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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

CASCADE FOREST CONSERVANCY, a non-profit corporation, Plaintiff, v. **LESLIE FREWING**, in her official capacity as Branch Chief, Land, Mineral and Energy Resources, Oregon State Office, BLM; **UNITED STATES BUREAU OF LAND MANAGEMENT**, an agency of the United States Government; **GAR ABBAS**, in his official capacity as Cowlitz Valley District Ranger; and **UNITED STATES FOREST SERVICE,** an agency of the United States Government; Defendants.	Civil No. 3:19-cv-00424 COMPLAINT FOR VACATUR OF ILLEGAL AGENCY DECISIONS, DECLARATORY AND INJUNCTIVE RELIEF (Pursuant to the Administrative Procedure Act; the Land and Water, Conservation Fund Act; the Reorganization Plan No. 3 of 1946; the National Environmental Policy Act)

1. This is a civil action brought by Plaintiff Cascade Forest Conservancy

("CFC," formerly Gifford Pinchot Taskforce "GPTF") for vacatur of illegal agency decisions, as well as declaratory and injunctive relief under the Administrative Procedure Act ("APA") (5 U.S.C. §§ 551 *et seq.*). CFC challenges Defendant United States Forest Service's ("USFS") Decision Notice and Finding of No Significant Impact ("DN/FONSI"), dated January 29, 2018, and Defendant United States Bureau of Land Management's ("BLM") Decision Record ("DR") and Finding of No Significant Impact ("FONSI"), both dated December 3, 2018 (collectively "DR/FONSI"), which together approved Ascot USA, Inc.'s ("Ascot's") application for two hardrock mineral prospecting permits ("Goat Mountain Prospecting Permits").

2. The challenged decisions authorized Ascot to undertake exploratory drilling on approximately 900 acres of land within the Gifford Pinchot National Forest ("Forest"). The Goat Mountain Hardrock Prospecting Project ("Project") will involve extensive industrial drilling operations and various construction activities, including road construction and reactivation, as well as associated logging. Implementation of the Project will result in significant impairment to outdoor recreation in the Project Area and adjacent lands; degradation of fish, plant and wildlife habitat; threaten the integrity of the Green River; and adversely impact native plants, wildlife, fish, soils, water quality, native biodiversity, and ecological integrity. Recreational activities in the Project Area that will be significantly impaired due to anticipated noise interference and road or area closures include hiking, backpacking, camping, biking, bird watching, and botany activities.

3. The DN/FONSI, DR/FONSI, as well as the underlying Goat Mountain Hardrock Prospecting Permit Applications Environmental Assessment, No. DOI-BLM-ORWA-0000-2016-0001-EA (August 7, 2017) ("2017 EA"), violate the Land and Water

Conservation Fund Act ("LWCFA") (54 U.S.C. §§ 200301 *et seq.*, formerly cited as 16 U.S.C. §§ 460*l*-4 *et seq.*) and the Reorganization Plan No. 3 of 1946 ("Reorganization Plan") (60 Stat. 1097, 1099; 5 U.S.C. App.).

a. Specifically, Defendants violated the LWCFA by authorizing activities that will directly interfere with public outdoor recreation on lands purchased with funds obligated for that specific purpose.

b. The Forest Service violated the Reorganization Plan by approving and consenting to Ascot's permit application, because mineral prospecting is plainly inconsistent with, and interferes with, the primary purpose for which the relevant land was acquired under the LWCFA, namely outdoor recreation. The Agency's decision to consent to the Project both (1) significantly interferes with recreation in the Project Area and (2) improperly elevates mineral prospecting above or equates mineral prospecting with the primary purpose of recreation.

4. In addition, Defendants violated the National Environmental Policy Act ("NEPA") (42 U.S.C. §§ 4321 *et seq.*) and its implementing regulations. Specifically, the Defendants violated NEPA by:

a. Failing to adequately consider and fully analyze all reasonable alternatives of the Project, including a proposed alternative that would not authorize prospecting/drilling on lands encumbered by LWCFA restrictions;

b. Failing to provide the necessary analysis of "cumulative impacts" of the proposed action, including the failure to consider the legal impossibility and/or environmental impacts of a future mine at the Project site;

c. Failing to take a "hard look" at the impact of the proposed action,

including failing to specifically disclose and analyze the extent of the closures within the Project Area to visitors seeking recreation opportunities;.

d. Failing to acknowledge, disclose and respond to all received comments on the proposed action, in violation of NEPA and the APA;

e. Failing to conduct an adequate baseline study to determine the present condition of groundwater and other resources in the area, even though that information is essential to evaluate whether Ascot's prospecting activities are negatively impacting groundwater and other resources;

f. Failing to respond, and failing to fully respond, to CFC's Freedom of Information Act ("FOIA") (5 U.S.C. § 552) requests, before requiring CFC to submit comments and administrative objections without complete responses to its FOIA requests and thereby depriving CFC of information it was legally entitled to receive and that was relevant and material to CFC's NEPA comments and USFS administrative objection; and

g. Issuing a FONSI and failing to prepare a Draft Environmental Impact Statement ("DEIS") and Final EIS, in violation of NEPA regulations. Without an adequate EA, Defendants' conclusion in the FONSIs that the Project will have no significant impact cannot stand.

5. CFC thus seeks an order and judgment:

a. Vacating and setting aside the DN/FONSI and DR/FONSI Decisions, as well as the underlying EA, as illegal agency actions under the LWCFA, Reorganization Plan, NEPA and APA;

b. Declaring that Defendants violated the LWCFA and the Reorganization Plan by approving and consenting to Ascot's Project without adequately analyzing whether prospecting would impermissibly interfere with the purposes for which the affected lands were acquired and by finding that the Project would not interfere with the purposes for which the affected lands were acquired;

c. Declaring that Defendants violated NEPA collectively, by failing to adequately analyze all reasonable Project alternatives and cumulative impacts, by failing to take a "hard look" at the impact of the proposed action, by failing to acknowledge, disclose and respond to all received comments, by failing to adequately conduct a baseline groundwater analysis, and individually, by issuing a FONSI and failing to prepare a DEIS and Final EIS, and violate NEPA and the USFS's administrative objection regulations by failing to respond, or fully respond, to CFC's FOIA requests, before requiring CFC to submit comments or administrative objections;

d. Enjoining Defendants from making any further decision or implementing any decision regarding Ascot's prospecting permit applications within the Forest unless and until Defendants comply with the LWCFA, the Reorganization Plan, NEPA and those statutes' implementing regulations;

e. Enjoining Defendants from allowing any further exploratory drilling on acquired lands within the Forest unless and until Defendants comply with the LWCFA, the Reorganization Plan, NEPA and those statutes implementing regulations;

f. Awarding CFC its reasonable attorneys fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412; and

g. Awarding such further relief as the Court deems just and equitable.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 2412 (costs, fees and expenses). CFC has exhausted all required administrative remedies provided by the USFS. CFC was not required to exhaust BLM's administrative appeals process. *Gifford Pinchot Task Force v. Perez*, No. 03:13-CV-00810-HZ, 2014 WL 3019165, at *5 (D. Or. July 3, 2014). CFC thus seeks judicial review of final administrative actions of the USFS and BLM. *See* 5 U.S.C. § 704 (actions reviewable).

7. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e)(1) because Defendant BLM resides in this district. This case is also properly filed in the Portland Division of this Court. The challenged DR/FONSI decisions were made by BLM State Director Jerome Perez on December 3, 2018 in BLM's Portland, Oregon office. The challenged 2017 EA was also issued by BLM's Portland, Oregon office in 2017. CFC also has an office in Portland, Oregon.

PARTIES

8. Plaintiff CASCADE FOREST CONSERVANCY ("CFC," formerly Gifford Pinchot Taskforce) is a non-profit organization whose mission is to protect and sustain forest, streams, wildlife, and communities in the heart of the Cascades through conservation, education, and advocacy. CFC represents over 12,000 members and supporters who share their vision of a forest where wild places remain to capture our

imagination and allow native wildlife to thrive. CFC has offices in Vancouver, Washington, and Portland, Oregon.

9. CFC's members recreate on the sites proposed for drilling, supporting roads, and the surrounding lakes, rivers, and trails. CFC's members hike, bike, camp, hunt, view wildlife, fish, enjoy the solitude and quiet of the public lands and waters at the project site, and otherwise use and enjoy both the land and the water that will be impacted by the Project's noise, drilling, water usage and impacts on groundwater, heavy machinery, tree felling, and road building. CFC members regularly recreate directly within the Project Area. CFC's members have personally led hiking and volunteer maintenance activities along the Green River Trail and the Goat Mountain Trail, and have particularly enjoyed using those trails to access Minnie Lee Creek, Deadman's Lake, and Vanson Peak. CFC's members also enjoy recreating at the Green River Horse Camp and Ryan Lake.

10. CFC members intend to continue recreating at and around the Goat Mountain area, including in the Project Area. Several CFC members have expressed concern that their ability to use the area may be curtailed by planned road closures as part of the proposed project. CFC members also are harmed by the increase of light, industrial noise, air, and water pollution to the area that would be sanctioned by this project and which would interfere with members' recreation and enjoyment.

11. Defendant LESLIE FREWING was the Branch Chief, Land, Mineral and Energy Resources for the Oregon State Office of the United States Bureau of Land Management ("BLM"), at the time the DR/FONSI was signed and is sued in her official capacity. The DR/FONSI does not legibly indicate who in fact signed the DR/FONSI on

Dec. 3, 2018. However, the title of the BLM official signing the DR/FONSI matches the title of Defendant Frewing and the signature on information and belief appears to be that of Defendant Frewing. These decisions constituted final agency action of the BLM.

12. Defendant UNITED STATES BUREAU OF LAND MANAGEMENT ("BLM") is an administrative agency within the United States Department of the Interior and is charged with managing the mineral resources of the Forest in accordance and compliance with federal laws and regulations. The BLM is an agency within the meaning of the APA, 5 U.S.C. § 551.

13. Defendant GAR ABBAS is the Cowlitz Valley District Ranger within the Forest and an employee of the United States Forest Service. Defendant Abbas signed the DN/FONSI. This decision constituted final agency action of United States Forest Service. Defendant Abbas is sued in his official capacity.

14. Defendant UNITED STATES FOREST SERVICE ("USFS") is an administrative agency within the United States Department of Agriculture and is charged with managing the surface lands of the Forest in accordance and compliance with federal laws and regulations. USFS is an agency within the meaning of the APA, 5 U.S.C. § 551.

SUMMARY OF THE LAW

Land and Water Conservation Fund Act

15. In enacting the LWCFA, Congress sought to facilitate the preservation, development, and accessibility of outdoor recreation resources by providing funds "for the acquisition of land, water, or an interest in land or water within inholdings within . . . areas [that] are primarily of value for outdoor recreation purposes." 54 U.S.C. § 200306. Specifically, "[t]he purposes of this Act [] are to assist in preserving, developing, and

assuring accessibility to all citizens . . . such quality and quantity of outdoor recreation resources as may be available and are necessary and desirable for individual active participation in such recreation[.]" Pub. L. 88–578, title I, § 1(b), 78 Stat. 897, *codified at* 54 U.S.C. § 100101 App.

Reorganization Plan No. 3 of 1946

16. Under the Reorganization Plan, Congress transferred to the Secretary of the Interior authority to regulate the uses of mineral deposits on certain USFS lands, including lands acquired under the LWCFA, "*[p]rovided,* [t]hat mineral development on such 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." 5 U.S.C. App. (emphasis in original).

National Environmental Policy Act

17. Congress enacted NEPA in 1969, directing all federal agencies to assess the environmental impacts of proposed actions that significantly affect the quality of the human environment. NEPA seeks to "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321. As such, NEPA obligates agencies to make available to the public high-quality information, including accurate scientific analyses, expert agency comments, and public comments, "before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b). NEPA's public disclosure goals are twofold: (1) to insure that the agency has carefully and fully contemplated the environmental effects of its action; and

(2) to insure that the public has sufficient information to review, comment on, and challenge (if necessary) the agency's action. 42 U.S.C. §§ 4321, 4332.

18. The Council on Environmental Quality ("CEQ") promulgated uniform regulations to implement NEPA that are binding on all federal agencies. Those regulations are found at 40 C.F.R. Parts 1500–1508.

19. The Court may review agency actions taken pursuant to NEPA under the APA. 5 U.S.C. §§ 702, 704, 706.

20. NEPA requires all federal agencies to prepare a "detailed statement" assessing the environmental impacts of all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). This statement is known as an Environmental Impact Statement ("EIS").

21. An environmental assessment ("EA") can be created to aid the agencies in determining whether or not a proposed activity will significantly affect the quality of the human environment. 40 C.F.R. §§1501.4(b), 1508.9. The role of the EA is to determine whether an EIS is needed or if a finding of no significant impact ("FONSI") is supported. *Id.*

22. To determine the significance of a federal action, CEQ regulations require agencies to look to both the context and the intensity of the action. 40 C.F.R. § 1508.27. Context refers to the significance of the action in regards to society as a whole, the affected region, the affected interests, and the locality. Both short- and long-term effects are relevant to the action's context. *Id.* § 1508.27(a). The intensity of the action is evaluated based on several factors, including, but not limited to, the degree to which the action affects public health or safety, the degree to which the effects on the quality of the

human environment are likely to be highly controversial, and the degree to which the possible effects on the human environment are highly uncertain or involve unknown characteristics. *Id.* § 1508.27(b).

23. An EA must include an adequate analysis of environmental impacts of a project and alternatives and must also include a consideration of the direct, indirect and cumulative impacts of the project and its alternatives, resulting from all past, present and reasonably foreseeable future actions. *Id.* §§ 1508.7, 1508.8, 1508.9, 1508.25(c). Cumulative impacts are impacts to the environment resulting from the incremental effects of the present action, combined with other past, present and reasonably foreseeable future actions, regardless of what agency or person undertook, undertakes or will undertake those actions. *Id.* § 1508.7. "Cumulative impacts can result from individually minor but collectively significant actions." *Id.*

24. BLM has adopted its own regulations to supplement CEQ's NEPA regulations. These supplemental regulations require consideration of all reasonably foreseeable actions, which includes those activities that a reasonable official "would take . . . into account in reaching a decision." 43 C.F.R. § 46.30.

25. In order for a federal agency to make a finding of no significant impact, it must present reasons why the action "will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared." 40 C.F.R. § 1508.13. The FONSI must include the EA "or a summary of it and shall note any other environmental documents related to it." *Id.*

26. NEPA requires that "environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. §

1500.1(b). NEPA requires that NEPA documents and any underlying or supporting documents be available to the public pursuant to FOIA. *See* 40 C.F.R. § 1506.6(f).

Administrative Procedure Act

27. Section 702 of the APA, 5 U.S.C. § 702, provides a private cause of action to any person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."

28. Under section 704 of the APA, 5 U.S.C. § 704, "final agency action" is reviewable. A final agency action is one that marks the consummation of the agency's decision-making process and one by which rights or obligations have been determined or from which legal consequences flow. *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

29. Under section 706 of the APA, 5 U.S.C. § 706, "The reviewing court shall – … (2) hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; … [or] (D) without observance of procedure required by law …"

SUMMARY OF THE FACTS

30. This is a long running dispute over the legality of decisions made by the USFS and BLM to allow prospecting for mineral deposits in the Forest. CFC has successfully challenged Defendants' unlawful decisions to permit prospecting in the past. *See Gifford Pinchot Task Force v. U.S. Forest Serv.*, No. 3:11-05510-BHS (W.D. Wash. 2011); *Gifford Pinchot Task Force v. Perez*, No. 13-CV-00810-HZ, 2014 WL 3019165 (D. Or. July 3, 2014). The Agencies' current decisions fail to cure the deficiencies noted by courts regarding prior, related decisions by these same agencies.

31. The Project Area contains a rich variety of wildlife habitat, recreational opportunities, deep forests, clear mountain streams, and other important environmental resources that are threatened by the Project's drilling and industrial activities. *See generally* 2017 EA. The primary use of the Goat Mountain area and headwaters of the Green River is for recreation. The area is important for camping, picnicing, fishing, hunting, hiking, equestrian riding, and huckleberry and mushroom picking, among other recreational activities. The Green River Horse Camp is an especially popular recreation destination.

The Green River, adjacent to the project site, is a popular site for fishing and other recreation.

32. Noise and other human activities from drilling and exploration activities will adversely affect recreational opportunities in the vicinity. CFC's members are particularly concerned that noise from the drilling and the increased traffic will disrupt the quiet and solitude of the Project Area, which are the most attractive qualities of the area for recreation.

The Project Area is within the Green River valley, which can amplify noise pollution in the area.

33. Road closures in the Project Area will also interfere with recreational activities, particularly plans to hike along the Green River Trail, which can be accessed by only one road, and other highly trafficked trails up to Goat Mountain.

Hiking trails in the Project Area afford recreators scenic views, like this one of Ryan Lake and the Green River.

34. In 2011, Ascot submitted two applications for Hardrock Prospecting Permits to authorize exploratory drilling and associated activities – including reactivation of decommissioned roads, tree removal, installation of drill pads, and removal of rock core samples – within Mineral Survey ("MS") parcels 708, 774, 779, 1329 and 1330. These parcels encompass approximately 900 acres of land within the Gifford Pinchot National Forest in Skamania County, Washington. The Project Area is located on and adjacent to the south facing slope of Goat Mountain, bordering the Mount St. Helens National Volcanic Monument, within twelve miles of the crater, and near the headwaters of the Green River.

The Project Area, on the slope of Goat Mountain, is adjacent to the Mt. St. Helens National Volcanic Monument.

35. Defendant USFS manages the surface of these lands, including the associated natural resources. Defendant BLM manages the sub-surface resources, including hardrock minerals.

36. The United States owns the undivided surface and mineral estates of parcels MS-1330, MS-1329, MS-774 and MS-779 in fee. Parcels MS-1329 and MS-1330 were acquired with funds from the LWCFA.

37. On just one parcel, MS-708, the United States owns the surface estate and an undivided one-half interest in the underlying mineral estate. The other half interest of the underlying mineral estate is privately held by Ascot. *See* Figure 1.

Figure 1 –Drill Sites and Land Parcels of Project Area[1]

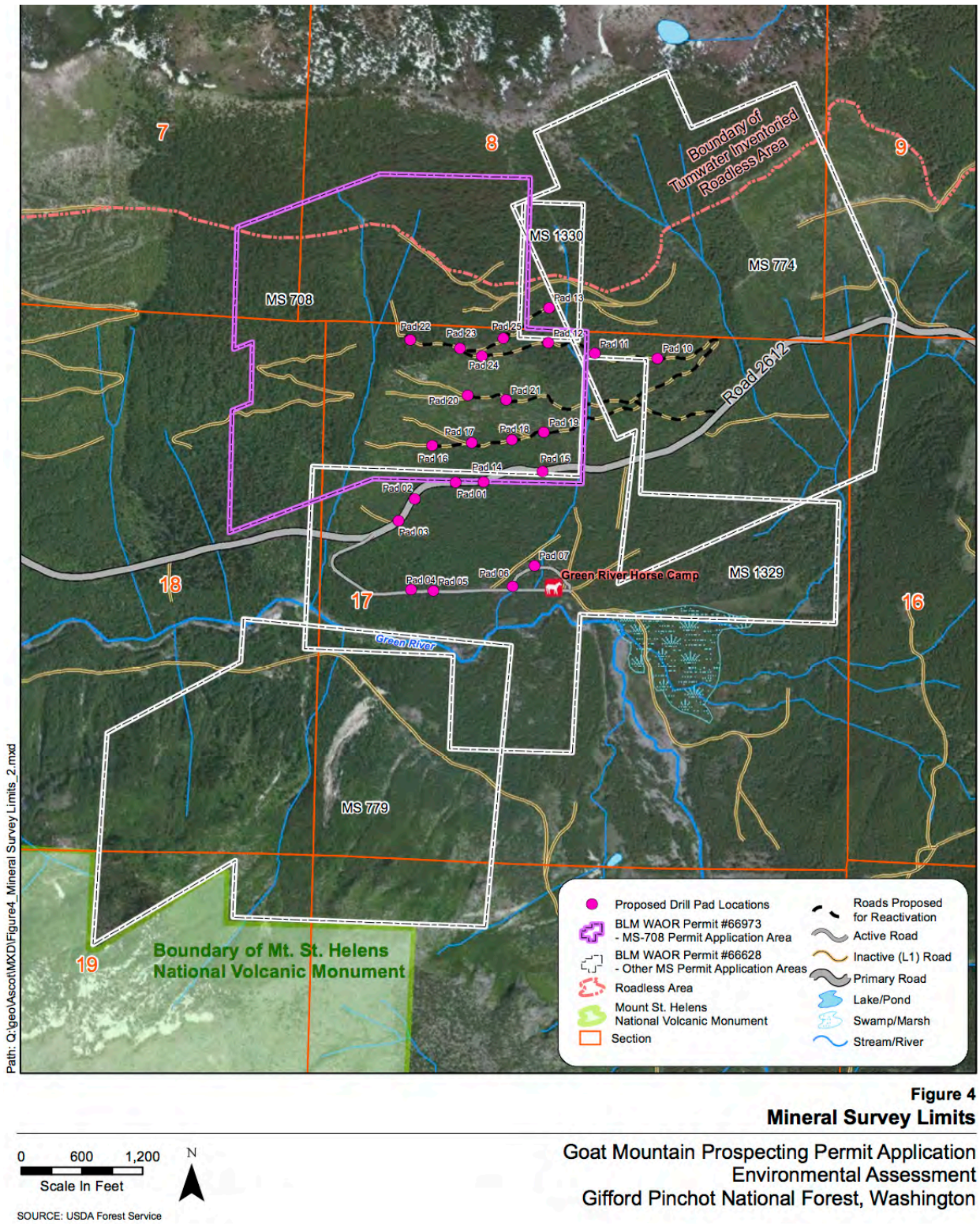

Figure 4
Mineral Survey Limits

Goat Mountain Prospecting Permit Application
Environmental Assessment
Gifford Pinchot National Forest, Washington

[1] Source: 2017 EA, App. A. Note: drill locations shown are as-proposed by the applicant. Drill pads 6 and 7 were subsequently removed from the as-approved project.

38. Ascot obtained its mineral interest in 2010 from General Moly Inc. That interest traces back to the Duval Corporation, which divested its mineral interests in 1986. At the time the United States took title to MS-708, Ascot's mineral estate was already severed.

39. In 2010, the USFS allowed Ascot to conduct exploratory drilling on the MS-708 parcel of USFS land without notice to the public and without conducting any analysis under NEPA. GPTF objected to that drilling when it discovered drilling was ongoing. In 2011, the USFS again attempted to allow Ascot to conduct exploratory drilling on that same parcel without complying with NEPA. GPTF received notice of that proposed drilling shortly before it was scheduled to begin and sought a preliminary injunction to stop it. *See Gifford Pinchot Task Force v. U.S. Forest Serv.*, 3:11-05510-BHS (W.D. Wash. 2011). The USFS withdrew its permission before the court could rule on GPTF's motion and the exploratory drilling planned for 2011 never occurred. Instead, later in 2011, Ascot submitted the two applications for hardrock prospecting permits on multiple parcels of USFS land that resulted in the permits at issue here.

40. Defendant BLM completed the public scoping process in the spring of 2012 and prepared an EA describing the environmental impacts of Ascot's proposed prospecting activities on June 29, 2012 ("June EA"). CFC submitted timely and extensive comments pertaining to project scoping and the June EA.

41. In December 2012, Defendant BLM made available to the public a "modified" EA, dated November 28, 2012 ("November" EA). Defendant USFS issued a DN/FONSI, documenting the agency's consent to issuance of the permits, on December

3, 2012. Based on this consent and in reliance on the USFS's determination that prospecting activities would not interfere with the primary purposes for which the relevant lands were acquired, BLM released a DR and FONSI, granting Ascot's applications, on December 20, 2012.

42. CFC, then known as Gifford Pinchot Task Force ("GPTF"), challenged these decisions in this Court, alleging violations of, *inter alia*, NEPA and the LWCFA.

43. In July 2014, Judge Hernandez issued a decision on Defendants' issuance of Ascot's permit, faulting the 2012 "modified" EA. *Gifford Pinchot Task Force v. Perez*, No. 13-CV-00810-HZ, 2014 WL 3019165 (D. Or. July 3, 2014). Judge Hernandez held that the purpose that controls the acquisition of land under the LWCFA continues to apply to post-acquisition development or activities on the land, and thus USFS must affirmatively find that authorized projects will not interfere with the primary purpose for which the land was acquired. *Id.* at *15. In this case, "the primary purposes for which the land was acquired are timber production, protection of navigable stream flow, and outdoor recreation." *Id.* at *16. Judge Hernandez found the Defendants failed to recognize outdoor recreation as a primary purpose for which the land was acquired, failed to comply with NEPA's "hard look" requirement absent baseline groundwater information, failed to conduct a baseline groundwater study, and failed to discuss a reasonable alternative. Thus, Defendant USFS's DN/FONSI was deficient. *Id.* at *25–40. Judge Hernandez therefore remanded the EA back to the Agencies.

44. In December 2015, rather than conduct a new analysis to address the myriad deficiencies found by the court, Defendant BLM merely chose to modify its EA once again.

45. Although Defendants published notice in a local newspaper regarding the availability of a modified EA and sought comments on that EA on or about January 5, 2016 (the "January 2016 EA"), they waited several weeks to give actual notice to CFC (then GPTF). CFC's counsel, who had successfully represented CFC in the litigation that ended in 2014 ,did not receive actual notice until January 22, 2016. But by then, because of inquiries from the press in mid-January, CFC (then GPTF) had become aware that the January 2016 EA was actually available and that a 30 day public comment had begun to run. CFC asked the Defendants to extend the 30 day comment period, but Defendants refused to do so.

46. On January 21, 2016, CFC (then GPTF) made FOIA requests to both USFS and BLM for copies of all documents relating to the exploratory drilling lease applications submitted by Ascot and the associated "modified" EA in order to fully and properly comment on and/or object to any draft NEPA analysis and any draft agency decisions.

47. On January 22, 2016, Defendant BLM acknowledged CFC's FOIA request and assigned it a tracking number. Defendant USFS did not acknowledge CFC's FOIA request in January of 2016.

48. On February 4, 2016, CFC commented on the "modified" EA without the benefit of any of the records it had requested pursuant to its FOIA requests. The fact that CFC was required to submit its comment with less than 30 days actual notice and without any response to its valid 2016 FOIA requests materially prejudiced CFC's ability to submit complete comments on the January 2016 EA.

49. On February 19, 2016, Defendant BLM contacted CFC, communicating it anticipated to complete a final response on the FOIA request by April 15, 2016. Defendant USFS had still not acknowledged CFC's FOIA request.

50. On May 5, 2016, Defendant BLM sent the first batch of responsive records to CFC.

51. On July 7, 2016, Defendant BLM sent the second batch of responsive records to CFC.

52. CFC filed an administrative appeal of BLM's production on August 8, 2016, challenging both the adequacy of the search and the decision to redacted a substantial number of records.

53. BLM acknowledged CFC's administrative appeal on August 16, 2016.

54. BLM has to date not responded to CFC's administrative appeal.

55. In August 2017, Defendant BLM made available to the public another "modified" EA ("2017 EA").

56. On August 23, 2017, more than 18 months after receiving it, Defendant USFS finally acknowledged CFC's January 2016 FOIA request and assigned it a tracking number.

57. On August 24, 2017, while the FOIA requests were still pending, and before the USFS had produced a single responsive record, Defendant USFS published a draft DN/FONSI which started a 45-day period for interested parties to submit administrative objections.

58. In September 2017, Defendant BLM sent a third batch of responsive records to CFC.

59. On September 18, 2017, CFC contacted USFS, demanding USFS produce requested records within ten business days so that CFC could use them when preparing its administrative objection.

60. On September 26, 2017, Defendant USFS responded to CFC, stating they would get "some records" out within the next ten business days.

61. USFS has not to date produced any documents in response to CFC's 2016 FOIA request. BLM has not to date completely responded to CFC's 2016 FOIA request or to its August 2016 administrative appeal of its partial response.

62. On October 7, 2017, CFC submitted an objection to the draft DN/FONSI without the benefit of having complete responses to its valid January 2016 FOIA requests. The fact that CFC did not have complete responses to its FOIA requests materially prejudiced CFC's ability to submit a complete Objection. CFC specifically objected to:

a. Defendants' failure to fully respond to CFC's FOIA requests before putting the draft DN/FONSI out for objections;

b. Defendant USFS's consent to the proposed prospecting, despite the Project's foreseeable interference with recreation in the Forest, in violation of the LWFCA and the Reorganization Plan;

c. Defendants' failure to consider and fully analyze all reasonable alternatives to the Project, in violation of NEPA;

d. Defendants' failure to consider and fully analyze all cumulative impacts of the proposed prospecting, in violation of NEPA;

e. Defendants' failure to take a "hard look" at the impact of the proposed action, particularly with respect to the extent of interference with recreation activities, in violation of NEPA;

f. Defendants' failure to acknowledge, disclose, and respond to all received comments, in violation of NEPA;

g. Defendants' failure to conduct an adequate baseline groundwater analysis, in violation of NEPA; and

h. Defendants' decision to issue a FONSI rather than a Draft EIS and Final EIS, in violation of NEPA.

63. Defendants' failure to timely respond to CFC's FOIA requests materially prejudiced CFC's ability to state its objections.

64. In December 2017, Defendant USFS issued an official response to the DN/FONSI objections, but declined to address the legal errors pointed out in CFC's objection letter.

65. On January 29, 2018, Defendant USFS issued the DN/FONSI, consenting to Defendant BLM's issuance of Ascot's two prospecting permits.

66. On December 3, 2018, Defendant BLM issued its DR/FONSI, approving Ascot's two prospecting permit applications.

FIRST CLAIM FOR RELIEF

Failure to Comply with the LWCFA, the Reorganization Plan, and the APA

67. CFC realleges and incorporates by reference all preceding paragraphs into each of the counts set forth below.

68. The LWCFA authorizes USFS to expend funds for the purchase of lands that are "primarily of value for outdoor recreation purposes." 54 U.S.C. § 200306. Under the LWCFA and Reorganization Plan, use of these lands can only be permitted with the consent of the USFS after the USFS finds that the proposed usage will not "interfere with the primary purposes for which the land was acquired." 60 Stat. 1097, 1099, 5 U.S.C. App. (2012).

69. USFS purchased Parcels MS-1329 and MS-1330 specifically for the purpose of recreation, using money appropriated under the LWCFA. However, the Project will degrade or destroy recreation opportunities and scenic values in the area, and otherwise interfere with the purpose(s) for which the Project lands were acquired. For example, drilling for minerals will interfere with public access to recreational sites and significantly impair the quality of recreation in the surrounding areas due to noise. Thus, the relevant provisions of the LWCFA and the Reorganization Plan preclude USFS from consenting to permit issuance and preclude BLM from approving the Project.

70. Contrary to the clear mandate of the LWCFA, which forbids interference with the primary purpose of acquired lands, the DN/FONSI improperly elevates the general policy goals of the Mining and Mineral Policy Act as a controlling purpose either equal to or above recreation.

71. Defendants USFS's and Gar Abbas's decisions to consent to and authorize exploratory drilling, as well as BLM's reliance on and acceptance of the USFS' decisions, thus violate the LCWFA and the Reorganization Plan.

72. Defendants USFS' and BLM's actions are arbitrary, capricious, an abuse of discretion and not in accordance with the LCWFA, Reorganization Plan and NEPA, in violation of 5 U.S.C. § 706(2).

SECOND CLAIM FOR RELIEF

Defendants' Violations of NEPA and the APA

73. Plaintiff realleges and incorporates by reference all preceding paragraphs into each of the counts set forth below.

COUNT ONE -Failure to Consider Reasonable Alternatives

74. NEPA mandates that an agency "shall to the fullest extent possible" use the NEPA process "to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the environment." 40 C.F.R. § 1500.2(e). The requirement to consider such alternatives applies to an EA. *Id.* § 1508.9.

75. The agencies failed to fully consider all reasonable alternatives, including but not limited to the reasonable alternative of protecting sensitive areas from negative impacts. CFC and others specifically proposed an alternative to only allow prospecting or mineral operations on Parcel MS-708, which would have avoided the LWCFA parcels at issue. However, Defendants declined to consider such an alternative, citing a need for the applicant to gather information for a future mine, despite the fact that Defendants described a future mine as "not reasonably foreseeable" for the purposes of evaluating the direct, indirect, and cumulative impacts of the Project. Defendants USFS' and BLM's actions are arbitrary, capricious, an abuse of discretion and not in accordance with NEPA, in violation of 5 U.S.C. § 706(2).

COUNT TWO-Failure to Fully Consider Impacts from the Project

76. Pursuant to NEPA, Defendants USFS and BLM must fully discuss and analyze the Project's direct, indirect, and cumulative impacts, when added to other past, present and reasonably foreseeable future actions within and near the Project Area. 40 C.F.R. §§ 1508.7, 1508.8, 1508.9. The agencies failed to do that in reviewing, consenting to, and approving the Project.

77. In concluding that the Project would not have a significant environmental effect, the agencies relied on the modified 2017 EA. Defendant BLM concluded in the 2017 EA that future mining is not a "reasonably foreseeable" future action, and therefore did not evaluate the potential environmental impacts of future mining in the 2017 EA.

78. The failure to consider the potential environmental impacts of a reasonably foreseeable mine is arbitrary, capricious, and contrary to NEPA. Defendant BLM's own regulations governing prospecting permits state that removal of materials from prospected sites must be for the purpose of demonstrating a "valuable deposit." *See* 43 C.F.R. § 3505.10(c) (2017) (allowing removal of materials only for demonstrating a valuable deposit). BLM's regulations further define a valuable deposit as one where a mine would be commercially viable. *Id.* § 3501.5 (defining "valuable deposit"). BLM's regulations thus make prospecting and mining connected actions.

79. Even if prospecting and mining were not considered connected actions within the meaning of NEPA, BLM's supplemental NEPA regulations require consideration of all "reasonably foreseeable actions, which includes those activities that a reasonable official "would take . . . into account in reaching a decision." 43 C.F.R. § 46.30. Here, the Agencies did in fact take a future mine into account in reaching their

decisions. The DN/FONSI repeatedly emphasizes the Mining and Mineral Policy Act, which the Agencies apparently interpret as a mandate to "foster and encourage . . . mining and mineral industries," finding that consenting to the prospecting permit is "consistent" with that Act.

80. Defendants' failure to provide a quantified analysis of the direct, indirect, and cumulative impacts from the Project and all the "past, present, and reasonably foreseeable future activities" in the Project Area violated NEPA and its implementing regulations, 40 C.F.R. §§1508.7, 1508.8. 1508.9, 1508.25 and BLM's NEPA regulations, rending their decisions arbitrary, capricious, an abuse of discretion and not in accordance with NEPA, in violation of 5 U.S.C. § 706(2).

COUNT THREE-Failure to Properly Consider the Project's Impacts on Outdoor Recreation

81. Defendants' failure to take a "hard look" at how drilling authorized by the Goat Mountain Hard Rock Prospecting Permits will impact the recreational values and access to recreation spots in the Project Area violates NEPA.

82. In failing to fully disclose or analyze the extent that recreational access will be restricted in the Project Area, the 2017 EA fails to take the required "hard look." The 2017 EA merely describes interference with recreational access as "temporary," without providing details as to the extent and severity of the interference. For example, the 2017 EA fails to provide specific discussions of anticipated noise levels, road closures, and square footage that must be closed to public access due to safety concerns.

83. The Defendants' actions are arbitrary, capricious, an abuse of discretion and not in accordance with NEPA, in violation of 5 U.S.C. § 706(2).

COUNT FOUR-Failure to Fully Consider Impacts to Groundwater

84. NEPA's implementing regulations require Defendants USFS and BLM to address the impacts of the prosed action and alternatives. In analyzing the affected environment, agencies must establish the baseline condition of natural resources in the Project Area.

85. The groundwater study prepared to support the 2017 EA is significantly flawed. Although Defendant BLM had almost three years to conduct a detailed baseline groundwater analysis, the 2017 EA relies exclusively on a minimal one-time sampling of three previously drilled holes from 2014. Defendants have not explained why these sites could not have been sampled further, or why additional sites could not have been sampled, in order to obtain a more representative and reliable data set, despite the fact that such information is absolutely necessary to evaluate the extent to which the Project will negatively impact groundwater and other resources.

86. In the absence of an adequate baseline analysis, Defendants' conclusion that exploratory drilling would not significantly affect groundwater and other resources in the Project Area is arbitrary, capricious, an abuse of discretion and not in accordance with NEPA, in violation of 5 U.S.C. § 706(2).

COUNT FIVE-Failure to Prepare and EIS

87. Although NEPA regulations allow an agency to avoid preparing a complete EIS by first preparing an Environmental Assessment (EA) and then issuing a Finding of No Significant Impact (FONSI), 40 C.F.R. § 1508.9, NEPA requires an EIS whenever a proposed action may have a significant impact on the environment. Here, the

EA and underlying record here does not support the Defendants' FONSIs and failure to prepare an EIS.

88. The Goat Mountain Prospecting Permits authorize a "major federal action" for NEPA purposes. Moreover, based on its context and the local intensity of certain imapcts, the Project may and likely will significantly affect "the quality of the human environment" in the Goat Mountain area. The Project may and likely will have a significant impact or significant cumulative impact on recreational activities, water resources, land, fish, wildlife, plants, scenery, and the unique features of both the Goat Mountain region and the surrounding areas, including the Mount St. Helens Volcanic National Monument, and will violate other federal laws including the LWCFA. See 40 C.F.R. § 1508.27.

89. Given the nature and impacts of the Goat Mountain Hardrock Prospecting Permits, including a reasonably foreseeable mine in the immediate vicinity of the Mount St. Helens National Volcanic Monument, and the inadequacy of the EA, Defendants' FONSIs and failure to prepare and EIS are arbitrary, capricious, an abuse of discretion and not in accordance with NEPA, in violation of 5 U.S.C. § 706(2).

COUNT SIX-Failure to Provide All Information to the Public

90. Pursuant to NEPA, Defendants USFS and BLM must make environmental information available to public officials and citizens before making decisions and taking actions. 40 C.F.R. § 1500.1(b). Further, NEPA requires Defendants to make available to the public NEPA documents and any underlying documents pursuant to FOIA. *See* 40 C.F.R. § 1506.6(f). Both USFS and BLM failed to make all environmental information available to the public before putting the DN/FONSI out for public comment or

objections, and failed to make underlying records available pursuant to timely FOIA requests.

91. After receiving FOIA requests from CFC for documents related to Ascot's proposed drilling at the Goat Mountain site, USFS failed to produce a single record in response to the request, and BLM failed to fully respond.

92. Defendants' failure to make environmental information available to the public before putting out the DN/FONSI for public comment and objection and failure to make underlying documents of the DN/FONSI available pursuant to CFC's FOIA requests prejudiced CFC's ability to submit complete comments and a complete administrative objection violated NEPA, and its implementing regulations, 40 C.F.R. § 1500.1(b); 40 C.F.R. § 1506.6(f), and the USFS's objection regulations, rendering Defendants' decisions arbitrary, capricious, an abuse of discretion and not in accordance with law, in violation of 5 U.S.C. § 706(2).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays for an order and judgment:

a. Declaring that Defendants violated the LWCFA, and the Reorganization Plan by consenting to and approving Ascot's prospecting permit applications without adequately analyzing whether prospecting would impermissibly interfere with the purposes for which the affected lands were acquired and by determining that the Project would not interfere with the purposes for which the affected lands were acquired;

b. Vacating and setting aside the DN/FONSI, and DR/FONSI, as well as the underlying EA, as illegal agency actions under the APA;

c. Declaring that Defendants violated NEPA individually, by failing to respond to CFC's FOIA requests, by failing to consider and fully analyze all reasonable alternatives, by failing to take a "hard look" at the impact of the proposed action, by failing to acknowledge and respond to all received comments, by failing to conduct an adequate baseline study to determine the present condition of groundwater in the relevant area, and by the Defendants' determination to issue a DN/FONSI and DR/FONSI and failure to prepare a DEIS and Final EIS;

d. Enjoining Defendants from implementing their decisions regarding the two Ascot prospecting permit applications within the Forest unless and until Defendants comply with the LWCFA, the Reorganization Plan, and NEPA and those statutes' implementing regulations;

e. Enjoining Defendants from approving any exploratory drilling on acquired lands within the Forest unless and until Defendants comply with the LWCFA, the Reorganization Plan, NEPA and those statutes' implementing regulations;

f. Awarding CFC its reasonable attorneys fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412; and

g. Awarding such further relief as the Court deems just and equitable.

Respectfully submitted this 22nd day of March, 2019

/s Tom Buchele
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