

March 13, 2015

Sent via email

To: Objection Reviewing Officer
Intermountain Region, US Forest Service
324 25th Street
Ogden, Utah 84401
objections-intermtn-regional-office@fs.fed.us

RE: OBJECTION to the
Golden Hand No. 1 and No. 2 Lode Mining Claims Project
Final EIS (FEIS) and Draft Record of Decision (DROD)
Responsible Official: Keith Lannom, Forest Supervisor
Payette National Forest (Krassel Ranger District)

I. INTRODUCTION

Pursuant to 36 CFR Part 218, the **Idaho Conservation League (ICL), The Wilderness Society (TWS), Earthworks, Friends of the Clearwater (FOC), and Wilderness Watch (WW)** (collectively Objectors), by their undersigned attorneys, file this Objection to the Final EIS (dated December 2014) and Preliminary/Draft Record of Decision (DROD) issued by Forest Supervisor Keith Lannom for the Golden Hand No. 1 and No. 2 Lode Mining Claims Project, proposed by American Independence Mines and Minerals Company (AIMMCO). *See* January 22, 2015 Dear Reviewer letter from Supervisor Lannom. The FEIS and DROD are contained in the USFS webpage at:

http://www.fs.usda.gov/wps/portal/fsinternet!/ut/p/c5/04_SB8K8xLLM9MSSzPy8xBz9CP0os3gDfxMDT8MwRydLA1cj72BTUwMTAwgAykeaxRtBeY4WBv4eHmF-YT4GMHkidBvgAI6EdIeDXIvdrAJuM3388jPTdUvyA2NMMgyUQQAYrgQmg!/?dl3/d3/L2dJQSEvUUt3QS9ZQnZ3LzZfS000MjZOMDcxT1RVODBJN0o2MTJQRDMwODQ!/?project=27442

Pursuant to Part 218, ICL is the lead objector. Contact person: John Robison, ICL Public Lands Director, PO Box 844, Boise, ID 83701, 208.345.6933; Street Address: 710 N 6th St., Boise, ID 83702. However, all Objectors are represented by their undersigned counsel and all U.S. Forest Service (USFS) correspondence regarding this Objection should be directed to the attorneys, Mr. Roger Flynn and Mr. Bryan Hurlbutt, at the address and contact information listed in the signature block at the conclusion.

All of the Objectors filed comments on the Draft EIS and proposed USFS actions on or about September 15 and 17, 2012, and have fully participated in the USFS review of the Project. ICL, TWS, and Earthworks submitted one set of comments on or about September 17, 2012 and FOC and WW submitted another set on or about September 15, 2012. Pursuant to 36 CFR 218.8, the parties state that the following content of this Objection demonstrates the connections between the September 15 and 17, 2012, comments (“previous comments”) for all issues raised herein, unless the issue or statement in the FEIS or DROD arose or was made after the opportunity for comment

on the Draft EIS closed, as detailed herein. Pursuant to 36 CFR 218.8(b), the previous comments submitted by the Objectors, dated September 15 and 17, 2012 (and reprinted in the FEIS Vol. II at 31–38, 40–83) are hereby incorporated by reference, with the applicable section and content as shown in the FEIS reprint.

II. THE PROPOSED PROJECT WOULD VIOLATE NUMEROUS FEDERAL LAWS AND CANNOT BE APPROVED AS PROPOSED IN THE DRAFT ROD and FEIS.

As detailed herein, and as noted in the previous comments, the Project would violate numerous federal public lands, environmental, wildlife, and related laws, regulations, and policies. As such, the USFS cannot approve the proposed Project or Plan of Operations (PoO), as amended by any of the action alternatives. These laws (with their implementing regulations and policies) include, but are not limited to: the Wilderness Act, the National Environmental Policy Act (NEPA), Forest Service Organic Act of 1897 (Organic Act), the 1872 Mining Law and related federal mining laws, the National Forest Management Act (NFMA), the Endangered Species Act (ESA), the Clean Water Act (CWA), and the Clean Air Act (CAA).

The remedy for these violations is for the USFS to not issue any Final ROD that would authorize approval of any PoO (i.e., the USFS must deny/reject any such PoO) for any action alternative reviewed in the FEIS that does not fully comply with each and every law, regulation, and policy noted herein. The Forest Supervisor must remand the FEIS and DROD back to the Payette National Forest with instructions to correct all errors noted herein before the USFS can consider approving any operations at the site.

The following additional Objection issues were raised in the previous comments and are discussed here in no particular order of importance. As such, pursuant to the Administrative Procedure Act, 5 U.S.C. §553-706, and USFS requirements, the Regional Forester’s Office must provide a detailed response to each of the issues/objections raised in this Objection.

III. SPECIFIC OBJECTION ISSUES

The Golden Hand Project Violates the Wilderness Act, the Forest Plan, and NEPA

As stated in the previous comments (FEIS Vol. II at 31–38, 40–83), AIMMCO proposes to conduct extensive operations in the Wilderness Area above and beyond what is allowed under the Wilderness Act, applicable Forest Service regulations, and the Forest Plan, including the minimal tool analysis. These include expanding the scope of AIMMCO’s confirmation activities beyond what they first proposed in 1987, using extensive motorized access, and expanding minimal tools to include chainsaws, dump trucks, flatbed trucks, pickup trucks, ATV/UTV, bulldozer, skid mounted core drill, and forklift.

Forest Service regulations state that: “Operations shall be conducted so as to protect National Forest surface resources in accordance with the general purposes of maintaining the National Wilderness Preservation System unimpaired for future use and enjoyment as wilderness and to preserve its wilderness character, consistent with the use of the land for mineral location, exploration,

development, drilling and production . . . including, **where essential**, the use of mechanized transport, aircraft or motorized equipment.” 36 CFR § 228.15(b)(emphasis added).

The regulations therefore require that the Forest Service prove that **all** aspects of any proposed project are “essential.” Much of the motorized transport and mechanized construction and minerals confirmation activities proposed by AIMMCO are not essential.

The leading mining and Wilderness case has interpreted 36 CFR § 228.15 to prohibit motorized access to a mine site in a wilderness area because it was not essential. In Clouser v. Espy, the Siskiyou National Forest approved a plan of operations for a mining claim subject to conditions, one of which was that the miners could only use non-motorized means of access to the claims. Clouser v. Espy, 42 F.3d 1522 (9th Cir. 1994), cert. denied sub nom. Clouser v. Glickman, 515 U.S. 1141 (1995). The Forest had determined, based on the fact that the agency’s mineral examiner had ridden a pack horse into the site, that “motorized access was not ‘essential’ to the mining operation under 36 C.F.R. § 228.15(b).” Id. at 1537. The Ninth Circuit upheld the Forest Service’s strict conditions, expressly recognizing that the agency’s requirements can result in the claims becoming invalid due to increased costs. “Although Forest Service decisions regarding access may indeed affect whether a claim is found to be ‘valid,’ that fact in no way alters 16 U.S.C. § 1134(b)’s unequivocal delegation of authority to the Secretary of Agriculture.” Clouser, 42 F.3d at 1529. “Virtually all forms of Forest Service regulation of mining claims – for instance, limiting the permissible methods of mining and prospecting in order to reduce incidental environmental damage – will result in increased operating costs, and thereby will affect claim validity.” Clouser, 42 F.3d at 1530.

In addition, and as required by agency directives, “where there are alternatives among management decisions, wilderness values shall dominate over all other considerations except where limited by the Wilderness Act, subsequent legislation, or regulations.” Forest Service Manual Chapter 2320.3, p. 8. In this case, there is clearly an alternative of disturbance only within the already-delineated bounds of the known deposits. Thus, even if this Deposit is still valuable (which the evidence does not support that it is), any proposed disturbance to the Wilderness outside the known Deposits cannot be authorized.

Similarly, the Forest Plan for the Payette National Forest includes binding standards which limit reasonable access to access for “essential” use for “valid” mining operations and which prohibit motorized access unless it is “proven essential.” The Land and Resource Management Plan for the Payette National Forest (July 2013) (“Forest Plan”) incorporates the Wilderness Management Plan for the Frank Church River of No Return Wilderness as the guiding plan for Management Area 14 of the Payette National Forest, which includes the Wilderness area and Golden Hand site. Forest Plan at III-274. The Wilderness Management Plan includes Standard XIII.E.1, which provides: “Reasonable access is allowed to valid mineral claims established before December 31, 1983. Such access is only for essential and exclusive use for the valid mining operations.” FC-RONR Wilderness Management Plan (May 22, 2009), p. 2-43. The Wilderness Management Plan also includes Standard XIII.E.2, which provides: “Reasonable access will be located to have the least lasting impact in wilderness values. To accomplish this, the use of motorized access by ground or air to claims shall be authorized only when proven essential. Road, trail, bridge, or aircraft landing

area construction or improvements is limited to those clearly identified as essential to the operation.” *Id.*

Many of the aspects of the proposed action for the Golden Hand POO are not reasonable or essential. Only those confirmation activities located within the boundaries of the “known” deposits can be considered “essential” and “reasonable.” Additional confirmation activities proposed by AIMMCO extending beyond the known deposits are not essential, and are prohibited by the Wilderness Act, including access and other activities related to the proposed confirmation work. Many of AIMMCO’s confirmation activities, however, extend beyond the boundaries of known deposits, and are therefore not essential or for valid confirmation activity. Notably, it does not appear that the Forest Service even evaluated whether each of AIMMCO’s proposed confirmation activities is essential or necessary to confirmation.

AIMMCO first proposed confirmation activities for Claims 1 and 2 in its 1987 Assessment Work Request. According to AIMMCO: “The stated purpose of the 1987 Assessment Work Request was to confirm and corroborate the mineral bearing xenolith on the ‘Glory Hole’ (Claims 2, 3, and 4) and to remove caved material from the Ella Portal in Claim 1.” Statement of Undisputed Facts, American Independence Mines & Minerals Co. v. Lyng, Case No. 1:00-cv-00291-BLW (D. Idaho Apr. 22, 2002), Dkt. 48, ¶ 35.¹ Now, AIMMCO’s proposed confirmation activities are substantially more extensive, particularly on Claim 1. On Claim 1, the company previously proposed only to reopen the Ella Adit for sampling using hand tools. Now on Claim 1, AIMMCO proposes reopening the Adit using an excavator and would also construct around 7 drill pads to drill core holes and would excavate pits to collect rock chips throughout the claim. AIMMCO would also construct an off-claim drill pad (on Claim 3) to confirm the minerals on Claim 1. On Claim 2, AIMMCO previously sought to conduct drilling and trenching targeting the Glory Hole found in or near the southern portion of Claim 2. But now, AIMMCO proposes trenching and around three drill pads on the northern portion of Claim 2, which does not appear to relate to the Glory Hole work previously proposed. None of these new or expanded activities that differ from what was proposed in 1987 by AIMMCO are valid or essential. And it is not clear which if any of the confirmation activities proposed in 1987 are truly valid and essential. But the Forest Service simply assumed all confirmation activities proposed by AIMMCO were valid and essential activities.

Additionally, even if AIMMCO’s confirmation activities are allowed, the amount of road work, motorized transport, use of drill rigs and bulldozers, and other activities proposed by AIMMCO has not been “proven essential.” For example, the Forest Service admits that shift changes, cores sample transport, and miscellaneous supplies/overhead transport could occur without using motorized vehicles. *See FEIS* at 2-3–2-4.

Not only is the Forest Service required to limit the use of motorized equipment in Wilderness to that which is proven to be essential for exercising valid rights. The Forest Service is also required under the Wilderness Act to preserve wilderness character. And the requirement in the Wilderness Act to establish “reasonable stipulations” to protect wilderness character applies to mineral leases and licenses. However, the FEIS and DROD do not meet the requirements of the Wilderness Act to protect wilderness character.

¹ The Statement of Undisputed Facts is attached as Exhibit H to these Objections. Exhibits A through J attached to these Objections include relevant documents from the American Independence Mines case.

The FEIS identifies three issues of unresolved conflict in the Proposed Action, starting with an acknowledgment that: “Activities associated with the Proposed Action could result in a degradation of wilderness character.” FEIS 1-16. By any reading of the Wilderness Act of 1964 and the Central Idaho Wilderness Act, the proposed action *would* result in a degradation of wilderness character.

The Preferred Alternative C makes a set of modifications to the proposed action, primarily moving camp operations, fuel storage, and mineral drill sample storage out of the wilderness boundary, and reducing the annual motorized trips into the wilderness by about 25 percent, from 771 to 571. Moving fuel and mineral storage off site outside the wilderness and the proposed placement of the workers camp off site are welcome recognition that such activities inside wilderness would violate the prohibition on structures or installations inside wilderness. Storage and living structures and installations are all prohibited in wilderness.

However, the limitation on travel times and trip numbers does not appear to be based on any use of the Minimum Requirements Analysis, including a “minimum tool” analysis, or another analysis designed to protect wilderness character or to limit activity to that which is essential. The Minimum Decision Guide is Forest Service policy to determine the minimum of intrusion for non-conforming but “special provisions” allowed in the Wilderness Act. While the Project Record includes an MRDG, it appears from the record that the MRDG was merely an after-the-fact paperwork exercise aimed at bolstering the record and was not used by the Forest Service to develop alternatives or to otherwise inform the agency’s decision-making process. Thus, the decision to only restrict about 25 percent of the maximum trips outlined by the operator appears to be arbitrary.

Similarly, the Forest Service’s decision to allow other activities that will degrade wilderness character (activities in addition to the motorized trips to and from the Wilderness) is arbitrary and capricious. These activities include an undisclosed number of vehicle trips wholly within the Wilderness as well as the use of drill rigs, bulldozers, and other mechanized equipment to perform drilling and trenching, road work, and other activities in the Wilderness. These activities also include the surface disturbing activities proposed by AIMMCO, including drilling, trenching, and road work. Both action alternatives (Alternative B and C) allow all of these activities to occur as proposed by AIMMCO. Because the Forest Service did not meaningfully use the MRDG or consider additional alternatives in the FEIS, the Forest Service failed to engage in reasoned decisionmaking and failed to ensure wilderness degrading activities would be kept to a minimum.

Notably, as the FEIS states at 2-32 to 2-33, the differences between Alternatives B and C do not alter the four concerns associated with degraded wilderness character. “The effects of this alternative are essentially the same as for Alternative B, in terms of effects on **wilderness character** and the four qualities associated with the character. There is really no pragmatic or substantially identifiable difference.” FEIS 3-21 to 22. Thus, the Forest Service recognized the modifications in Alternative C do not change the degradation of wilderness character from the proposed action, but the FEIS/DROD do not propose any significant measures to lessen degradation.

The Forest Service is supposed to develop a range of alternatives to address major issues. 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.” 42 U.S.C. § 4332(E); 40 CFR § 1508.9(b). It must “rigorously explore and objectively evaluate all reasonable alternatives” to the proposed action. City of Tenakee Springs v. Clough, 915 F.2d 1308, 1310 (9th Cir. 1990). Indeed, NEPA’s implementing regulations recognize that the consideration of alternatives is “the heart of the environmental impact statement.” 40 CFR 1502.14, *quoted in Alaska Wilderness Recreation and Tourism Ass’n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995).

In this case, the agency failed to meet this requirement because both action alternatives have almost identical impacts to wilderness. Minimization of wilderness impacts is a key issue that should have driven multiple alternatives. The Forest Service dismissed other alternatives (helicopter, winter, pack animals, etc.) that could have involved less disturbance to wilderness values. The Forest Service never considered AIMMCO’s 1987 Assessment Work Request as an alternative, which would involve substantially less confirmation activity and impacts to wilderness than Alternatives A and B. Nor did the Forest Service consider an alternative involving less activity than AIMMCO’s 1987 proposal, which is what Judge Winmill instructed (as discussed below). The Forest Service has not developed a mitigation program to help address wilderness issues, which could have been part of an action alternative. For example, are there any other non-compatible wilderness uses in the larger area that could be phased out or ended as part of an alternative?

As the FEIS describes in Section 2.3.2, consideration of non-mechanical access by foot and pack stock was dropped because mining in other wildernesses stipulated use of pack or foot access when it was more limited in scope. The travel for mine workers between the proposed mine exploration site at Coin Creek and the mine camp outside the wilderness on a daily or otherwise regular basis does not appear to have been considered for foot or pack access. While an argument can be made for staging drilling equipment and other mining equipment with motorized access, there appears to be no analysis of mine workers walking for about 1.5 hours or riding stock for about an hour to and from the exploration site four miles inside the wilderness, as miners have always done in remote areas. Walking or riding stock would limit daily or regular motorized travel trips, sometimes twice a day, and provide some additional degree of protection for wilderness character. Each year of operations could stage equipment at the beginning of the season and remove equipment not being wintered over, and then during the operating season miners should walk or ride stock into the work site. Carrying lunch does not require motorized transport. Adjustments to the transport schedule could analyze for ongoing equipment needs, such as fuel or repairs, with human transport accomplished on foot or on stock.

Other considerations of equipment modifications should also be considered to reduce impacts to wilderness character, such as quieter electric vehicles, equipment and tools (as opposed to diesel powered).

The description of authorized administrative uses of motorized or mechanical equipment in the FC-RNR Wilderness in FEIS Sections 3.3.2 and .3 neglects to mention most, if not all, of those authorizations were for fire control and fire management, which should be identified as emergency actions. The implication in the FEIS is the administrative actions are comparable to the proposed motorized mining operation, when the mining operation serves no emergency needs or management needs and the operation is concentrated in a relatively small area, 291 acres, compared to the vast

2.3 million acre wilderness. The mine operation is proposed to at least quadruple the amount of motorized intrusions into the wilderness on an annual basis, with a comparable cumulative effects on wilderness character – all in a 291-acre area compared to the 2.3 million acre wilderness. Any comparison of the mine motorized intrusions to emergency administrative actions for fire management are absurd and irrelevant, as well out-sized and out-classed by the proposed motorized mine activities. This illogical comparison is a further indication the FEIS does not adequately address the degradation of wilderness character as a critical concern.

The FEIS rightly determines both Alternatives B and C would cause irretrievable losses to the wilderness character, untrammelled conditions and to the wilderness experience during and after the proposed period of operation, 3-116. What the FEIS/DROD do not do is to suggest any measures to avoid these irretrievable losses. The FEIS confirms both Alternative B and C would set up the project area as sacrifice zone for wilderness character and wilderness experience.

The agency's response to these issues in the FEIS and DROD is inadequate. For example, the FEIS largely repeats the statement that: "This is indeed the crux of the FS management dilemma – respecting the claimant's legal rights for purposes of legitimate mineral development while protecting the Wilderness environment." FEIS Vol. II at 44. No substantive response is given that meets the agency's duty to "protect the Wilderness environment." Faced with this "management dilemma", the Forest Service should have scrutinized AIMMCO's proposal and should have carefully followed relevant laws, regulation, and guidance which direct the Forest Service to impose reasonable limits and restrictions. But instead, the Forest Service simply approved AIMMCO's proposal with only a few minor modifications.

The Frank Church-River of No Return Wilderness Management Plan includes Guideline XIII.E.6, which is particularly relevant to these issues. Guideline XIII.E.6 instructs the Forest Service to:

Use Forest Service Mineral Examiners to assess the proposed mineral development in determining: []

- a. Status of the asserted rights of the claimant
- b. That proposed methods of development are needed and reasonable and that the proposed operation is the next logical step in the orderly development of the mineral resources
- c. Which alternative methods are possible and reasonable to minimize or mitigate impacts on surface resources

FC-RONR Wilderness Management Plan, p. 2-44. There is no evidence in the Project Record that the Forest Service followed this Guideline. The Forest Service should use this process to identify what, if any, valid rights AIMMCO might have to conduct confirmation activities, and to ensure that confirmation activities are limited to only those needed and reasonable. The Forest Service should also use this process to develop alternative methods to minimize and mitigate impacts.

Economic Analysis

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), the FEIS does not contain an economic analysis of potential costs/benefits from the proposed mine exploration and the potential

economic losses from displacement of wilderness visitors, degraded wilderness experience, and degraded wildlife and fish habitats. The historic value of mine production may be estimated at its high for gold extraction, which appears to be about \$48,000 from 1932-34 when gold was \$35 per ounce. FEIS Appendix A-2. At today's hugely expanded value of gold, more than \$1,160 an ounce, the historic value of past extracted gold at today's prices would exceed \$2.3 million. At the same time, the value of outdoor recreation activities has also increased dramatically. A 2008 study of tourism in Idaho found that tourism generated over \$350 million. According to the Outdoor Industry Association, active outdoor recreation in Idaho generated \$2.2 billion in retail sales and services across Idaho. The Frank Church River of No Return Wilderness attracted 39,000 visitors in 2010. The Forest Service should assess the economic contribution of recreation in the Big Creek/Pueblo Summit area and see how it may be affected. Before any exploration moves forward with irretrievable degradation of wilderness character, great risk to fish and wildlife habitat and unknown future reclamation costs, it is critical that the Forest Service supplement the DEIS to assess the potential economic cost/benefits.

In response, the FEIS merely states that: "11.28 – The project proponents are exercising valid existing rights under the terms of a court decision. Although economics cannot directly influence the Forest Service decision, they are discussed in Section 1.5." FEIS Vol. II at 46. Yet no economic analysis is provided in Section 1.5. In addition, the statement that "The project proponents are exercising valid existing rights," is incorrect as such a determination on the claims has not been made.

The Proposed Plan of Operations Exceeds the Work Allowed by the District Court Decision

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), and as discussed above and herein, the Forest Service is extremely limited as to what it may approve in the Wilderness Area. At most, the agency may only authorize activities that were specifically allowed by Judge Winmill in his August 9, 2002 Memorandum Decision (Civ. No. 00-291-S-BLW).² In that Decision, the court instructed the Forest Service to allow AIMMCO to perform some limited work on Claims 1 & 2 to "corroborate preexisting exposures of a valuable mineral deposit." Decision at 8. As the court noted, in order for AIMMCO to have the right to do anything on its claims, the company must show, prior to the December 1, 1983 Wilderness Act deadline, "the exposure of a valuable mineral on the claim. An exposure is a physical discovery of mineral within the claim boundaries." Decision at 7.

Then, the court described AIMMCO's 1987 Work Assessment Request as follows: "On Claim 1, AIMMCO proposed to use hand labor to clear the entry to the Ella Portal. On claim 2, AIMMCO proposed mapping, sampling, trenching, and drilling to confirm the existence of mineral-bearing xenolith." Decision at 3. And Judge Winmill ruled: "[B]oth sides must give way. AIMMCO must reduce the scope of its surface disturbing proposals, focus only on work that is necessary to support validity, and propose mitigation and protective measures." Decision at 11.

² The Decision is attached as Exhibit I to these Objections.

Yet now, instead of reducing the scope of its proposal, AIMMCO seeks to significantly expand the scope of its proposal for Claim 1 and is targeting an entirely different area on Claim 2. Furthermore, proposing constructing 11 drill pads with 13-18 holes each and drilling down to 500 to 800 feet in depth is far beyond what was historically available and accessible to miners. Previous exploration was limited to surface sampling and some basic underground sampling accessed through hand work at the Ella Portal. The areas targeted for sampling here were not previously exposed and could not have been discovered. There is simply no way to corroborate and confirm a finding that was no previously exposed and discovered.

The FEIS fails to respond to these issues, merely stating that: “11.29 – The August 9 Memorandum Decision (Civ. No. 00-291-S-BLW) did not establish clearly what work was to be done on the Golden Hand No’s. 1 & 2 lode mining claims. The implication was that the Forest Service had denied AIMMCO the opportunity to conduct assessment work, including drilling. EIS @ 1.5.” FEIS Vol. II at 47. But Judge Winmill’s decision clearly expected the Forest Service to approve a plan that is a reduced version of AIMMCO’s 1987 Assessment Work Request. Therefore, the Forest Service should have started with that 1987 plan and then worked with AIMMCO to scale it back as instructed by the court.

The Forest Service recognized this when it received AIMMCO’s expanded Plan of Operations, first submitted in 2007. In a letter in the Project Record from District Ranger Joe Harper to Conway Ivy, dated January 27, 2009, District Ranger Harper provided at page 2:

We agree that Judge Winmill did not order that a specific work plan be followed. However, the only work plan before the court and before the Forest Service that had been proposed to “confirm and corroborate pre-existing exposures of a valuable mineral deposit” was the 1987 assessment work request submitted in a letter from your counsel, David Lombardi. Mr. Lombardi made it clear that the work proposed in that letter, if permitted prior to the mineral examination, would have satisfied the company’s needs for information that would verify the discovery of a valuable mineral deposit. Given that assertion, the only point in my last two letters is that the 1987 request is the logical starting point for discussions. . . .

I too look forward to continuing this process and working together to develop an operating plan that satisfies AIMMCO’s needs, is consistent with Judge Winmill’s ruling, and minimizes adverse impacts to the protected wilderness area. . . .

Nevertheless, the Forest Service now proposes to approve a substantially different, and much more extensive and intrusive plan, and the Forest Service never evaluated whether this new plan comports with Judge Winmill’s decision.

Work on Claim 1 Must Be Limited to Re-Opening the Ella Portal and Examining Samples

AIMMCO’s PoO proposes work on Claim 1 far beyond what the court allowed to “corroborate preexisting exposures of a valuable mineral deposit” on that claim. On Claim 1, AIMMCO proposes to conduct significant drilling, excavating and bulk sampling work away from the Ella Portal, as well as work to re-open the Portal and conduct sampling inside the tunnel. However,

AIMMCO's 1987 assessment work proposal, which the court required the USFS to re-consider, only proposed to "use hand labor to clear the entry to the Ella Portal." Decision at 3.

As held by the court, the USFS and the IBLA, in the claim validity contest, improperly failed to consider the existing evidence of exposed mineral inside the tunnel. The court thus ruled that AIMMCO has a right to gather this evidence of exposure within the tunnel. The court stated that, in order to have a valid claim, "AIMMCO must show that there was exposure in the Ella Portal sometime prior to December 31, 1983. Evidence of Bell's 40 samples, taken in 1935 from within the Ella Portal tunnel, are certainly relevant to that showing." Decision at 8.

However, in the proposed PoO, AIMMCO requests authorization to search for the requisite "exposure" away from the Ella Portal tunnel – via its drilling and trenching operations. Under the Wilderness Act, and the court's Decision, however, such exposure must have been made by the end of 1983. "A claimant must show that there was exposure prior to that date." Decision at 8. In other words, it is now too late for AIMMCO to attempt to find new exposures of mineral deposits outside of the existing Ella Portal tunnel. Mineral deposits 500-800 feet deep certainly were not exposed during that period of exploration.

As noted above, under the Mining Law and the Wilderness Act, AIMMCO must have discovered the valuable mineral deposit before the Withdrawal took effect. Although, as held by Judge Winmill, AIMMCO is allowed to "corroborate preexisting exposures of a valuable mineral deposit," such work cannot be a fishing expedition to search for new exposures. Other courts have allowed claimants to re-open old tunnels to allow for this corroboration. "For example, if the claimant had driven an adit which exposed valuable mineral prior to withdrawal, the claimant should be allowed to reopen a caved portion of the adit to take samples of the mineral he had previously exposed." U.S. V. Mavros, 122 IBLA 297, 310 (1992). However, "A discovery must be judged by what has been exposed on a mining claim at the time of withdrawal, and a claimant is not entitled to go onto a claim thereafter for the purpose of exposing new veins of lodes." U.S. v. Parker, 82 IBLA 344, 384 (1984).

Thus, a claimant is not allowed to drill or otherwise search for the valuable mineral deposit far removed from the initial exposure (and certainly not 500-800 feet below the surface). "There is no evidence that the core drilling proposed by appellants would have been anything more than an effort to uncover a valuable mineral deposit." U.S. v. Crowley, 124 IBLA 374, 378 (1992). A claimant in a withdrawn area cannot conduct further work "on what appears to be a promising structure in hopes of finding valuable mineral, as that activity would be considered further exploration to disclose a deposit not exposed prior to withdrawal. See U.S. v. Parker, 91 I.D. at 294; U.S. v. Niece, 77 IBLA 205, 207-08, n. 3; U.S. v. Chappell, 72 IBLA 88, 94 (1983) (precluded from engaging in exploratory drilling after withdrawal)." U.S. V. Mavros, 122 IBLA 297, 311 (1992).

In this case, outside of its proposal to reopen the Ella Portal tunnel for sampling, AIMMCO is essentially asking for permission to conduct exploration operations in an attempt to locate additional mineral deposit(s). As Figure 2-1 of the FEIS shows, AIMMCO's trenching and drilling operations would be far away from the Ella Portal – with no reasonable connection to the existing alleged exposure within the tunnel. AIMMCO's proposal, thus, fails to reduce the scale of surface disturbing activities as ordered by Judge Winmill. In fact, it substantially increases the scale on

Claim 1, and even into Claim 3 where the off-claim drill pad would be located. And nowhere does the FEIS or DROD show that the Forest Service has evaluated whether the proposal comports with Judge Winmill's directive that AIMMCO limit its original proposal to focus on only the work needed for the validity examination.

Thus, the Forest Service cannot authorize any of the activities on Claim 1 except for those needed to "corroborate preexisting exposures of a valuable mineral deposit" within the Ella Portal tunnel. Because the drilling, trenching, and excavating away from the tunnel are aimed at exposing new mineral deposits, any approval would violate the Wilderness Act, federal mining laws, and Judge Winmill's Decision.

The agency's response is again inadequate: "11.31 – In 1987 both the Forest Service and AIMMCO believed the Ella (Hand) adit to be on Claim No. 6. We now know it is on Claim No. 1. There was no map submitted with the 1987 plan so the location of the drill holes was not specified." FEIS Vol. II at 47. This response ignores the information that is available in the 1987 Assessment Work Request and other documents regarding AIMMCO's plans in 1987.³

Regarding the overarching legal issues, the FEIS merely states that: "11.32 – We acknowledge your comments, but the purpose of this EIS is not to evaluate legal issues. The Forest Service has been directed by the Court to work with AIMMCO to allow them the opportunity to complete assessment work and prepare for a new validity exam. Section 1.5." FEIS Vol. II at 48. The DROD also does not answer these questions. The USFS cannot simply abdicate its responsibility to address these issues.

AIMMCO Must Reduce the Scope of Its Proposed Work on Claim 2

On Claim 2, AIMMCO proposes an extensive series of drilling, trenching, and excavation operations. However, it is unclear whether these operations are the same as proposed by AIMMCO in its 1987 assessment work proposal. As the court's Decision points out, AIMMCO's basic challenge to the Forest Service's actions regarding Claim 2 was to the agency's denial of AIMCO's 1987 assessment work proposal. Decision at 9.

Thus, at most, AIMMCO is only entitled to do what it initially proposed in 1987. However, as Judge Winmill held, the actual operations that may be approved by the agency must result in fewer impacts, with a reduced scope of operations. "AIMMCO must reduce the scope of its surface disturbing proposals, focus only on work that is necessary to support validity, and propose mitigation and protective measures." Decision at 11. Thus, at a minimum, AIMMCO should not be allowed to conduct the extensive trenching operations proposed in the POO (and likely less drilling as well).

Furthermore, it appears that the confirmation activities AIMMCO proposes on Claim 2 are significantly different than what it originally proposed in 1987 and should not be allowed. According to AIMMCO's 1987 Assessment Work Request, AIMMCO would conduct limited drilling and trenching focused on the Glory Hole. Maps in the Project Record indicate that the

³ AIMMCO's 1987 Work Assessment Request for Golden Hand is found at pages 50–52 of attached Exhibit A. Exhibits A through J provide additional information related to AIMMCO's original proposal.

Glory Hole exposure is located on Claims 3 and 4 adjacent to the southern boundary of Claim 2. But AIMMCO's proposed drilling and trenching are all located near the northern boundary of Claim 2 and do not appear to be related to the Glory Hole exposure.

Additionally, AIMMCO can only legitimately propose operations that result in less surface disturbance to Claim 2 than what it proposed in 1987 and are focused on validity of the exposures it had previously identified. AIMMCO cannot now target an entirely different area on Claim 2 or some other exposure. Of course, any disturbance must also comply with the limitations and restrictions discussed in these comments. Because neither the scoping notice nor the POO describes what was proposed in 1987, it is impossible to ascertain whether AIMMCO's proposal complies with the court's Decision.

Remarkably, nowhere in the FEIS or DROD does the Forest Service disclose AIMMCO's 1987 proposal or evaluate how the new proposal relates to the original proposal or complies with Judge Winmill's directives.

In response, the agency again repeats its position that "the purpose of this EIS is not to evaluate legal issues." FEIS Vol. II at 48. The DROD also does not answer these questions. The USFS cannot simply abdicate its responsibility to address these issues.

The Forest Service Should Not Assume That AIMMCO Has Any Valid Rights in the Wilderness

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), although it appears that AIMMCO is proposing at this time what **it** considers was allowed by Judge Winmill to conduct limited assessment work to "corroborate preexisting exposures of a valuable mineral deposit," it must be remembered that AIMMCO has not shown that it has any rights to conduct anything more than what was specifically ordered by Judge Winmill. In other words, the Forest Service should not assume that American Independence Mine and Minerals (AIMMCO), the PoO applicant, **still** has a "discovery of a valuable mineral deposit" in the Wilderness. Although the IBLA held that such a discovery did exist in 1983 and in the late 1980s, it is clear from the record in this case, that such a discovery no longer exists.

The DROD goes so far as to state that: "**Golden Hand No's. 3, 4, and 8 lode mining claims have valid existing rights.**" DROD at 2 (emphasis added). While that may have arguably been the case at one point in time decades ago (a point the Objectors do not concede), there is no evidence in the record to support such a claim now.

As stated in the Forest Service's Surface Use Analysis (SUA), costs (including environmental compliance costs) to extract, develop, and market the limited deposit have risen considerably since the 1980s. SUA at 13. In addition, the price of diesel fuel and gold have fluctuated markedly since that time. Thus, it is highly doubtful that the deposit passes the Mining Law tests for validity. This is especially true since, as the SUA points out, the initial validity determination was highly suspect.

A discovery of a valuable mineral deposit is the essential requirement for a valid mining claim. The inherent value alone of a deposit is not enough to sustain its value; the claimant must presently, and

at all relevant times, be able to extract, process and market the deposit at a profit. The profitability of a proposed mining venture is one of the main components of a valid discovery.

It must be remembered that the test focuses on the prudent **person**, not the prudent miner, and certainly not the claimant. The Interior Secretary has stated: “It is thus evident that the willingness of a mining claimant, grounded only in the hope of success, to expend time and money in further efforts to develop a mine will not suffice.” U.S. v. Nevitt, A-30030 (July 28, 1964).

Claim validity is determined by the ability of the claimant to show that a profit can be made after accounting for the costs of compliance with all applicable laws. Costs of production and extraction of a mineral have a direct bearing on whether a prudent person would be justified in expenditure of labor and means. Finding a valuable mineral on a property is only the “first step” in the prudent person determination. In addition, the costs of extraction “must be examined” to determine whether the costs of removal and preparation of the minerals for sale is less than the sales price. Therefore, a valid discovery can never be fully proven until the full mining costs are subtracted from the expected revenues.

Regarding the nuts-and-bolts of proving a discovery, the IBLA has defined how a claim should be analyzed to determine the presence (or absence) of a valuable mineral deposit: “Claim validity is determined by the ability of the claimant to show that a profit can be made **after accounting for the costs of compliance with all applicable laws . . .**” Great Basin Mine Watch, 146 IBLA 248, 256 (1999) (emphasis added). The cost figures used by a claimant to prove the existence of a valuable mineral deposit should show that the claimant has a reasonable likelihood of developing a paying mine. In re Pacific Coast Molybdenum Co., 90 ID 352, 361 (1983). *See also*, U.S. v. Alaska Limestone Corp., 66 IBLA 316, 323 (1982) (The focal question in the prudent man test is the development of a valuable mine.).

Costs of production and extraction of a mineral have a direct bearing on whether a prudent person would be justified in expenditure of labor and means. Converse v. Udall, 399 F.2d 616, 622 (9th Cir., 1969) *cert. denied* 89 S.Ct. 635 (1969). Both geologic and economic information go towards proving that a claimant has discovered valuable mineral deposits. Dennis J. Kitts, 84 IBLA 338, 342 (1985). Finding a valuable mineral on a property is only the “first step” in the prudent person determination. Foresyth, 100 IBLA 185, 216 (1988). In addition, the costs of extraction “must be examined” to determine whether the costs of removal and preparation of the minerals for sale is less than the sales price. Id. Indeed, operating costs are “as critical to a determination of the practical value of a mining claim as the intrinsic value of the mineral present on the claim.” U.S. v. Calhoun and Howell, A-31004 (August 29, 1969), GFS SO-1969-35 (Mining). Therefore, a valid discovery can never be fully proven until the full mining costs are subtracted from the expected revenues.

In addition to production costs, environmental compliance and reclamation costs must also be factored in the claimant’s economic analysis in order to prove the existence of a valuable mineral deposit. Since a sufficiently profitable mining operation must be proven for a deposit to be considered valuable, determining the costs of environmental compliance is a necessary precursor towards validating a discovery. Great Basin Mine Watch, 146 IBLA 248, 256 (1999); U.S. v. Pittsburgh Pacific Company, 30 IBLA 388,405 (1977), *citing* U.S. v. Kosanke Sands, 12 IBLA 282, 298-99 (1973). As the Board in Pittsburgh Pacific recognized, environmental cost factors may be

significant enough to “stand in the way of a profitable mining operation” and therefore, must be addressed by the claimant. *Id.* at 393.

Since the Claims were last deemed valid, three fish species in the project area have been listed as threatened under the Endangered Species Act. Chinook salmon were listed in 1992, Snake River steelhead were listed in 1997, and Columbia River bull trout were listed in 1999. Operating, mitigation and reclamation costs for extraction projects in the habitat of ESA-listed fish species is extremely complicated and expensive and these costs have not been factored in. Under controlling Interior Department rulings and federal case law those claims, or portions thereof, that no longer contain a valuable mineral deposit are not valid. Under the Mining Law, a valid claim “cannot be based upon a discovery which existed only at some previous time.” *ROCKY MTN. MIN. L. FOUND., AMERICAN LAW OF MINING* § 35.08[3] (2d ed. 1993). As explicitly stated by the IBLA:

That a discovery of a valuable mineral deposit does not, by itself, create a vested right to patent is made clear when one considers cases where a discovery is made and then lost. Thus, **even though a claimant may have made a discovery and actually mined material from that claim, until a patent application has been perfected and the equitable title has vested, a claimant runs the risk of losing his discovery if the deposit is exhausted or if a material change in market conditions renders it unreasonable to expect that the mineral can be mined at a profit.** See, e.g., *Best v. Humboldt Placer Mining Co.*, 371 U.S. [334] at 336; *Multiple Use, Inc. v. Morton*, 353 F. Supp. 184, 193 (D. Ariz. 1972), *aff’d*, 504 F.2d 448 (9th Cir. 1974); *United States v. Mavros*, 122 IBLA 297, 302 (1992).

Estate of John M. Lighthill, 147 IBLA 25, 30 (1998) (emphasis added). See also, *U.S. v. Mary Belen Rosenberger*, 71 IBLA 195, 200 (1983); *United States v. W.S. Wood, et al.*, 51 IBLA 301, 312 (1980); *U.S. v. Mary E. Gray*, 50 IBLA 209, 211 (1980); *U.S. v. Ubehebe Lead Mines, Inc.*, 49 IBLA 1, 5 (1980); *Mulkern v. Hammitt*, 326 F.2d 896, 898 (9th Cir. 1964).

Environmental cost factors, particularly within Wilderness, may be significant enough to preclude profitable mining operations and need to be carefully considered.

Under controlling Interior Department rulings and federal case law those claims, or portions thereof, that no longer contain a valuable mineral deposit are not valid. As noted by a leading mining treatise: “Even though it may be established that a discovery existed within a claim at the date of a withdrawal, that discovery may be subsequently lost.” Maley, *Mineral Law*, 111 (6th Ed. 1996).

In this case, as noted in the SUA, it is highly doubtful that the revenues from the “Golden Hand Mine” sufficiently outweigh all of the necessary costs so as to have a sufficiently profitable mine. Here, the SUA noted that AIMMCO’s proposal for such limited drilling “seem[s] inconsistent with the goals one would expect of a mining company intent on optimizing data collection necessary to make a mine/no mine decision within a reasonable investment decision time frame.” SUA at 12.

In analogous situations, the federal courts have held that if mining claimants have held claims for several years and have attempted little or no development or operations, a presumption is raised that the claimants have failed to discover valuable mineral deposits or that the market value of the

discovered minerals was not sufficient to justify the costs of extraction. Further, changed economic conditions can render a mineral claim invalid, even though it may have been valid at one point in the past. Public land should not be allowed to become “perpetually encumbered and occupied by a private occupant just because, at one time, he had a valuable mine” Mulkern v. Hammitt, 326 F.2d 896, 898 (9th Cir. 1964).

As the IBLA has stated:

Even though a mining claim might have been perfected by the discovery of a valuable mineral deposit at the time of a withdrawal or at some other time in the past, it cannot be considered valid unless it is presently supported by a sufficient discovery. The current conditions must satisfy the requirements of the mining laws. The loss of the discovery, either through exhaustion of the minerals, changes in economic conditions, or other circumstances, results in the loss of the location. Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963); Mulkern v. Hammitt, 326 F.2d 896 (9th Cir. 1964).

U.S. v. Porter, 37 IBLA 313, 319 (1978) (emphasis added).

In this case, the fact that AIMCCO abandoned their previous efforts to develop the claims is telling.

[I]f mining claimants have held claims for several years and have attempted little or no development or operations, a presumption is raised that the claimants have failed to discover valuable mineral deposits or that the market value of the discovered minerals was not sufficient to justify the costs of extraction. *See, e.g., U.S. v. Humboldt Placer Mining Co.*, 8 IBLA 407 (1972); *U.S. v. Ruddock*, 52 L.D. 313 (1927); *Castle v. Womble*, 19 L.D. 455 (1894).

U.S. v. Zweifel, 508 F.2d 1150, 1156 n.5 (10th Cir. 1975), *cert. denied* 423 U.S. 829 (1975). The Interior Department has clearly adopted this reasoning:

[F]ailure to undertake actual operations may be used as evidence that no prudent man would be justified in so doing. For instance, if mining claimants have held claims for several years and have attempted little or no development of actual operations, a presumption may be raised that there has been no discovery of a valuable mineral deposit. This was the case in *Cameron v. United States*, where six years had elapsed from the date of location to the date of hearing. ... [T]he most persuasive evidence as to what a man of ordinary prudence would do with a particular mining claim is what men have, in fact, done or are doing, not what a witness is willing to state that a prudent man would do. A third standard is that money expended on further exploration or further research, but not on initiation of actual operations, is evidence only that further exploration or research may be justified; it is not evidence that the mineral exposed is valuable, or that prudent men would be justified in initiating actual operations.

U.S. v. Winegar, 16 IBLA 112, 127, 81 I.D. 370 (1974) (citations omitted).

The Interior Department's rulings on such issues also firmly supports the view that the lack of mineral development for an extended period evidences a lack of a discovery. *See U.S. v. Milton Wichner*, 35 IBLA 240 (1978) (quoting *U.S. v. Flurry*, A-30887 (March 5, 1968); *see also* Rocky Mtn. Min. L. Found., *American Law of Mining* § 35.14[2][e] (2d ed. 1993) and cases referenced.

The fact that AIMMCO never proceeded with mining operations following completion of the Golden Hand FEIS on Claims 3 and 4 supports this case. Thus, it would be improper to assume that AIMMCO still has the requisite "discovery" on the Golden Hand mine. As such, the Forest Service should deny any proposed use of the Wilderness and choose the No-Action Alternative.

In response the FEIS improperly avoids these issues by stating: "11.34 – We agree that a discovery may be lost. Please see the response to 11.38-39. However, Section 1.5 of the EIS describes the purpose and need and discloses the FS is responding by legal ruling to allow AIMMCO to prepare for validity hearing." FEIS Vol. II at 52.

AIMMCO Has Not Demonstrated A Discovery On Both Claims

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), even if AIMMCO can somehow still prove that the Golden Hand Mine satisfies the Mining Law's tests for validity, it still must show that it has discovered a valuable mineral deposit on each claim – which it has not done. The Mining Law states that "no location of a mining claim shall be made until the discovery of the vein or lode **within the limits of the claim located.**" 30 U.S.C. § 23 (emphasis added). This explicit language requires that a discovery be made within the boundaries of *each and every* lode mining claim. "Each lode claim must be independently supported by a discovery of a valuable mineral within the limits of the location as it is marked on the ground." *Lombardo Turquoise Milling & Mining Co. v. Hemanes*, 430 F. Supp. 429, 443 (D. Nev. 1977) *aff'd*, 605 F.2d 562 (9th Cir. 1979)(mem); *United States ex rel. United States Borax v. Ickes*, 98 F.2d 271, 278 (D.C. Cir. 1938); *United States v. Williamson*, 45 IBLA 264 (1980); *United States v. Stevens*, 14 IBLA 30 (1974); *United States v. Heard*, 18 IBLA 43 (1974); *United States v. Zweifel*, 16 IBLA 74 (1974); *United States v. Forsesyth*, 15 IBLA 43, 58 (1974); *United States v. Bunkowski*, 5 IBLA 102 (1972); *United States v. Melluzzo*, 76 Interior Dec. 181 (1969).

The Forest Service must ensure compliance with this fundamental requirement before it can approve any operations. To date, this has not been done.

Even if AIMMCO is allowed to aggregate its two claims, "the recovery expected from each claim must not only exceed the costs of mining, transporting, milling, and marketing the particular deposit on that claim but each claim must also bear a proportionate share of the development and capital costs attributable to the combined operation." *United States v. Collord*, 128 IBLA 266, 287-88 (1994). AIMMCO has failed to make this showing.

This test applies, however, only after the claimant has established both that valuable mineral deposits actually exist on the claims (i.e. mineral concentration above the cut-off grade) *and* after the claimant has established that the overall operation, including all of the claims in a group, will be profitable. *See United States v. Feezor*, 130 IBLA 146 (1994) (invalidating seven claims; five for lack of evidence supporting the existence of a valuable mineral deposit and two because the

claimant failed to carry its burden of showing that the combined operation had a ‘reasonable likelihood’ of producing a paying mine). *See also* United States v. New Jersey Zinc Co., 74 Interior Dec. 191 (1967) (finding that entire operation would not be marketable as a whole obviated need to examine marketability on claim by claim basis); United States v. Denison, 76 Interior Dec. 223, 243 (1969).

In this case, it is highly doubtful that claim # 4, at a minimum, is valid. There is little, if any ore from the Glory Hole Deposit in that claim. The company must prove that enough valuable mineral exists under that claim to generate enough profits to exceed the costs of extracting the overburden on that claim, extracting the mineral ore on that claim, processing, transporting, and marketing costs associated with developing that ore and mitigation and reclamation costs. In addition to these claim specific costs, the returns from each claim must also exceed the per ton proportionate share of all the general capital and development costs associated with the entire project. Any of AIMMCO’s claims which fail to cover these combined costs must be invalidated as lacking a valid discovery.⁴

AIMMCO’s “Valid Existing Rights” Are Very Limited

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), even if AIMMCO has some “rights” in the Wilderness (which, outside of the limited activities allowed by Judge Winnill’s Decision, is highly doubtful) AIMMCO’s “rights” under the Mining Law apply only to the land overlying the “discovered” ore body.

At the outset, it must be remembered that the Forest Service must construe the extent of AIMMCO’s “rights” very narrowly, in light of the Wilderness. “Where the fundamental thrust of a statute is to protect and maintain the natural character of affected lands, a narrow interpretation of the valid existing rights language is called for.” *See* Patenting of Mining Claims and Mill Sites in Wilderness Areas, M-36994 (Approved by Secretary Babbitt on May 22, 1998), at 5, 7; Estate of John M. Lighthill, 147 IBLA 24, 27-28 (2000); Leavenworth, Lawrence, & Galveston R.R. v. United States, 92 U.S. 733, 740 (1876)(federal land grants may not be “enlarged by ingenious reasoning”).

Under the Mining Law, a claimant is entitled to only those lands actually overlying a valuable mineral deposit. There is no absolute right to two 20-acre lode claims allowable under the Law absent valuable mineralization under that entire area. The Mining Law states that “all valuable mineral deposits in lands belonging to the United States ... shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase” 30 U.S.C. § 22. This statutory language unambiguously declares that any and all rights to the federal lands granted under the Mining Law are contingent upon the location of valuable minerals within those lands.

⁴ It is settled law that each claim must have an individual discovery point and that claims cannot “share” discovery points. *See* Belk v. Meagher, 104 U.S. 279, 284 (1881); *see also*, 2 ROCKY MTN. MIN. L. FOUND., AMERICAN LAW OF MINING § 35.09[2][a], at 35-23 (2d. ed. 1998). A discovery on one claim cannot support a discovery on another. As the Supreme Court has stated: “[a] discovery without the limits of the claim, no matter what its proximity [to a valuable mineral deposit], does not suffice.” Waskey v. Hammer, 223 U.S. 85, 91 (1912). The discovery of a valuable mineral deposit on one claim will not support the rights to another claim or group of claims even though the claims may be contiguous. *See* Ranchers Exploration & Dev. Co. v. Anaconda Co., 248 F. Supp. 708, 714 (D. Utah 1965).

There is no guaranteed right to the statutorily defined maximum size lode claim without proof of valuable mineralization underlying the entire length of each claim. AIMMCO is not entitled to any rights to surface lands where the lands encompassed by those lode claim locations do not actually overlie the principally discovered vein or lode. Furthermore, the veins or lodes must have been previously exposed and discovered.

The federal and state courts, including the United States Supreme Court, as well as legal commentators as far back as 1880, have also limited claimed lands to only that surface ground actually overlying valuable minerals, regardless of the size of a claimant's mining claim location on the ground.

Even if AIMMCO has some limited "rights" in the Wilderness, the Forest Service appears to be under the assumption that AIMMCO has "valid existing rights" to **all** the land within the boundaries of claims 3 & 4. That is incorrect. At most, AIMMCO has "rights" under the 1872 Mining Law to only the land overlying the "discovered" ore body. The fact that the IBLA held that AIMM had previously discovered a valuable mineral deposit in a small portion of claim 3 (and a minute portion of claim 4), does not translate into "rights" to explore for new ore bodies far from the only "known" ore body.

"Sampling and other testing of claims after a withdrawal is only allowed to confirm and corroborate the preexisting exposures of a valuable mineral deposit, discovered prior to the withdrawal." Maley, Mineral Law, at 110, *quoting U.S. v. Porter*, 37 IBLA 313, 316 (1978); *see also U.S. v. Foresyth*, 15 IBLA 43 (1974). Here, the only arguable valuable mineral deposit is the Glory Hole Deposit. The outside boundaries of that deposit have already been set by AIMM and the IBLA. AIMM cannot now seek to discover a **new** deposit outside the boundaries of the Glory Hole Deposit.

As stated in the SUA, the only "discovery" of a "valuable mineral deposit," according to the IBLA, involved the small 250 foot x 210 foot x 70 foot indicated/inferred reserves section shown in Figures 3-2, -3, -4 at DEIS 3-28 -30. Importantly, this ore body was found to "bounded by the two igneous dikes." SUA at 19. In other words, the "valuable mineral deposit" does not extend beyond this very small ore body. It should be noted that, as the SUA points out, even the extent of this ore body is likely less than what the IBLA found, since the "inferred reserves" are overly optimistic.

In actuality, the IBLA only held that there was, at some point in the past, a valid "discovery" of this small ore body. Such a limited discovery does not translate into rights to the surface, or the minerals, on lands outside the boundaries of this vein or lode. As acknowledged in the SUA, "AIMM[CO] proposes to drill only two holes from a single site within the area of 'known' indicated/inferred reserves and the remaining 47 drill holes outside that body in a pattern reminiscent, at least partly, of a random 'wildcat' effort." SUA at 14.

The law further provides that "[a] mining claim ... may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode." 30 U.S.C. § 23. Read together, these sections of the statute make it clear that 1,500-foot long claims may be located, but that this is the maximum allowable, and even then, only if located "along a vein or lode" and encompassing only that land overlying such vein or lode (plus 300 feet on either side of the middle of the vein or lode).

There is no guaranteed right to the statutorily defined maximum size lode claim without proof of valuable mineralization underlying the entire length of each claim. As the courts have explicitly held, “[i]t is true that the vein is the principal thing and the surface but an incident thereto.” Harper v. Hill, 113 P. 162, 165 (Cal. 1911). Further, “[t]he principal lode constitutes the measure of the miner’s right to the surface ground.” Patterson v. Hitchcock, 3 Colo. 533, 544 (1877). AIMM is not entitled to any rights to surface lands where the lands encompassed by those lode claim locations do not actually overlie the principally discovered vein or lode.

Further, in Zollars v. Evans, 5 F. 172, 173 (D.C. Colo. 1880)(emphasis added), the court stated that, “[O]n the public domain of the United States a miner may hold the place in which he may be working against all others having no better right. But when he asserts title to a full claim of 1,500 feet in length and 300 feet in width, **he must prove a lode extending throughout the claim.**”

Similarly, in Armstrong v. Lower, 6 Colo. 581, 585 (1883), the Colorado Supreme Court stated that “[i]f the vein did so depart [from the sideline] or terminate [before the end line], the portion of the claim beyond the point of departure or termination was open to [another] location” Thus, these cases hold that a claimant is entitled only to that portion of a mining claim actually overlying valuable minerals, and not automatically the entire 1,500-foot length of a full size claim.

“A location is held valid only to the extent of the lode which is included within it. If a location is extended beyond the limits of the lode, in so far as it goes beyond the lode it is invalid, for the reason that the location gives no right to the surface, except in connection with the lode.” Terrible Mining Co. v. Argentine Mining Co., 89 F. 583 (D. Colo. 1883) *aff’d* 122 U.S. 478 (1887).

In accord with these cases is Patterson v. Hitchcock, 3 Colo. 533, 544 (1877), where the Colorado Supreme Court stated that, under the Mining Law, “in the case of surface ground, [Congress] intended to grant that which was associated with the principal lode, by proximity, within prescribed limits. When this association ceases, in the case of surface ground, the reason for granting it ceases.” Further, “[t]he principal lode constitutes the measure of the miner’s right to the surface ground It follows, therefore, that if the lode terminates at any point within the location, or departs at any point from the side lines, that the location beyond such point, and to that extent, is defeasible if not void.” *Id.* at 545.

Similarly, in Lakin v. Roberts, 54 F. 461, 462 (9th Cir. 1893), the Ninth Circuit quoted the Mining Law’s length and width limits and stated that “[t]he provision for width of claims is as clearly universal as the provision for the length, and each completes the other. Omit either, and there is a defect.”

As stated by a leading commenter of the time:

The provisions of the Act of 1872 (secs. 2, 3) require by necessary implication that the location should be *on* the lode, the entire extent of the 1,500 feet. With a location *off* the lode, compliance with the law would be impossible in the matter of width, as the basis of measurement provided by the law (300 feet on each side of the middle of the vein at the surface) would have no existence.

It has been claimed that a mislocation, however it may affect the miner's right to the lode located, will not affect his right to the surface ground either in whole or in part; that under the Act of 1872 the surface ground is not a dependent grant. Under the Act of 1866, surface ground was allowed for the convenient working of the lode or vein, and for no other purpose. The right was clearly dependent upon the right to the lode located. It failing, all incidents thereto attaching would also necessarily fail. Although the Act of 1872 enlarges the rights of the locator by a grant of "all veins, lodes, and ledges, the top or apex of which lie within his surface lines," still, his right to the surface ground continues dependent upon his right to the principal lode; and his right to other lodes within his surface limits is equally dependent. It was intended to grant that which was associated with the principal lode by proximity within prescribed limits. When this association ceases, in the case of surface ground, the reason for granting it ceases. **If, therefore, the lode located terminates at any point within the location, or departs at any point from the side lines, the location beyond such point, and to that extent, is defeasible.**

Edward P. Weeks, *A Commentary on the Mining Legislation of Congress*, at § 63b, pp. 407-08, Sumner Whitney & Co. (1880)(*italics emphasis in original, bold emphasis added*).

In this case, even if AIMM still can prove it has a valid discovery of the limited Glory Hole Deposit, it is only entitled (at best) to those portions of its claims which overlie that deposit. The company only has an arguable right under the Mining Law to that small portion on each claim still encompassing valuable minerals. Because AIMMCO's proposal encompasses land within those lode claim locations extending beyond the point where the principal lode itself terminates, approval by the Forest Service would violate the Mining Law, the Wilderness Act, and other applicable Forest Service requirements.

Federal courts have squarely rejected interpreting a statute to give more land to an applicant than allowed by law.

Congress, by enacting Section 28, allowed ... companies to use a certain amount of land. ... These companies have now come into court ... and have said, "This is not enough land; give us more." We have no more power to grant their request, of course, than we have the power to increase congressional appropriations to needy recipients.

Wilderness Society v. Morton, 479 F.2d 842, 891 (D.C. Cir.) (en banc), cert. denied, 411 U.S. 917 (1973).

In response to these important issues, the agency merely states that: "11.36– Comment noted." FEIS Vol. II at 53. Because neither the FEIS nor DROD addresses these issues, they not only make an arbitrary and capricious decision, they fail to meaningfully respond to comments on the DEIS as required by NEPA. The agency is required to "respond explicitly and directly to conflicting views." Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1172 (9th Cir. 2006). NEPA's requirement that responses to opposing viewpoints be included in the final EIS "reflects the paramount Congressional desire to internalize opposing viewpoints into the decisionmaking process to ensure that an agency is cognizant of all the environmental trade-offs that are implicit in a decision." Cal.

v. Block, 690 F.2d 753, 770–71 (9th Cir. 1982) (citing *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979)).

SPECIFIC ENVIRONMENTAL AND RESOURCE CONCERNS

Impacts from road construction and use

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), we are also concerned about surface impacts from converting Forest Service Trail #13 into an access road, particularly with regard to the transportation of fuel and other chemicals into this area. The scoping document specifies a D-8 bulldozer and a 7 cubic yard dump truck are proposed for use. It does not specify if this heavy equipment will be used for road re-opening and road construction on the three miles of old roadbed entering the Wilderness. The scoping document declares “vehicle access would require clearing slough, downed trees and other obstacles to maintain a safe width for equipment transport...” Based on this description and based on personal experience from walking what is now Forest Service Trail #13, this work of clearing the old roadbed could be done with non-mechanized hand tools, such as shovel, crosscut saw and pick Maddox. The road clearing should be included in the Minimum Tool analysis mentioned below.

The FEIS contains a description of the proposed fords for the tributary to Coin Creek and Coin Creek, however, the FEIS should also have more thoroughly considered alternatives including temporary culverts, temporary bridges, hardened fords and skylines. The Forest Service assumed that the additional motorized trips required to install and remove the bridge constitute a greater wilderness incursion than reconstructing a sufficiently wide ford to allow for vehicle passage using rocks from talus slopes or waste dumps within the Wilderness:

2.3.4 Temporary Bridges in FC-RONR Wilderness

An alternative was suggested that would have installed a temporary bridge at the ford on a tributary of Coin Creek instead of filling gabion baskets with rock. Getting the needed materials into the FC-RONR wilderness may have necessitated further road maintenance to widen and clear temporary roads to accommodate the length and type of materials needed. The construction of a temporary bridge could have necessitated more trips into the wilderness than the use of gabions with rock sourced inside the FC-RONR wilderness. Bridge installation would have likely necessitated the construction of bridge abutments requiring removal and subsequent restoration following removal of the bridge at the conclusion of the project. Following removal of the bridge, the trail would still require repair to provide a trail ford of the creek for user access on Forest Trail #13. Additionally, road alignment and grade may have required adjustment to provide a safe approach onto the bridge.

This alternative was not selected for detailed analysis (FEIS section 2.3.4). Instead, in all action alternatives rock for gabions would be obtained from the Penn Ida waste dump or the talus slope on the road to the Ella Portal. The Penn Ida waste dump is also within the Frank Church River of No Return Wilderness and would require clearing an additional 0.3 miles of abandoned road. This would significantly expand the industrial footprint of the project. Likewise, the clearing of the disturbed area near the Bunkhouse for storage is another aspect of the project that could be

accomplished at Pueblo Summit or some other area outside the wilderness to reduce wilderness impacts.

In response, the FEIS stated: “11.39 - Section 2.3.4 of the EIS is as stated. The rationale is correct in that a temporary bridge could necessitate more trips into the wilderness, but specifically does not state within the wilderness. It is understood that sourcing from Penn-Ida could result in more trips within the wilderness from the source to site over a 0.3 mile distance, but would be expected to less than into the wilderness over a roughly 3.0 mile distance.” FEIS Vol. II at 54. However, this does not mean that this alternative is not “reasonable” and should have been considered in the EIS.

Further, hauling material from outside the Wilderness is not only more appropriate but also may constitute a lesser incursion, even if more trips are needed. In dismissing this alternative, the Forest Service only states that this *may have necessitated further road maintenance* and *may have required adjustment to provide a safe approach onto the bridge* but without a detailed analysis the public will never know the answer. While some improvements to these fords are desired for future trail work, the ford itself would be much wider than the reclaimed road which would be narrowed to a single track trail at the end of the project (FEIS 2-19). The Forest Service should compare overbuilding these fords with a temporary bridge and improving just the width of ford needed for a single track trail either before or after project completion.

In response to this comment and proposed reasonable alternative, the FEIS stated: “11.40 - Section 2.3.4 of the EIS describes the combined rationale for eliminating the alternative from detailed study. Any one factor may not have eliminated the alternative but all factors in combination were considered in eliminating the alternative from more detailed study. Staging at Pueblo Summit is only feasible for a very small amount of equipment and supplies. The summit area and the road leading up are narrow and with very limited pullouts to stage materials or equipment in.” FEIS Vol. II at 54. Yet this does not respond to the issue raised in the comment as required by NEPA.

One of the driving issues is effects to water quality and listed fish species. The FEIS acknowledges that fords can be problematic from a fisheries perspective:

Road stream crossings can be a major point of sediment delivery from roads (Gucinski et al. 2001; Taylor et al. 1999; Furniss et al. 1991). Fording can increase sediment delivery in three ways: Wave action from fording vehicles eroding streambanks, tire rutting concentrating surface runoff on approaches, and water draining off vehicles and eroding approaches (Brown 1994). Fording streams can also temporally increase turbidity by mobilizing fine material in the substrate of the ford. This type of turbidity represents redistribution of fine sediment within the channel rather than increased sediment yield from sources outside the channel. Although suspended sediment can kill fish at high concentrations (Waters 1995), it is not usually considered an important source of mortality. Turbidity can reduce the ability of fish to locate food and can damage respiratory tissues (Waters 1995), but short-term increases in turbidity are most likely to result in simple avoidance of turbid water. There are approximately nine stream crossings (all fords) along FR #371 and #373 including two fords of the North Fork Smith Creek.

FEIS 3-39. Despite these issues, the Forest Service failed to conduct a thorough analysis of a temporary bridge as a reasonable alternative. The FEIS merely stated that: “11.41 Turbidity from the ford on Coin Creek will not reach fish, which are approximately 1 mile downstream (pg. 3-40 EIS).” Yet FEIS p. 3-40 does not contain any discussion of fish location or impacts. The Forest Service needs to compare the estimated sediment delivery in Coin Creek from a new, road-wide ford and a temporary bridge with a narrower, trail-side ford.

The Forest Service also failed to disclose and evaluate the impacts of AIMMCO’s vehicle trips within the Wilderness. Under Alternatives B and C, motorized trips within project area to transport items appear to be authorized but the anticipated number of such trips are not disclosed, even though these vehicle trips include stream crossings and travel within RCAs. This vehicle traffic must be evaluated to evaluate sediment delivery and risk of contamination to Coin Creek. This traffic, combined with denuded vegetation from drill pads, trenching, and clearing the staging area will deliver sediment to Coin Creek near the claims, but the FEIS has failed to evaluate these impacts.⁵

Mine waste

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), the FEIS states that any waste rock sources (Werdenhoff, Ella Portal or Penn Ida) used as construction material for fords would first be tested for metals leachability. As a requirement under NEPA and the agency’s 36 CFR Part 228 regulations (as well as the Forest Plan standards under the NFMA noted herein), the Forest Service needs to characterize the waste rock in each of these dumps before permitting its use. Waste rock may contain acid-generating material or leach heavy metals which can contaminate surface and ground water. The added fact that this waste material is designed to be placed in riparian areas and stream channels necessitates that the Forest Service examine this as part of the SDEIS. Under the 1897 Organic Act and Part 228 regulations, the agency cannot permit operations that fail “to maintain and protect fisheries and wildlife which may be affected by the operations.” 36 CFR 228.8(e). These impacts also likely violate the USFS’ duties to “minimize adverse environmental impacts on National Forest surface resources,” including water resources, fish and wildlife, and habitat, under 36 CFR 228.8.

In response, the agency states:

11.45 - The appropriate analyses will be completed. The premise of the analysis was that rock would be clean. If the test reveals contamination outside that expected, then as with any changed circumstance, the FS would evaluate the changes per FSH 1909.15, Section 18 to determine if a changed circumstance exists and respond accordingly.

11.46- Chapter 3 of the EIS discloses effects to various resources and assumes that clean rock will be used. Section 2.4.2.2, 2.4.3.2, and 2.4.4 describe design features that would reduce or prevent undesirable effects. A metals leachability test (Synthetic Precipitation

⁵ See attached Exhibit M, “Golden Hand Road Inventory GRAIP Report” prepared by the Nez Perce Tribe Watershed Division on February 5, 2014. The report breaks the roads in the wilderness proposed to be used by AIMMCO into two segments: the road leading to the Golden Hand claims, and a boxed area near the site of proposed operations. The report shows that all sediment delivery occurs near the proposed operations where 28 percent of roads are located in RCAs.

Leaching Procedure or equivalent) would be completed prior to use of waste rock as aggregate.

11.47 - Only clean rock will be used.

FEIS Vol. II at 55. This admits that “The appropriate analyses” has yet to be done, i.e., it “will be completed” in the future, after the NEPA is over.

Such a permit-first, review later approach violates NEPA. “The purpose of an EIS is to obviate the need for speculation by insuring that available data are gathered and analyzed prior to the implementation of the proposed action.” Nat'l Parks Conservation Ass'n v. Babbitt, 241 F.3d 722, 732 (9th Cir. 2001). “[T]he “hard look” must be taken before, not after, the environmentally-threatening actions are put into effect.” *Id.* at 733. “NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” 40 CFR § 1500.1(b).

An agency must take into account all “reasonably foreseeable significant adverse effects” of the proposed action in its analysis of environmental effects. 40 C.F.R. § 1502.22; *see also id.* § 1508.7. NEPA also requires an agency to analyze missing and incomplete information. As we explain in greater detail below, an agency must either obtain information that is “essential to a reasoned choice among alternatives” or explain why such information was too costly or difficult to obtain. *Id.* § 1502.22.

Native Village of Point Hope v. Jewell, 740 F.3d 489, 493 (9th Cir. 2014). “If there is ‘essential’ information at the plan- or site-specific development and production stage, [the agency] will be required to perform the analysis under § 1502.22(b).” *Id.* at 499. “[W]hen the *nature* of the effect is reasonably foreseeable but its *extent* is not, we think that the agency may not simply ignore the effect. The CEQ has devised a specific procedure for ‘evaluating reasonably foreseeable significant adverse effects on the human environment’ when ‘there is incomplete or unavailable information.’ 40 C.F.R. § 1502.22.” Mid States Coalition for Progress v. Surface Transportation Board, 345 F.3d 520, 549-550 (8th Cir. 2003)(emphasis in original).

We are also concerned about storage of mine waste from the Ella Portal on the existing flat disturbed area in front of the portal location. A geochemical analysis of the material that has collapsed at the mouth of the adit material needs to be conducted. Furthermore, constructing a dump of mine waste in this area is inconsistent with protecting wilderness values as well as habitat protections needed by listed fish species that occupy this watershed. The plan for waste rock to be placed on the existing, flat work area is a stop-gap plan and not a waste rock storage plan.

In response, the agency states that: “11.48 – The material to be stored at the Ella is mostly colluvium.” FEIS Vol. II at 55. Yet, material that is “mostly” one type of rock does not mean that it is 100% that material. As above, failure to analyze this material in the FEIS violates NEPA.

As noted above, the Forest Service can only approve activities in the Wilderness that are “essential” to the operation. In other words, if an activity, even if essential to the overall operation, could feasibly be located outside the Wilderness, the agency is under an obligation to require that such activities occur outside the Wilderness. Arguments from the claimant that such restrictions cost too

much are not sufficient to override the agency's Wilderness duties. *See Clouser v. Espy*, 42 F.3d at 1529. The Ninth Circuit has clearly held that the agency can impose requirements that may adversely affect claim validity. "Virtually all forms of Forest Service regulation of mining claims – for instance, limiting the permissible methods of mining and prospecting in order to reduce incidental environmental damage – will result in increased operating costs, and thereby will claim validity." *Clouser*, 42 F.3d at 1530.

As such, the Forest Service should have analyzed an alternative in which the excavated waste rock is end-hauled outside of the existing Wilderness. One possible location is the Werdenhoff mill area. Once relocated, this material should be seeded and stabilized to reduce erosion. If there are potential contaminants of concern, this material should be capped, lined and otherwise isolated.

The agency's response is: "11.50 - Section 2.3.7 of the EIS describes the Removal of Ella Excavated Material From the Wilderness Alternative, which was eliminated from detailed study." FEIS Vol. II at 56. Yet that section states that:

There would be no increased potential for acid generation or metals leaching as a result of opening the Ella adit, since the excavated collapse material is **all** unmineralized colluvium and there would be no additional waste rock generated.

FEIS 2-4 (emphasis added). This contradicts the previous response, which stated that: "The material to be stored at the Ella is **mostly** colluvium." FEIS Vol. II at 55 (emphasis added). Also, as noted above, this is based on the assumption that future, as yet un-performed tests will show the material to be benign – something not contained in the FEIS.

Species impacts

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), the Objectors are committed to ensuring that impacts to wildlife such as Boreal owl, fisher, northern goshawk, pileated woodpecker, fisher, Canada lynx, wolverine, gray wolf, mule deer, rocky mountain elk, Townsend's big-eared bat, and Columbia spotted frog are fully disclosed, avoided when possible, minimized and mitigated. The FEIS gave a cursory review of potential impacts to a variety of Management Indicator Species, Forest Sensitive Species and Focal Species and concluded that any impacts, such as displacement from habitat, will be temporary given the seasonal nature of the exploration and the three year time period. However, the Forest Service does not appear to have conducted the needed field surveys to identify nests or other important habitat features. For example, should goshawks or other sensitive wildlife be encountered, seasonal and timing restrictions should be in place.

Wildlife such as great gray owls and goshawks are particularly sensitive to human disturbance. Studies have found that noise and disruption associated with timber harvest operations (e.g., harvesting, log truck traffic, road construction, timber cruising) can cause nest failure, especially during pair bonding, nest-building and incubation (US Forest Service 1992, Boal and Mannan 1994, Squires and Reynolds 1997). Regarding disturbance, the Klamath National Forest Guidelines restrict habitat modifying activities between March 1 and Aug. 31 within the primary nest zone-0.5 mile radius, restrict loud and/or continuous noise within 0.25 miles of an active nest site for the same time period.

While the Forest Service focused on road construction as the major impact here, the agency neglected to take into account the length and intensity of human disturbance related to the drilling activities and their impacts on sensitive species, including goshawk, lynx and wolverines. On the Boise National Forest, the Forest Service wildlife specialist acknowledged in the CuMo Exploration Project Record that exploration drilling impacts are the central concern about the Project's potential impacts on sensitive wildlife:

Habitat modification is not the primary concern/issue with this project, with the exception of any indirect impacts/effects to reproductive habitat (loss of nest trees, nest snags, or dens), disturbance associated with implementation activities – road construction, **drilling operations** - is.

See Forest Service Wildlife Specialist's Mike Feiger's comments on Biological Evaluation, Project Record #1974 (emphasis added).

For some projects, the Forest Service directs the proponent to implement protective measures such as establishing a seasonal buffer around nest trees or dens: "No trees with active nests will be cut." FEIS at 2-26.

However, buffers may not be sufficient to avoid disturbing or displacing wildlife with associated human activity – such as the lights and noises associated with drilling operations to be conducted on 24-hour basis. Even the use of sound baffles and light shields may still disturb wildlife. Likewise, the CuMo Project Record reveals the wildlife specialist's concerns that relying solely on protecting nest trees from being felled during road construction activities may not be adequately protective of wildlife such as goshawks:

Disturbance issues can affect nesting northern goshawk, for instance, up to ¼ to 1/2 mile depending upon topography and vegetation.

Forest Service Wildlife Specialist's Mike Feiger's comments on Biological Evaluation, Project Record #1974.

The Forest Service's own management guidelines for the northern goshawk recommend a 30-acre buffer around each nest where no adverse impacts may occur.⁶ In addition, the timing of human activities in the larger Post Fledging Family Area should be limited to the period from October to February. The Supplemental DEIS needs to include timing restrictions on activities within these specific buffer areas.

In response, the agency merely states: "11.55 – Thank you for your comments. " FEIS Vol. II at 57. This not only fails to response to the comment, it fails to implement this minimization measure required by the Part 228 regulations and the Wilderness requirements noted herein.

⁶ See "Management recommendations for the northern goshawk in the southwestern United States," Reynolds, Richard T.; Graham, Russell T.; Reiser, M. Hildegard (1992). Gen. Tech. Rep. RM-217, Ft. Collins, CO: U.S. Department of Agriculture, Forest Service, Rocky Mountain Forest and Range Experiment Station. 90 pp.

It is unclear from the FEIS the number and thoroughness of wildlife surveys in the project area. The Forest Service issued a blanket statement that adverse impacts or displacement of wildlife would be limited in time instead of conducting surveys to describe specific impacts.

The FEIS does suggest that the exploration activities may have impacts on these sensitive species, which have not been adequately evaluated or mitigated— including impacts from noise and lights of drilling activities occurring around the clock which may disturb the wildlife.

As numerous cases hold, federal agencies have duties under NEPA to fully evaluate potential impacts on such sensitive species and their habitats, through an adequate EIS. See Native Ecosystems Council v. Tidwell, 599 F.3d 926 (9th Cir. 2010) (Forest Service violated NEPA in failing to address adverse impacts on sensitive sage-grouse and its habitat); ONRC v. Goodman, 505 F.3d 884 (9th Cir. 2007) (failure to adequately study impacts of roads and logging on sensitive fisher and its habitat); Anderson v. Evans, 314 F.3d 1006, 1016 (9th Cir. 2002) (failure to address impacts on sensitive whale population). Here, the agency failed to take the required “hard look” at all direct, indirect, and cumulative impacts, failed to review all reasonable alternatives, failed to prepare a complete EIS, failed to ascertain the baseline conditions for the Project, and assumed that wildlife impacts would be insignificant and temporary without a detailed analysis as required under NEPA.

The “Biological Evaluation and Wildlife Specialist Report for Golden Hand #1 and #2 Mining Project” and the FEIS admit that noise disturbs numerous TEPC species with habitat in the area, but repeatedly dismisses these impacts by claiming noise disturbance would be intermittent. This is not accurate, as drilling would occur 24/7 during a three-month period, and noise from other activities, including vehicle travel (to and from the wilderness and within the wilderness), trenching, constructing drill pads, clearing the staging area, and other activities would also occur. And while the Wildlife Specialist Report and FEIS acknowledge that noise from AIMMCO’s operations could displace many species, it improperly discounts all displacement since it would be temporary (it would occur during 4 months of operations each year). Temporary displacement, however, can have significant impacts depending on the species and depending on the time of year and distance it would be displaced. The Wildlife Specialist Report and FEIS also fails to evaluate impacts of lights from 24/7 drilling and other activities that may involve lights, including motor vehicle use.

Water quality protections

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), the Objectors are still concerned about the use of fuels, lubricants, solvents, and other toxic chemicals being transported along streams, intermittent streams and drainages. Although the FEIS provides some details about the transportation of fuel and hazardous chemicals from the Walker Mill site to the Golden Hand Mine, there is little analysis of transportation along the South Fork Salmon River, East Fork South Fork Salmon River, Johnson Creek, or Lick Creek. The FEIS only states that the maximum shipment of fuel on Forest Roads #371 and #373 would be 500 gallons and that larger shipments (size undetermined) would use Johnson Creek Road or Lick Creek Road. We point out that Johnson

Creek Road supports listed fish species and much of the road is in close proximity to the creek. Lick Creek is an important tributary of the Secesh River which also supports listed fish species. A diesel fuel spill along the road could adversely affect multiple life stages of listed fish species. The SDEIS needs to provide specific guidance regarding fuel load limits, road conditions, pilot car requirements, and spill kit requirements for these access routes. Spill clean up materials, fire fighting gear, and a spill response plan will be kept in all vehicles. Oil-absorbent booms should be strategically cached along each river crossing so they can be quickly deployed in the event of a transportation accident.

The agency's response, FEIS Vol. II at 58, directing the public to the wildlife reports, does not adequately respond to these issues.

Adit water

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), although the FEIS predicts that there will not be any water quality threats from adit water, previous issues at the mine site call this into question. For example, the Golden Hand #3 and #4 DEIS on p. 3-85 had indicated elevated lead levels in water emanating from one of the adits. If this water is not currently expressing itself on the surface, the excavation work could redirect it to the surface where it could negatively impact Coin Creek through the introduction of sediment or chemical contaminants. The chemical composition of the material inside the Ella portal is unclear, as is the potential water quality impacts if contaminants are released. Characterization of this subsurface flow should be completed as part of this analysis. We recommend installing a grid of piezometers in advance of an exploration activities to better understand these dynamics and establish a baseline dataset.

The agency's response is again inadequate: "The groundwater specialist report describes groundwater conditions in the project area." FEIS Vol. II at 58. A review of the "groundwater specialist report" contains no data on flow or any detailed characterization of the groundwater.

If adit water is encountered, the Forest Service needs to develop a contingency plan for storage and treatment should the adit water have the potential to degrade surface water. Land application of waste water is problematic in saturated or frozen conditions and does not meet the agency's duties under the Organic Act and Part 228 regulations. In particular, the Forest Service needs to assess the ability of the soil and hillside to absorb water over the long term. The operator should have the appropriate permit to allow for any discharges to surface water.

Failure to Analyze Groundwater Impacts and Baseline Conditions

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), the Forest Service must conduct a baseline study of all potentially affected resources, including groundwater within the project area. The agency is required to "describe the environment of the areas to be affected or created by the alternatives under consideration." 40 C.F.R. § 1502.15. The establishment of the baseline conditions of the affected environment is a fundamental requirement of the NEPA process:

"NEPA clearly requires that consideration of environmental impacts of proposed projects take place before [a final decision] is made." LaFlamme v. FERC, 842 F.2d

1063, 1071 (9th Cir.1988) (emphasis in original). Once a project begins, the “pre-project environment” becomes a thing of the past, thereby making evaluation of the project's effect on pre-project resources impossible. *Id.* Without establishing the baseline conditions which exist in the vicinity ... before [the project] begins, there is simply no way to determine what effect the proposed [project] will have on the environment and, consequently, no way to comply with NEPA.

Half Moon Bay Fisherman’s Mark’t Ass’n v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988). “In analyzing the affected environment, NEPA requires the agency to set forth the baseline conditions.” Western Watersheds Project v. BLM, 552 F.Supp.2d 1113, 1126 (D. Nev. 2008). “The concept of a baseline against which to compare predictions of the effects of the proposed action and reasonable alternatives is critical to the NEPA process.” Council of Environmental Quality, *Considering Cumulative Effects under the National Environmental Policy Act* (May 11, 1999).

Such baseline information and analysis must be part of the EA and be subject to public review and comment under NEPA. The lack of an adequate baseline analysis fatally flaws an EA. “[O]nce a project begins, the pre-project environment becomes a thing of the past and evaluation of the project’s effect becomes simply impossible.” Northern Plains v. Surf. Transp. Brd., 668 F.3d 1067, 1083 (9th Cir. 2011). “[W]ithout [baseline] data, an agency cannot carefully consider information about significant environment impacts. Thus, the agency fail[s] to consider an important aspect of the problem, resulting in an arbitrary and capricious decision.” *Id.* at 1085.

Exploratory drilling of this nature has had unexpected consequences before, particularly if the drill hole is not completely cemented top to bottom:

Improperly plugged wells compromise aquifer integrity by destroying its natural isolation, and exposing it to potentially toxic materials from nearby formations.⁷

The Kilgore North Project on the Caribou-Targhee National Forest proposes similar drilling operations. The Environmental Assessment for that project noted several ways in which drilling fluid might overflow from sumps:

Water could discharge to the ground surface as sumps fill with sediment, plug or overtop. Fine sediment remaining suspended in sump water could discharge downslope in an overtopping event. Kilgore, North Environmental Assessment, p. 19.

Should this event happen, there are specific instructions for the operator:

Overflow event monitoring would document the estimated overflow volume, duration of the overflow event, and the time and duration of operation shut-downs. Otis would immediately collect and send for analysis an overflow water sample from any sump discharge. Parameters and laboratory methods would be the same as during baseline sampling.

⁷ R. Kubichek, J. Cupal, S. Choi, W. Iverson and M. Morris. *Identifying Groundwater Threats from Improperly Abandoned Boreholes*, Electrical Engineering Department, University of Wyoming, Laramie, WY.

Kilgore, North Environmental Assessment, p. 19.

Should there be enough flow to exceed the sump capacity; emergency measures would entail routing any overflow to portable tanks, to the ground surface in a hand dug trench, or to an area away from active waterways or wetlands. Brush, straw bales, straw waddles, or silt fences can be used to control erosion. Emergency packers are also available on all drill rigs and can be used to stem artesian flow. Kilgore, North Environmental Assessment, p. 68.

While the Forest Service states that the drill holes will be sealed, it does not describe the potential negative effects if the drill holes are not adequately sealed. Furthermore, there is no information on the track record for fully sealing drill holes or how the Forest Service will determine if drill holes are securely sealed. Factors to consider are the type of rock, whether the area is fractured, whether aquifers are encountered and the potential for human error. Contamination can be from a variety of sources, including introduction of fuel into the hole that stimulates bacterial growth and changes the redox potential which can lead to mobilization of metals, opening up reactive rock (like sulfides) to water and oxygen, and effects of introducing the mud itself which can result in pH changes, introduction of arsenic⁸, salts⁹ and oxygen into a formerly anaerobic environment, acid mine drainage,¹⁰ and cation exchange. In addition, lime and other additives from the cement mix may have adverse impacts on water quality. *See Fate and Effects of Whole Drilling Fluids and Fluid Components in Terrestrial and Freshwater Ecosystems: A Literature Review*, to EPA 1981. <http://nepis.epa.gov>

Even if the record contained the required analysis of the “drilling additives”, a full analysis of the chemical and physical nature of the materials brought to the surface by the drilling. We note that a groundwater analysis conducted by the Caribou-Targhee National Forest for the Kilgore North project found the following determination:

Baseline water quality monitoring data collected from the on-site production well indicate the presence of Selenium (Se), Arsenic (As), Iron (Fe), Nickel (Ni), Lead (Pb) and Zinc (Zn) in groundwater that will be encountered and also used in the drilling process. Data collected by Otis from the groundwater well indicates the presence of Se and Zn in groundwater at concentrations that, if discharge on the land surface, would exceed Idaho’s surface water quality criteria.

Kilgore North Environmental Assessment, p. 51.

At a minimum, the Forest Service needs to conduct a baseline study starting with water quantity and quality at springs, seeps and piezometers, establish a monitoring program and develop mitigation measures if needed to address these potential impacts. The Kilgore North Project includes

⁸ Effect of Water Use on Arsenic Release to Well Water in a Confined Aquifer, M.B. Gotkowitz et al. *Groundwater* 42, no. 4: 568-575.

⁹ Impact of Abandoned Wells on Groundwater, Tyler Gass, Lehr, J, and Heiss, H, EPA-600/3-77-095, August 1977, Ecological Research Services,

¹⁰ Plaintiffs’ Proposed Findings of Fact and Conclusions of Law Reply *Nunamta Aulukestai, et al. v. State of Alaska*, 3 AN-09-9173 CI, Pebble Trustees Plaintiffs Findings of Fact Reply FINAL2011 3 24. pdf

monitoring of drilling fluids during operations:

Otis would sample and analyze water quality from drill holes that penetrate the potentiometric (groundwater table) surface. Water samples collected and analyzed during exploration operations would be compared to pre-drilling water samples to ascertain any changes to water chemistry and water quality. Kilgore, North Environmental Assessment, p. 19.

Otis would continue to collect and analyze ground water quality data. Otis would create an annual report that includes analysis of the groundwater quality data noting changes to water chemistry. Parameters would remain the same as baseline monitoring. Groundwater discharges would be monitored for inorganic contaminants (including Selenium and Zinc) by Otis monthly during drilling.

Kilgore, North Environmental Assessment, p. 19.

The Kilgore North Decision Notice cites several circumstances in which sumps could overflow:

If the drill crew does not pay attention to the water levels of the drill water infiltration sumps, they could overflow and reach existing vegetation. Decision Notice, p. 65.

Water could discharge to the ground surface as sumps fill with sediment, plug or overtop. Decision Notice. 51.

The Forest Service's failure to require baseline groundwater studies, analysis and mitigation measures in reviewing a mining/exploration plan under NEPA and the 228 regulations was recently ruled illegal by the Idaho Federal District Court.

The Forest Service did not study the groundwater hydrology of the area but, instead, rested its finding of no significant impact on the finding that surface water quality levels have not fallen below certain levels as a result of past and present mining activities and the assumption that the closed system drilling methods would eliminate any further contamination to the water. Those assumptions, however, are arbitrary and capricious.

The appropriate course would be for the Forest Service to have conducted some baseline study and analysis of the groundwater in the area in order to reach the finding of no significant impact. The Forest Service's assurances that the closed system alleviates any concerns over impact to the groundwater may be enough as to the contamination concern if there were some baseline established and a system for monitoring. In this case, however, there is no monitoring mechanism in place for groundwater nor any mitigation measures in place to respond to possible impacts as have been put in place for other environmental considerations such as impacts to sensitive species.

Idaho Conservation League v. U.S. Forest Service, 2012 WL 3758161, at *16 (D. Idaho 2012). The Court noted the likely adverse impacts from mine drilling, noting the Declaration of Kathryn Didricksen (attached to the previous comments). Although that case involved a different mineral project, Ms. Didricksen's conclusion that mineral drilling likely causes significant impacts to groundwater holds true here. As the Court stated:

However, as pointed out in Ms. Didricksen's Declaration, drilling exploratory

boreholes can impact the local groundwater conditions by altering groundwater flow and drilling fluid and water leakage during borehole drilling. Ms. Didricksen opines that the Forest service should have conducted a baseline hydrogeologic study to examine the existing density and extent of bedrock fractures, the hydraulic conductivity of the local geologic formations, and measured the local groundwater levels to estimate groundwater flow directions before making a determination of no impact. This draws into question the reasonableness of the Forest Service's determination of no significant impact having been made without any baseline and/or study of the groundwater.

Id.

Additionally, the Court noted that the Forest Service cannot rely on mitigation measures as a substitute for NEPA compliance, which the FEIS does in this case.

Further, pointing to the use of closed drilling methods to answer the concerns regarding groundwater is arbitrary and capricious as it inappropriately relies upon mitigation measures to satisfy NEPA's obligations. *See Northern Plains Resource v. Surface Transp. Bd.*, 668 F.3d 1067, 1084 (9th Cir. 2011) (holding mitigation measures are not alone sufficient to meet NEPA's obligations to determine the projected extent of the environmental harm to resources before a project is approved.). While the assurances regarding closed drilling may ultimately be the appropriate way to address the concerns regarding contamination to the groundwater, it does not address concerns regarding the lack of baseline data, analysis, and monitoring of groundwater. These are significant environmental concerns which demand at least baseline analysis and/or at least some monitoring mechanism to give some assurance to the assumptions regarding the closed drilling methods before a finding of no significant impact can be made. *See Northern Plains*, 668 F.3d at 1083 ("Once a project begins, the pre-project environment becomes a thing of the past and evaluation of the project's effect becomes simply impossible.")(citation and marks omitted).

Id. at *17. This holds true for potential impacts to all resources from the Golden Hand operations, not just groundwater.

A more recent federal court decision reiterated the NEPA requirement for a detailed groundwater baseline analysis. "Ninth Circuit cases acknowledge the importance of obtaining baseline condition information before assessing the environmental impacts of a proposed project." Gifford Pinchot Task Force v. Perez, 2014 WL 3019165, *28 (D. Or. 2014)(USFS/BLM EA failed to obtain and analyze baseline water quality data in violation of NEPA).

The agency has not conducted this required baseline analysis for groundwater. Instead, the FEIS states that: "The groundwater specialist report, Appendix D of the EIS, and Section 3.4 of the EIS addresses these issues." FEIS Vol. II at 59. "11.69 - Baseline conditions are described in the groundwater specialist report and Section 3.4 of the EIS. Monitoring requirements are described in Appendix C." FEIS Vol. II at 61.

Yet Section 3.4 contains no groundwater baseline data. Nor does Appendix, D, which is largely a

discussion of well-bore and drilling procedures. It should be noted that Appendix C admits to the potential for groundwater impacts, as it requires groundwater monitoring. Yet it is impossible to have adequate monitoring of impacts without detailed pre-project baseline analysis.

As such, the FEIS is deficient and the Supplemental/Revised DEIS (SDEIS) must meet these requirements.

Lack of Surface Water Baseline

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), similar to the lack of an adequate baseline analysis for groundwater, the FEIS does not contain the required baseline analysis for surface water. For example, the FEIS admits that: “Surface water quality data in the area is limited to a single water sample taken from Coin Creek below the historic mining disturbance in October 2002.” FEIS at 3-37. Such paltry data clearly is not representative of the Project site, including the different affected areas, as well as seasonal and flow variations. Without an adequate baseline analysis of surfacewater conditions in the Coin Creek drainage in terms of both quality and quantity, the Forest Service is not able to adequately evaluate water quality and water quantity impacts from AIMMCO’s operations at the Project Site, which the Forest Service acknowledges would involve decreasing flows, stream fording, sediment generating activities, and the potential for the release of chemicals or other substances.

Acid Mine Drainage Issues

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), acid mine drainage does not appear to be mentioned in this analysis. We have concerns regarding the potential for acid-mine drainage from the existing and future waste rock piles at the Golden Hand site. All alternatives must meet the requirements of the Wilderness Plan, Organic Act and 228 regulations to “minimize adverse environmental impacts on surface resources” and take measures to address acid mine drainage or metals leaching.

The Wilderness Plan requires land managers to, “Ensure that all operations are conducted so as to minimize adverse environmental impacts on surface resources” (USDA 1985, p. 44). Alternatives must adequately address the following concerns:

- management of potentially acid generating materials,
- the potential for increased flows from reopened mine adits,
- and the potential for release of sludge from the reopened adits.

Waste rock samples from the Golden Hand site indicate that the proposed activities have some potential to generate acid mine drainage. The DEIS for the Golden Hand #3 and #4 stated that the vein and host rock at the Gold Hand Mine contain sulfides and base metal mineralization. Material with acid generating potential, or high base metal or sulfide content, could be encountered under this proposal especially through underground development.

The potential impacts from AMD generation are severe so the alternatives need to contain provisions for managing potentially acid generating (PAG) materials or addressing the long-term

consequences should AMD or metals leaching develop. The Forest Service needs to fully analyze the potential impacts in the SEIS.

The agency should identify the depth to groundwater at the mine site as well as include baseline data on groundwater quality. The agency should also evaluate the potential for encountering water once the adit is cleared.

In response, the agency repeats the unsupported statement that: “11.71- The groundwater specialist report addresses these issues.” FEIS Vol. II at 62. As noted above, the report fails to contain this required information and analysis.

Water quantity and water rights

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), the Forest Service needs to disclose the diversion point and the quantity of water used for the proposed activities in more detail than “less than 25,000 gallons per day.” It is critical that AIMCCO not withdraw more water than it can reasonably utilize. We are also concerned that the Forest Service would allow up to twelve hours of water withdrawal without utilizing it at the drilling pad before requiring that the operator remove the intake end of the line from the stream. Even just a 10% withdrawal of water from Coin Creek could have adverse effects on aquatic organisms.

Of particular concern are the effects of water withdrawals on fish, as well as the lack of detailed analysis regarding the withdrawals. One of the major limiting factors for fish habitat in Coin Creek is water quantity: “A reduction in flow could adversely affect listed fish and MIS that occur downstream by eliminating available occupied stream habitat in Coin Creek” (Golden Hand #3 and #4 DEIS 3-118). Under the Clean Water Act, as well as the USFS’ independent duties under the Organic Act and Part 228 regulations, the agency cannot allow the operator to take any action which would have adverse impacts on the potentially affected waters. The Forest Service should also severely limit any periods of water waste.

The agency’s response, stating that these questions have been fully answered, FEIS Vol. II at 62, does not respond to the fundamental issue that the Wilderness has federal reserved water rights which cannot be impaired. Simply saying that some mitigation will be imposed does not equal non-impairment.

Another issue regards the status of the temporary water right. Without a valid water right, which is essential for the operation, the subject mining claims are not valid. As held by the IBLA:

Beyond a mere showing of [mineral] values, there must also be a showing that the mining claimant has a reasonable prospect of success in mining and removing the mineral at a profit. See In re Pacific Coast Molybdenum co., 75 IBLA 16, 90 I.D. 352 (1983). For example, if water is absolutely essential to the mining and milling processes, such that without it there is no possibility of successfully mining the claim, the presence or absence of water will be determinative of the existence of a discovery, quite apart from the values disclosed by sampling. See United States v. Osborne, 28 IBLA 13, 33-35 (1976), aff’d sub nom., Bradford Mining Corp. v. Andrus, Civ. No. LV-77-218 (D. Nev. Mar. 15, 1979). ...

[The claimant] has not shown that sufficient water is available for appropriation to meet [its processing needs]. Absent such a showing, I do not see how the finding of validity can be sustained

Desert Survivors, 80 IBLA 111, 119 (Burski, J. concurring)(emphasis added).

In addition, the lack of a water right to operate the mine would require the Forest Service to deny any proposed operation. In Far West Exploration, Inc, 100 IBLA 306, 309 (1987), the Interior Department stated that “there was no choice for BLM but to reverse itself and rescind approval of [the claimant’s] mining plan” since the company “failed to establish that it had appropriated a water right to accomplish the mining use described by the [claimant’s] plan.”

Thus, in this case, unless and until AIMMCO can verify that it has a valid water right, the Forest Service should reject the POO.

Another water quantity and water rights issue has arisen subsequent to the comment period on the DEIS. In March, 2013, AIMMCO notified the Forest Service via e-mail that for domestic water use at the Werdenhoff Camp, AIMMCO has permission from Jerry Tucker of Heritage Mining to use water under his water right permit from the North Fork of Smith Creek, but this is nowhere discussed in the FEIS. ESA-listed fish and their habitat are present in the North Fork of Smith Creek and downstream in Smith Creek and Big Creek. Information about this water use needs to be disclosed and evaluated. The Forest Service needs to verify whether this is a valid water right and whether this water right can be used as proposed by AIMMCO. If the water diversion is located on the National Forest, the Forest Service needs to ensure there is a valid Special Use Permit or Ditch Bill Easement for the diversion, and that it has gone through Section 7 ESA consultation. And depending on how water is obtained from the North Fork of Smith, how much water is taken, and when it is taken, among other factors, the impacts may be significant and may require mitigation.

Reclamation

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), the FEIS states that the operator shall conduct “defined restoration” at the end of each operating season, but fails to provide details on what is required. Given the amount of surface disturbance, proximity to streams, high snowpack in the area and remote location, it is vital that the Forest Service define seasonal closure steps in this analysis and monitor the site to ensure it is properly restored both seasonally and at the end of mining activities. For example, it is unclear if multiple drill rigs and pads will be operational at one time or if concurrent reclamation would only allow one drill rigs and pad to be operational at any one time.

In addition, the Forest Service also needs to specify a definite timeline for road decommissioning, trail restoration, and reclaiming surface disturbance from the adit reconstruction. It is unclear how many field seasons the project could be permitted if the company asks for an extension or if operations are temporarily suspended. We recommend the establishment of a firm end date. If the project is approved, all disturbed areas should be reclaimed concurrently so the total amount of surface disturbance at any one time is limited. Given the limited amount of portal work allowed

under Judge Winmill's ruling, all sites should be reclaimed upon completion of one field season and before weather precludes further activities.

Should operations be extended for any reason, all surface disturbance needs to be stabilized for winter and spring runoff. Reclamation should include stabilizing any topsoil stockpiles and coarse woody debris ahead of time, reseeding the disturbed areas, and monitoring for noxious weeds.

The agency offers only a cursory response to these issues. FEIS Vol. II at 63.

Surface occupancy

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), surface occupancy on site or the use of the Bunkhouse is not "essential" to the Project and would be in violation of the applicable Wilderness requirements noted herein, and does not "minimize" all adverse impacts as required.

In response, the agency states: "11.77 - In general, occupancy of the FC-RONR Wilderness may be approved. Section 3.2 of the EIS discussed applicable law and code with respect to occupancy. FSM 2800, Chapter 2810, Section 2818 discussed occupancy of NFS lands available to claimants. Section 2.4.2 and 2.4.3 disclose any use or occupancy of NFS lands that would occur with Alternatives." FEIS Vol. II at 63. Yet simply because these uses "may be approved" does not mean that they meet the "essential" and "minimize" requirements.

As per minimum tool analysis, all vehicles to be used need to be directly applicable to the required work and cannot be used when there are other alternatives such as walking in and out of the site. As such, the workers should walk in and out of the site each day from Pueblo Summit along the existing trail. If a vehicle needed for a specific task has sufficient space for workers to ride in on it, then the vehicle is oversized for the task. In addition to toilets at the worksite, the operator should also be required to store any temporary food reserves in bear-proof food containers.

Season of use

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), the Forest Service failed to fully analyze an alternative limiting activities to Winter Operations. We had suggested developing an alternative allowing only winter activities which is the time of least potential intrusion to other Wilderness visitors and where surfaces are protected by snow. The 12/22/09 Decision Memo by Regional Forester Harv Forsgren on authorization of helicopters in Wilderness found winter was the appropriate time of activity because it "will occur on snow or frozen ground and will have no lasting effect on the wilderness resource. In addition, the helicopter landings will take place in the winter when recreation use is minimal." Given the issues and design features related to water quality protections and stream crossings, this alternative appears particularly relevant. Regarding the feasibility of such operations, we point out that the Golden Meadows exploration project has conducted and plans to conduct winter exploration activities in the same general area to reduce impacts in riparian conservation areas.

Although the agency's response mentions a few winter-related impacts as justification for rejecting this alternative, FEIS Vol. II at 64, it fails to discuss the numerous benefits from eliminating the summer-related impacts – thus improperly skewing the FEIS's alternatives analysis.

Cumulative effects

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), the FEIS fails to provide the quantified assessment of the cumulative impacts of all “past, present, and reasonably foreseeable future actions” in the area. We are concerned about the cumulative effects from not just this project within the Wilderness but also from other past, current and reasonably foreseeable future activities throughout the entire area. In particular, we are concerned about increasing use of OHVs in the Big Creek area upstream in the headwaters.

While road improvements on the Pueblo Summit Road may initially decrease sediment delivery into the North Fork Smith Creek, improved road conditions are likely to increase vehicular use of this road. Increased vehicular use increases the amount of sediment generated. According to statements from members of the Big Creek/Yellow Pine Collaborative, use of UTVs has greatly increased in this area over the last few years. If the public learns of the improved road conditions on this route, it is reasonable to expect increased motorized use and perhaps associated uses such as dispersed camping. The Forest Service should attempt to estimate not only the benefits from the road improvements, but the negative effects that increased motorized use on this road may have.

Furthermore, if AIMMCO intends to process and test ore in the Walker Millsite facility or the old Werdenhoff Millsite, operations here are an interrelated and interdependent action of the Golden Hand Mine (as AIMMCO has proposed in the past). If so, there will be substantial traffic and road use between the two sites (among other impacts), which are both within RHCAs in the Big Creek watershed. For example, the Forest Service may need to analyze the effects of ore trucks on strings of pack horses which regularly use the road between Big Creek and the Big Creek trail head. Water quality monitoring efforts mentioned in the FEIS needs to include checking for all regulated metals, sediment, turbidity, and groundwater flow at the mill site.

Since it is reasonably foreseeable that the Walker Millsite facility (or any other potential facility) will be used for processing/testing, the full impacts from any milling/testing facility, including transportation impacts must be analyzed under NEPA. *See CEC v. Office of Legacy Mgt.*, 819 F.Supp.2d 1193, 1212 (D.Colo. 2011)(federal agency must analyze the off-site impacts of milling); *South Fork Band Council v. Dept. of Interior*, 588 F.3d 718, 725-26 (9th Cir. 2009)(EIS deficient for failing to analyze off-site transportation and milling issues). In addition, since milling/testing is considered a connected action under NEPA, these impacts must be reviewed in a single EIS.

To comply with NEPA, the USFS must consider all direct, indirect, and cumulative environmental impacts of the proposed action. 40 CFR § 1502.16; 40 CFR § 1508.8; 40 CFR § 1508.25(c). “Direct effects” are caused by the action and occur at the same time and place as the proposed project. 40 CFR § 1508.8(a). “Indirect effects” are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. 40 CFR § 1508.8(b). All 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].” Id. “Cumulative effects” 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.

40 CFR § 1508.7. In a cumulative impact analysis, an agency must take a “hard look” at all actions.

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

Te-Moak Tribe of Western Shoshone, 608 F.3d 592, 603 (9th Cir. 2010) (rejecting EA for mineral operation that had failed to include detailed analysis of impacts from nearby proposed mining operations).

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. 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). The NEPA requirement to analyze cumulative impacts prevents agencies from undertaking a piecemeal review of environmental impacts. Earth Island Institute v. U.S. Forest Service, 351 F.3d 1291, 1306-07 (9th Cir. 2003).

The NEPA obligation to consider cumulative impacts extends to all “past,” “present,” and “reasonably foreseeable” future projects. Blue Mountains, 161 F.3d at 1214-15; Kern v. BLM, 284 F.3d at 1076; 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). The cumulative impacts analysis must include “reasonably foreseeable future actions,” which is a lower threshold than is used to determine whether an agency violates NEPA’s segmentation prohibition. Wilderness Workshop v. U.S. Bureau of Land Mgmt., 531 F.3d 1220, 1229 (10th Cir. 2008) quoting O’Reilly v. U.S. Army Corps of Eng’rs, 477 F.3d 225, 236 (5th Cir. 2007) (citing 40 C.F.R. § 1508.23)(“While a cumulative impact analysis requires the [reviewing agency] to include ‘reasonably foreseeable’ future actions in its review, improper segmentation is usually concerned with projects that have reached the proposal stage.”).

Thus, in this case, the USFS must consider the cumulative impacts from all past, present, and reasonably foreseeable future projects in the region on, at a minimum, water and air quality including ground and surface water quantity and quality, recreation, cultural/religious, wildlife, transportation/traffic, scenic and visual resources, etc.

As held by the court decisions noted herein, this means that the impacts from other projects – not just the current project under review – must be fully reviewed. This includes, at a minimum, the impacts from the transportation of materials. This duty to review extends to all other projects, on both public and private lands. Cumulative impacts must be reviewed “regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” 40 CFR § 1508.7. For example, in considering a challenge to federal approval of mineral leasing and mining, a court required an agency to look at the impacts from the proposed mill that would process ore from mines/leases, despite the fact that the proposed mill would be on private lands and despite the fact that the mill was not directly associated with the mines/leases being proposed and was not included in the lease/mining proposals. The court held:

[The agency’s] other two arguments—that the effects of the mill need not be evaluated because (1) it is being built by a company on private land, and (2) approval of the mill is controlled by other governmental entities—lack merit. Regardless of whether an EA or EIS is being prepared, the agency conducting the analysis must consider the “cumulative impacts” of the proposed action. . . .

Nothing in this regulation suggests that “cumulative impacts” are limited to those occurring on [public] land, or that [the agency] need not consider the impacts from related activities that another federal agency is in charge of approving or disapproving.

Colorado Environmental Coalition v. Office of Legacy Management, 819 F.Supp.2d 1193, 1212 (D. Colo. 2011). *See also* Sierra Club v. U.S. Dept. of Energy, 255 F.Supp.2d 1177, 1185 (D. Colo. 2002) (agency must review impacts from “reasonably foreseeable” mine on private land when preparing NEPA document for federal land easement related to the future mine. “The fact that a private company will undertake the mining is irrelevant under NEPA regulations. *See* 40 C.F.R. § 1508.7 (‘regardless of what agency or person undertakes such other actions’)).

Agencies must analyze all indirect and cumulative adverse environmental effects that are “reasonably foreseeable” if it is sufficiently likely to occur. These impacts include the off-site adverse effects from the smelting/processing and transportation. “The Forest Service says that cumulative impacts from non-Federal actions need not be analyzed because the Federal government cannot control them. That interpretation is inconsistent with 40 C.F.R. § 1508.7, which specifically requires such analysis.” Center for Biological Diversity v. National Highway Traffic Safety Administration, 508 F.3d 508, 517 (9th Cir. 2007)(agency must review of impact of greenhouse gases when setting vehicle fuel economy standards), *quoting* Res. Ltd., Inc. v. Robertson, 35 F.3d 1300, 1306 (9th Cir.1994). “[S]tatements that the indirect and cumulative effects will be minimal or that such effects are inevitable are insufficient under NEPA.” Ctr. for Biological Diversity v. U.S. Dept. of Interior, 623 F.3d 633, 640 (9th Cir. 2010). In one leading case, the agency was required to review the impacts from the burning of coal when reviewing the proposed railway access and transportation of the coal. Mid States Coalition for Progress v. Surface Transportation

Board, 345 F.3d 520, 548-550 (8th Cir. 2003). This was required even though the power plants using the coal were hundreds of miles away.

Here, the FEIS merely refers to a number of other projects/activities in the area, but provides none of the required quantified assessment of their impacts. *See, e.g.*, “cumulative impacts” discussion for fisheries, FEIS at 3-48 to 50, which mention a number of other projects, but fails to contain any of the required analysis. In response, the agency merely states that: “11.83 - Chapter 3 of the EIS discloses cumulative effects to various resources and includes ongoing motorized uses associated with recreation. Appendix A of the EIS discusses Cumulative Effects.” FEIS Vol. II at 64.

Of particular concern are other mining operations in the same watersheds impacted by Golden Hand, including the Golden Meadows Exploration Project, the Big Creek Road Exploration Project, and the Morgan Ridge Drilling Project, and other proposed and ongoing activities which have overlapping access routes for hauling fuel and other traffic. The FEIS fails to disclose the cumulative impacts of these and other similar activities which increase the risk of a fuel spill risk, sedimentation, wildlife disturbance, and the ability of recreationists and others to access and use the area.

Appendix A admits to the various cumulatively-impacting projects, but merely lists the acreage of the projects. Such a listing was expressly found to violate NEPA in 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). Yet for each of these resources/impacts, none of the required analysis regarding other existing and proposed activities in the region is provided.

[W]e have recently noted two critical features of a cumulative effects analysis. First, **it must not only describe related projects but also enumerate the environmental effects of those projects.** *See Lands Council v. Powell*, 395 F.3d 1019, 1028 (9th Cir.2005) (holding a cumulative effects analysis violated NEPA because it failed to provide “adequate data of the time, place, and scale” and did not explain in detail “how different project plans and harvest methods affected the environment”). Second, **it must consider the interaction of multiple activities and cannot focus exclusively on the environmental impacts of an individual project.** *See Klamath–Siskiyou*, 387 F.3d at 996 (finding a cumulative effects analysis inadequate when “it only considers the effects of the very project at issue” and does not “take into account the combined effects that can be expected as a result of undertaking” multiple projects).

Oregon Natural Resources Council Fund v. Brong, 492 F.3d 1120, 1133 (9th Cir. 2007)(emphasis added). None of the “cumulative effects/impacts” sections of the FEIS for the various resources and impacts contain this quantification and other detailed analysis required by NEPA.

Forest Service Needs to Analyze Minimum Requirements Alternatives

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), the Objectors do not believe that the alternatives analyze represent the minimal requirements (sometimes referred to as tool) to

reasonably accomplish the purpose and need. The Forest Service needs to consider additional alternatives that would meet AIMMCO's need for reasonable access and reduced environmental impacts while staying consistent with the minimum requirements responsibility provided by the Wilderness Act. As part of an environmental analysis, this minimum requirements analysis should be conducted under the Minimum Requirements Decision Guide (MRDG). A key, relevant provision of the guide is stated on the first page, "careful management is needed to minimize the impacts from human activities in wilderness, including grazing, access to private lands, **mining**, [emphasis added] management of fish and wildlife, fire and recreation. These activities have the potential to negatively impact the values that we are charged with protecting."

In response, the agency states: "11.88 - As noted throughout the EIS, protection and propagation of Wilderness is mandated by the 1964 Wilderness Act and the Central Idaho Wilderness Act of 1980 which is the underpinning of Forest Service management of this area. The relationship between the Wilderness Act and development of mineral resources is addressed in Section 1.5 (page 1-6) and again in Section 3.3 (pages 3-11– 3-12). The project record includes a MRDG analysis (Minimum Requirements Decision Guide), addressing the need to preserve the Wilderness environment (U.S. Congress 1964, Section 4[d-2]) and the need to permit ingress and egress which have been or are being customarily enjoyed (U.S. Congress 1964, Section 5b) and mineral development activities that are reasonable and feasible. " FEIS Vol. II at 66. Yet such an important issue needs to be included in the FEIS and DROD, not merely included in the agency's files. *See Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980) (documents "contained in the administrative record, but not incorporated in any way into an EIS, can bring into compliance with NEPA an EIS that by itself is inadequate"); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208 (9th Cir. 1998).

As noted herein, aside from failing to provide the MRDG in the DEIS or FEIS for the public to review, the agency failed to consider appropriate options for the DEIS, FEIS and MRDG . As explained earlier, the Project Record shows that the MRDG was an afterthought aimed at stuffing the record and was not used to inform the NEPA or decisionmaking process. Furthermore, the MRDG is deficient for a variety of reasons.

The MRDG fails to clearly acknowledge that the rights associated with these claims, which are narrow to what the court has mandated for the validity determination, as discussed thoroughly already. Yet, the thrust of the MRDG reads as if the Forest Service has no choice but to approve the confirmation activities proposed by AIMMCO. The MRDG on page 12 states:

AIMMCO has the legal right to develop the mineral resources on their Wilderness claims where valid existing rights have been established, and the Forest Service has the legal authority to manage those activities to minimize, where feasible, environmental impacts on surface resources, including Wilderness.

The MRDG, FEIS and DROD all conclude that the proposed action (Alternative C) is the minimum required to make a determination of whether these two claims contain a valuable deposit. However, as already explained, AIMMCO's 1987 Assessment Work Request should have been the starting point for the Forest Service, and AIMMCO's activities should have been scaled back from there, as instructed by Judge Winmill, instead of the vastly expanded proposal under Alternative C.

The MRDG failed to appropriately consider no motorized travel or reductions in motorized travel. Even though the MRDG stated, it's "not possible to quantify the actual increase in duration" it would take to use some stock support rather than a full motorized option which was selected, it failed to analyze such an option. Options that did not reconstruct the existing "temporary routes" to reduce impacts to Wilderness were not considered under any alternative. And even assuming some motorized travel is necessary, the MRDG fails to consider whether nonmotorized travel is suitable for certain travel and fails to identify the minimum amount of motorized travel necessary.

Violations of the Forest Plan and the NFMA

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), the Forest Service is violating National Forest Management Act's (NFMA) requirement that all actions, such as mining, be consistent with the Forest Plan. NFMA's Forest Plan consistency provision requires that resource plans and permits (such as a mining Plan or permit) *shall be* consistent with the Land and Resource Management Plan (Forest Plan). 16 U.S.C. § 1604(i); 36 C.F.R. § 219.10(e). See also, 36 C.F.R. Part 228 (mineral regulations enacted pursuant to the Organic Act).

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), Alternatives B and C appear to locate some structures and facilities, and conduct operations, including road construction and reconstruction, within Riparian Conservation Areas (RCA) protected under the Payette Forest Plan (similar to the previous INFISH and PACFISH standards) – including tributaries to several streams that contain threatened and sensitive fish species such as Bull trout, Chinook salmon, Steelhead trout, Westslope cutthroat trout and Redband trout.

Forest Service authorization of mining, including in a ROD, must comply with all Forest Plan and NFMA requirements. Hells Canyon Preservation Council v. Haines, 2006 WL 2252554, *7-*10 (D. Or. 2006), 63 ERC 1466, 36 Env'tl. L. Rep. 20,158 (finding ROD for mining operations violates Forest Plan/INFISH and other standards). As held by the federal court in Hells Canyon, the fact that operations are proposed on an unpatented mining claim does not override the agency's duty to comply with the Forest Plan standards under the NFMA.

AIMMCO's current proposal is inconsistent with the binding Forest Plan standards. For example, Payette Plan Standard and Guideline MIST08, which requires that the agency:

Locate new structures, support facilities, and roads outside RCAs. Where no alternative to siting facilities in RCAs exists, locate and construct the facilities in ways that avoid or minimize degrading effects to RCAs and streams, and adverse effects to TEPC species. Where no alternative to road construction in RCAs exists, keep roads to the minimum necessary for the approved mineral activity. Close, obliterate, and revegetate such roads if no longer required for mineral or other management activities.

It appears that both Alternative B and C will locate new roads, structures, and other facilities in RCAs and may locate excavation trenches in RCAs. Unless the Forest Service determines, with full NEPA compliance, that there is absolutely "no alternative" to the location of all these facilities in the RCA, it must prohibit their placement in the RHCA. See Hells Canyon Preservation Council v.

Haines, 2006 WL 2252554, *7-*10 (D. Or. 2006). *See also* Forest Plan Standard FRGU06 (“new roads and landings should be constructed out of RCAs wherever possible.”). *See also* Gifford Pinchot Task Force v. Perez, 2014 WL 3019165, *20-22 (D. Or. 2014)(mine exploration drilling waste sump is a “support facility” requiring compliance with similar forest plan riparian protection standards). We note that some of Midas Gold’s drill sites in riparian conservation areas propose to pump drilling fluids to sump containers that are located outside of the riparian area.

In response, the agency states that: “11.91 - Sections 2.4.2.1 and 2.4.3.1 of the EIS disclose the Forest Plan amendment needed to complete the project. The project record includes a Forest Plan consistency check including standards and guidelines associated with facilities in the RCA.” FEIS Vol. II at 67. Yet this does not eliminate the fact that some of these structures, facilities, or roads will be located in a RCA.

Also, as noted above, the agency’s analysis of these issues must be found in the EIS, subject to public comment (on at least the DEIS), not somewhere in the agency’s files. Here, the agency’s response does not answer the question/concern. A simple reference to the “project record” for the required NEPA and NFMA analysis is totally insufficient. “[U]nless a document has been publicly circulated and available for public comment, it does not satisfy NEPA’s EIS requirements.” Massachusetts v. Watt, 716 F.2d 946, 951 (1st Cir. 1983). “The adequacy of the environmental impact statement itself is to be judged solely by the information contained in that document.” Village of False Pass v. Watt, 565 F. Supp. 1123, 1141 (D. Alaska 1983), *aff’d*, 735 F.2d 605 (9th Cir. 1984).

The Project could also implicate MIST09, which “prohibit[s] solid and sanitary waste facilities in RCAs” unless there is “no alternative to locating mine waste (waste rock, spent ore, tailings) facilities in RCAs.” If no alternative exists, then MIST09 requires a series of strict analysis and mitigation measures that must be met.

In response, the agency says that: “11.92 – No mine waste facilities are proposed. “ FEIS Vol. II at 67. Yet, as noted herein, some waste rock will be located at the portal, contradicting the agency’s position. In addition, cuttings from drilling operations will also be dispersed near the drill sites.

In addition, the FEIS admits that waste rock from the Ella Portal will be dumped in “lifts.” FEIS at 2-8. Based on FEIS Figure 2-1 (at p. 2-9), including the slope of the ground falling away below the portal, this material would be located in the RCA. As such, the agency has violated MIST09.

Further, at least one drill site (#2) is located in the RCA. FEIS Figure 2-1. “A mud pit with an approximate capacity of 4,000 gallons of drilling fluid and cuttings would be constructed in the road at each drill pad or a portable pit would be used.” FEIS at 2-8. As noted above, the federal courts have found that such a drilling sump or pit is a “support facility” required to comply with the language of MIST08. *See Gifford Pinchot Task Force v. Perez*, 2014 WL 3019165, *20-22 (D. Or. 2014)(mine exploration drilling waste sump is a “support facility” requiring compliance with similar forest plan riparian protection standards).

The FEIS also admits that structures such as latrines will be located within the RCA at the Golden Hand site. “With the exception of the Golden Hand mine site, all latrines would be located outside

of the RCAs.” FEIS at 3-43. Again, the location of structures in a RCA must comply with MIST08, which has not occurred in this case.

Lastly, the FEIS admits that water delivery structures and/or support facilities will be located within the RCA. “Both Alternative B and C would provide the needed access to AIMMCO’s water right. Additionally, multiple water tanks for storage along with the needed pipes and pumps to transport water to drilling operations would be authorized for use.” FEIS at S-14. These structures/facilities, by definition will be located in/along the RCA established for Coin Creek. As the FEIS admits, the Project will “Obtain water from Coin Creek in accordance with the water right, which would not exceed 25,000 gallons per day.” FEIS at S-10. Again, compliance with MIST08 is required, but has not occurred here.

Allowing such activities to occur and be located within a RCA not only violates the NFMA and Forest Plan, it also fails to comply with the alternatives review and other requirements of NEPA as well as the agency’s duty to prevent or minimize all adverse impacts under the Wilderness Act, Organic Act, and Part 228 regulations as noted herein.

In addition to RCA issues, the Forest Service failed to comply with additional binding Forest Plan standards set forth in the Wilderness Management Plan for the Frank Church-River of No Return Wilderness. The Forest Plan for the Payette National Forest incorporates the Wilderness Management Plan as the guiding plan for Management Area 14 of the Forest, which includes the Golden Hand project site. Forest Plan at III-274. The Wilderness Management Plan includes Standard XIII.E.1: “Reasonable access is allowed to valid mineral claims established before December 31, 1983. Such access is only for essential and exclusive use for the valid mining operations.” FC-RONR Wilderness Management Plan (May 22, 2009), p. 2-43. The Wilderness Management Plan also includes the following Standard XIII.E.2: “Reasonable access will be located to have the least lasting impact in wilderness values. To accomplish this, the use of motorized access by ground or air to claims shall be authorized only when proven essential. Road, trail, bridge, or aircraft landing area construction or improvements is limited to those clearly identified as essential to the operation.” *Id.*

The Forest Service failed to comply with each of these Wilderness Management Plan standards. Approving Alternative B or C would fail to comply with Standard XIII.E.1, because AIMMCO’s proposed confirmation activities are not essential for valid mining operations. If AIMMCO has any valid rights on Claims 1 and 2, they are limited now to preparing for validity under the specific instructions given by Judge Winmill in 2002 in District of Idaho Case No. 1:00-cv-00291-BLW. Nowhere in the FEIS or DROD does the Forest Service discuss why the different parts of AIMMCO’s proposed operations are essential for valid mining operations. And as already discussed in these objections, Alternatives B and C are a substantial expansion from what AIMMCO determined to be essential in 1987. Approving Alternative B or C would fail to comply with Standard XIII.E.2., because the motorized access has not be “proven essential.” Rather, the Forest Service acknowledges that shift changes, cores sample transport, and miscellaneous supplies/overhead transport could occur without using motorized vehicles. *See FEIS* at 2-3–2-4.

The Forest Service also failed to follow Guidelines set forth in the Wilderness Management Plan. Guideline XIII.E.6 instructs the Forest Service to:

Use Forest Service Mineral Examiners to assess the proposed mineral development in determining: []

- a. Status of the asserted rights of the claimant
- b. That proposed methods of development are needed and reasonable and that the proposed operation is the next logical step in the orderly development of the mineral resources
- c. Which alternative methods are possible and reasonable to minimize or mitigate impacts on surface resources

FC-RONR Wilderness Management Plan, p. 2-44. There is no evidence in the Project Record that the Forest Service followed this Guideline.

The SDEIS should include a detailed Watershed Analysis

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), the Forest Service should complete a watershed analysis prior as part of the SDEIS. Because the watershed analysis results provide crucial data needed to adjust the Plan of Operations, this step must precede the approval of any mine exploration activities. Based on watershed analysis results, the USFS should adjust proposed plans of operation or, if necessary, prohibit mining operations to prevent degradation of the ecological processes and functions and adverse effects to listed salmon and designated critical habitat (NMFS Biological Opinion on LRMPs, 1995). In addition, no action alternative is appropriate until the Forest Service has conducted a watershed analysis when mining operations are likely to have an adverse effect on high priority watersheds.

In response, the agency refers to the Biological Assessment (BA) conducted for some species. FEIS Vol. II at 67. Yet, a limited in-stream BA is not a substitute for a watershed-based analysis, particularly as the Project's impacts will be felt in the streams as well as the related upland and riparian areas. And the BA is not part of the DEIS and FEIS disclosed to the public.

A watershed analysis is particularly important to evaluate the impacts of fuel transport and other vehicle traffic associated with the Golden Hand project on the Middle Fork Salmon River watershed and the South Fork Salmon River watershed. These watersheds are uniquely important for ESA-listed fish species, as well as for water-based recreation.

Impacts of Increased Road Density on Priority Watersheds and Threatened Species

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), new roads built into a lightly roaded area can have a disproportionately negative impact on threatened populations by impacting the rare, relatively healthy habitat that exists within and downstream of the project area for bull trout, Chinook salmon, steelhead and westslope cutthroat trout.

While most of the road activity involves expanding trails into roads outside of riparian areas, some roadwork and more intensive trenching occurs within or adjacent to Riparian Conservation Areas. Coin Creek itself provides critical habitat for steelhead. Even roadwork outside of riparian areas can lead to sedimentation during large precipitation events or in landslide prone areas.

Whether roads are inside or outside Wilderness Areas, they still can have a profound and irreversible impact on priority habitat for the four affected threatened and MIS species. The previous INFISH and PACFISH direction rightfully highlights the importance of protecting watersheds such as those in the project area that have relatively low road densities. As stated by NMFS in its 1995 opinion on the salmon-bearing forest plans, the need to protect high quality habitats is an urgent one. (BiOp at 72-73). The idea is that "...priority should be given to protecting a well distributed, interconnected network of watersheds containing the highest quality habitats and habitats with the best potential for restoration. (BiOp at 67). Within these watersheds, "the risk of degradation to existing physical and ecological conditions should be minimized, and the probability of maintaining good habitat conditions maximized."

Thomson and Lee¹¹ found that density of juvenile Chinook salmon decreased as the geometric mean road density increased among surveyed streams in the Upper Columbia River basin. They suggest that road density exceeding 0.4 mile per mile squared is a significant issue in any watershed. In addition, the negative effects of roads on bull trout habitat and population survival are well established, and recognized in the DEIS and throughout the scientific literature.¹² The Middle Fork of the Salmon River is designated as critical habitat in the draft critical habitat rule for bull trout, with the Big Creek populations designated as core populations. Any project within the range of a critical population of a listed species should eliminate adverse effects on habitats - not increase risk. Given the relatively low road density in the area, an excellent opportunity to preserve and improve the ecological integrity of bull trout habitat exists.

The agency responds by referencing the BA. FEIS Vol. II at 68. Yet the BA largely relies on mitigation measures whose effectiveness has not been analyzed or supported by sufficient evidence. NEPA requires that all mitigation measures be fully analyzed for their effectiveness. This applies to the proposed mitigation for fisheries and water resources as well as all other mitigation measures listed in the FEIS and BA and BiOp.

Failure to Have an Adequate Mitigation Analysis, Including an Analysis of the Effectiveness of Each Mitigation Measure

¹¹ Thompson, W. L. and D. C. Lee. Modeling relationships between landscape-level attributes and snorkel counts of Chinook salmon and steelhead parr in Idaho. *Can. J. Fish. Aquat. Sci.* 57:1834-1842.

¹² Lee, D.C., J.R. Sedell, B.E. Rieman, R.F. Thurow, J.E. Williams and others. 1997. Broadscale assessment of aquatic species and habitats. Pp. 1057-1496, *In*: T.M. Quigley and S.J. Arbelbide, tech. eds. As assessment of ecosystem components in the interior Columbia Basin and portions of the Klamath and Great Basins. USDA Forest Service, Pacific Northwest Research Station. PNW-GTR-328. Portland, OR. Baxter, C. V., C. A. Frissell and F. R. Hauer. 1999. Geomorphology, logging roads, and the distribution of bull trout (*Salvelinus confluentus*) spawning in a forested river basin: implications for management and conservation. *Transactions of the American Fisheries Society* 128:854-867.

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), NEPA requires the USFS to: (1) “include appropriate mitigation measures not already included in the proposed action or alternatives,” 40 CFR § 1502.14(f); and (2) “include discussions of: . . . Means to mitigate adverse environmental impacts (if not already covered under 1502.14(f)).” 40 CFR § 1502.16(h). NEPA regulations define “mitigation” as a way to avoid, minimize, rectify, or compensate for the impact of a potentially harmful action. 40 C.F.R. §§1508.20(a)-(e). “[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the ‘action-forcing’ function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects.” Robertson, 490 U.S. at 353.

[NEPA] does require that an EIS discuss mitigation measures, with “sufficient detail to ensure that environmental consequences have been fairly evaluated.” Methow Valley, 490 U.S. at 352, 109 S.Ct. 1835.

An essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective. *Compare* Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1381 (9th Cir.1998) (disapproving an EIS that lacked such an assessment) *with* Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 477 (9th Cir.2000) (upholding an EIS where “[e]ach mitigating process was evaluated separately and given an effectiveness rating”). The Supreme Court has required a mitigation discussion precisely for the purpose of evaluating whether anticipated environmental impacts can be avoided. Methow Valley, 490 U.S. at 351–52, 109 S.Ct. 1835(citing 42 U.S.C. § 4332(C)(ii)). A mitigation discussion without at least *some* evaluation of effectiveness is useless in making that determination.

South Fork Band Council v. Dept. of Interior, 588 F.3d 718, 727 (9th Cir. 2009)(rejecting EIS for failure to conduct adequate review of mitigation and mitigation effectiveness in mine EIS)(emphasis added).

Thus, the FEIS’s brief listing of mitigation measures is not acceptable. The agency is required to fully analyze the impacts to each resource, fully analyze each mitigation measure, and fully analyze the effectiveness of each proposed mitigation measure for all potentially affected resources (e.g., fisheries, surface and ground water, air, land, wildlife, recreation, religious/cultural, etc.).

Further, reliance on future mitigation measures included in the FEIS cannot substitute for the required pre-approval NEPA review.

[M]itigation measures, while necessary, are not alone sufficient to meet the [agency’s] NEPA obligations to determine the projected extent of the environmental harm to enumerated resources *before* a project is approved. Mitigation measures may help alleviate impact *after* construction, but do not help to evaluate and understand the impact before construction. In a way, reliance on mitigation measures presupposes approval. It assumes that—regardless of what effects construction may have on resources—there are mitigation measures that might counteract the effect without first understanding the extent of the problem. This is inconsistent with what NEPA requires.

Northern Plains, 668 F.3d at 1084-85 (emphasis in original).

Roads Analysis Needed

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), a Roads Analysis is required to inform decisions made after January 12, 2002. The goal of the Forest Service Transportation Policy (Roads Policy) is to promote prioritization. The Roads Policy is unambiguous, “When proposed road management activities [road construction, reconstruction and decommissioning] would result in changes in access, such as changes in current use, traffic patterns and road standards, or where there may be adverse effects on soil and water resources, ecological processes, or biological communities, those decisions must be informed by roads analysis (FSM 7712.1).” This project clearly alters access and has environmental impacts and therefore must be informed by a Roads Analysis. A Roads Analysis at the watershed scale would be most appropriate since it could be completed in conjunction with the watershed analysis that has not yet been completed for this project.

The Policy further outlines the minimum requirements for outcomes of a Roads Analysis, including the identification of needed and unneeded roads, site-specific priorities, and identification of areas of special sensitivity. Priority watersheds (RHCAs as identified in the Forest Plan) are such areas of special sensitivity that must be considered in Roads Analysis. If road construction or reconstruction is going to occur as part of the project decision, the SDEIS must be informed by a Roads Analysis.

The agency responds with a statement that: 11.101 - The Big Creek TAP was completed in 2009. The objectives stated in FSH 7709.55, Chapter 20, Section 20.2 would not apply to this project. The project does not propose to add routes to the NFS system and would not require a TAP to inform the decision. 11.102 - The Big Creek TAP was completed in 2009. The objectives stated in FSH 7709.55, Chapter 20, Section 20.2 would not apply to this project. The project does not propose to add routes to the NFS system and would not require a TAP to inform the decision. Sections 2.4.2 and 2.4.3 of the EIS describe road maintenance and reconstruction that would occur, along with temporary road authorizations. No road construction would occur. “ FEIS Vol. II at 68-69.

Yet the fact that “no road construction would occur,” does not eliminate the need for the analysis, as that requirement also applies “When proposed road management activities [road construction, reconstruction and decommissioning] would result in changes in access, such as changes in current use, traffic patterns and road standards, or where there may be adverse effects on soil and water resources, ecological processes, or biological communities, those decisions must be informed by roads analysis (FSM 7712.1).”

Landslide Prone Areas

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), the Objectors have significant concerns about the construction of several temporary roads and drill pads in high to moderate landslide prone areas near Coin Creek (DEIS 3-46).

“Although landslides are naturally occurring events, human caused disturbances such as road construction, reconstruction, drill pad construction and trenching can increase the potential for and occurrence of landslides. The term “landslides,” is a collective term that includes both deep-seated, geologic failures and smaller localized mass erosional events such as slumps, debris torrents, debris slides and rockfall. Three principal factors influence slope stability: soil moisture, root strength and slope gradient. Debris torrents occurred on two unnamed tributaries to Coin Creek in 2007.” FEIS 3-51.

The fact that the area appears currently stable does not mean that the risk rating will stay low during or after project activities. Each drill pad site would widen the road from the existing 8 foot width to 20 feet. In addition, a lined mud pit with a 4,000 gallon capacity would be constructed in the drill pad.

The agency responds with a statement that fails to ensure against the potential for landslides: “11.104 - Sections 2.4.2 and 2.4.3 of the EIS describe road maintenance and reconstruction that would occur, along with temporary road authorizations. No road construction would occur. Section 3.5.2 discloses the effects of Alternatives on soil resources including landslide prone area. The silt fence design feature is intended to reduce impacts from slumping or channelized flow on the fill slope of constructed pads. Section 2.4.4 discloses project PDFs designed to reduce project impacts.” FEIS Vol. II at 69.

While the Forest Service proposes to utilize silt fences with steel posts and wire mesh backing below drill pads constructed in high to moderate landslide prone areas, the FEIS provides no documentation on the effectiveness of silt fences in stabilizing landslides. As noted above, the failure to analyze the effectiveness of a mitigation measure violates NEPA.

We note that the Kilgore North Environmental Assessment contains direction stating that for drill rigs on steeper slopes where slope stability may be an issue, the use of containers for sumps should be considered:

On steep slopes where sump construction is impractical, containment vessels to capture sediment may be an appropriate measure and should be considered as practical mitigation. Kilgore North EA, p. 111.
http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/94028_FSPLT3_2408067.pdf

As mentioned before, we do not believe that any of the drilling is allowed under Judge Winmill’s order as it constitutes additional exploration. Should this drilling be deemed allowable, the Forest Service should analyze additional alternatives which address the landslide concern. For example, the proponent could construct a series of raised platforms to use as drill pads instead of disturbing the ground and utilize helicopters to transport the drill rig itself. This type of technology is currently being used at the nearby Golden Meadows exploration site. The Forest Service briefly examined using helicopters as a way to avoid road construction but never developed this alternative (Chapter 2-1). The reason that this alternative was never developed was that it appeared that helicopter use would create more of a wilderness intrusion than ground vehicle transportation.

However, the Forest Service has not analyzed using the helicopters just for the drill rig transportation. Personnel, fuel and other equipment could still be transported on the improved trail. Once the drill pad platforms have been constructed using ground support, a helicopter could be used solely for transporting the drill rig. This alternative could also limit the amount of road work needed to support ground vehicles and the overall number of helicopter trips.

The agency's response only focuses on the helicopter access part of the issue/concern and fails to respond to the reasonable and legitimate alternative of raised drill platforms. FEIS Vol. II at 69.

Alternatively, winter operations over snow could also help address the landslide concern, as platforms could be constructed on top of snow, alleviating significant ground disturbance. Another option would be utilizing pack animals or a much smaller and more portable "Winkie" drill which would help address access and disturbance issues. Winkie drills are easily transportable without a road system can drill down to several hundred feet.

As noted above, the agency's summary rejection of the winter operations alternative is inadequate, as it only focused on the perceived negative aspects of such operations, yet failed to analyze the positive aspects as noted in the previous comments.

Bonding and Reclamation Requirements

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), the Forest Service's 36 CFR part 228 regulations, as well as Payette Forest Plan Standard MIST06 require the Forest Service to establish an adequate reclamation bond. Bonding costs need to be detailed in the SDEIS for each alternative. The reclamation bond must be independent of the bond covering AIMMCO's Antimony Rainbow mine or any other AIMMCO operation.

In calculating bonding costs, the Forest Service should consider the previous non-compliance of AIMMCO regarding its failure to post adequate bonding and adhere to water rights regulations on the Walker mill site. Despite having run mining operations in this area for several decades, AIMMCO did not bother to incorporate well-known and standardized best management practices in the previous Golden Hand Plan of Operations. AIMMCO's inadequate mapping and lack of specificity raises further doubts about how seriously this company regards its environmental responsibilities.

The bond must be substantive enough to cover the worst possible impacts to the area's fragile ecosystem as well as the area surrounding the transportation route and processing site. Bonding should also be provided for possible spills of fuels and other hazardous materials that will be driven or flown in to the Big Creek area. The bonding should reflect the impacts to the sensitive nature of this site and the listed species inhabiting the area. The claims occur on a slope rated at a moderate to high risk to road cut failures, and the bond should reflect the risk imposed by road construction. Bonding costs should be calculated according to Forest Service pricing, including the cost of renting and transporting equipment and wages for all workers and supervisors.

The Forest Service needs to describe the reclamation process and all associated costs in detail. This analysis should include the volume and type of material to be moved, equipment needed, location

for stockpiling, and sequence for reclamation. Many of the trails inside the Wilderness boundary have been covered by sediment aggrading from cut slopes and have been re-vegetated by alders and small scattered trees. During any trail or road construction, all topsoil, developing soil, and woody debris need to be salvaged and stockpiled for future reclamation. Reclamation by ripping these roads to mineral soil is unacceptable because of the loss of decades of soil development that has occurred since the trails were abandoned. Once roads are re-contoured, the topsoil, developing soil, and woody debris need to be replaced and reseeded with native vegetation. This reclamation of the area must take place concurrently with the mining operation as much as possible. Final reclamation, including all road obliteration, must as soon as possible after closure of operation. Bonding figures should take into account long term water treatment if the adit water proves to be or becomes contaminated over time.

The U.S. EPA also strongly criticized the Forest Service for not including bonding in the NEPA process – noting that such a failure violates NEPA.

[A] key component to determining the environmental impacts of a mine is the effectiveness of closure and reclamation activities, including long-term water maintenance. The amount and viability of financial assurance are critical factors in determining the effectiveness of reclamation and closure activities and, therefore, the significance of environmental impacts. The final EIS should include details about the bond mechanism and a range of costs so that there is a context for understanding the cost of ensuring that the mine is appropriately reclaimed and closed.

EPA comments on DEIS dated September 17, 2012, reprinted at FEIS Vol. II at 7-9.

The USFS responded to the previous comments and EPA with its position that: “Including bond estimates in NEPA decisions would be premature. The NEPA analysis includes addressing mitigation and monitoring measures that typically require bonding but are not finalized until the NEPA decision is made.” FEIS Vol. II at 4 and 70. Although recognizing that bonding is part of “mitigation and monitoring,” the agency nevertheless argues that providing public review of bonding is “premature.”

Yet such analysis that is what the NEPA process mandates for other aspects of each action alternative. For example, the FEIS arguably reviewed the different environmental impacts, including from the reclamation activities, of each alternative. There is nothing about estimating the costs of reclamation for each alternative that would be harder than reviewing the environmental impacts from each alternative. In fact, once the latter is done, calculating the costs would be easier, as the cost of each alternative is a factor that must be considered in the FEIS anyway.

The aforementioned Minimum Requirement Decision Guide should also be followed to determine the most appropriate, minimum tool approach for reclamation and restoration plans, which also must be covered by bonding. Bonding figures should take into account the minimum tool costs, where costs and convenience are not the primary concern for preferred alternative but full costs must be considered in bonding. A plan of responsibility should also be determined for the reclamation and restoration activities, in advance and only for the claim validation drilling and not

for any potential future mining. The plan should be full recovery of the Wilderness after validation drilling.

Alternatives Should Minimize Adverse Environmental Impacts

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), in addition to the limitations on disturbance in the Wilderness, under the Part 228 regulations, the Forest Service must ensure that “[a]ll operations shall be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest surface resources.” 36 C.F.R. § 228.8. The only constraint on the Forest Service’s duty to minimize is that such minimization measures must be “feasible.” 36 CFR § 228.8. There is nothing in the regulations or law which states that the agency is precluded from requiring further mitigation and minimization measures because such measures are financially impractical under AIMMCO’s current financial situation. “Virtually all forms of Forest Service regulation of mining claims – for instance, limiting the permissible methods of mining and prospecting in order to reduce incidental environmental damage – will result in increased operating costs, and thereby will claim validity.” Clouser, 42 F.3d at 1530.

The agency responded with a generalized statement that: “11.110 – The project record contains a minimum tools analysis. The FS worked with AIMMCO for more than two years to develop a plan that minimized adverse environmental impacts, met AIMMCOs needs and complied with the 2002 Federal District Court decision.” FEIS Vol. II at 71. Yet no details are provided, and no response is given to the numerous examples contained in the previous comments where the agency has purportedly reduced impacts, but have not minimized them.

Noise Levels

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), while Claims No. 1 and 2 may be partially shielded from view because of their location in a hollow, noise will be a major effect on the Wilderness character of the area. Mechanical noise produced from mining operations can travel miles and disrupt both Wilderness visitors and wildlife. To minimize these effects, handsaws and shovels need to be used instead of chain saws and other mechanical equipment when clearing downed trees and other obstacles when clearing the site. Intrusive machinery, if allowed at all, needs to be used only when no other reasonable tool exists. The maximum noise allowed by the generator and all equipment must operate under 78 decibels when measured at a distance of 50 feet, the standard used for snowmobiles in Yellowstone National Park. Again, winter operations may be appropriate to limit noise and Wilderness visitor intrusion.

In response, the agency refers (at FEIS Vol. II at 71) to other sections of the FEIS, where the document merely states that: “To the extent practicable, all equipment used within the FC-RONR Wilderness would be fitted with devices that provide maximum noise dampening. Noise dampening devices would be maintained for utmost effectiveness.” FEIS 2-18. No details are given regarding this equipment nor any analysis of the effectiveness of the purported mitigation measures (in violation of NEPA).

Threatened and Endangered Species

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), threatened and endangered species in this area include bull trout, Chinook salmon, steelhead, west slope cutthroat trout, lynx, and gray wolves. Subsequent to the comment period, the Forest Service submitted Biological Assessments to USFWS and NMFS. USFWS issued a letter of concurrence for lynx and northern Idaho ground squirrel, and a BiOp for bull trout. NMFS has issued a BiOp for steelhead and Chinook salmon. *See DROD*, p. 5.

We remain particularly concerned about effects of water withdrawals on fish. One of the major limiting factors for fish habitat in Coin Creek is water quantity: “A reduction in flow could adversely affect listed fish and MIS that occur downstream by eliminating available occupied stream habitat in Coin Creek” (Golden Hand #3 and #4 DEIS 3-118). In addition to violating the Endangered Species Act, the agency’s approval of the Project would violate the Organic Act and 228 regulations noted above.

Here, the agency’s response (FEIS Vol. II at 72) merely refers to the BA and BiOp, which as noted herein, are inadequate.

And as already explained above, AIMMCO now intends to use water from the North Fork of Smith Creek at the Werdenhoff camp. This was not disclosed in the BA and is not in the FEIS and requires reinitiating consultation over impacts to bull trout, steelhead, and Chinook salmon and their habitat.

USFWS prepared an incidental take statement with its bull trout BiOp, which found that take of bull trout is anticipated from vehicles driving through the fords on the North Fork of Smith Creek. Biological Opinion for the Golden Hand Number 1 and 2 Lode Mining Claims on the Payette National Forest, U.S. Fish and Wildlife Service (Oct. 30, 2013), p. 56–57. USFWS set the level of authorized incidental take at the 300 estimated round trips from Logan Creek to the Werdenhoff site each year, which is 600 individual stream crossings per year. *Id.* at 57. However, the Forest Service failed to accurately estimate the number of trips across the ford associated with the Golden Hand Project. The 600 crossings number includes every-other-day fuel deliveries to Werdenhoff and transportation of personnel and other supplies to and from Werdenhoff from outside the project area. However, neither the FEIS nor BA disclose additional vehicle trips associated with workers living at Werdenhoff four months each year. While living at Werdenhoff, workers will likely drive across the ford regularly to travel to Big Creek, Yellow Pine, Cascade, McCall, or other locations for personal reasons. The Forest Service needs to disclose, evaluate, and mitigate for the impacts of these additional vehicle trips and may need to reinitiate ESA consultation.

The BA and FEIS also failed to estimate the number of vehicle trips AIMMCO might take within the Wilderness, in addition to the round trips to and from the project site in the wilderness. These additional trips would involve fording Coin Creek and travel within RCAs, and increase the risk of contamination and sediment delivery. With the high level of traffic combined with denuded vegetation from drill pads, trenching, and the staging area, much of which occurs within and near RCAs, there may be sediment delivery to Coin Creek that may adversely impact ESA-listed fish.

Noxious Weeds

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), alien invasive species are the second leading factor contributing to worldwide loss of biodiversity. Forty-nine percent of threatened, endangered, and sensitive species are threatened in part by alien invasive species. Noxious weeds infest 184,000 acres of the Payette and Boise National Forests and 4,600 additional acres of public lands every year.

The most efficient way to deal with alien non-native species is to prevent incursions into intact habitats that as refuges for native species: "Weed prevention means placing a priority on preserving and protecting lands not presently infested," (Noxious Weeds, AG 500, Utah State University Extension). Once noxious weeds become established, it becomes far more expensive to control or eradicate these species. Furthermore, treatments such as herbicides and biological control agents may further compromise the ecological integrity of these areas.

Any action alternative will vastly increase the possibility that noxious weeds will infest this area: "Roads, trails, and rivers have been identified as the primary conduits for noxious weed species transport and establishment" (Noxious Weed Situation Analysis on the Payette National Forest, 8 Jan 2002). Each level of road improvement opens a larger area of formerly natural habitat to invasion by weedy species. From this perspective, the alternative with the least amount of road construction represents the smallest threat of infestation.

The operator should be required to wash all equipment, including the undercarriage of vehicles, before entering the National Forest. We also recommend that all equipment, including boots and pant cuffs, need to be brushed before entering the site. Disturbed soil areas need to be reseeded with native plants, and then followed up with non-chemical weeded control to prevent expansion of noxious weeds. A noxious weed monitoring and treatment program needs to be implemented as part of this project.

If any pack animals are utilized, they should be given only certified weed free feed 96 hours before entering and while in the Payette National Forest and that their hides and hooves will be cleaned thoroughly. The SDEIS should specify that saddles and tack must also be cleaned off upon each entry.

The agency's response again lacks any details or mitigation effectiveness analysis. FEIS Vol. II at 72.

Air quality and vehicle type

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), both alternatives B and C entail using a number of vehicles, including a 1940 era International Harvest 6x6 Truck with 7 cubic yards dump capacity and a 1940 era GMC 6x6 truck with a flatbed. One of the issues for this project is the protection of air quality within a Class I airshed and the minimization of human disturbance in the wilderness. The Forest Service has not compared how the fuel efficiency, exhaust and emissions from these 1940 era trucks compare with modern vehicles. It may well be that using more modern vehicles would reduce the fuel needs (and associated environmental cost with fuel transportation and storage), exhaust and overall emissions. The Forest Service needs to conduct this analysis as

part of the SDEIS. On page 2-16 the Forest Service mentions that mechanical equipment would be fitted with devices to reduce emissions, but provides no other information.

The agency's response again lacks any details or mitigation effectiveness analysis. FEIS Vol. II at 74.

The Forest Service Is Authorized to Limit Exploration to Only the First Initial Stage

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), it is accepted Forest Service policy to consider the initial phase of a mining project (i.e., the obtaining of additional information) as a separate alternative that should be reviewed in the NEPA process. Indeed, as noted herein, such an alternative is the only action alternative that can even be considered for approval. For example, the Northwest Region recently affirmed a decision by the Siskiyou National Forest that did exactly that. In the NICORE FEIS and ROD, the Forest reviewed and approved an alternative well short of full mine development. See NICORE ROD, as well as decision of Regional Forester rejecting the mine applicant's appeal (USFS official document incorporated into record).

At NICORE, the Forest Service declined to approve the full-scale mining alternative until the company had obtained more mineralogical data from test digging and sampling. It remanded the proposed plan of operations for full-scale mining back to the applicant and only approved the first-phase of operations – sampling and data evaluation. Notably, the Forest Service specifically stated that it would not approve the full-scale mining alternative until the applicant resubmitted its first-phase proposal, obtained the necessary information and submitted the proposal for agency and public review, and then resubmitted the full-scale alternative proposal.

Under its 36 CFR Part 228 regulations and related statutes, the Forest Service must reject an “unreasonable” mine plan. “Although the Forest Service cannot categorically deny a reasonable plan of operations, **it can reject an unreasonable plan and prohibit mining activity** until it has evaluated the plan and imposed mitigation measures.” Siskiyou Regional Education Project v. Rose, 87 F. Supp. 2d 1074 (D. Or. 1999)(emphasis added). That is exactly what the Siskiyou National Forest, as affirmed by the Northwest Regional Office, did in the NICORE case.

At NICORE, the Regional Office followed accepted Forest Service practice in denying the full-scale mining alternative, affirming the Siskiyou Forest's decision to approve the only “reasonable” alternative – the alternative of gathering more environmental and economic data. The Regional Office “determined that additional sampling and testing will best meet that regulatory framework to minimize impacts on a very environmentally sensitive area.” NICORE appeal decision at 4 (USFS official document incorporated into record). The agency continued:

The FS could have returned the plan of operation as being unreasonable. However, it chose to process the plan, to conduct the environmental impact statement and approve the additional exploration and development activities as being the most reasonable next step in determining if the deposit can be economically developed. If the additional sampling and testing proves positive, then the plan can be modified to include full-scale development.

NICORE appeal decision at 4.

At Golden Hand, as noted herein, the agency should have “returned the plan of operation as being unreasonable.” However, at most, due to the severe environmental and economic uncertainties in alternatives B & C, the agency can only approve, at most, a very limited alternative of further evaluation of the site without drilling activities.

This authority and responsibility of the Forest Service to review less-than-full scale development alternatives and to disapprove unreasonable mining plans of operations was recently affirmed by the Northern Region. In its October 13, 2000 decision regarding an appeal of the Gallatin National Forest’s approval of the Lodestar Mine, Deputy Regional Forester McCallister overturned the Forest’s approval of the Mine because “the record does not adequately address the reasonableness of the proposed activities.” Lodestar appeal decision at 2 (USFS official document incorporated into record). Ms. McCallister affirmed the recommendation of the Appeal Reviewing Officer that the Forest should have thoroughly reviewed the reasonableness of approving “more exploratory drilling prior to approving the development of the two adits and production mining.” October 11, 2000 Reviewing Officer recommendation at 5 (USFS official document incorporated into record).

At Golden Hand, the Forest Service correctly described how the proposed exploration development proposed under Alternatives B and C as allowing more Wilderness impacts than are permissible, as noted herein, however, **any** drilling outside of the boundaries of the “discovered” ore body are not permissible.

In addition to the limitations on disturbance in the Wilderness, under the Part 228 regulations, the Forest Service must “minimize adverse environmental impacts” to Forest resources. 36 CFR § 228.8. Alternatives B and C do not meet this standard. The Forest Service’s position appears to be that further minimization of adverse impacts is unwarranted due to the financial impacts to AIMM. That, however, is not a valid reason for failing to truly minimize impacts. The only constraint on the Forest Service’s duty to minimize is that such minimization measures must be “feasible.” 36 CFR § 228.8. There is nothing in the regulations or law which states that the agency is precluded from requiring further mitigation and minimization measures because such measures are financially impractical under AIMM’s current financial situation or because of low commodity prices.

The agency’s answer to these issues, FEIS Vol. II at 74, is completely unresponsive. “11.124 – The proposal being considered in this EIS is for limited collection of geologic information under the terms of a Federal District Court decision. No mining is proposed.”

Forest Service Needs to Analyze Additional Alternatives

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), the Forest Service failed to consider additional alternatives that would meet AIMM’s need for reasonable access and reduce environmental impacts to a greater extent than the proposed action alternatives. While the Forest Service briefly mentioned several other alternatives (non-mechanized, winter, temporary bridges),

without analyzing them it is impossible to adequately compare their effectiveness in addressing issues. In addition, the use of portable containers as sumps instead of digging sump holes could help address the landslide issue. All sumps should have escape ramps for wildlife species.

In addition, the SDEIS needs to analyze a new alternative which limits all mineral development to underground activity through the existing Ella Portal. This alternative would allow continued delineation of the ore body through the east and west drifts without the severe surface effects of surface trenching and drilling. The Forest Service should also develop an alternative to better address the Visual Quality Forest Plan Standard SCST01.

The agency's response, FEIS Vol. II at 76, merely repeats the unsubstantiated position that all reasonable alternatives were fully reviewed, which as shown herein and in the previous comments, is not the case.

No Unclassified Travelways Should Be Added to the Road System

As stated in the previous comments (FEIS Vol. II at 31-38, 40-83), transportation management manual direction directs managers to, "emphasize maintenance and reconstruction of classified roads to meet road management objectives (FSM 7712.5). Give priority to upgrading the most heavily used roads to provide safe and efficient travel and reduce adverse environmental impacts (FSM 7703.2)." Given limited budgets and this clear direction, it seems both fiscally and ecologically irresponsible, and legally untenable, to increase the classified road system.

The Roads Policy manual direction accompanying this rule identifies unclassified roads as unneeded, and further prohibits reconstruction of unclassified roads. The roads status is mentioned briefly in the FEIS: "The road density and location indicator is rated at Functioning at Unacceptable Risk overall within the Big Creek portion of the analysis area." FEIS p. 3-36.

The agency responds with generalized statements with any details and repeats the same error by rejecting the need to comply with road requirements under its view that there will not be any brand new "roads": "11.134 - This project would not expand the NFS system of roads. All roads would be temporary. Sections 2.4.2 and 2.4.3 of the EIS describe road maintenance and reconstruction that would occur, along with temporary road authorizations. No road construction would occur. 11.135 - This project would not expand the NFS system of roads. All roads would be temporary. Sections 2.4.2 and 2.4.3 of the EIS describe road maintenance and reconstruction that would occur, along with temporary road authorizations. No road construction would occur." FEIS Vol. II at 78.

Both watershed and roads analysis are intended as tools to assess the cumulative impacts of all activities in a watershed. Individual project decisions logically and legally cannot proceed without tiering analysis to what is going on throughout the watershed. This is particularly important in watersheds that provide some of the last, best habitat for threatened aquatic species. It is much easier to protect healthier ecosystems than it is to restore them after the damage is done. The Forest Service has collected useful and ecologically important data on road and watershed impacts, but without the completion of the watershed and roads analysis and a cumulative analysis of the impacts, the data in the file are useless. The law requires decisions to be based on these analyses, not simply that data be collected on the impacts, but that the impacts be considered fully.

We are concerned about classification of unauthorized roads, even small segments such as the 0.1 mile segment to the Werdenhoff Mill, as well as the conversion of Wilderness trails into access roads. The Forest Service must consider all of these activities as new road construction.

The agency's response relies on its purported cumulative impacts review in the FEIS: "11.136 – Sections 3.4.5 and 3.5.3 in the EIS provide an analysis of cumulative effects on Fisheries, Watershed, and Soils. The Fisheries Specialist Report (Project Record) and Biological Assessment provide an assessment of current condition as project effects to a sweat of Watershed Condition Indicators. The Biological Assessment provide an assessment of cumulative effects on ESA listed fish and designated critical habitat, including interrelated and interdependent effects. 11.137 - A watershed analysis was not completed prior to responding to this plan of operation. The Big Creek TAP was completed in 2009. The objectives stated in FSH 7709.55, Chapter 20, Section 20.2 would not apply to this project. The project does not propose to add routes to the NFS system and would not require a TAP to inform the decision. Section 1.5 of the EIS discloses the purpose and need for the project. Chapter 3 of the EIS discloses effects to various resources including cumulative effects." FEIS Vol. II at 78.

As detailed above, however, the FEIS fails to contain the required quantified assessment of the impacts from all past, present, and reasonably foreseeable future actions in the area, and thus violates NEPA.

IV. Suggested Remedies

As already stated on page 2 above, the proper remedy is for the Forest Service not to issue any Final ROD that would authorize approval of any PoO (i.e., the USFS must deny/reject any such PoO) for any action alternative reviewed in the FEIS that does not fully comply with each and every law, regulation, and policy noted herein. The Forest Supervisor must remand the FEIS and DROD back to the Payette National Forest with instructions to correct all errors noted herein before the USFS can consider approving any operations at the site.

Objectors provide the additional suggestions to resolve our concerns:

- Prepare a new or Supplemental EIS including additional action alternatives that reduce the extent and intrusiveness of AIMMCO's proposed activities to comply with the Wilderness Act, other federal laws and regulations, and Judge Winmill's 2002 Decision.
- Eliminate drilling and trenching operations and limit all surface disturbing activities to areas which were previously accessible and where previous discoveries were made.
- For each alternative, limit the use of mechanized equipment and motorized transport to that which is proven essential.
- Design and conduct a study to establish baseline water quality and quality data for surface and ground water resources. This analysis should include a map showing the stream, spring and groundwater sampling locations. The Forest Service should consider requiring an additional season to collect baseline information.
- Include additional mitigation measures and design features. These may include the following:

- Including additional road decommissioning outside the immediate project area for mitigation.
 - Conduct an OHV education and enforcement program to minimize impacts from increased use in the area, including increased signage, closures of areas for dispersed camping, increased education and outreach efforts, and increased enforcement.
- Update the cumulative effects to quantify the effects and to reflect the Golden Meadows and other projects in the area.
 - Require the use of a contained system instead of a sump where this feature can minimize landslide or water contamination risks. Sump containers should be located outside or riparian conservation areas. If sumps are to be used, they should be surrounded by netting to deter wildlife from falling in and becoming entrapped. We are concerned about both large mammals and amphibians. Sumps should also be equipped with escape ramps for wildlife. Please see specifications below on the System 360 Total Fluids Management System from Baroid Industrial Drilling Products. The Baroid Industrial Website (<http://www.baroididp.com/idp/products-applications/equipment-line/equipment-line.page?node-id=hlz0i2yg>).

V. Conclusion

In conclusion, as detailed above and in the previous comments submitted by all Objectors, the FEIS and DROD fail to fully comply with numerous federal laws, regulations, policies and other requirements. As such, the Forest Supervisor's Office must remand both documents and correct all errors noted herein. The USFS cannot approve any of the action alternatives described in the FEIS and DROD, or any alternative at all that the applicant may propose, unless and until all laws, etc., noted herein are satisfied. Please direct all communications regarding this Objection to the undersigned attorneys.

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List of Exhibits

I. Documents from American Independence Mines & Minerals Co. v. Lyng, Case No. 1:00-cv-00291-BLW (D. Idaho Apr. 22, 2002):

Exhibit A: Complaint, Dkt. # 1 (filed Jul. 21, 1988).

Exhibit B: Opening Brief in Support of Motion for Summary Judgment, Dkt. # 35 (filed Nov. 19, 2001).

Exhibit C: Declaration of Conway G. Ivy in Support of Plaintiff's Opening Brief on Summary Judgment, Dkt. # 36 (filed Nov. 19, 2001).

Exhibit D: Declaration of John M. Marshall in Support of Plaintiff's Opening Brief on Summary Judgment, Dkt. # 37 (filed Nov. 19, 2001).

Exhibit E: Corrected Supplemental Declaration of John M. Marshall in Support of Motion for Summary Judgment, Dkt. # 41 (filed Nov. 21, 2001).

Exhibit F: United States Brief on Summary Judgment, Dkt. # 43 (filed Dec. 17, 2001).

Exhibit G: AIMMCO's Reply Brief in Support of Motion for Summary Judgment, Dkt. # 45 (filed Jan. 17, 2002).

Exhibit H: Statement of Undisputed Facts, Dkt. # 48 (filed Apr. 22, 2002).

Exhibit I: Memorandum Decision, Dkt. # 49 (filed Aug. 12, 2002).

Exhibit J: Judgment (filed Aug. 12, 2002).

II. Documents related to the Kilgore Gold Exploration Project in the Dubois Ranger District of the Caribou-Targhee National Forest:

Exhibit K: United States Department of Agriculture, Forest Service, *Environmental Assessment: Kilgore, North Area (Otis Capital USA, Corp. Kilgore Gold Exploration Project–Mine Ridge North Area)*, Oct. 2014.

Exhibit L: United States Department of Agriculture, Forest Service, *Decision Notice and Finding of No Significant Impact: Kilgore, North Area (Otis Capital USA, Corp. Kilgore Gold Exploration Project–Mine Ridge North Area)*, Dec. 30, 2014.

III. Other:

Exhibit M, Nez Perce Tribe Watershed Division, *Golden Hand Road Inventory GRAIP Report*, Feb. 5, 2014