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**File Code:** 1570

**Date:** March 21, 2013

Tom Buchele  
Earthrise Law Center  
10015 SW Terwilliger Blvd.  
Portland, OR 97219

**CERTIFIED MAIL  
RETURN RECEIPT REQUESTED  
NUMBER: 7010 1870 0000 4162 3460**

RE: Goat Mountain Hardrock Prospecting Permit Applications Appeal

Dear Mr. Buchele:

This constitutes my decision, pursuant to 36 CFR 215.18(b)(1), on your appeal (#13-06-03-0002-215) of District Ranger Gar Abbas' decision for the Goat Mountain Hardrock Prospecting Permit Application Environmental Assessment (EA) on the Cowlitz Valley Ranger District, Gifford Pinchot National Forest.

**Project Overview**

On December 3, 2012, Gar Abbas, District Ranger for the Cowlitz Valley Ranger District on the Gifford Pinchot National Forest signed a decision notice (DN) for the Goat Mountain Hardrock Prospecting Permit Application EA, prepared by the Bureau of Land Management under the provisions of the Reorganization Plan No. 3 of 1946 for acquired lands by authority of the Weeks Act of 1911. His decision provides consent with certain required conditions as described in Alternative 3 of the EA to the Bureau of Land Management for the issuance of hardrock mineral prospecting permits on National Forest System lands.

Pursuant to 36 CFR 215.17, an attempt was made to seek informal resolution of the appeal. The District Ranger notified me that informal resolution was not reached. He did indicate that a major point of concern that your organization has is with regards to future mining and Forest Service consent. With regards to the issue of a future mine, the District Ranger's decision clearly states that if any application for lease (for future mining) was received by the BLM, this would necessitate additional NEPA, and would require the BLM to request "second consent" to that activity when, and if, that occurs. This means that while the District Ranger found that issuing consent to prospecting was consistent with the purposes for which the lands were acquired, he would have to make a second finding with regards to mining, and that would have to be done in a separate NEPA document. I hope this clarifies the Forest Service's responsibilities with regards to any future mine.

My review of this appeal has been conducted in accordance with 36 CFR 215.18, *Formal review and disposition procedures*. I have reviewed the appeal record, including the recommendations of the Appeal Reviewing Officer. A copy of his recommendation is enclosed.



The Appeal Reviewing Officer focused his review on the appeal record and the issues that were raised in your appeal.

**Appeal Decision**

After a detailed review of the record and the Appeal Reviewing Officer's recommendation, I affirm with instructions the Responsible Official's decision for the Goat Mountain Hardrock Prospecting Permit Applications Project and deny your requested relief. The instruction that I am issuing to the District Ranger is to provide clarification as to how the issuance of consent to the BLM complies with the minerals management standards and guidelines in the Gifford Pinchot National Forest Land and Resource Management Plan, as amended.

This decision constitutes the final administrative determination of the Department of Agriculture [36 CFR 215.18(c)]. A copy of this letter will be posted on the national appeals web page at <http://www.fs.fed.us/appeals>.

Sincerely,



JANINE CLAYTON  
Forest Supervisor Appeal Deciding Officer

Enclosure(s)

cc: Robert G Varner, Debbie Anderson, Adam A Felts, Brittany N Zapata, Erica Taecker, Gar Abbas, Ruth Seeger, Robert W Fujimoto, Joseph Gates, Dave Olson, Diane Sommervold, Mailroom R6 Gifford Pinchot



United States  
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Forest  
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P.O. Box 158  
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541-427-3231

File Code: 1570

Date: March 15, 2013

Route To:

Subject: Appeal Recommendation, Goat Mountain Hardrock Prospecting Permit Applications

To: Janine Clayton, Forest Supervisor, Gifford Pinchot National Forest

On December 3, 2012, Gar Abbas, District Ranger for the Cowlitz Valley Ranger District on the Gifford Pinchot National Forest signed a decision notice (DN) and finding of no significant impact (FONSI) for the Goat Mountain Hardrock Mineral Prospecting Permit Applications EA, prepared by the Bureau of Land Management (BLM) under the provisions of the Reorganization Plan No. 3 of 1946 for acquired lands by authority of the Weeks Act of 1911. His decision provides consent with certain required conditions as described in Alternative 3 to the Bureau of Land Management for the issuance of hardrock mineral prospecting permits on National Forest System lands.

One appeal (#13-06-03-0002-215) was filed by Tom Buchele of the Earthrise Law Center on behalf of Jessica Walz Schafer of the Gifford Pinchot Task Force. The Gifford Pinchot Task Force requested that the "DN, FONSI, and November EA approving/consenting or supporting the issuance of the Goat Mountain Hardrock Prospecting Project Permits be withdrawn and that the DN, FONSI, and November EA be reevaluated, modified, and made available for public comment to meet the objections presented in the Appellant's Statement of Reasons and all legal requirements."

### Review and Findings

My review was conducted in accordance with 36 CFR 215.19 to ensure that the analysis and decision are in compliance with applicable laws, regulations, policies, and orders. The decision space of the Forest Service is very narrow in that the Forest Service granted consent to the BLM, who is ultimately responsible for issuance of the permits. Many of the appellant's issues surrounded what they believe are the inadequacies of the BLMs EA. These issues are outside of the scope of this appeal decision and the appellant did not file an appeal of the BLMs decision record. I did, however, respond to those points by highlighting where in the EA the BLM documented the potential effects. The Responsible Official of the Forest Service's DN/FONSI used this information to determine whether or not issuing consent to the BLM was consistent with the purposes for which the lands were acquired, and whether or not the issuance of consent had a significant impact and was in accordance with applicable laws, regulations and policies.

The appeal record, including the appellant's issues, has been thoroughly reviewed. Having reviewed the DN/FONSI, BLM EA, and the project record (both the BLMs record and the Forest Service's record) as required by 36 CFR 215.19(b), I conclude the following:

1. The decision clearly describes that consent will be issued to the BLM, and is described in sufficient detail that the reader can easily understand what will occur as a result of the decision.
2. The selected alternative will accomplish the purpose and need established and includes the applicable conditions stipulated by the Forest Service for issuing consent to the BLM.
3. The decision is consistent with policy, direction, and supporting evidence. The record contains documentation regarding resource conditions and the Responsible Official's decision document is based on the record and reflects a reasonable conclusion.



4. The record reflects that the Responsible Official considered public comments and concerns during the analysis and decision making process. The Responsible Official's cooperated with the BLM to allow interested publics the opportunity to comment and be involved in the proposal.

After considering the claims made by the appellant and reviewing the record, I found that the Responsible Official granted consent to the BLM in a manner that is consistent with the Gifford Pinchot NF LRMP, as amended. I found no violations of law, regulations, or Forest Service policy.

**Recommendation**

After reviewing the appeal record, I recommend affirming the decision with instructions. I believe that clarity could be added as to how the issuance of consent is consistent with minerals management standards and guidelines. I believe that the documentation adequately supports the District Ranger's decision to issue consent to the BLM with regards to all appeal points raised by the appellant.

Enclosed with this memo are my responses to each appeal issue.



ROBERT VARNER  
District Ranger

cc: Debbie Anderson, Adam A Felts

**Goat Mountain Hardrock Mineral Prospecting Permits Environmental Assessment (EA)**  
**Appeal Statements and Responses**  
Cowlitz Valley Ranger District  
Gifford Pinchot National Forest  
March 2013

**Appellant**

Gifford Pinchot Task Force

**Appeal Number**

13-06-03-0002-215

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***Violations of Law and Regulation***

**Appellant Statement #1:** Appellant states that “The Forest Service’s decisions failed to satisfy the requirements of the APA; the LWCF Act; NEPA; NFMA; the ESA; the CWA; the NWFP; the Wild and Scenic Rivers Act; the Reorganization Plan No. 3 of 1946; the Weeks Act of March 1, 1911; the Weeks Act of March 4, 1917; and these statutes’ implementing regulations.” Appeal at 5.

**Response:** I find that the Responsible Official was correct in concluding consistency with the stated laws, rules and regulations in the Forest Service’s Decision Notice (DN), which gave consent to the BLM to issue prospecting conditions with certain required conditions for use and protection of the National Forest System surface lands managed by the Forest Service. DN at 1. The Responsible Official documented how consent is consistent in the *Findings Required by Other Laws and Regulations* section of the Decision Notice, including consistency with the National Forest Management Act, Clean Water Act, Clean Air Act, Weeks Act of 1911, Mineral Resources on Weeks Law Land Act of 1917 and Reorganization Plan No. 3 of 1946. DN at 13-15.

Section 1.4 of the EA at 6-8 also disclosed consistency of the issuance of consent with the Gifford Pinchot National Forest Land and Resource Management Plan (LRMP), as amended. Appendix B of the EA disclosed the “Relationship to Federal, State, and Local Regulations and Policies” and listed how the EA addressed most regulations.

The EA that was written by the BLM fulfills their responsibility to consider and disclose the effects of issuing the prospecting permits. The decision written by the Forest Service adopted the BLMs EA. The scope of the Forest Service’s decision is limited to issuance of consent to the BLM with specification of certain conditions to protect the purposes for which the NFS lands were acquired. The BLM then decided whether or not to issue prospecting permits to the applicant, which they did and documented in their Decision Record. Thus, at issue for the Forest Service is whether or not the BLM EA contained adequate information for the Forest Service to issue consent and to determine that issuing consent was consistent with the purposes for which the lands were acquired, and whether or not issuing consent complied with applicable laws, regulations, and policies and that it would not have a significant impact on the environment. Consistency with laws listed by the appellant is determined by the processes conducted during the environmental analysis, and is demonstrated as follows:

- Administrative Procedure Act (APA) - Administrative procedures were followed by the Forest Service and BLM by providing the public with the opportunity to comment and appeal the project. DN at 15-16.
- Land and Water Conservation Fund (LWCF) Act – Applicability with this act is described in the EA, Appendix C, Response to Comments #20, Appendix C at 6. See response to Appellant Statement #8 for more details.

- National Environmental Policy Act (NEPA) – Consistency with NEPA is demonstrated by the BLMs preparation of the environmental analysis documents, opportunity for public involvement and comment, development of issues, alternatives and disclosure of the environmental effects analysis.
- National Forest Management Act (NFMA) – Compliance with the NFMA is fully addressed in the DN at 13-14.
- Endangered Species Act (ESA) – Effects of the issuance of consent on Threatened, Endangered and Proposed species in the project biological assessment (BA) prepared by contractor URS (April 12, 2012). US Fish and Wildlife Service (USFWS) (August 21, 2012) concurred with the findings of the July 26, 2012 transmittal of the 4/12/12 BA. The EA prepared by the BLM documented the effects to Threatened and Endangered species (EA at 62-71). Additionally, response to comment #41 summarized the analysis of wildlife species and disclosed the potential location of wildlife species in the EA. EA Appendix C, page 12.
- Clean Water Act (CWA) – How issuance of consent complies with the CWA is fully addressed in the decision notice (DN) at 14.
- Northwest Forest Plan (NWFP) – How issuance of consent is consistent with the NWFP is found in the NFMA consistency section of the DN at 13-14.
- Reorganization Act No. 3 of 1946 – How issuance of consent complies with the Reorganization Act No. 3 of 1946 is fully addressed in the DN at 14.
- Weeks Act 1911 and the Mineral Resources on Weeks Law Land Act of 1917 – How issuance of consent complies with the Weeks Act of 1911 and the Mineral Resources on Weeks Law Land Act of 1917 is fully addressed in the DN at 14-15. See also response to Appellant Statements #7 and #8.

**Appellant Statement #2:** Appellant states that the DN, finding of no significant impact (FONSI), and EA do not ensure that all requirements of the National Forest Management Act (NFMA) will be met at all times and that there is little, if any, detailed analysis as to how the project complies with minerals management standards in the Forest Plan, as amended. Appeal at 21.

**Response:** I find that the Responsible Official correctly considered the impacts of issuing consent and documented the findings of consistency with the National Forest Management Act in the Decision Notice and acted within his authority to grant consent (with applicable conditions that protect the purposes for which the lands were acquired) to the BLM for issuance of a prospecting permit. DN at 12-14.

The NFMA requires that permits be consistent with the Land and Resource Management Plan under which they were prepared. NFMA, Section 6(i). Consistency of issuing consent with the Gifford Pinchot National Forest LRMP, as amended, is documented through the standards and guidelines. The applicable regulation at 43 CFR 3590 requires the permittee to design their activities to be consistent with the terms, conditions, and stipulations of the permit, which are set forth by the BLM. The required terms of Forest Service consent (see Attachment 1 to the Forest Service DN) will be carried forward by BLM onto the permit. BLM Decision Record (DR) at 2, 3 and 20.

The minerals management standards are addressed in Appendix F of the EA, which disclosed the mitigation measures that would be included with the permits that would be issued by the BLM. BLM DR at 3. The minerals management (MM) standards specifically referenced in the appeal are all associated with standards in the NWFP standards and guidelines at C-34 and C-35, MM-1 through MM-4. These standards only apply to riparian reserves. The EA states that there are two pads within riparian reserves, which are pads 6 and 7, with disturbance of approximately 20 feet by 20 feet, or roughly 400

square feet for each pad. EA at 18. The effects analysis in the EA at 39 state that riparian impacts would be minor with some tree clearing (<12-inch dbh) and minor brush removal may occur in association with drill Pads 6 and 7.

In the Hydrology/Hydrogeology section of the mitigation measures in the EA at Appendix F, there are standards and guidelines for minerals management in riparian areas. The DN describes the conditions of additional mitigation identified in the EA are of the sole discretion of the BLM and their decision making process (DN at 18) and are not a part of the Forest Service decision space. These are recommended to the BLM for inclusion in the permit or specific exploration plan and were adopted as part of the BLMs Decision Record. BLM DR at 3. A review of the mitigation measures in Appendix F indicate that the minerals management standards of the NWFP have been addressed by the BLM and are summarized as follows:

- NWFP Standard and Guideline MM-1 calls for reclamation plans, approved plan of operations and a reclamation bond for all minerals operations. The EA describes the reclamation to be conducted (EA at 24), that a plan of operations/exploration must be provided (BLM DR at 3), and that a reclamation bond is required. See 43 CFR 3590. As such, issuance of consent by the Forest Service complies with MM-1 through BLMs requirement of a plan of operations and subsequent reclamation.
- NWFP Standard and Guideline MM-2 calls for structures, support facilities, and roads to be located outside of Riparian Reserves. Where no alternative to siting facilities in Riparian Reserves exists, locate them in a way compatible with ACS objectives. Because of the narrow Forest Service decision space, the DN articulates that certain mitigations will be brought forward as recommendations to the BLM for inclusion in the prospecting permit or as terms of exploration plan approval. These were included in the BLMs Decision Record at 3. The other mitigations outlined in the EA, such as Appendix F which includes mitigation measure MM-23, offers guidance to locate structures outside of riparian reserves, and minimizes effects to aquatic and other riparian dependent resources. Furthermore, the EA describes Pads 6 and 7 as being within riparian reserves. The effects of using these pads for exploration are limited to removal of some trees less than 12 inches in dbh on a 20 by 20 foot area for each pad. EA at 18. The ACS objectives have been met for permit issuance. EA at 45-48. Existing roads would be maintained to minimize damage to aquatic and riparian resources. EA Appendix F at 3. As such, the issuance of consent by the Forest Service complies with MM-2 because of the mitigations adopted by the BLM in their decision record. BLM DR at 3.
- NWFP Standard and Guideline MM-3 prohibits solid and sanitary waste facilities in Riparian Reserves. If no alternative to locating mine waste (waste rock, spent ore, tailings) facilities in Riparian Reserves exists, and releases can be prevented and stability can be assured, then:
  - Analyze waste material
  - Locate and design facilities using best conventional techniques
  - Monitor waste and facilities after operations
  - Reclaim waste facilities after operations
  - Require reclamation bonds

The issuance of the prospecting permits would facilitate mineral exploration activities only; no mine waste as described above would be generated. To the extent the MM-3 applies to the issuance of prospecting permits by the BLM and consent issuance by the Forest Service, the EA is responsive to these measures in Appendix F of the EA. Mitigation measure MM-26 in the EA Appendix F at 3 states to avoid side-casting (placement of unconsolidated earthen waste materials resulting from road and drill site construction and maintenance) in riparian reserves. Because prospecting only involves exploratory drilling, no mine waste, ore or tailings would be removed or left within riparian reserves. Additionally, mitigation measures MM-41, MM-42, MM-43 in EA Appendix F at 5 stipulate the measures needed for the protection of water quality, monitoring of water, and measures to be

completed after drilling to seal the drill holes and other abandonment methods to reduce or eliminate impacts. The applicable BLM regulations also require that inspections of operations occur, and require reclamation bonds (43 CFR 3590). As such, the issuance consent by the Forest Service complies with MM-3 because of the mitigation measures adopted by the BLM. BLM DR at 3.

- NWFP Standard and Guideline MM-4 states that for leasable minerals prohibit surface occupancy within Riparian Reserves for oil, gas and geothermal exploration and development activities where leases do not already exist. This is not an oil, gas, or geothermal project, so this standard and guideline does not apply.

The EA also identified Fisheries Design Criteria and Best Management Practices which addressed elements of the four Minerals Management standards from the NWFP. EA at 78-79. The EA includes mitigation and Best Management Practices to issue the permits (BLMs action) and to give consent to issuance of permits (Forest Service's action). This includes references to Forest Service Manual Best Management Practices (BMPs) for Minerals Exploration, Forest Service National Core BMPs for Water Quality Management in Minerals Management Activities, and Minerals and Road Management Standards and Guidelines established for Riparian Reserves in the Gifford Pinchot National Forest Land and Resource Management Plan, as amended. EA Appendix F at 3.

In order to provide clarity to the appellant and other interested publics as to how the issuance of consent complies with applicable Forest Service standards and guidelines, I recommend that the Responsible Official provide a crosswalk that demonstrates how the BLMs selected alternative complies with the Gifford Pinchot Land and Resource Management Plan, as amended, with regards to the applicable standards and guidelines for minerals management. To reiterate, the applicable regulation at 43 CFR 3590 requires the permittee to design their activities to be consistent with the terms, conditions, and stipulations of the permit, which are set forth by the BLM and which include mitigation set forth in Appendix F. BLM DR at 3.

**Appellant Statement #3:** Appellant states that the EA relies on future mitigation measures to comply with Forest Plan standards, but that there is no discussion of the effectiveness of those measures in violation of NEPA. Appeal at 43 and 44.

**Response:** I find that the Responsible Official correctly identified mitigation measures within the scope of the Forest Service's decision authority that must be part of the prospecting permits issued by the BLM as a condition of the consent decision by the Forest Service. These conditions are articulated in Attachment 1 of the Decision Notice. DN at 17-18.

For Environmental Impact Statements (EISs), the regulation at 40 CFR 1502.14(f) requires alternatives to include a description of applicable mitigation. While this project was documented in an EA by the BLM, the Gifford Pinchot National Forest, as a cooperating agency, included conditions that are needed for consent issuance to be consistent with the purposes for which the lands were acquired. These conditions are included in the DN at Attachment 1. The DN also describes the conditions of additional mitigation identified in the EA are of the sole discretion of the BLM and their decision making process (DN at 18) and are not a part of the Forest Service decision space, but were included in the BLMs Decision Record at 3. The effectiveness of mitigation included in the BLMs decision is described throughout Chapter 3 of the EA and in Appendix F. For example, Appendix F at F-1 describes the conditions upon which erosion control devices would be applied and also describes how monitoring the adequacy of erosion control may lead to additional treatments.

**Appellant Statement #4:** Appellant states that the EA incorporated by reference a project file (specifically the analysis of the primary purposes for which the agency acquired the land) without specific citation in violation of 40 CFR 1502.21, thus impeding the public's review of the proposed action. Appeal at 59 and 60.

**Response:** I find that the references to a 2006 analysis in the EA at 8 and the references to the project file were properly incorporated into the record by the BLM.

The procedural issue of incorporation by reference was the responsibility of the BLM and is not within the Forest Service's decision authority. Appellant only filed an appeal on the Forest Service's decision and as such, assertions of procedural violations on the BLMs EA are not within the scope of responses to this appeal.

Regardless, the EA written by the BLM to issue prospecting permits notes that information concerning the USFS evaluation in 2006 in response to BLMs request for consideration of an application for a hardrock mineral lease is included in the project record. EA at 8. The Forest Service letter is cited in the Literature Cited section of the EA dated May 2, 2006. EA at 127. Section 1.5 of the EA also described that the primary purpose for which the lands were acquired under the Weeks Act was for the purpose of regulating the flow of navigable rivers and for the production of timber. EA at 8.

**Appellant Statement #5:** Appellant states that the June 2012 EA was not marked as a draft and that the EA released in late December of 2012 (dated November 30, 2012) further confused matters by failing to suggest that the July EA was a draft and the November EA was a final indicates that the public's input was not taken seriously. Appeal at 60. Appellant also states that the announced schedule for documenting and seeking public comment regarding the decision was not followed, further inhibiting meaningful public comment. Appeal at 60.

**Response:** I find that the Responsible Official noted how public comments on the BLMs EA were considered prior to his issuance of consent.

The procedural issue of the nomenclature of the EA was the responsibility of the BLM and is not within the Forest Service's decision authority. Appellant only filed an appeal on the Forest Service's decision and as such, assertions of procedural violations on the BLMs EA are not within the scope of responses to this appeal.

Regardless, the DN clearly articulates the public involvement process for the EA (DN at 8-9) which included public meetings attended by over 600 attendees (EA at 12), an initial scoping period and an extended comment period offered by the BLM for the June EA. Initially, 200 comments were received during the scoping period during February and March 2012. DN at 8; EA at 11-14. The 30 day public comment period was initiated on June 29, 2012 and was extended an additional 15 days to August 15, 2012 by the BLM. The June 2012 EA was available for comment during this time period. Over 6,000 individual comment documents were received on the June 2012 EA. DN at 9; EA at 14. Substantive comments were used to modify the June EA and resulted in the November 30, 2012 EA. The nature of the revisions to the BLMs EA was identified, and included additional stipulations and mitigations in response to comments received. EA at 14.

Appendix C of the EA also discloses consideration of public comments received during scoping and the 30 + 15 day comment period (45 days total). Response to comments #2, #3, #4 and #5 additionally

addressed how public involvement was accomplished, how public comments were considered and the availability of the project record on the BLM's website. EA Appendix C at 1.

See also response to Appellant Statement #6 regarding the legal notice of decision and release of DN/FONSI that includes clear language that the Forest Service was making a decision subject to appeal under the regulation at 36 CFR 215.

**Appellant Statement #6:** Appellant states that the Forest Service released its FONSI before the EA dated November 30, 2012 was released, and it was not clear which EA the Forest Service relied on to make its finding of no significant impact, again raising serious questions regarding the involvement of the public in the process. Appeal at 60 and 61.

**Response:** I find that the Responsible Official correctly signed the Decision Notice and FONSI based on the EA prepared by the BLM. DN at 1.

The following is a timeline of events relating to the release and public notification for this project:

- The DN was signed on 12/3/2012 by the Forest Service.
- An Forest Service news release was issued (12/4/2012) by the Gifford Pinchot National Forest announcing a decision had been made with the website location of the agency's Decision Notice.
- A corrected news release was issued the same day announcing that while a decision had been made, the modified Environmental Assessment was not available to the public. This corrected news release also stated that the BLM would announce when the final Environmental Assessment became available.
- The BLM issued a news release on 12/20/2012 announcing their decision on hardrock prospecting, including the URL for the BLM's Decision Record and additional information. BLM News release 12/20/2012. This is when the EA becomes available to the public.
- A legal notice of decision was published in the Newspaper of Record (*The Chronicle*, Centralia, WA) on 12/22/2012 detailing opportunity to appeal under 36 CFR 215 for the FS.
- When the legal notice was published on 12/22/2012, Jim Thode was sent a copy of the legal notice which included URLs for web listings of the Forest Service's Decision Notice and the BLM's EA.

Thus, it is clear from the record that the Responsible Official signed his decision (12/3/2012) after he received the BLM's EA (dated November 30, 2012). Release of the EA to the public was the responsibility of the BLM and is outside this scope of the appeal of the Forest Service's decision.

#### ***Inconsistencies With The Purposes For Which The Land Was Acquired***

**Appellant Statement #7:** Appellant states that mineral prospecting and any future proposal to mine is "inconsistent with the purposes for which the land in question was acquired" which was to regulate flow of the Green River and preserve the scenic beauty of the area (appellant also mentions outdoor recreation and habitat needs for wildlife as purposes in their appeal at 14), and that any prospecting or future mining must be consistent with these purposes and with the provisions of the 1946 Reorganization Plan No. 3, and if not consistent, they would be illegal. Appeal at 5, 6, 9, and 11-17.

**Response:** I find that the DN was prepared in response to the request by the BLM for consent to process a prospecting permit and that the Responsible Official for the Forest Service found that consenting to

the potential issuance of a prospecting permit was consistent with the purposes for which the land was acquired.

The Mineral Resources on Weeks Law Land Act of 1917, along with the Reorganization Plan No. 3 of 1946 provides for the Secretary of Interior, in cooperation with the Secretary of Agriculture to permit the prospecting, development, and utilization of the mineral resources on lands acquired by the Weeks Act of 1911. The Secretary of the Interior can authorize prospecting, development, and utilization of mineral resources on lands acquired under the Weeks Act “only when he is advised by the Secretary of Agriculture that such development will not interfere with the primary purposes for which the land was acquired and only in accordance with such conditions as may be specified by the Secretary of Agriculture in order to protect such purposes.” Reorganization Plan No. 3 of 1946, § 402, 60 Stat. 1097. While appellant repeatedly states that the proposed prospecting is not consistent with the purposes for which the land was acquired, I note that the agency must also specify conditions “in order to protect such purposes” according to the Reorganization plan No. 3 of 1946. It is important to note that none of these laws impose any management prescription upon the acquired lands. Instead, the acquired lands are assigned a management area or management prescription based on the surrounding lands. In the case of the lands in question, the lands were assigned as matrix, riparian reserve, or in the case of the lands within ¼ mile of the Green River, they were assigned to the Wild and Scenic Rivers Management Area category. Forest Plan at IV-108. Thus, the Forest Service must determine that consenting to the issuance of a prospecting permit is not inconsistent with the protection of navigable waters or timber production and complies with the applicable Forest Plan management area prescriptions..

As stated in the DN at 5 and 14, the issuance of consent is consistent with the purpose for which the land was acquired under the Weeks Act (protection of navigable waters and timber production), and are limited in context and intensity (projecting about 3.3 acres of disturbance across a 1.3 million acre forest). Issuance of consent is also consistent with the land allocations of matrix and riparian reserve. Consistency with the land allocation associated with the Wild and Scenic River Management Area Category is ensured by the Responsible Official’s decision to include a condition that requires specific operation designs for exploration activity that may be contemplated near the Green River. DN at 6; DN at Attachment 1, Condition 6. See response to Appellant Statement #14-2#5 for further articulation as to how the project is consistent with the assigned land allocations.

Specified conditions were included in the DN in order to protect the resources and values of the Green River watershed (which shows how the agency included protections for the purposes for which the land was acquired). DN Attachment 1 at 17 and 18. With regards to the issue of a future mine, the DN at 3 also clearly states that if any application for lease was received by the BLM, this would necessitate additional NEPA, and would require the BLM to request “second consent” to that activity when, and if, that occurs. See also response to Appellant Statements #11-#13 for more details regarding future proposals.

**Appellant Statement #8:** Appellant also states that the purchase used LWCF funds and that these funds can only be used to purchase lands that will provide outdoor recreation to the public. Appeal at 5, 6, and 9. Appellant states that the EA does not explain why the LWCF and proposed land purchase document are not relevant to the question of the primary purpose of the acquisition and assumes without analysis that the Weeks Act alone controls the property. Appeal at 11 and 12. Appellant also states that the Forest Service “seems to have stated its views that mining is a “preferred use” of these lands” by citing the 1970 [Mining and Minerals Policy] Act and Forest Plan. Appeal at 20.

**Response:** I find that the selection of Alternative 3 by the BLM adequately identified that potential impacts of the prospecting activity are limited in context and intensity and that the Forest Service found that issuance of consent does not “interfere” with the purposes for which the lands were acquired. DN at 5, 6, and 13.

The Mineral Resources on Weeks Law Land Act of 1917, along with the Reorganization Plan No. 3 of 1946 provides for the Secretary of Interior, in cooperation with the Secretary of Agriculture to permit the prospecting, development, and utilization of the mineral resources on lands acquired by the Weeks Act of 1911.

The EA outlined the purposes for the acquisition (EA at 8, 9 and EA Appendix C at 6), further stating that the no deed restrictions were inferred or accepted by the Trust For Public Lands (TPL) and the Forest Service as part of the land transfer. EA Appendix C at 6. The project record also includes acknowledgement that the Forest Service acknowledged an outstanding private mineral interest (EA Appendix C at 6), which would not prevent the acquisition of these lands and interests.

As stated in the response to comments, “The Land and Water Conservation Fund was created by Congress in 1964 to provide money to purchase land for the benefit of all Americans. The money placed into the Fund, by Congress, is primarily derived from royalties received into the Treasury from off-shore Federal oil and gas leases. Four Agencies are eligible to obtain LWCF funding including the U.S. D.A. Forest Service and the U.S.D.I. Bureau of Land Management, U.S.D.I. National Park Service and the U.S.D.I. Fish and Wildlife Service. Lands purchased with money provided through the LWCF are used for a variety of public purposes. The Fund facilitates the purchase of public lands, but the enabling Statutes provide the foundation of the purpose for which the lands were acquired. (See EA, Sections 1.5 and 1.7).” Although Section 7 of the Land and Water Conservation Fund Act (16 USC 460I-9) makes monies from the Fund available for the acquisition of lands within the National Forest System “which are primarily of value for outdoor recreation purposes” it does not and cannot assign management prescriptions to lands that are purchased. In the case of the acquired lands here, the Weeks Act of 1911, as amended, along with the Gifford Pinchot National Forest Land and Resource Management Plan specify the management areas and management prescriptions, as noted in response to Appellant Statement #7.

With regards to the 1970 Mining and Minerals Policy Act of 1970, the Act states that the “The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs, (3) mining, mineral, and metallurgical research, including the use and recycling of scrap to promote the wise and efficient use of our natural and reclaimable mineral resources, and (4) the study and development of methods for the disposal, control, and reclamation of mineral waste products, and the reclamation of mined land, so as to lessen any adverse impact of mineral extraction and processing upon the physical environment that may result from mining or mineral activities.” Nothing in this Act declares that mining is the “preferred use” of the area in question for this project, as stated by appellant. Exploration for minerals is also supported by the Gifford Pinchot National Forest LRMP, as amended. EA at 10. Thus, I find that this statement regarding appellant’s assertion that mining is the preferred use of these lands is the opinion of the appellant that is not supported by fact.

**Appellant Statement #9:** Appellant states that the Forest is in error, both legally and factually, by considering and focusing on only the purposes underlying the Weeks Act and by ignoring the purposes that had to underlie the property's purchase with LWCF funds. Appeal at 9-12.

**Response:** I find that the EA addressed the purposes of land acquisition under the applicable authority, including the Weeks Act. EA at 8-10; EA Appendix C at 6. In referencing the EA, I find that the DN appropriately provided consent to permit prospecting and acknowledged the limited context and intensity of the potential effects, and also included conditions to protect the purposes for which the land was acquired, thus complying with the intent of the Mineral Resources on Weeks Law Land Act of 1917 and the Reorganization Plan No. 3 of 1946. DN at 2-5, 14 and 15.

The Mineral Resources on Weeks Law Land Act of 1917, along with the Reorganization Plan No. 3 of 1946 provides for the Secretary of Interior, in cooperation with the Secretary of Agriculture to permit the prospecting, development, and utilization of the mineral resources on lands acquired by the Weeks Act of 1911.

Since these lands were acquired, the decision space for determining whether to pursue the issuance of a prospecting permit is within the purview of the BLM, not the FS. I find that the DN appropriately responded to the BLM's request for consent for prospecting permits issued by the BLM (DN at 3) as the surface managing agency.

See response to Appellant Statement #7 and #8 for further details.

**Appellant Statement #10:** Appellant states that the EA admits that there will be negative effects (for up to four years) to scenery, recreation, timber management, wildlife habitat and natural water flow objectives and as such, prospecting and mining are not consistent with protection of the purposes for which the lands were acquired. Appeal at 14-17.

**Response:** I find that the EA addressed the potential impacts of the proposed prospecting activities and that the Responsible Official for the Forest Service found that consenting to the issuance of prospecting permits would be consistent with the purposes for which the lands were acquired and that the Responsible Official considered impacts prior to issuing consent.

The Mineral Resources on Weeks Law Land Act of 1917, along with the Reorganization Plan No. 3 of 1946 provides for the Secretary of Interior, in cooperation with the Secretary of Agriculture to permit the prospecting, development, and utilization of the mineral resources on lands acquired by the Weeks Act of 1911.

The EA fully described the impacts related to the prospecting activity as short term to scenery (visuals) (EA at 97-98), recreation (EA at 110-113), timber management (EA at 82-85), wildlife habitat (EA at 56, and 62-71), and water flow (EA at 37-45). The Responsible Official adequately referenced the tradeoff of short term impacts in selecting Alternative 3 with conditions and mitigations (DN at 3, 5-10, 12-14, and 17), as not being significant in context or intensity. Reclamation of the impacted areas is also required, further limiting the context and intensity of the potential effects. EA at 24.

In terms of context and intensity, the proposed project is expected to locate 23 drill pads (0.23 acres of disturbance) on existing decommissioned roads. The reactivation of decommissioned roads would occupy about 3 acres, which when combined with the drill pads would disturb a total of 3.30 acres of

ground within the nearly 900 acre project area (less than one percent of the project area). EA at 16, 20. A total of 68 trees less than 12 inches in diameter at breast height are expected to be removed. EA at 19. See response to Appellant Statements #7-#9 for details as to how the project is consistent for the purposes for which the lands were acquired.

### ***Reasonably Foreseeable Future Action of Mine Development***

**Appellant Statement #11:** Appellant states that the EA did not fully consider the effects of the reasonably foreseeable, cumulative and/or connected action of future mineral development, including development of a mine and states that the Forest Service and BLM failed to apply directives from the Interior Secretary and Solicitor with regards to the proper level of agency oversight and review of prospecting permits. Appeal at 6, 12, 13, 17-19, 29, 34-40, 49 and 57.

**Response:** I find that since the actual action of mining potentially occurring in this area is speculative and the effects of such a speculative action are not fully known, the EA written by the BLM correctly considered a future mine as not being cumulative or a connected action. EA at 29; EA Appendix C at 2.

The regulation at 36 CFR 220.3 defines a reasonably foreseeable future action as “Those Federal or non-Federal activities not yet undertaken, for which there are existing decisions, funding, or identified proposals. Identified proposals for Forest Service actions are described in § 220.4(a)(1).” The regulation at 36 CFR 220.4(a)(1) further defines an identified proposal when the Forest Service “has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated.” In the case of a future mine, no proposal exists and no effects can be meaningfully evaluated.

The DN clearly states that if any lease application for mining is received in the future by the BLM, it would require additional NEPA, and would require the BLM to request “second consent” to that activity when, and if, that occur. DN at 3. Furthermore, the EA at Appendix D includes a review by the National Association of Environmental Professionals regarding cumulative effects for this project, and concurs that a future mine is not a reasonably foreseeable future action that would need to be considered for cumulative effects at this time.

In light of the requirements of the Reorganization Plan No. 3 of 1946 and the applicable implementing regulation at 43 CFR 3500 pertaining to mineral resources on acquired lands, I find that the Forest Service’s DN (as the surface management agency) appropriately responded to the BLM’s request for “consent” on prospecting permits that would be issued by the BLM and that the scope of the cumulative effects analysis conducted by the BLM met the requirements of the Forest Service such that the Responsible Official could make an informed decision regarding issuance of consent. DN at 3.

**Appellant Statement #12:** Appellant states that the Finding of No Significant Impact (FONSI) did not clearly state that if and when a mine was proposed, the Forest would make another determination that a mine does or does not interfere with the primary purposes for which the land was acquired. Appeal at 17. Appellant states that without such a statement, the decision sets a precedent under 40 CFR 1508.27(b)(6), which makes the FONSI unsupportable. Appeal at 17 and 57.

**Response:** I find that the EA at 12 stated that if the results of exploratory drilling lead the applicant to apply for a Hardrock Mineral Lease, the environmental consequences of that action will be evaluated by the agencies as a separate action and NEPA process. There are various steps and determinations that

must be undertaken by BLM and an applicant before any leasing action would be considered (43 CFR 3500). The EA also states that since a mine is not currently being proposed, and is only speculative; there is no requirement for a mine to be accounted for in the cumulative effects analysis. EA at 12, footnote #9.

I find that as partner agencies, both the Forest Service and BLM clearly understood their role for the purposes of this current action, and if any future lease application for mining is received, it would require additional NEPA and would require the BLM to request "second consent" to that activity when, and if, that occurs. EA at 12; DN at 3. See also response to Appellant Statement #11.

**Appellant Statement #13:** Appellant contends that the agencies' stated purpose and need for the project, which is to delineate the ore body, is wrong and that any prospecting permit is not legally valid. Appeal at 8. Appellant states that purpose and need is wrong because there is already evidence that supports the nature and extent of the ore body (and as such, no further prospecting is needed), but that what is missing is the evidence of marketability, which Ascot has not proven. Appeal at 7, 8, 13, 36, and 37.

**Response:** I find that the applicable legal and regulatory framework give the choice of the appropriate mechanism to authorize exploration activities for hardrock minerals on acquired National Forest System lands to the BLM and that this appeal statement is not within the Forest Service's decision space.

The regulation at 43 CFR 3500 requires the BLM to request "consent" from the surface managing agency (in this case, the Forest Service). To that end, I find that the FS responded to the BLMs request for consent (DN at 1, 3-6, 8- 12, 14, and 18) in preparing a DN, and added additional conditions and mitigations to protect the affected forest resources and the primary purposes for which the lands were acquired. The procedural issue of framing the purpose and need was the responsibility of the BLM and is not within the Forest Service's decision authority. Appellant only filed an appeal on the Forest Service's decision and as such, assertions of procedural violations on the BLMs EA are not within the scope of responses to this appeal.

As stated above, the purpose and need is the responsibility of the BLM. The BLMs decision record (DR) fully explained the need for action and stated that "Insufficient information is currently available for the BLM to determine the existence of a valuable deposit. Before issuing any prospecting permits, the BLM must make and document a finding that "prospecting is needed to determine the existence of a valuable deposit" on the subject lands (43 C.F.R. § 3501.10(a)). The BLM will issue prospecting permits under 43 C.F.R. § 3505.10 and § 3509.40, for the permittee to collect geotechnical information necessary for the BLM to determine if a valuable deposit exists. "Valuable deposit" means "an occurrence of minerals of such character that a person of ordinary prudence would be justified in the further expenditure of his or her labor and means, with a reasonable prospect of success in developing a profitable mine" ( 43 C.F.R. § 3501.5). This is a higher regulatory standard than the previous "workability standard," which did not take into account costs other than direct costs. Ascot USA, Inc., and other parties who have held or expressed interest in these same lands have generally represented existing data as inadequate to make informed geotechnical, mineralogical, and engineering feasibility determinations as to whether a valuable deposit exists. Additional geotechnical exploration will validate and expand upon existing data and related published reports." BLM DR at 5.

### ***Aquatic Environment/Riparian Reserves***

**Appellant Statement #14:** Appellant states that the Forest relied on inadequate NEPA analysis and was arbitrary and capricious by concluding that the prospecting would not result in a significant impact because the agencies failed to conduct a baseline study to determine the present condition of groundwater resources in the area that would be needed in order to determine if the prospecting activities would negatively affect groundwater. Appeal at 6 and 40-43. Appellant also states that the future mitigation and monitoring are insufficient to prevent groundwater contamination. Appeal at 42.

**Response:** I find that the BLMs EA adequately addressed present groundwater conditions (EA at 36 and 37), and more specifically addressed the effects to groundwater resources in Chapter 3 (EA at 31, 33, 39, 40, 42, 43, 44, and 48), and that information was considered by the Forest Service's Responsible Official prior to issuing consent to the BLM. The procedural issue of describing impacts was the responsibility of the BLM and is not within the Forest Service's decision authority. Appellant only filed an appeal on the Forest Service's decision and as such, assertions of procedural violations on the BLMs EA are not within the scope of responses to this appeal.

In addition to the disclosure noted above, the EA includes measures to protect groundwater and reduce the risk of detrimental impacts to both water quantity and quality. The project is limited to 5,000 gallons per day of use which will have negligible effects on downstream water flows in the Green River. The maximum allowed use is approximately 0.1 percent of the typical summer flows in the Green River. EA at 41 and 43; EA Appendix C at 5.

In addition, the EA noted that water sampling at two existing drill holes prior to and during drilling would be performed to monitor effects to water resources (EA at 44; EA Appendix F at 5, MM-42) and after the completion of drilling, the holes would be sealed to prevent contamination following state standards described in WAC 173-160 (EA at 44; EA Appendix F at 5, MM-43). Monitoring of the drainage from existing drill holes in the project area would be used to assess the effects on groundwater (EA Appendix F at 5, MM-42).

Mitigation measures were also included to prevent groundwater contamination, specifically Acid Rock Drainage (ARD), as disclosed in the geology section. EA at 32-33; EA Appendix F at 2 - MM-19; EA Appendix F at 5 - MM-41, MM-42, and MM-43. These were adopted by the BLM in their Decision Record at 3 and serve to reduce the impacts of the project.

**Appellant Statement #15:** Appellant states that the EA and DN acted arbitrarily and capriciously by concluding that the project would not significantly affect surface water in the project area because the swamp/marsh that is close to the proposed drill location of holes 6 and 7 was not adequately considered. Appeal at 43.

**Response:** I find that the EA identified Riparian Reserves, wetlands, and floodplains and disclosed that no wetlands were observed at the proposed drill pad locations. EA at 34 and 35. The Responsible Official for the Forest Service considered this information prior to issuing consent to the BLM.

The procedural issue of describing impacts was the responsibility of the BLM and is not within the Forest Service's decision authority. Appellant only filed an appeal on the Forest Service's decision and as such, assertions of procedural violations on the BLMs EA are not within the scope of responses to this appeal.

The EA outlined the effects prospecting at drill pads 6 and 7 (EA at 39), which includes minor brushing, removal of limited numbers of trees, and includes reclamation of the site following use. The EA stated that these effects are expected to be limited in context and intensity, and as such, meet or do not prevent attainment of ACS Objectives and riparian reserve standards and guidelines. The EA discloses the location of the swamp/marsh on the project area map (EA Appendix A, Figure 2), which is over 1000 feet away from drill hole 7, and even further away from drill hole 6.

**Appellant Statement #16:** Appellant states that the agencies failed to consider all reasonable alternatives, including an alternative that would have kept all roads, structures, and support facilities out of the riparian reserve and an alternative that would have considered the options detailed in the Interior Secretary/Solicitor's Directive. Appeal at 44 and 45.

**Response:** I find that the EA analyzed an adequate range of alternatives, given the scope and scale of the project that is being analyzed by the BLM. The Forest Service's decision is limited to consenting to the issuance of a prospecting permit. The procedural issue of the range of alternatives was the responsibility of the BLM and is not within the Forest Service's decision authority. Appellant only filed an appeal on the Forest Service's decision and as such, assertions of procedural violations on the BLM's EA are not within the scope of responses to this appeal.

Regardless, the EA disclosed that additional alternatives were considered, but eliminated from detailed analysis, including alternatives suggested by appellant. EA at 28; DN at 7. The Forest Service also acknowledged that no new road construction, permanent structures, or support facilities are proposed for this project. DN at 5 and 6.

**Appellant Statement #17:** Appellant states that the DN/FONSI's implication that only the general objectives of the Aquatic Conservation Strategy need be met is wrong. Appeal at 22. Appellant states that "the EA fails to show how the proposed project will "meet" or not prevent the attainment of [aquatic conservation strategy] ACS objectives to "restore" various aspects of aquatic area health. Indeed, the EA focuses on the fact that the project may "maintain" some current conditions, but it never discusses how the project will meet or not prevent attainment of the *restoration* part of the objective beyond mitigating the detrimental effects of the proposed project activities." Appeal at 52 and 53. Appellant argues that localized negative effects, as admitted to in the EA, are inconsistent with the ACS, in violation of NEPA. Appeal at 53.

**Response:** I find that the EA adequately disclosed the findings for the ACS Objectives (EA at 45, 48, and Appendix F) and conveyed the findings in the DN at 13-14 and that the Responsible Official for the Forest Service considered these impacts prior to issuing consent to the BLM.

The procedural issue of describing impacts was the responsibility of the BLM in their EA and is not within the Forest Service's decision authority. Appellant only filed an appeal on the Forest Service's decision and as such, assertions of procedural violations on the BLM's EA are not within the scope of responses to this appeal.

By meeting the criteria of "does not retard or prevent attainment of Aquatic Conservation Strategy objectives", I find that the Forest Service is meeting the standard to "maintain and restore" as specified in the Northwest Forest Plan ROD at B-9, 10. The Forest Service is only granting consent to the BLM to issue a prospecting permit and only has the authority to specify conditions of consent to the BLM, which provide protection to the surface resources that are under Forest Service management. Attachment 1

to the DN/FONSI specifies those conditions, including conditions that protect the purposes for which the lands were acquired (navigable waters and timber production) and comply with other applicable laws and regulations.

**Appellant Statement #18:** Appellant states that the project violates riparian reserve standards and guidelines MM-2 (because structures, support facilities and roads will occur inside riparian reserves and no alternatives were explored), MM-3 (because waste materials associated with drilling operations will occur in riparian reserves and no alternatives were explored) and MM-4 (because surface occupancy for leasable minerals will occur within riparian reserves). Appeal at 23-27.

**Response:** I find that the EA adequately considered the Gifford Pinchot's Forest Plan standards and guidelines (EA at 7) and effects were properly disclosed. EA at 39. See response to Appellant Statement #2 for more details.

**Appellant Statement #19:** Appellant states that a detailed watershed analysis is required for management activities in Key Watersheds or riparian reserves, and none was conducted, in violation of the Forest Plan. Appeal at 27.

**Response:** I find that since the project area is not located within a Key Watershed (DN at 16, Forest Plan as amended, Table B6-3), no watershed analysis is required as directed in Standards and Guidelines of the Forest Plan, as amended (Forest Plan Standards and Guidelines, as amended at B-20).

Regardless, a watershed analysis was completed for the Upper Toutle River Watershed, which includes the Green River in 1997, thus complying with the standards and guidelines.

**Appellant Statement #20:** Appellant states that the EA failed to consider synergistic effects of project activities when combined with other conditions and activities, specifically related to potential impacts to the hydrogeological and fisheries conditions of water that is already high in copper content from increased sediment. Appeal at 34, 51, 55-57. Appellant states that the EA failed to discuss how sediment and existing project conditions will directly, indirectly and cumulatively impact aquatic organisms both within the project area and downstream of the project. Appeal at 34, 51, 56 and 57.

**Response:** I find that the EA disclosed the potential for cumulative effects to occur to fisheries and water quality and that the Responsible Official for the Forest Service considered the potential for cumulative effects prior to issuing consent to the BLM.

The procedural issue of describing impacts was the responsibility of the BLM and is not within the Forest Service's decision authority. Appellant only filed an appeal on the Forest Service's decision and as such, assertions of procedural violations on the BLMs EA are not within the scope of responses to this appeal.

Regardless, the BLMs EA disclosed the potential for cumulative effects to occur to both fisheries and water quality. EA at 42, 44, 52, 53, 76, and 77. The EA also considered the existing copper concentrations in the water and the potential effects of sediment (EA at 5, 7, 15, 36, and 42) to both water quality and aquatic organisms both within the project area and downstream. EA at 75- 77. As stated in the EA, the area has low erosion risk from surface water flows and as such, direct inputs of sediment are not expected to occur. EA at 38. Implementation of best management practices and erosion control measures would also reduce the risk of sediment entering any streams and were adopted by the BLM in their decision. EA at 77 and 78; EA at Appendix F; BLM DR at 3.

**Appellant Statement #21:** Appellant states that the EA failed to discuss the potential runoff effects from soils stockpiles in the road reclamation process, failed to discuss where and how the stockpiled soil will be stored and how runoff would be avoided. Appeal at 46. Appellant also states that the EA failed to discuss the impacts of the increased potential from erosion due to the adjusted drilling schedule. Appeal at 46 and 47. Appellant also states that the EA fails to acknowledge the potential for substantial disagreement about the nature and extent of the potential impacts of the project, including, but not limited to impacts on wildlife, streams and other natural resources affected by erosion. EA at 48, 49, and 53.

**Response:** I find that the EA described the potential effects from any surface runoff that may occur and that the Responsible Official for the Forest Service considered the potential for surface runoff prior to issuing consent to the BLM.

The procedural issue of describing impacts was the responsibility of the BLM and is not within the Forest Service's decision authority. Appellant only filed an appeal on the Forest Service's decision and as such, assertions of procedural violations on the BLMs EA are not within the scope of responses to this appeal.

The BLMs EA provided descriptions of soil stockpile sites, drilling operations, and reclamation methods (EA at 16-28), displayed the effects of the road and drill pad improvements (EA at 38, 39), conveyed the erosion risk for different soil types (EA at 49 and 50), and outlined the impacts of the adjusted drilling schedule (EA at 52 and 53). The design criteria and Best Management Practices for reducing the risk of erosion are discussed as well. (EA at 77 and 78). BLMs regulations require the permittee to take measures in the exploration plan to avoid, minimize or repair soil erosion and pollution of surface water, among other requirements. Approval of a specific exploration plan is in the purview of BLM (43 CFR 3590). See also response to Appellant Statement #20.

**Appellant Statement #22:** Appellant states that the EA failed to discuss the potential impacts from the temporary water storage tank under alternative 3, and does not identify how big the tank will be, or what type of equipment or surface area will be needed to install, remove, and/or operate the tank. Appeal at 47.

**Response:** I find that the EA provides a description of the water requirements and use is included in the descriptions of alternatives 2 and 3 (EA at 23, 25 and 26) that the Responsible Official for the Forest Service considered the potential for impacts from temporary storage tanks prior to issuing consent to the BLM.

The procedural issue of describing impacts was the responsibility of the BLM. Appellant only filed an appeal on the Forest Service's decision and as such, assertions of procedural violations on the BLMs EA are not within the scope of responses to this appeal.

Although the exact size or area required for tank placement are not specified in the EA, the location of the water storage tank would be agreed upon by the USFS, BLM, and Ascot's field representative (EA at 26) and would be within the currently defined drill pads. EA at 26. Mitigation measures for support facilities are also displayed and were adopted by the BLM in their Decision Record. EA Appendix F at 3, MM-23; BLM DR at 3. Given that the water storage tanks would be placed within existing disturbed areas, the Responsible official considered that impacts were limited in context and intensity, given that the total project disturbance is limited to about 3.3 acres within the 1.3 million acre national forest.

Approval of the storage tank would be part of the specific exploration plan that would be approved by BLM.

**Appellant Statement #23:** Appellant states that the EA fails to acknowledge or clearly quantify the long-term adverse impacts (to soils, air and groundwater) from the project's anticipated water use and additional truck traffic and questions the EAs estimated water use projections. EA at 48. Appellant further states that the EA fails to acknowledge the impact to groundwater and fisheries (increases in temperature) of withdrawing 5,000 gallons per day of water for use at the drill sites. EA at 48, 56 and 57.

**Response:** I find that the effects to groundwater resources were adequately displayed and that the Responsible Official for the Forest Service considered the potential effects prior to issuing consent to the BLM.

The procedural issue of describing impacts was the responsibility of the BLM. Appellant only filed an appeal on the Forest Service's decision and as such, assertions of procedural violations on the BLMs EA are not within the scope of responses to this appeal.

Regardless, the BLMs EA at 31-33, 39-41, 43-44, and 48 describes the limited potential for any impacts to occur. Groundwater impact avoidance and minimization measures are identified (EA at 48) which would mitigate any long-term effects from the activities included in this project. Water use projections are based on monitoring from past drilling projects in the area. EA at 3. The effects of water withdrawals are disclosed in the EA at 40-41 and 43-44 and in the EA Appendix C at 6, (#19).

The project impacts (EA at 43) and mitigation measures related to road improvements (EA Appendix F at 3, 4, MM-22 to MM-39) are also thoroughly disclosed and were adopted by the BLM in their Decision Record. BLM DR at 3. The effects to air quality from road use (EA at 101-104) and effects on water quality and fisheries from water withdrawals (EA at 41-44, 74) are addressed and are expected to be negligible.

Finally, the effects to fish Management Indicator Species (MIS) were found to be insignificant and discountable (EA at 76) and therefore no effect is expected from project actions on Forest-wide viability for this indicator species.

**Appellant Statement #24:** Appellant states that the EA should have analyzed the effects of the polymers and other drilling materials (no limit was put on the amounts used) on fisheries. Appeal at 56.

**Response:** I find that the EA properly considered the effects of drilling materials on fisheries and that the Responsible Official for the Forest Service considered the potential effects prior to issuing consent to the BLM.

The procedural issue of describing impacts was the responsibility of the BLM. Appellant only filed an appeal on the Forest Service's decision and as such, assertions of procedural violations on the BLMs EA are not within the scope of responses to this appeal.

A description of the drilling materials is included for Alternative 3. EA at 26. Potential effects on water quality and aquatic species from drilling and prospecting activities are disclosed. EA at 39 and 43.

Materials proposed for use in Alternative 3 are approved for use in domestic water wells and thus would not have any effect on aquatic resources. EA Appendix C at 9.

Mitigation measures MM-41 and MM-43 (EA at Appendix F) are included to protect water quality during drilling operations. Monitoring of groundwater would be conducted during the project operations (EA at 44; Appendix F at MM-42). Since the effects to water quality are expected to be negligible, there would be no measureable effect to fisheries or the aquatic environment. EA at 74.

**Appellant Statement #25:** Appellant states that the agencies violated the Clean Water Act (CWA) when it authorized and consented to the project and authorized new culverts on roads without first complying with Section 401 of the CWA, which requires that certification be obtained before a federal license or permit can be issued for activities that may result in any discharge into navigable waters. Appeal at 57-59. Appellant also states that the project violates Section 402 of the CWA. Appeal at 58. Appellant states that the EA violated the Code of Federal Regulations (CFR) at 40 CFR 1502.25(b) by failing to list all required permits and licenses. Appeal at 59.

**Response:** I find that the Responsible Official properly considered Section 401 of the Clean Water Act prior to issuing consent to the BLM.

The procedural issue of what to include in the EA was the responsibility of the BLM. Appellant only filed an appeal on the Forest Service's decision and as such, assertions of procedural violations on the BLMs EA are not within the scope of responses to this appeal.

Regardless, the BLMs EA describes the need to make a delineation of the intermittent stream crossings for determination of the need for 401 permitting. EA at 45; EA Appendix C at 12. The EA states that the project complies with the Clean Water Act (DN at 14) by the inclusion of project Best Management Practices, which results in compliance with sections 401 and 402 of the CWA. The required permits and licenses are listed in the EA at Appendix B and the EA Appendix C at 12 states that standard stipulations on the prospecting permit require holder to obtain all necessary State and Federal permits. If an NPDES or any other Clean Water Act Permit is required, the permit holder must obtain it. BLM regulations require the permittee to conduct its operations consistent with Federal and State water quality standards (43 CFR 3590).

### ***EIS Required***

**Appellant Statement #26:** Appellant states that the Forest violated NEPA by issuing an invalid FONSI and that the agency was arbitrary and capricious in not requiring an EIS. Appeal at 27 and 29. Appellant states that the project is a major federal action requiring an EIS because it will have a significant impact on water resources, land, fish, wildlife, plants, recreational activities, and the economy of the Goat Mountain region and surrounding areas. Appeal at 28 and 29.

**Response:** I find that the Responsible Official considered both the context and intensity of the project in determining that no significant impact on the quality of the human environment will result from issuing consent to the BLM. The determination of the appropriate analysis document was the responsibility of the BLM and is not within the Forest Service's decision authority. Appellant only filed an appeal on the Forest Service's decision and as such, assertions of procedural violations on the BLMs EA are not within the scope of responses to this appeal.

The regulations at 40 CFR 1508.27 specifies significance as being dependent upon both context and intensity and provides definitions of each. The regulation at 40 CFR 1508.13 defines a FONSI as a document briefly presenting the reasons why an action, not excluded, will not have a significant effect on the human environment and for which an EIS therefore will not be otherwise prepared. DN at 9-12.

The DN at 15 clearly indicates that both context and intensity were considered in the 10 intensity factors for rationale. The Forest Service reviewed and adopted the BLM EA (DN at 1) and the DN at 9 found that neither public controversy nor project complexity required an EIS. The DN at 9-12 addressed the Council on Environmental Quality (CEQs) criteria for significance and 10 intensity factors for rationale as to why an EIS would not be prepared. Based on the analysis in the EA, all potential adverse impacts from the 3.3 acres of disturbance on the 1.3 million acres forest are limited in context and intensity and considered to be minor, and appropriate project design features and best management practices are designed into the selected alternative to minimize the potential for adverse environmental effects. DN at 12-13.

The response to comments that was completed and attached to the EA at Appendix C also addressed the BLM's decision to not prepare an EIS. See the EA at Appendix C, page 1.

### ***Cumulative Effects***

**Appellant Statement #27:** Appellant states that the EA failed to consider all cumulative impacts from other past, present and reasonably foreseeable future activities in the region, including activities such as timber, recreation, travel, grazing, mineral, and others and as such, the EAs cumulative effects analysis is vague, cursory, piecemeal and perfunctory in violation of NEPA. EA at 30, and 33. As such, appellant states that because the FONSI's conclusions rely on the deficient EA, the FONSI is arbitrary and capricious and contrary to law. Appeal at 46. Specifically, appellant states that the noise and weather related impacts to resources were not fully considered. Appeal at 33, 54 and 55.

**Response:** I find the EA sufficiently analyzed the cumulative effects of the proposed action and that the Responsible Official for the Forest Service considered cumulate impacts prior to issuing consent to the BLM.

The procedural issue of describing cumulative impacts was the responsibility of the BLM. Appellant only filed an appeal on the Forest Service's decision and as such, assertions of procedural violations on the BLMs EA are not within the scope of responses to this appeal.

Regardless, a review of the BLMs EA shows that cumulative effects were analyzed across all potentially affected resources. In analyzing their resource, specialists used their professional judgment in considering direct and indirect effects on the environment that were expected or likely to result from the alternatives when combined with past, present and reasonably foreseeable future actions. Specialists also considered present effects of past actions on their resource in considering overall effects.

The EA states "no specific plans for management or development activities in or near the Project Area are known at this time." EA at 29. The EA goes on to articulate that a mine is only speculative in nature and therefore is not accounted for the in the cumulative effects analysis. EA at 29. Further, the EA at 29 describes on-going activities in the area include recreational use and timber management.

The BLM responded to the public's concern regarding cumulative effects in the EA Appendix C, response to comment #7 stating that future mining is not reasonable foreseeable. EA Appendix C at 3. In addition, Appendix D includes a review by the National Association of Environmental Professionals regarding their finding that the cumulative effects analysis was sufficient and need not include any potential future mine, since that potential future action does not meet the definition of a reasonably foreseeable action. Therefore neither the Forest Service nor the BLM's regulations consider future mining a reasonable future project to be considered in the cumulative effects analysis.

**Appellant Statement #28:** Appellant states that the EA failed to disclose the results of the 2010 exploratory drilling. Such information would be useful in assessing the project's impacts on Goat Mountain's geologic and mineral resources. Appeal at 47.

**Response:** I find that the Responsible Official utilized information from the 2010 drilling operations to identify impacts and that the BLM disclosed those impacts in the EA. The Responsible Official for the Forest Service considered these impacts prior to issuing consent to the BLM.

The procedural issue of describing impacts was the responsibility of the BLM. Appellant only filed an appeal on the Forest Service's decision and as such, assertions of procedural violations on the BLM's EA are not within the scope of responses to this appeal.

Regardless, the following are citations in the EA where information from the 2010 drilling operations that were utilized in the effects analysis for this project. The EA states "During the 2010 drilling program, vegetation encountered along old logging and drill roads was not as dense as anticipated." This enabled the decommissioned roads to be reactivated and reclaimed to nearly original (pre-reactivation) condition, using salvaged sloughed and cast material. EA at 18. The EA goes on to state that as was the case for the 2010 exploration program, no trees greater than 12 inches in dbh would be removed. EA at 19.

In the hydrogeological section of the EA in chapter 3, it is disclosed that "a rock core drilled in 2010 reportedly encountered artesian conditions, which is an indicator of confined conditions. An exploration drill hole located in the northeast portion of the site reportedly flowed water following drilling. This drill hole was reportedly capped after completion to stop the flow of water to the surface. Two additional former drill holes (MM-10-10 and Duval hole 06 near Pad 20) reportedly encountered artesian conditions." EA at 37.

Impacts of the proposed action were also based on impacts observed during the 2010 drilling season. The EA states "Under the Proposed Action, less than 10 gallons of cuttings would be expected based on returns observed during 2010 drilling." EA at 39. The EA continues utilizing information from the 2010 drilling by stating "Exploration activities completed in 2010 suggest that the hydraulic conductivity of native soils is sufficient to allow complete infiltration of the fluid." EA at 40. Additionally the EA states "Water requirements for the Proposed Action are estimated to average approximately 5 gpm with a potential peak use of 20 gpm. Actual water use may average lower based on conditions experienced in 2010 (possibly as little as 2,400 gpd or approximately 360,000 gallons over the five month project)." EA at 41.

The project record also contains pictures of one 2010 drill site during and after drilling was completed and rehabilitation done. (See E:\GoatMountainAppealRecord\_022013\2 - Reference Material\2011 Litigation\Public Information for web site\Picture of one drill site before and after.docx).

## **Wildlife**

**Appellant Statement #29:** Appellant states that the EA contains cursory and unsupported determinations of effects from noise, lights, road work and traffic to various listed, sensitive, or otherwise pertinent species of wildlife and their habitat. Appeal at 47 and 49-55. Specifically, appellant states that biological assessment (BA) conclusively assumes that federally listed species such as grizzly bears, gray wolves, Canada lynx, and various species of fish, including anadromous fish and bull trout do not exist within the project area and does so without citation to scientific authority. Appeal at 50, 51, 54 and 55. Appellant also states that the EA “briefly examines habitat for listed and other species such as the pine marten, Roosevelt elk, blacktail deer, wolverine, Townsend’s big-eared bat, pileated woodpecker, and cavity tree excavator group, among others, but fails to cite *any* authority for its conclusions that “key habitat elements” do not exist in the project area” and fails to analyze project impacts on species such as the black bear and cougar. Appeal at 51, 52, and 55.

**Response:** I find that the Responsible Official based his decision notice and finding of no significant impact of issuing consent on the BLMs EA, which contained adequate information regarding federally listed fish and wildlife species, forest Management Indicator Species (MIS), and other special status species that have the potential to occur in the project area.

The procedural issue of describing impacts was the responsibility of the BLM. Appellant only filed an appeal on the Forest Service’s decision and as such, assertions of procedural violations on the BLMs EA are not within the scope of responses to this appeal.

In terms of context and intensity, the proposed project is expected to locate 23 drill pads (0.23 acres of disturbance) on existing decommissioned roads. The reactivation of decommissioned roads would occupy about 3 acres, which when combined with the drill pads would disturb a total of 3.30 acres of ground within the nearly 900 acre project area (less than one percent of the project area). EA at 16, 20. A total of 68 trees less than 12 inches in diameter at breast height are expected to be removed. EA at 19.

The EA contains components of the biological evaluation, which is a process used to determine if effects to a species may occur. If no habitat is present within or adjacent to the analysis area, and the species has not been documented in the analysis area, no impacts to the species are possible. The EA at 56 states that gray wolf and grizzly bear are unlikely to be present due to the high active road density in the project area, and includes three literature citations to support this determination. A review of the Federal Register notice for critical habitat for Canada lynx shows that the project area is not within the 2009 critical habitat designation for Canada lynx and the species is not listed on the Regional Forester’s sensitive species list, and as such, the species was not considered in the EA.

For bull trout, a resident fish species that is also a Forest MIS, the EA documents that there are no bull trout in the project area, and as such, no impacts could occur. This is fully supported in the project record, in an email from the Forest fisheries biologist, which states that the “nearest bull trout occur in the North Fork Lewis River to the southeast and in the Puyallup and Nisqually Rivers to the northwest (see recovery plans at [www.fws.gov/pacific/bulltrout/Recovery.html](http://www.fws.gov/pacific/bulltrout/Recovery.html)). Bull trout do not occur in the Green River, NF Toutle or Cowlitz Rivers (NOTE: there is a different Green River that drains into to Puget Sound that has bull trout); as such there are no bull trout or bull trout Critical Habitat considerations to further evaluate.” Project Record, Fish and Wildlife Documents.

Anadromous fish are also discussed in the EA, which states that “there would be no anadromous fish issues to address as a result of this Project due to distribution-limiting barriers downstream at the confluence of the Green River with Falls Creek at RM 24.95 and at RM 31.3. The Project Area occurs around RM 32, which is approximately seven miles upstream from the first anadromous barrier, and far enough upstream from the anadromous barrier for any ESA-listed salmonid species to not be affected by the Proposed Project activities, (and is also consequently beyond EFH).” EA at 73.

Effects to species including pine marten, Roosevelt elk, blacktail deer, wolverine, Townsend’s big-eared bat, pileated woodpecker, and cavity tree excavator group are described in the EA, including a description of their habitat. Citations are given for each species, as to the habitats they are found in. EA at 57-61. The majority of the project area is comprised of areas deforested by the 1980 eruption of Mount St. Helens. Only a part of the northern portion of the project area contains mature forest that was not impacted by the eruption. The majority of the project area affected by the eruption was salvage logged in 1982 and subsequently reforested, so it does not likely contain key habitat elements that old growth dependent species prefer. EA at 54. Thus, the habitat for wildlife species was adequately described in the EA. Noise levels were described in the EA at 21, 22. This information was used by the biologists to determine impacts to wildlife species. The EA also cites Rich and Longcore, 2006, which describes the potential impact of artificial night light on mammals. EA at 64.

The EA at 63-64 describes impacts to wildlife species, including Federal ESA and/or USFS Sensitive, MIS, S&M, and others such as migratory and resident birds and mammals. Black bear and cougar are not on the Gifford Pinchot National Forest’s list of special status species, therefore there is no obligation for the District to consider effects specifically to black bears or cougars. However, because the EA included resident mammals as species that may be affected, impacts to species such as black bear and cougar were considered. Impacts of the project specifically to cougar were not raised as an issue during the scoping or comment period for this project. EA Appendix C and project record, scoping and public comments. If issues are not raised during the scoping or comment period, the agency does not have a chance to respond to any concerns in a timely manner. 40 CFR 1501.7; 36 CFR 215.2.

Additionally, Appendix C at 11 responds to the comment raised by appellant regarding black bear. As stated there, “the black bear while not discussed in the effects section would have a similar response to the human activity as elk. Bears would avoid the area during the drilling and return once the activity is over. There would be limited disturbance of vegetation and foraging opportunities and the roads would be closed once the exploration is completed.”

**Appellant Statement #30:** Appellant states that the EA fails to cite surveys for and explain the potential impacts to the Larch Mountain or Van Dyke’s salamander. Appeal at 52.

**Response:** I find that the EA did describe the potential for impacts to occur to the Van Dyke’s and Larch Mountain salamander and that the Responsible Official for the Forest Service considered these impacts prior to issuing consent to the BLM.

The procedural issue of describing impacts was the responsibility of the BLM. Appellant only filed an appeal on the Forest Service’s decision and as such, assertions of procedural violations on the BLMs EA are not within the scope of responses to this appeal.

Regardless, the EA at 60 describes the potential habitat for the Van Dyke's salamander, while the EA at 61 describes the potential habitat for Larch Mountain salamander. Impacts to both species are discussed in the EA at 66. Specifically, the areas where the proposed project would occur is not within bedrock outcrops or cobble streams (Van Dyke's salamander) or in rocks bathed in a constant flow of water or rocky stream substrate. Thus, the EA correctly concludes that it is unlikely that either species would occur and that there would be no impacts to these species.

In addition, the EA contains a mitigation measure to ensure that low mobility species, such as salamanders are protected. In the event that salamanders or frogs are found, they would be "carefully removed from the Project site" by a qualified employee, who would "clear each drill pad site of wildlife prior to setting up the drill rig and beginning operations." EA Appendix F at 7. This ensures that these and other low mobility species, if found, are adequately protected.

### ***Recreation***

**Appellant Statement #31:** Appellant states that the EA downplays all effects and temporary and/or eliminated through rehabilitation. Appeal at 47 and 48. Appellant further states that the EA "grossly underestimates the project's visual, noise, aesthetic, and other impacts on recreation." Appeal at 47 and 48.

**Response:** I find that the EA adequately estimated the project's impacts to recreation and that the Responsible Official for the Forest Service considered these impacts prior to issuing consent to the BLM.

The procedural issue of describing impacts was the responsibility of the BLM. Appellant only filed an appeal on the Forest Service's decision and as such, assertions of procedural violations on the BLM's EA are not within the scope of responses to this appeal.

Regardless, none of the impacts from the estimated 3 acres of disturbance, including noise and other disturbances, are considered permanent, as they would be eliminated when drilling was completed, which is expected to take three to four months. EA at 110. The context (scale) of the project (3 acres of ground disturbance in a 900 acre project area, across the 1.3 million acre forest), also minimizes impacts to recreation.

Direct, indirect, and cumulative effects to the aesthetic and visual quality of the area are disclosed in the EA at 94-99. The visual quality objectives (VQOs) for the area include retention and partial retention (foreground) and modification (middleground). EA at 94. The EA discloses that five drill sites are within the foreground of road 2612 and route 20 and the rest would be screened from public. None of the drill sites can be seen from Mount St. Helens. EA at 96. The project is also visible from the Green River Horse Camp, but not visible from other campgrounds, picnic areas, or developed sites.

The EA fully discloses the context and intensity of the potential effects to visuals. As described in the EA at 98, by avoiding operations at pads 6 and 7 during peak recreation use and by mitigating noise and light impacts, direct visual impacts would be reduced. EA at 98.

Noise related impacts are addressed throughout the EA. Drill rig noise is estimated by decibel level and distance from drill rig. EA at 22. Noise is then discussed in relevant resource sections, including recreation, which fully discloses the potential direct effects from noise to forest visitors. EA at 110.

The affected environment and the direct, indirect, and cumulative impacts to recreation are described in the EA at 107-113. Mitigation measures to reduce the impact to recreation resources include maintaining access, sequencing drilling, signage and notices, use of noise and light reduction techniques, and controlling access for safety and health concerns. EA at 113. Because the impacts would only occur while drills are on site and in operation, the impacts were found to be short term and temporary in nature. EA at 112.

The EA Appendix C at 7 and 10 also responded to comments regarding recreation, and documents that impacts are short term and temporary.

**Appellant Statement #32:** Appellant states that the project fails to fully meet the requirements of the Wild and Scenic Rivers Act because the prospecting activities do not fully protect the recreational and environmental values of the watershed. Appeal at 59.

**Response:** I find that the EA adequately disclosed the effects of the project on the eligible wild and scenic river and that the Responsible Official for the Forest Service considered these impacts prior to issuing consent to the BLM.

The procedural issue of describing impacts was the responsibility of the BLM. Appellant only filed an appeal on the Forest Service's decision and as such, assertions of procedural violations on the BLMs EA are not within the scope of responses to this appeal.

The Wild and Scenic Rivers Management Area Category in the GPNF Plan is described as "lands within ¼ mile of designated rivers within the forest boundary appearing to be both eligible and suitable for addition to the National Wild and Scenic Rivers System. Also included are those eligible river corridors for which suitability has not yet been determined." Forest Plan at IV -108.

The objective of this management area is to protect the "outstandingly remarkable values" including scenery, recreation, geological and historical (mining), as well as the visual quality objective of partial retention, and recreation opportunity spectrum objective of roaded natural areas. In order to meet these objectives, Standards and Guidelines for Minerals and Geology activities within designated and potential wild and scenic rivers require that "approved plans will include reasonable mitigation and reclamation measures to minimize surface disturbance, sedimentation and visual impairment," (Forest Plan IV -111). The DN states that "To address the public concern, as well as ensure consistency with the Forest Plan, my decision includes a condition that requires specific operational designs for exploration activity that may be contemplated near the Green River." DN, Attachment 1, Condition 6; DN at 6.

The EA describes the impacts of the selected alternative the recreational and environmental values of the watershed including scenery, visual quality objectives of partial retention and roaded natural areas (EA at 94-99), recreation (EA at 107-113), geological and historical (mining) resources (EA at 30-33) and the nearby inventoried roadless area. EA at 80.

**Appellant Statement #33:** Appellant states that the agencies failed to fully address the environmental and other impacts from mining that would occur pursuant to a future preference right lease. Appeal at 17.

**Response:** I find that the EA stated that if the results of exploratory drilling lead the applicant to apply for a hardrock mineral lease, the environmental consequences of that action will be evaluated by the

Agencies as a separate action and NEPA process. EA at 12. BLM regulations require additional steps and determinations be made before a leasing actions would be considered. 43 CFR 3500.

As partner agencies, both the Forest Service and BLM clearly understood their role for the purposes of this current action, and if any future lease application for mining is received, it would require additional NEPA and would require the BLM to request "second consent" to that activity when, and if, that occurs. EA at 12, DN at 3.

Further, I find that the appellant is incorrect in their assertion that a preference right lease would be issued. A preference right lease as codified in 43 CFR 3507.11(d) "Permits issued under the authority of the Reorganization Plan No. 3 of 1946". The regulation states that "Prospecting permits for minerals BLM administers under the authority for Reorganization Plan No. 3 of 1946 do not entitle you to a preference right lease. We may grant you a noncompetitive lease if you discover a valuable deposit during the permit term." The project is authorized under the Mineral Resources on Weeks Law Land Act of 1917 and administered by the Department of Interior as described in the Reorganization Plan No. 3 of 1946. DN at 14; EA at 9 and 10. Therefore, this proponent may not be granted a preference right lease under the regulation referenced by the appellant.