October 22, 2018

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Mt. Baker Snoqualmie National Forest
810 State Route 20
Sedro-Wooley, WA 98284
Submitted electronically to: commentspacificnorthwest-mtbakersnoqualmie-mtbaker@fs.fed.us

Re: Excelsior Mine Redevelopment Draft Environmental Assessment

Dear Ms. Uloth:

On behalf of the undersigned organizations we appreciate the opportunity to provide comments on the draft Environmental Assessment (EA) for the Excelsior Mine redevelopment project located in the Mt. Baker Ranger District of the Mt. Baker-Snoqualmie National Forest.

We recognize that mining is one of the allowed uses on Forest Service lands. However, such activities do create potential impacts not only from mining but also from associated roading to the surrounding watershed and environment – especially where conducted under the antiquated 1872 Mining Law governing such activities. Consequently, proposed mining requires a thorough and serious analysis to avoid detrimental impacts to longstanding conservation, recreation, wildlife and Tribal values.

Roadless areas represent some of the last and best remaining intact forests and watersheds which provide clean water, fish and wildlife habitat and world class opportunities for recreationists and the ability for northwest Tribes to exercise their cultural and treaty rights.

Many of the organizations signing this letter also submitted scoping comments in December 2017 on this same issue. After reading the response in the EA to our scoping comments, our primary concern is that the proposed road access plan to the Excelsior mine site is in violation of the National Forest Roadless Area Conservation Rule of 2001 (Roadless Rule) and is not needed given that a Forest Service system road already accesses the mine site. We are also concerned that the EA does not analyze alternative road access nor does it adequately disclose the project's potential environmental impacts.

Most immediately, we are alarmed that *unauthorized* road development work has already taken place illegally within this inventoried roadless area. We request that the Forest Service take immediate corrective action and suspend further review of the proposed Excelsior Mine operating plan pending an investigation of this unauthorized activity.

Background on the Roadless Rule

The proposed mine redevelopment directly impacts the Mt. Baker North Inventoried Roadless Area. This roadless area was part of nearly 60 million acres of unroaded, unlogged national forest lands nationwide that were protected from new road construction under the 2001 Roadless Rule. The rule was established as road maintenance backlogs on more than 370,000 miles of national forest roads ballooned to an $8 billion price tag along with increasing aquatic risks to watersheds and threatened species resulting from decades of unsustainable logging of old growth forests. Proponents of the rule argued that if the Forest Service can't pay for and maintain the roads they already have, they should not build any new roads into the few areas of the forest that remain unroaded.

After the most extensive federal rulemaking process in the history of the federal government, spanning 16 months and resulting in more than 1.6 million individual comments (95% supportive) and more than 600 public meetings, the Roadless Rule became a balanced and popular policy that has stood the test of time and many court challenges. With more than one-half of America's National Forests already open to logging, mining, and drilling, the rule was intended to preserve the last third of undeveloped forestlands as a home for wildlife, a haven for recreation, a source of clean water and a heritage for future generations. A wide range of activities are permissible in roadless areas; however, maintaining unclassified roads or reconstructing unneeded roads to access mining claims is not allowed.

Concerns about the Environmental Assessment

I. Request for a field tour with the Forest Service of the proposed "upper road" in the roadless area and original access road washout

The proposed project would have significant impact to the Mt. Baker North Inventoried Roadless Area. Significant questions surround the status, classification and authorized activities associated with the upper road which is accessible only via the closed (and apparently gated) FS Road 3700-033.

We request to take a field tour of the upper road and original access road (FS Road 3700-031) to better understand the rationale behind the proposed action in the EA. Hopefully this can be accommodated in the next few weeks before the area is snowed in.

II. The proposal violates the Roadless Rule

A. Unauthorized clearing of the upper road has already occurred.

The unclassified upper road is a non-system road that presumably was built by miners in connection with mining activity, possibly in the early 1900s. The unclassified upper road evidently has not been used or has been accessible for many years.

However, a site visit on October 14 by two concerned citizens revealed that trees and brush have recently been removed from the roadway, and ATVs have begun using the unclassified upper road. Additionally,

despite the fact that FS Road 3700-033 is shown to have a gate on the map in the draft EA as a level 1 closed road, no such gate was in place on October 14, 2018.

We are very concerned that road clearing and tree cutting have occurred within the Mt. Baker North Inventoried Roadless Area, evidently conducted without Forest Service authorization and prior to completion of the environmental analysis and any public involvement process. This activity clearly violates both the Roadless Rule and the National Environmental Policy Act.

We request that the Forest Service immediately conduct an investigation of this unauthorized and illegal road clearing activity and take steps to ensure that no further illegal road work or ATV use occurs. We also ask that you suspend further review of the proposed Excelsior Mine Plan of Operations until the investigation has been completed and appropriate corrective action has been taken, including closure of the unclassified upper road to ATVs.

B. The Roadless Rule does not allow for maintenance of "unclassified roads" such as the upper road identified as part of this project.

The Roadless Rule prohibits road construction and reconstruction in Inventoried Roadless Areas, with certain exceptions. [36 CFR 294.12(a)]. Further, the Rule provides that "Maintenance of classified roads is permissible in inventoried roadless areas." [36 CFR 294.12(c)].

Phase one of the Proposed Action involves "the maintenance and use of … an existing non-Forest Service temporary road … referred to as the 'upper road'." [EA Pg. 4]. According to the EA, the upper road project is consistent with the Roadless Rule because "there is no actual road construction or reconstruction proposed." [EA Pg. 13]. However, the Draft EA totally ignores the fact that the Rule only allows maintenance of "classified roads" in IRAs – not unclassified roads like the upper road.

The Roadless Rule defines a "classified road" as a road that is "determined to be needed for long-term motor vehicle access, including … privately owned roads, National Forest System roads, and other roads authorized by the Forest Service." [36 CFR 294.11]. Conversely, an "unclassified road" is defined as one "that is not part of the forest transportation system, such as … abandoned travelways."[1] The noted "upper road" in question clearly meets the definition of an "unclassified road."

The EA states that the "official" status of the unnamed unclassified upper road is that of a "non-system road" and that the road "would be maintained as a primitive road while mining activities are authorized." EA Pg. 44]. Therefore, the upper road officially is not a classified road as defined by the Roadless Rule and, accordingly, road maintenance work is not permitted by the Rule.

C. The Roadless Rule only allows reconstruction pursuant to statute (i.e., the 1872 Mining Law) if a road in needed

[1] Since 2001, the Forest Service has developed new terminology and definitions for its road system. For example, the 2005 Travel Management Rule contains definitions for "forest road" and "unauthorized road" that are comparable to the Roadless Rule's definitions of classified and unclassified roads. However, we believe that the Roadless Rule's terminology and definitions remain in effect and should be used in evaluating compliance with the Roadless Rule in this EA.

While insisting that "no actual road construction or reconstruction [is] proposed," the EA subsequently argues that even "if road construction or reconstruction were indeed proposed as part of this plan of operations, the project would still be consistent with the Roadless Rule, as the Rule includes a clear exemption for road construction and reconstruction relative to locatable mineral activities (36 CFR 294.12(b)(3)." [EA Pg. 13]. Making these two separate and somewhat contradictory arguments about how the proposal is not in violation of the Roadless Rule is disconcerting. The Forest Service never answers or justifies the question as to whether the upper road is a classified road under the Roadless Rule. Instead they provide competing rationales focused on why the project is not in violation of the Roadless Rule. It is left up to the concerned public and stakeholders to make the clarification as to why the project violates the Roadless Rule.

The Forest Service's description of the Roadless Rule's exemption is not accurate. The Rule provides an exception when "a road is <u>needed</u> pursuant to reserved or outstanding rights, or as provided for by statute or treaty." [36 CFR 294.12(b)(3)]. Thus, the exemption of locatable mineral activities only applies if road construction or reconstruction is "needed" for mining – not "relative to" mining.

If the Forest Service decides to change the Proposed Action from road maintenance to road construction or reconstruction of the upper road, it will need to revise the EA to evaluate whether the Upper Road is actually "needed" for access to a mining site. As discussed in Section III below, such an evaluation should be done by comparing the Upper Road to alternative access routes. In particular, the alternative of repairing and using existing FS Road 3700-031 is must be evaluated.

D. The project has not been approved by the U.S. Department of Agriculture.

The Forest Service should formally obtain an exemption pursuant to the relevant authority in the Roadless Rule from the Under Secretary of Agriculture or other federal official with delegated authority. Since 2001, the Chief of the Forest Service and/or the Secretary of Agriculture has reserved approval authority over road building projects in IRAs. In 2010 the Secretary reviewed and approved the Olivine Mine project on the Mt. Baker Snoqualmie National Forest.[2] In 2011, the Secretary of Agriculture issued a memorandum stating:

> "The Under Secretary is re-delegated authority concerning road construction, road reconstruction, and incidental timber cutting within inventoried roadless areas that is associated with operations of locatable mining activities undertaken pursuant to the United States Mining Laws and regulated pursuant to 16 U.S.C. 478, 16 U.S.C. 551, and 36 CFR 228, Subpart A. The Under Secretary shall assure that the Forest Service is directed to comply with the requirements for environmental protection, set forth in 36 CFR 228.8, that all operations be conducted so as, where feasible, to minimize adverse environmental impacts on national forest surface resources, including air quality, water quality, scenic values, fisheries and wildlife habitats, soils , and other resource values as well as the necessary assurances concerning solid wastes, reclamation, and certifications of approval by other relevant State and Federal agencies."[3]

[2] https://www.fs.usda.gov/nfs/11558/www/nepa/52391_FSPLT2_024057.pdf, p. 10.
[3] SECRETARY'S MEMORANDUM 1042-156 Authority to Approve Road Construction and Timber Harvesting In Certain Lands Administered by the Forest Service (May 30, 2011) https://www.fs.usda.gov/roadmain/roadless/secretarysmemo.

The Forest Service should provide the Under Secretary with the full administrative record, including public comments, in order to ensure a fair and informed administrative review of this proposed exemption from the Roadless Rule.

III. The EA's decision to dismiss developing an alternative around repairing the original access to the mine site was arbitrary and capricious

In scoping comments submitted by many of the undersigned organizations, we called for the agency to develop an alternative that would analyze and evaluate the relative costs and impacts to the affected environment of repairing the washout on FS Road 3700-031. This road is an existing Forest Service system road that has provided the original access to the Excelsior mine site without impacting the inventoried roadless area. Repairing this road would restore access without violating the Roadless Rule and potentially at less or comparable expense and impact than constructing a new road through intact old-growth forest to arrive at the same location.

The Forest dismissed developing this alternative access route outside of an inventoried roadless area arguing that "impacts to hydrologic, fish, and soil resources would be considerable when compared to the impacts on these same resources from the use and maintenance of the upper road." (EA Pg. 12-13) However, no analysis or other details were provided to support that statement. The EA identified that a half bridge would need to be replaced to restore access to the original access route outside the roadless area, but no cost was reported nor was there a cost to reconstructing the unclassified upper road to an engineering standard for hauling. Furthermore, the existing washout remains unrepaired, presumably producing sedimentation and other impacts on streams and tributaries to Wells Creek. The inattention to this aquatic risk has and will continue to add to the deferred maintenance costs for this road segment, violating the Forest Service's responsibility to upholding the Clean Water Act. Reconstructing FS Road 3700-031 would have the benefit of addressing the deferred maintenance issue on this system road instead of adding more miles to the road system that will over time create more impacts to the watershed.

This decision was arbitrary and capricious, and the EA should be revised to include the analysis of this alternative as requested by many of the undersigned organizations during scoping. Such an analysis is necessary to determine if construction/reconstruction of the upper road is "needed" for the mining, as well as to comply with NEPA's requirement to consider reasonable alternatives.

IV. The EA fails to fully analyze all baseline conditions

Despite acknowledging that the Project will either directly or indirectly impact various resources, such as wildlife, water quality, etc., the EA fails to fully analyze the baseline conditions of these affected resources.

For example, although the EA admits that species listed under the Endangered Species Act may be adversely affected (and for northern spotted owls and marbled murrelets "likely to adversely affect" these species), no surveys for the species have been done. Indeed, the EA admits that no surveys were done for any species described in Table 7 (ESA-listed, Sensitive Species, Indicator Species, etc.). (EA Pg. 48). The EA also notes that sediment runoff may increase from Project activities, (EA Pg. 18, 21-22), but no on-site baseline water quality analysis was done for sediment or related impacts.

The USFS is required to "describe the environment of the areas to be affected or created by the alternatives under consideration."[4] The establishment of the baseline conditions of the affected environment is a fundamental requirement of the NEPA process:

> "Without establishing the baseline conditions which exist ... before [a project] begins, there is simply no way to determine what effect the [project] will have on the environment and, consequently, no way to comply with NEPA."[5]

A recent federal court decision involving mining on national forest lands in western Washington emphasized the NEPA requirement for a detailed groundwater baseline analysis in an EA.

> "Ninth Circuit cases acknowledge the importance of obtaining baseline condition information before assessing the environmental impacts of a proposed project."[6]

As another example, the EA admits to the potential for sediment discharges, but relies on vague "mitigation" measures to attempt to offset these impacts:

> "The NWFP (USDA FS and USDI BLM 1994) Standards and Guidelines for Road Management in Riparian Reserves require that road drainage be routed away from potentially unstable channels, fills, and hillslopes. Most of the upper road, which is aligned on a series of switchbacks through a broad draw leading down to Wells Creek, is within a Riparian Reserve situated around that draw. Water draining down the road is most likely to discharge at the middle of the draw where drainage would flow naturally, as well as at switchback ends that are topographic low points. Removal of vegetation and road blading are both actions that will compact the road surface and reduce infiltration, causing more rainfall or snowmelt to become runoff. Increased amounts of runoff concentrated to a small number of discharge points such as the middle of the draw or ends of the switchback will likely lead to surface erosion of soils downslope of the discharge point, saturation of the hillslope, and potential mass wasting. Three mitigation measures will reduce or eliminate the risk of negative effects of the proposed project to soils…" (EA Pg. 40)

Yet as the court in Gifford Pinchot v. Perez held, reliance on future mitigation measure cannot be used as a substitute for full baseline analysis.

> "The mitigation measures incorporated into Alternative 3, likely go a long way to controlling possible contamination of groundwater, but, without baseline data, the impact to groundwater remains uncertain because there is no information as to the current conditions of the actual Project area. As a result, there is no way to determine what effect the action will have on the environment and thus, "no way to comply with NEPA."[7]

V. The EA fails to analyze mine rock under NEPA and plan standards

The EA admits that the agency must ensure compliance with the Minerals Management Standards in the Northwest and Mt. Baker-Snoqualmie National Forest Plan. Yet despite acknowledging the Forest Plan(s)' requirement that the agency "Analyze the waste material using the best conventional sampling methods and analytic techniques to determine its chemical and physical stability characteristics," (EA Pg.

[4] 40 C.F.R. §1502.15.
[5] Half Moon Bay Fisherman's Mktg. Ass'n v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988).
[6] Gifford Pinchot Task Force v. Perez, 2014 WL 3019165, *28 (D. Or. 2014) (USFS/BLM EA for mineral exploration project failed to obtain and analyze baseline water quality data in violation of NEPA).
[7] Gifford Pinchot at *33 quoting Half Moon Bay, 857 F.2d at 510.".

41) the EA admits that such analysis will only occur in the future, long after the NEPA and public review process is over. "Before placing any waste rock on either mine dump the claimant shall provide the Forest Service sample results for waste rock sulfide contents." (EA Pg. 13). Under NEPA and the Forest Plan(s) (and thus the National Forest Management Act), this analysis must be done as part of the public NEPA process – not deferred to the operational phases of the project.

VI. The EA fails to fully analyze all direct, indirect and cumulative impacts

The EA lists a number of current and future reasonably foreseeable future projects in the analysis area, but it contains no detailed analysis of their impacts.[8] In addition, the EA mentions other potentially connected actions to (and cumulative impacts from) other named and unnamed facilities, but little information is provided about these sites, regarding both the current baseline conditions as well as the impacts from these facilities:

> "excavated material from the vicinity of the Mine Portals and waste ore from the mines should be transported and deposited in a stable location such as the Burnt Knob quarry if feasible, unless chemical analysis demonstrates that this material needs to be transported off forest to a suitable certified waste site." (EA Pg. 41)

The EA thus fails to conduct the required "hard look" at the Project's impacts, including both the mine site itself and the access route(s).

Under NEPA, USFS must consider all direct, indirect, and cumulative environmental impacts of the proposed action.[9] Direct effects are caused by the action and occur at the same time and place as the proposed project.[10] Indirect effects are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.[11] Both types of impacts include "effects on natural resources and on the components, structures, and functioning of affected ecosystems," as well as "aesthetic, historic, cultural, economic, social or health [effects]."[12] The USFS must also fully review the impacts from all "past, present, and reasonably foreseeable future actions." These are the "cumulative effect/impacts" under NEPA. Cumulative effects/impacts are defined as:

> "[T]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."[13]

In a cumulative impact analysis, an agency must take a "hard look" at all actions.

> "An EA's analysis of cumulative impacts must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment. … Without such

[8] EA Appendix A, Table A: Past, Present, and Foreseeable Actions for Cumulative Effects Analysis
[9] 40 CFR §§ 1502.16, 1508.8, 1508.25(c).
[10] 40 CFR § 1508.8(a).
[11] 40 CFR § 1508.8(b).
[12] Id.
[13] 40 CFR § 1508.7

> information, neither the courts nor the public ... can be assured that the [agency] provided the hard look that it is required to provide."[14]

A cumulative impact analysis must provide a "useful analysis" that includes a detailed and quantified evaluation of cumulative impacts to allow for informed decision-making and public disclosure.[15] The NEPA requirement to analyze cumulative impacts prevents agencies from undertaking a piecemeal review of environmental impacts.[16] The NEPA obligation to consider cumulative impacts extends to all "past," "present," and "reasonably foreseeable" future projects.[17] None of the "cumulative effects/impacts" discussions in the EA for the various resources and impacts contain this required quantification and other detailed reviews required by NEPA.

VII. The EA fails to articulate and identify the relative cost of reconstructing the upper road using agency best practices

As we discussed above, we believe that the proposed use of the "upper road" as an alternative access route to the mine site is unnecessary and in violation of the Roadless Rule. In addition, the cost of the reconstructing the upper road for this purpose would be significant.

The EA fails to articulate what the cost of the proposed upper road and upgrading FS Road 3700-033 would entail over a period of 20 years. The U.S. Forest Service has an obligation to comply with State and Federal regulations including the Clean Water Act. Best Management Practices (BMPs) are used to control non-point source pollution to meet water quality standards. With any road project, the Agency has a duty to follow its own manual – "National Best Management Practices for Water Quality Management on National Forest System Lands" (April 2012).

Road Management Activities are outlined beginning on page 104 in order to "avoid, minimize, or mitigate adverse effects….from road management activities." There are eleven core BMPs in this category that relate to roads and need to be followed, including:

> "Limit roads to the minimum practicable number, width and total length consistent with the purpose of specific operations, local topography, geology, and climate to achieve land management plan desired conditions, goals and objectives for access and water quality management…use existing roads when practicable."[18]

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[14] Te-Moak Tribe of Western Shoshone v. U.S. Dept. of Interior, 608 F.3d 592, 603 (9th Cir. 2010) (rejecting BLM-issued EA for mineral exploration that had failed to include detailed analysis of impacts from nearby proposed mining operations).

[15] Kern v. U.S. Bureau of Land Management, 284 F.3d 1062, 1066 (9th Cir. 2002); Ocean Advocates v. U.S. Army Corps of Engineers, 361 F.3d 1108 1118 (9th Cir. 2004).

[16] Earth Island Institute v. U.S. Forest Service, 351 F.3d 1291, 1306-07 (9th Cir. 2003).

[17] Hall v. Norton, 266 F.3d 969, 978 (9th Cir. 2001) (finding cumulative analysis on land exchange for one development failed to consider impacts from other developments potentially subject to land exchanges); Great Basin Mine Watch v. Hankins, 456 F.3d 955, 971-974 (9th Cir. 2006)(requiring "mine-specific … cumulative data," a "quantified assessment of their [other projects] combined environmental impacts," and "objective quantification of the impacts" from other existing and proposed mining operations in the region).

[18] National Best Management Practices for Water Quality Management on National Forest System Lands" (April 2012). Pg. 105.

FS Road 3700-033 is currently listed as a closed (Level 1/Storage) road on the agency's INFRA database and slated to be decommissioned and removed from the road system at some point in the future. The current and future maintenance costs for a closed road are low compared to maintaining an open road (Level 2) that would provide for vehicle access to the mine site, potentially including truck and other haul vehicles for a period of up to 20 years. Therefore, the relative maintenance cost of the proposed use of the upper road option would be significant over the lifetime of the project.

The proposed Upper road would be adding mileage and maintenance costs to the Forest's already unsustainable road system. This would happen at a time when the Mt. Baker Snoqualmie National Forest has just completed a two-year public process resulting in decisions on two Access Travel Management Plans (including the Nooksack watershed) that were focused on complying with an agency mandate to reduce their road system to a sustainable level from a maintenance perspective.

Additionally, limited road maintenance funds will be directed toward this project over the next 20 years which will have financial impacts on other road maintenance priorities elsewhere on the Mt. Baker Ranger District where recreational and tribal access should be prioritized.

VIII. The EA fails to fully review all reasonable alternatives under NEPA and the Forest Plan/NFMA, and minimize impacts and comply with the 1897 Organic Act and Part 228 Regulations

Although the EA professes to comply with the agency's duty to minimize all adverse impacts, that is not the case. We have discussed above the fact that an alternative to repair FS Road 3700-031 was dismissed.

Additionally, the agency never considered or adopted an alternative of seasonal restrictions to protect wildlife, especially listed species. For the northern spotted owl, the EA admits that noise and other impacts will occur during the nesting/breeding seasons for northern spotted owls and marbled murrelets.

> "Activities generating noise above ambient noise could impact approximately 18 acres of suitable spotted owl nesting habitat in the early breeding season, from March 1 through July 15. As a result, adverse effects from noise generating activities are expected to occur. This alternative may affect, and is likely to adversely affect the spotted owl due to noise disturbance in the early nesting season." (EA Pg. 50-51)

> "Activities generating noise above ambient noise could impact approximately 28 acres of suitable murrelet nesting habitat during the breeding season, from April 1st through September 23rd. As a result, adverse effects from noise generating activities are expected to occur. This alternative may affect and is likely to adversely affect the marbled murrelet due to noise disturbance in the early nesting season. As a result, adverse effects to nesting murrelets from noise generating activities are expected to occur within a limited portion of the project's suitable habitat. This alternative may affect and is likely to adversely affect the marbled murrelet due to noise disturbance in the early nesting season." (EA Pg. 51)

Under NEPA, the agency should have considered the alternative of limiting access and related operations to avoid these nesting/breeding seasons. Such an alternative is a "reasonable alternative" that should have been fully considered. NEPA requires the agency to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources."[19] It must "rigorously explore and objectively evaluate all

[19] 42 U.S.C. § 4332(E); 40 CFR § 1508.9(b).

reasonable alternatives" to the proposed action.[20] The alternatives analysis is considered the heart of a NEPA analysis.[21] The alternatives analysis should present the environmental impacts in comparative form, thus sharply defining important issues and providing the public and the decisionmaker with a clear basis for choice.[22] The lead agency must "rigorously explore and objectively evaluate all reasonable alternatives" including alternatives that are "not within the [lead agency's] jurisdiction."[23]

In this case, the EA failed to consider, at a minimum, the reasonable alternatives of, at a minimum: (1) seasonal wildlife restrictions; (2) helicopter access, instead of using the road through the roadless area; (3) approving fewer years of operation; (4) keeping "roads, structures, and support facilities" out of the Riparian Reserves pursuant to the Forest Plan(s); and (5) exploring the continued use of FS Road 3700-031 to provide access to the mine without impacting the roadless area.

For example, regarding the MM (Minerals Management) Standards in the Forest Plan(s), the EA fails to conduct the required analysis to ensure that "no alternative exists" to locating the roads, waste dumps, structures, and other project support facilities outside of Riparian Reserves. Federal courts have required the Forest Service to comply with all Forest Plan Standards and Guidelines in reviewing and approving mining Plans of Operations submitted pursuant to claims filed under the 1872 Mining Law.[24] In that case, the court held that the Forest Service's Plan of Operations approvals violated the road density and riparian and fisheries requirements, among other requirements.

In Gifford Pinchot, the court specifically held that the EA's failure to fully review the alternative of keeping "structures, and support facilities" out of the Riparian Reserves, violated not only NEPA but the NFMA/Forest Plan(s).[25]

Regarding fewer years of operations, the EA states that the project is expected to last 10 years. "The upper road would be maintained as a primitive jeep road for an expected period of 10 years." (EA Pg. 12) Yet actual operations at the site consists largely of facilitating road access, mine adit/tunnel sampling, and minimal reclamation:

> "*Phase I* includes the restoration, use, and maintenance of the upper road and use and maintenance of FSR 3700-033. … *Phase II* includes mine maintenance and underground sampling activities. *Phase III* would include mine site and access reclamation. Mine site reclamation would include stabilizing and revegetating the mine dumps, permanently closing both portals, and properly closing all drill holes underground." (EA Pg. 12-13)

There is no compelling need for such operations to be spread over 10 years. Limiting the years of operation will certainly reduce the impacts to wildlife, recreation, and other resources – in line with the agency's duty to "minimize" all adverse impacts under 36 CFR Part 228. The EA contains no analysis why such a reduction is not reasonable under NEPA.

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[20] City of Tenakee Springs v. Clough, 915 F.2d 1308, 1310 (9th Cir. 1990).
[21] 40 C.F.R. § 1502.14.
[22] Id.
[23] Id.
[24] See Hells Canyon Preservation Council v. Haines, 2006 WL 2252554, at *6-10 (D. Oregon 2006)(Forest Service approval of mining PoO violated the National Forest Management Act, NFMA, when approval violated Forest Plan Standards and Guidelines for Riparian Reserves).
[25] Gifford Pinchot Task Force v. Perez, 2014 WL 3019165, **16-19, 39-40 (D. Or. 2014).

Regarding helicopter access, it is entirely reasonable to fully review and require such an alternative. That is exactly what the USFS did in Oregon in 1999 in order to minimize road impacts and protect sensitive watersheds.

> "I have selected Alternative 9. Under Alternative 9, roads would not be developed. Rather, helicopters would be used to haul samples of the ore. The sample would be processed, with the results reported to the Forest Service. Alternative 9 was developed to help resolve the operational and economic uncertainties related to the project. It would better protect the unique and cherished values inherent to the Rough and Ready Creek watershed than the Proposed Plan of Operations or any other mining alternative."[26]

Further, BLM recently reviewed and required helicopter access in California, when reviewing drilling operations which required access across sensitive and important lands.[27] Due to the Roadless Area and other important resources that would be adversely impacted by the proposed road route in the Excelsior EA, this alternative is both reasonable and warranted.

Regarding seasonal use/access restrictions to protect listed and other species, it is standard USFS mitigation to preclude operations during sensitive breeding and/or nesting season. For example, in one recent case in Arizona, the USFS authorized exploratory drilling operations subject to the following restriction:

> "Drilling operations will not occur from March 1st to August 31st to avoid potential disturbance to the Mexican Spotted Owl (MSO) during its breeding season."[28]

Procedurally, the agency should fully consider this alternative under NEPA here. Substantively, in order to meet its duties under the Organic Act, ESA, NFMA and other laws and regulations, the agency should impose these restrictions as a condition of approval (March 1 to Sept. 23 to account for both Northern Spotted Owl and Marbled Murrelet).

It should be noted that the imposition of such alternatives is not precluded by the fact that the project occurs on mining claims. USFS has duties under the Organic Act and implementing regulations "to maintain and protect fisheries and wildlife which may be affected by the operations."[29] The failure to protect wildlife also violates USFS's duties to "minimize adverse environmental impacts on National Forest surface resources."[30] The operator also has a separate regulatory obligation to "take all practicable measures to maintain and protect fisheries and wildlife habitat which may be affected by the operations."[31] "Under the Organic Act the Forest Service must …require [the project applicant] to take all practicable measures to maintain and protect fisheries and wildlife habitat."[32] Thus, all these requirements apply even under USFS's view (albeit erroneous) that the project proponent has an absolute "right" to conduct all its operations on public land.

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[26] Forest Supervisor, Siskiyou National Forest, Record of Decision, NICORE Project, August 9, 1999

[27] See, U.S. Department of the Interior, Bureau of Land Management, Environmental Assessment DOI-BLM-CA-D050-2017-0037-EA, October 2017, Perdito Exploration Project; DECISION RECORD FOR ENVIRONMENTAL ASSESSMENT DOI-BLM-CA-D050-2017-0037-EA, May 16, 2018.

[28] Decision Memorandum, Sunnyside Project, USDA Forest Service, Coronado National Forest, Sept. 12, 2014, at 7.

[29] 36 C.F.R. §228.8(e).

[30] 36 C.F.R. §228.8.

[31] 36 C.F.R. §228.8(e). Rock Creek Alliance v. Forest Service, 703 F.Supp.2d 1152, 1164 (D. Montana 2010) (mine approval violated Organic Act and 228 regulations by failing to protect water quality and fisheries).

[32] Id. at 1170.

Regarding limitations on access, in Clouser v. Espy, the Ninth Circuit affirmed the Forest Service's authority to impose significant restrictions on a mining operation, in that case limiting the claimant to access via pack-mule only.[33] The court rejected the claimant's argument that such a restriction violated federal mining laws:

> In light of the broad language of [Organic Administration Act §] 551's grant of authority, [Organic Administration Act §] 478's clarification that activities of miners on national forest lands are subject to regulation under the statute, and this substantial body of case law, there can be no doubt that the Department of Agriculture possesses statutory authority to regulate activities related to mining—even in non-wilderness areas—in order to preserve the national forests.[34]

Recent decisions have reinforced the USFS's broad authority over mining. "[T]he Secretary of Agriculture has long had the authority to restrict motorized access to specified areas of national forests, including to mining claims.[35]

IX. This project should require an Environmental Impact Statement level of analysis under the National Environmental Policy Act

The Forest Service opted to prepare an Environmental Assessment rather than a more rigorous Environmental Impact Statement (EIS) for this project. However, Forest Service NEPA regulations identify classes of actions normally requiring Environmental Impact Statements including:

> "Class 2: proposals that would substantially alter the undeveloped character of an inventoried roadless area or a potential wilderness area."[36]

The regulations provide a specific example that is directly relevant to the Excelsior mine redevelopment:

> "Approving a plan of operations for a mine that could cause considerable surface disturbance in a potential wilderness area."[37]

The area of the roadless area impacted by the proposed unclassified "upper road" is characterized by old-growth forests and is known to be nesting habitat for marbled murrelets and spotted owls, both species listed under the Endangered Species Act.

Thus, USFS's decision not to prepare an EIS was made without the critical information regarding cumulative and other impacts, alternatives, and baseline conditions detailed above. The agency cannot issue a FONSI. Further, as noted herein, the potential significance of project impacts to the roadless area, important wildlife species, and other resources warrants preparation of an EIS.

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[33] Clouser v. Espy, 42 F.3d 1522 (9th Cir. 1994).
[34] Id. at 1530.
[35] See Clouser [v. Espy], 42 F.3d 1522, 1530 (9th Cir. 1994). Public Lands for the People v. U.S. Dept. of Agriculture, 697, F.3d 1192, 1198 (9th Cir. 2012) (emphasis added) (upholding denial of access routes to mining claims in travel management plan).
[36] [36 CFR 220.5(a)(2)]
[37] [36 CFR 220.5(a)(2)(iii)]

We appreciate the opportunity to provide comments on the draft EA Environmental Assessment. We remain very concerned about what we view as a violation of the 2001 Roadless Rule and the impacts of mining activities to the Tribal, recreational and conservation values of the forest and watershed.

Sincerely,

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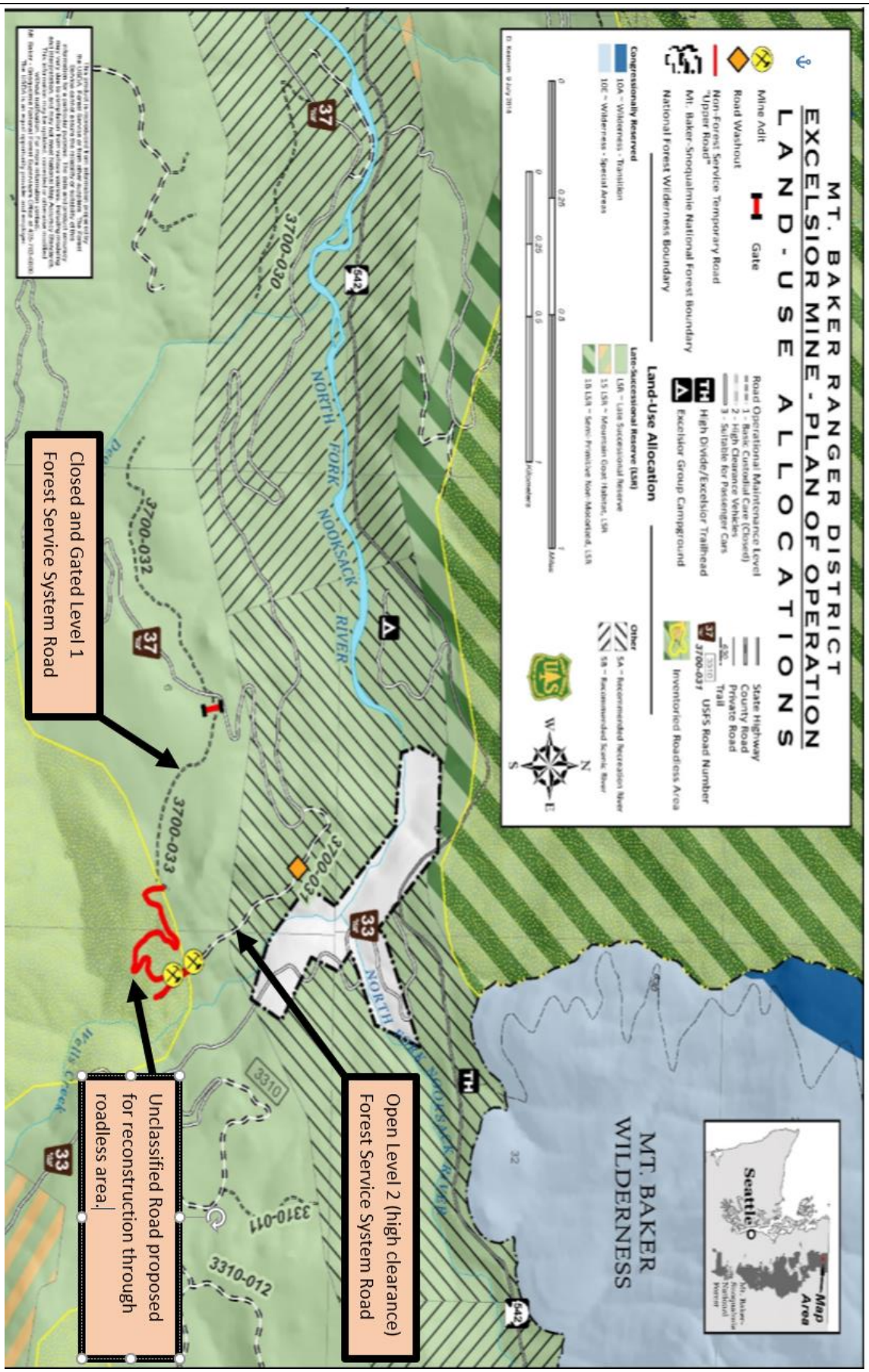
Proposal Map of Excelsior Redevelopment Project