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Objection Reviewing Officer, Forest Supervisor Gina Owens
Attn: 1570 Appeals and Objections
501 E. 5th Street, # 404
Vancouver, WA 98661

Re: OBJECTION Goat Mountain Hardrock Prospecting Permits, Gifford Pinchot National Forest, from Cascade Forest Conservancy; Submitted electronically (<https://cara.ecosystem-management.org/Public//CommentInput?Project=46996>) and via Certified Mail # 7016 0910 0002 2817 1078.

Dear Objection Reviewing Officer, Forest Supervisor Gina Owens:

The Cascade Forest Conservancy (“CFC,” formerly Gifford Pinchot Taskforce) submits this Objection, under 36 C.F.R. part 218, to the Goat Mountain Hardrock Prospecting Permits Draft Decision Notice and Finding of No Significant Impact (“FONSI”) (collectively the “Draft Decision”).¹ The Forest Service official responsible for that project is Cowlitz Valley District Ranger Gar Abbas. The affected national forest is the Gifford Pinchot National Forest. CFC is an independent, non-profit organization whose mission is to protect and sustain forest, streams, wildlife, and communities in the heart of the Cascades through conservation, education, and advocacy. CFC represents over 10,000 members and supporters who share their vision of a forest where wild places remain to capture our imagination and allow native wildlife to thrive. For purposes of this Objection, CFC is represented by legal counsel, the Earthrise Law Center,

¹ CFC’s Objection includes the Modified Environmental Assessment (Aug. 7, 2017), Doc No. DOI-BLM-ORWA-0000-2016-0001-EA (“MEA”) upon which the Draft Decision is based.

through Tom Buchele, Earthrise's Co-Director, Kathryn Roberts Earthrise Legal Fellow, and Roger Flynn, Director of the Western Mining Action Project. Mr. Buchele's mailing address, email address and phone number are set forth above. Mr. Flynn's contact information is: P.O. Box 349, Lyons, CO 80540, wmap@igc.org, (ph) (303-823-5738). Please direct all correspondence and responses to this Objection to Mr. Buchele and Mr. Flynn.

CFC has previously submitted timely, written comments regarding this project throughout the periods where public comments were requested. *See, e.g.*, Exhibit 1, CFC (Comment Feb. 4, 2016). This Objection also addresses issues that have arisen after any prior comment period.

Notice Published: The public notice regarding the Draft Decision was published on August 24, 2017. Therefore, under Section 218.7, this Objection is timely because CFC submitted it electronically and by U.S. mail on October 07, 2017, which is within 45 days of that publication date.

CFC submits its Objection electronically with a list of supporting exhibits and in hard copy via certified U.S. mail with an attached CD containing electronic copies of all of its supporting exhibits.

CFC requests an Objection Resolution meeting to address the concerns raised in its Objection which are set forth below.

Issues addressed in this Objection:

CFC has several objections to the Draft Decision, which it sets out in detail below. Initially, CFC objects because its ability to properly prepare its objection has been materially

prejudiced by the USFS and BLM's continuing failure and refusal to produce relevant agency records in response to FOIA requests that CFC submitted in January of 2016. The USFS should not have begun this objection process until it and the BLM had fully responded to CFC's FOIA requests and the USFS should withdraw its Draft Decision until the public has available to it all relevant agency records. In terms of the records and draft analysis that is publicly available, CFC's primary concerns are the Draft Decision's improper analysis and conclusion that the prospect drilling will not interfere with the primary recreational purpose for which much of the land was acquired, and the failure to fully analyze the impacts of the project, including a potential future mine. The Draft Decision and MEA acknowledge the project will have substantial effects on ongoing recreation throughout the project area, but creates an exception to the non-interference legal standard for effects that the Forest Service deems to be "temporary." Further, the Draft Decision and MEA on which it relies fail to fully analyze the project's impacts, including wholly declining to evaluate the environmental impacts, or even the legal possibility, of a future mine in the project area. Despite this, the Agencies rely on that very "unforeseeable" future project to decline otherwise appropriate alternatives, and conclude that the project aligns with the government's policy of promoting mining. As such, the Agencies analysis and conclusions in the MEA and Draft Decision are legally flawed and should be withdrawn.

As is set out in more detail below, CFC specifically objects to:

1. The Forest Service's failure to respond at all and the BLM's failure to fully respond to CFC's January 2016 FOIA requests before putting the Draft Decision out for objections.
2. The Forest Service's grant of consent to the proposed prospect drilling, despite the action's interference with recreation throughout the project area, in violation of the Land and Water Conservation Fund Act ("LWCF Act") and the Reorganization Plan No. 3 of 1946 ("Reorganization Plan").

3. The Agencies' failure, in violation of the National Environmental Policy Act ("NEPA"), to consider and fully analyze all reasonable alternatives.
4. The Agencies' failure, in violation of NEPA, to fully analyze all cumulative impacts of the proposed action, including failing to consider the legal impossibility and environmental impacts of a future mine at the project site.
5. The Agencies' failure, in violation of NEPA, to take a "hard look" at the impact of the proposed action, including failing to specifically disclose and analyze the extent of closures within the project area to visitors seeking recreation opportunities.
6. The Agencies' failure, in violation of NEPA and the the Administrative Procedure Act ("APA"), to acknowledge, disclose and respond to all received comments.
7. The Agencies' failure, in violation of NEPA, to adequately conduct a baseline groundwater analysis.
8. The Forest Service's determination to issue a FONSI, and failure to prepare a Draft Environmental Impact Statement ("DEIS") and Final EIS in violation of NEPA regulations.

I. The Forest Service and BLM's Illegal Failure to Respond to CFC's January FOIA Requests has improperly Prejudiced CFC's Ability To Prepare a Complete Objection.

Informed public participation in federal agency decision-making is an essential part of the NEPA process. 40 C.F.R. § 1500.1(b) (2017). In order to participate effectively, the public is entitled under NEPA to receive not only the agency's draft NEPA analysis itself, but also all incorporated documents and documents otherwise underlying the NEPA analysis and Proposed Action. *Id.* §§ 1502.21, 1506.6(f). CEQ regulations specifically require that federal agencies make such documents available pursuant to FOIA requests, and in order for that availability to be meaningful under NEPA, the public must have those documents before they comment on or object to any draft NEPA analysis. *Id.*; *see generally League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 2014 WL 6977611 at *14–20 (D. Or., Dec. 9, 2014) ["LOWD"].

In January of 2016 CFC (through its predecessor the Gifford Pinchot Task Force [“GPTF”]) submitted FOIA requests to both the Forest Service and BLM seeking documents related to Ascot’s proposed drilling at the Goat Mountain site. Exhibit 2, Jan. 2016 FOIA Request. The clear purpose of these requested records was to allow CFC to fully and properly comment on and/or object to any draft NEPA analysis and any draft agency decisions. The Forest Service has failed to produce a single record to CFC in response to its 2016 FOIA request and did not even acknowledge that request until August of 2017. Exhibit 3, Aug. 23 2017 e-mail from Melani Gonzalez to Laurele Fulkerson. CFC has demanded that the Forest Service produce the requested records this week, but the Forest Service will not do so. *See* Exhibit 4, Sept. 2017 Letter from Tom Buchele to Forest Service (Melani Gonzalez); Exhibit 5, Forest Service Response to Letter. The BLM has produced some records but with grossly excessive redactions. CFC appealed that improper partial response in August of 2016 and that appeal is still pending. Exhibit 6, CFC Appeal of BLM FOIA Production. As of the date of this objection the BLM has still not fully responded to CFC’s FOIA request. *See* Exhibit 7, BLM Partial Response to CFC FOIA Request.

The Forest Service has totally failed to meet its NEPA and FOIA responsibilities with regard to CFC’s FOIA request and the related NEPA process for the Draft Decision. The BLM’s incomplete and grossly delayed response has further prejudiced CFC’s ability to prepare this objection. This dereliction of the Forest Service’s (and the BLM’s) statutory responsibilities under FOIA is completely unacceptable under any circumstances. However, the Forest Service has now compounded its FOIA violations by issuing its Draft Decision before producing a single document in response to CFC’s timely and highly relevant FOIA request, requiring CFC to submit this Objection to the Draft Decision without the benefit of the documents CFC requested

specifically to help it prepare for its response to this Draft Decision. This violates NEPA as well as FOIA and is grounds for invalidating any resulting final decision that the Forest Service might issue. *See, e.g.*, 40 C.F.R. §1506.6(f); *LOWD*, 2014 WL 6977611 at *20; *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Pena*, 2015 WL 1567444 at *4 (D. Or., April 6, 2015) (failure to produce documents underlying draft NEPA analysis was “serious” error that justified vacatur of ROD and NEPA analysis).

The Forest Service’s failure to produce these documents has clearly and obviously prejudiced CFC’s ability to prepare its objections to the Draft Decision. The reviewing officer should therefore uphold the CFC’s Objection and require the Forest Service to withdraw its Draft Decision. The Forest Service can reissue its Draft Decision after it has produced all the documents that are responsive to the January 2016 request.

This objection is based on information that arose after the period for public comment.

II. The Proposed Action interferes with recreation, the primary purpose for which part of the project area lands were acquired.

The project area is located within the Gifford Pinchot National Forest, in Washington State, just north of Mt. St. Helens National Volcanic Monument, and adjacent to the Green River, designated as a Recreational River in the Forest Plan. MEA, at 154. Within the project area is the Green River Horse Camp, more than a dozen hiking trails, river access, and other backcountry camping areas. *Id.* at 155. While mineral prospecting in the area occurred more than a hundred years ago, unsurprisingly, today the dominant usage of the area is recreation. *Id.* Approximately 168 acres (parcels MS-1329 and MS-1330, the “LWCF Lands”) of the project area were acquired by the Forest Service specifically for the purpose of recreation, using money appropriated under the Land and Water Conservation Fund Act (“LWCF Act”). *Id.* at 14.

Currently, recreation in the project area includes “hiking, horseback riding, bicycling, kayaking, camping, picnicking, fishing, hunting, wildlife and bird watching, sightseeing, [] pleasure driving . . . [and] opportunities for gathering of special forest products including berries, mushrooms, boughs, beargrass, and floral greens.” *Id.* at 154; *see also* Exhibits 8–12 (Declarations of members of CFC describing their own recreational use in the project area).

Under both the LWCF Act and the Reorganization Plan No. 3 of 1946, (“Reorganization Plan”), use of these acquired lands can be permitted only with consent of the Forest Service, and only after the Forest Service properly finds that the proposed usage will not “interfere with the primary purposes for which the land was acquired.” 60 Stat. 1097, 1099, 5 U.S.C. Appendix (2012).

The LWCF Act purpose is “preserving, developing, and assuring accessibility . . . [to] such quality and quantity of outdoor recreation resources as may be available and are necessary.” Pub. L. 88-578, § 1(b) (1964), 54 U.S.C. § 100101 Note (formerly cited 16 U.S.C. § 460I-4). The LWCF Act creates a fund whereby certain federal agencies may acquire land that achieves Congress’ purpose. *Id.*, 54 U.S.C. § 200306 (formerly cited 16 U.S.C. § 460I-9).

As applied to the project here, the Forest Service can only consent to the proposed permits where it concludes, properly, based on a complete record and a reasonable and legal interpretation of the applicable law, that the prospect drilling, and all its associated cumulative effects, will not interfere with the primary recreational purpose for which the land was acquired, which includes all of the currently occurring recreation activities throughout the area. 5 U.S.C. Appendix. In the Draft Decision, the Forest Service erred in elevating a general policy – facilitating mining – under the direction of a different US Cabinet Department, above the

recreation purpose, and in concluding the project will not interfere with recreation despite the evidence demonstrating otherwise.

Apparently, the Forest Service believes it can, or must, “balance” a policy of facilitating mining – which was NOT a primary purpose for which it acquired the LWCF Lands – with recreational use, which was the express, primary purpose for which the Forest Service acquired the LWCF Lands. This confused and wholly irrational interpretation of its legal obligations cannot be reconciled with the actual applicable laws, the actual facts regarding the acquisition of the LWCF Lands, and the admitted, actual interference with recreational use that would be caused by the proposed drilling on the LWCF Lands.

A. The LWCF Act is Not Controlled, Conditioned or Superseded by the Mining and Minerals Policy Act, 1970

The Agencies support their decision to allow the prospect drilling by repeatedly referring to the government’s “overall policy” of fostering mineral development, as noted in the Mining and Mineral Policy Act of 1970. *See e.g.* Draft Decision, at 5 (“decision is consistent with the Federal government’s overall policy to foster and encourage private enterprise”); *id.* at 9 (“restricting prospecting . . . does not meet the intent of Congress as expressed in the Mining and Minerals Policy Act, 1970”); MEA, at 17 (noting that the Forest Service purpose is to “encourage and facilitate the orderly exploration, development, and production of mineral and energy resources”); *id.* at 38 (“Both the BLM and USFS are mindful of the federal government’s policy to foster and encourage private enterprise”). However, a substantial portion of the drill sites are located within parcels acquired with LWCF Act funds, which are not controlled by an “overall policy” to foster mining, but are controlled by a much more specific Congressional mandate to foster recreation. 54 U.S.C. § 200306 (formerly cited 16 U.S.C. § 460l-9); *see also*

Exhibit 13, Ascot Resources Proposed Drill Sites Map (showing 9 proposed drill pads within parcels MS-1329 and MS-1330 which were acquired under the LWCF Act). The Agencies framework, including both the analysis in the MEA and the decision rationale in the FONSI, impermissibly elevate mining and mineral development as a controlling, or at least equivalent primary purpose even though the LWCF Act specifically requires recreation to be the primary use of the land. *See e.g.* MEA, at 8–9, Table 1.3-1 (listing Mining and Minerals Policy Act of 1970 but neither the LWCF Act nor the Reorganization Plan as among the “Supplemental Authorities Consulted” where “regulatory compliance” is required in the Agencies’ decision-making). As such, the Agencies’ decision is unreasonable, arbitrary and capricious and contrary to law.

The LWCF Act is not controlled by the general policy of the government to foster private mineral development on certain public lands. First, the Mining and Minerals Policy Act is the responsibility of the Dept. of the Interior, not the Forest Service. *See* 30 U.S.C. § 21a (2012) (“It shall be the responsibility of the Secretary of the Interior to carry out this policy when exercising his authority.”). Federally acquired lands under the LWCF Act are under the control of the Forest Service, and it is the Forest Service who must ensure that any usage of such lands will not interfere with the primary purposes for which the land was acquired. 5 U.S.C. Appendix. While the BLM may argue that the general policy set out in the Mining and Minerals Policy Act may be relevant to its decision to grant or deny a prospecting permit, it is not relevant to the Forest Service’s determination that the proposed action does not interfere with the primary purpose of the land it acquired using LWCF funds. The Forest Service’s decision is thus contrary to law and its interpretation of the law is patently unreasonable where it relies on this policy to justify its consent to allow mineral prospecting on lands subject to the LWCF Act and where that

prospecting would undeniably interfere with the recreational use of those lands while that prospecting occurs.

Second, even if the Mining and Minerals Policy Act did apply to the Forest Service's decision, it would not prevail over the Service's mandate in the LWCF Act.² As a general canon of construction when interpreting multiple legal provisions, the specific controls the general. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (“[I]t is a commonplace of statutory construction that the specific governs the general . . . That is particularly true where . . . Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.”) (internal citations omitted). The Mining and Minerals Policy Act is a general policy, not directed at specific parcels of land, but is one consideration within the process of general land management by the Dept. of the Interior. 30 U.S.C. § 21a. In contrast, the LWCF Act is a specific program, allowing acquisition of specific parcels of land, and mandates that those specific parcels be used for recreation. 54 U.S.C. § 200306(a)(2)(B) (formerly cited 16 U.S.C. § 460l-9). The LWCF Act was enacted to address the specific findings of a Congressional Commission reporting on the problem of inadequate recreation space and the increasing demand for such space. *See* S. Rep. No. 88-1364 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3633, 3634 (LWCF Act introduced in response to findings of Outdoor Recreation Resources Review Commission). As a matter of statutory construction, even where the Mining and Minerals Policy Act's general pronouncement could affect management decisions by the Forest Service, it must still yield to the specific mandate governing LWCF Act lands.

² If the 1970 Act applies, the MEA and Draft Decision ignore the equally-important congressional purpose that any mineral development “assure[s] satisfaction of . . . environmental needs,” 30 U.S.C. §21a(2), which has not occurred here as noted herein.

B. Mining and Mineral Development is Inconsistent with the LWCF Act

As an initial matter, the Agencies' analysis fails to acknowledge that prospecting activities are inherently incompatible with recreation. Ultimately *any* prospecting interferes with recreation because the two cannot happen simultaneously on the same tract of land. Unlike land acquired for other purposes like timber management or watershed conservation, recreation is fundamentally impossible to reconcile with prospect drilling because recreation involves members of the public accessing and roaming the land freely, with little supervision, control or impediment. Drilling with heavy machinery creates a public safety hazard to such free access. *See* MEA at 151. Recreation on parcels MS-1329 and MS-1330 is not only ongoing, but is the primary use of the project area today. *Id.* at 154; *see also* Exhibits 8–12 (describing the varied type of recreation uses ongoing in the area). The type of recreation in the project area is not limited to one specific spot that prospecting activities can simply avoid. Rather, all manner of recreation opportunities occur throughout the area. Exhibits 8–12; MEA, at 154. When prospecting occurs, the Forest Service will have to block access to those areas to ensure public safety. *See* MEA, at 27, Plate 1 (depicting gate to block road for safety and equipment security); *id.* at 151 (noting among the direct effects of the prospecting that “[a]ccess around the drill rig and equipment laydown area would be restricted for purposes of public safety”). This is the opposite of ensuring prospecting does not interfere with recreation; it is ensuring recreation will not interfere with prospecting. Were the two uses on equal footing, the Agencies' approach of allegedly balancing the two interests might be a permissible compromise. However, on lands acquired with LWCF Act funds, the two uses are not equal. Congress has decided the preference of usage in favor of recreation. *See* 54 U.S.C. § 100101 Note (formerly cited 16 U.S.C. § 4601-4)

(purpose of LWCF Act is to preserve recreation spaces); S. Rep. No. 88-1364 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3633, 3636 (noting “This is a recreation bill, and . . . moneys appropriated from the fund shall be for outdoor recreation [] purposes”). The Forest Service must honor that policy choice by the Legislature.

Beyond the plain incompatibility of mining activity and outdoor recreation on the same parcel of land at the same time, Congress’ intent for LWCF Act land management was clear that it did not include mineral development. The structure, text, and legislative history of the LWCF Act all show that Congress created the fund to acquire land to be used for primarily recreation purposes. *See* 54 U.S.C. § 200306(a)(1); S. Rep. No. 88-1364 (1964), *reprinted in* 1964 U.S.C.C.A.N. at 3634. Congress’ sole purpose in the LWCF Act is “preserving, developing, and assuring accessibility to all citizens . . . of present and future generations such quality and quantity of outdoor recreation resources as may be available and are necessary.” 54 U.S.C. § 100101 Note (formerly cited 16 U.S.C. § 460l-4). As Judge Hernandez noted, this purpose controls not merely acquisition, but also usage post-acquisition. *Gifford Pinchot Task Force v. Perez*, 13-CV-00810, 2014 WL 3019165, at *10 (D. Or. 2014). Congressional intent to preclude non-recreational use of such lands, or at least uses that interfere with such recreational use, is seen in Section 6(f)(3), which expressly prohibits land acquired by the states from being “converted to [use] other than public outdoor recreation.” 54 U.S.C. § 200305(f)(3) (formerly cited 16 U.S.C. §460l-8). While this section is directed at the lands managed by the states, there is nothing in the text or structure of the LWCF Act that suggests Congress intended that recreational use be substantially different or less important on federally controlled LWCF Act lands. On the contrary, the legislative history specifically noted that “[a]ll levels of government share an interest in and responsibility for meeting the outdoor recreation needs of the Nation.” S.

Rep. No. 88-1364 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3633, 3638. With respect to Forest Service acquisitions, Congress intended that the purchases be for recreation value more “than for the other multiple purposes of national forest lands. This is a recreation bill, and . . . moneys appropriated from the fund shall be for outdoor recreation [] purposes.” *Id.* at 3636. For the Forest Service to rely upon a more general “overall policy” directed at a different Cabinet Department in allowing a proposed action that is inconsistent with recreational use, ignores the intent of Congress and contravenes the LWCF Act.

The language in the Mineral Policy Act, 30 U.S.C. § 21a, that the Forest Service treats as binding and as imposing substantive restrictions on its discretionary decision-making, is remarkably similar to the language in the first section of NEPA establishing a “continuing policy of the Federal Government . . . to create and maintain conditions under which man and nature can exist in productive harmony.” 42 U.S.C. §4331(a). However, the federal government has argued that this language creates no substantive restrictions and that NEPA imposes only procedural obligations on federal agency decision-making. The US Supreme Court upheld those arguments, in some of its first NEPA cases, and held that NEPA was purely procedural, and the introductory policy statements did not place any substantive duties on the agencies to meet those policies. *Strycker’s Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1980) (“In *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558, 98 S.Ct. 1197, 1219, 55 L.Ed.2d 460 (1978), we stated that NEPA, while establishing ‘significant substantive goals for the Nation,’ imposes upon agencies duties that are ‘essentially procedural.’”). Federal agencies like the Forest Service cannot both treat policy language in NEPA as imposing no substantive duties and then insist that almost identical policy language in the Mining Policy Act affirmatively restricts their discretion when making decisions like the one at issue here.

Even where mineral development is a potential use, Congress has long understood that not every possible use is possible simultaneously. *See generally* 16 U.S.C. § 531(a) (noting in the definition of “multiple use” that “some land will be used for less than all of the resources”). Rather, the Forest Service is charged with managing competing uses according to relative value of use. *Id.* (“multiple use” means “consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output”) For lands acquired with LWCF Act funds, Congress set the relative value, with recreation being “primar[y].” 54 U.S.C. § 200306(a)(2)(B)(i)(II) (formerly cited 16 U.S.C. § 460l-9). Thus, the Forest Service has a mandate to consider the priority among competing uses, and a mandate that recreation is the first priority on parcels MS-1329 and MS-1330, because they were acquired under the LWCF Act. When approving the LWCF Act Congress specifically recognized that it was addressing a shortage of land available for outdoor recreation. It is irrational and unreasonable for the Forest Service to now insist that recreational use on land it acquired specifically to address this shortage must now be subject to even “temporary” interference by another, non-primary use. The Agencies’ decision, which consistently elevates mineral policy above other use, is inconsistent with the general mandate of multiple use, as well as the specific mandate of primarily using parcels MS-1329 and MS-1330 for outdoor recreation.

C. The Proposed Action Interferes with the Recreational Purpose for Which the Land was Acquired.

Apart from the LWCF Act itself, the Reorganization Plan prohibits the Forest Service from consenting to development projects on certain acquired lands if the project would “interfere” with the primary purpose for which the land was acquired. 5 U.S.C. Appendix.

Despite acknowledging the actual, practical effects of the interference with recreation anticipated by the proposed drilling, the Draft Decision concludes “none of the action alternatives would interfere with the primary purpose for which the lands were acquired.” Draft Decision, at 18. This decision relies on a flawed interpretation of the Reorganization Plan and is contrary to the evidence.

The Draft Decision and MEA both create an exception to the Reorganization Plan’s interference standard for “temporary” effects. *See id.* (citing the “temporary nature of activities and their anticipated effects”). First, this description is misleading. The project is not ‘temporary’ as a practical matter for recreational visitors. The permit allows drilling 24 hours a day, for up to 6 years. MEA, at 157 (“Each drill would generally be operational 24 hours a day, 7 days a week, including holidays”). While this may be a short time span for determining the impacts to timber management in a mature-age forest, it is not temporary to the citizens and visitors who travel from other areas seeking recreation, and may only visit the area once. *See e.g.* Exhibit 1, at 24 (discussing that some visitors are infrequent or one-time visitors); *see also* Exhibit 8, Decl. of Nicole Budine, at 2 (expressing concern with the six year duration and how such a project would not be temporary).

Second, the Draft Decision’s conclusion that temporary effects do not constitute interference is wrong as a matter of law. An exception for temporary effects is inconsistent with the text of the Reorganization Plan, which contains no such exception. *See* 5 U.S.C. Appendix. The Reorganization Plan requires a plain meaning interference standard. *Id.* Such exception is similarly inconsistent with a plain meaning of the word “interfere.” *See* MIRIAM WEBSTER’S NEW INT’L DICTIONARY (3rd Ed), 1178 (2002) (defining “interfere” as “to interpose in a way that hinders or impedes . . . [Legal Definition] to act in a way that impedes or obstructs others”). And

finally, such an exception is inconsistent with the purposes defined in the LWCF Act, which emphasize both the preservation in perpetuity of recreational space, and the need to provide and maintain access to such space. *See* 54 U.S.C. § 100101 Note (formerly cited 16 U.S.C. § 460l-4). Whatever the duration, a project that closes access to roads and/or recreational trails during the time of year when recreational visitors most frequently visit the area, most certainly “impedes or obstructs” (i.e. interferes with) an express purpose of providing accessible recreation space. *See* MEA, at 26 (discussing gate to prohibit visitor access, and parking of vehicles on roads closed to visitors). Similarly, even temporary displacement of wildlife “hinders” (interferes with) recreational activities like bird and wildlife viewing or hunting. *Id.* at 103 (noting the project impacts “include disruption of foraging behavior, increased risk of predation, disruption of biological clocks, and disruption of dispersal movements and corridor use of wildlife” but concluding that this does not impact recreation in the area because the “general public would be kept from accessing these roads”); Exhibit 10, Decl. of Susan Saul, at 2 (describing how wildlife and bird viewing is part of her recreation in the area). Increased noise and light pollution from the prospecting interferes with recreational visitors seeking the area’s scenic beauty and solitude. *See* MEA, at 156 (discussing noise impacts); Exhibit 11, Decl. of Alice Linker, at 2 (describing how noise from drill rigs will keep her from recreating). CFC, along with many others, has consistently brought to the Agencies’ attention the type of ongoing recreation activities by its members that will be obstructed or hindered by the prospecting activities. *See e.g.* Exhibit 1, at 22–27; Exhibit 14, Goat Mountain Exploration Permit Postcard Petition (documenting over 150 signatures expressing concerns with the project due to interference with recreation opportunities); Exhibit 15, Letter from W. John Bohrsen, President, Clark-Skamania Flyfishers (expressing concerns over impacts to recreational fishing in the area). The Agencies

acknowledge that all of these impacts will take place, and that they will occur at a time when visitors are expected to be attempting to engage in these recreational activities. Yet, the Agencies summarily conclude that none of these impacts interfere with the recreational purposes for which the land was acquired. *See* Draft Decision, at 18. Such conclusion is unsupported by the facts, and is inconsistent with the law. *See Alliance For The Wild Rockies*, 632 F.3d 1127, 1135 (9th Cir. 2011) (recreators’ inability to “view, experience, and utilize the areas in their undisturbed state” represents irreparable harm).

Moreover, as is discussed in more detail below, because the Forest Service has repeatedly refused to specifically describe how it will limit access to the area while the prospect drilling takes place, the Forest Service has no basis for asserting that any interference will be minimal, temporary or inconsequential. The Forest Service and the public cannot properly evaluate the actual impacts to, or interference with, recreational use until and unless the Forest Service clarifies the actual extent of the restrictions it will impose in places where the prospect drilling would occur. The extent of such restrictions is entirely up to the Forest Service, and its failure to disclose that information in the latest EA or in its Draft Decision is a deliberate decision to withhold this information with the public.

This objection can be remedied by the Forest Service withdrawing its flawed consent given the project’s interference with recreation.

This issue was raised by CFC (previously Gifford Pinchot Task Force) in comments to the Agency. *See* Exhibit 1, at 22.

III. The MEA and FONSI failed to consider and analyze all reasonable alternatives as required by NEPA.

NEPA requires the Agencies to evaluate and analyze all reasonable alternatives before arriving at a decision. *See Native Ecosystems Council v. United States Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2005); *Muckleshoot Indian Tribe v. United States Forest Serv.*, 177 F.3d 800, 813 (9th Cir. 1999). Despite being presented with a reasonable alternative of permitting prospecting on only parcel MS-708, the Agencies declined to consider the alternative because it “would not meet the purpose and need of either the applicant or the government.” MEA, at 38. However, the Agencies’ stated rationale is premised on the need for information to evaluate a future mine permit, which the Agencies insist in all other parts of the decision is “only speculative.” *Id.* at 20, n. 7; *see also* Draft Decision, at 4 (“future mining is not a reasonably foreseeable future action”). Declining to analyze an alternative that limits the environmental and recreational impacts to the project area because it would not provide information to approve a future mine that the Agencies consider not “foreseeable” is arbitrary and capricious and violates the requirements of NEPA.

Included in public comments on the draft MEA was a request to analyze an alternative that limited the drilling sites to only parcel MS-708 (“MS-708 Alternative”). MEA, at 38. The rationale for the MS-708 Alternative is obvious. First Ascot has submitted two separate applications for a permit – one for parcel MS-708 and a second for the other areas included the two parcels acquired using LWCF funds, as required by BLM’s regulations that delineate between total and fractional mineral leasing. *See* MEA, at 6–7 (discussing separate permit applications); *see also* 43 C.F.R. § 3505.12 (prospecting permits); 43 C.F.R. § 3509.47 (permits for fractional lease interests). This alone provides a “practical” reason for considering the permits separately. *See* Draft Decision, at 9. Second, the parcel is roughly “in the middle of the project area,” which would provide a reasonable sample of the surrounding area. *Id.* Third, the parcel

contains nearly 50% of the applicant's proposed drill sites, but reduces the affected area by nearly 80%, to only 200 acres, rather than proposed 900 acres. *Id.* Fourth, by eliminating parcels acquired under the LWCF Act from the project area, the Agencies would likely avoid the issue of whether mineral prospecting interferes with the primary purpose for which the land was acquired, and fulfills the intent of the gift of parcels within the Gifford Pinchot National Forest. *See* Exhibit 16, Letter from Paul Kundtz, Northwest Director, Trust for Public Land (detailing the purpose of the 1984-86 land conveyances to the US for inclusion in the Gifford Pinchot National Forest); Exhibit 17, Documentation of the Transfer to the US. In short, despite the Agencies' conclusory statement otherwise, the MS-708 Alternative has compelling environmental, legal, and practical reasons that justify conducting an analysis in the MEA. *See* Draft Decision, at 9 (describing alternative as having "no compelling environmental, legal or practical reason").

Despite these reasons supporting analysis, the Agencies summarily dismissed the MS-708 Alternative for two related reasons, neither of which is legally valid. First, the Agencies cite the Mining and Minerals Policy Act of 1970 as a basis for concluding that prospecting should be favored. *See id.* ("[R]estricting prospecting to this one area does not meet the intent of Congress as expressed in the Mining and Minerals Policy Act, 1970."). Second, the Agencies conclude that without allowing prospecting throughout the area proposed by the applicant "the Agencies would be precluded from taking administrative action on any future leasing application." MEA, at 38–39. The Agencies' first reason fails because it does not account for or differentiate between parcels that are not controlled by the Mining and Minerals Policy Act, and the fact that the 1970 Act does not bind the Forest Service as noted above. The Agencies' second reason fails because it is inconsistent with the Agencies' stated position that a future mine is not currently

foreseeable, and thus cannot form the basis of the Agencies decision-making unless the full range of impacts of a future mine are considered in the NEPA analysis.

As stated in more detail above, the Mining and Minerals Policy Act does not provide an “overall policy” on all land throughout the project area, but is limited by Congressionally mandated purposes for lands acquired using specific funds or authority. *See* discussion *supra*, p. 8. Ironically, one of the benefits of the MS-708 Alternative is that it limits prospecting to only lands not subject to the LWCF Act, thus possibly eliminating the conflict with that Act. Further, in absence of separating out the parcels subject to specific, non-mining purposes, the Agencies cannot rely on a general policy of favoring mining to justify rejecting a reasonable alternative for analysis.

The Agencies’ related second rationale, that the MS-708 Alternative would provide insufficient information to be able to take action on a future mine application, is contrary to the Agencies’ own stated position on the speculative nature of a future mine. If, as the Agencies assert for the remainder of the MEA and Draft Decision, a future mine is only speculative, then it cannot be the basis for rejecting the a reasonable alternative. If the Agencies consider a future mine to be foreseeable enough that it affects the scope of the proposed project, and can form a reasoned basis for considering alternatives, than the full range of impacts of a future mine must be considered throughout the NEPA analysis, including in the cumulative effects. In addition, if such a future mine is not speculative (so as to support the rejection of the MS-708 Alternative), then the agency must factor in whether such a future mine would ever by consistent with the Weeks Act and LWCF Act (which as the record shows, could not be the case due to the significant impacts to recreation, water, and other forest uses).

Finally, the draft decision insists there would be no “reasonable environmental justification” for not including all 900+ acres covered by both permit applications in an alternative that is fully addressed and evaluated in the MEA. Draft Decision, at 9. That statement is demonstrably false. It simply ignores the fact that there will be actual impacts from the proposed prospect drilling to recreation even if the Forest Service labels them as “temporary,” and avoiding impacts to recreation on some of the 900 acres is a “reasonable environmental justification.” Indeed when two of the parcels at issue were acquired with LWCF Act funds, not considering an alternative that would avoid all or most impacts to recreation on those parcels is clearly arbitrary and capricious and contrary to law.

The Agencies can resolve this objection by fully considering and analyzing the MS-708 Alternative as proposed previously by comments.

This issue was raised by CFC (previously Gifford Pinchot Task Force) in comments to the Agency. *See* Exhibit 1, at 44.

IV. The MEA and FONSI failed to analyze the cumulative effects, including a potential future mine, in violation of NEPA.

NEPA “require[s that] an agency consider ‘connected actions’ and ‘cumulative actions’ within a single EA or EIS.” *Wetlands Action Network v. United States Army Corps of Eng’rs*, 222 F.3d 1105, 1118 (9th Cir. 2000) *abrogated on other grounds by Wilderness Soc. v. United States Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (citing 40 C.F.R. § 1508.25). “NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment. Rather, it is designed to require such analysis as soon as it can be reasonably done.” *Kern v. Bureau of Land Management*, 284 F.3d, 1062, 1072 (9th Cir. 2002). This requires an agency to engage in “reasonable forecasting” because “speculation is . . . implicit in NEPA.” *N. Plains*

Resource Council, Inc. v. Surface Transp. Bd., 668 F.3d 1067, 1079 (9th Cir. 2011). Such reasonable forecasting includes consideration of “all reasonably foreseeable future actions . . . even if they are not specific proposals.” *Id.* (citing UNITED STATES ENVTL. PROT. AGENCY, CONSIDERATION OF CUMULATIVE IMPACT ANALYSIS IN EPA REVIEW OF NEPA DOCUMENTS, OFFICE OF FEDERAL ACTIVITIES, 12–13 (May 1999), *available at* <http://www.epa.gov/compliance/resources/policies/nepa/cumulative.pdf>.)

Rather than acknowledge and analyze all connected and cumulative actions of the prospecting application, the Agencies dismissed a future mine as “speculative.”³ MEA, at 20, n. 7; *see also* Draft Decision, at 13. This position is inconsistent with: NEPA, which requires evaluation of connected actions; BLM’s own regulations, which plainly link prospecting permits and future mining; and the Agencies’ analysis throughout the MEA which justifies the entire proposal by referencing the promotion of mining, and rejects narrower alternative actions because it may hinder future mining.

As an initial matter, the Agencies erred in failing to consider future mining as a “connected action” to the prospecting permit, which requires consideration within a single NEPA document. 40 C.F.R. § 1508.25(a)(1) (2017). Actions are connected where they “[a]re interdependent parts of a larger action and depend on the larger action for their justification.” *Id.* § (a)(1)(iii). BLM’s regulations for prospecting permits make clear that a future mine *must* be the justification for the prospecting activities proposed. The permit application seeks permission

³ The Agencies summarily rely on *Jones v. Nat’l Marine Fisheries Serv.* for the proposition that future mining is not foreseeable until the project is formally proposed. *Id.* (citing 741 F.3d 989, 1000–01 (9th Cir. 2013)). However, the Ninth Circuit has required cumulative impacts assessed even for projects not yet formally proposed. *See e.g. Soda Mt. Wilderness Council v. United States Bureau of Land Mgt.*, 607 Fed. Appx. 670, 672 (9th Cir. 2015) (unpublished) (concluding that notes from an interdisciplinary team showed that an not-yet proposed project was “reasonably foreseeable”).

to remove material from the site. MEA, at 25. Under BLM's own regulations, such removal is only permissible for the purposes of demonstrating a "valuable deposit" which BLM defines as sufficient minerals such that there is a "reasonable prospect of success in developing a profitable mine." See 43 C.F.R. § 3505.10(c) (2017) (allowing removal of materials only for demonstrating a valuable deposit); *id.* § 3501.5 (defining "valuable deposit"). In promulgating these regulations, BLM specifically addressed the link between a prospecting permit and a future mine, noting that material "collected during the period of the prospecting permit . . . is justified by the expectation he or she can develop a profitable mine." Leasing of Solid Minerals Other than Coal and Oil Shale, 64 Fed. Reg. 53,512, 53,528 (Oct. 1, 1999) (codified at 43 C.F.R. pt. 3500).

The Ninth Circuit employs an "independent utility" test to determine when "an agency is required to consider multiple actions in a single NEPA review pursuant to the CEQ regulations." *Wetlands Action Network v. United States Army Corps of Eng'rs*, 222 F.3d 1105, 1118 (9th Cir. 2000), *abrogated on other grounds by Wilderness Soc. v. United States Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011). Under this test, impacts from related projects are not considered only where "each of two projects would have taken place with or without the other and thus had independent utility." *Id.* (internal quotations omitted); *see also Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir. 1985) (independent utility test failed where the future action "cannot proceed without [the present action] and [the present action] would not [occur] but for the contemplated [future action]."). In applying the test, the Ninth Circuit held that projects had independent utility where the record showed "[i]t would not be unwise or irrational to undertake the [the first action] even if it was determined that the later phases could not be constructed." *Wetlands Action Network*, 22 F.3d at 1118.

BLM's regulations plainly demonstrate that prospecting and commercial mining are not independent. *See* 64 Fed. Reg. at 53,522 (“Obtaining a prospecting permit is the first step to development . . . Prospecting permits are required when you are exploring an area for commercial development.”). Indeed, the only purpose of a prospecting permit is “to determine if a valuable deposit exists,” meaning to determine if a profitable mine can be developed. 43 C.F.R. § 3505.10(a). Thus, a future mine in the project area is not “speculative” as the Agencies contend, MEA at 20, n. 7, but is the justification for the prospecting permit Ascot seeks. Under BLM's regulations, a future mine is not independent of the prospecting, but rather cannot proceed without the prospecting and the prospecting would not occur but for the contemplation of a mine. 64 Fed. Reg. at 53,522; *see also Thomas*, 753 F.2d at 758 (independent utility test failed where present action would not occur but for contemplated future action). Failure to include the future mine in the Agencies' analysis thus contravenes NEPA and Ninth Circuit law.⁴

Even if consideration of a future mine was not compelled by CEQ's NEPA regulations, it would nonetheless need to be considered based on the Agencies' approach to the analysis of the permit application. BLM's supplemental regulations require NEPA consideration of all reasonably future foreseeable actions, which includes those activities that a reasonable official “would take . . . into account in reaching a decision.” 43 C.F.R. § 46.30. The Agencies did in fact take the possibility of a future mine into account in reaching their decision. For example, the Draft Decision's “Decision Rationale” section cites the Mining and Mineral Policy Act's policy to “foster and encourage . . . mining and mineral industries” and finds that consenting to the

⁴ Even if the project and future mining are not “connected actions,” the MEA failed to fully analyze the cumulative impacts from future mining. *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 968-74 (9th Cir. 2006) (BLM failed to review cumulative impacts from other reasonably foreseeable mine, even though the two mines were not connected actions under NEPA).

prospecting permit is “consistent” with that Act. Draft Decision, at 5. However, the same section also expressly states that a prospecting permit is “*not* a minerals development (e.g. mining) project.” *Id.* at 6 (emphasis in original). The only way a prospecting permit could be “foster[ing] and encourag[ing]” mining is if the Forest Service’s Decision Rationale is taking into account the potential future mine connected with this prospecting permit. Similarly, the Agencies’ rejection of the MS-708 Alternative is expressly justified on the need to be able to act on a future mine application. MEA, at 39; *see* discussion *supra*, p. 17. The Agencies did in fact take into account a future mine throughout the analysis and decision-making process. Because the Agencies’ MEA and Draft Decision account for a future mine in justifying their decisions, they must also account for a future mine in evaluating the direct, indirect, and cumulative effects of the action.

Finally, the inclusion of a future mine in the analysis is particularly relevant here, where the Agencies are (1) constrained by a legal regime that will prevent the approval or development of any future mine in the project area, and (2) the decision requires a finding of being in the public interest. NEPA establishes “action-forcing” procedures that require agencies to take a “hard look” at environmental consequences. *Ctr. for Biological Diversity v. Dept. of Interior*, 623 F.3d 633, 642 (9th Cir. 2010). As the Ninth Circuit noted:

An EIS serves two purposes:

First, [i]t ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts. Second, it guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.

Id. (quoting *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004)). “NEPA prohibits uninformed agency action.” *Center for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1214 (9th Cir. 2008). BLM’s permit decision requires a finding that the permit is in the public interest. *See* MEA, at 7 (describing BLM’s approval process). The

weighing of the public interest turns heavily on the possibility of a future mine, and the Agencies failure to include that in the analysis precludes a fully informed decision, particularly in light of the legal regime much of the project area is subject to.

Because substantial parts of the project area are subject to the LWCF Act, the Weeks Act, and the Reorganization Plan, it is unlikely the Agencies could legally permit mining on those parcels. Any kind of commercial-scale mining would certainly interfere with the purposes for which the land was acquired. *See generally* discussion *supra*, p. 14. A mine would not be either of limited surface area or of temporary duration, the main factors driving the Agencies conclusion that prospecting does not interfere with the purpose for which the land was acquired. *See* Draft Decision, at 18 (noting the “limited scope and temporary nature” to justify consent to prospecting on LWCF Act lands); *see also Gifford Pinchot Task Force v. Perez*, 13-CV-00810, 2014 WL 3019165, at *15 (D. Or. 2014) (noting the fact that the project was not full scale mining).

At the same time, the public interest in the prospecting permit is highly dependent on the potential future mine. Approximately 1 out of every 3 comments received on the project related to jobs, and/or improving the local economy. MEA, at 20. But the Agencies concluded that the prospecting itself involves minimal jobs or economic impact. *See id.* at 33 (noting only 18 jobs from the project, many of which may not be hired from local applicants). The economic-based public interest that may be served by the project is tied to a future mine, not the current prospecting. *Id.* at 20. Similarly, the utility of the current prospecting project to the public is eliminated if no future mine could be permitted. Even where mitigated, the prospecting project will at least temporarily negatively impact recreation, as well as wildlife, forest, and water resources. *See* Exhibits 8–12 (discussing recreation impacts); *see also* MEA, at 156 (recreation

impacts); MEA, at 102–03 (wildlife impacts); MEA, at 102 (forest impacts); MEA, at 32 (water impacts). If these impacts are never offset by a public benefit (like the potential local economic effects of a mine), the public interest weighs heavily against the project. In short, the Agencies cannot make an informed determination that the public interest is served by this project unless a future mine is considered. The Agencies failure to evaluate a future mine undermines both the requirements of NEPA and the BLM’s public interest review.

Even if the MEA does not or could not fully evaluate the impacts of an actual, specific proposal for a mine, it can and must evaluate whether it would be legally possible for the agencies to approve any type of future mine. Much of the MEA’s analysis appears to simply assume that such a future approval could occur. But legally that assumption appears to be highly questionable, at least for any acquired lands. At a minimum the Agencies or the applicant must at least offer an analysis of whether, and what type of, mining could legally ever occur on these acquired public lands before allowing the proposed prospect mining. Absent at least the possibility that a future mine could legally be approved, the proposed prospect drilling is a futile act. Approving a futile act that causes actual adverse impacts, even if those impacts are labeled “temporary” or “minimal” is arbitrary and capricious.

This objection can be resolved by fully analyzing the cumulative effects of a potential future mine resulting from the approval of prospecting.

This issue was raised by CFC (previously Gifford Pinchot Task Force) in comments to the Agency. *See* Exhibit 1, at 36.

V. The MEA and Draft Decision fail to take a “hard look” at all impacts, including public access.

In the decades since *Overton Park*,⁵ federal agencies have been required to take a “hard look” at their decision making. Harold Leventhal, *Environmental Decisionmaking And The Role Of The Courts*, 122 U. PA. L. REV, 509, 511 (1974). This requirement is nothing new. Thus, it is unfortunate to see the Agencies so blatantly shirk their duty to take a “hard look” at how drilling authorized by the Goat Mountain Hard Rock Prospecting Permits will impact the significant recreation values in the Project Area. NEPA requires that a project’s MEA take a “hard look” at impacts to recreation caused by drilling. *See High Country Conservation Advocates v. United States Forest Serv.*, 52 F. Supp. 3d 1174, 1199 (D. Colo., 2014). By failing to fully disclose or analyze the extent that recreational access will be restricted in the Project Area, the MEA fails to take the required “hard look.”

Our February 4th, CFC’s 2016 comments asked three simple questions that could shed light on the impacts this project would have on recreation. The questions are “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.” Exhibit 1, at 23. Unfortunately, these questions have not been clearly answered, in either the “Public Scoping Comment Matrix” or in the substance of the document. Rather, the MEA uses vague language and never truly reveals the extent of closure in the project area.

Opportunities for primitive and unconfined recreation throughout the Project Area will remain as they currently are limited only to the extent resulting from existing road decommissioning and closure of more than 10 years and from temporary exclusion in the immediate vicinity of operating drilling equipment in order to maintain public and operator safety.

MEA, at 156.

⁵ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415–16 (1971).

This initial description of direct effects for Alternative 2 is the closest the MEA comes to a disclosure of effects on recreation for Alternative 4. The direct effects of Alternative 4 (which eliminates Pads 6-7) are compared to the direct effects of Alternative 3, which are compared to the direct effects of Alternative 2. *Id.*, at 160. Alternative 4 appears to be mostly similar to Alternative 2, but simply omits Pads 6-7. *Id.* The MEA never gives a definitive description of Alternative 4's effects on recreation. However, a close reading of the MEA paints a less promising picture than the introductory description provides. Even the cheerful introduction does not withstand close scrutiny. The sentence, “. . . [t]emporary exclusion in the immediate vicinity of operating drilling equipment in order to maintain public and operator safety” is particularly troubling in its lack of specificity. *Id.*, at 156. What is the “immediate vicinity”? *Id.* The pads themselves have an area of 400 square feet. *Id.*, at 117. Will recreators be allowed to walk straight up to the edge of the drill pad? Will they be asked to stay 50 feet away? Or will access be restricted within 150 feet of the drill pad, as indicated in Ascot's application? Exhibit 1, at 23. A 150-foot buffer zone could require significant closure of the areal and prevent road access. *Id.* Without knowing what “immediate vicinity” means, the public cannot know how access will be restricted. *See e.g.* Exhibit 8, at 2 (noting that despite being fully engaged in the permitting prospect, recreator is unable to discern full extent of how road closures will impact planned activities in the area). Without saying where recreators will and won't be allowed to go, the MEA has not met the “hard look” standard for impacts to recreation. How can one take a “hard look” at impacts when one cannot say what those impacts will actually be?

Even restricting access to the “immediate vicinity” can have a significant effect on recreation values in the project area. Many drill pads appear to be located on or in the immediate vicinity of roads in the project area. MEA, at App. A, Figure 3. As noted in CFC’s comments, blocking the FS Road 2612 would make the Green River Horse Camp inaccessible (particularly to horse trailers) any time pads 1, 2, 3, 4, 5, 14, and 15 are active. Exhibit 1, at 24–25. The MEA claims that public access to road will not be restricted by drilling. MEA, at 151. However, this statement is difficult to verify when the MEA does not specify what a safe distance from an active drill pad is. Furthermore, just because a drill pad does not interfere with road traffic does not mean that associated equipment and personal will not effectively close the route. The MEA fails to take a “hard look” at the project’s effects on access because it does not define the true extent of area closure, nor is it realistic about the difficulties caused by construction and operation. These inadequacies become more glaring when considering further language in the MEA.

Closer examination shows that the extent of closure of the project area may be much greater than that contemplated in the recreation section of the MEA. Even the closure acknowledged by the recreation section seems to go farther than the “immediate vicinity” of operating drilling equipment:

Public use of vehicles over the temporarily reactivated road segments beyond the Project security gate off of FS Road 2612 would be discouraged during the Project timeframe. . .

Id. at 156. This quotation embodies the vague and nonspecific approach the MEA takes in describing effects to recreation. What does “discouraged” mean? Is this discouragement voluntary? If only the “immediate vicinity” of an operating drill pad is closed, why must there be a gate? If road access is discouraged, is non-road access

discouraged? The fact that the roads have been previously decommissioned is immaterial. Recreation does not only occur on currently active roads. *See id.* at 155 (detailing the myriad types of recreation seen); *see generally* Exhibits 8–12 (examples of various non-road-based recreation). The roads will be reactivated, and the question of whether the public will be allowed to use them should be answered definitively. Furthermore, reactivating a road only to restrict access to it would effectively limit what was previously off-road recreation.

These questions opened by the recreation section of the MEA highlight the confusing and contradictory nature of the Agencies' purported analysis. For example, more explicit language is used earlier in the MEA. "For safety reasons, public access to drill sites in the northern portion of the Project Area would be limited during active drilling through the use of a temporary locked gate." MEA, at 26. This implies a stricter limiting of access than does the section on effects to recreation. To limit access at the security gate would be to limit access to the majority of drill sites in the project area. This is a much greater restriction than that contemplated in the Recreation section of the MEA. This limitation is also inconsistent with the claim that access will only be restricted in the "immediate vicinity" of active drill sites. Gating a road and barring traffic is a restriction of access that will greatly impede recreation. *See e.g.* Exhibit 10, at 2–3. Will access to the north half of the project area be restricted anytime a drill site is active? The MEA does not answer that question either. The public deserves to know what limitation to access this project will cause. The inconsistency and vagueness regarding closure of the area and impacts to recreation shows that the MEA has failed to take a "hard look" at project impacts.

Finally, the project contemplates significant tree removal, 68 trees to be exact. MEA, at 28. Felling trees is a dangerous activity and public access to an active logging site should be restricted. The recreation section fails to analyze how tree removal would affect public access. Perhaps this is because all trees removed are located in the northern section of the project area, behind the security gate where access may or may not be allowed. *Id.* at 102. The public will obviously not be allowed to access areas where tree felling is occurring. These restrictions to access must be fully disclosed and analyzed. The MEA fails to take a hard look at the impact of tree removal, i.e. logging, in the project area. Further, the permanent removal/logging of trees, to the detriment of recreational users who value the current intact ecosystem, results in certainly more than “temporary” impacts pursuant to the LWCF Act noted above.

The MEA does not take a “hard look” at how access restriction and closure in the project area will affect recreation values. Readers of the MEA simply cannot know what parts of the project area they will be restricted from, or for how long they will be restricted. The Forest Service is the agency that will decide how and when it would limit access and restrict recreation if the proposed prospect drilling occurs. The Forest Service already knows, or easily could know, the precise and full extent of those restrictions. The only reason for not fully and specifically describing the extent of those restrictions and for not answering the very specific questions in CFC’s prior comments, is to intentionally hide information from the public and to avoid addressing the actual impacts of those restrictions on recreation. Such deliberate withholding of relevant information, which is fully under the control of the Forest Service, violates NEPA and is arbitrary and capricious. The Forest Service should withdraw the Draft Decision, prepare a new NEPA document that discloses the extent of closure in the project area and analyzes the effect

closure will have on recreation, allow the public to comment on the document, and respond to the public's comments.

This issue was raised by CFC (previously Gifford Pinchot Task Force) in comments to the Agency. *See* Exhibit 1, at 23.

VI. The Agencies arbitrarily and capriciously responded to only selective comments received throughout the public comment period.

The BLM and Forest Service sought public comment on an earlier version of the MEA in January of 2015. Many members of the public, including CFC, submitted extensive comments. *See* Exhibit 1. The documents which the Forest Service has now made available for its objection process more than 18 months later do not include any document that fully and systematically responds to the many comments that the public submitted in early 2016. The agencies have had more than enough time to prepare a public response to the comments they solicited in 2016 and if such responses exist then should have been released at the same time the agencies released their August 2017 MEA. Obviously, if the agencies had prepared a draft EIS, as they should have, *see* discussion, *infra* at 38, they would have a legal obligation to respond to such comments. 40 C.F.R. § 1503.4. But even if relying on an EA were appropriate, it is arbitrary and capricious for an agency to solicit public comment on an earlier MEA, and then to completely fail to even acknowledge that such a public comment process occurred in the current version of that MEA, while selectively responding to only a handful of comments. Because the Forest Service has not made its or the BLM's responses to public comments available during the objection process the Forest Service cannot use any comment responses that it or the BLM has or that they subsequently prepare to defend their NEPA analysis or agency decisions in future litigation.

This objection is based off new information that arose after the period for public comment.

VII. The MEA Fails to Adequately Analyze the Baseline Groundwater Conditions and Fails to Accurately Analysis the Project’s Impacts.

As noted in our previous comments, the agency has failed to properly analyze the baseline conditions of resources that might be affected by the Project. The MEA purports to fully analyze the baseline conditions for groundwater and groundwater quality, to comply with NEPA and the Court’s 2014 decision. MEA, at 1. The MEA acknowledges the threat to groundwater posed by the Project:

[T]he potential impacts of the Proposed Action on the groundwater resource would include the following:

- Disturbance of Bedrock Aquifer
- Effects of Drilling Fluid Filtrate Mixing with Groundwater
- Mixing of Groundwater and Surface Water
- Effects on Water Quantity
- Artesian Conditions
- Drilling Fluid Loss & Gain
- Borehole Abandonment

Id., App. G, at 34. “All of the proposed boreholes would likely penetrate bedrock aquifers.” *Id.*, App. G, at 42. Thus, a full and complete baseline analysis of all water quality and quantity conditions at and near the Project site must be completed and subject to public review in a new revised EA.

Yet a review of the MEA shows that little progress has been made to accurately determine the baseline groundwater conditions, especially groundwater quality. The Regional Office should remand the MEA back to the Forest Supervisor with instructions to conduct the proper baseline and impacts analysis required by NEPA and the Court’s Order.

The Court Order specifically faulted the previous EA for not having a comprehensive baseline analysis representative of the entire Project area:

While Alternative 3 requires sampling and monitoring before drilling, the failure to obtain onsite data before analyzing the environmental effects means that such analysis cannot possibly be based on all of the relevant information.

Second, the monitoring is proposed for only the two preexisting holes with no ongoing monitoring of the groundwater at any of the holes being drilled as part of the Project. Thus, as a mitigation measure, it is unclear how the effects to groundwater caused by the drilling will actually be assessed. Furthermore, the 2012 EA does not explain why sampling at two discrete holes not newly drilled as part of the Project will provide accurate information about contamination to groundwater at the drill sites. The monitoring required as part of Alternative 3 fails to address the Project's impact to groundwater.

Gifford Pinchot Task Force v. Perez, 13-CV-00810, 2014 WL 3019165, at *31 (D. Or., July 3, 2014). The MEA suffers from the same problems. Although the agency has had almost 3 years to conduct a detailed baseline groundwater analysis, it relies exclusively on the minimal one-time sampling of 3 previously drilled holes in the Fall of 2014. *See* MEA at 1, relying on Appendix G (Groundwater Resources Report).⁶ Based on that Report, the MEA concludes that:

These drillholes were sampled during the baseline groundwater quality assessment and are considered by the URS investigators to be representative of the groundwater conditions within the Project Area based on the location of the samples obtained and results of analytical testing performed on groundwater as described within the Groundwater Resources Report in Appendix G.

Id., at 36. Outside of this statement, no independent Forest Service or BLM analysis is provided. The Report acknowledges the limited sampling and limited conclusion obtained from that sampling:

[T]he groundwater samples collected from the three holes drilled during past mineral

⁶ The MEA also continues to rely on future mitigation and monitoring as a substitute for accurate baseline analysis, which the Court found to be in violation of NEPA. *See id.*, App. G, at 47 (“monitoring the known groundwater conditions at select sampling sites before, during, and after drilling would be conducted.”).

exploration programs are also similar. This *suggests* that the groundwater quality in terms of the elevated arsenic is *possibly* reflective of the site-specific background conditions.

Id., App. G, at 31 (emphasis added). This certainly is not the comprehensive baseline analysis ordered by the Court.⁷ The EA's sole groundwater baseline sampling occurred at only these 3 holes:

A confined to semi-confined groundwater bedrock aquifer appears to be present beneath the Project Area based on the artesian conditions observed at three drilled holes that were sampled during the autumn of 2014 (Horse Camp, Pad 10 and Pad 21 drill holes²); see Figure 10, Surface Water and Groundwater Sampling Locations – 2014. All three drill holes were completed in conjunction with historical exploratory drilling. The Horse Camp Drill Hole is located along USFS Road 2612 east of the proposed security gate and in the easternmost portion of the Project Area. The Pad 10 and Pad 21 drill holes are associated with the proposed respective drill pads that are located in the eastern and central portions of the Project Area, respectively.

Id., App. G, at 18. Also, it appears that this sampling occurred only once, sometime during the Fall of 2014. No explanation is given as to why these sites could not have been sampled throughout the past few years to obtain a more representative data set.

Further, that Report noted the existence of 2 other artesian wells/holes in the Project Area that were **not** analyzed. “Based on the review of the historical exploration drill logs, artesian conditions were also encountered in two other drilled holes that were completed within the Project Area. These included one drill hole located at Pad 11 within the north-central portion of the site, and one drill hole located at Pad 6 in the southern, lowermost portion of the Project Area.” *Id.*

⁷ Also, as noted herein, the results are not “similar,” the Arsenic readings differ by an entire order of magnitude and the Zinc readings are two to three times different. *Id.*, App. G, at 22, Table 2.

Thus, at a minimum, reliance on sampling of only 3 holes, when 2 others were easily available, shows that the sampling was not fully “representative” of the entire Project site, as asserted by the company that prepared the Appendix G Report.

In addition, that Report noted the existence of dozens of other previous holes in the Project area that were never sampled. *See id.*, App G, at Figure 6. No scientific justification is provided as to why the baseline sampling was limited to only 3 holes with artesian pressure conditions instead of the numerous other holes that are available for sampling – let alone why the other 2 artesian holes were not sampled and analyzed.

Even a review of the 3 holes that were sampled shows a wide disparity between the results. *See id.*, App. G, at 22, Table 2. Some results, such as for toxic Arsenic, differ by an order or magnitude. *Id.* The results for Zinc differ by two or three times the sampling results from the other sites. *Id.* No effort is made to reconcile these differences. More importantly, these striking differences lead to the conclusion that groundwater quality varies greatly across the site, and it is still unknown what the levels are at other locations. This is especially critical due to the fact that the Project proposes to drill 63 holes from 23 sites spread out across the area. Clearly, a more representative sampling and analysis study is needed to accurately ascertain the baseline groundwater conditions.

The MEA admits that due to the elevated copper concentrations in the surface waters, the Project would utilize the various, but unspecified, drill holes as the source of water for the drilling: “The Proposed Action would use groundwater available from previous drill holes within the Project Area as the primary source of water for drilling fluids.” *Id.*, App. G, at 40.⁸ It is

⁸ “It should be noted that even if relevant permits could be acquired, the on-site surface could not be utilized as a water source for drilling due to the elevated concentrations of copper.” *Id.*, App. G, at 41.

unclear if this reference to “previous drill holes” means just the 3 holes with artesian conditions, the other two holes with artesian conditions noted above, or any of the other dozens of holes shown in Figure 6 of the Report. Although, as noted above, limiting the baseline sampling to just the 3 artesian holes is problematic, any use of these other holes necessarily means that water from these holes could have been obtained for baseline sampling. Thus, for whatever situation, the NEPA mandates for full baseline and impacts analysis is lacking.

It should be noted that if the water source holes include more than the 3 artesian holes, it would require additional infrastructure not analyzed in the EA (in addition to potential violations of the Riparian protections in the Forest Plan for the structures and support facilities needed for this water delivery). At a minimum, the failure of the MEA to specify which holes will be utilized for the drilling water precluded public review and thus further violates NEPA.

This objection can be resolved by conducting a full baseline analysis, with adequate sampling, to comply with NEPA and the Court’s Order.

This issue was raised by CFC (previously Gifford Pinchot Task Force) in comments to the Agency. *See* Exhibit 1, at 43.

VIII. Due to the Inadequate MEA, the FONSI Cannot Be Supported Under 40 C.F.R. §

1508.27 and the Agencies Must Prepare and EIS.

“If an agency decides not to prepare an [Environmental Impact Statement (“EIS”)], it must supply a convincing statement of reasons to explain why a project’s impacts are insignificant. The statement of reasons is crucial to determining whether the agency took a hard look at the potential environmental impact of a project.” *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 937 (9th Cir. 2010) (finding that Forest Service violated NEPA in issuing FONSI based on

inadequate analysis). “An agency cannot . . . avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment. Instead, an agency must provide a reasoned explanation of its decision.” *Jones v. Gordon*, 792 F.2d 821, 828 (9th Cir. 1986); *see also*, *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213–14 (9th Cir. 1998) (ruling that an EIS was required where the Forest Service lacked information about how project may affect sediment input into streams); *Anderson v. Evans*, 371 F.3d 475, 489–93 (9th Cir. 2004) (holding that “uncertain” impacts required an EIS). “An agency is required to prepare an EIS when there are substantial questions about whether a project *may* cause significant degradation of the human environment.” *Native Ecosystems Council v. United States Forest Serv.*, 428 F.3d 1233, 1239 (9th Cir. 2005) (emphasis in original). As the Ninth Circuit noted, “this is a low standard.” *California Wilderness Coal. v. United States*, 631 F.3d 1072, 1097 (9th Cir. 2011). “An agency cannot avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment.” *Jones v. Gordon*, 792 F.2d 821, 828 (9th Cir. 1986). “The agency must supply a convincing statement of reasons why potential effects are insignificant.” *The Steamboaters v. Fed. Energy Regulatory Comm’n*, 759 F.2d 1382, 1393 (9th Cir.1985).

These requirements have not been satisfied by the Forest Service’s FONSI, which is based on an inadequate MEA. The Agencies’ Draft Decision has failed to properly address both context and intensity. The FONSI, like the MEA ignores the context of the project. NEPA regulations require that both long term and short-term effects be taken into account. 40 C.F.R. § 1508.27(a). Mining is an entirely foreseeable effect of mineral exploration, and yet the Agencies have steadfastly refused to examine potential effects from a future hard rock mine. The

regulations similarly list affected interests as a context that must be analyzed. *Id.* Ascot's affected interest in the project area is rooted in the possibility of future mineral extraction. The FONSI fails to acknowledge and analyze the context of mineral exploration and possible future mineral extraction..

Furthermore, the FONSI has failed to properly address the intensity of the project. *See id.* § 1508.27(b). The FONSI improperly and arbitrarily determined that none of the ten intensity factors were implicated by the Proposed Action. *See* Draft Decision, at 12–15. In fact, the proposed action will likely have impacts under at least 7 of the ten factors listed in NEPA regulations, as discussed below. *See* 40 C.F.R. § 1508.27(b).

- 1) The draft decision fails to adequately analyze or disclose the projects impacts, particularly regarding effects to recreation access. The Draft Decision also fails to adequately analyze baseline groundwater conditions and effects to groundwater. The analysis regarding the projects adverse effects is insufficient under 40 C.F.R. § 1508.27(b)(1).
- 2) The Draft Decision fails to adequately consider effects to public health and safety, as required by 40 C.F.R. § 1508.27(b)(2). The Draft Decision points to the temporary restrictions of public access to the drill sites to support their finding. However, the MEA never specifies the extent of this restriction, thus it is impossible to know if the restriction will be adequate. Furthermore, the MEA fails to adequately analyze baseline groundwater conditions or effects to groundwater. Groundwater contamination poses a serious threat to public health and safety and must be analyzed thoroughly.

- 3) The Draft Decision's determination that the project will have no impacts on unique resources is inadequate. *See id.* § 1508.27(b)(3). The determination that the project will not affect the Mount St. Helens National Volcanic Monument was made with minimal evidence. Here the fact that the project area includes LWCF lands with their primary recreational purpose is a "unique characteristic" that the MEA fails to fully consider. Thus, the Decision Document fails to fully disclose and analyze the potential effects to the project area's unique recreation values, including the Green River Horse Camp.
- 4) The effects of this project on the quality of the human environment are highly controversial, contrary to the Agencies' assertion otherwise. *See* Draft Decision, at 13; *see also* 40 C.F.R. § 1508.27(b)(4). The Agencies' determination regarding effects to groundwater is being challenged on a specific, factual basis. Furthermore, the effects on recreation access are inherently controversial because the extent of closure has not been adequately disclosed and the agencies are proposing to allow prospect drilling on LWCF lands whose primary purpose is to provide recreational opportunities to the public. Without knowing the extent of closure in specific, measurable terms, the public can only use speculate as to full impact over the next six years that the project may span. *See* Exhibit 8, at 2–3; Exhibit 9, Decl. of Charlotte Persons, at 2. The limited definitive information in the MEA points to more significant effects than the Agencies have acknowledged, making the Agencies' determination highly controversial.
- 5) This project's effects on the human environment are extremely uncertain. *See* 40 C.F.R. § 1508.27(b)(4). The analysis of baseline groundwater conditions is

inadequate, as discussed above. Without knowing the true baseline conditions, the project planners cannot know for sure what the full range of effects of the project will be. Similarly, the effects to recreation are uncertain because the Agencies refuse to disclose the extent of closure in either a temporal or spacial sense. One cannot be certain about the effects to recreation if one does not know when and where recreators will be excluded in the project area.

- 6) The proposed action is directly related to significant other actions and carries significant cumulative effects. According to the CEQ “[s]ignificance 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.” 40 C.F.R. § 1508.27(b)(7). As discussed above, the purpose of mineral exploration is to demonstrate the viability of a future mine. Ascot is not drilling for scientific or recreational purposes, and indeed could not apply for the permits it has without the intention to develop a mine. *See* discussion, *supra* p. 21–27. The refusal of the Agencies to acknowledge the connection between a prospecting permit and extracting minerals is not only contrary to BLM’s own regulations, but is further a mockery of the CEQ regulations.
- 7) Approximately 168 acres (parcels MS-1329 and MS-1330) of the project area were acquired by the Forest Service specifically for the purpose of recreation. The proposed action certain to interfere with recreation on these parcels, because it is fundamentally incompatible with recreation. *See* discussion, *supra* p. 11. This constitutes a violation of the LWCF Act and the Reorganization Plan. Thus, the

action threatens a violation of Federal Law, triggering an additional significance factor. *See* 40 C.F.R. § 1508.27(b)(10).

If even *one* of the above intensity factors exists, an EIS may be required. *Ocean Advocates v. United States Army Corps of Eng'rs*, 402 F.3d 846, 865 (9th Cir.2004) (holding that “[a] court may find substantial risk of a significant effect based on just one of these factors”). Here, 7 factors may apply, easily justifying an EIS. An EIS “must be prepared if substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor.” *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006). “[A] plaintiff need not show that significant effects *will in fact occur*, but if the plaintiff raises substantial questions whether a project may have a significant effect, an EIS must be prepared.” *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998) (emphasis in original). The decision to issue a FONSI is thus arbitrary and capricious.

The Project poses potentially significant risks to recreation, ground and surface waters, air quality, wildlife and wildlife habitat, and other resources. Without the required hard look, and baseline, cumulative impacts, and connected impacts analysis, it is impossible to fully ascertain the level of threats to these public resources. Because of the potentially significant impacts, coupled with the lack of required analysis under NEPA, the FONSI and decision not to prepare an EIS cannot stand.

Overall, the deficient MEA renders the Decision/FONSI inadequate. “[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) (Forest

Service violated NEPA in issuing FONSI based on inadequate analysis); *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1223–24 (9th Cir. 2008) (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.”). This objection can be resolved by withdrawal of the Forest Service’s FONSI and preparation of a DEIS.

This issue was raised by CFC (previously Gifford Pinchot Task Force) in comments to the Agency. *See* Exhibit 1, at 32.

Conclusion

Each of CFC’s objections set forth above, individually and collectively, require the Forest Service to withdraw the Draft Decision and MEA. Then the Forest Service and BLM should prepare a comprehensive Draft EIS to fully address all the direct, indirect, and cumulative impacts from the proposed prospecting, including a potential future mine, and with particular attention paid to the legal standard for finding interference with recreation. Then, after the BLM and Forest Service have allowed public comment on that new NEPA analysis, the Forest Service can reconsider the proposed prospecting and issue a new draft decision, subject to the Forest Service’s objection process.

Sincerely,

/s/Tom Buchele
Tom Buchele
Kathryn Roberts
Roger Flynn
Counsel for CFC (formerly Gifford Pinchot Taskforce)

Objection Exhibit List

(Digital Copies of all Exhibits Included on CD with Hard-Copy of this Objection submitted via U.S. Certified Mail)

Exhibit 1	CFC, Comment on Draft Modified Environmental Assessment (Feb. 4, 2016)
Exhibit 2	Jan. 2016 FOIA Request
Exhibit 3	Aug. 2017 e-mail from Melani Gonzalez to Laurele Fulkerson
Exhibit 4	Sept. 2017 Letter from Tom Buchele to Forest Service (Melani Gonzalez)
Exhibit 5	Forest Service Response to Letter
Exhibit 6	CFC Appeal of BLM FOIA Production.
Exhibit 7	BLM Partial Response to CFC FOIA Request
Exhibit 8	Declaration of Nicole Budine, member CFC
Exhibit 9	Declaration of Charlotte Parsons, member CFC
Exhibit 10	Declaration of Susan Saul, member CFC
Exhibit 11	Declaration of Alice Linker, member CFC
Exhibit 12	Declaration of Craig Lynch, member CFC
Exhibit 13	Ascot Resources, Proposed Drill Sites Map (2012)
Exhibit 14	Goat Mountain Exploration Permit Postcard Petition
Exhibit 15	Letter from W. John Bohrnsen, Clark-Skamania Flyfishers
Exhibit 16	Letter from Paul Kundtz, Northwest Director, Trust for Public Land
Exhibit 17	Documentation of the Transfer to the US