fails to analyze some potential direct and indirect effects from the proposed project.

For the reasons discussed herein, the MEA fails to provide a clear, comprehensive, and/or scientifically supported analysis of the project's direct and indirect effects.

First, the MEA fails to address and/or quantify the direct and indirect effects of some project activities. For instance, the MEA fails to clearly discuss potential runoff effects from soils stockpiled

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[145] 40 C.F.R. § 1508.9.
[146] *See* 40 C.F.R. §§ 1508.8, 1508.25.
[147] 40 C.F.R. § 1508.27(b)(7).
[148] *Id.*
[149] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

in the road reclamation process. Though the MEA discusses how stockpiled soil will be added back to reclaimed roads so as to prevent erosion *on the former road beds*, it does not discuss where and how the stockpiled soil will be stored, and how sediment runoff from those piles will be avoided. Similarly, the MEA fails to quantify and discuss the impacts of the increased potential from erosion due to the adjusted drilling schedule. If drilling occurs during periods of higher precipitation, the agencies admit that work such as soil staging, temporary culvert discharge, and increased water truck traffic could "increase the potential for erosion."[150] Despite this admitted adverse effect, the agencies nonetheless summarily conclude that the likelihood of soil erosion and resulting deleterious sedimentation is low. Additionally, the MEA fails to clearly discuss potential impacts from the temporary water storage tank proposed under Alternative 3, including the fact that the location of the tank is undetermined.[151] The MEA admits that the use of a water storage tank would increase water traffic on local roads, but does not address how big the tank will be, and what type of equipment or surface area will be needed to install, remove, and/or operate it. Also, while it acknowledges that the project includes a high risk of spreading noxious weeds, the MEA fails to discuss the possibility of spreading noxious weeds as heavy equipment moves from drill site to drill site.

Second, the MEA fails to disclose the results of the 2010 exploratory drilling. Such information would be useful in assessing the project's impacts on Goat Mountain's geologic and mineral resources. Without clear information on this topic, the MEA's analysis of project impacts to those resources is deficient and inadequate.

Third, under NEPA's implementing regulations, "[t]he draft environmental impact statement shall list all Federal permits… which must be obtained in implementing the proposal. If it is uncertain whether a Federal permit… is necessary, the draft environmental impact statement shall so indicate."[152] The Ninth Circuit held on August 17, 2010 that "stormwater runoff from logging roads that is collected by and then discharged from a system of ditches, culverts, and channels is a point source discharge for which [a National Pollutant Discharge Elimination System permit under the federal Clean Water Act] is required."[153] When the Ninth Circuit amended its opinion on May 17, 2011, the court did not change the stormwater-runoff rule.[154]

Here, there are significant water quality concerns that have not been adequately addressed. For example, it does not appear that the agencies will require Ascot to obtain NPDES permit coverage for the sediment and other pollutants discharged from the road culverts and other water management structures. As the Ninth Circuit has stated:

> Further, the term man-made "conveyance," the essential trigger for finding a "point source" under the CWA, is broadly defined. [W]hen stormwater runoff is collected in a system of ditches, culverts, and channels and is then discharged into a stream or river, there is a "discernable, confined and discrete conveyance" of pollutants, and there is therefore a discharge from a point source. In other words, runoff is not

[150] MEA at 57.
[151] MEA at 33.
[152] 40 C.F.R. § 1502.25(b) (2012).
[153] *N.W. Envtl. Def. Ctr. v. Brown,* 617 F.3d 1176, 1198 (9th Cir. 2010), *withdrawn and superseded,* 640 F.3d 1063 (9th Cir. 2011).
[154] *Native Ecosystems Council v. Weldon*, 2012 WL 991833 at *15 (D. Mont. Mar. 26, 2012).

> inherently a nonpoint or point source of pollution. Rather, it is a nonpoint or point source under § 502(14) depending on whether it is allowed to run off naturally (and is thus a nonpoint source) or is collected, channeled, and discharged through a system of ditches, culverts, channels, and similar conveyances (and is thus a point source discharge).[155]
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> *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063, 1070-71 (9th Cir. 2011) (culverts directing stormwater flows are point sources subject to NPDES permitting) *overturned on other grounds Decker v. Nw. Envtl. Def. Ctr.,* 133 S.Ct. 1326 (2013).

Although the Supreme Court overturned Brown on other grounds, the culverts-as-point-sources rule remains. The Ninth Circuit recently reiterated, in light of the Supreme Court's and its previous decision in those cases, that:

> The Court left intact our holding that "when stormwater runoff is collected in a system of ditches, culverts, and channels and is then discharged into a stream or river, there is a 'discernable, confined and discrete conveyance' of pollutants, and there is therefore a discharge from a point source" within the meaning of the Clean Water Act's basic definition of a point source in 33 U.S.C. § 1362(14).[156]
>
> *Northwest Environmental Defense Center v. Decker*, 728 F.3d 1085-86 (9th Cir. 2013).

Relatedly, the Project cannot be approved without the required CWA Section 401 Certification. *Hells Canyon Preservation Council v. Haines*, 2006 WL 2252554, *4 (D. Or. 2006).[157] Because of the above-noted discharges, a Certification must be obtained as a requirement of USFS/BLM approval.

Without the required CWA permits (and Section 401 Certification), the USFS cannot approve the drilling plan. *See Dubois v. U.S. Dept. of Agriculture*, 102 F3d 127, 1300 (1st Cir. 1996) ("the Forest Service was obligated to assure itself that an NPDES permit was obtained before permitting the [requested activity].").

The MEA was released well after these rulings. Despite the binding effect of the Ninth Circuit's ruling, the MEA makes no mention of whether a National Pollutant Discharge Elimination System (NPDES) permit might be required for the road-related activities.[158] Here, BLM/USFS have similarly occluded such opportunity in the MEA.

The proposed project involves reactivating 1.69 miles of decommissioned roads – some of which have been out of service for a number of years. The MEA both fail to mention any anticipated need for Clean Water Act (CWA) stormwater discharge permits under NPDES, as required by *Northwest Environmental Defense Center v. Decker*, and *N.W. Envtl. Def. Ctr. v. Brown.* BLM/USFS should have

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[155] *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063, 1070-71 (9th Cir. 2011) (culverts directing stormwater flows are point sources subject to NPDES permitting) *overturned on other grounds Decker v. Nw. Envtl. Def. Ctr.,* 133 S.Ct. 1326 (2013).

[156] *Northwest Environmental Defense Center v. Decker*, 728 F.3d 1085-86 (9th Cir. 2013).

[157] *Hells Canyon Preservation Council v. Haines*, 2006 WL 2252554, *4 (D. Or. 2006).

[158] *Id.* (concluding that by failing to identify a possible NPDES permit requirement in a Draft EIS, the Forest Service had "occluded the opportunity for public comment on that aspect of the decision-making process").

given the public the opportunity to comment on the permits that it may be required to obtain for that road construction and reconstruction – failure to do so was a direct violation of NEPA.

Lastly, as discussed elsewhere, the MEA contains cursory and largely unsupported determinations of project effects to various listed, sensitive, or otherwise pertinent species of wildlife and their habitat.

B. The MEA downplays all acknowledged effects as temporary and eliminated through rehabilitation.

The MEA claims that all effects will be "temporary" and any detrimental disturbance will be rehabilitated. However, even "temporary" impacts can be significant. For instance, interference with recreation – especially the scale of recreation popular in the Goat Mountain area – is significant. As discussed elsewhere, the MEA grossly underestimates the project's visual, noise, aesthetic, and other impacts on recreation. Additionally, though the EA describes any and all adverse impacts as short term because the project period is so short, it fails to describe job impacts as short term, even though they correspond to the same period.

The MEA also fails to acknowledge or clearly quantify the long-term adverse impacts from the project's anticipated water use and additional truck traffic. The MEA estimates that each drill site will require two to twenty gallons per minute (gpm) of water; given the project timing, at two gpm each drill site will require almost 6,000 gpd as opposed to the 5,000 cited in the EA.[159] The MEA acknowledges this potential, yet contains no analysis (outside of a reference to a state permit, which does not satisfy NEPA).[160] The additional required water will be trucked in from off-site. Water tanker trucks are large and heavy, they emit air pollutants associated with diesel fuel, and they compact soils on roads. The MEA vaguely mentions water requirements without clear information or useful analysis, avoiding discussion of adverse effects on soils, air pollution, and groundwater withdrawal from prospective water use and additional truck hauling. In fact, the MEA seems to imply that these activities have virtually no impact. This discussion blurs important project details and fails to satisfy NEPA's requirements for useful analysis.

C. The MEA fails to acknowledge the potential for substantial disagreement about the nature and extent of potential impacts.

The MEA concludes that the proposed project is not likely to have highly controversial environmental effects. However, as discussed elsewhere, the MEA fails to acknowledge and/or clearly address some potential project effects on specific natural resources, including but not limited to, wildlife and streams and/or other natural resources affected by erosion. By not acknowledging some potential impacts from various project actions, the analysis in scoping and the MEA forecloses useful scientific discussion about the environmental effects of some project actions under 40 CFR 1508.27(b)(4). For instance, by assuming that some listed species are not present in Green River, the MEA forecloses scientific discussion of the project's potential impacts on those species. Such blind conclusions make the MEA inadequate.

[159] MEA at 55.
[160] *Id.*

D. The MEA fails to acknowledge the reasonable foreseeability of a future mine, thus avoiding discussion of how approval of the exploratory drilling represents a decision in principle about permitting a future mine.

As discussed above, the agencies should have considered the potential cumulative impacts of a future mine on the project area. A future mine constitutes a cumulative and/or connected action under NEPA. Indeed, a decision to permit exploratory drilling is a pre-requisite to its approval of subsequent leasing applications. BLM/USFS has made no indication that it does not intend to reject a future leasing application; it only states that it will be required by law to undergo NEPA analysis before it permits such leasing. However, BLM/USFS have affirmatively granted Ascot's preliminary groundwork for establishing a future mine. Thus, it has taken one step in paving the way for development of that future mine. By approving a prospecting permit but failing to acknowledge the reasonable foreseeability of a resulting mine, BLM/USFS avoid discussing how granting the prospecting permit represents its decision *in principle* to permit a future mine.

E. The MEA fails to adequately consider cumulative environmental effects.

A valid cumulative effects analysis must thus include an analysis of the "incremental impact[s] of the [proposed] action when added to other past, present, and reasonably foreseeable future actions" on national forest lands and nearby or adjacent lands.[161] This analysis should address combined or synergistic effects in addition to isolated effects.[162]

Additionally, an adequate cumulative effects analysis "must be more than perfunctory;" its analysis of those cumulative impacts must be "useful."[163] To be useful, it must contain "some quantified or detailed information."[164] This assures "the courts [and] the public, in reviewing [a] decision…. that the Forest Service provided the hard look that it is required to provide."[165] "General statements about possible effects and some risk do not constitute a hard look."[166] Additionally, the required cumulative effects analysis must be comprehensive.[167] Lastly, disclosures and analysis on the cumulative effects of proposed action alternatives must include high quality scientific analysis that would satisfy the "hard look" standard.[168]

The EA concludes that the proposed project will not result in significant cumulative environmental effects. However, the cumulative effects analyses in the MEA underlying this conclusion are vague and perfunctory. Such cursory analyses fail to provide useful information about the synergistic,

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[161] 40 C.F.R. § 1508.7.

[162] *See Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 994 (9th Cir. 2004) ("[T]he total impact from a set of actions may be greater than the sum of the parts…. [T]he addition of a small amount here, a small amount there, and still more at another point could add up to something with a much greater impact….").

[163] *Id.* at 994; *see also Kern*, 284 F.3d at 1075.

[164] *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1379 (9th Cir. 1998).

[165] *Id.*

[166] *Id.* at 1380 (internal parentheses omitted).

[167] *See* 40 C.F.R. §§ 1502.16 (2012) (regarding environmental consequences), 1508.7 (regarding cumulative impact).

[168] 40 C.F.R. §§ 1502.24 (2012), 1500.1(b) (2012); *see also Robertson v. Methow Valley*, 490 U.S. at 353, *supra* n. 149; *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208 (9th Cir. 1998) *cert. denied*; *Malheur Lumber Co. v. Blue Mountains Biodiversity Project*, 527 U.S. 1003 (1999).

combined effects of the project when added to other conditions and activities, in violation of NEPA.

First, the MEA's cumulative effects analyses are cursory and vague. Some discussions are limited to the cumulative effects of *one type of action*. For instance, for noise, the MEA claims summarily that "Negligible cumulative noise effects would result."[169] This vague, cursory analysis is confined only to project noise-related impacts, without considering how *other* existing or reasonably foreseeable activities or conditions could affect the impacts of project-related noise. For example, what effects will wind or other environmental conditions have on how noise carries throughout this widely used recreational area? Additionally, this "analysis" fails to clearly define *what resources* the MEA considered that *could* be impacted from project-related noise. The MEA repeats this narrowly focused and cursory type of analysis throughout the document.[170] What about other weather-related impacts, such as increased likelihood of precipitation during adjusted periods of project drilling?

Second, the MEA's cumulative effects analyses fail to address the synergistic effects of project activities when combined with other conditions and activities. For instance, for hydrogeological and fisheries conditions, the MEA does not discuss the combined impacts of even "minor" increases in sediment to waters that are already high in copper.[171] Fish and other aquatic organisms in those copper-high waters may be already stressed.[172] To the extent that sediment from the project *does* reach area waters, the MEA fails to discuss how sediment and existing project conditions will cumulatively impact area aquatic organisms and other aquatic organisms.

F. <u>The MEA draws unsupported conclusions about project impacts to listed wildlife and other species, in violation of NEPA and the ESA.</u>

Under NEPA and the Endangered Species Act (ESA), BLM/USFS are required to discuss anticipated project impacts to listed species. ESA § 7(a)(2) requires that "[e]ach Federal agency *shall*… *insure* that any action authorized, funded, or carried out by such agency… is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species."[173] This responsibility imposes an "institutionalized caution mandate" on action agencies, requiring them to prove that their actions are non-jeopardizing to the continued existence of a listed species.[174] The obligation to "insure" against jeopardy or adverse modification thus requires federal agencies to give the benefit

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169 MEA at 161.

170 *See*, for example, discussion of cumulative effects on fisheries, MEA at 56 ("Cumulative effects on streams are mostly related to additional small increments of the same kinds of effects as have occurred in the past and will continue to occur based on current uses.").

171 MEA at 47 (impaired for copper).

172 Elizabeth Materna, U.S. Fish and Wildlife Service, *Temperature Interaction Issue Paper* 3 (U.S. Environmental Protection Agency 2001).

173 16 U.S.C.A. § 1536(a)(2) (2012) (emphasis added).

174 *Washington Toxics Coalition v. EPA*, 413 F.3d 1024, 1035 (9th Cir. 2005); *Sierra Club v. Marsh*, 816 F.2d 1376, 1389 (9th Cir. 1987); *see also Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) ("Congress has spoken in the plainest of words… in favor of affording endangered species the highest of priorities… [by] adopting a policy which it described as 'institutionalized caution.'").

of the doubt to endangered species and to place the burden of risk and uncertainty on the proposed action.[175]

The MEA and revised Biological Assessment (BA) conclude that the project will have no significant adverse effects on species listed or proposed to be listed as Federally Endangered or Threatened Species, or their designated critical habitat. This conclusion is based upon the impacts analysis within the MEA, as based upon the BA prepared for the project. However, the BA's and EA's discussion of impacts to wildlife is fundamentally flawed, and fails to give species the benefit of the doubt. The BA conclusively assumes that federally listed species such as grizzly bears, gray wolves, Canada lynx, and various species of fish do not exist within the Project Area, largely without citation to scientific authority. The MEA admits that project-related activities could have effects on species within the Project Area, but repeatedly dismisses those impacts with similarly unsupported claims about the presence of listed, sensitive, and other relevant wildlife species. Thus, BLM/USFS avoid discussing project impacts on any species *besides* the northern spotted owl. Such unsupported claims invalidate the analysis of project impacts to other listed species, in violation of NEPA and the ESA.

The MEA claims to generally assume that wildlife is present within the project area even if no actual data exists to support that assumption. This is a positive trend in the analysis for both NEPA and ESA purposes, especially given that BLM/USFS admit that some project activities could detrimentally disturb wildlife or habitat. For example, admitting that project-related noise and light could disturb wildlife at varying levels of severity and admitting that project activities occurring near the Green River Horse Camp have the potential to directly affect fish if present in the stream, including via temporary displacement).

However, BLM/USFS remove the benefits of this perspective when they repeatedly summarily assume that certain species do not occupy the Project Area. As noted above, the BA concludes that grizzly bears, gray wolves, and Canada lynx, among other species, do not exist in the Project Area. However, the BA fails to support these assumptions with scientific data. The MEA/BA also fails to discuss the presence of listed fish species within the Project Area, dismissing their existence as impossible due to migratory barriers.[176] However, the MEA/BA cite no studies indicating that those species do not exist – even in non-migratory form – in the Project Area.

Similarly, the MEA fails to cite scientific authority to support the proposition that many species are not located in the analysis area, including but not limited to, bull trout. Because of the barriers downstream at the confluence of the Green River with Falls Creek, the EA assumes that anadromous fish are not present in the Project Area.[177] Still, the EA cites no studies that confirm that these species are not present, and fails to give the species the benefit of the doubt despite claims to do so.

Unsupported assumptions like these are especially important because the MEA states that sedimentation may be likely to occur from installation of temporary culverts or other related project activities, though it will settle out before it would get to anadromous fish barriers.[178] However, if

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[175] *See Sierra Club v. Marsh*, 816 F.2d at 1386, *supra* n. 174.
[176] MEA at 110.
[177] MEA at 110.
[178] *See* MEA at 110-11.

listed fish *are* present in the relevant Project Area waterways, that increase in sediment – however "minor" or "negligible" – could detrimentally impact listed or other species that are already stressed from water conditions high in copper. By assuming that listed fish are not present, but without data to support that assumption, BLM/USFS may be jeopardizing the existence of listed species despite implementation of Best Management Practices to protect resident fish.

As another general matter, the MEA contains cursory and largely unsupported determinations of project effects to various listed, sensitive, or otherwise pertinent species and their habitat. For example, the MEA *briefly* examines habitat for listed and other species such as the pine marten, Roosevelt elk, blacktail deer, wolverine, Townsend's big-eared bat, pileated woodpecker, and cavity tree excavator group, among others, but fails to cite *any* authority for its conclusions that "key habitat elements" do not exist in the project area.[179] The EA consistently shrugs off or avoids explanation of direct project impacts to the noted species by claiming that "key habitat elements" do not occur within the project area (*see, e.g.* Cascade torrent salamander) or because species would only be "temporarily" affected or displaced (*see, e.g.* Roosevelt elk, blacktail deer, wolverine). This is a particularly notable failure for Survey and Manage species such as the Larch Mountain or Van Dyke's salamander, for which BLM fails to cite surveys or reasonably quantify potential project impacts. Where BLM lacks data, its assumptions about project effects to listed or other species are unsupported and undermine its NEPA analysis.

X. The Project Violates the NFMA, Forest Plan Standards, and the Organic Act.

Approval of this project would violate the 1994 Northwest Forest Plan (NWFP) (incorporated into the GPNF LRMP) and related Aquatic Conservation Strategy (ACS). The MEA does not fully respond to the federal court's decision in this case, that, at a minimum, drill shacks, sumps and related structures and support facilities must comply with the MM-2 Plan Standard.

Congress enacted the NFMA in 1976 to establish a legal framework for managing natural resources on USFS lands.[180] Among other things, the NFMA requires the USFS to prepare a land and resource management plan ("Forest Plan") for each national forest.[181], and include in the Forest Plan standards and guidelines for how the forest shall be managed.[182] The NFMA requires that all site-specific actions authorized by the USFS be consistent with Forest Plan standards and guidelines.[183] "Pursuant to the NFMA, the Forest Service must demonstrate that a site-specific project would be consistent with the land resource management plan of the entire forest." [184] "[W]e must affirm the district court's decision to enjoin the [Project] if that [Project] is inconsistent with the Land Management Plan." [185] "All site specific actions must be consistent with adopted forest plans."[186]

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[179] *See* MEA at 99.
[180] 16 U.S.C. §§ 1601 *et seq.*
[181] 16 U.S.C. § 1604(a),
[182] 16 U.S.C. §§ 1604(c) & 1604(g)(2) & (3)
[183] 16 U.S.C. § 1604(i).
[184] Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1377 (9th Cir.1998).
[185] Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1068 (9th Cir. 1998).
[186] Idaho Sporting Congress v. Rittenhouse, 305 F.3d 957, 966 (9th Coir. 2002)

"Specific projects . . . must be analyzed by the Forest Service and the analysis must show that each project is consistent with the plan."[187]

As the district court held, USFS authorization of mining and mineral exploration must comply with all Forest Plan and NFMA requirements.[188]

The MEA acknowledges the presence of designated Riparian Reserves (RR) within the Project Area. Figure 6 shows that, at a minimum, drill pads 6 and 7 (and possible culvert locations) are with the RR. Thus, the following binding standards, among others, apply to those activities to be located in the Riparian Reserves:

> MM-2 **Locate structures, support facilities, and roads outside Riparian Reserves. Where no alternative to siting facilities in Riparian Reserves exists**, locate them in a way compatible with Aquatic Conservation Strategy objectives. …[189]

The MEA notes the requirements to protect Riparian Reserves under the Forest Plan.[190] However, the agencies argue that MM-2 is satisfied if the general objectives of Aquatic and Riparian Conservation Strategy need be met. "All alternatives considered for this Project would be consistent with the Minerals Management Standards and Guidelines set forth as described in Table 3.3-2."[191] These agency positions contradict the facts and misapply the law. The MEA discusses the reviewed alternatives and their relationship to MM-2.

> *Alternative 2 and 3*: Work in the Riparian Reserve would be limited to two drill pads and associated drillholes, and reactivation of previously constructed deactivated roads. While locating the drill pads and shacks would include placing "structures," these would be relatively small and temporary in nature. All work would be done consistent with the ACS objectives.[192]

The MEA analyzed Alternative 4, which would:

> *Alternative 4*: Work in the Riparian Reserve would only include reactivating the same previously constructed roads described under Alternatives 2 and 3, but would avoid siting drill pads and any associated "structures" in the Riparian Reserve.[193]

Thus, Alternative 4 is the only action alternative that arguably complies with MM-2. MM-2 strictly requires the agencies to "**Locate structures, support facilities, and roads outside Riparian Reserves.**" Only if "no alternative exists" to such location, may drill pads 6 and 7 (with their

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[187] Neighbors of Cuddy Mountain v. Alexandar, 303 F.3d 1059, 1062 (9th Cir. 2002).
[188] Gifford Pinchot, 2014 WL 3019165, *16-21. *See also* Hells Canyon Preservation Council v. Haines, 2006 WL 2252554, *7-*10 (D. Oregon 2006) (approval of mining operations violated Forest Plan minerals management standards); Rock Creek Alliance v. U.S. Forest Service, 703 F.Supp.2d 1152, 1187, n. 23 (D. Mont. 2010)(same).
[189] MEA at 70.
[190] MEA at 70.
[191] MEA at 69.
[192] MEA at 70.
[193] MEA at 70.

structures and support facilities) be located within the RR. The district court held that the drill shacks and sumps must comply with MM-2.

> Thus, MM–2 unambiguously includes "support facilities" of all sizes and duration. Even assuming the MM–2 language is ambiguous and the USFS's interpretation is entitled to deference, I conclude that at least as to the drill shacks and the sumps, the interpretation is arbitrary and capricious because it is plainly erroneous.[194]

Here, there clearly is an alternative to locating drill pads 6 and 7 within the RR. Indeed, the MEA considered such an alternative, Alternative 4. The MEA offers no reason for why Alternative 4 could not be chosen and neither agency can now argue that Alternative 4 is unreasonable, as it was considered a "reasonable alternative" in the MEA. As the district court held: "I agree with Plaintiff that the alternative of keeping drilling and related facilities out of the riparian reserves is not unreasonable."[195]

Notably, the district court rejected the argument put forth by the USFS/BLM and Ascot that the project complies with the Forest Plan if the general terms of the ACS are met (which is not the case anyway here). Rather, the court focused on the specific MM-2 standard.

The agency cannot escape MM-2 by focusing on drill pads 6 and 7 alone, arguing that there are no alternatives to locating those specific drill sites in those specific locations. If that were true, then MM-2 would be rendered meaningless, as one could always argue that there was "no alternative" to those specific locations. Rather, as the court found, the project is considered as a whole. Here, because there clearly is an alternative to locating drill pads 6 and 7 (and other facilities/structures such as the diesel pumps and water hoses/pipes), MM-2 applies and these facilities/structures cannot be located in the RR.

In addition to violating MM-2, locating these facilities/structures within the RR also violates the agencies duty to protect public land resources, including fisheries and water quality under the 1897 Organic Act (USFS) and FLPMA (BLM). The MEA admits that removing drill pads 6 and 7 from the RR will protect fisheries, water quality and other public resources compared to Alternatives 2 and 3, which would locate the pads within the RR.

For fisheries, the MEA admits that: "The cumulative effects on fish and aquatic habitat would be similar to those described for Alternative 3, but have a reduced potential to reach the same magnitude of effects due to the elimination of Pads 6 and 7 from this alternative."[196] Importantly, even with the proposed BMP's adverse water quality effects would occur from the drill sites – impacts that would not occur to the RR in the vicinity of drill pads 6 and 7 if they were removed from the RR.

> As outlined in Section 2.1, *Alternatives,* and Appendix E, *Best Management Practices*, a

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[194] *Gifford Pinchot*, 2014 WL 3019165, *21. In addition, water distribution support facilities and conveyance structures will also be located with the Riparian Reserves. MEA at 31 (water supplied to drill sites "by small diesel pumps placed near the water source, with pressure hoses supplying water to drill sites up to 1,000–2,500 feet away.").

[195] *Gifford Pinchot*, 2014 WL 3019165, *40.

[196] MEA at 115.

> number of BMPs would be implemented during reactivation/installation, operation, and reclamation of the Proposed Project to minimize potential impacts on fisheries; however, **the potential remains for disturbance of sites adjacent to streams to result in erosion that could adversely impact fisheries**.[197]

The same is true for sediment loading from the drill pads, as Alternative 4 would eliminate this problem for drill sites 6 and 7.

> Alternative 4 is distinguished from Alternative 3 in that it does not include the installation and exploration activities previously described at Pads 6 and 7 in order to avoid activity within the Riparian Reserve.
> …
> The direct effects on soils would be similar to those described for Alternative 3; however, the potential for disturbed soil to result in sediment contributions to waterways would be reduced because soil disturbance in the Riparian Reserve would be limited to reactivating temporary roads.[198]

Wildlife would also benefit from removing drill sites 6 and 7 from the RR. For example, regarding Van Dyke's Salamander, Alternative 4 would have far less impacts than the other action alternative.

> Alternative 4 is distinguished from Alternative 3 in that it does not include the installation and exploration activities previously described at Pads 6 and 7 to avoid activity within the Riparian Reserve.
> …
> The direct effects on wildlife and wildlife habitat would be similar to those described for Alternative 3 except that Alternative 4 would not include drilling at pads 6 and 7 that are the nearest sites to the observed Van Dyke's salamander location. Therefore, alternative 4 would have less potential to impact Van Dyke's salamander than alternatives 2 and 3.[199]

Thus, not only does Alternative 4 better comply with MM-2, it better satisfies (at least for drill sites 6 and 7) the USFS's duties to protect sensitive species, water quality, and fisheries under the Organic Act and NFMA.

Lastly, although as noted above, strict compliance with MM-2 is required regardless of the general provisions of the ACS, here the ACS also is not met. The NWFP requires that a proposed project meet the ACS objectives, which requires the agencies "to improve and maintain the ecological health of watersheds and aquatic ecosystems."[200]

> The ACS was developed to improve and maintain the ecological health of watersheds and aquatic ecosystems contained within them on federal public lands. The four primary

[197] MEA at 115 (emphasis added).
[198] MEA at 77.
[199] MEA at 108.
[200] MEA Appendix B at 1.

components of the ACS are designed to operate together to maintain and restore the productivity and resiliency of riparian and aquatic ecosystems.[201]

Thus, at a minimum, locating drill sites 6 and 7 (as well as diesel pumps/water facilities/structures) within the RR also violates the ACS. Further, the MEA qualifies its own allegations of ACS compliance when it admits that it will avoid long-term and other impacts "to the extent permitted by the geologic target" or other variables.[202] Such an exemption from the Forest Plan and ACS is not legally authorized. As already noted, although choosing Alternative 4 would not remedy the other illegal impacts caused by that alternative and by the insufficient analysis of those impacts in the MEA, it is the only action alternative that may comply with the ACS.

XI. The MEA Fails to Comply with NEPA's and the District Court's Mandate for a Full Baseline Analysis.

The district court fund that the 2012 EA violated NEPA's requirement that all baseline conditions be fully analyzed.[203] "Ninth Circuit cases acknowledge the importance of obtaining baseline condition information before assessing the environmental impacts of a proposed project."[204] The BLM/USFS must "describe the environment of the areas to be affected or created by the alternatives under consideration." [205] "Without establishing the baseline conditions . . . there is simply no way to determine what effect the [action] will have on the environment, and consequently, no way to comply with NEPA." [206] The lack of an adequate baseline analysis fatally flaws an agency's NEPA review. "[O]nce a project begins, the pre-project environment becomes a thing of the past and evaluation of the project's effect becomes simply impossible." [207] "[W]ithout [baseline] data, an agency cannot carefully consider information about significant environment impacts. Thus, the agency fail[s] to consider an important aspect of the problem, resulting in an arbitrary and capricious decision."[208]

In an attempt to comply with these requirements, the MEA contains some discussion of baseline groundwater conditions for a portion of the project area. However, as admitted by the MEA, the consultant's report only reviewed groundwater data from three well sites – pads 10, 21, and the horse camp well.[209] No new wells were drilled. This represents a small fraction of the Project area, and nowhere represents a complete or accurate representation of the groundwater conditions in an around the project area. Further, the data was obtained from the deep bedrock aquifer in this limited area, and not from the Green River Alluvial Aquifer, which the MEA admits is the other aquifer that will be affected by the project drilling and related operations.[210]

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[201] MEA Appendix B at 1.
[202] MEA at 64 and 65.
[203] *Gifford Pinchot*, 2014 WL 3019165, *25-33.
[204] *Gifford Pinchot*, 2014 WL 3019165, *28.
[205] 40 C.F.R. § 1502.15
[206] Half Moon Bay Fisherman's Mktg. Ass'n v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988)
[207] Northern Plains Resource Council v. Surf. Transp. Brd., 668 F.3d 1067, 1083 (9th Cir. 2011)
[208] *Id.* at 1085
[209] MEA Appendix G at 18.
[210] MEA Appendix G at 17-18.

Thus, the minimal baseline groundwater analysis does not meet the strict requirements contained in NEPA and the district court's ruling.

XII. The MEA Fails to Comply with NEPA's and the District Court's Mandate for Full Analysis of the Effectiveness of Mitigation Measures.

The district court held that the EA failed to fully analyze the effectiveness of each mitigation measure relied upon by the agencies. "I agree with Plaintiff that the 2012 EA fails to address the effectiveness of the mitigation measures." [211] NEPA documents must: (1) "include appropriate mitigation measures not already included in the proposed action or alternatives," and (2) "include discussion of . . . Means to mitigate adverse environmental impacts (if not already covered under 1502.14(f))."[212]"Mitigation" is defined as a way to avoid, minimize, rectify, or compensate for the impact of a potentially harmful action.[213] NEPA requires that mitigation measures be discussed with "sufficient detail to ensure that environmental consequences have been fairly evaluated."[214] "[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA.

Without such a discussion neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects." [215] The discussion of mitigation measures must also assess their effectiveness:

> An essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective. … The Supreme Court has required a mitigation discussion precisely for the purpose of evaluating whether anticipated environmental impacts can be avoided.[216] A mitigation discussion without at least *some* evaluation of effectiveness is useless in making that determination. [217]

Despite this, the MEA fails to contain the required mitigation effectiveness analysis. While mitigation measures are discussed and listed, little if any analysis is provided as to the level of effectiveness of these measures. As such, the MEA violates NEPA.

XIII. The MEA Fails to Consider All Reasonable Alternatives.

The MEA should have considered at least one additional reasonable alternative – that of only approving operations on lands within MS-708, where Ascot holds a partial mineral estate. As detailed above, it is inconceivable that full-scale mining would comply with the Weeks Act, LWCF Act and related laws governing these acquired lands. The USFS/BLM are under no obligation whatsoever to approve exploration or mining on lands outside MS-708 (and even within MS-708

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[211] *Gifford Pinchot*, 2014 WL 3019165, *39.
[212] 40 C.F.R. § 1502.14(f); 40 C.F.R. § 1502.16(h).
[213] . 40 C.F.R. § 1508.20 (a)-(e)
[214] Methow Valley Citizens Council, 490 U.S. at 352
[215] *Id.*
[216] Methow Valley, 490 U.S. at 351-52, 109 S. Ct. 1835 (citing 42 U.S.C. § 4332(C)(ii)).
[217] South Fork Band Council v. U.S. Dep't of Interior, 588 F.3d 718, 726 (9th Cir. 2009)(emphasis in original).

Ascot has no authority to demand approval in violation of federal law). Thus, review and approval of exploration should be limited to only those property interests held by Ascot (i.e., the partial mineral estate in MS-708).

NEPA requires the agency to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources." [218] It must "rigorously explore and objectively evaluate all reasonable alternatives" to the proposed action. [219] An EA must give alternatives full and meaningful consideration. [220] BLM/USFS failed to meet this requirement by continuing to consider alternatives that clearly are illegal because they violate the ACS, Alternatives 2 and 3, and failing to consider other potentially legal and reasonable alternatives.

XIV. Given the Nature of this Proposed Action, and the Reasonably Foreseeable Consequences, an EIS Should Be Prepared.

Our organizations strongly advise BLM/USFS to complete an EIS at this time. NEPA requires that an EIS be "include[d] in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment."[221] An EIS must be completed if (1) the proposed project is a "major federal action" and (2) the proposed project will "significantly affect the quality of the human environment."[222] Major federal actions include "new and continuing activities, including projects and programs… regulated, or approved by federal agencies."[223] This includes "[a]pproval of specific projects, such as… activities located in a defined geographic area [and] actions approved by permit or other regulatory decision."[224] A project's significance is determined by considering the context and intensity of the anticipated impacts of the proposed project.[225] The human environment "include[s] the natural and physical environment and the relationship of people with that environment."[226]

It is clear that the proposed Goat Mountain prospecting project is a "major federal action" for NEPA purposes. Council on Environmental Quality (CEQ) regulations define "major federal actions" to include "new and continuing activities… entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies."[227] In this case, BLM must approve Ascot's application for a prospecting permit before the project can begin. This approval is a typical "major federal action" for NEPA purposes. Moreover, this project will significantly affect "the quality of the human environment" in the Goat Mountain area. Significance is determined by considering the context and intensity of the impact of the proposed project.[228] As discussed throughout these

[218] 42 U.S.C. § 4332(E); *see also* 40 C.F.R. § 1508.9(b)
[219] City of Tenakee Springs v. Clough, 915 F.2d 1308, 1310 (9th Cir. 1990)
[220] Center for Biological Diversity v. Nat'l Hwy Traffic Safety Admin., 538 F.3d 1172, 1217 (9th Cir. 2008).
[221] 42 U.S.C.A. §4332(C); 40 CFR § 1502.3 (2012).
[222] 42 U.S.C.A. § 4332; 40 C.F.R. § 1508.18 (2012).
[223] 40 C.F.R. § 1508.18(a).
[224] 40 C.F.R. § 1508.18(b)(4).
[225] 40 C.F.R. § 1508.27.
[226] 40 C.F.R. § 1508.14 (2012).
[227] 40 C.F.R. § 1508.18(a).
[228] 40 C.F.R. § 1508.27.

comments, the proposed project will have a significant impact on water resources, land, fish, wildlife, plants, recreational activities, and the economy of both the Goat Mountain and regional areas. Thus, the proposed project will significantly affect the quality of "the natural and physical environment and the relationship of people" (the "human environment").[229]

The goal of an EIS is to "provide full and fair discussion of significant environmental impacts and… inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment."[230] The EIS must be "concise, clear, and to the point, and [] be supported by evidence that agencies have made the necessary environmental analyses."[231] When determining whether an EIS is adequate, the Ninth Circuit will review the agency decision to "ensure that the agency has taken a 'hard look' at the potential environmental consequences of the proposed action."[232] Given the nature of the proposed activities, project proximity to the Mount St. Helens National Volcanic Monument, and the probability that the proposed prospecting will lead to applications to develop located minerals, BLM/USFS should prepare an EIS.

The EIS must discuss "the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, alternatives to the proposed action, the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."[233] The requirement that unavoidable "adverse environmental effects" be included in the EIS "entails a duty to discuss measures to mitigate adverse environmental requirements."[234] The discussion of mitigation measures must be "reasonably thorough" and "in sufficient detail to ensure that environmental consequences have been fairly evaluated."[235]

XV. USFS and BLM have not complied with the court order by providing the analysis and information that would allow them to make an express determination regarding whether the proposed prospecting interferes with the primary outdoor recreation purpose for acquiring the USFS lands at issue.

A. USFS has made an unsupported and conclusory determination in the Modified EA regarding outdoor recreation.

In *Gifford Pinchot Task Force v. Perez*, the court held that "Lands purchased by USFS with LWCF Act funds must be 'primarily of value for outdoor recreation purposes.' 16 U.S.C. §460*l*-9 (a)(1)(b)."[236] The court continued, emphasizing the importance of managing those lands for the primary purpose

[229] 40 C.F.R. § 1508.14.
[230] 40 C.F.R. § 1502.1 (2012).
[231] 40 C.F.R. § 1500.2(b) (2012).
[232] *N.W. Envtl. Advocs. v. Natl. Marine Fisheries Serv.,* 460 F.3d 1125, 1133 (9th Cir. 2006) (quoting *Klamath-Siskiyou*, 387 F.3d at 993) (internal quotations omitted).
[233] 42 U.S.C. § 4332(C)(i)–(v).
[234] *City of Carmel-By-The Sea v. U.S. Dept. of Transp.,* 123 F.3d 1142, 1153–1154 (9th Cir. 1997).
[235] *Id.* at 1154 (quoting *Robertson v. Methow Valley,* 490 U.S. at 353, *supra* n. 149 and *Laguna Greenbelt, Inc. v. U.S. Dept. of Transp.,* 42 F.3d 517, 529 (9th Cir. 1994)).
[236] *2014 WL 3019165, 9*

of outdoor recreation after acquisition.[237] The Court held that "BLM may approve mineral prospecting and development on Weeks Act land so long as USFS advises that such activities will not interfere with the primary purposes for which the lands were acquired," but USFS must make that advice known by an express determination in the EA.[238]

USFS recognizes the Court's unequivocal order to make an *express determination* on whether the proposed action interfers with the purpose of outdoor recreation in its introduction,[239] section 1.4 "Primary Purpose for which the Lands were Acquired."[240] Implicit in that directive of course is that such an express determination must be supported by sufficient analysis and information that is fully disclosed to the public in the MEA.

The MEA does contain a conclusory statement that the "project is not expected to disturb recreation experience to the extent that it would interfere with recreation as a primary purpose for the land acquired through LWCF."[241] But as noted repeatedly above there is not sufficient analysis or disclosure of information in the MEA to rationally support such a conclusion. For example, the MEA plainly ignores or downplays the fact that people will not recreate around these loud and visually obtrusive drilling rigs. There is not a person who recreates outside who would choose to hike, camp, hunt, or otherwise spend time in nature anywhere near these drilling rigs and activities.

The Court plainly requires USFS to recognize outdoor recreation as a primary purpose and make an express determination. The Court stated that the 2012 MEA was inadequate because "the agencies failed to recognize outdoor recreation as a primary purpose. Their failure to do so and the resultant failure to make *an express determination that the Project is not inconsistent* with the purpose of outdoor recreation is contrary to the requirements of the governing law and thus, is arbitrary and capricious."[242] [emphasis added]. USFS misinterprets this directive to make an express determination and states that "to satisfy the Court order, the FS will advise the BLM whether the Project would interfere with or be inconsistent with" LWCF primary purposes.[243]

USFS downplays the significance of the LWCF/*Weeks Act* lands, stating that the "determination related to the primary purpose of outdoor recreation only applies to the 168 acres within MS-1329 and -1330," but nearly half of the drill sites are located within these lands.[244] Pads 6 and 7 are in NWFP ACS Riparian Reserves. Pads 4 and 5 are in a proposed Wild and Scenic River corridor. All four of those drilling pads are near the Green River, a "Wild Stock Gene Bank" for native steelhead populations. There are 9 proposed drill pads (of 20) within or directly adjacent to the lands at issue, and the significance of proper management of these lands should not be understated.

B. <u>USFS has not disclosed what it deems to be "interference" with the primary outdoor recreation purpose under the controlling statutes.</u>

[237] *Id.*
[238] *Id.*
[239] 2015 MEA at 1
[240] 2015 MEA at 14
[241] 2015 MEA at 154
[242] *Gifford Pinchot Task Force v. Perez*, 2014 WL 3019165, 16.
[243] MEA at 14
[244] *Id*

In order to make a determination, USFS must have interpreted the term "not interfere" in the language of the Reorganization Plan No.3 of 1946, Sec. 402 and the language in the LWCF defining its primary purpose as providing the "quality and quantity of outdoor recreation resources as may be available and are necessary and desirable."[245] To determine the existence or lack of interference with such a primary purpose, USFS must have determined what constitutes interference under the statute. Yet the EA provides no explanation whatsoever regarding how the MEA interpreted or applied this language to its disclosed analysis and information and reached its conclusory assertion of no interference. *Webster's Third New Int'l Dictionary* defines "interference" as "the act of meddling in or hampering an activity or process," and defines "interfere" as "to come in collision: to be in opposition: to run at cross-purposes." [246] This definition gives no temporal quality to the idea of interference; as such, the MEA cannot base its conclusion of no interference on a time-based spectrum that does not exist within the language of either statute.

USFS states that "the naturalness of areas in the immediate vicinity of the surface disturbance would be temporally limited," and goes on to admit that near the horse camp, "noise disturbance from the drilling may be an issue, especially on weekends," and "[n]oise from exploration activities could reduce the opportunity for solitude in the immediate vicinity of each individual drill pad." [247] However, the USFS makes no attempt to disclose how these impacts do or do not constitute interference under the controlling statutory language. If USFS does not consider "temporally limited" or "temporary" impacts to be interference, USFS must disclose how this determination was made, or alternatively, what analysis was used to determine what timeframe would constitute interference or make actions inand with the primary purpose of outdoor recreation. If USFS has an interpretation of what constitutes "interference" it must disclose that interpretation. If USFS has not interpreted what constitutes "interference" its determination that there will be none is necessarily arbitrary.

Because this will be the first time that these agencies have considered what constitutes interference with the primary outdoor recreation purpose on lands acquired under the LWCF, the need for complete disclosure of the information used and a thorough explanation of how that information was applied to the statutory language is especially necessary in this NEPA analysis. This analysis and conclusion has the very real potential to set a precedent for how these statutory provisions may be applied by these agencies in the future regarding other proposals to prospect or mine on LWCF lands. Thus under 40 C.F.R. Sec. 1508.27(b)(6), this clear potential to set a precedent regarding future actions is another reason that a FONSI could not be sustained and a complete EIS is required regarding this precedent setting proposal.

XVI. All Action Alternatives are inconsistent and interfere with the purpose of outdoor recreation.

A. Pursuant to the Reorganization Plan of 1946 and LWCF directives, mineral prospecting is inconsistent and interferes with the "primary purpose" for which lands in the Project area were acquired.

[245] 16 U.S.C. Sec. 4601-4.
[246] *Webster's Third New Int'l Dictionary* 1178 (2002).
[247] MEA at 150.

All action alternatives considered are inconsistent and interfere with the Primary Purpose for which the lands were acquired under the *Weeks Act* and LWCF. USFS concedes that under Alternative 4, there will be less recreation impact "by eliminating operations at pads 6 and 7… direct effects on recreation associated with horse camp… would not occur."[248] This assertion makes it clear that USFS recognizes that there are impacts associated with the drill sites, even though it states that "it is anticipated that hunting opportunities would not be adversely impacted" by Alternatives 2 and 3.[249] In the very next paragraph, USFS states that "there would likely be a minor and temporary reduction in wildlife viewing opportunities," talking past itself and failing to recognize the necessity of viewing wildlife in order to hunt it.[250]

USFS also ignores the fact that federal courts consider even a "minor and temporary reduction" to outdoor recreational opportunities constitutes an irreparable harm, and therefore also constitutes actual, significant interference with outdoor recreation. In the EA at issue, USFS interprets a minor or temporary impact as an impact that does not interfere with the primary recreational purpose for which these lands were acquired. In *San Luis Valley Ecosystem Council v. U.S. Fish and Wildlife Service*, two "exploratory wells" were at issue. The Government in that case argued that "activities will be contained and temporary," and because reclamation was required as a part of the plan, any harm would not be irreparable.[251] The District Court rejected this argument and found in favor of the plaintiff "even though some of the harm to the Plaintiff's aesthetics interests and noise will be temporary." [252] In the EA at hand, USFS's assertion of no interference is irreconcilable with this case law.

The very short season for which there is access to this area intensifies the imperative for an undisturbed recreational experience. Drill shacks that emit 70dB at 100 ft. constantly will have significant effects on wildlife in the area. USFS concedes that the effects from Alternatives 2 and 3 will be greater than the impact from Alternative 4, but USFS does not recognize that there will be significant impacts on wildlife from Alternative 4, as well. The only distinguishing factors between Alternatives 2/3 and 4 is the existence of drill pads 6 and 7 in the Riparian Reserves areas. However, elk do not exist exclusively within Riparian Reserves. As such, if USFS recognizes wildlife effects from Alternatives 2 and 3, it must recognize there will be effects on wildlife in Alternative 4 from other drill pad locations within the proposed Wild and Scenic river corridor and directly adjacent to the lands acquired under the LWCF.

B. <u>USFS does not disclose known effects on recreation opportunities in the Project Area.</u>

The MEA does not disclose if or when recreational opportunities will be limited due to closure orders pursuant to 36 C.F.R. § 261.50. USFS must have considered whether closures would be required for drilling activities. In order to determine effects on recreation in the Project area, USFS must adequately disclose what it knows and plans to do about access in the Project area. USFS does state that "all recreational activities would continue except within the immediate vicinity of proposed drill sites during Project operations. Temporarily reactivated FS temporary roads would not be

[248] MEA at 154.
[249] MEA at 150.
[250] *Id.*
[251] *San Luis Valley Ecosystem Council v. U.S. Fish and Wildlife Service,* 657 F. Supp. 2d 1233, 1241 (D. Colo., 2009)
[252] *Id.*

available for use by the general public," but no detail is given regarding what "immediate vicinity" means and the geographic and temporal scope of any necessary closure orders for restricting access in these areas.[253] 40 C.F.R. § 1501 emphasizes the need for a comprehensive and transparent planning process to allow for informed decision-making. ("Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts"). Without properly disclosing and considering all known effects, USFS cannot issue a valid finding regarding potential impacts.

Conclusion

We respectfully request that the BLM/USFS select the no action alternative to prevent exploratory drilling in this area. Failing that, we request that a full EIS be prepared in order to fully assess the environmental impacts of this project. We look forward to discussing the issues we raise in more detail throughout the planning of the project. Please contact Laurele Fulkerson, Policy Director at Gifford Pinchot Task Force, 4506 SE Belmont, Suite 230a, Portland, OR 97215, Tel: (503) 222-0055, laurele@gptaskforce.org, with any questions regarding these comments.

Sincerely,

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[253] MEA at 149-150.

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