

Gifford Pinchot Task Force \* Washington Wild \* American Whitewater \* American Rivers \*  
Mazamas \* Washington Trails Association \* The Mountaineers \* Lower Columbia Canoe Club \*  
Conservation Northwest \* Willapa Hills Audubon Society \* Sierra Club \* Clark-Skamania Flyfishers  
\* Vancouver Wildlife League \* Mount St. Helens Club \* Friends of Clark County \*  
National Park Conservation Association

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August 15, 2012

To Whom this May Concern,

Thank you for the opportunity to provide comments on the Goat Mountain Prospecting Environmental Assessment (EA). This letter is signed by 16 organizations, which represent tens of thousands of citizens from Oregon and Washington State dedicated to protecting and restoring Northwest ecosystems and our iconic fish and wildlife populations. The following comments detail our 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).

## **I. Concerns Regarding the Process**

The purpose of an 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].”<sup>1</sup> EAs must “include brief discussions of the need for the proposal, of alternatives..., of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.”<sup>2</sup> An EIS must be completed if, based on the EA, the proposed federal project will “significantly affect[] the quality of the human environment.”<sup>3</sup> “Effects” for purposes of the National Environmental Policy Act (NEPA) include “ecological [], aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative.”<sup>4</sup> We believe that the BLM should not issue a permit for exploratory drilling because of the environmental and human effects the drilling will

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<sup>1</sup> 40 C.F.R. § 1508.9 (2012).

<sup>2</sup> *Kern v. U.S. Bureau of Land Mgt.*, 284 F.3d 1062, 1076 (9th Cir. 2002).

<sup>3</sup> 42 U.S.C.A. § 4332(2)(C) (2012); *see Kern*, 284 F.3d at 1067, *supra* n. 2 (“NEPA requires federal agencies to prepare an EIS prior to taking major Federal actions significantly affecting the quality of the environment.”) (Internal quotations omitted)).

<sup>4</sup> 40 C.F.R. § 1508.8(b) (2012).

have. However, should the BLM 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 Bureau of Land Management (BLM) and the United States Forest Service (USFS) submitted a comprehensive schedule for this project at three public meetings.<sup>5</sup> The timeframe presented at those meetings is quite short for an adequate Environmental Analysis and a thorough review of comments being submitted. In the original schedule it showed that the EA was to be resubmitted approximately on May 22, 22 days after the close of the EA comment period on April 30, with a decision to be made shortly thereafter on June 1. If the schedule were to be followed, it certainly would not have provided for a meaningful review of the public comments. Although this project has not followed that schedule with the EA release to the public on June 28, 2012, we are concerned that there may be an effort to get back on schedule. One example of this concern is that the EA released to the public on June 28, 2012 was not clearly titled as a draft.

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.”<sup>6</sup> 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.”<sup>7</sup>

Additionally, the EA points to a project file in regards to specific documents used to justify some of the analysis in the EA, including information on the primary purpose of the land acquisition as well as for information on the polymers being used during the drilling.<sup>8</sup> In order to fully comment on the EA, the Gifford Pinchot Task Force (GPTF) and other signing organizations were required to request the project file and were unable to pinpoint the document on the primary purpose being referenced in the EA. To fully participate in the NEPA process the public should be given access to documents of importance to the analysis.

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<sup>5</sup> See attached Exhibit C. Photos taken at the Morton meeting by Jessica Schafer, Conservation Director, Gifford Pinchot Task Force

<sup>6</sup> *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)).

<sup>7</sup> *Id.* at 971 (quoting *West v. Secretary of Dept. of Transp.*, 206 F.3d 920, 930 n. 14 (9th Cir. 2000)).

<sup>8</sup> See Goat Mountain Hardrock Prospecting Permit Applications Environmental Assessment 7 (June 28, 2012) [hereinafter EA] (“The USFS conducted an evaluation, including consideration of the purposed for which the lands were acquired in order to reply to BLM. *This information is included in the project file for the subject application.*” (emphasis added)).

## II. 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 reason 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 Resource 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 any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as "crystal ball inquiry."<sup>9</sup>

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."<sup>10</sup> A future hardrock mine on 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 hardrock 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."<sup>11</sup> To determine the significance of a proposed action, an agency must consider

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<sup>9</sup> *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975) (quoting *Scientists' Institute for Pub. Info. v. Atomic Energy Comm.*, 481 F.2d 1079, 1092 (D.C.C. 1973). See also *Kern*, 284 F.3d at 1072, *supra* n. 2; *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)).

<sup>10</sup> 40 C.F.R. § 1508.25(a) (2012); *Kern*, 284 F.3d at 1075, *supra* n. 2.

<sup>11</sup> 40 C.F.R. § 1508.25(a)(2).

“[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.”<sup>12</sup> 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.*”<sup>13</sup>

In the Goat Mountain EA, BLM avoided its responsibility under NEPA to consider the potential cumulative impacts of a reasonably foreseeable future mine in the project area. Indeed, BLM claims that a mine at Goat Mountain is “only speculative” and that “potential concerns related to mine development lie beyond the scope of th[e] EA.”<sup>14</sup> According to BLM, 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.<sup>15</sup>

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 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.<sup>16</sup> 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.’”<sup>17</sup> 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].”<sup>18</sup>

Here, a mine on 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 a mine 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.<sup>19</sup> Second, both BLM and Ascot acknowledge that

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

<sup>13</sup> 40 C.F.R. § 1508.7 (2012) (emphasis added).

<sup>14</sup> EA at 12; *id.* at n. 9, (citing *Wilderness Workshop v. U.S. Bureau of Land Mgt.*, 531 F.3d 1220, 1229 (10th Cir. 2008) and *O’Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225, 236 (5th Cir. 2007)).

<sup>15</sup> EA at 26 (citing *Wilderness Workshop*, 531 F.3d at 1229, *supra* n. 14).

<sup>16</sup> *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 962 (9th Cir. 2003).

<sup>17</sup> *Id.* (noting that “speculation is . . . implicit in NEPA”).

<sup>18</sup> *Id.*; *N. Plains Resource Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1079 (9th Cir. 2011).

<sup>19</sup> *See* EA at 2.

significant mineral deposits exist in the project area to be evaluated with the proposed project.<sup>20</sup> Ascot's Chief Financial Officer Robert Evans has eagerly quoted this same fact.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup> Ascot Resources Inc. also sent out a pamphlet to select residents of Lewis, Skamania, and Cowlitz County.<sup>24</sup> On the third page, this pamphlet tells residents to "join the conversation to help create a state-of-the-art 21<sup>st</sup> century mine." This pamphlet is clearly developed to indicate that Ascot Resources Inc. intends to develop a mine in this location. Purposefully excluding any discussion of a mine 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,<sup>25</sup> it is *also* possible that the deposit *does* indeed exist and mining *would be* feasible. Both BLM and Ascot seem to think that the deposit does exist, and that it is likely feasible for development – hence the exploratory drilling; thus 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 BLM to include the environmental impacts from that mine in the EA.

The BLM's 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, BLM addresses "speculative" estimates and other related information as a "potential foreseeable action[]... in the [cumulative effects] analysis."<sup>26</sup> 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."<sup>27</sup> 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

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<sup>20</sup> See 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").

<sup>21</sup> Marquise 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](http://tdn.com/news/local/article_11d7a34c-fac2-11e0-a1be-001cc4c002e0.html)) (see Exhibit A).

<sup>22</sup> *Id.*

<sup>23</sup> *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](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).

<sup>24</sup> Ascot Resources, *An Opportunity for Your Consideration* (2011). See attached Exhibit D.

<sup>25</sup> EA at 26.

<sup>26</sup> *Wilderness Workshop*, 531 F.3d at 1229, *supra* n. 14 (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").

<sup>27</sup> *O'Reilly*, 477 F.3d at 237, *supra* n. 14 (quoting *Env'tl. Def. Fund v. Marsh*, 651 F.2d 983, 999 n. 19 (5th Cir. 1981) (emphasis added)).

proposed prospecting and the reasonably foreseeable – and, apparently, likely – future mine, BLM has violated NEPA and its underlying purpose.

B. A future hardrock 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 larger 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 collectively have a substantial impact.”<sup>28</sup> 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.”<sup>29</sup> If the projects have “independent utility,” they do not require the same EIS.<sup>30</sup>

Under Ninth Circuit law, the proposed exploratory drilling and a hardrock mine in the Goat Mountain area are connected actions under NEPA. The BLM should have considered the impacts of a hardrock 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 hardrock 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 hardrock 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.<sup>31</sup> 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.”<sup>32</sup> 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.<sup>33</sup>

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<sup>28</sup> *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).

<sup>29</sup> *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 894 (9th Cir. 2002).

<sup>30</sup> *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)).

<sup>31</sup> 531 F.3d at 1222, *supra* n. 14.

<sup>32</sup> *Id.* at 1228.

<sup>33</sup> *Id.* at 1231.

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.

### **III. Drilling is not Compatible with the Primary Purpose for Which the Land Was Acquired**

The EA 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 transferred to the Interior Department in 1946 by section 402 of the Reorganization Plan No. 3 of 1946, 5 U.S.C. App. 1.<sup>34</sup>

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.<sup>35</sup> Further, such acquisition is authorized only if it “will promote or protect the navigation of streams on whose watersheds they lie.”<sup>36</sup>

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.<sup>37</sup> 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.”<sup>38</sup>

The 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

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<sup>34</sup> 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.

<sup>35</sup> *Weeks Act*, 16 U.S.C.A. § 515 (2012) (hereinafter *Weeks Act*).

<sup>36</sup> *Id.*

<sup>37</sup> 16 U.S.C.A. § 4601-4-11 (2012).

<sup>38</sup> Pub. L. No. 94-422, §101(4), 90 Stat. 1313 (1976) (codified in 16 U.S.C. § 4601-9(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).

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.<sup>39</sup>

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

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.**<sup>40</sup>

Thus, 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.*<sup>41</sup> 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 beautify of his area which is to become an important Monument portal.”<sup>42</sup> 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” which have shaped historic and current use of the area.<sup>43</sup> In its draft FONSI, BLM proposes to permit mineral prospecting activities that are inconsistent 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.

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<sup>39</sup> 16 U.S.C.A. § 460L-4.

<sup>40</sup> 5 U.S.C.A. app. § 1 (2012) (emphasis added). *See also* Memorandum M-36993, at 3.

<sup>41</sup> EA at 8; 16 U.S.C.A. § 552 (2012).

<sup>42</sup> EA at 7.

<sup>43</sup> *Id.*; *see also* 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).

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.<sup>44</sup> Labeling such adverse impacts as “temporary” or “minimal” does not change the fact that they are inconsistent with the land’s primary purpose. Prospecting – and mining – activities at the Green River’s portal to the National Volcanic 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 Horsecamp, 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.<sup>45</sup> Mining would essentially destroy all scenic beauty of Goat Mountain and limit public use of this area.<sup>46</sup>

In this case, hardrock mineral exploration and/or development, as proposed by Ascot Resource 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 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.”<sup>47</sup> 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.<sup>48</sup> The statements included in paragraph 2, “nothing in this Act shall be construed as authorizing... buffer... 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.<sup>49</sup> The EA seems to argue that Congress’ creation of the Mt. 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.<sup>50</sup> However, the EA fails to include important historical information surrounding the development of the monument, including 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

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<sup>44</sup> EA at 101 (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”).

<sup>45</sup> See Exhibit E. 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.

<sup>46</sup> See Exhibit F. Exhibit F is a photograph of the Thompson Creek Mine in Idaho.

<sup>47</sup> *Weeks Act* § 6, *supra* n. 35.

<sup>48</sup> See EA at 7.

<sup>49</sup> EA at 7.

<sup>50</sup> EA at 7 (arguing that the lack of any “buffer” around the Monument automatically translates into a preference for mineral development).

monument bills being proposed would cost the government millions of dollars to buy out copper mining claims and threatened to veto the bills.<sup>51</sup> 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 too low to justify going ahead.”<sup>52</sup> Duval at that time opposed any national monument or park because they had “invested a hell of a lot of money in the area.”<sup>53</sup> 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. In fact, these subject lands were acquired by the Forest Service 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 land in question has 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 both 2010 and 2011 for essentially the same drilling project. This is of concern because the land was acquired for very specific purposes that will be directly affected by the drilling in question. Without the Forest Service perspective and a discussion of the potential reasons for compatibility, the EA is lacking analysis on this issue.

The EA mentions “[i]n 2006, the USFS responded to BLM’s request for input on an application for a hardrock mineral lease for the same lands” that are the subject of the current EA.<sup>54</sup> However, the EA fails to explain what the USFS’s response to that BLM request was. Instead, the EA directs the reader to the “project file” for this information. After looking through the project file, we found that there is general concern from the USFS regarding the primary purpose of acquisition. BLM’s failure to include this information in the EA itself and analyze the consequences of this action limits the information upon which the agencies and general public can draw to make a decision and give informed comments on the current proposal.

There is no one document that states the primary purpose for which the land was 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 Trusts for Public Lands to Bob Starke, US Forest Service 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 Mt. St. Helens National Volcanic

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<sup>51</sup> Andre Stepankowsky, *Peak Monument Near OK*, The Daily News (Mar. 13, 1982) (attached Exhibit G).

<sup>52</sup> Rick Seifert, *Peak Use Theories Debated*, The Daily News (Feb. 5, 1981) (attached Exhibit H).

<sup>53</sup> *Id.*

<sup>54</sup> EA at 7.

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.”<sup>55</sup>

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.”<sup>56</sup> 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 entering into such agreement or compact.*”<sup>57</sup> 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.”<sup>58</sup>

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.<sup>59</sup>

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.**”<sup>60</sup> 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);

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<sup>55</sup> 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).

<sup>56</sup> 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).

<sup>57</sup> *Weeks Act* 16 U.S.C.A. § 552, *supra* n. 35 (emphasis added).

<sup>58</sup> 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).

<sup>59</sup> Ltr. from Robert W. Williams, Forest Supervisor, U.S. Dept. of Agric. to Regional Forester, R-6 (Feb. 4, 1986) (attached Exhibit L).

<sup>60</sup> 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).

- (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 properties).<sup>61</sup>

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.

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 EA 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 EA states “[e]xisting reports suggest that this might be one of the largest copper-molybdenum-silver... porphyries of Miocene age known in Washington State.”<sup>62</sup> 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.<sup>63</sup> 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 EA 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.<sup>64</sup> However, the EA 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.<sup>65</sup>

In the 1980s, Duval approached TPL to divest its holdings in the Green River area.<sup>66</sup> TPL obtained this land from Duval. The purpose behind TPL’s involvement was “to preserve the integrity of the

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<sup>61</sup> *Id.*

<sup>62</sup> EA at 2.

<sup>63</sup> 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](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.

<sup>64</sup> EA at 2.

<sup>65</sup> See attached Exhibit N 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.

<sup>66</sup> Ltr. from Trust For Public Lands to Bob Starke, USDA-Forest Service Lands and Minerals (Apr. 26, 1984).

Green River.”<sup>67</sup> The Forest Service then purchased the land from TPL in 1986 using Land and Water Conservation Funds, 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 Funds 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.”<sup>68</sup>

Prior to acquisition, the Forest Service (FS) 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?”<sup>69</sup> Mineral development of the area was thought to be of low potential because of the value of the mineral 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 in the headwater area 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, hardrock 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.

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<sup>67</sup> Ltr. from Kim Miller, *supra* n. 55.

<sup>68</sup> USDA Proposed Land Purchase, January 16, 1986; Correspondence to Ralph Benson, Jan. 13, 1986.

<sup>69</sup> Trust for Public Lands, Correspondence, Apr. 26, 1984.

#### IV. Effects of the Proposed Project on 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.<sup>70</sup> 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.<sup>71</sup> 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.<sup>72</sup> The use of permit-exempt wells has exploded over the last few decades, and the issue of using permit-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 EA did not perform a thorough analysis to adequately address the water resource impacts from exploratory drilling. The EA also fails to ensure that senior downstream water rights will not be impaired by groundwater. The analysis in the EA 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.<sup>73</sup>

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<sup>70</sup> 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.

<sup>71</sup> RCW 90.44.020; See also *Rettkowski v. Department of Ecology*, 122 Wash.2d 219, 226 n.1, 858 P.2d 232 (1993).

<sup>72</sup> 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

<sup>73</sup> EA p. 33

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.”<sup>74</sup> 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 area’s value for salmon and steelhead recovery 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.<sup>75</sup> 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.”<sup>76</sup> 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 gpd for its industrial use, similar exploratory drilling operations use significant amounts of water, potentially more than 5,000 gallons of water per day. The EA fails to adequately analyze the consequences of the high water use on the aquifer levels and stream flows in nearby streams, like the Green River. The EA 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.

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<sup>74</sup> <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.”)

<sup>75</sup> 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.)

<sup>76</sup> WAC 173-526-070(2)

The information provided in the EA 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.”<sup>77</sup> However, the EA 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 EA 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 ground water 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 Resource 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 EA claims that it will have a negligible effect on the system, but increasing the water table could potentially impact soil stability, filtration efficiency, and other consequences.

#### B. The EA 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 EA, Ascot Resource 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.”<sup>78</sup> However the EA does not include a comprehensive list of the additives to be used (i.e. AQUAGUARD, BENSEAL, 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...”<sup>79</sup> To better understand the effects of the additives on the environment, the EA 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.

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<sup>77</sup> EA at 36.

<sup>78</sup> EA at 20.

<sup>79</sup> EA at 20.

The EA does list that Bentonite and polymer-drilling additives will be used.<sup>80</sup> 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 EA 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 EA 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.,<sup>81</sup> 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.”<sup>82</sup> However, the current EA only proposes that the “water used would be infiltrated back into the substrate either through down-hole loss or infiltration into drill sumps.”<sup>83</sup> The EA 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.<sup>84</sup> 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. 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.”<sup>85</sup> 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.<sup>86</sup> 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.”<sup>87</sup> There is a very real potential that Ascot’s drilling operations could have unanticipated

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<sup>80</sup> See EA at 20.

<sup>81</sup> 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).

<sup>82</sup> 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).

<sup>83</sup> EA at 41–42.

<sup>84</sup> EA at 1.

<sup>85</sup> *Buckhorn mine fined \$395,000*, *supra* n. 82.

<sup>86</sup> *Washington Wild*, Buckhorn Mine Fined for Water Quality Violations, [http://www.wawild.org/index.php?option=com\\_content&task=view&id=622&Itemid=1](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](http://rocktheearth.org/joomla/index.php?option=com_content&task=view&id=65&Itemid=40) (accessed Aug. 9, 2012).

<sup>87</sup> *Rock the Earth*, *supra* n. 86.

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 EA 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.

## **V. 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 EA does not adequately analyze the project's total impacts on soils nor make these impacts known. These are significant defects in the EA 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.<sup>88</sup> 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.

### **A. The EA 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. GPTF Conservation Director, Jessica Schafer, along with an intern, photographed sites of heavy compaction from drilling that occurred in this area in 2010.<sup>89</sup> The EA 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.<sup>90</sup> 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.<sup>91</sup> Although it is not adequately discussed in the EA, it is well documented that logging machinery and other high intensive equipment significantly compacts soil. The EA 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 EA which states that "proposed action is expected to be relatively minor considering that FS Road 2612 is already well compacted."<sup>92</sup> 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

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<sup>88</sup> Beschta et al. 2004.

<sup>89</sup> See attached Exhibit O. Photographs taken on July 13, 2012.

<sup>90</sup> CWWR, 1996; Beschta et al., 2004.

<sup>91</sup> M. Peterson, P. Ayers, & D. Westfall, *Soil: Managing Soil Compaction*, 1, 1 (available at <http://mining.state.co.us/TechnicalBulletins/ManagingSoilCompaction.pdf>).

<sup>92</sup> EA at 45.

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 EA 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.<sup>93</sup> The EA 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. 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 EA has no analysis of the magnitude and duration of elevated erosion caused by the construction of so-called “temporary” roads.

**VI. The EA Fails to Adequately Analyze Road Usage and Effects from Increased Road Usage**

In our scoping comments, we were very concerned 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 EA 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 EA 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

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<sup>93</sup> Potyondy et al. 1991; Menning et al., 1996, Beschta et al. 2004; Foltz et al., 2007

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 EA.

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.

## **VII. The EA Does Not Adequately Consider the Project's Effects on Recreation**

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.”<sup>94</sup> “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.”<sup>95</sup> 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.”<sup>96</sup> “The purpose of an Unroaded Recreation area is to ‘provide a variety of dispersed recreation opportunities in a semi-primitive or undeveloped setting.’”<sup>97</sup>

The EA rightly points out that the area provides a wide variety of recreational opportunity, but fails to adequately analyze the real impacts to recreation in this area.<sup>98</sup> The area is home to several significant trails, provides access to the river for fishing, and contains the Green River Horse Camp. The EA fails to discuss some of the significant impacts in favor of dismissing effects as localized and not lasting. For example, the EA states “[o]pportunities for primitive and unconfined recreation would not be available beyond the security gate.... However, this area has been unavailable for more than 10 years because the road has been decommissioned.”<sup>99</sup> The EA goes on to state that because other roads remain open with access to “the USFS Green River and Goat Mountain Trails... [recreation] would not be impacted by this Action.”<sup>100</sup> The EA inadequately analyzes the impacts to recreation by dismissing the use of the actual drill location without due consideration.

Although the roads have been decommissioned, the area still provides opportunities to hike, hunt, 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 EA inappropriately dismisses the recreational opportunities of the area without due consideration. Drilling in this area would essentially prohibit use of the entire area beyond the gate for hiking,

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<sup>94</sup> 16 U.S.C.A. § 529 (2012).

<sup>95</sup> 16 U.S.C.A. § 531(a) (2012).

<sup>96</sup> The Gifford Pinchot National Forest Land and Resource Management Plan (GPNF LRMP); EA at 100.

<sup>97</sup> EA at 100.

<sup>98</sup> See EA at 99.

<sup>99</sup> EA at 100.

<sup>100</sup> EA at 100–02.

hunting, and wildlife and bird watching due to direct prohibition and noise in the direct vicinity of the drilling. Beyond that effect, recreation on a wider scale will be severely impacted by noise, dust, lights, and the physical presence of drill equipment.

We are increasingly disappointed that there was terse discussion of the real impacts from noise, dust, lights, and vehicular traffic to recreation, with these issues being brought up in the EA in only a rudimentary way.<sup>101</sup> On July 13, 2012, 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.<sup>102</sup>

The Biological Assessment states that the drill pad sites will take up to 20 x 20 feet at a maximum.<sup>103</sup> 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 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.”<sup>104</sup> 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 2, 2013. 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.

The agencies need to consider the comments in regards to recreation in more depth and include adequate analysis of the project’s effects on recreation in the final EA or EIS and decision. Recreation clubs 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.”<sup>105</sup> In *Anglers*, two environmental groups challenged the USFS’s and BLM’s consideration of recreational effects from exploratory gas and oil drilling on a parcel of land within the Huron-Manistee National Forest. They

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<sup>101</sup> See EA at 56–59, 89–99, 101–04, 108–10

<sup>102</sup> Email from Craig Lynch, [ctflyfish@aol.com](mailto:ctflyfish@aol.com) to Darcy Nonemacher, Associate Director Washington Conservation Programs American Rivers, [DNonemacher@americanrivers.org](mailto:DNonemacher@americanrivers.org) *Recreation Inventory for Green River* (July 19, 2012).

<sup>103</sup> EA at Appendix E: Biological Assessment 2 [hereinafter BA].

<sup>104</sup> EA at 99.

<sup>105</sup> *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).

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.”<sup>106</sup> 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.”<sup>107</sup> 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).”<sup>108</sup> The court found that “the defendants ‘entirely failed to consider an important aspect of the problem,’ rendering their decision arbitrary and capricious.”<sup>109</sup>

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 EA inadequately analyzes the effects 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.”<sup>110</sup> There are archery, muzzleloader, and modern firearm hunting permits available.<sup>111</sup> A basic elk hunting license costs \$495 for a non-resident, \$48.40 for a resident, and \$19.80 for a youth or disabled person.<sup>112</sup> 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.”<sup>113</sup> 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 blocked, then 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.

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<sup>106</sup> *Id.* at 820.

<sup>107</sup> *Id.* at 825.

<sup>108</sup> *Id.* at 826.

<sup>109</sup> *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)).

<sup>110</sup> Doug Rose, *Cascade Mountains Elk*, [http://www.gameandfishmag.com/2010/09/29/hunting\\_elk-hunting\\_wo\\_aa105502a/](http://www.gameandfishmag.com/2010/09/29/hunting_elk-hunting_wo_aa105502a/) (last updated Sept. 29, 2010).

<sup>111</sup> Washington Dept. of Fish & Wildlife, *Hunting*, “Summary of General Hunting Season Dates,” [http://wdfw.wa.gov/hunting/regulations/summary\\_hunting\\_dates.html](http://wdfw.wa.gov/hunting/regulations/summary_hunting_dates.html) (accessed July 31, 2012).

<sup>112</sup> Washington Dept. of Fish & Wildlife “Information: License Fees: Big Game,” <https://fishhunt.dfw.wa.gov/wa/license> (accessed July 31, 2012).

<sup>113</sup> 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/>).

The EA 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.<sup>114</sup> 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.

The EA also inadequately analyzes affects to tourists using Mount St. Helens. Mount Saint 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.<sup>115</sup> 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.”<sup>116</sup> 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.<sup>117</sup> It is imperative that the area surrounding the Mount Saint Helens National Volcanic Monument does not deteriorate, especially considering the sheer number of visitors to the pristine environment each year. The EA does little to address any affects to visitors’ experience of Mount St. Helens and the scenic value of Goat Mountain.

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.<sup>118</sup>

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, for example horseback riding, hunting, wildlife watching and hiking, in favor of other activities – exploratory drilling.

### **VIII. The EA Does not Adequately Address the Socio-Economics of the Region and Fails to include Economic Impacts to Recreation and Tourism**

Although we appreciate that the EA included a section on socioeconomics, the EA lacks analysis of the impacts of recreation on the economic climate. In fact, the EA does not include anything on the value of recreation for Washington State and the region because of tourism, recreation, and other

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<sup>114</sup> EA at 101.

<sup>115</sup> 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?](http://tdn.com/news/local/coveted-mount-st-helens-summer-hiking-permits-tough-to-come/article_92c4b434-d200-11e1-afe8-001a4bcf887a.html?)).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

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

economic drivers for the area. Without this analysis, the EA 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.<sup>119</sup> During 2010, "travel spending in Washington directly supported 143,000 jobs with earnings of \$4.3 billion."<sup>120</sup> Forty-two point seven percent of Washingtonians sightsee, while 27.8 percent of Washingtonians specifically sightsee in scenic areas.<sup>121</sup>

The EA 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."<sup>122</sup> These jobs consist of one drill foreman, two to four drillers, two to four drill helpers, two to three geologists, two to three core technicians, two local trail and pad contractors, and one security employee.<sup>123</sup> If a water truck is used, Ascot may employ one or two additional persons to transport water.<sup>124</sup> However, Ascot has said that while it attempts to hire local personnel when appropriate, some jobs require specialists.<sup>125</sup> 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.<sup>126</sup> 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.<sup>127</sup> "Drilling would start as early as late May and be completed, including reclamation, by late October 2013."<sup>128</sup> 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 private residences.<sup>129</sup> This expectation reconfirms the intention that these jobs will only be temporary.

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<sup>119</sup> 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").

<sup>120</sup> *Id.* at 6.

<sup>121</sup> SCORP regional data.

<sup>122</sup> EA at 23.

<sup>123</sup> EA at 106.

<sup>124</sup> EA at 107.

<sup>125</sup> EA at 106.

<sup>126</sup> 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](http://tdn.com/news/local/public-hearing-on-exploratory-drilling-near-volcano-draws-about-people/article_1ebab6cc-5877-11e1-b732-001871e3ce6c.html)).

<sup>127</sup> EA at 22.

<sup>128</sup> *Id.*

<sup>129</sup> EA at 106.

The EA indicates, “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.”<sup>130</sup> 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 EA 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 EA. (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.’”<sup>131</sup>

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.<sup>132</sup> 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.”<sup>133</sup> 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.”<sup>134</sup> The Forest Service received comments from various groups, including the Arizona Game and Fish Department and the Department of Interior’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.”<sup>135</sup> 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 impact statement. Because the agency did not make such a disclosure, the final statement violates NEPA and its implementing regulations.”<sup>136</sup>

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

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<sup>130</sup> EA at 106 (emphasis added).

<sup>131</sup> *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)).

<sup>132</sup> 349 F.3d 1157, 1160 (9th Cir. 2003).

<sup>133</sup> *Id.* at 1160–61.

<sup>134</sup> *Id.* at 1161.

<sup>135</sup> *Id.* at 1164–65.

<sup>136</sup> *Id.* at 1168.

agencies should consider information based on tourism as well as the environmental effects from the project.

## **IX. The EA Fails to Adequately Analyze Effects to 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 EA does not adequately consider effects on important wildlife species**

The EA'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.<sup>137</sup> Rather than analyze the issues, the EA 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.<sup>138</sup>

The EA 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.<sup>139</sup> 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.<sup>140</sup> For example, elk are greatly impacted by roads and road use, avoiding areas where there is more noise and road infrastructure.<sup>141</sup> The EA 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.<sup>142</sup>

The EA also fails to analyze impacts to species from noise.<sup>143</sup> 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 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,

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<sup>137</sup> See EA at 47–64

<sup>138</sup> See EA at 56.

<sup>139</sup> Harris 1984; Wilcove et al. 1986; Saunders et al. 1991 in Meffe et al. 1997

<sup>140</sup> See Noss and Cooperrider 1994.

<sup>141</sup> 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. Legee (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.

<sup>142</sup> EA at 57.

<sup>143</sup> See EA at 57.

mating, and signaling. Again the EA dismisses these concerns stating that impacts will be temporary in nature.<sup>144</sup>

Additionally, the EA never mentions black bear as being present 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 EA does not adequately analyze effects to fisheries

A major concern for aquatic species is the effects that road building and drilling will have on sediment loading in rivers, streams, and other water bodies close to the proximity of the drilling site. The Green River is not far from the major activity and is home to a vast array of aquatic fish and insects. 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.<sup>145</sup> The Green River also contains important current and potential habitat for winter steelhead, fall Chinook, and coho.<sup>146</sup> Increased sediment in watersheds can have severe effects on the aquatic habitat and spawning areas needed for fish survival.

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 EA states that Ascot will use minimal amounts, but does not put a limit on the amount. It is possible that these chemical substances can have adverse effects on fisheries and those effects should be analyzed in the EA.

As previously mentioned in our scoping comments, the Green River is a “Wild Stock Gene Bank” for salmonoid species. Reductions in instream flow due to withdrawal of water that is hydraulically connected to surface waters as well as pollution from chemicals and sediment can have a serious effect on salmonoid species and degrade habitat downstream. The EA does not adequately address this issue. Rather, the EA states that there is a fish barrier that limits the reach of anadromous fish.<sup>147</sup> 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 effects to water quality due to chemical substances can affect fish downstream. These concerns were not addressed in the EA.

### X. **The Draft FONSI Draws Unsubstantiated Conclusions Based on an Inadequate NEPA Analysis**

An agency prepares an environmental assessment to provide “sufficient evidence and analysis for determining whether to prepare an [EIS] or [FONSI].”<sup>148</sup> The analysis must consider the direct, indirect, and cumulative environmental effects of the proposed action with past, present, and future agency and private activities.<sup>149</sup> In determining whether a project will have significant impact on the

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<sup>144</sup> See Barber et al 2010.

<sup>145</sup> 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.

<sup>146</sup> See WRIA 26 watershed plan (p. 2-17) available at <http://www.lcfrb.gen.wa.us/w25/WRIA%2025-26%20Watershed%20Management%20Plan.pdf>.

<sup>147</sup> See EA 3.6.13.

<sup>148</sup> 40 C.F.R. § 1508.9.

<sup>149</sup> See 40 C.F.R. §§ 1508.8, 1508.25.

environment, an agency must consider “[whether] the action is related to other actions with individually insignificant but cumulatively significant impacts.”<sup>150</sup> 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.”<sup>151</sup> NEPA requires that agencies take a “hard look” at the environmental consequences of proposed actions on the project environment.<sup>152</sup> The Goat Mountain EA fails to satisfy these requirements because it lacks discussion of some of the project’s potential direct, indirect, and cumulative environmental effects. Further, the EA 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 EA stage. To the extent that the FONSI’s conclusions rely on the deficient EA, the FONSI is arbitrary and capricious and contrary to law.

A. The EA fails to discuss some potential direct and indirect effects from the proposed project

Based on the analysis within the EA, the FONSI concludes that the environmental effects of the project on various natural resources will be “minimal or undetectable.”<sup>153</sup> However, for the reasons discussed below, the EA fails to provide a clear, comprehensive, and/or scientifically supported analysis of the project’s direct and indirect effects.

First, the EA fails to address and/or quantify the direct and indirect effects of some project activities. For instance, the EA fails to clearly discuss potential runoff effects from soils stockpiled in the road reclamation process.<sup>154</sup> Though the EA 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 EA fails to quantify and discuss the impacts of the increased potential from erosion due to the adjusted drilling schedule.<sup>155</sup> If drilling occurs during periods of higher precipitation, BLM admits that work such as soil staging, temporary culvert discharge, and increased water truck traffic could “increase the potential for erosion.”<sup>156</sup> Despite this admitted adverse effect, BLM nonetheless summarily concludes that the likelihood of soil erosion and resulting deleterious sedimentation is low.<sup>157</sup> Additionally, the EA fails to clearly discuss potential impacts from the temporary water storage tank proposed under Alternative 3.<sup>158</sup> The EA 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 EA fails to

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<sup>150</sup> 40 C.F.R. § 1508.27(b)(7).

<sup>151</sup> *Id.*

<sup>152</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

<sup>153</sup> Draft Proposed Goat Mountain Hardrock Mineral Prospecting Permit Application Finding of No Significant Impact 2, 5 [hereinafter FONSI].

<sup>154</sup> *See* EA at 17.

<sup>155</sup> EA at 46.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> EA at 24.

discuss the possibility of spreading noxious weeds as heavy equipment moves from drill site to drill site.<sup>159</sup>

Second, the EA 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 EA'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."<sup>160</sup> 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."<sup>161</sup> When the Ninth Circuit amended its opinion on May 17, 2011, the court did not change the stormwater-runoff rule.<sup>162</sup> BLM's EA was released well after these rulings, in June 2012. Despite the binding effect of the Ninth Circuit's ruling, the EA makes no mention of whether a National Pollutant Discharge Elimination System (NPDES) permit might be required for the road-related activities.<sup>163</sup> Here, BLM has similarly occluded such opportunity in the EA.

The proposed project involves reactivating 1.69 miles of decommissioned roads – some of which have been out of service for a number of years.<sup>164</sup> The EA and FONSI both fail to mention any anticipated need for Clean Water Act (CWA) stormwater discharge permits under NPDES, as required by *N.W. Envtl. Def. Ctr. v. Brown*.<sup>165</sup> BLM should have 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.

Significantly, BLM may not rely on the silvicultural exception under Section 429 of the Consolidated Appropriations Act of 2012 to dismiss the possibility that a permit might be required.<sup>166</sup> As clearly noted in *Native Ecosystems v. Weldon*, that exception only applies until September 30, 2012; after that date a permit will be required under the Ninth Circuit's opinion in *Brown*, barring congressional

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<sup>159</sup> EA at 75, 77.

<sup>160</sup> 40 C.F.R. § 1502.25(b) (2012).

<sup>161</sup> *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).

<sup>162</sup> *Native Ecosystems Council v. Weldon*, 2012 WL 991833 at \*15 (D. Mont. Mar. 26, 2012).

<sup>163</sup> *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").

<sup>164</sup> EA at 96.

<sup>165</sup> 617 F.3d 1176, *supra* n. 161.

<sup>166</sup> Pub.L. No. 112–74, § 429, 125 Stat. 786, 1046–47 (Dec. 23, 2011). That statute says, in pertinent part: "From the date of enactment of this Act until September 30, 2012, the Administrator of the Environmental Protection Agency shall not require a permit under section 402 of the Federal Water Pollution Control Act (33 U.S.C. 1342), nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from roads, the construction, use, or maintenance of which are associated with silvicultural activities, or from other silvicultural activities involving nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, logging operations, or surface drainage."

action to extend the exception.<sup>167</sup> Moreover, on its face, the provision would not apply in Washington, where the state Department of Ecology, not the EPA, administers the CWA's NPDES program.

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

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

Based on the analysis within the EA, the FONSI claims that all effects will be “temporary” and any detrimental disturbance will be rehabilitated.<sup>168</sup> 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 EA 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 EA also fails to acknowledge or clearly quantify the long-term adverse impacts from the project's anticipated water use and additional truck traffic. The EA 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.<sup>169</sup> BLM even acknowledges this.<sup>170</sup> The additional required water will be trucked in from off-site.<sup>171</sup> Water tanker trucks are large and heavy, they emit air pollutants associated with diesel fuel, and they compact soils on roads. The EA 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.<sup>172</sup> In fact, the EA 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 EA fails to acknowledge the potential for substantial disagreement about the nature and extent of potential impacts

Based on the EA, the FONSI concludes that the proposed project is not likely to have highly controversial environmental effects.<sup>173</sup> However, as discussed elsewhere, the EA 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 BLM's analysis in scoping and the EA 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

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<sup>167</sup> *Native Ecosystems*, 2012 WL at \*16, *supra* n. 162.

<sup>168</sup> FONSI at 2.

<sup>169</sup> EA at 21.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> See EA at 21–22. Just because Ascot can withdraw 5,000 gpd without a permit does not mean that withdrawing that much groundwater from the system will have no impact. The EA fails to acknowledge this.

<sup>173</sup> FONSI at 2–3.

not present in Green River, the EA forecloses scientific discussion of the project's potential impacts on those species.<sup>174</sup> Such blind conclusions make the EA inadequate. Thus, to the extent the FONSI relies on the EA to support the conclusion that the project will not have highly controversial environmental effects, the FONSI is arbitrary and capricious and contrary to law.

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

As discussed above, BLM 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, BLM's decision to permit exploratory drilling is a pre-requisite to its approval of subsequent leasing applications.<sup>175</sup> BLM 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 has 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 avoids discussing how granting the prospecting permit represents its decision *in principle* to permit a future mine.

E. The EA 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.<sup>176</sup> This analysis should address combined or synergistic effects in addition to isolated effects.<sup>177</sup>

Additionally, an adequate cumulative effects analysis "must be more than perfunctory;" its analysis of those cumulative impacts must be "useful."<sup>178</sup> To be useful, it must contain "some quantified or detailed information."<sup>179</sup> 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."<sup>180</sup> "General statements about possible effects and some risk do not constitute a hard look."<sup>181</sup> Additionally, the required cumulative effects analysis must be comprehensive.<sup>182</sup> Lastly, disclosures and analysis on the

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<sup>174</sup> EA at 65.

<sup>175</sup> FONSI at 3.

<sup>176</sup> 40 C.F.R. § 1508.7.

<sup>177</sup> 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....").

<sup>178</sup> *Id.* at 994; see also *Kern*, 284 F.3d at 1075.

<sup>179</sup> *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1379 (9th Cir. 1998).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 1380 (internal parentheses omitted).

<sup>182</sup> See 40 C.F.R. §§ 1502.16 (2012) (regarding environmental consequences), 1508.7 (regarding cumulative impact).

cumulative effects of proposed action alternatives must include high quality scientific analysis that would satisfy the “hard look” standard.<sup>183</sup>

Based on the EA, the FONSI concludes that the proposed project will not result in significant cumulative environmental effects. However, the cumulative effects analyses in the EA underlying this conclusion are vague and perfunctory. Such cursory analyses fail to provide useful information about the synergistic, combined effects of the project when added to other conditions and activities, in violation of NEPA.

First, the EA’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 EA claims, summarily, that “[n]o cumulative noise effects are anticipated from the temporary use of drilling, vehicles or other equipment.”<sup>184</sup> 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 EA considered that *could* be impacted from project-related noise. The EA repeats this narrowly-focused and cursory type of analysis throughout the document.<sup>185</sup> What about other weather-related impacts, such as increased likelihood of precipitation during adjusted periods of project drilling?

Second, the EA’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 EA does not discuss the combined impacts of even “minor” increases in sediment to waters that are already high in copper.<sup>186</sup> Fish and other aquatic organisms in those copper-high waters may be already stressed.<sup>187</sup> To the extent that sediment from the project *does* reach area waters, the EA fails to discuss how sediment and existing project conditions will cumulatively impact area aquatic organisms and other aquatic organisms.

F. The EA draws unsupported conclusions about project impacts to listed wildlife and other species, in violation of NEPA and the ESA

Under NEPA and the Endangered Species Act (ESA), BLM is 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.”<sup>188</sup> This responsibility imposes an “institutionalized caution mandate” on action agencies, requiring them to prove that their actions are

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<sup>183</sup> 40 C.F.R. §§ 1502.24 (2012), 1500.1(b) (2012); *see also* *Robertson v. Methow Valley*, 490 U.S. at 353, *supra* n. 152; *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).

<sup>184</sup> EA at 109.

<sup>185</sup> *See*, for example, discussion of cumulative effects on soils, EA at 46 (confining the cumulative effects analysis to “small increments of the same kinds of effects as have occurred in the past”).

<sup>186</sup> EA at 38, 68.

<sup>187</sup> Elizabeth Materna, U.S. Fish and Wildlife Service, *Temperature Interaction Issue Paper 3* (U.S. Environmental Protection Agency 2001).

<sup>188</sup> 16 U.S.C.A. § 1536(a)(2) (2012) (emphasis added).

non-jeopardizing to the continued existence of a listed species.<sup>189</sup> The obligation to “insure” against jeopardy or adverse modification thus requires federal agencies to give the benefit of the doubt to endangered species and to place the burden of risk and uncertainty on the proposed action.<sup>190</sup>

The FONSI concludes 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.”<sup>191</sup> This conclusion is based upon the impacts analysis within the EA, as based upon the Biological Assessment (BA) prepared for the project.<sup>192</sup> 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.<sup>193</sup> The EA 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 avoids discussing project impacts on any species *besides* the northern spotted owl. Such unsupported claims invalidate BLM’s analysis of project impacts to other listed species, in violation of NEPA and the ESA.

The EA claims to generally assume that wildlife is present within the project area even if no actual data exists to support that assumption.<sup>194</sup> This is a positive trend in BLM’s analysis for both NEPA and ESA purposes, especially given that BLM admits that some project activities could detrimentally disturb wildlife or habitat.<sup>195</sup>

However, BLM removes the benefits of this perspective when it repeatedly summarily assumes 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.<sup>196</sup> However, the BA fails to support these assumptions with scientific data. The BA also fails to discuss the presence of listed fish species within the Project Area, dismissing their existence as impossible due to migratory barriers.<sup>197</sup> However, the BA cites no studies indicating that those species do not exist – even in non-migratory form – in the Project Area.

Similarly, the EA 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.<sup>198</sup> Because of the “distribution-limiting barriers downstream at the confluence of the Green River with Falls Creek,”

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<sup>189</sup> *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.’”).

<sup>190</sup> See *Sierra Club v. Marsh*, 816 F.2d at 1386, *supra* n. 189.

<sup>191</sup> FONSI at 3.

<sup>192</sup> *Id.* at 5.

<sup>193</sup> BA at 7–8.

<sup>194</sup> See EA at 58, 64–65.

<sup>195</sup> See EA at 57 (admitting that project-related noise and light could disturb wildlife at varying levels of severity) and 67 (admitting that project activities occurring near Green River Horse Camp have the potential to directly affect fish if present in the stream, including via temporary displacement).

<sup>196</sup> BA at 7–8.

<sup>197</sup> EA at 9 (noting that Steelhead and Chinook salmon critical habitat does not extend into the Action Area past “an impassible anadromous fish barrier”).

<sup>198</sup> See EA at 66.

the EA assumes that anadromous fish are not present in the Project Area.<sup>199</sup> 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 BLM's claims to do so.

Unsupported assumptions like these are especially important because the EA 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*.<sup>200</sup> However, if 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 may be jeopardizing the existence of listed species despite implementation of Best Management Practices to protect resident fish.<sup>201</sup>

As another general matter, the EA contains cursory and largely unsupported determinations of project effects to various listed, sensitive, or otherwise pertinent species and their habitat. For example, the EA *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.<sup>202</sup> 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.

G. As described in the EA, the proposed project will be inconsistent with the Aquatic Conservation Strategy Objectives in the Northwest Forest Plan

The FONSI concludes that the project will not violate the 1994 Northwest Forest Plan (NWFP) and Aquatic Conservation Strategy (ACS).<sup>203</sup> The NWFP requires that a proposed project “meet” or “does not prevent attainment” of the ACS objectives.<sup>204</sup> The nine ACS objectives discussed in the EA all begin with the words “[m]aintain and restore.”<sup>205</sup> The EA fails to show how the proposed project will “meet” or not prevent the attainment of objectives to “restore” various aspects of aquatic area health. Indeed, the EA focuses on the fact that the project may “maintain” some current conditions, but it never discusses how the project will meet or not prevent attainment of the *restoration* part of the objective beyond mitigating the detrimental effects of the proposed project activities. In fact, the EA even admits that the project could have localized negative effects and will require restoration following implementation.<sup>206</sup> Localized negative effects are *negative effects*, and are

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<sup>199</sup> EA at 65.

<sup>200</sup> *See* EA at 65, 67.

<sup>201</sup> EA at 67.

<sup>202</sup> *See* EA at 58–59.

<sup>203</sup> FONSI at 4.

<sup>204</sup> EA at 39.

<sup>205</sup> EA at 39–41.

<sup>206</sup> *See* EA at 39.

inconsistent with the ACS objectives. Further, the EA 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.<sup>207</sup> BLM’s conditional allegations of compliance with the ACS are unsupported, vague, and inadequate, in violation of NEPA.

## **XI. Given the Nature of this Proposed Action, and the Reasonably Foreseeable Consequences, the BLM Should Prepare an EIS**

Our organizations strongly advise BLM and the Forest Service 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.”<sup>208</sup> 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.”<sup>209</sup> Major federal actions include “new and continuing activities, including projects and programs... regulated, or approved by federal agencies.”<sup>210</sup> 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.”<sup>211</sup> A project’s significance is determined by considering the context and intensity of the anticipated impacts of the proposed project.<sup>212</sup> The human environment “include[s] the natural and physical environment and the relationship of people with that environment.”<sup>213</sup>

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.”<sup>214</sup> 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.<sup>215</sup> As discussed throughout these 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”).<sup>216</sup>

The goal of an EIS is to “provide full and fair discussion of significant environmental impacts and... inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.”<sup>217</sup> The EIS must be “concise, clear, and to the point, and [] be supported by evidence that agencies have made the necessary

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<sup>207</sup> EA at 40.

<sup>208</sup> 42 U.S.C.A. § 4332(C); 40 CFR § 1502.3 (2012).

<sup>209</sup> 42 U.S.C.A. § 4332; 40 C.F.R. § 1508.18 (2012).

<sup>210</sup> 40 C.F.R. § 1508.18(a).

<sup>211</sup> 40 C.F.R. § 1508.18(b)(4).

<sup>212</sup> 40 C.F.R. § 1508.27.

<sup>213</sup> 40 C.F.R. § 1508.14 (2012).

<sup>214</sup> 40 C.F.R. § 1508.18(a).

<sup>215</sup> 40 C.F.R. § 1508.27.

<sup>216</sup> 40 C.F.R. § 1508.14.

<sup>217</sup> 40 C.F.R. § 1502.1 (2012).

environmental analyses.”<sup>218</sup> 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.”<sup>219</sup> Given the nature of the proposed activities, project proximity to the Mt. St. Helens National Volcanic Monument, and the probability that the proposed prospecting will lead to applications to develop located minerals, BLM should prepare an EIS.

BLM itself seems to recognize that the proposed project is worthy of an EIS: the agency issued a draft FONSI for the project. CEQ regulations require that a draft FONSI be made available for public review and comment when, *inter alia*, “[t]he proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement.”<sup>220</sup> By releasing a draft FONSI, the BLM has signaled that the proposed hardrock prospecting project “is, or is closely similar to” a project which would normally require 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.”<sup>221</sup> The requirement that unavoidable “adverse environmental effects” be included in the EIS “entails a duty to discuss measures to mitigate adverse environmental requirements.”<sup>222</sup> The discussion of mitigation measures must be “reasonably thorough” and “in sufficient detail to ensure that environmental consequences have been fairly evaluated.”<sup>223</sup>

## **XII. Conclusion**

Thank you for taking the time to consider our comments on the EA. We respectfully request that the BLM 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 Jessica Schafer, Conservation Director for the Gifford Pinchot Task Force, with any questions regarding these comments. Jessica can be reached by phone at 503-221-2102 ext. 101 or by e-mail at [jessica@gptaskforce.org](mailto:jessica@gptaskforce.org).

Sincerely,

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<sup>218</sup> 40 C.F.R. § 1500.2(b) (2012).

<sup>219</sup> *N.W. Envtl. Advoc. v. Natl. Marine Fisheries Serv.*, 460 F.3d 1125, 1133 (9th Cir. 2006) (quoting *Klamath-Siskiyou*, 387 F.3d at 993) (internal quotations omitted).

<sup>220</sup> 40 C.F.R. § 1501.4(e)(2)(i) (2012).

<sup>221</sup> 42 U.S.C.A. § 4332(C)(i)–(v).

<sup>222</sup> *City of Carmel-By-The Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1153–1154 (9th Cir. 1997).

<sup>223</sup> *Id.* at 1154 (quoting *Robertson v. Methow Valley*, 490 U.S. at 353, *supra* n. 152 and *Laguna Greenbelt, Inc. v. U.S. Dept. of Transp.*, 42 F.3d 517, 529 (9th Cir. 1994)).

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American Rivers

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Russ Pascoe  
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Lower Columbia Canoe Club

Thomas O'Keefe  
Pacific Northwest Stewardship Director  
American Whitewater

Sean Smith  
Policy Director  
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Sydney Reisbick  
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Friends of Clark County

Charles Raines  
Sierra Club  
and  
Joe Ludwig  
Loo-Wit Group  
Washington State Chapter Sierra Club