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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION

<p>ALLIANCE FOR THE WILD ROCKIES,  Plaintiff,  v.  SCOTT HAIGHT, in his official capacity as Manager of the Butte Field Office, Bureau of Land Management; and U.S. BUREAU OF LAND MANAGEMENT,  Defendants.</p>	<p>CV-14-     -M-</p>  <p>COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF</p>
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## INTRODUCTION

1. This case challenges the Bureau of Land Management’s (“BLM”) decision to grant a right-of-way for the transport of industrial mining products across the public lands of the Elkhorn Mountains in violation of the Federal Land Policy and Management Act (“FLPMA”) and the National Environmental Policy Act (“NEPA”) and their implementing regulations.

2. More specifically, this suit challenges the Defendants’ issuance and approval, on July 1, 2014, of a Right-of-Way across federal public land to Smith Contracting, Inc., of Butte Montana (“Smith”), Serial Number MTM-106022, (“Golden Asset Mine ROW,” or “ROW”). The ROW authorizes Smith to turn an unimproved two-track dirt road into a major industrial mine ore haul route in order for Smith to operate a gold mining operation on its private lands known as the Golden Asset Mine. The ROW grant was issued pursuant to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761 et seq. BLM also prepared an Environmental Assessment (“EA”) for the ROW and issued a Finding of No Significant Impact (“FONSI”) and Decision Record (“DR”) as part of its approval of the ROW. Plaintiff challenges the issuance and approval of the ROW as well as the EA and FONSI/DR decisions.

3. The Elkhorn Mountains of western Montana provide crucial habitat for one of the healthiest herds of elk in Montana and a migration corridor essential to the recovery of the lynx and the grizzly bear.

4. The Elkhorns' wildlife values are so outstanding that they have inspired a unique system of cooperative management between BLM, the Forest Service, and the Montana Department of Fish, Wildlife, and Parks ("MDFWP"). This cooperative management has been incorporated into the Resource Management Plan ("RMP") that governs BLM's management of the affected area.

5. BLM has now issued a right-of-way to Smith that will enable Smith to transport ore from the Golden Asset Mine, without consulting the Forest Service or the Montana MDFWP or conducting monitoring as required by the RMP. BLM's issuance of this Golden Asset Mine Road "ROW" thus violated FLPMA's requirement that all agency land management decisions comply with the RMP.

6. The Golden Asset Mine Road ROW also violated FLPMA because it will adversely affect the scenic and esthetic values of the Elkhorn Mountains, the fish and wildlife habitat of the area, other lawful users of nearby public land, public safety, property rights, and the public interest. 43 U.S.C. §§ 1761-1771. BLM's failure to analyze the adverse impacts from continued operations and aspects of the Golden Asset Mine itself also violates FLPMA's requirement that BLM consider such impacts from activities made possible or otherwise facilitated by issuance of the ROW. BLM's unilateral determination that the ROW complied with FLPMA is thus arbitrary and capricious and without evidentiary support as it was made without considering the impacts from the Mine and off-site transportation, storage, and processing of the ore.

7. In addition, the Golden-Asset Mine Road ROW violates NEPA because BLM failed to analyze the impacts of the Golden Asset Mine itself, to obtain baseline information or data for any of the resource values of the Troy Creek drainage, to analyze the effectiveness of the mitigation measures included in the ROW, to assess the cumulative impacts of the ROW in combination with past, present, and reasonably foreseeable mining, private development, livestock grazing, or other activities in the area, and otherwise take the required “hard look” at the project required by NEPA.

8. The Court should accordingly declare as illegal, vacate, and set aside the Golden Asset Mine Road ROW, EA, FONSI, and DR and issue such injunctive relief as may be necessary to preserve the public lands crossed by the ROW and protect the public interest and related environmental values affected by the ROW and Mine.

#### JURISDICTION AND VENUE

9. Jurisdiction is proper in this Court under 28 U.S.C. §§ 1331 and 1346, because this action arises under the laws of the United States, including the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701 et seq. (“FLPMA”), the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq., (“NEPA”), the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq. (“APA”), the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Equal Access to Justice Act 28 U.S.C. §§ 2412 et seq.

10. An actual, justiciable controversy now exists between Plaintiff and Defendants. The requested relief is proper under 28 U.S.C. §§ 2201-02 and 5 U.S.C. §§ 705 and 706.

11. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial district and Plaintiff has members in the district. Moreover, Plaintiff's office is located in the Missoula Division of this Court.

12. The federal government has waived sovereign immunity in this action pursuant to the APA, 5 U.S.C. §§ 701-706.

### PARTIES

13. Alliance for the Wild Rockies ("AWR") is a Montana-based nonprofit organization dedicated to the protection and preservation of the native biodiversity of the Northern Rockies Bioregion, its native plant, fish, and animal life, and its naturally functioning ecosystems. AWR has over 2,500 members, including members who live and/or recreate in the lands and waters of the Elkhorn Mountains affected by the ROW activities and the Golden Asset Mine, including the lands traversed by the ROW. These uses and interests will be adversely affected by the issuance of the ROW. AWR's and its members' interests in participating in the NEPA process and ensuring that BLM's compliance with all of the procedural requirements of NEPA and FLPMA are also adversely affected and injured by BLM's failure to follow these legally-mandated procedures. AWR's registered office is located in Missoula, Montana. AWR brings this action on its own behalf and on behalf of its adversely affected members.

14. AWR's members and staff use and enjoy, on a continuing and ongoing basis, the public lands of the Elkhorn Mountains for hiking, fishing, hunting, camping, photographing landscapes and wildlife, and engaging in other vocational, scientific, and recreational activities. The Plaintiff's members and staff derive aesthetic, recreational, inspirational, educational, and other benefits from their activities in these areas, including the lands and waters affected by the issuance of the ROW, on a regular and continuing basis and intend to do so frequently in the future. AWR submitted timely comments during the BLM's NEPA review process for the ROW, raising the issues contained in this Complaint.

15. The above-described aesthetic, recreational, inspirational, educational, and other interests of the Plaintiff has been, are being, and, unless the relief prayed for is granted, will continue to be adversely and irreparably injured if the Golden Asset Mine Road ROW remains in effect. These are actual, concrete injuries to Plaintiff caused by Defendants' failure to comply with FLPMA, NEPA and the APA. The above-named injuries would be redressed by the relief requested in this Complaint. Plaintiff has no other adequate remedy at law.

16. Defendant SCOTT HAIGHT is the manager of BLM's Butte Field Office, headquartered in Butte, Montana. Mr. Haight has legal authority for managing the public lands traversed by the Golden Asset Mine ROW in compliance with federal laws, regulations, and the Butte Resource Management Plan ("RMP"). Mr. Haight signed and

issued the challenged ROW and was responsible for the issuance of the EA, FONSI, and DR challenged in this case. He is sued solely in his official capacity.

17. Defendant BUREAU OF LAND MANAGEMENT is an agency or instrumentality of the United States charged with managing the public lands in the Butte Field Office, in accordance and in compliance with federal regulations.

### FACTUAL ALLEGATIONS

#### The Elkhorn Mountains

18. The Elkhorn Mountain Range encompasses an area of approximately 300,000 acres in western Montana. Environmental Assessment DOI-MT-BO2013-00230 EA: Golden Asset Mine Road Right-of-Way 8 (June 2014)(“EA”).

19. As BLM has recognized, the Elkhorns’ “expansive big game winter range on public land is unique.” Butte Proposed RMP/Final EIS 1048 (Sept. 26, 2008)(“RMP EIS”).

20. Specifically, the lower elevations of the Elkhorns provide critical winter range for mule deer, pronghorn, and elk.

21. The Elkhorn Mountains also provide habitat for mountain plover and for several species that have been designated as “sensitive” by BLM, including westslope cutthroat trout, golden eagle, northern goshawk, long-billed curlew, black-backed woodpecker, American three-toed woodpecker, and Brewer’s sparrow.

22. Almost seventy percent of the BLM-managed lands in the Elkhorn Mountains have been described as “core” area for migrating grizzly bears. RMP EIS at 248.

23. In addition, the Elkhorns provide an important corridor that links the Yellowstone Ecosystem, the Continental Divide, the Gravelly Mountains, the Tobacco Root Mountains, the Belt Mountains, and the Northern Continental Divide Ecosystem. This linkage area makes movement and genetic exchange possible between these areas possible for dispersed wildlife populations.

24. Such wildlife corridors “can be critical for territorial species such as mountain lion or grizzly bear.” RMP EIS at 247.

25. The Interagency Grizzly Bear Committee has accordingly recommended that roads and trails in linkage zones be managed to “facilitate target species movement and limit mortality risk, displacement, and disturbance.” RMP EIS at 247.

#### Management of the Elkhorn Mountains

26. Since 1992, BLM, the U.S. Forest Service, and the Montana Department of Fish, Wildlife and Parks (“MDFWP”) have worked cooperatively to manage the Elkhorns for the benefit of wildlife.

27. Seventy percent of the surface area in the Elkhorn mountains is publicly owned, with ownership divided between the U.S. Forest Service, the State of Montana, and the BLM.

28. Recognizing the wildlife values of the Elkhorn Mountains, the BLM, the Forest Service, and MDFWP entered into a Memorandum of Understanding in 1992 that established the Elkhorn Cooperative Management Area (“ECMA”). Memorandum of



Understanding (MOU) Elkhorns Cooperative Management Area: “An Agreement on Working Together” (updated 2000)(“ECMA MOU”).

29. The ECMA MOU has three purposes:

1. To manage the Elkhorns as an ecological unit across political boundaries for the purpose of sustaining ecological systems, including the full range of potential biological diversity and ecosystem processes.

2. To cooperatively manage the ECMA with consistent policies and standards for resource management.

3. To establish and maintain channels of intra- and interagency communication to enhance management consistency, commitment, and cost effectiveness.

ECMA MOU at 5.

30. One of the ECMA MOU’s goals is that “travel management emphasizes the protection of soil, water, vegetation, and wildlife.” EMCA MOU at 5. Accordingly, the EMCA MOU’s principles include, “Wildlife values are a strong consideration in evaluating all land use proposals . . .” ECMA MOU at 5.

31. The ECMA MOU Implementation Plan mandates, “Decisions on projects in the Elkhorns are coordinated among the agencies and with local governments. Routine administrative decisions will be routed through the Elkhorn Coordinator, through Implementation Group meetings or by direct contacts with unit managers or staff.” ECMA MOU at 10.

32. The ECMA MOU was revised in 2000, when the agencies again agreed, “Continued cooperation and coordination by all involved agencies, local governments, and the public are essential to successful management of the Elkhorns.” ECMA MOU at 4.

33. The unique system of collaborative management established by the ECMA MOU “has been nationally recognized as a model of collaborative management. The public expects that management across the ecosystem favors wildlife.” RMP EIS at 1048.

34. Consistent with the history of collaboration in managing this area, the BLM, the Helena National Forest, and the Deerlodge National Forest undertook yet another collaborative project and adopted a Travel Management Plan for the Elkhorns in 1995.

The Elkhorn Mountains Area of Critical Environmental Concern (ACEC)

35. The BLM lands in the Elkhorn mountains are managed by BLM’s Butte Field Office, a subdivision of BLM charged with managing 307,309 surface acres and a total of about 660,819 acres of federal subsurface mineral estate dispersed throughout eight counties in western Montana. *See also* 43 C.F.R. § 1601.0-5 (public lands managed by the BLM divided into units it calls “Field Offices.”)

36. BLM’s management of the Butte Field Office is governed by the Butte Resource Management Plan (“RMP”), which was adopted in 2009. Record of Decision/Approved RMP (April 17, 2009).

37. The RMP adopts the EMCA MOU and recognizes BLM’s obligation to comply with it when making decisions for or taking action in the ACEC: “Current direction outlined in the Memorandum of Understanding (MOU) signed by MFWP, USFS, and BLM will be followed within a modified boundary from the one described in the MOU.” RMP at 55.

38. The RMP further provides,

- “The Elkhorns will be managed as an ecological unit across political boundaries for the purpose of sustaining ecological systems, including the full range of potential biological diversity and ecosystem processes[.]”
- “BLM will continue to actively participate in partnerships[.]” and
- “BLM will continue to work with MFWP and the USFS to resolve issues in the Elkhorn Mountain Range.”

RMP at 55.

39. In regard to noxious weed management, the RMP likewise requires, “BLM will continue cooperative agreements with county and state entities. Management efforts will be coordinated with other federal, state, and county agencies, weed management areas, and private landowners and organizations.” RMP at 28.

40. At the time BLM adopted the Butte RMP, it knew of thirteen species of noxious weeds that had invaded the Butte Field Office and were spreading rapidly in much of the Field Office, particularly along roads and streams. BLM determined that vehicles and water were “primary carriers of weed seed.” RMP EIS at 237.

41. In order to address this problem, the Butte RMP mandates, “Monitoring will be conducted to determine if weed treatment strategies are effective at the project level and Planning Area- and Decision Area-wide.” RMP at 29.

42. Similarly, the RMP further requires, “BLM will continue to cooperate with MFWP and the Forest Service to sample and inventory those streams with native fish populations under BLM administration, and to monitor fish populations and distribution.” RMP at 37.

43. Recognizing the unique management structure and the value of the Elkhorn Mountains for wildlife, the Butte RMP designates the Elkhorn Mountains an “Area of Critical Environmental Concern” (“ACEC”). RMP at 54. The ACEC “encompasses the BLM-administered 3,575-acre Elkhorn Wilderness Study Area (WSA) on the west side of the Elkhorn Mountains; this WSA has not been studied for wilderness suitability.” RMP EIS at 1046.

44. The Elkhorn Mountains ACEC is adjacent to a 64,522 acre wilderness study area of the same name managed by the Forest Service. BLM RMP at 1046.

45. The Elkhorn Mountains ACEC is also near the Elkhorn Tack-on Wilderness Study Area, and adjacent to 64,522-acre Elkhorn Inventoried Roadless Area that is administered by the USFS.” RMP EIS at 309.

46. The Elkhorn ACEC contains 11.8 miles of fish bearing streams, including five miles with special status fish species. RMP EIS at 401.

47. The Butte RMP requires, “continued or additional (in the case of the Elkhorn ACEC) protection to fish and other aquatic organisms by maintaining or restoring riparian and in- stream habitats and by protecting or restoring habitat at the landscape scale (reducing road density or restoring upland vegetation).” RMP EIS at 405-406.

48. Motorized travel in the ACEC is limited to designated routes and the RMP prohibits the authorization of new roads for public access. RMP at 54.

49. The Golden Asset Mine Road (as approved in the ROW) is located in the Elkhorn Mountains ACEC. EA at 9.

The Troy Creek Drainage

50. Troy Creek runs through BLM Section 130 on the west side of the Elkhorn mountains in the Elkhorn Mountains ACEC. EA at 8.

51. Much of the Troy Creek drainage has suffered extensive forest mortality caused by pine beetles. EA at 8.

52. The area is also afflicted with invasions of non-native weeds, including spotted knapweed, thistle, and dalmatian toadflax. Such weeds are “aggressive invaders, especially of disturbed soils, and decrease habitat value for wildlife, reduce range productivity for livestock, and increase costs for other land management activities.” EA at 14.

53. Both unpatented mining claims and private ranches are interspersed with public lands in the Troy Creek drainage. EA at 16.

54. Troy Creek parallels Troy Creek Road, a primitive two track that is open seasonally from May 16 to December 1. Although Troy Creek Road itself is open to the public, it can only be accessed by crossing Aspen Valley Ranches, a private subdivision of 20 plus acre parcels.

55. Traffic on the road delivers sediment to Troy Creek, as well as two ephemeral reaches that “cross or are adjacent to the route on BLM land.” EA at 11.

56. The ongoing disturbance along the road from water damage provides a potential seedbed for noxious weeds to spread. EA at 14.

57. BLM has rated Troy Creek as “functioning, at risk.” EA at 44.

58. BLM predicts that both motorized and nonmotorized recreation in the area will increase in the coming years. Draft Environmental Assessment DOI-MT-BO2013-00230 EA: Golden Asset Mine Road Right-of-Way 20 (Sept. 30, 2013)(“Draft EA”). The growth in private development and increased demand for recreation makes the public lands of this area increasingly important for wildlife. EA at 17.

The Proposed Golden Asset Mine Road Right-of-Way

59. The Golconda Mining Company had operated a mine on a private inholding near Troy Creek. The mine site is completely surrounded by federal land. EA at 15.

60. The mine processed hard rock ore on-site, using heap leaching to extract precious metals. This process consisted of crushing ore extracted from the mine, heaping it on a leach pad, then irrigating it with a cyanide leach solution to dissolve the desired metals.

61. The mine was originally accessed from the north, through the Golconda Creek drainage on public land. In the 1980s, Golconda improved the Troy Creek Road and began using it to access the mine instead.

62. In the 1990s, a dam at the mine gave way, spilling arsenic and turning Golconda Creek brown. Montana’s Department of Environmental Quality (“MDEQ”) used the bond the mining company had posted to attempt to clean up the spill. The mine closed.

63. There are still piles of waste rock, tailings, and cyanide-laced materials at the mine site, as well as an open pit. In the EA for the ROW, BLM failed to review the current conditions and impacts from the Mine, as well as the reasonably foreseeable future impacts from Mine operation made possible by the granting of the ROW.

64. Since the mine closed, use of the Troy Creek road has been limited to “casual use” per the mandate of the 1995 Travel Management Plan. EA at 2. “Casual Use” in BLM’s FLPMA ROW regulations is defined as “activities ordinarily resulting in no or negligible disturbance of public lands, resources, or improvements. *Examples of casual use include:* Surveying, marking routes, and collecting data to use to prepare [ROW] grant applications.” 43 CFR § 2801.5 (emphasis in original). The use of the Troy Creek Road for access to, or hauling ore or other mine-related materials, does not fit the definition of “casual use.”

65. After nearly twenty years of light use, the Troy Creek Road is now a primitive two track with no gravel or turnouts.

66. The Golconda Mine was acquired by Smith, and renamed “the Golden Asset Mine.” Smith initially intended to salvage the leach pad ore material.

67. On January 15, 2014, Smith submitted a Small Miner Exclusion Statement (“SMES”) to MDEQ, announcing its intent to reopen the Golden Asset Mine. A SMES is an exclusion from obtaining an operating (full-scale mining) permit from MDEQ. Montana Code Annotated (MCA) §§ 82-4-301, et seq., ARM §§ 17.24.101, et seq.

68. Smith later represented to the media that the company was “trying to reduce environmental degradation caused by the historic tailings.” “BLM extends comment period for Golden Asset Mine proposal,” Helena Independent Record (Oct. 23, 2013). BLM’s EA did not analyze the “environmental degradation” at the Mine site.

69. MDEQ's approval of the SMES excuses Smith from obtaining a full scale mining permit for the Golden Asset Mine. Under this permitting scheme, MDEQ did not prepare an Environmental Impact Statement, or even an Environmental Assessment, under the Montana Environmental Policy Act ("MEPA"), Montana Code Annotated §§ 75-1-101 et seq.

70. Smith subsequently sought permission from BLM to transport leach pad material over the Troy Creek Road to the Golden Sunlight Mine in Whitehall, Montana.

71. BLM held a public meeting on August 13, 2013. The public voiced concerns about a variety of issues, including the potential to displace big game during hunting season and decreased enjoyment of the area. EA at 4.

72. At the meeting, BLM disclosed that hazardous waste spills at the old Golconda Mine had led to the mine's closure. BLM's EA did not analyze the current conditions resulting from the previous waste spills at the Mine site.

73. Also at the August 13 meeting, a representative of Smith indicated that the company intends to continue mining for longer than three years, depending on what the company discovers while mining.

74. BLM conducted one or more site visits to the road, but did not conduct a visit to the Mine site.

75. BLM did not consult with Jefferson County. *See* EA at 33 (BLM responding to public comment that asked, "Have you consulted with the county?").



76. In violation of the ECMA MOU (and the RMP), on information and belief, BLM did not consult with the Forest Service, MDFWP, the Elkhorn Coordinator, or the Implementation Group from the ECMA MOU.

77. Smith modified its request for the right-of-way. Rather than salvaging the tailings on site, Smith now proposes to mine additional ore and then transport it, unprocessed, to Jefferson City, Montana.

78. The proposed route would cross the public lands on the Troy Creek Road, pass through Aspen Valley Ranches on Oglivie Road, then go under Interstate 15 on Billy Gulch Road before reaching Jefferson City. The route would follow South Main Street in Jefferson City for 3.3 miles.

79. The 3.3 miles of South Main Street proposed for use by Smith is narrow, congested, and travels through a residential area along a school bus route. South Main Street receives minimal maintenance.

80. Where the proposed route crosses Jefferson Street, there is a blind corner that prevents drivers from seeing traffic approaching from over a hill.

81. BLM's EA did not analyze either the impacts from transporting the ore off of the public lands ROW or the impacts from processing the ore once it has reached its destination.

82. As part of the NEPA process, BLM prepared a draft Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI") and released these documents

for public comment in October 2013. The Draft EA considered two alternatives: “no action” and granting Smith the requested right-of-way.

83. Plaintiff, as well as certain of its members, submitted comments on the draft EA and FONSI. They reminded BLM of other activities that occur in the vicinity of the Troy Creek Road and urged BLM to consider these activities in its cumulative impacts analysis. *See* Comments of Alliance for the Wild Rockies on the Golden Asset Mine Road Right-of-Way at 7-8, 10-12, 19 (Oct. 14, 2013).

84. AWR also urged BLM to conduct comprehensive baseline testing, including comprehensive monitoring and surveys of fish habitat and watershed conditions. *Id.* at 3-4, 12.

85. In addition, AWR reminded BLM that it must comply with the requirements of Title V, Section 504, of FLPMA in considering Smith’s application for the right-of-way, including BLM’s obligation to impose conditions that will minimize damage to all federal lands that could potentially be impacted by the right-of-way, or from the Mine itself, as well as BLM’s duty to protect the public interest. *Id.* at 20-24.

86. BLM issued a final EA adopting the Proposed Action and FONSI in the summer of 2014. Environmental Assessment DOI-MT-BO2013-00230EA: Golden Asset Mine Road Right-of-Way (“EA”)(June 2014); Finding of No Significant Impact Golden Asset Mine Access Road Right-of-Way DOI-MT-BO70-2013-0023-EA (July 1, 2014)(“FONSI”). Appendix 1 of the EA is a summary of the comments BLM received and BLM’s responses to those comments.

87. The EA admits that the Mine is a connected, non-federal action, but does not examine the impacts of the mine itself, either individually or in combination with the development of the “number of” unpatented mining claims in the area that could foreseeably be developed in the future. EA at 16.

88. The EA states, “The Golden Asset Mine mining operation could be a connected non-Federal action.” FONSI at 3. Yet the EA did not analyze the impacts from the Mine as a connected action under NEPA, nor any of the Mine’s direct, indirect, or cumulative impacts. This downplays BLM’s original conclusion in the Draft EA that “The mining operation would be a connected non-Federal action. Since the non-federal action effects can be prevented by BLM decision-making, the effects are properly considered indirect effects of the BLM action.” Draft EA at 19.

89. The Final EA does not include baseline information for any of the environmental components of the Elkhorn Mountains or the Troy Creek drainage.

90. Although BLM states that DEQ took water samples, both at the Golden Asset Mine site and from nearby Golconda Creek, the EA does not disclose the results of this sampling. In response to a comment that asked about the sampling, BLM admitted, “BLM does not have the sample results or related assessments.” EA at 50.

91. The EA also does not contain any specific information about weed invasions, despite the fact that BLM’s own management plan requires, “Monitoring [to] be conducted to determine if weed treatment strategies are effective at the project level and Planning Area- and Decision Area-wide.” RMP at 29.

92. The EA further admits, “Wildlife survey specific to the project area have not been conducted,” and “There is no data on fish populations in [Troy] creek.” EA at 10-11.

93. Consequently, the EA lists the mammals, birds, amphibians, and reptiles that “are expected” or “could” occur in the project area, but does not identify which species are present, the health of their populations, or the quality of their habitat. EA at 11.

94. Likewise, the EA states that sensitive species such as the long-legged myotis, great grey owl, and three-toed woodpecker “may be” present near the right-of-way but again states that surveys have not been conducted. EA at 11-12.

95. When a commenter asked how past activities had impacted plant diversity in the area, BLM responded, “A study on the impacts of past actions on the diversity of plant species across the analysis area is outside the scope of the analysis needed for considering the impact of the proposed action.” EA at 27.

96. This lack of baseline information necessarily impairs BLM’s analysis of the ROW’s impacts, as well as BLM’s duties to protect the public interest and related environmental values under FLPMA, and eliminates AWR’s and the public’s ability to fully participate in the NEPA and FLPMA process.

97. The EA relies on “forest cover along the route” and “topography” to mitigate the displacement impacts of increased road use on elk, carnivores and songbirds, despite the lack of baseline information about vegetation conditions. The EA also admits, “The exact amount of displacement cannot be determined at this time[.]” *See* EA at 13.

98. The EA is also flawed because it does not analyze the effectiveness of the mitigation measures upon which its determination of insignificance is based, despite the fact that the Butte RMP directs, “The use of other BMPs should be analyzed on a case-by-case basis in NEPA documents associated with projects on the public lands.” RMP EIS at 957.

99. For instance, the Final EA asserts that “water quality” is “not present in the areas impacted by the proposed or alternative actions” based on the assumption that the road “improvements” in the proposed action would reduce sedimentation. EA at 10. The Final EA’s analysis of water quality further assumes that mines authorized under Montana’s SMES exception “do not affect creeks.” *Id.* Yet, the EA contains no baseline information on the quality, quantity, or other conditions of the waters, making it impossible to determine whether the “improvements” and sediment reduction will actually occur (and to what extent).

100. Likewise, the Final EA asserts that wetlands/riparian zones are “present, but not affected to a degree that detailed analysis is required” based on the assumption that the “Water drainage improvements” in the proposed action would reduce impacts to the creek. EA at 10.

101. The Final EA also relies on the “the proposed water drainage features” to assert that the weed-promoting disturbance incident to “reconstruction” to insignificance. EA at 14.

102. Likewise, the EA claims that reductions in sedimentation and erosion from the road modifications will render the cumulative impacts of the road insignificant. EA at 17.

103. Finally, the EA fails to consider the direct, indirect, and cumulative impacts of the ROW when combined with other uses and activities in the area. No quantified assessment of these impacts was prepared or analyzed.

104. For instance, over eighty percent of the Butte Field Office is managed for livestock grazing, RMP EIS at 249, but the EA does not disclose which grazing allotments are located in the Troy Creek drainage, the stocking rate of these allotments, their seasons of use, the impacts from grazing on recreation, wildlife, and related environmental values, or whether the conditions in these areas comply with the rangeland health standards.

105. Likewise, the EA fails to analyze the reasonably foreseeable exploration or development of the unpatented and patented mining claims (i.e., private lands) in this area.

106. In addition, the EA admits that further private development is reasonably foreseeable but makes no attempt to quantify how many areas could be developed, how much additional traffic this could create for the roads, or even identify the types of additional disturbance associated with the construction of subdivisions.

#### The Record of Decision and Right-of-Way Grant

107. On July 1, BLM issued a Right-of-Way Grant/Temporary Use Permit (“the ROW”) to Smith, along with a supporting EA and FONSI/DR.

108. The ROW authorizes Smith to “reconstruct, use, and maintain” the Troy Creek road from May 16 to December 1 for three years.

109. This period of use includes all of Montana’s hunting season in the area. The expiration date of the ROW is June 30, 2017, but Smith may apply to BLM to extend it.

110. The ROW states, “[T]he Holder agrees to pay the Bureau of Land Management fair market value rental as determined by the Authorizing Officer,” but does not specify a rental amount or indicate whether this rent and all applicable fees and costs have been paid as required by FLPMA and its implementing regulations.

111. The ROW contains fourteen generically-worded stipulations and nineteen “special stipulations.” The special stipulations provide that Smith may haul no more than twenty-five loads of unprocessed hardrock ore per week.

112. The ROW allows Smith to grade, add gravel, and install water bars and/or swales. Smith may grade and gravel existing “wide spots” to create turnouts along the road.

113. WHEREFORE, Plaintiff prays for relief as set forth below.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF:  
VIOLATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT

115. Plaintiff realleges and incorporates by reference the preceding paragraphs.

116. This First Claim for Relief challenges the Defendants’ violation of the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq., and NEPA’s implementing regulations in issuing the Golden Asset Mine ROW based on the defective and inadequate

EA and FONSI. This claim is brought pursuant to the judicial review provisions of the APA, 5 U.S.C. § 706.

117. Congress enacted the National Environmental Policy Act (“NEPA”) in 1969, directing all federal agencies to assess the environmental impacts of proposed actions that significantly affect the quality of the human environment. NEPA’s public disclosure goals are twofold: (1) to insure that the agency has carefully and fully contemplated the environmental effects of its action; and (2) to insure that the public has sufficient information to review (and challenge if necessary) the agency’s action.

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

119. Agency actions taken pursuant to NEPA are reviewable by this Court under the APA. 5 U.S.C. §§ 702, 704, 706.

120. NEPA requires all federal agencies to prepare a “detailed statement” assessing the environmental impacts of all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). This statement is known as an Environmental Impact Statement (“EIS”). A federal agency may initially prepare an EA to determine if an EIS is warranted. An EA must provide a convincing statement of reasons why an EIS should not be prepared. An EIS must be prepared if there may be significant environmental impacts. An inadequate EA renders a decision not to prepare an EIS (i.e., a FONSI) legally deficient under NEPA.



121. NEPA seeks to “promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.” 42 U.S.C. § 4321. To this end, NEPA’s implementing regulations require agencies to provide the decisionmaker and the public with adequate information, evidence, and analyses to fully assess the potential impacts of proposed actions. 40 C.F.R. § 1502.1. The scope of NEPA review is broad, including the disclosure and consideration of all reasonable alternatives, *Id.* § 1502.14(a), and direct, indirect and cumulative impacts on “ecological ... aesthetic, historical, cultural, economic, social, or health” interests. *Id.* § 1508.8. The NEPA documentation must provide the decision maker and the public with adequate information, evidence and analyses to fully assess the potential impacts of the proposed actions. *Id.* § 1502.1.

122. The federal agency must “[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated;” “[d]evote substantial treatment to each alternative considered in detail including the proposed action;” and “[i]nclude reasonable alternatives not within the jurisdiction of the lead agency.” *Id.* § 1502.14(a)-(c).

123. To satisfy NEPA’s “hard look” requirement, a federal agency must present the environmental impacts of the proposed action and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among the options by the decisionmaker and the public. *Id.* § 1502.14.

124. An adequate analysis of environmental impacts of a project must also include a consideration of the direct, indirect, and cumulative impacts of the project resulting from all past, present and reasonably foreseeable future actions. *Id.* §§ 1508.7, 1508.8, 1508.25(c). “Cumulative impact’ is the impact on the environment which results from the incremental impact of the present 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.” *Id.* § 1508.7.

125. NEPA also requires that the agency review all “connected actions.” According to NEPA, actions are connected if they: (1) automatically trigger other actions which may require environmental impact statements; (2) cannot or will not proceed unless other actions are taken previously or simultaneously; or (3) are interdependent parts of a larger action and depend on the larger action for their justification. 40 C.F.R. 1508.25(a)(1).

126. NEPA obligates agencies to make available to the public high quality information, including accurate scientific analyses, expert agency comments and public comments, “before decisions are made and before actions are taken.” *Id.* § 1500.1(b). Moreover, an agency’s discussion and analysis must be based on professional and scientific integrity. *Id.* § 1502.24.

127. NEPA requires that the agencies incorporate into their analyses “appropriate mitigation measures not already included in the proposed action or alternatives.” *Id.* § 1502.14(f). Pursuant to 40 C.F.R. § 1508.20(a)-(e), “mitigation” means methods to avoid,

minimize, rectify, or compensate for the impact of a potentially harmful action. Agencies must discuss mitigation measures with sufficient detail to ensure that environmental consequences have been fairly evaluated. NEPA also requires that the agencies fully analyze the effectiveness of each mitigation measure.

128. NEPA's implementing regulations require the agencies to "describe the environment of the area(s) to be affected or created by the alternatives under consideration." 40 C.F.R. § 1502.15. In analyzing the affected environment, agencies must establish the baseline condition of natural resources in the project area.

129. NEPA analysis must include consideration of connected nonfederal actions as well as the cumulative impacts of the proposed action when combined with other past, present, and reasonably foreseeable future actions. *See* 40 C.F.R. §§ 1508.7; 1508.25(a).

130. Defendants violated NEPA and its implementing regulations in multiple respects in issuing the Golden Asset Mine Road Right-of-Way based on the EA and FONSI/DR. These violations include, but are not limited to:

A. Failing to consider the conditions and effects of the connected action of the Golden Asset Mine;

B. Failing to consider the direct, indirect, and cumulative effects of the proposed action in association with past, present, and reasonably foreseeable future actions, including, but not limited to, the impacts of the Golden Asset Mine, transportation, storage, and processing of Mine ore/products off of public land, nearby mining activities,

livestock grazing, increased recreational use of the public lands, and private development;

C. Failing to collect or consider baseline information about the wildlife populations, stream and riparian conditions, land health, and other environmental components of the lands and waters potentially affected by the use of the ROW and the Mine, including nearby private, state, and federal lands.

D. Failing to analyze the effectiveness of the mitigation measures included in the ROW;

E. Otherwise failing to take the required “hard look” at the project under NEPA. In addition, the failure to comply with NEPA noted above in preparing the EA renders BLM’s decision not to prepare an EIS in the FONSI/DR in violation of NEPA.

131. Defendants’ failure to undertake lawful and proper environmental review as required by NEPA is arbitrary, capricious, an abuse of discretion, not in accordance with law, and has caused or threatens serious prejudice and injury to the rights and interests of Plaintiff and its members.

132. The BLM’s actions and omissions noted above regarding its approval of the ROW, including the EA and FONSI/DR, violate the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et. seq.* and its implementing regulations.

133. BLM’s actions and omissions noted above are arbitrary, capricious, an abuse of discretion, not in accordance with law, without observance of procedure required by law,

and in excess of statutory jurisdiction, authority, or limitations, within the meaning of the judicial review provisions of the APA, 5 U.S.C. §§ 701-706.

SECOND CLAIM FOR RELIEF:  
VIOLATION OF FEDERAL LAND POLICY AND MANAGEMENT ACT

134. Plaintiff realleges and incorporates by reference the preceding paragraphs.

135. This Second Claim for Relief challenges the Defendants' violation of FLPMA, 43 U.S.C. § 1701 et seq., and its implementing regulations concerning the issuance of rights-of-way across the public lands. This claim is brought pursuant to judicial review provisions of the APA, 5 U.S.C. § 706.

136. FLPMA requires that all rights-of-way across the public lands contain terms and conditions that will “minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment,” 43 U.S.C. §1765(a)(ii), as well as “protect the other lawful users of the lands adjacent to or traversed by such right-of-way;” “protect lives and property” and “otherwise protect the public interest in the lands traversed by the right-of-way or adjacent thereto.” 43 U.S.C. §1765(b).

137. Under FLPMA Title V, Section 504, the BLM may only grant a ROW if it “(4) will do no unnecessary damage to the environment.” 43 U.S.C. § 1764(a). Rights of way “shall be granted, issued or renewed ... consistent with ... any other applicable laws.” *Id.* § 1764(c). A right-of-way that “may have significant impacts on the environment” requires submission of a plan of construction, operation, and rehabilitation of the right-of-way. *Id.* § 1764(d). A Title V ROW “shall contain terms and conditions which will ...

(ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment.” *Id.* § 1765(a). In addition, the ROW can only be issued if activities resulting from the SUP/ROW:

(i) protect Federal property and economic interests; (ii) manage efficiently the lands which are subject to the right-of-way or adjacent thereto and protect the other lawful users of the lands adjacent to or traversed by such right-of-way; (iii) protect lives and property; (iv) protect the interests of individuals living in the general area traversed by the right-of-way who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes; (v) require location of the right-of-way along a route that will cause least damage to the environment, taking into consideration feasibility and other relevant factors; and (vi) otherwise protect the public interest in the lands traversed by the right-of-way or adjacent thereto.

FLPMA, § 1765(b). BLM regulations for FLPMA ROW’s are found at 43 CFR Part 2800. Under those regulations, BLM must deny an ROW application, among other reasons, if “The proposed use would not be in the public interest § 2804.26 (a)(2). BLM did not make the requisite findings that these requirements would be met.

138. At least two additional important substantive requirements flow from the FLPMA’s ROW provisions. First, BLM has a mandatory duty under Section 505(a) to impose conditions that “will minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment.” *Id.* §1765(a). The terms of this section do not limit “damage” specifically to the land within the ROW corridor. Rather, the repeated use of the expansive term “the environment” indicates that the overall effects of the ROW on cultural, environmental, scenic and aesthetic values must be evaluated and these resources protected.

139. In addition, the obligation to impose terms and conditions that “protect Federal property and economic interests” in Section 505(b) requires BLM to impose conditions that protect not only the land crossed by the right-of-way, but all federal land affected by the approval of the ROW.

140. Second, the requirements in Section 505(b) require a BLM determination as to what conditions are “necessary” to protect federal property and economic interests, as well as “otherwise protect[ing] the public interest in the lands traversed by the right-of-way or adjacent thereto.” This means that the agency can only approve the ROW if it “protects the public interest in lands” not only upon which the road would traverse, but also lands and resources adjacent to, associated with, and resulting from, the issuance of the ROW.

141. BLM failed to meet these requirements in this case, especially due to its admitted refusal to consider the environmental and other impacts caused by the Mine, as well as the transportation, storage, and processing of the ore off of public land.

142. Thus, in this case, BLM can only approve the ROW if all aspects of the Road, and the Golden Asset Mine itself, “protect the public interest.” The agency has made no showing that this is the case here. Indeed, BLM specifically stated that it did not analyze the current conditions at the Mine, nor the expected adverse environmental impacts from the Mine. BLM’s determination that the grant of the ROW complied with all FLPMA requirements, without preparing an adequate EA, including failing to analyze the impacts from Mine operation, as well as the transportation, storage, and processing of the ore

on/across non-public lands, is without the required evidentiary support in the record and is arbitrary and capricious.

143. Defendants' issuance of the Golden Asset Mine ROW violated 43 U.S.C. §§ 1761-1771 because the terms and conditions of the ROW will not protect the public interest, scenic and esthetic values, fish and wildlife habitat, property, lives, or other lawful uses of the public lands.

144. FLPMA also mandates: "The Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him under section 1712 of this title when they are available." 43 U.S.C. § 1732(a). FLPMA requires that all resource management decisions "shall conform to the approved [land use] plan." 43 C.F.R. § 1610.5-3(a).

145. Further, BLM "shall take appropriate measures . . . to make operations and activities under existing permits, contracts, cooperative agreements or other instruments for occupancy and use, conform to the approved [land use] plan . . . ." See 43 C.F.R. § 1610.5-3(b).

146. BLM's issuance of the ROW violates the requirements of the applicable Butte RMP in multiple respects including, but not limited to:

- A) Failing to coordinate its decision about the Golden Asset Mine Road ROW with the Forest Service, the MDFWP, or local government;
- B) Failing to consult with Jefferson County;



C) Failing to monitor the Troy Creek drainage to determine if weed treatment strategies are effective at the project level; and

D) Failing to cooperate with MFWP and the Forest Service to monitor fish populations and their distribution.

147. BLM's failure to comply with the provisions and requirements of the ECMA MOU and RMP violates FLPMA.

148. Defendants' issuance of the ROW in violation of FLPMA's substantive and procedural requirements is arbitrary, capricious, an abuse of discretion, not in accordance with law, and has caused or threatens serious prejudice and injury to the rights and interests of AWR and its members.

149. The BLM's actions and omissions noted above regarding its approval of the ROW, including the EA and FONSI/DR, violate FLPMA and its implementing regulations.

150. BLM's actions and omissions noted above are arbitrary, capricious, an abuse of discretion, not in accordance with law, without observance of procedure required by law, and in excess of statutory jurisdiction, authority, or limitations, within the meaning of the judicial review provisions of the APA, 5 U.S.C. §§ 701-706.

#### PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court grant the following relief:

- 1) Order, adjudge and declare that the Defendants violated the National Environmental Policy Act;
- 2) Order, adjudge and declare that the Defendants violated the Federal Land Policy and Management Act;
- 3) Set aside and vacate the Golden Asset Mine Road ROW approval/issuance, EA, FONSI, and DR;
- 4) Issue such temporary, preliminary, and/or permanent injunctive relief as may be requested by Plaintiff;
- 5) Award Plaintiff its reasonable attorney fees, costs, and litigation expenses, under the Equal Access to Justice Act, and/or any other applicable provision of law; and
- 6) Grant such further and additional relief as the Court deems just and proper in order to remedy the violations of law alleged herein and to protect the interests of the Plaintiff, the public, and the environment.

Dated: August 5, 2014

Respectfully submitted,  
/s/ Timothy M. Bechtold  
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