



Via U.S. Mail and Email

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Re: DEIS for the Montanore Project

Please accept these comments on behalf of Save Our Cabinets and Earthworks. We hereby incorporate by reference comments submitted by the Center for Science in Public Participation (CSP2), Brian Peck for NRDC, Tom Myers, and Matthew Clifford. We also incorporate and include by reference herein all previous comments or communications submitted to the Forest Service and/or MDEQ by Save Our Cabinets or Earthworks.

Save Our Cabinets is a Montana nonprofit corporation. Our primary mission is to protect the 94,000-acre Cabinet Mountains Wilderness Area in northwestern Montana from activities incompatible with wilderness through public education and advocacy.

Earthworks is a national nonprofit organization, with field offices in Missoula and Bozeman Montana. Earthworks is dedicated to protecting communities and the environment from the adverse impacts of mineral development.

While our comments and those of our experts point out the many deficiencies in the DEIS and raise questions about alternatives not considered or considered and dismissed, our position is the extreme impacts to wilderness, wildlife, and water quality make the

only acceptable alternative the no-action alternative. No amount of monitoring or mitigation can produce a mine in this location that would be acceptable.

As proposed, the Montanore Project (or Project), and each of the Project action alternatives reviewed in the Draft EIS, violates one or more federal or state environmental, public land, and natural resource laws and/or their implementing regulations, and thus cannot be approved. As discussed in more detail below, these laws include the Clean Water Act (CWA), the Endangered Species Act (ESA), the National Forest Management Act (NFMA), the Forest Service Organic Act of 1897 (Organic Act), the National Environmental Policy Act (NEPA), Montana state water and air quality laws, and the Montana Environmental Policy Act (MEPA), among others. In addition, due to the numerous NEPA/MEPA violations, the agencies must prepare a revised Draft EIS for public review (i.e., it is not acceptable for the agencies to simply issue a Final EIS in this case).

IMPACTS TO WATER QUALITY AND QUANTITY

BHES Order

The BHES Order, issued to Noranda in 1992, authorized degradation and established nondegradation limits in surface and ground water adjacent to the Montanore Project for discharges from the project (BHES 1992). The Order established numeric nondegradation limits for total dissolved solids, chromium, copper, iron, manganese, and zinc (both surface and ground water), as well as nitrate (ground water only), and total inorganic nitrogen (surface water only). Pursuant to BHES's Order, these nondegradation limits apply to all surface and ground water affected by the Montanore Project and remain in effect during the operational life of the mine and for so long thereafter as necessary (BHES 1992).

Mines Management (MMC) is currently (2009) engaged in the MPDES permitting process with MDEQ. The company is applying to have additional discharges related to the Montanore Mine included in the MPDES permit. How can a BHES Order issued in 1992 properly evaluate water quality impacts of mine-related discharges that were not considered in the 1991, 1997, and 2006 versions of the MPDES? Cumulative impacts from the multiple discharges, many of which have yet to be permitted, were not considered when the 1992 BHES Order was issued. It is likely that the baseline water quality of the region also has changed from 17 years of activity that includes timber harvest and other commercial activities.

Much of the surface water impacted by the BHES Order now provides habitat for the threatened species of bull trout. The original order, when issued, was not required to consider the impacts to bull trout nor impacts to the westslope cutthroat trout and interior redband trout, which are both sensitive species. The wildlife impacts to threatened and sensitive species should be considered when evaluating the validity of the order issued in 1992. The 1992 Order does not authorize the degradation of bull trout habitat.

The DEIS establishes the fact that impacts are likely to the “Outstanding Resource Waters” of the Cabinet Mountains Wilderness. The 1992 Order cannot authorize the degradation of “Outstanding Resource Waters” that are protected under the Clean Water Act.

Land Application Disposal

The location of the LAD would be between Poorman and Ramsey Creeks, both of which provide habitat for the bull trout, a threatened species, and pure redband trout, a forest sensitive species and species of special concern. The DEIS establishes that any discharge using the LAD process would essentially be a discharge to adjacent streams since there is a distinct hydrologic connection between groundwater and surface water.

For the water quality impact analysis, it was assumed that the percolation of treated ground water from the LAD Areas would be essentially a direct discharge into the receiving stream. (DEIS, Vol.2, Page 491)

Percolation from the LAD Areas would enter the ground water system and would discharge at nearby springs and/or eventually to adjacent streams as diffuse flow. (DEIS V.2, pg. 440)

Thus, these discharges must be covered by an MPDES Permit, which has not been done. The Project cannot avoid the strict requirements for water quality protection contained in the CWA and Montana water quality laws in an attempt to circumvent NPDES requirements via the LAD scheme.

This connection between ground and surface water and the existence of bull trout and redband trout in the receiving streams make the quality of the discharge critical. However, the quality of the discharge is highly suspect with respect to nutrients, metals, and dissolved solids. There would be a mine related disruption in the natural flow of deep ground water, which contributes essential elements to the chemical makeup of the streams. Under NEPA and MEPA, these impacts must be fully analyzed.

Alternatives 2, 3, and 4 would affect stream quality by changing dissolved solids, nutrients, and metals concentrations. Changes would occur in part due to reductions in streamflow contributions from deeper ground water, which contributes more total dissolved solids to streams than shallower sources of water. (DEIS Summary page 35)

The essential elements which would flow into the streams via ground water, would be replaced by nutrients and metals from the LAD, including chromium, copper, iron, manganese, and zinc.

The existing ground water quality beneath the LAD Areas would be altered because discharged wastewater percolating into ground water beneath the LAD Areas would have higher concentrations of nitrates, several metals, and total dissolved solids than the existing water quality. (DEIS, Vol. 2, Page 440)

A treatment option is considered in the DEIS prior to discharge to the LAD site. The DEIS also acknowledges that there is a high degree of uncertainty in the effectiveness in this treatment process. The DEIS recognizes and unfortunately “assumes that there would be no operational issues at the LAD areas.” This discharge will be perpetual and operational issues can be expected.

It is not possible to estimate actual removal rates for total dissolved solids, nutrients, and metals until mine wastewater application to the LAD Areas occurs and monitoring data are collected. The percent removal values used for total dissolved solids, nitrogen, and metals are uncertain. For the analysis of the effects of land application of wastewater, it was assumed that there would be no operational issues at the LAD Areas, such as uneven application of wastewater or runoff from the site directly to streams prior to treatment. It was also assumed that the treatment rates would not change over time, which may be realistic if LAD sites are properly monitored, inspected and maintained. (DEIS Volume 2, page 491)

The LAD discharge would only be applicable during the six-month growing season. A five-month growing season is more accurate for this northern climate. Frost commonly occurs in September, and the growing season often does not begin until May, when the ground is already saturated from snowmelt. The limited and ambiguous options for winter discharge, and discharge during extended rainy periods that would occur much of the year, need extensive clarification and in some instances need to be reconsidered. If the LAD was unable to accept the volume of discharge, options for the overflow need to be explored in great detail in the DEIS. Those options for the discharge require the same scrutiny as the LAD. The winter discharge option of snowmaking indicates that the options outside of the LAD are very limited.

The option for storing excess water at the tailings impoundment also needs to be explained in detail. Would the impoundment option be lined? Would the impoundment option be treated prior to winter storage? During a significant rain event would there be a risk of overflow?

During rainy periods when the LAD ground is at saturation from rainfall, how would the volume of mine discharge water be managed? If the mine were to shutdown and demand for the water were to stop, what would the storage capacity be during the winter months? If the mine was to close long term and wastewater was being produced from the mine and the tailings impoundment, how would it be managed?

The region’s temperate rainforest climate with late season snowmelt makes the handling and storage of excess water problematic. Have LAD treatment systems been used successfully for similar mining operations of the same scope in this type of climate?

The DEIS is unable to determine how long the LAD would have to be utilized, and states that ***the length of time tailings water may be discharged at the LAD areas is not known, but may be decades or more.*** It is even mentioned ***that some seepage from the tailings facility would continue in perpetuity.*** (DEIS Vol.2 page 448). It certainly appears that

the water captured from the tailings impoundment and discharged to the LAD will in all likelihood become perpetual. The DEIS states that the discharge at closing could be as high as 930 gpm, eventually decreasing to 200 gpm ten years after closing. Both are significant and would have to be dealt with after the mine has closed, and, in all likelihood, the mining company is no longer present to maintain the LAD. Given that the long-term discharge of 50-100 gpm would occur long after the mining company has departed, who will be responsible for the maintenance of this perpetual discharge?

The DEIS mentions some of the potential issues that may be encountered when using the LAD option for mine waste water discharge. Problems such as clogged soils and wet/dry cycles are some of the issues mentioned by EPA and the COE that would make this type of discharge problematic. From a pragmatic perspective, it is the discharge through the sprinklers that may create the most significant problem. Sprinkler heads inherently plug, stick and freeze up on cold nights. Sprinkler lines leak through faulty gaskets and rupture. This proposed system would require 24/7-maintenance. A stuck head would discharge enough water in one location over a period of one evening to risk runoff to surface waters. A rupture in the line going unnoticed would reach surface water quickly. This system is essentially irrigation, which requires around the clock observation and maintenance. This proposed discharge method is inherently flawed and should not be considered for application in a sensitive ecosystem such as the Libby Creek watershed.

It would be prudent to consider the State's prior experience with LAD when evaluating its potential application at Montanore. LAD operations at the Zortman Landusky, Beal and Kendall Mines have failed to work as predicted, resulting in significant impacts to land and water resources.

At the Beal Mountain Mine, land application of process solution initiated in 2001 resulted in adverse water quality impacts. The 2005 EECA analysis on Beal found that "Springs located within and downhill of the land application area show appreciable increases in cyanide and selenium concentrations since land application began in 2001." (***Draft EECA, Beal Mountain mine Engineering Evaluation/Cost Analysis, Prepared for USFS Northern Region, September 2005.***)

At the Zortman Landusky Mine, LAD has also resulted in serious water quality impacts, as described by a 2006 memo by Dr. Dave Chambers, "The most problematic mine discharge/compliance point at this time is Goslin Gulch, where the land application of partially treated effluent (mainly from the Landusky leach pads) had been applied for several years. It is anticipated that after this year (2006), the land application area will no longer be needed, and that all effluent from the mines (from both the leach pads and waste rock dumps) will be routed through the treatment plants. At the point of compliance for the Goslin Gulch the surface water, when running (Ruby Creek is an intermittent stream at this point), exceeds Montana Water Quality Standards for selenium (60 times the standard), nitrate (10 times the standard), and residual cyanide (20 times the standard). Selenium is the most problematic contaminant because it can affect aquatic organisms (probably no fish present), sheep and horses. Once land application stops, it is possible that water quality in Ruby Creek downstream of the LAD area will improve

significantly. However, it is also possible that the existing water quality problems could continue for some time, as the solution that was land-applied is flushed through the soils. There are no present plans to collect or treat this discharge.” (*David Chambers, Memorandum, May 18, 2006*)

At the Kendall Mine, impacts to vegetation and soils from LAD were identified: “Environmental management staff members have noticed signs of distressed vegetation in areas, which have received direct application of treated water on the site.” (*Montana DEQ, Letter from Director Jan Sensibaugh to James Volberding CR Kendall, January 11, 2002.*) DEQ initiated an EIS in 2002 to develop a final reclamation plan for the site, including an evaluation of the effects of land application of process water on revegetation efforts. (*Final EA and Decision Notice on CR Kendall Corp Amended Closure Plan Proposed Coversoil System Changes, Appendix F. February 5, 2002*)

The Tailings Impoundment

Numerous impacts would be expected from the tailings impoundment, including the stability of the impoundment, water quality issues from uncollected seepage into groundwater, runoff from the tailings, and the management of post mining seepage. The seepage collection process and the collection pond potentially would impact surface and groundwater from failure, leaks, and storm events. Another concern would be fugitive dust that has plagued other mines in the area.

The DEIS predicts the possibility of a tailings impoundment failure as high as 1%. The consequences of such a failure would be catastrophic to the fisheries and to water quality. Is it prudent to locate the 120 million ton tailings impoundment on top of wetlands and springs, including artesian springs? The agencies need to consider the impact of an impoundment failure on the Kootenai River because of the massive volume of sediment and metals that would enter the drainage.

The high hazard dam proposed for Montanore containing 120 million tons of tailings should not be exempt from Montana’s Dam Safety Act. Potential financial hardship on the mining company should not be considered when analyzing alternatives for tailings disposal.

After mine closure and during storm events, runoff from the tailings impoundment would enter Little Cherry Creek. What would the long-term impacts be from this discharge on all downstream waters? What are the potential impacts from the sediment, nutrients, and metals on the water quality and fisheries from tailings runoff on not only Libby and Little Cherry Creek, but also on the Kootenai River? These discharges must be regulated under the MPDES Permit.

The tailings impoundment at the Troy mine has an unresolved issue with fugitive dust. Numerous complaints from area homeowners to the agencies have not resolved the problem. Are the agencies planning on being more responsive to the fugitive dust issue at Montanore? What are the long-term impacts on air and water quality, human health, and

aesthetics from wind blown dust containing metals and nutrients? Sprinklers are in place at Troy, but have been unable to control the problem.

The Mine Void

After the mine void fills, the DEIS predicts that water from the mine would begin discharging in perpetuity into the East Fork of Bull River. The possibility of metals and nutrients from this flooded mine cavity entering into the East Fork Bull River is not considered with any degree of certainty. ***The fate and transport of dissolved metals within the flooded mine void cannot be predicted without significant uncertainty. (DEIS, Vol. 1, page 311)***

Additional available options for the mine void drainage need to be explored. No alternative should be permitted that includes allowing mine effluent to discharge into any wilderness stream that is prime habitat for bull trout. Is discharging to the East Fork of Bull River a cost saving measure for MMC? No discharge should be permitted that would include any drainage into any location within the Cabinet Mountains Wilderness. ***...the numerical model predicted that ground water from the filled mine void may flow toward the East Fork Bull River drainage. (DEIS, Vol. 1, page 310)***

If ground water flowed from the filled mine void to the East Fork Bull River, attenuation and dilution of the dissolved metals as it moved about 3,000 feet vertically through fractures would likely reduce concentrations. The actual flow path may be longer than 3,000 feet. The fate and transport of dissolved metals within the flooded mine void cannot be predicted without significant uncertainty, particularly considering the relatively low surface water standards. (DEIS, S, pg. 31)

Allowing water from the mine void to perpetually drain to the East Fork of Bull River, and risk potential exposure to metals from mine drainage should not be permitted because the receiving waters are “Outstanding Resource Waters,” and are afforded the highest level of protection possible.

This potentially perpetual drainage also poses a significant threat to Rock Lake. No mine related discharge should be permitted to the “Outstanding Resource Waters” of Rock Lake. If a discharge to the wilderness is needed for the mine to operate then the project should not be permitted.

The agencies’ numerical model indicates that during the post-mining period, there would be the potential for ground water to flow toward the mine void from the East Fork Rock Creek drainage (including Rock Lake). If this occurred, there may be subtle changes in the water quality of Rock Lake. (DEIS Volume 2, Page 435)

Once the flow from the mine cavity begins it cannot be shutoff. The subsequent impacts to places such as the East Fork of Bull River and Rock Creek would become perpetual. The impacts to the Cabinet Mountains Wilderness are inevitable because of the perpetual nature of the discharge.

Outstanding resource waters (ORW) -- waters located wholly within the boundaries of areas designated as national parks or national wilderness areas or other waters approved by the legislature. The highest level of protection pertains to outstanding resource waters (ORW). Apart from nonsignificant activities (mentioned below), the state may not authorize any degradation of ORW (MCA § 75-5-316(2)).

The mitigation of using bulkheads in the void to reduce the flow into the East Fork of Bull River is of very limited value because their effectiveness in protecting the wilderness waters is questionable. Even if the bulkheads did reduce the flow to the East Fork of Bull River, would it not simply force the mine effluent to discharge at other locations within the Cabinet Mountains Wilderness? If the bulkheads required maintenance after mine closure, who would be responsible for monitoring and maintenance? If the void was filled, how would the work be performed underwater? Is the use of bulkheads simply an easy economic fix for MMC?

If hydrologic modeling during initial mine operations (by Year 5 of operations) determined that one or more bulkheads would be necessary to minimize changes in East Fork Rock Creek and East Fork Bull River stream flows, MMC would submit a plan for bulkheads to the agencies for approval. One or more bulkheads would be maintained underground, if necessary, after the plan's approval. (DEIS, V.1, Pg. 109)

Why isn't hydrologic modeling done in advance of mining to make this determination? The mitigation measures intended to protect the East Fork of Bull River and other wilderness waters should be explained in detail before the permitting of the mine is considered, not after agency approval. Also, because of the value of the aquatic resources that are at risk, any "modeling" by MMC needs to have a third party peer review to evaluate the results of the modeling and the actual long-term effectiveness of the proposed mitigation.

MMC intends to construct a three- dimensional ground water model during the mine development period when additional hydraulic data would be collected. A calibrated model could be used to evaluate the potential for the migration of dissolved metals from the mine void to surface water drainages such as the East Fork Bull River. If modeling were to indicate potential exceedances of surface water standards in nearby streams, various mitigation measures would have to be adopted prior to active mining. (Vol.1, S-31)

Overall, the eventual discharges must be regulated under the MPDES Permit. All CWA and Montana requirements discussed herein would apply to these discharges. Further, the agencies should not allow perpetual discharge(s) from any mine workings (including these), as such a practice violates the USFS' duties to protect water quality and fisheries, as well its duty to ensure proper reclamation, under the Organic Act, 36 CFR Part 228 regulations

Acid Rock Drainage

The Rock Lake ore body is potentially acid generating. This potential for acid generation creates an immediate threat because of the proposed use of the waste rock in construction activities. The waste rock would be used to construct the dams at the tailings impoundment. If the waste rock used in construction is potentially acid generating, then it is also likely that the tailings would have the potential to become acid generating.

The environmental geochemistry data indicate that some portions of the lower Revett Formation have potential to generate acid, while others do not. Kinetic data support potential for acid generation from the lower Revett sulfide halos, particularly the barren lead zone that separates the two ore zones. (DEIS, Page 388)

While the risk would be mitigated by MMC's plan to limit mining of rock from the barren lead zone, this risk would need additional characterization through additional sampling and testing prior to waste rock placement as the Libby and Ramsey adits were advanced through the lower Revett halo zones. This would be particularly important for delineation of waste rock that would be used in construction of surface facilities.

It appears the agencies do not know what the actual likelihood of acid generation is, and that there is insufficient information to make an informed decision. A simple statement that risk would be "mitigated" is not sufficient. What criteria would the agencies use to make decisions related to whether mine development would proceed or additional mitigations would be provided following review of this additional characterization? Would the public be involved in this decision-making process?

The acid generating potential of the ore body also creates potential long-term impacts because of the possibility that ARD will develop over time and be present in the seeps and spring associated with the mine void. If the ore body were acid generating, the mine void and its subsequent discharge would place the region's water quality at risk. The acid generating potential of the ore body and the impacts on the region's water quality, may not be apparent until many years after mining is completed, but the risk of perpetual impacts is real. Metals leaching is already a concern for places like the East Fork of Bull River; the presence of ARD would serve to exacerbate this threat to water quality by making the metals more soluble.

The development of acid drainage is time-dependent and, at some sites, may form after many years of slow depletion in available alkalinity or slowly increasing sulfide oxidation (Price and Errington 1998). Drainage from acid-producing rocks typically contains elevated concentrations of metals, which are generally more soluble under acid conditions and can adversely affect water quality and aquatic life. (DEIS, Page 374)

Selenium

The DEIS states that antimony, barium, beryllium, nickel, selenium, and thallium would be analyzed during the initial production year. (*DEIS, Sect. 1.5.5, C 23*) Due to its toxicity to fish and birds, selenium is of particular concern. What will be done if selenium releases occur?

Bonding

The DEIS contains insufficient information on bonding, particularly regarding water quality. There is limited information regarding a transmission line bond for clean up and reclamation and for the \$6.2 million bond required by the Forest Service for reclamation. We could find no information pertaining to a bond to cover long-term water treatment, as is required. Under NEPA, the EIS process must allow the public to fully participate in the bonding process.

Overall Failure to Comply with All Water Quality Standards and Requirements

Under the CWA, EPA and MDEQ regulations, as well as the USFS' duties to protect water quality and fisheries under the Organic Act and 36 CFR Part 228 regulations, the Project cannot be approved due to violations of these requirements. For example, under CWA Section 313, the USFS must ensure that all discharges, both point and non-point, do not violate any water quality standards or requirements – which has not been achieved here.

Under the Clean Water Act, all federal agencies must comply with state water quality standards, including a state's antidegradation policy. 33 U.S.C. § 1323(a). Judicial review of this requirement is available under the Administrative Procedure Act. Oregon Natural Resources Council v. United States Forest Service, 834 F.2d 842, 852 (9th Cir.1987).

Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1153 (9th Cir. 1998). *See also* Marble Mountain Audubon Soc'y v. Rice, 914 F.2d 179, 182-83 (9th Cir. 1990); Oregon Natural Resources Council v. Lyng, 882 F.2d 1417, 1424-25 (9th Cir. 1989).

Further, under the Organic Act and 36 CFR Part 228, the USFS cannot approve any mining Plan of Operations that does ensure maintenance and achievement of all standards at all times. Hells Canyon Presv. Council v. Haines, 2006 WL 2252554, *4-5 (D. Or. 2006)(USFS mine approvals must comply with CWA standards). *See also* 36 CFR 228.8. This includes the related duty of protecting fisheries. *See* 36 CFR 228.8(e). This also includes the USFS' duty to “minimize adverse impacts” under the part 228 regulations.

Under Montana law, “no increases are allowed above naturally occurring concentrations of sediment or suspended sediment ... which will or are likely to ... render the waters harmful, detrimental, or injurious to --- wild animals, birds, fish, or other wildlife.” Admin. Rules of Montana (“ARM”) § 17.30.623(f). Montana water quality standards

also require that “The maximum allowable increase above naturally occurring turbidity is five nephelometric turbidity units [NTUs].” ARM § 17.30.623(d).

The USFS must comply with all standards at all times, and may not rely on “mitigation” that may alleviate the problem in the future. *See Sierra Club v. Union Oil Co.*, 813 F.2d 1480, 1489 (9th Cir. 1987) (water quality standards must “be met at all times”). *See also Hells Canyon*, 2006 WL 2252554, at *5 (rejecting USFS argument that future mitigation would comply with CWA). The USFS violates the CWA, the Organic Act and Part 228 regulations when it fails to ensure that water quality standards and fisheries will be protected at all times. *Id.* at *6.

In addition to the above-discussed issues, the following water quality violations prevent approval of the Project.

First, the agencies have not ensured that federal Effluent Limitations, including New Source Performance Standards for froth-floatation copper/silver mines, will be met. For example, under 40 CFR 440.104, the agencies cannot authorize any discharge from process wastewater from the Project (with the only exception being for net precipitation allowance which has not been demonstrated here). The term “process wastewater” is broadly defined at 40 CFR 401.11(q). The revised Draft EIS must detail how the Project complies with this strict “zero discharge” requirement, which has yet to be shown.

Secondly, the DEIS has not shown how the Project will comply with the strict protections for impaired water under the CWA, including CWA Section 303(d) and EPA regulations at 40 CFR 122.4. Under the CWA and EPA regulations, no new discharge is allowed which will not ensure compliance with, or may cause or contribute to a violation of, water quality standards. Here, due to the impaired nature of Libby Creek and other waters (including listing on Montana’s 303(d) list), as well as the failure of the agencies to have any plan to ensure achievement of water quality standards at all times, no new discharge can be allowed into these waters that may affect the pollutants or limitations for which the stream is impaired. *See Friends of Pinto Creek v. EPA*, 504 F.3d 1007 (9th Cir. 2007)(voiding EPA-issued NPDES permit which had authorized new copper discharges into a stream that was impaired for copper).

Thirdly, the dewatering/lowering of flows and levels in streams and lakes affected by the Project (including the wilderness lakes), violates the duty to protect beneficial uses of these waters. These beneficial uses, such as the protection of aquatic life, are recognized as water quality standards and cannot be impaired.

The text [of the CWA] makes it plain that water quality standards contain two components. We think the language of § 303 is most naturally read to require that a project be consistent with *both* components, namely, the designated uses *and* the water quality criteria. **Accordingly, under the literal terms of the statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards.**

PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700, 714-715 (1994) (*italics* emphasis in original, **bold** emphasis added). Thus, the CWA prohibits any activity that will not fully protect all of the designated uses for that waterbody. In other words, simply meeting numeric standards (which the Project also does not achieve) is not enough. The CWA requires the maintenance of all beneficial uses at all times. The Project violates these requirements.

Fourth, the diversion channels around Libby Creek and other areas prevents the maintenance and achievement of all numeric and narrative water quality standards, as well as failing to maintain and protect all beneficial uses (such as aquatic life) at all times. The agencies cannot approve a project that so substantially alters the hydrologic regime, including the manipulation of entire streambeds, and still meet these requirements. In addition, the downstream discharges from the diversion channels must be regulated as point source discharges into their receiving waters (such as Libby Creek), with the associated requirements that these discharges comply with all standards, etc. *See Friends of Pinto Creek v. EPA*, 504 F.3d at 1015-1016. Any eventual MPDES permit (if one could be legally issued, which is not the case here now) must include these sources as regulated outfalls and be subject to public comment on a revised permit.

Lastly, the Project does not comply with the CWA Section 404(b)(1) Guidelines and other requirements regarding the destruction of wetlands and related waters under CWA Section 404. Here, the agencies have not shown that there are no practicable alternatives to the wetlands destruction, especially since under the 404 program, it is presumed that such a non-water-dependent project has practicable alternatives to the wetlands filling/destruction. Relatedly, it has not been shown the Project complies with Executive Orders protecting wetlands or that the Project minimizes wetlands impacts, as required by federal laws including the CWA.

FISHERIES

In addition to violating the ESA regarding failures to protect listed species such as the Bull Trout, the Project also violates the USFS' duty to "maintain and protect fisheries and wildlife habitat which may be affected by the operations." 36 CFR 228.8(e). The reductions in flow and/or water levels in lakes and streams, with the significant adverse impacts to fisheries habitat, violates these requirements. This is in addition to the discharges of sediment and other pollutants that illegally degrade fisheries habitat. Further problems are discussed below.

Sediment Introduction

Sediment could be introduced to streams from several sources associated with the Montanore mine, including, but not limited to, construction of the transmission lines, vegetation removal, and run-off from the tailings. Other significant sources include road construction, increased industrial traffic, the diversion of Cherry Creek, and potential run-off from the LAD areas into Poorman and Ramsey Creeks. Road construction and re-construction is one of the primary sources of sediment from mining. It is estimated that

Alternative #4 would disturb 135 acres for access roads.

The LAD areas will likely deliver sediment to the Poorman and Ramsey creeks, both of which provide habitat for bull trout. It will be difficult, if not impossible, for the LAD not to reach the point of saturation resulting in runoff to surface water. A small rain event on already saturated soil will create surface runoff into adjacent streams.

The disturbance of Riparian Habitat Conservation Areas (RHCAs) would also contribute to sediment impacts to the streams. The preferred Alternative #4 would disturb 349 acres of RHCAs, mostly related to the Cherry Creek tailings impoundment site. Can the amount of RHCA damage be reduced?

The Little Cherry Creek tailings impoundment would create sediment that would be channeled into Little Cherry Creek, which provides habitat for the Interior Redband Trout. Little Cherry Creek also empties into Libby Creek, which provides habitat for bull trout.

Approximately 1.2 million tons of waste rock would be hauled to the Little Cherry Creek tailings impoundment to be used in the construction of the dams. Libby Creek road would be used for the hauling of the waste rock. How many loads of waste rock would be hauled daily from the Libby adit to the tailings impoundment?

According to the Rock Creek EIS, the Rock Creek mine would impact approximately 482 acres. The sediment abatement analysis done by River Design used acres disturbed to calculate the volume of sediment produced by the Rock Creek mine. River Design determined that the 482 acres of mining activity would produce as much as 1,400 tons of sediment per year on Rock Creek. The Montanore mine will impact approximately 2,582 acres, depending on which alternative is chosen. For consistency, the same method accepted by the agencies for Rock Creek would equate into 7,500 tons of sediment per year produced from mine operation based on acres disturbed.

The transmission line construction and required maintenance would produce sediment from vegetation clearing, line construction, road building, and stream crossings. The transmission line could run as much as 16.4 miles with a 500-foot corridor resulting in impacts to an additional 500 acres. Depending on which transmission alternative is chosen and using the same formula used in the Rock Creek mine analysis, the transmission line and corridor could produce approximately 1,450 tons of sediment per year.

The Montanore mine and transmission-line would impact approximately 3,082 acres, and could potentially generate approximately 9,000 tons of sediment per year. How will the USFS and MDEQ determine the amount of sediment produced? As with Rock Creek, will the agencies calculate the sediment based on acres disturbed?

What would be the length of time of the short-term waiver that may be authorized for turbidity? Which streams would be impacted by the increased sediment load?

It should be noted that the agencies cannot waive the above-discussed requirements that all water quality standards be maintained and achieved at all times. In other words, there is no “short-term, or temporary” exemption from the CWA’s, ESA’s, Organic Act’s, and other legal requirements to protect water quality, fisheries, and fisheries habitat.

Impacts to Rock Creek

A) Bull Trout

The DEIS establishes that the mine would measurably impact the East Fork of Rock Creek and exacerbate the dewatering issue in the main stem of Rock Creek. This dewatering of the mainstem of Rock Creek was determined in the 2006 Bi-Op for the Rock Creek mine to be the limiting factor for fish in this drainage. It is likely that the dewatering would be perpetual. Would the dewatering of the main stem Rock Creek from the Montanore Mine exacerbate the impacts from the sediment that is predicted to enter the stream from the proposed and permitted Rock Creek mine?

The DEIS for the Montanore project examines the dewatering impacts to westslope cutthroat trout 0.75 miles downstream from Rock Lake and looks at dewatered sections of the mainstem, but fails to analyze the impacts to the bull trout stronghold in the lower reach of the East Fork of Rock Creek. It was suggested that the dewatering would impact the upper reaches of the East Fork of Rock Creek and the main stem, but not the section of the East Fork where the bulk of the bull trout population resides and where critical habitat is found for the species. How can the mine related dewatering process impact the extreme upper reaches of the East Fork of Rock Creek, and the main stem but somehow not impact the mid and lower section of the East Fork where a large portion of the bull trout reside? ***Changes in flow downstream from Rock Creek Meadows would not likely be measurable, but would contribute to the dewatered sections of lower Rock Creek. (Vol. 1, pg. 307)***

If the mine could potentially impact the water quality of Rock Lake, which empties into Rock Creek, how could the water quality of Rock Creek remain unaffected as suggested by the DEIS?

During operations, Alternatives 2, 3, and 4 would reduce flow in East Fork Rock Creek and East Fork Bull River. These flow changes would affect aquatic habitat in the East Fork Rock Creek between Rock Lake and Rock Creek Meadows, a distance of about 0.75 mile. Trout habitat may be reduced during low flows from August to April. This habitat loss would be detrimental to the resident westslope cutthroat trout populations in the higher elevations of East Fork Rock Creek. Changes in flow from Rock Creek Meadows downstream would not likely be measurable, but would contribute to the dewatered sections and lower habitat in lower Rock Creek. (DEIS Volume 1, page 42)

The limiting factor for fish in this drainage may be the two lengthy reaches of the stream that dewater in most years during summer or fall. Consequently, the threat to

the population of resident bull trout inhabiting Rock Creek is relatively high due to these current habitat conditions. (2006 Rock Creek Biological Opinion, Page B-43)

B) Westslope Cutthroat Trout

A pure strain of westslope cutthroat trout exists in the East Fork of Rock Creek. As a forest sensitive species and a species of special concern, the Montanore project would likely push the westslope cutthroat trout toward protective status due to impacts in the East Fork of Rock Creek and Bull River. It is the responsibility of the agencies to protect the westslope cutthroat trout. The habitat of the westslope cutthroat trout should be protected from the perpetual dewatering impacts that would be a consequence of the Montanore Mine.

“This habitat loss would be detrimental to the resident westslope cutthroat trout populations in the higher elevations of East Fork Rock Creek. (DEIS Volume 1, page 42)

The westslope cutthroat trout now occupies only 19-27% of its historic range in Montana; genetically pure westslope cutthroat trout now occupy only 2-4% of their historic stream distribution. The dewatering of the East Fork of Bull River would have a deleterious effect on the westslope cutthroat trout population. According to the Montana Fish, Wildlife and Parks, ***Fish (westslope cutthroat) have been unable to use countless miles of spawning habitat due to dewatering of streams for irrigation and because of barriers created by dams and road culverts.***

U.S.F.S. Sensitive Species designation

“Develop and implement management practices to ensure that species do not become threatened or endangered because of Forest Service actions. Maintain viable populations of all native and desired nonnative wildlife, fish, and plant species in habitats distributed throughout their geographic range on National Forest System lands.” USFS Sensitive Species Summary

C) Redband Trout

Little Cherry Creek is a perennial stream that would be diverted to accommodate the tailings. Little Cherry Creek would lose 13,000 feet of habitat for the population of pure redband trout, yet the DEIS claims that the impacts would be minimal. The redband trout is a forest sensitive species and a Montana species of special concern. These designations warrant the species special protection. ***Little Cherry Creek would be diverted permanently around the tailings impoundment, resulting in a loss of 13,000 feet of aquatic habitat in the existing Little Cherry Creek. (DEIS, Summary, Page 39)***

Alternative 3 did not require the diversion of a perennial stream, but was dismissed because of the smaller capacity for tailings. Are there not other options that should be considered to limit the volume of tailings to avoid the diversion of Little Cherry Creek? It was obvious that costs to MMC were considered in the decision to destroy aquatic habitat

by choosing the Cherry Creek site. Why do the agencies seem more concerned with the costs incurred by MMC than the habitat lost from the diversion of a perennial stream? Shouldn't the concern be for the redband trout and the habitat that would be lost by the diversion of Little Cherry Creek?

According to the Montana Fish, Wildlife and Parks, stream habitat degradation is one of the significant threats to the redband trout. ***Habitat degradation has been primarily attributed to poor land management practices, construction of dams and diversions, and floodplain development. Known or predicted secure populations inhabit 17 percent of the historic range and 24 percent of the present range (Lee et al. 1997).***

The impacts to the redband trout from the proposed Montanore project would be contrary to the protections afforded as a “forest sensitive species” and a “species of special concern.” The goal should be to protect native habitat to ensure that the redband does not require protection under the endangered species act. How would diverting a perennial stream and destroying native fish habitat in the process contribute towards those objectives?

Impacts to East Fork Bull River

A) Bull Trout

1. Importance of East Fork of Bull River

The East Fork Bull River is the primary source for bull trout in the lower Clark Fork River Drainage, and should be afforded the highest level of protection by the agencies. The impacts to the bull trout in the East Fork would be from 70 years of mine induced dewatering and an untreated perpetual drainage from the mine void. The fisheries would be exposed to and impacted by metals leaching, acid mine drainage, and nutrients from the mine void. When water quality problems develop in the East Fork of Bull River from mining, stopping the flow from the mine void will not be possible.

Surveys of reaches in other streams within the Bull River drainage in 1999 indicated that the majority of the bull trout in this watershed are found in the East Fork, with 85 percent of the all the bull trout collected in the Bull River watershed collected from the East Fork Bull River. (DEIS page 279)

Because the East Fork Bull River is considered the most important bull trout stream in the lower Clark Fork River drainage (Montana Bull Trout Scientific Group 1996), decreased levels of bull trout spawning within this stream could have long-term adverse effects on the bull trout population within the lower Clark Fork River drainage. (DEIS page 315)

The Bull River supports more spawning bull trout than other tributaries in the Lower Clark Fork Core Area. Furthermore, at present the Bull River system is the primary source (about 80-90 percent) of the Cabinet Gorge Reservoir migratory bull trout population (Moran 2005). (2006 Bio-Op on Rock Creek, page B-80)

2. Rock Creek BiOp relies on protection of East Fork Bull River

The 2006 Biological Opinion for the Rock Creek mine contends that in the event that Rock Creek loses its bull trout population as a result of mine activity, the core population in the region would remain stable because the Bull River would remain unimpaired by mining. The environmental reach of Montanore extends into Bull River and also Rock Creek. Trivializing the importance of the population of bull trout in the East Fork of Bull River will not be an option when analyzing the impacts from the Montanore project. Real protections for the fish and the East Fork of Bull River from the Montanore project are required.

Anticipated impacts to bull trout (from the Rock Creek mine) are unlikely outside of the Rock Creek drainage and no activity is proposed in the Bull River drainage, the principal and most productive local population in the core area. Even in the unanticipated and unlikely event of extirpation of Rock Creek bull trout, Bull River fish and other local populations would remain unimpaired and would maintain the viability and functionality of the core area population. (2206 Rock Creek BiOp, B-86)

3. Montanore mine's impacts

The dewatering of the East Fork of Bull River would significantly impact the stream's aquatic habitat. The impacts from dewatering would include an alteration of stream temperature, and mineral and nutrient dilution. Data on the reduction of flows appear limited, but the agency acknowledges that the reduction would be "relatively large," and if the chart on page S-30 of the DEIS is any indication of the expected flow reduction, it would be significant. Any reduction in flow to the East Fork of Bull River would degrade aquatic habitat. With dewatering occurring over a 70-year span, the agency will not be able to protect approximately ten generations of bull trout, from the obvious habitat degradation. When it becomes apparent that the dewatering is having a significant impact on bull trout, what recourse will the agencies have to stop the dewatering created by the mine void?

The agencies' numerical model predicted mining period changes to base flow in the upper reaches of each drainage of Rock Creek and the East Fork Bull River that are relatively large compared to calculated pre-mining base flow (ERO Resources Corp. 2008b). This indicates that the base flow in the upper reaches of each stream could be reduced in the first mile below St. Paul Lake and Rock Lake. The agencies' numerical model indicates that portions of the East Fork of Rock Creek south of the proposed Rock Creek Mine would experience additional reduction to base flow. (V.2, Page 447)

Flow reductions in the upper river may result in habitat loss and adversely affect the bull trout population that spawns in East Fork Bull River. (DEIS S-39)

.....any decrease in flow could have adverse long-term effects on the bull trout and westslope cutthroat trout populations in these streams by decreasing available habitat in the headwaters of these streams during certain times of the year. Bull trout may be particularly affected by these decreases because the habitat loss would occur during their spawning period. Additionally, the East Fork Bull River is considered one of the

most important bull trout spawning streams in the lower Clark Fork River drainage. (DEIS page 349)

Is the DEIS considering allowing streambed modification of the East Fork of Bull River within the wilderness boundary? How would this be consistent with the protection afforded “Outstanding Resource Waters?”

....MMC would construct instream structures forming pools and deep water habitat (>1.5 feet depth) from Snake Creek to a location 0.5 mile into the CMW. (V.1, S., pg. 40)

B) Westslope Cutthroat

The East Fork of Bull River also contains a population of pure westslope cutthroat trout. The dewatering of the East Fork of Bull River would likely impact the habitat for westslope cutthroat trout, a forest sensitive species and species of special concern. The westslope cutthroat trout now occupies only 19-27% of its historic range in Montana. Genetically pure westslope cutthroat trout now occupy only 2-4% of their historic stream distribution. Westslope cutthroat trout, like bull trout, require clean, cold water. How would the dewatering of the East Fork Bull River impact water temperature? One of the primary causes of the decline of the westslope cutthroat trout is the dewatering of spawning streams. What do the agencies see as their role in protecting a forest sensitive species and species of special concern such as the westslope cutthroat trout? The introduction of metals, nutrients, or sediment would degrade the habitat of the westslope cutthroat in the East Fork of Bull River.

Fish (westslope cutthroat) have been unable to use countless miles of spawning habitat due to dewatering of streams for irrigation and because of barriers created by dams and road culverts. (Beth Gardner, Flathead National Forest, Species of Special Concern)

They (westslope cutthroat trout) potentially could be affected from any activities within the Fisher River, East Fork Bull River, and Rock Creek watersheds. (DEIS Volume 1, page 288)

“Develop and implement management practices to ensure that species do not become threatened or endangered because of Forest Service actions. Maintain viable populations of all native and desired nonnative wildlife, fish, and plant species in habitats distributed throughout their geographic range on National Forest System lands.” (USFS Sensitive Species Summary)

WILDLIFE

In addition to violating the ESA’s duty to protect listed fish and their habitat, the Project does not comply with the ESA’s requirements to protect listed wildlife species. In addition, the DEIS does not adequately analyze (and ensure protection of) “sensitive” and

other protected species. Additional details follow.

Grizzly Bears

Permitting the Montanore mine would have devastating impacts on the fragile grizzly bear population in the Cabinet/Yaak Ecosystem. The volume of acreage impacted, the unsuitable mitigation suggested, the increase in human-caused mortalities, and the cumulative impacts from the permitted Rock Creek mine create an unworkable situation.

There are varying estimates of the number of bears in the Cabinet/Yaak ecosystem. The census total in the DEIS is 40-45, with 35-40 estimated in the Rock Creek Bi-Op. With 10-15 bears inhabiting the Cabinet Mountains Wilderness and only 3-5 females, how can the bear survive the mine related impacts?

Impacts Related to Human Population Increases:

The migration of workers, their families, and others seeking employment to the region of the Cabinet Mountains Wilderness, will cause a population increase likely to exceed 2,500 and may go significantly higher.

The result would be a very substantial influx of workers and their families from outside the local area. This population influx could easily total 2,000-2,500 individuals, and might go substantially higher depending on the timing of mine activities, the condition of local and regional labor markets, and other factors. (Rock Creek EIS, V.2, Page A-1-8)

This massive and rapid migration to the region will have devastating impacts on the grizzly bear. Many who relocate to the area will not be willing to adjust their lifestyle to avoid conflicts with grizzly bears. Outreach by mitigation mandated MFWP staff would be ineffective due to a culture intolerant of grizzly bears. As mitigation for the Rock Creek mine a “specialist” was hired to protect the bear, but failed to protect the recently transplanted grizzly that was poached in Noxon in 2008. The death of this bear and a recent human/bear conflict in the Bull River area both involved unsecured garbage. This problem was to be addressed by the hiring of the conflict specialist.

The potential for poaching could increase with the influx of workers with diverse social, cultural and economic backgrounds, many of whom may be unfamiliar with or lack interest in wildlife conservation. For example, following the initial phase at the Montanore Mine project, some workers associated with the mine were convicted of poaching deer USDI 1993b. (2206 Rock Creek BiOp, pg. A-73)

A rapid increase in poaching should be of concern for the wildlife agencies. Of the 30 grizzly mortalities in the region from 1982 to 2005, 11 were either due to poaching or of a suspicious nature. This situation would only worsen.

The massive migration also would significantly increase the number of hunters in the field. Statistically, 24% of Montanans hunt. The mines would increase the number of big game hunters in the region by approximately 600 for the fall big game and spring bear seasons. The DEIS acknowledges that most human-caused grizzly bear mortalities on the KNF are the result of interactions between bears and big game hunters (Kasworm and Manley 1988). With 600 new and inexperienced bear hunters wandering the field, cases of mistaken identity will increase significantly.

Mortality due to mistaken identity is a risk to grizzly bears that can increase with the number of hunters, the number of bears and the degree of attractants. (2006 Rock Creek BiOp, pg. A-34)

Highway 2 is already problematic for bears traveling between the Yaak and Cabinet portions of the recovery zone. The mine related human migration to the Troy and Libby areas and the accompanying development would serve to permanently sever the travel corridor between the Cabinets and the Yaak. The construction of the Rock Creek and Montanore mines also would render unsuitable the narrow habitat connecting the southern portion of the Cabinet Mountains Wilderness from the larger northern segment. The result of mine related impacts would likely be three disjunct and isolated grizzly bear populations. How are the agencies going to improve the connectivity between the three regions?

Mitigation Measures:

The replacement acres required to mitigate for impacts to the grizzly bear depends on which option is chosen. The amount of habitat acres impacted varies from 23,260 acres for option 3C to 27,107 for option 4E. **(Table 22, page 136 Volume 1 DEIS)**. It appears that MMC must secure 4,470 acres, but there is confusion about this because the DEIS states that the secured parcels could in fact be used by MMC for purposes other than protecting grizzly bear habitat. ***Any of the following could occur with the acquired parcels, including mill site or mining claims that MMC might patent as a result of the Montanore Project. (DEIS, Vol.1, pg. 89)*** Is the DEIS allowing mitigation acreage that was secured as bear habitat to be industrialized in the future?

If MMC secures 4,470 undeveloped acres that is suitable habitat, this acreage is likely already occupied by the bear. This acreage would not represent the creation of any new habitat so the bear would still suffer a loss of suitable habitat.

The remaining difference (23,260 to 27,107 minus 4,470 acres) would be “mitigated” with road access changes. The road access changes include seasonal closures, use by mine traffic only, and allowing snowmobiles. To be even considered for bear mitigation, the roads need to be removed, not open, even seasonally, to mine related traffic, local traffic, and snowmobiles. Road closures should not be used as mitigation. Mitigation measures should consist of creating additional habitat that is currently not available to the bear. New habitat needs to be made available to the bear to offset the mine related losses.

In recent years, the C-Y bear population has been augmented with bears transplanted from the NCDE. However, the population has remained fairly stable without augmentation. Is augmentation from the NCDE being done simply to offset the expected losses from the Rock Creek and Montanore mines? What is the fate of transplanted bears?

Cumulative Mine Impacts:

The grizzly bear faces the loss and fragmentation of its habitat because of mine construction, operation, and the rapid and substantial increase of human intrusion into its historic range. Mine related impacts to the grizzly must be inclusive of both the Rock Creek and Montanore projects. The impact analysis also should include the prospects of additional mining projects including the Libby Creek Ventures and Wayup mines, both of which would occur in the grizzly recovery zone. Why are the cumulative impacts from all reasonably foreseeable mining operations in the region not being analyzed? All of these projects would impact the narrow band of wilderness between Elephant and Carney peaks. The industrialization of this one half mile wide region of wilderness would eliminate the north-south corridor for the grizzly bear. If the north-south corridor were severed, how would the bear's recovery be affected?

The DEIS does not preclude the simultaneous or sequential operations of the Rock Creek and Montanore mines. The cumulative impacts on the bear would be significant. The non-jeopardy opinion in the 2006 Bi-Op on the Rock Creek mine seems to be based on Noranda's forfeiture of the project. According to the Rock Creek 2006 Bi-Op, the abandonment of the Montanore mine project improved the baseline for grizzly bears within the action area. ***Noranda abandoned the Montanore Mine project, and its omission creates a significant improvement in the baseline conditions in the action area. (2006 Rock Creek BiOp Pg. A-36)***

It is likely that Noranda's 2002 abandonment also played a significant role in changing the jeopardy opinion in the 2000 Rock Creek Bi-Op to a non-jeopardy in the 2002 version. ***Noranda formally withdrew its plan of operations and abandoned several required permits necessary to develop the proposed Montanore mine, west of the Cabinet divide (Noranda Inc. in litt. 2002a, 2002b, 2002c, 2002d The Service completed an initial biological opinion for the Rock Creek Mine project on December 15, 2000 in which we concluded that the proposed action was likely to jeopardize grizzly bears. The Service withdrew this biological opinion in March 2002. (2006 Rock Creek BiOp Pg. A-102)***

Lynx

Lynx were listed as a threatened species in 2000. The Kootenai National Forest is within a core lynx area. Long-term losses of lynx habitat are expected to occur as a direct consequence of the Montanore mine. The impacts on lynx from the proposed mine include, but are not limited to, loss and degradation of habitat, degradation of habitat for a major food source, increased mortality from vehicular collisions, and the risk of

incidental take from trapping. Cumulative impacts from the Rock Creek mine will have significant impacts on travel and dispersal capabilities because of a reduction in remote areas and a constriction of the Cabinet Mountains Wilderness.

Lynx would lose considerable habitat as a result of the Montanore mine. Construction of the transmission lines and the tailings facility would impact approximately 629 acres of habitat, including denning habitat for the lynx. Isn't it likely that the volume of lynx habitat impacted will be much greater because the species will be displaced by the industrialization? Shouldn't it be expected that human activity, traffic volume, and noise would drive the lynx to other drainages?

As a consequence of increased access into lynx habitat, it is expected that there will be an increase in incidental take of lynx by trapping.

Habitat of the snowshoe hare would be impacted by the construction of the mine including the transmission lines. It is estimated that the snowshoe hare, a primary food source of the lynx, could lose as much as 391 acres of habitat.

Wolverine

A forest sensitive species, the wolverine would most likely be cumulatively affected by the Montanore and Rock Creek mines. Impacts would include a reduction in travel and dispersal capabilities because of a reduction in remote areas and a constriction of the Cabinet Mountains Wilderness. An increased trapping risk from both mines and an increase in local human populations would cumulatively increase the risk that trapping could exceed the ability of the wolverine to maintain population numbers. **(Rock Creek EIS 4-172)**

The wolverine could become listed as a threatened species in the near future because of a small and isolated population, degradation of habitat, and sensitivity to human disturbance. How would the management of this species change if it became listed? With the Rock Creek mine already permitted, are the cumulative impacts going to be considered?

Mountain Goat

Mountain goats are a USFS indicator species. The direct impacts from the Montanore mine include, but are not limited to; displacement from habitat due to mine related activities such as blasting and road building. The mining process will likely increase stress levels resulting in low reproductive rates. Long-term disturbance on 5,656 acres seems conservative because of the invasive nature of the activities within the habitat. It is likely that goats would be forced to vacate their historic range.

The Rock Creek EIS states that the Montanore mine would have the most direct cumulative impact on mountain goats. The goats use the head end of Libby, Ramsey, West Fisher, and Poorman Creek. The DEIS states that these drainages are the population

epicenter for the mountain goat herd in the southern Cabinet Mountains.

Impacts on the Rock Peak herd would be compounded when impacts from Noranda also are considered. The shifting of animals out of the Rock Creek and Ramsey Creek drainages into the CMW from either side could increase the stress of the displaced animals. It also could increase the use of unaffected summer ranges creating potential conflicts with resident goats in the CMW. (Rock Creek EIS, Summary page 31)

How do the agencies plan on protecting the mountain goat population from displacement from both the Montanore mine and Rock Creek mine? How will the agencies protect goat habitat from the impacts from projects such as the Wayup and Fourth of July mines? Other projects in the area would displace goats from an additional 4,561 acres of habitat.

Pileated Woodpecker

The projected loss of Old Growth habitat would impact this Forest Management Indicator Species by resulting in habitat loss and fragmentation and the loss of nesting cavities and feeding substrates. Fragmentation is especially problematic for this species given its large territory size and birds would be vulnerable to predation as they fly among fragmented habitat. Pileated Woodpeckers have strong year-round pair bonds (Kilham 1979) and site fidelity, occupying the same location in successive years (Kilham 1959). Pileated Woodpeckers are dependent on suitable snag densities, requiring large, tall snags usually with decaying heartwood (McClelland 1979). In studies conducted in Oregon by Bull (1987) the mean dbh was 84m and the mean tree height was 28m. In Washington, mean dbh and height were 97 cm and 41 m; (K. Aubry and C. Raley unpubl. data). In Montana, McClelland (1979) reported a mean dbh and height of 29.5 and 92 respectively. Clearly, snags of this size are uncommon outside of old growth and displaced pairs may not find suitable nesting cavities.

A statement is made in the DEIS that “Snag densities and quantities of downed wood would remain above KNF-recommended levels and would be sufficient to sustain viable populations of cavity-dependent species in the KNF (S-62). While they may or may not be sufficient to maintain populations of smaller cavity nesters, snag requirements of Pileated Woodpeckers are for large diameter trees. It appears that KNF conducted sampling of snags in old growth, but Table 152 indicates that the analysis was based on snags per acre greater than 10” diameter, and there is no indication of what percentage of these are at least 20” dbh. Optimum habitat exists when the average of all snags over 20” dbh is 30”. Habitats without suitably sized snags are unsuitable (Schroeder 1982). The USDA Forest Service has several publications on managing and monitoring Pileated Woodpeckers (Bull et al. 1991) including a protocol for sampling snags (Bate et al. 2002).

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Songbirds

The DEIS acknowledges that songbirds, including forest sensitive species, would be impacted by all action alternatives, and for alternatives 3 and 4 proposes mitigations encompassing surveys for active nests of sensitive species, not removing vegetation during the breeding season, and conducting annual monitoring. While conducting monitoring is useful for obtaining baseline data and for analyzing population trends, it does not mitigate for impacts. These surveys also do not track mortality. Mortality in songbirds is extremely difficult to document. Birds displaced from their habitat likely are unable to breed or, worse, perish if suitable habitat with vacant territories is unavailable. Also, some displaced individuals may be forced to locate to less desirable locations, such as along roads, where mortality rates are higher.

The project will result in habitat loss and some will be permanently lost. The loss of riparian and old growth habitats is especially problematic. Riparian habitat, especially cottonwood bottomlands, provides habitat for the greatest diversity of birds. Old growth cedar-hemlock forest constitutes a habitat type that is becoming increasingly rare and maintains a unique assemblage of species including winter wren, varied thrush, Townsend's warbler, golden crowned kinglet, chestnut-backed chickadee, brown creeper and others. *Coniferous forest on private lands is primarily dominated by dry ponderosa pine/Douglas-fir communities. (DEIS, pg 818).*

Under the description of alternatives in 3.24.6.4, it is stated: **Alternative 2 would result in localized impacts to birds associated with forest and shrub field habitats, it would not result in widespread changes in bird communities on the KNF.** The DEIS then

goes on to say that impacts would be less for Alternatives 3 and 4. While changes in composition of communities in the forest overall may not change, bird abundance would be affected with less breeding pairs present. The cumulative loss of habitat for breeding pairs is what contributes to declining bird populations. In continuing to permit every mine proposed, the Kootenai should begin assessing cumulative impacts and deny permits for projects such as this which has widespread impacts on a multitude of species including sensitive species, management indicator species, and threatened species.

Black-backed woodpeckers

Since this species is limited to early post-fire forests, impacts would result from the loss of potential habitat with the removal of forest habitat and with fire suppression on MMC project lands. This project would impact black-backed woodpeckers cumulatively from fire suppression, logging activities, especially post fire salvage logging, and snag removal by woodcutters on both Forest Service land and private lands. The DEIS acknowledges cumulative impacts (*Pg 806*), but does not address a solution. Continuing to authorize projects that will impact sensitive species is contrary to the Forest Service's duty to maintain viable populations of sensitive species and prevent a trend towards ESA listing.

FAILURE TO FULLY ANALYZE IMPACTS TO, AND PROTECT, AIR QUALITY

It is the responsibility of the USFS to "preserve and protect and enhance" the air quality of the Cabinet Mountains Wilderness. Allowing the degradation of that Class 1 airshed is a violation of the Clean Air Act.

Section 160 of the CAA requires measures "to preserve, protect and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores and other areas of special national or regional natural, recreation, scenic, or historic value." Class I areas include Forest Service and Fish and Wildlife Service wilderness areas over 5,000 acres that were in existence before August 1977, and National Parks in excess of 6,000 acres as of August 1977. Designation as a Class I area allows only very small increments of new pollution above already existing air pollution levels.

Emission Sources:

Potential sources of emissions from the Montanore mine would include impacts from diesel and diesel-electric underground mining equipment and dust from the mill site and the tailings impoundment. Large truck traffic and other mine related equipment including scrapers, dozers, and loaders would operate adjacent to the Cabinet Mountains Wilderness contributing considerable emissions to the Class 1 airshed.

Fugitive dust emissions from the tailings impoundment have been a significant issue at the Troy Mine. Fugitive dust at the Troy mine was to be controlled by the use of sprinklers, yet this procedure has been largely unsuccessful and the blowing dust has had

significant impacts to adjacent landowners. The Montanore project also intends to control fugitive dust from that tailings impoundment with the use of sprinklers. Why would the use of sprinklers on the tailings impoundment be effective at Montanore when they have been largely ineffective at Troy?

Failures of the DEIS:

The DEIS fails to adequately analyze all direct, indirect and cumulative air quality impacts. For example, the DEIS barely mentions the air impacts from the nearby Rock Creek Project proposed directly adjacent to the Cabinet Mountains Wilderness Area in northwest Montana, a pristine Class I airshed. This proposal includes up to four ventilation adits, including one adit to be located in the heart of the Wilderness Area itself. Furthermore, according to Montana Department of Environmental Quality (MDEQ) calculations, emissions of criteria pollutants from the Rock Creek Project alone are predicted, in some instances, to consume 96% to 98% of the allowable Class I increment for the Cabinet Mountain Wilderness Area (CMWA).

If the Class I increment were triggered for NO₂, Sterling could potentially consume 96% of the Class I increment for NO₂ assuming the mine were operated continually at the maximum level allowed. (Rock Creek EIS, Section 4, page 10)

Importantly, MDEQ has previously stated that the Rock Creek Project did not violate the PSD increments in this Class I airshed because, at the time, MDEQ did not include the Montanore Project in its increment analysis (due to MDEQ's position that Montanore no longer had a valid air quality permit in 2002). Now, due to the near-total consumption of the applicable increment by the Rock Creek Project, the agencies cannot argue that both projects can be located adjacent and/or within the same Class I area.

The USFS and MDEQ must “demonstrate that the allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reductions (including secondary emissions) would not cause or contribute to air pollution in violation of...any applicable maximum allowable increase over the baseline concentration in any area.” 40 C.F.R. §52.21(k), accord, EPA's New Source Review Workshop Manual: Prevention of Significant Deterioration and Nonattainment Area Permitting (Draft October 1990) at C.35 (hereinafter “NSR Manual”)(commanding that all new stationary sources consume available increment after the minor source baseline date has been triggered).¹

Thus, even if Montanore is not considered a “major source” (which is incorrect, see below), the agencies are still required to ensure that the entire facility, including pollution emissions from on-site equipment, does not violate applicable maximum allowable increases (i.e. PSD standards/increments).

¹ Under the USFS' 36 CFR Part 228 regulations, it cannot approve any mining plan that may violate any applicable federal or state air quality requirement.

The state's position is that increment consumption is not applicable to this project because it is a minor source in an area where the baseline has not been triggered. The Environmental Protection Agency's position is that the baseline is triggered for the entire state and all sources consume increment.. (Rock Creek EIS Volume 2, Appendix C, page 21)

The [PSD major source] permit process alone does not ensure that maximum concentrations or allowable increments will not be exceeded. Significant deterioration may occur due to increased emissions from unregulated minor sources....

Alabama Power v. Costle, 636 F.2d 323, 362 (D.C. Cir. 1980). In another case, the D.C. Circuit held that these minor sources were still required to comply with PSD increments. The court held that even if sources were not considered “major”:

[That] hardly means that their operators are free to pollute at will. As EPA noted, they remain subject to other Clean Air Act limitations (e.g., national ambient air quality standards and, in areas in which the PSD baseline has been triggered, PSD increment limitations)...

Natural Resources Defense Council v. EPA, 937 F.2d 641, 646 (D.C. Cir. 1991)(emphasis added). The Court went on to hold:

Although the PSD rules are triggered only by a major source, they require control—to keep the affected area within permissible PSD “increments”—of any source. Thus, even with surface coal mines not listed [as major sources], states will be under an obligation to control them ...

Id., at 647 (internal citations omitted) (italics emphasis in original)(bold emphasis added). Finally, the D.C. Circuit held, “In the allocation of responsibilities made by Congress, maximum [PSD increment] limitations have been set. These must be observed by the states” Id., at 364 (emphasis added).

Here, the agencies must demonstrate compliance with the applicable increments (and increment consumption) for NO_x, SO₂, and PM-10 in issuing this permit.² The Project consumes available increment for NO_x, SO₂, and PM-10 and an air quality impact analysis and increment inventory must be provided.

Minor sources also consume increment, and under EPA's PSD regulation minor sources cannot be allowed to exceed the increment. (EPA comments on the Rock Creek mine 1998.)

² The CAA itself sets the PSD increments for PM-10 and SO₂. 42 U.S.C. §7473(b). EPA has set PSD increments for NO_x. 40 C.F.R. §52.21(c).

Additionally, the agencies must assess, review, determine and/or model, the cumulative impacts of the Project in conjunction with all other emissions sources within a 50 kilometer impact area to determine the cumulative impacts to the Class I and II areas for NO_x, PM-10, and SO₂. NSR Manual at C.35.

Also, any increment inventory performed to determine compliance with applicable PSD increments for NO_x, SO₂, and PM-10 should not be limited to stack emissions, but must include all emissions from the Project. NSR Manual at C.35-36.

Here, due to the already-approved Rock Creek air emissions, there is little, if any increment left for the Montanore Project to emit into the CMWA Class I airshed. The DEIS incorrectly states that the Montanore Project is not subject to these PSD (Prevention of Significant Deterioration) requirements. The US EPA disagrees with MDEQ's assumption that the Rock Creek and Montanore projects are minor sources in a baseline area where the baseline has not been triggered. EPA Region VIII has consistently disagreed with this position and has, in the alternative, instructed MDEQ on numerous occasions to apply the PSD requirements to the Rock Creek Project.

Accordingly, the Montanore Project must comply with the PSD increment requirements, which based on the already-permitted Rock Creek Project, it likely cannot due. At a minimum, a new cumulative air quality model analyzing the air emissions from both Projects must be included in the revised Draft EIS.

Also, the DEIS' assumption that the Montanore Project is a "minor source" ignores the fact that the combined emissions from the Project are well-above the applicable triggers (e.g., for PM₁₀ and CO at a minimum, see Table 45). The agencies cannot categorize Project emissions as "fugitive" to escape the Title V and other permitting requirements.

Although Libby Creek Ventures and the Wayup mine are considered minor potential sources, they would still consume increment for NO₂ from fossil fuel consumption. Have the agencies considered the potential impacts to the Class 1 airshed from additional mines in the area, including Libby Creek Ventures and the Wayup mine? The dismissal of potential impacts from these projects seems to be based on an agency assumption that these mines would always remain small with minimal impacts. These mines need to be included in any analysis of future impacts to the airshed because the current size of the project should not be indicative of future potential emissions generated.

The DEIS seems to be concluding that the Rock Creek and Montanore mine sites are in two different geographical locations, so that emissions and associated impacts on the wilderness airshed would not be considered cumulatively. What does the agency base its conclusion on that these two mines are located in two different geographical areas? The ridge that separates the two projects is part of the Class 1 airshed of the Cabinet Mountains Wilderness, and should not be considered as a buffer between the two sources. The conclusion that the air quality impacts from these two projects would not overlap seems to ignore the region's geography and requires an explanation as to how this determination was made.

The geographic areas of impact for each project do not overlap, and therefore would not be additive. Thus, cumulative air quality impacts would not exceed the NAAQS or MAAQS. (DEIS, Volume 1. Page 239)

According to the 1992 EIS, “NOx and SO2 increment consumption would occur from both projects (Rock Creek and Montanore), but the analysis indicates that there would not be a combined or overlapping increment consumption.” This means that a small portion of the allowable increase in ambient air pollution concentrations under PSD Class I designations would occur as a result of each project. (DEIS volume 1 page 239)

The emissions from both respective projects would not remain stationary above the source but would impact the air quality of locations adjacent to the proposed mines. EPA acknowledges that ***NOx and pollutants formed from NOx, can be transported over long distances. This means that problems associated with NOx are not confined to areas where NOx are emitted. (EPA-How nitrogen oxides affect the way we live and breath.)***

In direct reference to the Montanore mine, EPA also comments, ***Given that most of the PSD increment will be consumed for NO2 (and to some extent SO2), there is the possibility that further emission increases from other sources could exceed the increment. The EPA does not necessarily agree that the area is too remote for future emission sources more than 100km from class 1 areas are quite common. (EPA comments on the Rock Creek mine 3/12/01)***

The plants sites for both projects would be approximately 4 miles from each other and be less than a mile from the Class 1 airshed of the Cabinet Mountains Wilderness. St.Paul Peak in the wilderness would be 2 miles or less from both operations, well within reach of the air quality and visual impacts from these projects.

Libby Lakes Acidification:

The emissions of SO4 and NO3 from this project would threaten the pristine and sensitive nature of Libby Lakes with acidification. The cumulative air impacts to Libby Lakes from the large and small mines that are located in the region of the Cabinet Mountains Wilderness must be considered. Even by agency standards, the Wayup Mine, Libby Creek Ventures, and the proposed Montanore mine would have to be considered to be in the same “geographical area.”

The Forest Service has monitored Libby Lakes for many years because of their high quality waters and sensitivity to change. There is concern that emissions from regional mining projects could increase acid deposition to the lakes, with acidification of the lake watershed and lake chemistry and associated adverse aquatic (DEIS Volume 1 effects. (DEIS Volume 1 page 239)

Inconsistent Analyses:

The agency conclusion that the mine would not impact the Cabinet Mountains Wilderness seems very inconsistent with other agency analysis within the state of Montana. The USFS EIS travel plan for the Lewis and Clark National Forest, expressed concerns that OHV activity would negatively impact the Class 1 airsheds of the adjacent Bob Marshall and Scapegoat wilderness. Yet the Kootenai National Forest dismisses any impacts on the Class 1 airshed of the Cabinet Mountains Wilderness from two adjacent massive mining operations. Is it the conclusion of the USFS that ATV's have a greater impact on a Class 1 airshed than two mining operations or does the Bob Marshall and Scapegoat wilderness receive more protection from the Lewis and Clark National Forest than the Cabinet Mountains Wilderness is afforded from the Kootenai?

There are concerns that motorcycles, ATVs and snowmobiles are negatively impacting the air quality of adjacent Class 1 airsheds: Bob Marshall Wilderness, Scapegoat Wilderness and Glacier National Park. (EIS travel plan Lewis and Clark National Forest)

Conclusion:

Overall, the DEIS violates the USFS' and MDEQ's duties to ensure compliance with all federal and state air quality requirements, as well as the agencies' duties under NEPA and MEPA to fully review, and make available for public comment, a complete air quality analysis.

OLD GROWTH

It is calculated that 175 acres of old growth habitat would be impacted as a result of the agencies' preferred alternative. The actual acreage impacted remains ambiguous because of the agencies' decision to reallocate and reclassify designated old growth habitat (MA13) within areas of the operating permit to mineral development (MA31). Is impacted old growth habitat not being accounted for because of a classification change?

The agencies' solution to mitigate for the loss of the old growth will not compensate in any way for the industrialization of this habitat. The agencies propose to designate 657 acres elsewhere on the forest as old growth so it would be managed to retain and develop old growth characteristics. Several problems with this approach are apparent, including the fact that the classification as old growth (MA13) failed to protect the acreage of habitat that would be harvested as a direct result of the Montanore mine. Why would classifying 657 acres as old growth provide any additional future security? The agencies also recognize that the 657 acres will not replace the old growth that is lost because in actuality no new old growth would have been created. The replacement acres are not old growth, but will be managed "to retain or develop old growth characteristics."

Another statement in the DEIS appears a desperate attempt to redefine old growth habitat and simplify the replacement of established old growth that is lost: ***Replacement old***

growth stands do not have enough old growth characteristics to be considered old growth, but are expected to become old growth in time. (DEIS Vol. 2 page 666)

This statement is ridiculous and is recognition that old growth in the Kootenai National Forest is limited. The agencies do, however, recognize the amount of time that is required for old growth characteristics to develop: *Given the recovery time of old growth forest, edge effects would likely require centuries following disturbance to be eliminated. (DEIS Vol. 2 page 524)*

The agencies also propose to change the classification of an additional 182 acres from old growth (MA13) to mineral development (MA31). The claim is that there would be no physical loss of old growth from this reclassification, then why is the classification change being made? Would the reclassification simplify the process by which 182 of old growth acres could be developed for future mine considerations?

Alternative 4 would involve the reallocation of 182 acres of designated old growth (MA 13) to MA 31 (Mineral Development) that have not been accounted for in direct disturbance and indirect edge effects. (DEIS Vol. 2 page 675)

VIOLATIONS OF THE NFMA AND THE KOOTENAI NATIONAL FOREST PLAN

The NFMA requires all site-specific actions authorized by the Forest Service to be consistent with Forest Plan standards and guidelines. Friends of Se. Future v. Morrison, 153 F.3d 1059, 1068 n.4 (9th Cir. 1998). The Kootenai Forest Plan (KFP), as amended by INFISH, establishes several standards that apply to mining plans in order to protect inland native fisheries. USFS authorization of mining must comply with all Forest Plan and INFISH requirements. See Hells Canyon, 2006 WL 2252554, *7-*10 (approval of mining violated INFISH and other Forest Plan standards); Siskiyou Regional Education Project v. Rose, 87 F. Supp. 2d 1074 (D. Or. 1999) (violation of Forest Plan standards for mining). These include the Minerals Management (MM) standards, which protect fisheries habitat, Riparian Habitat Conservation Areas (RHCAs), and water quality. See DEIS at 27, 31. INFISH “standards and guidelines replace existing conflicting direction [in Forest Plans] except where Forest Plan direction provides for more protection for inland native fish habitat.” The Lands Council, 395 F.3d 1019, 1033 (9th Cir. 2005).

The DEIS admits that: **“the lead agencies did not identify an alternative that would be in compliance with all KFP standards** (see section 2.13.2.1, *Forest Plan Consistency*).” DEIS at 31 (emphasis added). As discussed above, there is no “mining exemption” from the duty to comply with the NFMA and all Forest Plan/INFISH standards. Thus, at the outset, the Project cannot be approved, due to the admitted failure to comply with all standards.

Regarding INFISH, it established six standards for Mineral Management, MM1-MM6. These binding standards require, in part, the Forest Service to:

[MM1] **Minimize adverse affects to inland native fish species** from mineral operations.... For operations in a [RHCA] take all practicable measures to **maintain, protect, and rehabilitate fish and wildlife habitat** which may be affected by the operations. ... [MM2] **Locate structures, support facilities, and roads outside [RHCAs]**. Where no alternative to siting facilities in [RHCAs] exists, locate and construct the facilities in ways that **avoid impacts to [RHCAs] and streams and adverse effects on inland native fish.** [MM3] **“Prohibit solid and sanitary waste facilities in [RHCAs]**. If no alternative to locating mine wastes (waste rock, spent ore, tailings) facilities in [RHCAs] exists, **and releases can be prevented** and stability ensured, then (a) analyze the waste material using the best conventional sampling methods and analytic techniques to determine its chemical and physical stability characteristics. (b) ... If the best conventional technology is not sufficient to prevent such releases and ensure stability over the long term, **prohibit such facilities in [RHCAs]**.

INFISH at A-10 (emphasis added). Further, INFISH’s “Roads Management” Standard, RF-2d, requires the agency to “avoid sediment delivery to streams from the road surface.” INFISH at A-8.

Here, the Project does not comply with all of these INFISH and other Forest Plan requirements. The DEIS also does not ensure that the operator take all practicable measures to “maintain, protect, and rehabilitate fish and wildlife habitat” as required by INFISH standard MM-1. The same is true for the agency’s decision to locate “structures, support facilities, and roads” in a RHCA (MM-2). Because the Project’s roads, pipelines, transmission lines, culverts, fences, and mitigation structures are considered structures or support facilities, they are prohibited, unless there is no alternative to locating them within a RHCA. *See Hells Canyon*, 2006 WL 2252554, at *8-9. The agency has not shown that no alternative exists for these structures and facilities.

Further, the Project does not avoid locating solid waste and facilities (such as waste rock, tailings, etc.) outside of RHCAs, as required by MM-3. Such location could only be authorized after the required alternatives review, waste analysis, and other MM-3 requirements – something which has yet to occur. Even if the DEIS had reviewed alternative waste facilities outside of RHCAs, the other requirements of MM-3 have been violated. Releases from the tailings, waste, and development rock within an RHCA will not be “prevented,” and the location of waste facilities has not been “prohibited,” as required by MM-3. Also, even if releases could be prevented, the USFS did not “analyze the waste material using the best conventional sampling methods and analytic techniques to determine its chemical and physical stability characteristics” – as required by MM-3. It should also be noted that the failures to review alternatives to each structure, facility, usage, etc. in the RHCA’s violates NEPA’s requirement that the agencies fully analyze all reasonable alternatives.

The DEIS proposes to amend the Kootenai Forest Plan (KFP) to allow the projected use of forestlands that would be required for the Montanore project. The agency cannot change the allocation of lands in the 1987 KFP simply to accommodate the needs of a

mining proposal. If changing the allocation of federal lands can be done at anytime depending on the needs of particular projects, what is the purpose of a forest plan?

Each mine and transmission line alternative would require an amendment to the 1987 Kootenai Land and Resource Management Plan, as known as the Kootenai Forest Plan (KFP) in order for the alternative to be consistent with the plan (USDA Forest Service 1987). The amendment would be completed in accordance with the regulations governing Forest Plan amendments found in 36 CFR 219 and Forest Service Manual 1921.03. (DEIS, Summary page 26)

It should be noted that, even if the KNF could amend the Forest Plan (which it has not done properly in this case), it cannot amend INFISH. Thus, failure to comply with all INFISH requirements mandates rejection of the Plan of Operations.

Lastly, the Forest Service is under the mistaken assumption that it must amend the Forest Plan to accommodate MMC's mining plan. That is incorrect. As discussed above, the Forest Service, under NFMA, must deny mining plans that do not comply with all Forest Plan standards. The mining law does not require that the Forest Plan be amended in order to allow the project. Thus, in light of the errors and inadequacies noted in these comments, the Forest Service's amendments to the Forest Plan violates numerous federal laws and cannot stand.

WILDERNESS

Overview:

The Kootenai National Forest is 2.2 million acres, yet the 94,000-acre Cabinet Mountains Wilderness is the only protected wilderness in the forest. The proposed mining operation would be located inside the wilderness boundary, directly beneath Rock Lake. Impacts to wilderness lakes are expected, including Rock Lake and St. Paul Lake, and possibly even the high alpine chain of Libby Lakes. The mine cavity will divert groundwater that these lakes depend on for recharge. Once the cavity beneath the wilderness is created, the consequences cannot be reversed.

Impacts to wilderness streams and creeks also are expected, including the East Fork of Bull River, which is essential for the survival of the threatened bull trout in the region. Most of the impacted tributaries in the Libby Creek drainage find their origin within the boundary of the Cabinet Mountains Wilderness and are dependent upon it for recharge.

Subsidence or collapse of the subsurface cavity and tunnels occurs frequently in the industry. If that failure were to happen beneath the wilderness, surface impacts could be expected.

The USFS has a responsibility under the Wilderness Act, as well as the Organic Act and NFMA, to protect the Wilderness and wilderness water rights. Federal agencies have a duty to protect federal reserved water rights under their statutory mandates to manage and

protect public land and water resources. See Sierra Club v. Yeutter, 911 F.2d 1405 (10th Cir. 1990). Federal courts have recognized the duty to “take appropriate action ... for the management and protection of public ... lands.” Sierra Club v. Andrus, 487 F.Supp. 443, 448 (D.D.C. 1980), *aff’d* Sierra Club v. Watt, 659 F.2d 203, 206 (D.C. Cir. 1981)(although these cases deal with BLM lands, the overarching duty to protect public lands and waters apply to the USFS as well). Such duty arises “in the event of a real and immediate water supply threat” to federal resources, including water resources. Id.

Such actions may include, but are not limited to: (1) asserting reserved water rights, (2) acquiring water rights and rights-of-way, (3) **denying the [proposed action] which may constitute or aid a threat to ... resources**, or (4) bringing trespass or nuisance actions if appropriate.

Andrus, 487 F. Supp. at 448 (emphasis added). Here, any adverse impact to the water levels or uses of the wilderness lakes and streams would violate the USFS’ duties to protect these resources.

Compounding the threats from this project to the Cabinet Mountains Wilderness Area are the numerous other mining interests that have claims for the ore beneath the wilderness, including the proposed Rock Creek project. If one project were permitted, it would be difficult to deny other interests from the ore. The consequences would be a wilderness that would be honeycombed from extracted ore, rimmed with operating and abandoned mining infrastructure, and scarred by discarded tailings.

Many species depend on this small wilderness for regional survival. The grizzly bear, lynx, wolverine, and mountain goat are species that will suffer massive habitat loss and incidental take from the rapid increase of hunters in the field. The 2006 Biological Opinion on the proposed Rock Creek mine recognized the consequences to wildlife from immigration resulting from the mine.

Noise and visual mine related impacts to the wilderness would further degrade the wilderness character of the region and would continue through the 16-19 year life of the mine. These impacts would not only be significant for wildlife, but also would seriously affect the “wilderness experience” sought by hikers, wildlife enthusiasts, hunters and fishers.

Noise related impacts would be created by blasting of rock, heavy truck traffic, and the constant operation of heavy equipment, generators, and ventilation fans. During the construction phase, noise (85 dBA) would be produced by heavy equipment, such as scrapers, bulldozers, graders, loaders, and rock trucks. (*DEIS Vol.2, Page 636*) Hearing damage occurs at 90 dBA; jet aircraft engine noise registers at 110 dBA; a busy city street is 60 dBA. The noise at the boundary of the Cabinet Mountains Wilderness would be 55 dBA, almost equal to the noise of a busy city street. (*DEIS Vol.2, Page 637*) Generators and ventilation fans also would generate noise (85dBA) that would be audible within the Cabinet Mountains Wilderness. (*DEIS Vol.2, Pages 636, 637*) Blasting of the evaluation adit would generate noise around 122 dBA.

Visual impacts to the wilderness also would be significant and include a massive 647-acre, 318' high tailings pile, a 310' high dam to contain the tailings, 16 miles of power line construction, around the clock heavy truck traffic, and a ventilation adit adjacent to Rock Lake. The mine would create 24/7 industrial lighting, all well within visual range of the wilderness, with significant impacts to the night sky. **(DEIS, Vol.2, Page 708)**

Heavy industrial mine traffic would continuously operate adjacent to the wilderness. **(DEIS Vol.2, Page 636)** The tailings impoundment would have physical characteristics that contrast significantly with the surrounding landscape. The scenic integrity and landscape character changes at the impoundment site would be noticeable indefinitely. **(DEIS, Summary, Page 41)** The mine plan includes constructing a 16 mile 230 kV transmission line in the Libby Creek drainage. **(DEIS Vol.1, Page 89)**

Air quality issues would include cumulative impacts associated with the neighboring Rock Creek mine. The wilderness has a Class One Airshed meriting the highest level of protection. Potential impacts include discharges of particulates (PM10), nitric oxides, and sulfur dioxides. The agency needs to evaluate the air quality impacts from proposed mining in the region cumulatively.

Other impacts to wilderness would include increased hunting pressure, increased use of some trails, and increased incursions by motorized recreationists resulting from the influx of new temporary and permanent residents.

All of these impacts would severely diminish the wilderness attributes of the CMW. Alone, and in combination with impacts from the Rock Creek mine, they would remove enjoyment of this wilderness from a segment of the population that would no longer visit the CMW.

The proposed mine also would be located adjacent to Inventoried Roadless Areas, including the Cabinet Face East and Barren Peak IRA's. These areas include old growth and core grizzly bear habitat. **(DEIS Vol. 3 figure #47)**

Rock Lake impacts

Rock Lake would be dewatered because the mine cavity would intercept groundwater the lake needs to maintain water levels. It is also likely that the dewatering would impact the water quality of Rock Lake. Is perpetually dewatering a wilderness lake allowable under the protection afforded "Outstanding Resource Waters?" Would it be allowable for the Montanore mine to degrade Rock Lake either through dewatering and the withholding of necessary minerals and nutrients, or through the introduction of deleterious metals and or nutrients? If these changes were to occur during the operation of the mine, and the degradation was inherent to the project and became worse over time, what options would be available to the agencies to protect Rock Lake?

Because deep bedrock ground water is a contributor to Rock Lake throughout the year, mining may affect the level of Rock Lake. The agencies' ground water model predicts a decrease in ground water inflow to Rock Lake. This may result in measurable changes

in lake level. (DEIS, V.1, Pg. 307)

Assuming these water bodies receive water from both shallow and deep ground water sources, reducing the source of deeper ground water could reduce the introduction of certain minerals considered to be necessary for potential populations of organisms. (DEIS, V.1, S-30)

Changes in nutrient and metal concentrations in Rock Lake and St. Paul Lake would be the same as discussed for Alternative 2. Reduced productivity may be the most likely effect, reducing production in algae, macroinvertebrates, and fish. (DEIS, V.1, Pg. 322)

Rock Lake and St. Paul Lake may become more dilute, with lower dissolved mineral concentrations (Gurrieri 2001).

Conflicting statements are found in the DEIS and require further explanation. Reducing the flow of deeper ground water into Rock Lake would “*reduce the introduction of certain minerals considered to be necessary for potential populations of organisms.*” (DEIS, Section, 3.10.4, Pg. 434) The DEIS (Section 3.6.4, Pg. 312) also states that “*as a result of mining, Rock and St. Paul lakes may have higher dissolved mineral concentrations, which may decrease algal and macroinvertebrate production in both lakes, and potentially reduce the fishery of Rock Lake.*” Are these minerals that would normally not be present in the lake, but could be introduced as a consequence of the mining activity beneath Rock Lake? The disruption of deep groundwater inflow to Rock Lake by mining would lower lake levels and reduce the volume of minerals essential for much of the lakes’ organisms. It appears mining would also potentially introduce metals that would be harmful to the lake’s organisms.

Drainage from the mine void also could potentially impact Rock Lake with a discharge of metals that could be perpetual.

The agencies’ numerical model indicates that during the post-mining period, there would be the potential for ground water to flow toward the mine void from the East Fork Rock Creek drainage (including Rock Lake). If this occurred, there may be subtle changes in the water quality of Rock Lake. (DEIS Volume 2, Page 435)

Rock Lake is an “Outstanding Resource Water.” Would it be allowable under the protections afforded a wilderness lake to introduce mine related nutrients and minerals that would degrade an “Outstanding Resource Water” and its fisheries?

Outstanding Resource Waters (ORW) -- waters located wholly within the boundaries of areas designated as national parks or national wilderness areas or other waters approved by the legislature. The highest level of protection pertains to outstanding resource waters (ORW). Apart from nonsignificant activities, the state may not authorize any degradation of ORW (MCA § 75-5-316(2)).

Subsidence

Subsidence is an inevitable consequence of mining. Subsidence in the mine void could impact the region's hydrology including surface features such as lakes, streams, creeks, and wetlands. Subsidence would also exacerbate the dewatering expected as a result of the Montanore project by intercepting additional shallow groundwater.

Subsidence is an inevitable consequence of underground mining – it may be small and localized or extend over large areas, it may be immediate or delayed for many years. Underground mining causes impacts to hydrologic features like lakes, streams, wetlands, and underground aquifers. (Jim Kuipers, Exec. Summary, Subsidence and Hydrologic Environmental Impacts Technical Report.)

The agencies acknowledge that subsidence could occur and the impacts to ground water could extend upwards approximately 400 feet. With a mining depth of approximately 500 feet, how would the shallow ground water be impacted and what would the potential implications be to the surface water of the wilderness?

It is estimated that chimney subsidence impacts to ground water may occur up to about 400 feet above the mine workings. (DEIS, Section 3.9.3, Page 396)

The expected occurrence of subsidence long after the cessation of mining would make predicting the long-term impacts to the region's hydrology problematic. How do the agencies propose to predict what the actual surface and hydrologic impacts would be from subsidence that would occur decades after mining has ended?

Subsidence after mine abandonment due to time-dependent pillar, roof, or floor failure may still occur and may be the dominant form of subsidence in room-and-pillar mining without pillar recovery (Singh 1992). Residual subsidence may occur tens or even hundreds of years after active mining. (DEIS, Section 3.9.3, Page 396)

The DEIS proposes to use mining depth as a mitigation for mine subsidence. Other research indicates that mining at any depth can result in subsidence. The surface above the mine cavity is wilderness. Can these proposed mining depth mitigations actually protect surface features long-term and prevent the occurrence of sinkholes and surface disturbance?

There are several common misconceptions about subsidence. For example, depth of the mine (as measured by the thickness of overlying strata) is often suggested as a prevention or mitigation measure. Similarly, the extraction area is often correlated with the size of the subsidence area. (Jim Kuipers, Pg. 3, Subsidence and Hydrologic Environmental Impacts Technical Report.)

Considering the history of the Troy mine and the occurrence of subsidence, it is surprising that the DEIS would use that mine as an analogy for the Montanore mine. The Montanore mine proposes using a mining depth of 500 feet, despite two very recent

sinkholes at Troy having occurred at 270 feet and 320 feet. Why are the agencies assuming there won't be future issues of subsidence and surface disturbance at Troy, and at depths greater than the recent 320 feet?

The mining depths associated with the two Troy sinkholes were 270 feet and 320 feet, respectively. Minimum mining depth at Montanore would be 500 feet. Assuming similar mining heights, the increased depth at Montanore would reduce the likelihood of sinkhole subsidence. (DEIS, V.1, pg. 398)

With expected roof failure and chimney subsidence at the proposed Montanore mine and the tragic fatality that occurred at the Troy mine in 2007, are there additional safety concerns that would be analogous with Troy? After the 2007 collapse of the roof that took the life of a miner, concerns were raised about the geology of the roof at Troy. Would similar conditions be expected at the Montanore mine?

The rock at Troy - the geologic Revett formation - tends to come off in big blocks, Peterson said, and is shot through with broad horizontal layers of "mud." Scott and other geologists suspect that "mud" might actually be argillite, which when soaked with groundwater becomes something approaching clay. (Missoulian, August 7, 2007)

Dewatering of Libby Lakes

The Libby adit is flooded with approximately 33 million gallons of water. What is the source of that water? Has there been any monitoring of Libby Lakes to determine if the lakes are the source of the adit water?

It is possible that random fractures exist above elevations of 5,600 feet that are saturated between the fractured bedrock water table and the shallow ground water flow path, hydraulically connecting the two ground water flow paths. If this condition were to exist, drawdown of the fractured bedrock water table by mine dewatering could reduce flow to unidentified springs or affect lake levels associated with this type of fracture, such as the Libby Lakes. (Summary page 29)

Libby Lakes Acidification

The USFS analysis of the impacts to Libby Lakes must consider mine related air emissions from multiple sources. All of the region's numerous mining projects would consume fossil fuels. Emissions of SO₄ and NO₃ would threaten the pristine and sensitive nature of Libby Lakes with acidification. Why are the cumulative air impacts on the Libby Lakes from the large and small mines that are located in the region of the Cabinet Mountains Wilderness not being considered? Even by agency standards, the Wayup mine, Libby Creek Ventures, and the proposed Montanore mine would have to be considered in the same "geographical area."

The Forest Service has monitored Libby Lakes for many years because of their high quality waters and sensitivity to change. There is concern that emissions from regional

mining projects could increase acid deposition to the lakes, with acidification of the lake watershed and lake chemistry and associated adverse aquatic effects. (DEIS, Section 3.4, Page 239)

Wilderness Attributes

None of the alternatives would directly affect the wilderness attributes of the Cabinet Mountains Wilderness. (DEIS Vol 1 page S-55) How can this statement be made by the agencies? Do impacts and displacement from habitat of several wilderness wildlife species not affect wilderness attributes? Do impacts to the hydrology of wilderness lakes and streams not affect wilderness attributes? This mine would directly impact numerous alpine wilderness lakes including Rock Lake and St. Paul Lake and wilderness stream reaches including the East Fork of Bull River. The impacts would include dewatering that would lower lake levels.

An attribute is defined as “a quality considered as belonging to a person or thing; characteristic.” By draining wilderness lakes and displacing wildlife that belong in the wilderness, the Montanore mine would alter the attributes that would be expected by wilderness visitors.

As discussed in the overview section that described the multiple impacts to wilderness, the CMW would no longer be visited by a segment of the population whose wilderness experience would be destroyed by constant noise, industrial lighting, and the destruction of the viewshed adjacent to the wilderness.

FAILURE TO FULLY ANALYZE ALL CUMULATIVE IMPACTS FROM OTHER PROJECTS

The Montanore mine is but one prospective mining project in this region of the Cabinet Mountains. The numerous active and currently abandoned mining projects are either already impacting the region’s environment or have the potential to do so in the future. The Rock Creek mine is but one high profile project that would impact area wildlife and water quality. Other mine claims in the vicinity of the Montanore project also could potentially produce impacts individually and cumulatively. The abandoned Snowshoe mine is already impacting the water quality of Snowshoe and Big Cherry Creek. The Way-up and Fourth of July mines threaten local watersheds due to road construction impacts.

Abandoned and active mine projects should all be considered when evaluating the numerous impacts from the Montanore mine. All of the active mine claims would entail road building, noise, air quality impacts, discharges to ground and surface waters, sediment production, and impacts to threatened species. The evaluation of impacts from the Montanore mine on grizzly bear, lynx, bull trout, wolverine and other species needs to include potential cumulative impacts from other large and small mining proposals. The proposed Montanore and Rock Creek mines would not operate in a vacuum.

Montanore's DEIS addresses the possibility that the agencies may permit numerous mines to operate simultaneously. While the DEIS seems to accept that Montanore, Rock Creek, Way-up, Fourth of July, and others may be permitted to operate concurrently, the DEIS fails to give even cursory examination of the cumulative impacts to wildlife, wilderness, and water quality.

These requirements are in addition to the DEIS' failure to review the cumulative impacts from all "past, present, and reasonably foreseeable future actions" under NEPA/MEPA. 40 CFR § 1508.7. In this case, the DEIS' analysis of cumulative impacts consists largely of a listing of the number of acres affected by the past, present, and reasonably foreseeable future surface disturbances for the cumulative impact areas. *See* DEIS at 216-223. Although the DEIS contains a short paragraph or two discussing cumulative impacts to some resources, the document provides no additional information on the actual cumulative impacts.

The Ninth Circuit recently and squarely rejected such reliance on the listing of the acreages of other projects as the primary means to review cumulative impacts.

A calculation of the total number of acres to be [impacted by the other projects] in the watershed is a necessary component of a cumulative effects analysis, but it is not a sufficient description of the actual environmental effects that can be expected from [impacting] those areas.

Klamath Siskiyou Wildlands Center v. BLM, 387 F.3d 989, 995 (9th Cir. 2004).

[T]he general rule under NEPA is that, in assessing cumulative effects, the Environmental Impact Statement must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment. *See Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1379-80 (9th Cir.1998); *City of Carmel-By-The-Sea v. United States Dept. of Transp.*, 123 F.3d 1142, 1160-61 (9th Cir.1997).

Lands Council v. Powell, 395 F.3d 1019, 1028 (9th Cir. 2005).

The [agency] cannot simply offer conclusions. Rather, it must identify and discuss the impacts that will be caused by each successive [project], including how the combination of those various impacts is expected to affect the environment, so as to provide a reasonably thorough assessment of the project's cumulative impacts.

Klamath Siskiyou, 387 F.3d at 1001. In a major mining and NEPA decision, the Ninth Circuit specifically rejected the type of brief mention or listing of projects/acreages as found in the DEIS. In Great Basin Mine Watch v. Hankins, 456 F.3d 955, 971-974 (9th Cir. 2006), the court struck down the same sort of acreage listing and brief, generalized descriptions of mining impacts in the region. The court required BLM to include "mine-specific ... cumulative data." *Id.* at 973. Relying on Klamath-Siskiyou, and Lands

Council, the court highlighted the need for a “quantified assessment of their [other projects] combined environmental impacts” and “objective quantification of the impacts.” Id. at 972. That has not been done here.

CLIMATE CHANGE

Climate change is prominent in discussions by national, state, and local governments working to address its implications. Many industries, small businesses, municipalities, and individuals are voluntarily working to reduce their carbon footprint and contribution to climate change, which likely will have the most widespread environmental, economic, and social implications on a worldwide scale.

The power and fossil fuel consumption and resulting carbon footprint of this mine appears not to have been addressed in this DEIS. To reflect the immediacy to address climate change and to adhere to the CEQ’s draft guidance on climate change, the NEPA document for this mine should include an analysis of how the project could add to global warming and climate change, and how climate change could increase the project’s impacts.

According to the 1997 Draft Guidance Regarding Consideration Of Global Climatic Change in Environmental Documents Prepared Pursuant to the National Environmental Policy Act: ***Global climate change is a serious environmental concern which, given the current state of scientific knowledge, must be viewed under NEPA as a reasonably foreseeable impact of continued emissions and changes in sinks of greenhouse gases. Thus, federal agencies must analyze the extent to which both their proposed and ongoing programs or other activities might influence such emissions and sinks, thereby contributing to, or reducing the problems of global warming. Such analyses can best be done in the context of NEPA and should look at how federal actions may affect global climate change and, to the extent possible given the current state of scientific knowledge, how federal actions may be affected by global climate change.***

Climate change is expected to result in an increased frequency of major storm events. In recent years, several large storm events of the size of a 100-year event took place in western Montana and northern Idaho. One such event obliterated a road in the Lightning Creek drainage in northern Idaho. The resistance on the part of DEQ to require that storm overflow ponds, ditches and other facilities that will discharge to ground or surface waters during high flow events be designed to at least a 100 year storm event is baffling. Overflow facilities for the Montanore mine do not appear to have been designed to accommodate these larger storm events that are occurring with greater frequency, but rather to the 10-year/24 hour event. Failure to do so ensures that untreated discharges of mine waste water to Montana’s ground and surface waters will be more frequent. This is a major flaw in this project.

In addition to affecting the frequency of storm events, climate change could result in significantly less or more annual precipitation in given years and in increased

temperatures. This could impact vegetation patterns, wetlands, fisheries, and hydrologic cycles. These impacts should be addressed.

FAILURE TO REVIEW ALL REASONABLE ALTERNATIVES

The DEIS fails to comply with NEPA/MEPA's strict requirements 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(E); 40 CFR § 1508.9(b). The agencies 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). It should be noted that our inclusion of alternatives does not necessarily mean that we believe that the adoption of these alternatives would render the illegal Project legal. Regardless, NEPA's alternatives requirements must be met.

Here, in addition to the project alternatives discussed above that were not reviewed, as well as those described in the comments from our experts, the following alternatives should have been fully analyzed.

Alternatives should be considered that do not include allowing mine effluent to discharge into a wilderness stream that is prime habitat for bull trout. Is discharging to the East Fork of Bull River a cost saving measure for MMC? The agencies should have analyzed other options for the water in the flooded mine void.

Why is a high hazard dam that contains 120 million tons of tailings exempt from Montana's Dam Safety Act? Other options for the tailings impoundment that would not create such significant long-term impacts to the watershed should have been analyzed.

Alternative 3 did not require the diversion of a perennial stream, but was dismissed because of the smaller capacity for tailings. Other options should be considered to limit the volume of tailings to avoid the diversion of Little Cherry Creek, such as the backfilling of the tailings.

The LAD discharge would only be applicable during the 6-month growing season. Five months is more accurate in this northern climate. Frost commonly occurs in September, and the growing season often does not begin until May. The limited and ambiguous options for the winter discharge, which is most of the year, need extensive clarification and makes the LAD seasonal and unworkable for this application. Alternatives other than the LAD need to be explored because of afore mentioned problems and impacts that will become inherent with this type of discharge. The additional options for the discharge would require the same scrutiny as the LAD.

Another alternative that was not reviewed regards the USFS' authority, under the Wilderness Act, 16 U.S.C. § 1134(a), to exchange private interests within a Wilderness Area as a means of protecting Wilderness values. The Act provides that access to private property surrounded by wilderness may be denied so long as the property is "exchanged

for federally owned land in the same State of approximately equal value.” 16 U.S.C. § 1134(a). In other words, “[t]he language of § [1134(a)] indicates that a landowner has a right to access or exchange. If he is offered either, he has been accorded all the rights granted by the statute.” 4A Op. Off. Legal Counsel 30, 50 (1980) (emphasis in original) (attached).

Here, the KNF failed to consider the alternative of an exchange. This clearly reasonable alternative should have been considered by the KNF. Indeed, such an alternative is specifically sanctioned by Congress.

THE AGENCIES IMPROPERLY INTEND TO APPROVE THE ENTIRE PROJECT DESPITE THE LACK OF CRITICAL INFORMATION FROM THE EVALUATION ADIT

The USFS intends to approve **both** phases of the Project, despite acknowledging that critical information is lacking about the Project’s baseline conditions and environmental impacts. The continuance of the Phase I evaluation adit is needed to gather additional data on ground water quality and flow, geochemical data, and rock mechanics data. Despite this, the USFS believes that it had enough information to approve the entire Project and will only later review the information to be obtained by Phase I. This “permit now and design later mentality” violates NEPA. In addition, the DEIS’ failure to review approving the evaluation adit only as an alternative violates the above-discussed alternatives requirements.

By failing to conduct an adequate analysis of the impacts of the entire Project, the agency also failed to fully involve the public in its decision-making processes. “NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” 40 CFR § 1500.1(b). “NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment. Rather, it is designed to require such analysis as soon as it can reasonably be done.” Kern v. BLM, 284 F.3d 1062, 1072 (9th Cir. 2002). The agency also lacks the required baseline information (to be obtained from Phase I and other studies/reviews). “[W]ithout establishing ... baseline conditions ... there is simply no way to determine what effect [an action] 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).

The agency’s decision to approve the entire Project at one time also violates its NEPA duty to “rigorously explore and objectively evaluate all reasonable alternatives” to the proposed action. City of Tenakee Springs, 915 F.2d at 1310. Although due to the severe environmental impacts and illegalities of Phase I, we of course do not support approval of either Phase, the agency should have fully considered approval of only the evaluation adit.

In addition, under its 36 CFR Part 228 regulations and related statutes, the Forest Service must reject an “unreasonable” mine plan. Here, it is not reasonable to approve the entire

Project at this time. Although, due to the numerous problems inherent with each phase of this Project, we cannot support approval of any phase, since completion of the evaluation audit is the next step in the “logical sequence” of developing the ore body, that phase is the only phase that can be considered for approval at this time.

LACK OF ADEQUATE MITIGATION ANALYSIS

Similar to the agency’s deferral of review of information to be obtained from Phase I and other future reports/studies, the DEIS also defers review of a host of mitigation measures and analysis of the Project’s baseline (current) conditions and future environmental impacts. NEPA regulations require that an EIS: (1) “include appropriate mitigation measures not already included in the proposed action or alternatives,” 40 CFR § 1502.14(f); and (2) “include discussions of: . . . Means to mitigate adverse environmental impacts (if not already covered under 1502.14(f)).” 40 CFR § 1502.16(h). In addition, under 40 CFR § 1505.2(c), “A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.”

The DEIS listed many important mitigation measures without any detailed analysis of their implementation or effectiveness. This approach was rejected by the Ninth Circuit in Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1380-81 (9th Cir. 1998)(“The Forest Service’s broad generalizations and vague references to mitigation measures . . . do not constitute the detail as to mitigation measures that would be undertaken, and their effectiveness, that the Forest Service is required to provide.”).

Here, the agencies cannot defer analysis of mitigation measures. The revised DEIS must include, and make available to the public, detailed discussions of all mitigation measures.

IMPROPER POSTPONEMENT OF ANALYSIS

Overall, by deferring analysis of baseline conditions, mitigation, and impacts, the agencies have also violated their NEPA/MEPA obligations regarding incomplete and unavailable scientific information by not collecting the necessary data to adequately describe the affected environment and the Mine’s impacts. The existence of incomplete or unavailable scientific information concerning significant adverse environmental impacts triggers the requirements of 40 CFR § 1502.22. This provision requires “the disclosure and analysis of the costs of uncertainty [and] the costs of proceeding without more and better information.” Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark (SOCATS), 720 F.2d 1475, 1478 (9th Cir. 1983). “On their face these regulations require an ordered process by an agency when it is proceeding in the face of uncertainty.” Save Our Ecosystems v. Clark, 747 F.2d 1240, 1244 (9th Cir. 1984).

40 CFR § 1502.22 imposes three mandatory obligations on the Forest Service in the face of scientific uncertainty: (1) a duty to disclose the scientific uncertainty; (2) a duty to complete independent research and gather information if no adequate information exists (unless the costs are exorbitant or the means of obtaining the information are not known); and (3) a duty to evaluate the potential, reasonably foreseeable impacts in the absence of

relevant information, using a four-step process. The Forest Service has failed to meet these requirements in the face of substantial uncertainty regarding numerous foreseeable environmental impacts of the Project – deferring review until after the FEIS and ROD were completed. The agency admits that full information is still lacking, but has not, and cannot, demonstrate that “the costs are exorbitant or the means of obtaining the information are not known.” 40 CFR § 1502.22.

The duty to conduct independent research when faced with incomplete or unavailable information insures agencies comply with NEPA’s central purpose – “to obviate the need for speculation by insuring that available data is gathered and analyzed prior to the implementation of the proposed action.” Save our Ecosystems at 1248-49. The Ninth Circuit has held that “Section 1502.22 clearly contemplated original research if necessary.” Id. at 1244 note 5.

THE FOREST SERVICE FAILED TO PROPERLY APPLY ITS DISCRETIONARY AUTHORITY OVER THE PROJECT.

The KNF based its review, and intended approval of the Project, on its position that the applicant has a “right” under the 1872 Mining Law to develop the Project and that the USFS cannot deny a “reasonable” proposal. DEIS at 11. The Forest Service has improperly processed the entire mining proposal under the auspices of the 1872 Mining Law and the 36 CFR Part 228 regulations, when in fact, only the activities proposed on valid claims themselves are arguably entitled to the statutory protections identified by the agency.³ Without a valid claim, a mining claimant does not have any rights against the United States to develop the claim. “While a claimant can explore for valuable mineral deposits before perfecting a valid mining claim, without such a claim, she has no property rights against the United States (although she may establish rights against other potential claimants), and her use of the land may be circumscribed beyond the [standard for operations on valid claims] because it is not explicitly protected by the Mining Law.” Mineral Policy Center v. Norton, 292 F.Supp.2d 30, 47-48 (D.D.C. 2003).

Any activity that is not proposed for valid claims should be reviewed and approved/disapproved under the Forest Service’s discretionary authority under the NFMA, Organic Act, and FLPMA, and their implementing regulations (e.g., rights-of-way for electrical transmission lines, roads, and various pipelines).

The failure of the Forest Service to properly apply its discretionary authority also improperly biased its alternatives review under NEPA. In this case, the Forest Service prepared the DEIS based on the assumption that MMC had statutory rights to develop all federal land in the area, an incorrect assumption.

The KNF also incorrectly assumed that MMC had a “right” to the use of federal land for its water delivery pipelines, transmission lines, and other uses. Here, the determination

³ Since the ore body is privately owned, any “rights” under the Mining Law do not apply since the Mining Law only applies on public land.

as to whether to approve the water delivery and tailings pipelines was improperly made solely under the Part 228 regulations. In contrast, the agency is, as it should be, apparently processing the application for the electrical transmission lines under a Special Use Permit under FLPMA Title V. Such Title V Special Uses (e.g., right-of-ways) are completely discretionary and must account for a number of public interest factors.

The KNF reviewed the water and tailings pipelines under its Part 228 regulations, which the agency believes limits its authority (i.e., the agency can only “minimize” impacts from the use, it cannot deny the proposed use). This incorrectly implements FLPMA Title V as it ignores the discretion, fair market values, and public interest requirements of that law. In other words, the agency is under no obligation to approve the water supply and tailings pipelines and roads. Any EIS or Project approval based on the agency’s misconception of federal law and the agency’s authority cannot stand.

A ROW across federal land must be obtained pursuant to FLPMA Title V:

§ 1761. Grant, issue, or renewal of rights-of-way

(a) Authorized purposes

The Secretary [of Interior], with respect to the public lands ... and, the Secretary of Agriculture, with respect to lands within the National Forest System (except in each case land designated as wilderness), are authorized to grant, issue, or renew rights-of-way over, upon, under, or through such lands for--

(1) reservoirs, canals, ditches, flumes, laterals, pipes, pipelines, tunnels, and other facilities and systems for the impoundment, storage, transportation, or distribution of water;

(6) roads, trails, highways, railroads, canals, tunnels, tramways, airways, livestock driveways, or other means of transportation except where such facilities are constructed and maintained in connection with commercial recreation facilities on lands in the National Forest System; or

(7) such other necessary transportation or other systems or facilities which are in the public interest and which require rights-of-way over, upon, under, or through such lands.

43 U.S.C. § 1761(a). The KNF incorrectly implies that MMC’s “rights” to access its patented claims override the agency’s duty under FLPMA to require a ROW.

Thus, the issue is whether rights to “access” mining operations under federal mining law override Congress’ intent to authorize uses such as water delivery pipelines under ROWs pursuant to Title V. “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, even if BLM thinks that it does.” Coggins & Glicksman, PUBLIC NATURAL RESOURCES LAW, 10E-50 (West Group 2003).

A leading Interior Department (Interior Board of Land Appeals, or IBLA) decision specifically rejects any argument that water pipelines are covered by the “access” provisions of federal mining law. Desert Survivors, 96 IBLA 193, 195-197 (1987)(emphasis added), 1987 IBLA LEXIS 81. *See also* Far West Exploration, 100 IBLA 306, 309, n. 4 (1987) (“such a [FLPMA] right-of-way must be obtained prior to transportation of water across Federal lands for mining.”); Wayne D. Klump, 130 IBLA 98, 101 (1995)(“Further, pipelines for conveyance of water as well as associated development across public lands must generally be authorized under the regulations governing rights-of-way. See 43 CFR 2800.0-7 and Desert Survivors, 96 IBLA 193, 196 (1987), finding that a mining claimant was required to obtain a right-of-way from BLM for conveyance of water from public lands outside his claim onto the claim, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1988) (now implemented by Departmental regulations at 43 CFR Part 2800).”). Although these cases focus on Interior Department lands, FLPMA Title V requirements apply equally to the Forest Service.

Here, there is no evidence that the water and tailings pipelines are necessary for MMC’s “access” to its ore body or mining claims. This is not a case where a road across public land would be necessary for a company to truly “access” its mining claims. Federal mining laws, especially the Mining Law of 1872 (and its predecessor, the 1866 mining law), granted rights of “ingress and egress” to valid mining claims on public land. 30 U.S.C. §§ 22-47. The water delivery and tailings pipelines at issue here is not, however, for “ingress or egress” – it is solely to facilitate MMC’s removal of tailings and delivery of water.

In this case, MMC has not submitted the required ROW applications. The KNF has also failed to analyze, and ensure, the protection of the public interest and public treasury, as required by FLPMA and Forest Service implementing regulations. FLPMA states that “[t]he Congress declares that it is the policy of the United States that ... (9) the United States receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute.” 43 U.S.C. § 1701(a).

The federal courts have rejected the position that “fair market value” is not required, or that the agencies do not have discretionary authority, over mining-related operations conducted off of valid claims. *See Mineral Policy Center v. Norton*, 292 F.Supp.2d at 47-48. The court went on to acknowledge the federal land agency’s authority to impose FLPMA’s multiple use and sustained yield requirements on all lands not covered by valid mining or millsite claims. *Id.* at 49. The court also required that the agencies meet FLPMA’s “fair market value requirement.” *Id.* By failing to require a ROW application for MMC’s pipelines, roads, and other uses of public lands not covered by valid mining or millsite claims, the KNF failed to protect the public interest and the public treasury.

CONCLUSION

As detailed above, due to numerous violations of federal and state law, the Project, and any action alternative reviewed in the DEIS, cannot be approved. Further, due to the various NEPA/MEPA inadequacies, the agencies must prepare a revised DEIS in accordance with law.

Thank you for the opportunity to comment on this important matter. Please include the undersigned in all public notices, alerts, etc.

Sincerely,

/s/ Jim Costello

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