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June 3, 2022

Coronado National Forest
Charles E. Woodard, District Ranger, Charles.woodard@usda.gov
Deborah Bradley, Geologist and Project Lead, Deborah.bradley@usda.gov
300 West Congress Street
Tucson, AZ 85701

**Re: Wedgetail Exploratory Drilling Project**

Dear Ranger Woodard and Project Lead Bradley,

Please accept these comments on the Wedgetail Exploratory Drilling Project from the Center for Biological Diversity, Arizona Mining Reform Coalition, Sierra Club Grand Canyon Chapter, Save the Scenic Santa Ritas, and Tucson Audubon Society.

First and foremost, we ask that at least an Environmental Assessment be completed for the Project, as the Project does not qualify for a Categorical Exclusion.

The May 5, 2022 Scoping Letter also lacks critical information about the drilling and other proposed activities to fully evaluate all the impacts of the Project or to develop mitigations. The point of the National Environmental Policy Act (NEPA) is for the United States Forest Service (USFS) to make an informed decision and to facilitate public involvement. Without the needed information, it is impossible for the Forest Service or the public to determine if all potentially significant environmental impacts have been identified and considered. The attachments and references cited in these comments are being provided in electronic format to the Forest Service and are incorporated herein into the administrative record for the agency's consideration.

## I. The Project Does Not Qualify for a Categorical Exclusion

The Forest Service cannot use a categorical exclusion (CE) to approve the Project for at least three reasons: (1) the Project cannot be completed in "one year or less;" (2) the Project will likely adversely affect a designated threatened species (Mexican Spotted Owl) and thus presents an "extraordinary circumstance" precluding the use of a CE; and (3) the Forest Service failed to properly evaluate the cumulative impacts of the Project and other activities prior to proposing to rely on a CE, as required by its scoping regulations.

1. The Project Does Not Fit Within the One-Year Limit

The Forest Service proposes to exclude the Project from detailed NEPA review based on its belief that it "may be categorically excluded," relying on 36 CFR 220.6 (e)(8), because it is purported to be a "short term (1 year or less) mineral investigation and incidental support activities." Scoping Letter at 2. At the outset, the agency must show that all required aspects of the Project operations will be completed within one year, not just that it is anticipated that all operations can be completed within one year from starting. In this case, the agency cannot meet this standard.

When an agency's action does not comport with its chosen CE category, courts must invalidate the action. *See* West v. Dep't of Transp., 206 F.3d 920, 928-29 (9th Cir. 2000); High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 641-48 (9th Cir. 2004). Courts must review "whether the path taken to reach the conclusion was the right one in light of NEPA's procedural requirements." West, 206 F.3d at 929 (citation omitted). Here it clearly is not.

At the outset, the agency's and company's assertion that they have ensured that there will be "successful reclamation" within one year, Scoping Letter at 2, is unsupported. It is standard USFS practice, including for the Coronado National Forest, to monitor the first year's reclamation efforts during the next year, or longer, and to require additional seeding, weed control, ground work, etc. in future years. In a recent similar exploration project, the Coronado National Forest (NF) recognized that additional years of work would be needed to ensure the success of the initial reclamation:

> The Forest Service will monitor and assess the progress of some reclamation activities, including revegetation, invasive species treatments, and erosion control, for a minimum of three years. Dependent on the success of the second phase of reclamation, additional seeding, weed treatment, or installation of erosion control structures may occur.

USFS Decision Memo, Sunnyside Project, Coronado NF, April 2105, at 3 (attached).

The same Decision Memo established required Design Features that included holding the reclamation bond for at least three years in order to ascertain whether reclamation was successful and met agency requirements: "Upon completion of the project, a partial bond can be refunded withholding funds for revegetation, monitoring, and portions of indirect costs for a minimum of three (3) years pending attainment of acceptable ground cover as determined by the Authorized Officer." Sunnyside Decision Memo at 3. More recently, the Coronado NF approved a much smaller exploration project, with only one drill site, and required, as part of the reclamation, a "3-year weed monitoring/spraying program." Sycamore Canyon Silver-Gold Project Decision Memo, Dec. 16, 2021, at 3 (attached).

The science of reclamation also recognizes that reclamation success cannot be determined until at least the following year's growing seasons have been monitored, if not much longer. "Reclamation activities through vegetation planting is [sic] always followed by monitoring and evaluation of the success of reclamation plants. The monitoring activities need to be performed periodically to monitor the progress of the work; while the evaluation activities are intended to measure the degree of success of forest and/or land reclamation activities." Identifying The

Key Variables for Assessing The Reclamation Success on Early Growth Vegetation in Exploration of Oil and Gas Mining Areas, at 1, Jurnal Manajemen Hutan Tropika, 26(3), 222-232, December 2020 EISSN: 2089-2063, DOI: 10.7226/jtfm.26.3.222 (attached).

Further, in order to adequately ensure reclamation success, the agency must have sufficient data and analysis of the soil and other conditions at the site, which is lacking here. "Assessment of mine soil quality is the key parameter for evaluation of reclamation success." Development of mine soil quality index (MSQI) for evaluation of reclamation success: A chronosequence study, at 1, Ecological Engineering 71 (2014) 10–20 (attached).

The company's Plan of Operations (PoO) further admits that additional work will be needed in the future, as "[t]he site would be monitored and additional seeding would take place, as needed." PoO at 18. The agency acknowledges the same: "The site would be monitored, and additional seeding would take place, as needed." Scoping Letter at 3.

As stated in the agency's Reclamation Policy, successful reclamation is dependent on multi-year monitoring and reseeding/revegetation: "The performance standards should be met and that success should be demonstrated over a certain period of time before the applicable part of the bond is released. … In the case of revegetation, the required composition, cover or productivity should be maintained for a series of years before being considered successful." USFS TRAINING GUIDE FOR RECLAMATION BOND ESTIMATION AND ADMINISTRATION, at 8. (2004) (attached).

Under USFS regulations, all aspects of the Project, including monitoring and reclamation, are considered part of the authorized "operation," defined as: "All functions, work and activities in connection with prospecting, exploration, development, mining or processing of mineral resources and all uses reasonably incident thereto." 36 C.F.R. §228.3. Thus, whether or not drilling may finish in one year, other Project operations "in connection with" and "reasonably incident" to the actual exploration will not be completed within a year. As such, the Project, taken as a whole as mandated by the agency regulations, does not meet the "1 year or less" requirement of the CE utilized by the agency here.

This was the exact ruling in Defenders of Wildlife v. U.S. Forest Service, Order, 4:14-cv-02446-RM (D. Ariz., 2015)(attached), which involved the Coronado NF's approval of the Sunnyside exploration project discussed above. The federal court held that since monitoring of reclamation success would last more than the initial year, and that reclamation based on that monitoring "may be required during the three-year monitoring period," the agency could not use the "short-term" mineral exploration category for a proposed mineral exploration project.

> Defendants argue that this three-year monitoring period should not be considered part of the project's duration because all ground-disturbing project activities will be completed before the monitoring period begins; however, the Decision Memorandum anticipates that additional ground disturbing reclamation activities may be required

during the three-year monitoring period. USFS's determination that the project can be completed in one year or less is unsupported by the record.

Defenders, Order at 8. "USFS argues that, if additional reclamation work is required during the three-year monitoring period, the additional reclamation work would be reviewed under NEPA. However, the reclamation work is already contemplated in and authorized by the Decision Memorandum, with no indication in the record that the already-approved reclamation design features would require a new Plan of Operations or further review and approval." Order at 8, n.5. "Therefore, USFS's approval of the project using the categorical exclusion for short-term mineral explorations pursuant to 36 C.F.R. § 220.6(e)(8) was arbitrary and capricious." Order at 8.

2. Extraordinary Circumstances Preclude Use of a CE

The Forest Service has identified "extraordinary circumstances" that make the use of a CE inappropriate and that indicate the proposed action warrants an EA or EIS. 36 C.F.R. §§ 220.6(a), (b); Forest Service Handbook ("FSH") § 1909.15, Ch. 31.2. These extraordinary circumstances include consideration of whether "[f]ederally listed threatened or endangered species or designated critical habitat, or Forest Service sensitive species" are in the project area. 36 C.F.R. § 220.6(b)(1)(i); FSH § 1909.15, Ch. 31.2(1). When a project area contains extraordinary circumstances related to the proposed action, the use of a categorical exclusion may be inappropriate and the Forest Service should consider preparing an EA or EIS instead. See 36 C.F.R. §§ 220.6(a), (b). However, the mere presence of one or more of the extraordinary circumstances resource conditions does not preclude the use of a categorical exclusion. Rather it is the existence of a cause and effect relationship between a proposed action and the potential effect on these resource conditions. If such a cause and effect relationship exists, the degree of the potential effect of the proposed action on these resource conditions determines whether extraordinary circumstances exist. 36 C.F.R. § 220.6(b)(2). *See also* FSH § 1909.15, Ch. 31.2 ("If the degree of potential effect raises uncertainty over its significance, then an extraordinary circumstance exists, precluding use of a categorical exclusion.").

Under USFS CE regulations:

> Categorical exclusions.
> (a) General.
> A proposed action may be categorically excluded from further analysis and documentation in an EIS or EA only if there are no extraordinary circumstances related to the proposed action and if:
> (1) The proposed action is within one of the categories established by the Secretary at 7 CFR part 1b.3; or
> (2) The proposed action is within a category listed in § 220.6(d) and (e).
> (b) Resource conditions.
> (1) Resource conditions that should be considered in determining whether extraordinary circumstances related to a proposed action warrant further analysis and documentation in an EA or an EIS are:

(i) Federally listed threatened or endangered species or designated critical habitat, species proposed for Federal listing or proposed critical habitat, or Forest Service sensitive species;
(ii) Flood plains, wetlands, or municipal watersheds;
(iii) Congressionally designated areas, such as wilderness, wilderness study areas, or national recreation areas;
(iv) Inventoried roadless area or potential wilderness area;
(v) Research natural areas;
(vi) American Indians and Alaska Native religious or cultural sites; and
(vii) Archaeological sites, or historic properties or areas.

36 C.F.R. § 220.6. Here, at a minimum, due to the potentially significant impacts to the Mexican Spotted Owl, and its Critical Habitat, as well as to un-inventoried religious or cultural sites, these extraordinary circumstances prevent using a categorical exclusion for the Project.

Regarding the Mexican Spotted Owl, the Project would be located in the designated Critical Habitat, Unit BR-W-11.[1] It will be impossible not to have impacts, and maybe even substantial impacts, to this protected species and its habitat. This is due not only to the impacts from the drilling, construction, noise, lighting, and road construction, but also from the dewatering of local waters, water use, and the installation of the 3.2 mile waterline (PoO at 7).

The ESA requires the Forest Service in consultation with U.S. Fish and Wildlife Service (FWS) to "insure that any action authorized, funded or carried out by" the 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 the critical habitat of such species. 16 U.S.C. § 1536(a)(2). FWS and the Forest Service are required to use the best available scientific data during consultation. *Id*. For each proposed action the action agency must request from the FWS whether any listed or proposed species may be present in the area of the proposed agency action. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If listed or proposed species may be present, the action agency must prepare a "biological assessment" to determine whether the listed species is likely to be adversely affected by the proposed action. *Id*. The biological assessment step is an important one as it determines whether or not the agency may need to move forward with more detailed analysis in a Biological Opinion. Here, the Service has not undertaken the biological assessment process, despite the entire proposed project falling squarely within designated Mexican Spotted Owl critical habitat. This is a violation of the agency's obligations under the ESA.

This very Forest prepared a Biological Assessment for even a smaller exploratory mining operation–the Sunnyside Project–which makes the Forest Service's failure to do so here puzzling. For that project, to minimize impacts to the species during breeding season, the drilling operations were precluded from occurring between March 1 to August 31. Here, it is not clear, what, if any limitations on activities or protections for Mexican Spotted Owl critical habitat the Forest Service is contemplating. According to the PoO, it does not appear there would be

[1] 69 Fed. Reg. 53,182, 53,215 (Aug. 31, 2004).

any meaningful limitations, such as preclusion of drilling activities during breeding and nesting season. To the contrary, the PoO contemplates drilling operations spanning a consecutive 10-month period. PoO at 8. The extent of such impacts on the species and its critical habitat need to be analyzed in accordance with the ESA.

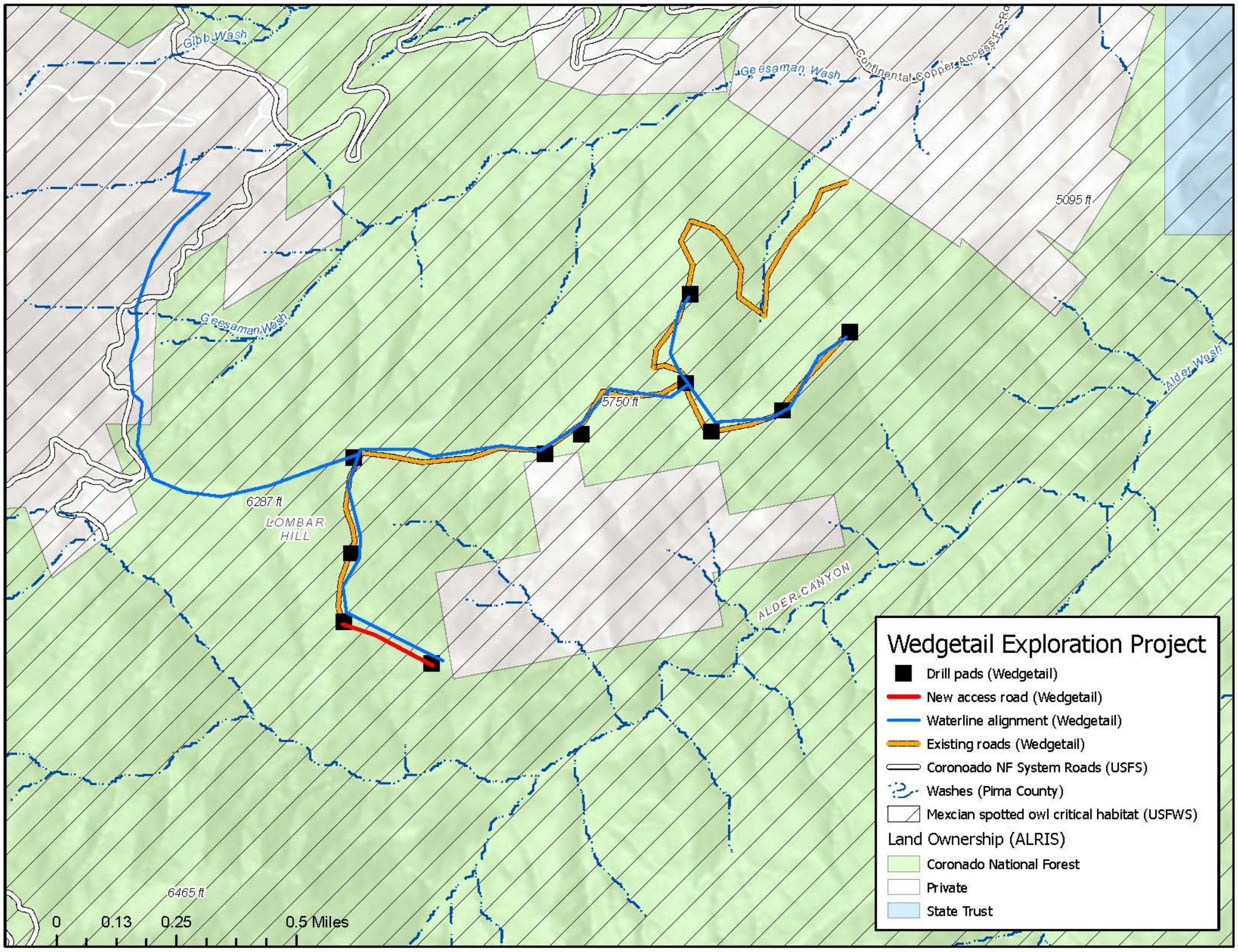


Fig. 1: Map overlaying designated Mexican Spotted Owl habitat with the proposed project.

In overturning the Forest Service's approval for exploration activities for the Sunnyside Project, the Court also noted that the Coronado NF's determination to use CE-8 despite these impacts "is undermined by the revised Decision Memorandum's failure to consider the Sunnyside Project's cumulative effects in relation to other temporally and geographically similar" activities in the area. Order at 13. Such analysis is also similarly missing here and further underscores the Forest Service's need to comply with its ESA mandates.

The PoO states that "[t]he Project footprint does not occur within any Mexican spotted owl (MSO) Protected Activity Centers (PACs) or known MSO nest and roost locations." PoO at 15. But that ignores that the Project is within designated MSO Critical Habitat. The recovery plan for this species acknowledges that because the "owl is a widespread subspecies with a disjunct and somewhat fragmented distribution, management of the owl and its habitat must be conducted at the landscape scale."[2] Accordingly, whether or not the exploration activities are proposed in PACs is not a determinative indicator as far as the exploration project's possible impacts on the species and its habitat nor does it excuse the Forest Service from fulfilling its ESA obligations. Additionally, the claim that the "Project footprint" may not occur in these areas, even if true, does not account for the noise, lighting, visual, and other indirect effects the Project will cause to the MSO and its Critical Habitat. *See* Defenders, Order at 13 (Forest Service CE failed to "provide a convincing explanation of why these potential effects to the Mexican spotted owl are certain to be environmentally insignificant.").

For instance, elevated noise levels may affect Mexican spotted owls in the vicinity of the sound. The impact of noise on Mexican spotted owls varies with the frequency of noisy events, topography, weather conditions, reproductive status of the owl, and the owl's location relative to the sound source. The recovery plan for the Mexican spotted owl recommends breeding-season noise restrictions be applied to noise levels in excess of 69 decibels, and the Project will produce noise levels in excess of that 69-decibel limit. Sporadic noise events, such as chainsaw operation during brush clearing and roadway grading, may affect Mexican spotted owls by causing them to change behaviors and/or flush from perches. Consistent noise, such as that associated with drilling operations, may negatively impact the Mexican spotted owl's ability to forage and communicate in the vicinity of the sound. In general, noise above 92 decibels may cause Mexican spotted owls to "flush" (be forced to fly) from roost sites. A rock drill typically creates 98 decibels of noise. Moreover, acute noise events, such as chainsaw operations, cause flushing at a lower threshold of 46 decibels. Project activities are expected to elicit flush responses from Mexican spotted owls both during the breeding season and during post-breeding dispersal. And because young Mexican spotted owls are particularly susceptible to predation, one possible negative impact of an increase in flushing is an increase in predation of young owls.

*See also* Delaney and Grubb, Nov. 2003, which "measured sound maintenance from three different types of road maintenance equipment (rock crusher/loader, dozer/roller, and grader)" and determined that "it appears that spotted owls are capable of hearing all the sound sources tested during this pilot study out to distances of at least 400 m.").

Further, there is no information as to whether other protected species, such as Forest Service Sensitive Species, may inhabit or visit the area, which may preclude reliance on a CE. And although the PoO states that the project proponent was also providing to the Forest Service a "Biological Evaluation," this document was not provided for the public to review during the public comment period. In any event, the Forest Service cannot rely on others for its ESA compliance. The Forest Service has an independent duty to ensure ESA compliance. 16 U.S.C. § 1536(a)(2). Here, the proposal is fully within, and undoubtedly will disturb, designated Mexican Spotted Owl critical habitat, and therefore the Forest Service cannot ignore this fact's implications for the Forest Service's analysis, approval, and compliance with federal law for this proposed exploration project.

[2] MSO Recovery Plan at VIII.

Mexican Spotted Owls are considered habitat specialists because they generally roost and nest in late-seral-stage (mature) forests and rocky canyon habitats. A diverse range of other habitat types can be used for foraging or dispersal, including managed and unmanaged forests, pinyon-juniper woodlands, mixed-conifer forests, ponderosa pine forests, cliff faces, terraces between cliffs, and riparian zones. (USFWS 2012).

Drilling and other Project activities producing loud noises, lights, human movement, and vehicle traffic all can disrupt the MSO's communication, dispersal, and foraging. The likely existence of, and potentially significant impacts to, Mexican Spotted Owls in the project footprint, nearby Alder Canyon, where pinyon-juniper woodlands, riparian zones, and Alder Box Spring are located, as well as other affected areas, is an "extraordinary circumstance" precluding the use of a CE.

Owl courtship generally begins in March, and eggs are laid in late March. Owlets generally fledge in early to mid-June, before they are able to fly. Fledglings jump to nearby cliffs, trees, or the ground and are dependent on their parents for food early in the fledging period. By August, young are generally independent, and dispersal occurs from mid-September to early October (USFWS 2012). Young can disperse from 1 to 92 km, but most successfully dispersing juveniles remain near their natal territories (Ganey et al. 1998). And as mentioned above, young Mexican spotted owls are particularly susceptible to predation, and thus predation of young Mexican spotted owls may be increased when they are flushed from protected roosting areas.

Mexican Spotted Owls that migrate from their nesting territory generally move between 5 and 50 km and do so to achieve a change in elevation downslope for the winter. Migrating individuals leave their home territories in November or December and return between January and April. Characteristics of over-wintering habitat are unknown (Ganey and Block 2005; USFWS 2012).

Project activities during times of likely dispersal into the Project area would adversely affect the owls.

Another factor not considered or disclosed in the Forest Service's scoping notice is the fact that the alleged "existing road" that Wedgetail proposes to improve for the Project is not part of the Coronado National Forest Travel Management Plan. Any improvements will require additional NEPA analysis either through the Forest Plan revision process or as a separate Record of Decision and must also be done in accordance with the agency's regulations for revisions of designations, which includes public involvement and coordination with governmental entities. 16 U.S.C. § 1604(i) ("Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans."); *Native Ecosystems Council v. United States Forest Serv.*, 418 F.3d 953, 961 (9th Cir. 2005); 36 C.F.R. § 212.34. If the Forest Service fails to undertake this required analysis and process, the approval for this exploration project would be inconsistent with the Forest Plan, in violation of the National Forest Management Act, 16 U.S.C. § 1600 *et seq*. Additionally, improvements to the "existing road" also raise the question of access and use by the public, which could significantly increase the impacts to Mexican Spotted Owls through noise, light, and further fragmentation of their critical habitat. Road improvements also stand to have other impacts beyond those on this listed species, such as increased erosion, spread of noxious and invasive weeds, and impacts to other wildlife species. These are the very type of indirect effects that would be disclosed, analyzed, and mitigated for in a Biological Assessment, Biological Opinion, Environmental Assessment, and consultation with the FWS, but will improperly fall through the cracks with the Forest Service's proposed CE approach.

Lastly, regarding Native American religious or cultural sites, the agency has yet to fully consult with all potentially affected Tribes under the National Historic Preservation Act (NHPA) and applicable Executive Orders. As such it is impossible for the agency at this time to determine whether impacts to these sites may be significant.

3. The Agency Must Analyze All Cumulative Impacts to Determine If a CE Can Be Used

NEPA's statutory framework, as well as USFS's own regulatory policies enumerated in the Forest Service Handbook (FSH), Section 1909.15 *et seq.*, require the agency to consider potentially significant environmental effects, including cumulative impacts, before deciding to invoke a categorical exclusion and moving forward with a proposed action in the absence of an EA or EIS. If the proposed action may have a significant effect, USFS must prepare an EIS. See 36 C.F.R. §220.6(c). If, in contrast, USFS is uncertain whether the proposed action may have a significant effect, it must prepare an EA. Id. The Forest Service cannot rely on a NEPA categorical exclusion if the action may have significant impacts. The Forest Service's NEPA Handbook instructs, "[if] the proposed action may have a significant environment effect, prepare an EIS," and not a categorical exclusion. NEPA Handbook § 31.3

As the Ninth Circuit has held, plaintiffs "need not show that significant impacts will in fact occur, but raising 'substantial questions' that a project may have significant impacts is sufficient." Ocean Advocates v. U.S. Army Corps of Engineers, 402 F.3d 846, 865 (9th Cir. 2005) (emphasis in original); Citizens for a Better Forestry v. Dept. of Agriculture, 481F.Supp.2d 1059, 1090 (N.D. Cal. 2007) ("invocation of any CE is inappropriate if the agency action may have significant effects on the environment as defined by the CEQ regulations.").

As provided in the Forest Service Handbook:

> If the responsible official determines, based on scoping, that it is uncertain whether the proposed action may have a significant effect on the environment, prepare an EA. If the responsible official determines, based on scoping, that the proposed action may have a significant environmental effect, prepare an EIS. (36 C.F.R. 220.6(c)).

FSH 1909.5, Section 31.3.

> Scoping is required for all Forest Service proposed actions, including those that would appear to be categorically excluded […]. Scoping is important to discover information that could point to the need for an EA or EIS versus a CE. Scoping is the means to identify the presence or absence of any extraordinary circumstances that would warrant

> further documentation in an EA or EIS. Scoping should also reveal any past, present, or reasonably foreseeable future actions with the potential to create uncertainty over the significance of cumulative effects.

Id.

Thus, the Forest Service's first step in analyzing the proposed mining exploration plan must be to determine what type of NEPA analysis is appropriate. Before the agency begins to consider whether a proposed activity fits within the specified criteria in which a CE was promulgated, the first question is whether there might be significant effects necessitating an EIS, or if there is uncertainty, an EA. "[A]ll that is required to render the CE inappropriate is the possibility of significant effects." Citizens for Better Forestry, 481 F.Supp.2d at 1087-88.

NEPA's statutory framework, as well as the Forest Service's own regulatory policies enumerated in the Forest Service Handbook ("FSH"), 1909.15 et seq., requires the agency to consider potentially significant environmental effects, including cumulative impacts, before deciding to invoke a CE and to move forward in the absence of an EA or EIS.

The duty of the Forest Service to analyze cumulative impacts in determining whether the proposed project may have significant impacts was confirmed in Hells Canyon Preservation Council v. Connaughton, 2013 WL 665134, *6-8 (D. Or. 2013), where the court relied on the scoping sections of 36 C.F.R. §220.6(c) and FSH 31.3 as the basis for requiring the USFS to do at least an EA to determine whether their "may be significant impacts."

> Thus, only where the potential effect on the resource condition is known to be insignificant, and scoping does not reveal otherwise or raise uncertainty, does the action comply with USFS's policy on extraordinary circumstances. Accordingly, only where the potential effects of a proposed action are certain to be insignificant may USFS invoke a categorical exclusion. The determination of the significance of the potential effects requires USFS to consider the cumulative effects and impacts of past, present, and reasonably foreseeable future actions. See FSH 1909.5, Section 31.3.

Hells Canyon, 2013 WL at * 6.

That was also the ruling in Defenders, in a very similar case, where the court found that the Coronado National Forest failed to analyze the impacts related to nearby reasonably foreseeable activities when it relied upon CE-8.

> In determining whether a proposed action has "significant" environmental effects, an agency should consider whether the action is related to other actions with individually insignificant but cumulatively significant impacts. *See* 40 C.F.R. § 1508.27(b)(7); Forest Service Handbook § 1909.15, Ch. 31.3 ("Scoping should . . . reveal any past, present, or reasonably foreseeable future actions with the potential to create uncertainty over the significance of cumulative effects."); *Alliance for the Wild Rockies v. Weber*, 979 F. Supp. 2d 1118, 1129 (D. Mont. 2013) (the "extraordinary circumstances analysis includes consideration of whether a normally excluded action may have cumulatively significant environmental effect"); *Sierra Club v. United States*, 255 F. Supp. 2d 1177, 1182 (D. Colo. 2002) ("In determining whether an action requires an EA or EIS or is categorically

> excluded, federal agencies must not only review the direct impacts of the action, but also analyze indirect and cumulative impacts.").

Defenders, Order at 13-14.

Thus, the Forest Service must consider possible significant effects, and, in particular, the cumulative impacts of nearby current and reasonably foreseeable mining/mineral, agriculture, water withdrawals/use, grazing, off-road vehicle use, water depletion, traffic, energy development, recreation (including off-highway vehicle uses), and all other such activities in the area (including along/near access and truck routes).

The fact that the drilling and other project operations will essentially abut private lands protected by a Restrictive Covenant held by Pima County only further highlights the need to consider the full ramifications of the project on important affected public resources. *See* attached Pima County Restrictive Covenant (excerpts).

## II. The 3.2 Mile Water Line Requires a Right-of-Way Under FLPMA, and All Water Use and Impacts Must be Fully Analyzed

The Scoping Letter barely mentions the unanalyzed significant impacts from removing and using 20,000 gallons of water, every day. The PoO states that:

> Water would be needed during the drilling process, and the drill hole may discharge water during the drilling process. The maximum amount of water used would be about 20,000 gallons per 24 hours of drilling which is the maximum output of the water pumps used by Boart Longyear. Less water will be used if circulation can be obtained, where the water potentially created by the borehole could be used in the drilling operation. Additionally, the water pumps used by the drilling contractor have a maximum output of 27 gallons per minute, which equates to 20,000 gallons per day. The water that would be used for the Project could come from the water source at the Oracle Ridge Mine Property and would be conveyed through a 1-inch polyflex hose line that would be laid by hand across NFS lands, and alongside existing roads from the Oracle Ridge private property (Figures 2 and 3). The total hose length would be laid in four segments totaling approximately 3.2 miles. No surface disturbance would be required for the placement and use of the waterline.

PoO at 7. At the outset, the fact that the "water that would be used for the Project **could come** from the water source at the Oracle Ridge Mine Property" (emphasis added) highlights the uncertainties with the Project that the agency must determine, subject to full public review, before it can consider approving any activities on federal land.

The agency erroneously believes that water delivery facilities are covered under the company's purported "rights" under the 1872 Mining Law and is regulated under the 36 C.F.R. Part 228 regulations. But water delivery structures such as the one proposed here to cross

USFS land require a Right-of-Way (ROW) under the Federal Land Policy Management Act (FLPMA), Title V, which applies to the USFS as well as the Interior Department.

Pipelines and associated infrastructure, including those across public land related to a mining operation, are not covered by statutory rights under the Mining Law. "[A] right-of-way must be obtained prior to transportation of water across Federal lands for mining." Far West Exploration, Inc., 100 IBLA 306, 308 n. 4 (1988) citing Desert Survivors, 96 IBLA 193 (1987). *See also* Alanco Environmental Resources Corp., 145 IBLA 289, 297 (1998) ("construction of a road, was subject not only to authorization under 43 C.F.R. Subpart 3809, but also to issuance of a right-of-way under 43 C.F.R. Part 2800."); Wayne D. Klump, 130 IBLA 98, 100 (1995) ("Regardless of his right of access across the public lands to his mining claims and of his prior water rights, use of the public lands must be in compliance with the requirements of the relevant statutes and regulations [FLPMA Title V and ROW regulations].").

The Interior Department has expressly rejected the argument that rights under the mining laws apply to pipelines and roads associated with water delivery:

> Clearly, FLPMA repealed or amended previous acts and Title V now requires that BLM approve a right-of-way application prior to the transportation of water across public land for mining purposes. See 43 U.S.C. § 1761 (1982). As was the case prior to passage of Title V of FLPMA, however, approval of such an application remains a discretionary matter and the Secretary has broad discretion regarding the amount of information he may require from an applicant for a right-of-way grant prior to accepting the application for consideration. Bumble Bee Seafoods, Inc., 65 IBLA 391 (1982). A decision approving a right-of-way application must be made upon a reasoned analysis of the factors involved in the right-of-way, with due regard for the public interest. See East Canyon Irrigation Co., 47 IBLA 155 (1980).
>
> BLM apparently contends that a mining claimant does not need a right-of-way to convey water from land outside the claim for use on the claim. It asserts that such use is encompassed in the implied rights of access which a mining claimant possesses under the mining laws. Such an assertion cannot be credited.
>
> The implied right of access to mining claims never embraced the right to convey water from outside the claim for use on the claim. This latter right emanated from an express statutory grant in the 1866 mining act. See 30 U.S.C. § 51 (1970) and 43 U.S.C. § 661 (1970). In enacting FLPMA, Congress repealed the 1866 grant of a right-of-way for the construction of ditches and canals (see § 706(a) of FLPMA, 90 Stat. 2793) and provided, in section 501(a)(1), 43 U.S.C. § 1761(a)(1), for the grant of a right-of-way for the conveyance of water under new procedures. In effect, Congress substituted one statutory procedure for another. There is simply no authority for the assertion that mining claimants need not obtain a right-of-way under Title V for conveyance of water from lands outside the claim onto the claim.

Desert Survivors, 96 IBLA 193, 196 (1987). The leading treatise on federal natural resources law confirms this rule: "Rights-of-way must be explicitly applied for and granted; approvals of mining plans or other operational plans do not implicitly confer a right-of-way." Coggins and Glicksman, PUBLIC NATURAL RESOURCES LAW, §15.21.

Thus, the USFS must subject the proposed water-delivery structure to FLPMA, including the agency's 36 CFR Part 251 special use regulations. These regulations mandate the protection of the public interest, among other requirements, subject to full public review. The agency's failure to do that here fatally flaws the proposed review and approval of the Project.

## III. Because Use of a CE for the Project Is Prohibited, the Agency Must Prepare, at a Minimum, a NEPA-Compliant EA.

"An agency cannot avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment. The agency must supply a convincing statement of reasons why potential effects are insignificant." Public Service Co. of Colorado v. Andrus, 825 F.Supp. 1483, 1496 (D. Idaho 1993) citing The Steamboaters v. FERC, 759 F.2d 1383, 1393 (9th Cir. 1985).

"[T]o prevail on the claim that the federal agencies were required to prepare an EIS, the plaintiffs need not demonstrate that significant effects will occur. A showing that there are 'substantial questions whether a project may have a significant effect' on the environment is sufficient." Anderson v. Evans, 371 F.3d 475, 488 (9th Cir. 2004)(italics in original, citations omitted). *See also* Western Land Exchange Project v. BLM, 315 F.Supp.2d 1068, 1087 (D. Nev. 2004) (same).

The agency cannot avoid preparing an EIS by making conclusory assertions that an activity will have only an insignificant impact on the environment. *See* Alaska Ctr. for Env't v. United States Forest Serv., 189 F.3d 851, 859 (9th Cir.1999). If an agency, such as the USFS, opts not to prepare an EIS, it must put forth a "convincing statement of reasons" that explain why the project will impact the environment no more than insignificantly. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir.1998). As the Arizona federal court held, the agency must "provide a convincing explanation of why these potential effects to the Mexican spotted owl are certain to be environmentally insignificant." Defenders, Order at 13.

An EIS that is prepared (or at a minimum, a draft EA prepared for public comment) must fully review all reasonable alternatives, provide for mitigation and an analysis of the effectiveness of all mitigation measures, review all direct, indirect, and cumulative impacts, and fully analyze all baseline conditions of the potentially affected environment, among other NEPA requirements.

In addition, the agency must fully comply with the following NEPA requirements.

*The EA/EIS must fully analyze all baseline conditions prior to approving the Project.*

The establishment of the baseline conditions of the affected environment is a fundamental requirement of the NEPA process. "NEPA clearly requires that consideration of environmental impacts of proposed projects take place before [a final decision] is made." LaFlamme v. FERC, 842 F.2d 1063, 1071 (9th Cir.1988) (emphasis in original). Once a project begins, the "pre-project environment" becomes a thing of the past, thereby making evaluation of the project's effect on pre-project resources impossible. Id. Without establishing the baseline conditions which exist in the vicinity … before [the project] begins, there is simply no way to determine what effect the proposed [project] will have on the environment and, consequently, no way to comply with NEPA. Half Moon Bay Fisherman's Mark't Ass'n v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988). "In analyzing the affected environment, NEPA requires the agency to set forth the baseline conditions." Western Watersheds Project v. BLM, 552 F.Supp.2d 1113, 1126 (D. Nev. 2008). "The concept of a baseline against which to compare predictions of the effects of the proposed action and reasonable alternatives is critical to the NEPA process." Council of Environmental Quality, Considering Cumulative Effects under the National Environmental Policy Act (May 11, 1999). Such baseline information and analysis must be part of the EA/EIS and be subject to public review and comment under NEPA.

Here, at a minimum, prior to considering or approving any activities or use of federal land, the Forest Service must first obtain this required baseline information and subject the information and analysis to public review and comment in an EA/EIS. "NEPA requires that the agency provide the data on which it bases its environmental analysis. Such analyses must occur before the proposed action is approved, not afterward." Northern Plains v. Surf. Transp. Brd., 668 F.3d 1067, 1083 (9th Cir 2011) (concluding that an agency's "plans to conduct surveys and studies as part of its post-approval mitigation measures," in the absence of baseline data, indicate failure to take the requisite "hard look" at environmental impacts).

This requirement applies not only to ground and surface waters, but also to any other potentially affected resource such as air quality, recreation, cultural/religious/historical resources, soils, and wildlife. For example, here the Forest Service must provide baseline information regarding the number of Mexican Spotted Owl in the area and how they utilize the habitat.

*The agency must include an adequate mitigation plan under NEPA.*

Under NEPA, the agency must have an adequate mitigation plan to minimize or eliminate all potential project impacts. "[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 353 (1989). NEPA requires that the agency discuss mitigation measures, with "sufficient detail to ensure that environmental consequences have been fairly evaluated." Methow Valley, 490 U.S. at 352.

An essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective. *Compare* Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1381 (9th Cir.1998) (disapproving an EIS that lacked such an assessment) *with* Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 477 (9th Cir.2000) (upholding an EIS where "[e]ach mitigating process was evaluated separately and given an effectiveness rating"). The Supreme Court has required a mitigation discussion precisely for the purpose of evaluating whether anticipated environmental impacts can be avoided. Methow Valley, 490 U.S. at 351–52 (citing 42 U.S.C. § 4332(C)(ii)).

A mitigation discussion without at least some evaluation of effectiveness is useless in making that determination. South Fork Band Council v. Dept. of Interior, 588 F.3d 718, 727 (9th Cir. 2009) (rejecting EIS for failure to conduct adequate review of mitigation and mitigation effectiveness in mine EIS). "The comments submitted by [plaintiff] also call into question the efficacy of the mitigation measures and rely on several scientific studies. In the face of such concerns, it is difficult for this Court to see how the [agency's] reliance on mitigation is supported by substantial evidence in the record." Wyoming Outdoor Council v. U.S. Army Corps of Eng'rs, 351 F. Supp. 2d 1232, 1251 n. 8 (D. Wyo. 2005). *See also* Dine Citizens v. Klein, 747 F.Supp.2d 1234, 1258-59 (D. Colo. 2010) (finding "lack of detail as the nature of the mitigation measures" precluded "meaningful judicial review").

*The agency must fully review all reasonable alternatives.*

NEPA requires the agency to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332€. It must "rigorously explore and objectively evaluate all reasonable alternatives" to the proposed action. City of Tenakee Springs v. Clough, 915 F.2d 1308, 1310 (9th Cir. 1990).

The alternatives analysis should present the environmental impacts in comparative form, thus sharply defining important issues and providing the public and the decisionmaker with a clear basis for choice. Id. The lead agency must "rigorously explore and objectively evaluate all reasonable alternatives," including alternatives that are "not within the [lead agency's] jurisdiction." Id. "While a federal agency need not consider all possible alternatives for a given action in preparing an EA, it must consider a range of alternatives that covers the full spectrum of possibilities." Ayers v. Espy, 873 F.Supp. 455, 473 (D. Colo. 1994).

In this case, the agency must consider, at a minimum, the following reasonable alternatives: (1) access to each activity without the construction or reconstruction/improvement of new or improved roads, including helicopter access; (2) reduction in the amount, scope, and impact of each activity or group of activities, including drilling-waste disposal; (3) timing restrictions to protect wildlife; (4) preclusion of any impact to cultural/religious/historical resources, (5) moving the activities further from wildlife core/home ranges, (6) elimination of, and alternatives to, the need for a water delivery structure on federal lands.

## IV. Compliance with the Forest Plan and NFMA is Required.

It also appears that approval of the Project would violate the National Forest Management Act (NFMA). The NFMA requires all site-specific actions authorized by the Forest Service to be consistent with Forest Plan standards and guidelines. Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1068 n.4 (9th Cir. 1998). Forest Service authorization of mining and mineral exploration must comply with all Forest Plan and NFMA requirements. Save Our Cabinets v. U.S. Dept. of Agriculture, 254 F.Supp.3d 1241, 1259-60 (D. Mont. 2017)(rejecting approval of mining plan for failing to ensure compliance for the "Desired Conditions" for water quality in the Forest Plan). *See also* Hells Canyon Preservation Council v. Haines, 2006 WL 2252554, *7-*10 (D. Oregon 2006)(finding ROD and PoO approval for mining violated Forest Plan); Rock Creek Alliance v. U.S. Forest Service, 703 F.Supp.2d 1152, 1187, n. 23 (D. Mont. 2010)(same).

As noted above, the proposal to use and improve the "existing road" that is not on the travel management maps is not consistent with the Forest Plan. Coronado National Forest Land and Resource Mgmt. Plan at 75 ("Motor vehicle use is allowed on the designated system of roads and motorized trails shown on the motor vehicle use map that is available at each ranger district office. Motor vehicle use is prohibited in all other locations, unless it is specifically authorized by law, permit, and/or orders issued by the Forest Service in conjunction with resource management and public safety actions.").

## V. The Forest Service Must Also Comply with the 1897 Organic Act and its Part 228, 251 and FLPMA Requirements

On the National Forests, the Organic Act requires the Forest Service "to regulate their occupancy and use and to preserve the forests thereon from destruction." 16 U.S.C. § 551. "[P]ersons entering the national forests for the purpose of exploiting mineral resources must comply with the rules and regulations covering such national forests." Clouser v. Espy, 42 F.3d 1522, 1529 (9th Cir. 1994).

The USFS mining regulations require that "all [mining] operations shall be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest resources." 36 C.F.R. § 228.8. In addition, the operator must fully describe "measures to be taken to meet the requirements for environmental protection in § 228.8." 36 C.F.R. 228.4(c)(3). "This court does not believe the law supports the Forest Service's concession of authority to miners under the General Mining Act in derogation of environmental laws and regulations." Hells Canyon Preservation Council v. Haines, 2006 WL 2252554, at *6 (D. Or. 2006)(finding violation of Organic Act in Forest Service's failure to minimize adverse impacts to streams).

In addition to ensuring compliance with all applicable environmental standards under the 36 CFR Part 228 regulations, the USFS has a mandatory duty to require "all practicable measures to maintain and protect fisheries and wildlife habitat which may be affected by the operations" under 36 CFR § 228.8(e)). *See* Rock Creek Alliance v. Forest Service, 703 F.Supp.2d 1152, 1170 (D. Montana 2010) (Forest Service violated Organic Act and 228 regulations by failing to protect water quality and fisheries in approving the mining plan). This includes complying with all requirements to protect listed and other protected species.

Importantly, a simple and generalized reduction of impacts does not equate to the strict requirements for minimization of impacts and protection of resources. The Forest Service's duty to minimize impacts is not met simply by somewhat reducing those impacts. Trout Unlimited v. U.S. Dep't. of Agriculture, 320 F.Supp.2d 1090, 1110 (D. Colo. 2004). In interpreting the Federal Land Policy and Management Act (FLPMA)'s duty on the agency to "minimize damage to … fish and wildlife habitat and otherwise protect the environment," 43 U.S.C. § 1765(a), the court specifically stated the agency's finding that mitigation measures would "reasonably protect" fisheries and habitat failed to meet its duty to "minimize" impacts.

Id. Also, the agency must comply with all of the requirements of Title V of FLPMA, which requires the agency to review the Project's roads under the strict FLPMA requirements.

The agency must demonstrate that all feasible means have been required to minimize all adverse impacts to all potentially affected resources. For example, the Ninth Circuit Court of Appeals ruled that the Forest Service had the authority to strictly limit mining claimants' vehicular access to mining claims. Public Lands for the People v. U.S. Dept. of Agriculture, 697 F.3d 1192 (9th Cir.2012). As held by the court:

> The Secretary of Agriculture has the right to restrict motorized access to specified areas of the national forests, including mining claims. [Clouser v. Espy, 42 F.3d at 1530 (citing 16 U.S.C. § 551)] (means of access "may be regulated by the Forest Service"). More specifically, we have upheld Forest Service decisions restricting the holders of mining claims to the use of pack animals or other non-motorized means to access their claims. Id. at 1536-38. Relatedly, we have rejected the contention that conduct "reasonably incident[al]" to mining could not be regulated. United States v. Doremus, 888 F.2d 630, 632-33 (9th Cir. 1989). Our precedent thus confirms that the Forest Service has ample authority to restrict motor vehicle use within the ENF [El Dorado National Forest].

Id. at 1197.

Thus, in this case, in order to minimize all adverse impacts, the agency must, among other restrictions to protect wildlife and the environment, limit Project activities that do not expand existing roads. Also, as noted herein, the agency must fully consider such limitations as reasonable alternative(s) under NEPA. Additionally, to reduce cumulative impacts to wildlife species that are sensitive to light, noise, and other human activities incidental to mineral exploration, the USFS should consider the timing of the project in relation to other adjacent or nearby projects and consider imposing timing restrictions so that these multiple projects in the same general area occur sequentially rather than at the same time. The same is true for other affected resources such as air quality, water, cultural resources, recreation, etc..

## VI. The Agency Must Comply with the National Historic Preservation Act (NHPA) and Other Requirements to Protect Native American Interests and Resources.

The USFS must comply with the NHPA and requirements regarding Native American interests and resources. Due to the potential that cultural and religious sites and resources will be adversely affected, it would be a violation of the NHPA and other laws (and NEPA as noted above) to approve the Project without the required review of, and protection of, cultural/historical resources.

> [T]he fundamental purpose of the NHPA is to ensure the preservation of historical resources. See 16 U.S.C. § 470a(d)(1)(A) (requiring the Secretary to "promulgate regulations to assist Indian tribes in preserving their particular historic properties" and "to encourage coordination ... in historic preservation planning and in the identification,

evaluation, protection, and interpretation of historic properties"); see also Nat'l Indian Youth Council v. Watt, 664 F.2d 220, 226 (10th Cir.1981) ("The purpose of the National Historic Preservation Act (NHPA), is the preservation of historic resources."). Early consultation with tribes is encouraged by the regulations "to ensure that all types of historic properties and all public interests in such properties are given due consideration...." 16 U.S.C. § 470a(d)(1)(A).

<u>Te-Moak Tribe of Western Shoshone v. U.S. Department of the Interior</u>, 608 F.3d 592, 609 (9th Cir. 2010).

Under the NHPA, a federal agency must make a reasonable and good faith effort to identify historic properties, 36 C.F.R. § 800.4(b); determine whether identified properties are eligible for listing on the National Register based on criteria in 36 C.F.R. § 60.4; assess the effects of the undertaking on any eligible historic properties found, 36 C.F.R. §§ 800.4(c), 800.5, 800.9(a); determine whether the effect will be adverse, 36 C.F.R. §§ 800.5(c), 800.9(b); and avoid or mitigate any adverse effects, 36 C.F.R. §§ 800.8[c],800.9(c). The [federal agency] must confer with the State Historic Preservation Officer ("SHPO") and seek the approval of the Advisory Council on Historic Preservation ("Council"). *See* <u>Muckleshoot Indian Tribe v. U.S. Forest Service</u>, 177 F.3d 800, 805 (9th Cir. 1999). *See also* 36 CFR § 800.8(c)(1)(v)(agency must "[d]evelop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the EA.")

Based on the minimal information supplied by the Scoping Letter and the PoO, the agency cannot approve the Project without the required analysis under the NHPA, with full public review and Tribal consultation. Furthermore, any approved exploration activities must include the requirement of Tribal monitors to be on site during drilling activities, at the expense of the Project proponent. The Tribal monitors should also be present during the archeological survey.

**<u>Conclusion</u>**

The Forest Service cannot approve the Project as proposed. At a minimum, an EA is required, subject to the applicable legal mandates noted above.

Thank you for the opportunity to submit these comments.

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