KATIE SWEENEY
Executive Vice President, Legal Affairs and General Counsel

Submitted Electronically To:
https://cara.ecosystem-management.org/Public/CommentInput?Project=50516

October 28, 2020

United States Forest Service, Payette National Forest
Attn: Linda Jackson, Payette Forest Supervisor
500 North Mission Street
McCall, ID 83638

RE: Comments on the Payette and Boise National Forests' Draft Environmental Impact Statement for the Stibnite Gold Project
EIS No. 20200165

Dear Ms. Jackson:

The National Mining Association (NMA) appreciates the opportunity to submit these comments on the Draft Environmental Impact Statement (DEIS) published by the Payette and Boise National Forests (Forest Service) for Midas Gold Idaho Inc.'s (Midas Gold) proposed Stibnite Gold Project (SGP) in Valley County, Idaho. 85 Fed. Reg. 49,649 (Aug. 14, 2020) and 85 Fed. Reg. 62,298 (Oct. 2, 2020) (Comment period extended to October 28).

I. Introduction

A. Identity of the National Mining Association and its Interest in the Stibnite Gold Project

The National Mining Association, based in Washington, D.C., is the national trade association of the mining industry. NMA represents the majority of companies that mine and produce minerals in the United States and Idaho, including "locatable" minerals governed by the Mining Law of 1872, 30 U.S.C. §22 *et seq.*, as amended (collectively, Mining Law). NMA members explore for and produce gold, silver, copper, molybdenum, uranium, lead, zinc, platinum, palladium, and rare earth and critical minerals such as antimony. NMA also represents the producers of most of America's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and engineering, transportation, financial and other businesses that serve the mining industry.

NMA has been closely following Midas Gold's SGP efforts to develop the SGP. The SGP is a pioneering approach to hardrock mining as it will combine mining activities with much needed restoration of legacy contamination. After several failed attempts at Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) driven cleanup, the Stibnite Mine was eventually forsaken in 2012 by the federal government, leaving behind poor ground and surface water quality generated from legacy contamination. The proposed action under this National Environmental Policy Act (NEPA) review will indelibly improve the environmental conditions on the site as a product of a thoughtful project design and execution of its Plan of Restoration and Operations (PRO). This novel approach is a win-win for the environment and the Idaho economy. The SGP mining/restoration model will entice new and existing sources of private capital to serve the important economic needs of job creation, mineral (including critical mineral) production and environmental resurgence.

As the country faces the unprecedented and mounting challenges related to the COVID-19 pandemic, it has become apparent that the domestic mining industry – and the resources it provides – is more critical than ever to our nation's economic and national security. Minerals are the building blocks of America's industrial base and manufacturing supply chains. Domestic mining remains vital to helping the nation weather this COVID-19 storm and the nation's eventual road to a strong recovery. NMA firmly believes that responsible mining is an important catalyst for critical job creation. Sustained job creation is not just the province of state and local government. The federal government must partner with responsible users of public lands who have the financial wherewithal to attract capital investment in job growth. Once approved, the Stibnite Gold Project will bring measured, consistent growth to Idaho and its job creation will help fuel an economic comeback which need is critical in Idaho and the Western United States.

B. The Stibnite Gold Project is a National High Priority Mining Project Subject to Timely Environmental Review by the Forest Service

Under Executive Order (E.O.) 13766 "*Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects*" (82. Fed. Reg. 8657, January 24, 2017) and Section 5(d) of the President's E. O. 13807 "*Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects*" (82 Fed. Reg. 40463, August 15, 2017), the administration is supporting all opportunities for post-pandemic job creation while improving government decision making. Just a few months ago the Stibnite Gold Project was been designated by the administration as a "High Priority Infrastructure Project" pursuant to E.O. 13766. In a letter dated July 27, 2020, the Chair of the Council on Environmental Quality (CEQ) informed United States Department of Agriculture (USDA) Secretary Perdue of its determination that the Stibnite Gold Project qualifies as a high priority infrastructure project. As such, the secretary was directed to provide an efficient and timely NEPA review for the project consistent with "One Federal Decision", an administration policy designed to closely coordinate and provide better accountability for permitting, authorizations and approvals among federal agencies. Additionally, the SGP was afforded a "Dashboard" that provides scheduling milestones and a publicly available schedule for project milestones,

including NEPA review, *see* https://www.permits.performance.gov/permitting-project/stibnite-gold-project.

The timeliness of the NEPA process, and mining permit approvals more broadly, have long been of concern to NMA as project delays have significant consequences. An inefficient NEPA process contributes to the lengthy and unpredictable permitting process that discourages the capital investments required for mineral exploration and mine development. An inefficient permitting system presents a major barrier to the domestic mining sector's ability to perform to its full potential and supply more of our infrastructure and manufacturing needs. The U.S. has one of the longest permitting processes in the world for mining projects. In the U.S., necessary government authorizations now take approximately seven to 10 years to secure, placing the U.S. at a competitive disadvantage in attracting investment for mineral development and exacerbating our over-reliance on foreign sources of minerals. By comparison it takes other major mining countries with similar environmental standards take between two and three years to approve mining projects. Moreover, it is not clear that such delays yield any environmental benefits versus the significant additional costs to project proponents.

Delays in the permitting process have real world consequences. According to a 2015 SNL Metals & Mining report, "Permitting, Economic Value and Mining in the United States," the unexpected delays alone reduce a typical mining project's value by more than one-third. (The report is available at https://mineralsmakelife.org.) Furthermore, the higher costs and increased risk that often arise from a prolonged permitting process can cut the expected value of a mine in half before production even begins. The combined impact of unexpected and open-ended delays as well as higher costs and risks can lead to mining projects becoming financially unviable.

More recently, in her testimony before Congress in 2018, the CEO of Midas Gold Idaho, Inc. testified about the impacts of delays on the SGP:

> [E]ach quarter that we fail to meet our deadline requires additional resources and costs us $1.5 million in permitting costs payable to the [United States] Forest Service and their contractor and $2.6 million for our personnel and consultants to address the quarterly permitting requirements.
>
> …
>
> [E]qually robust permitting processes in first world countries like Canada and Australia are regularly completed in two to three years and at considerably lower cost. There is no reason that we in the United States cannot have an equally thorough, effective and efficient process that is completed in a timely manner.

The Department of the Interior's Final List of Critical Minerals for 2018 and Opportunities to Strengthen the United States' Mineral Security: Hearing Before the S.

Comm on Energy and Natural Resources, S. HRG. 115-523 (2018) (testimony of Laurel Sayer, President and CEO of Midas Gold Idaho, Inc.), at 55.

Unfortunately, as of the close of this comment period, the schedule for the NEPA review of the SGP has slipped at least ten times, making the project's inclusion as a high priority infrastructure project even more appropriate. The imposition of additional requirements regarding efficiency, coordination and accountability are clearly necessary to keep this important infrastructure project on track.

II. Comments

A. The NEPA Review for the Stibnite Gold Project Must Account for the Rights Provided by the Mining Law

The purpose of this NEPA review is to "consider approval of the plan of operations submitted by Midas Gold in September 2016 … to mine and process gold, silver, and antimony from deposits at the SGP mine site in central Idaho for commercial sale." DEIS at 1-6. The stated need for the federal action is to:

- Respond to Midas Gold's plan of operations for development of the SGP to mine gold, silver, and antimony deposits in central Idaho;
- Ensure that the selected alternative, where feasible, would minimize adverse environmental impacts on NFS [National Forest System] surface resources;
- Ensure that, prior to approval, measures are included that provide for mitigation of environmental impacts and reclamation of the NFS surface disturbance; and
- Ensure that the selected alternative would comply with other applicable federal and state laws and regulations.

DEIS at 1-6, 1-7.

As the Forest Service proceeds with the permitting of the SGP it must properly consider and account for the specific mandates and requirements of the Mining Law. The Mining Law establishes the right to access public lands to explore and develop locatable minerals on public lands. Specifically, Congress declared "all valuable mineral deposits in lands belonging to the United States … free and open to exploration and purchase." Mining Law of 1872 § 1,17 Stat. 91 (codified at 30 U.S.C. § 22). With this single statement, the Mining Law changes the status of the lands to which it applies by bestowing on citizens a right to enter the lands to explore for and develop minerals." *See Interior Solicitor's Opinion,* Authorization of Reasonably Incident Mining Uses on Lands Open to the Operation of the Mining Law of 1872*,* M-37057 (August 17, 2020) at 3. The history of the Mining Law reflects Congress' unequivocal support for the exploration and development of mineral resources on federal lands, including National Forests.

As such, the Forest Service cannot materially interfere with prospecting, mining, and other incidental uses on those lands in the course of its management of surface resources. The Mining Law created "a presumption in favor of mining that is difficult—if not impossible—to overcome." *High Country Citizens All. v. Clarke*, 454 F.3d 1177, 1186 (10th Cir. 2006) (citation omitted). The Forest Service's organic act and its mining regulations recognize this limitation. Specifically, the Organic Act of 1897, which remains a central statutory authority for the Forest Service today, mandates "nor shall anything herein prohibit any person from entering...national forests for all proper and lawful purposes including that of prospecting, locating and developing mineral resources..." 16 U.S.C. §478. Similarly, the Service's locatable mineral regulations (36 C.F.R. Part 228) recognize the interplay of the regulations with the Mining Law. The statement of purpose for the 228 regulations indicates the regulations are designed to:

> [S]et forth rules and procedures through which use of the surface of National Forest System lands in connection with operations authorized by the United States mining laws (30 U.S.C. 21-54), *which confer a statutory right to enter upon the public lands to search for minerals*, shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources. It is not the purpose of these regulations to provide for the management of mineral resources; the responsibility for managing such resources is in the Secretary of the Interior.

36 C.F.R. § 228.1 (emphasis added).

Not long after the Mining Law was enacted, Clarence King, the first director of the United States Geological Survey (USGS) reasoned that industrial development requires reliable supplies of basic mineral resource. (Skinner, Brian, Earth Resources, Proc. Natl. Acad. Sci. USA Vol. 76, No. 9, pp. 4212-4217, September 1979). This logic is as valid today as it was a century ago. In enacting the Mining Law, Congress specifically sought to "promote the development of the mining resources of the United States," 17 Stat. 91 (1872), knowing that "[m]any branches of mining, and those which yield the largest returns, can be carried on only by deep excavations in the earth and the use of powerful machinery…[,] in many cases thousands of feet, into the earth…." *McKinley v. Wheeler*, 130 U.S. 630, 633 (1889). Subsequent amendments have not diminished Congress's intent that it is "in the national interest to foster and encourage private enterprise in [] the development of economically sound and stable domestic mining." 30 U.S.C. §21a (Mining and Minerals Policy Act of 1970); *see also United States v. Iron Silver Min. Co*., 128 U.S. 673, 675-76 (1888) (recognizing "policy of the government to favor the development of mines … and every facility is afforded for that purpose…"); Pub. L. No. 167, ch. 375, 69 Stat. 368 (July 23, 1955) (codified at 30 U.S.C. §612); 43 U.S.C. §1701(a)(12) (reiterating "policy of the United States that … the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals … from the public lands").

Even more than 100 years after the original Mining Law's enactment, Congress reaffirmed that:

> it is the continuing policy of the United States to promote an adequate and stable supply of materials [including minerals] necessary to maintain national security, economic well-being and industrial production with appropriate attention to a long-term balance between resource production, energy use, a healthy environment, natural resources conservation, and social needs.

Pub. L. No. 96-479, 94 Stat. 2305 (Oct. 21, 1981) (codified at 30 U.S.C. §1602). This policy applies equally to National Forest lands. Under the 1897 Organic Act, the National Forests "are not parks set aside for nonuse, but have been established for economic reasons." *United States v. Weiss*, 642 F.2d 296, 299 (9th Cir. 1981) (citation omitted); 30 Cong. Rec. 966 (May 10, 1897) (Cong. McRae)). Furthermore, where Congress intends to restrict mining, it does so expressly. The Wilderness Act is a prime example of Congress designating lands to be preserved from future development (including operation of the Mining Law), subject to valid existing rights. Pub. L. No. 88-577, 78 Stat. 890 (Sept. 3, 1964) (codified at 16 U.S.C. §1131).

As Congress continues to recognize, mining is essential to modern society. Investments in mineral production not only provide direct and indirect employment associated with mining itself, but also provide enormous further economic benefits as minerals are processed and used in manufactured goods. U.S. mining's contribution to our economy and society is significant. The value added by major industries that consume the $86.3 billion of minerals produced in the U.S. is an estimated $3.1 trillion (2019), or more than 14 percent of our GDP. USGS, Mineral Commodity Summaries, 2020. Mining's direct and indirect economic contribution includes nearly 2 million jobs with wage and benefits well above the state average for the industrial sector. In addition, domestic mining generates $42 billion in tax payments to federal, state and local governments.

B. The History of the Stibnite Mining District, its Subsequent Abandonment by the Federal Government, and the Poor Water Quality Left Behind

1. The Legacy of the Stibnite Mining District

According to U.S. Bureau of Mines records, the Stibnite Mining District produced 4.3 million tons of ore and reprocessed 74,570 tons of tailings between 1939 and 1952. In addition, the District produced 59.3 million pounds of antimony and 844,779 units of tungsten. These last two metals were classified as strategic materials and the Mining District's production of both was critical to the United States during World War II. In 1943, General Eisenhower sent a telegram to the Idahoans who worked at the mine thanking them for their specific contribution to the successful campaign in North Africa. After the war, the U.S. Munitions Board credited the Stibnite Mining District's tungsten production with "shorten[ing] the war by at least a year and sav[ing] the lives of hundreds of thousands of our men." (102 Cong. Rec. 4230 (Mar. 7, 1956) (statement of Mr. Durham, Rep.-N.C.).

Through the ensuing years, there were attempts at further development of the Stibnite Mining District, some of which were explicitly encouraged by the federal government. In late 1951, the Defense Minerals Exploration Administration (DMEA) was established to continue the mineral exploration programs that were already in place under the authority of the Defense Production Act (DPA). Under the DMEA program, antimony mines were eligible for assistance amounting to 75 percent of the project costs, and Stibnite operators such as the Bradley Mining Company were awarded federal contracts to explore for antimony and tungsten.

Cleanup of the legacy contamination at the Stibnite Site has been the object of three major CERCLA consent decrees. In *United States of America v. Bradley Mining Company*, Case No. 3:08-CV-03968 TEH and *United States of America v. Bradley Mining Company*, Case No. 3:08-CV-05501 TEH (N.D. Cal.) (Consent Decree filed April 19, 2012), the United States and other potentially responsible parties (PRPs) exchanged covenants not to sue. Under that decree, CERCLA response cost contribution protection was extended to "Settling Federal Agencies"—defined as USDA, the Department of Defense, the Department of the Interior (DOI), the Environmental Protection Agency (EPA), the General Services Administration, "as well as any other department, agency, and instrumentality of the United States against whom claims for cost recovery, natural resources damages, or contribution under CERCLA could be asserted . . . ." With this last extension of CERLCA protection in the *Bradley Mining Company* case, the federal government, including the Forest Service, effectively abandoned the Stibnite Mining District.

The United States' pervasive involvement in mining at the site, from encouraging exploration, to infrastructure assistance, to building an ore processing facility, cements the United States as a party that bears the dominant equitable responsibility for the present adverse state of the site. Through the 2012 *Bradley Mining Company* consent decree, the federal government deftly avoided the judicial outcome of a recent Tenth Circuit case, *Chevron Mining v. United States*, 863 F.3d 1261 (10th Cir. 2017). There, the Court of Appeals found that when the federal government actively encouraged mining activities on its lands through the DPA, it was a strong indicator that the United States was a PRP under CERCLA.

2. The Abandonment of the Stibnite Mine Site by the Federal Government has Left Behind Poor Water Quality

The rush to flee the Stibnite Mining District by the federal agencies with since-forgiven responsibility for site cleanup has resulted in a new legacy. Poor baseline water quality with no plans for improvement other than the permitting of the SGP. The DEIS clearly shows the current state of water quality at the Stibnite Site.

With respect to surface water:

- DEIS Section 3.9.3.3.2 states that "the types of waste generated by past mining activity include spent or in SODA heap leach pads, tailings (i.e. Bradley tailings) and waste rock in the Bradley and West End Dumps. These historical mining

wastes have created numerous geochemical changes and legacy impacts typical for this type of mining district that are a part of the affected environment."

- DEIS Section 3.9.3.3.2.1 states that "the late 1990's, concentrations of antimony and arsenic in Meadow Creek were highest immediately below the historical Bradley tailings deposits in the lower Meadow Creek Valley, suggesting that the Bradley tailings provided a continuous source of antimony and arsenic in Meadow Creek (URS 2000).

- DEIS Section 3.9.3.3.2.1 also notes that "farther downstream in Meadow Creek and the EFSFSR, averaged dissolved arsenic concentrations remain largely stable but at average dissolved antimony concentrations continue to increase, reaching a high of 31.0 ug/L at EFSFSR assessment node YP-SR-4. The increase in dissolved antimony concentrations downstream of YP-T-27 occurs due to multiple factors including seeps and springs emanating from historical mining features; metals leached from spent ore and waste rock; situ mineralization traversed by Meadow Creek (i.e., the hanger flats deposit), and other naturally occurring mineralization present throughout the EFSFSR drainage."

- DEIS Section 4.9.2.5.2.1 clearly concludes that the current legacy conditions at the Stibnite mine site "have contributed to elevated metals concentrations in surface water." Recent data indicate that antimony, arsenic, and mercury routinely exceeds surface water quality standards below the Bradley tailings, and water quality data collected between 2012 and 2017 indicate that these constituents exceed surface water standards in 44% of the samples collected for dissolved and total antimony, 55-57% of the samples collected for dissolved in total arsenic, and 3-27% of the samples for dissolved and total mercury (Midas Gold 2019)."

- "Overall, the elevated metals concentrations found in the surface water are unlikely to improve in the future without additional remediation which is not currently planned." *Id*.

With respect to ground water:

- DEIS Section 3.9.3.3.2.2 states that "elevated concentrations of dissolved arsenic (over 12,000 ug/L) and dissolved antimony (over 1,000 ug/L) was associated with ground water wells screened completely or partially in the Bradley tailings material, suggesting that the historical Bradley tailings currently present throughout the Meadow Creek Valley may have an adverse influence on ground water quality within the mines site.

- Further, "the water quality of nearby seeps associated with the Bradley tailings, SODA, and Keyway Dam also was elevated in metals, an indication that historical mining features are impacting the alluvial and bedrock aquifers."

As these factual findings in the DEIS clearly reflect, widespread legacy contamination is present across the site. Given the abandonment of the government of any further federal cleanup efforts, Midas Gold's PRO and development of the SGP presents the only viable opportunity to improve the surface and groundwater quality at the site.

C. Responsible Mining and Development of Critical Minerals Are an Affirmative Priority of the Multi-Use Mission of National Forest System Lands and Consistent with Recent Mineral Executive Orders

Shortly before the SGP was designated a High Priority Project, the Secretary of Agriculture issued a directive to the Chief of the Forest Service that she "focus resources on activities that support the productive use of these lands to deliver goods and services efficiently and effectively to meet the needs of our citizens." *See* Secretarial Memorandum to the Chief of the Forest Service (June 12, 2020). Among other directives, the Forest Service was mandated to "streamline processes and identify new opportunities to increase America's energy dominance and reduce reliance on foreign countries for critical minerals," and "streamline policy to ensure environmental reviews focus on analysis that is required by law and regulation." The directive explicitly reflects the multi-use mission of the Forest Service as laid out in decades of congressional enactments that clearly mandated that stewardship over the national forests would be guided by the principles of multiple use and sustained yield.

Additionally, responsible mining and development of critical minerals are consistent with President Trump two orders on critical minerals: E.O. 13817, "*A Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals*" (82 Fed. Reg. 60835, Dec. 20 2017) and E.O. 13953, "*Addressing the Threat to the Domestic Supply Chain from Reliance on Critical Minerals from Foreign Adversaries*" (85 Fed. Reg. 62539, Sept. 30, 2020). E.O. 13817 declares that it "shall be the policy of the Federal Government to reduce the Nation's vulnerability to disruptions in the supply of critical minerals, which constitutes a strategic vulnerability for the security and prosperity of the United States." Specifically, the order directs agencies to promote exploration and development of critical minerals through a variety of means including streamlined permitting and increased access. Additionally this order directs DOI to develop a list of critical minerals defined as minerals that: 1) are essential to the economic and national security of the United States; 2) possess a supply chain of which is vulnerable to disruption; and 3) serve an essential function in the manufacturing of a product, the absence of which would have significant consequences for the economy or national security.

E.O. 13953 builds upon the 2017 order and specifically supports enhancing domestic mining through new market mechanisms, strengthening supply chains and reducing permitting and bureaucratic delays and inconsistencies for new production. Highlighting the importance reducing permit delays, the order notes that "a stronger domestic mining and processing industry fosters a healthier and faster-growing economy for the United States."

Pursuant to E.O. 13817, antimony was recently designated as one of thirty-five "Critical Minerals" by the Department of the Interior, see 83 Fed. Reg. 23,295 (May 18, 2018).

Once permitted, the Stibnite Gold Project will be the only domestic source of antimony. Antimony is a versatile metal with many important uses, including as a hardening alloy for lead, especially storage batteries and cable sheaths. It is also used in bearing metal, type metal, solder, collapsible tubes and foil, sheet and pipes and semiconductor technology. Furthermore, antimony is used as a flame retardant, in fireworks and in antimony salts, which are used in the rubber, chemical and textile industries, as well as medicine and glassmaking. According to the USGS, the U.S. was 84 percent import reliant in 2019. *See* USGS, Mineral Commodity Summaries (2020).

D. Mining Claim Validity Is Not A Prerequisite for Approving Mine Plans of Operations

1. Rosemont Mine Order Incorrectly Held Forest Service Regulations Require a Claim Validity Determination Prior to Plan Approval

On July 31, 2019, the U.S. District Court for the District of Arizona issued a decision vacating the Forest Service's approval of the plan of operations for the proposed Rosemont Mine. *See Center for Biological Diversity et al. v. United States Fish and Wildlife Service et al.,* 2019 WL 3503330 (D. Ariz. July 31, 2019) ("*Rosemont Mine Order*"). The court found that the Forest Service erred when it applied its surface management regulations (36 C.F.R. Part 228) to approve the proposed mine's tailings storage facility and waste rock dumps on National Forest lands.

According to the court, the agency should have considered those facilities under its special use permit regulations (36 C.F.R. Part 251). The Forest Service made that error, according to the court, because it did not confirm that the unpatented mining claims under the ancillary facilities were "valid," as defined by the court. According to the court's reasoning, only activities on "valid" claims are regulated under the Forest Service mining regulations—ancillary facilities require a special use permit. The court's conclusion squarely conflicts with applicable statutes, regulations, case law, and the strong congressional policy favoring mineral development and multiple uses of federal lands.

2. Imposing a Claim Validity Requirement Is Contrary to Applicable Statues, Regulations, Legal Precedent and Long-standing Policies

Importantly, Congress expressly withheld from the USDA (and by extension, the Forest Service), any authority to administer "such laws as affect the surveying, prospecting, locating, … entering, … certifying, or patenting of any of such lands." 33 Stat. 628 (Feb. 1, 1905) (codified at 16 U.S.C. §472). As discussed above, the Forest Service's regulations acknowledge the management of mineral resources is the responsibility of DOI. 36 C.F.R. §228.1.

Given the division of authority between DOI's Bureau of Land Management (BLM) and the Forest Service, the Forest Service regulations governing mining plans make no provision for the review or examination of mining claim and mill site validity under the Mining Law. While DOI has delegated some mineral examination and contest

prosecution to the Forest Service through a 1957 Memorandum of Understanding; nonetheless, all such Forest Service actions are subject to DOI's review and approval. *See Apex & Extralateral Rights Issues Raised by the Stillwater Mineral Patent*, Interior Solicitor's Opinion, M-36955, 93 I.D. 369, 371 n.2 (Apr. 18, 1986) (explaining that "the Forest Service conducts mineral examinations on National Forest lands, and recommends any contest charges to BLM" and that "[t]he Forest Service prosecutes the contest BLM initiates before the Interior Department"); U.S. Forest Service Manual ("FSM") §2816.4 (2007) (referencing memorandum's year of execution); *see also Wilderness Soc'y v. Dombeck*, 168 F.3d 367 (9th Cir. 1999) (upholding Forest Service determination and report of mine-claim validity prepared for BLM in withdrawn Cabinet Mountains Wilderness Area).

As DOI retains the ultimate approval authority over mineral examinations, BLM's interpretation of when claim-validity determinations must be conducted is of paramount importance. BLM's regulations do not provide for mine claim validity determinations as part of mine plan approvals. *See* 43 C.F.R. Subpart 3809. In fact, DOI has expressly rejected the notion that any law requires validity determinations before approval of mine plans of operations. *Legal Requirements for Determining Mining Claim Validity Before Approving a Mining Plan of Operations*, Interior Solicitor's Opinion, M-37012 2-4 (Nov. 14, 2005).

The DOI Solicitor recently confirmed and supplemented to 2005 Opinion. In *Authorization of Reasonably Incident Mining Uses on Lands Open to the Operation of the Mining Law of 1872*, M-37057 (Aug. 17, 2020), the Solicitor supplemented the 2005 Opinion's conclusion that mining claim validity determinations are not required before allowing reasonably incident mining uses on open lands by showing:

1) that a mining claim is not a condition precedent to conducting or obtaining authorization to conduct reasonably incident mining uses on open lands;
2) that the need to verify rights correlates to the rights being asserted; and
3) that BLM's regulations at 43 C.F.R. subparts 3715, 3802, and 3809 are the appropriate regulatory authorities for such uses.

The Department's interpretation of its regulations given the allocation of authority by Congress to the BLM in this regard is entitled to deference.

3. Earthworks Decision

In stark contrast to the Rosemont decision, just this week the U.S. District Court for the District of Columbia issued a well-reasoned decision in *Earthworks vs. Department of the Interior* (DOI) that reaffirmed important rights of miners to explore and operate on federal lands pursuant to the Mining Law. Case 1:09-cv-01972-RC (Oct. 26, 2020). Importantly, and aligned with the DOI interpretations through the Solicitor Opinions on claim validity discussed in the preceding section of these comments, the court ruled that "the Mining Law, its implementing regulations, and related case law have never required Interior or BLM to verify validity of a claim by independently confirming discovery." Further the court found that as a matter of both law and practice, validity proceedings

are largely discretionary. Finally, the court held that Earthworks' position on claim validity determinations would "have quietly upended the current claim system under the Mining Law." Citing BLM's statistics that conducting validity determinations for all existing mining claims would exceed the BLM's annual operating budget many times over, the court refused to read to acquiesce to Earthworks position as it would "silently work such a fundamental change to longstanding practice under the Mining Law." NMA asserts that the *Earthworks* decision is the proper interpretation of the Mining Law and the regulations that govern mining on federal lands.

E. Financial Assurance for the Stibnite Gold Project Will be Determined by a Well Established and Robust Process

NMA has a strong and long-standing interest in ensuing that hardrock mining projects such as the Stibnite Gold Project have appropriate financial assurance mechanisms in place. Requirements related to financial assurance are an essential component of the federal and state regulatory scheme to ensure that the public will not ultimately become responsible for releases of hazardous substances or reclamation. However, NMA is adamantly opposed to unnecessary and duplicative financial assurance and believes that existing federal and state programs impose significant and sufficient financial responsibility requirements on the hardrock mining industry.

As an example, NMA opposed EPA identification of classes of facilities in the hardrock mining industry for the a first of its kind financial assurance rulemaking under CERCLA Section 108(b). *See* Identification of Priority Classes of Facilities for Development of CERCLA 108(b) Financial Responsibility Requirements, 74 Fed. Reg. 37,213 (July 28, 2009) NMA was involved in every step of the rulemaking process that followed. Ultimately, EPA concluded that "modern regulation of hardrock mining facilities, among other factors, reduces the risk of federally financed response actions to a low level such that no additional financial responsibility requirements for this industry are appropriate." 83 *Fed. Reg.* 7556, 7565 (Feb. 21, 2018); *see also Idaho Conservation League v. Wheeler*, 930 F.3d 494 (D.C. Cir. 2019) (upholding decision not to issue final rule).

There is no question that Midas Gold is required to provide financial assurance for the Stibnite Gold Project without question. The DEIS clearly sets forth the authority by which Midas Gold will have to provide sufficient financial assurance to guarantee the Forest Service would have the necessary funds to reclaim the site, including the costs of any necessary long-term management:

> "As part of the approval of a plan of operations for the SGP, the PNF Forest Supervisor would require Midas Gold to post financial assurance to ensure that NFS lands and resources involved with the mining operation are reclaimed in accordance with the approved plan of operations and reclamation requirements (36 CFR 228.8 and 228.13).This financial assurance would provide adequate funding to allow the Forest Service to complete reclamation and post closure operation, including continuation of any post closure active or passive water treatment, maintenance activities, and necessary monitoring for as long as required to return the site to a stable and acceptable condition. The amount of financial assurance would

> be determined by the Forest Service and would "address all Forest Service costs that would be incurred in taking over operations because of operator default." (Forest Service 2004).

Draft EIS at p. 2-75. In detailed comments on the above mentioned EPA rulemaking addressing financial assurance under CERCLA Section 108(b), the Deputy Chief of the National Forest System strongly justified the integrity of the federal regulations that govern the financial assurance mechanism at issue with the Stibnite Gold Project:

> An operator complies with Forest Service regulations by developing a Plan of Operations, which includes detailed reclamation and closure plans, which the Forest Service reviews and approves to minimize the risk to the environment based on predicted outcomes. The operator must then provide a measure of financial responsibility to ensure that, upon closure, the operation no longer presents a risk to the environment and a liability to the Forest Service and public. Any ongoing obligation to continue the protection of the environment is also provided for in a long-term FA instrument required by the Forest Service. In this way, the Forest Service can assure that the operation is closed according to the approved plan, and that the agency has the financial means to accomplish this task should the operator fail to do so. Thus, risks are administratively and financially minimized during closure and, when necessary, post-closure. Additionally, Forest Service regulations at (CFR § 228.4(e)) allow the agency to require a modification to the Plan of Operations and reclamation plan and to allow for bond adjustments to address unforeseen environmental effects. In this way, risks are administratively minimized while a mine is in operation.

See Docket ID No. EPA-HQ-SFUND-2015-0718, U.S. Department of Agricultural Forest Service Comments on Federal Register notice, Vol 82, No 7: EPA 40 CFR Part 320 "Financial Responsibility Requirements Under CERCLA §108(b) for Classes of Facilities in the Hardrock Mining Industry" (April 18, 2017) at 5.

it is not unusual during NEPA review of hardrock mining projects for certain public sectors to demand estimates of the required financial assurance. Federal agencies use the NEPA analysis as an information gathering tool to analyze and eventually choose a preferred alternative. Before a preferred alternative for the Stibnite Gold Project is selected, it is premature for the Forest Service to calculate a reclamation cost estimate prior to selecting the preferred alternative. The usual practice is that the financial assurance cost calculation comes later in the process, after the agency has identified its preferred alternative and issued its Record of Decision.

The Forest Service will take the lead in determining the amount of financial assurance required for the SGP. It is expected that Midas Gold, the Forest Service, and Idaho Department of Lands – the state agency with jurisdiction in FA development - will use the Standardized Reclamation Cost Estimator (SRCE) software tool to calculate the required financial assurance figure. The SRCE has a proven track record in determining financial assurance requirements and was developed in the state of

Nevada, the country's largest hardrock mining state. The track record of SRCE is robust, including consideration of all likely contingencies such as costs to implement, manage, and complete reclamation in addition to performing long-term monitoring, inspection, and maintenance.

F. The Alternatives Presented in the Draft Environmental Impact Statement

1. The Range of Alternatives is Thoroughly Sufficient to Address the Purpose and Need of the NEPA Analysis

Generally, a lead federal action agency need not consider an infinite range of alternatives, only reasonable or feasible ones. There is not a numerical limit on the number of alternatives that must be considered, *see Native Ecosystems Council v. Forest Service*, 428 F.3d 1233, 1246 (9th Cir. 2005), and an agency's discussion of detailed alternatives "cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978).

Both the CEQ's 1978 NEPA regulations and its recent 2020 revisions set forth the requirements to evaluate a reasonable range of alternatives. Under 40 CFR § 1502.14 of the 2020 NEPA regulations, agencies must evaluate reasonable alternatives to the proposed action to enable comparisons between alternatives, to include appropriate mitigation measures not already included in the proposed action or alternatives, and to limit their consideration to a reasonable number of alternatives. The DEIS easily comports with the NEPA requirement to analyze reasonable alternatives. Here, the DEIS clearly sets forth an array of action alternatives and the no-action alternative. There are relatively few reasonable and feasible alternatives for the SGP due to the challenging nature of the project terrain when analyzed with the proposed project facilities.

2. The No Action Alternative

As noted above in the discussion of the context of this NEPA review under the Mining Law, the DEIS fails to fully explain the setting this project as applied to the rights of the project proponent. Often in these settings, it is not uncommon for the federal land management agencies to admit that the Forest Service (or BLM) do not have the discretionary authority to categorically disapprove a mining project that is governed by the Mining Law. While 36 CFR § 228.8, which requires the Forest Service to protect surface resources on National Forest System lands, allows the agency to impose reasonable conditions of project development but those conditions cannot materially interfere with proposed activities that are reasonably necessary under the Mining Law and that comply with other federal and state applicable laws and regulations.

This DEIS, however, fails to include any discussion of the Mining Law rights of the project proponent and the Forest Service's limited discretionary authority to categorically reject a proposed mining project. As an example, Section 2.7 omits

discussion of the statutory and constitutional limits of Forest Service authority when reviewing a proposed Plan of Operations for a proposed mining project on National Forest System lands open to mineral entry under the Mining Law. The No Action Alternative would impede Midas Gold's statutory rights to develop its mining claims and thus cannot be selected as the agency's Preferred Alternative.

Additionally, the No Action Alternative cannot be selected for an additional and important reason. As framed by the discussion of the existing state of site water quality, the Stibnite Mining District is, at an irreducible minimum, an abandoned CERCLA "facility" showing continuing signs of a failed cleanup effort after the United States absolved itself of liability through the 2012 *Bradley Mining Company* consent decree. Accordingly, although required by the NEPA regulations, the No Action Alternative, as a matter of law and policy, cannot be seriously considered for selection, particularly where the Forest Service itself has been afforded CERCLA liability protection by EPA.

In essence, selection of the No Action Alternative would renew the abandonment of the Stibnite Mining District. Failing to select an Action Alternative would result in, among others:

- Continued degradation of water quality by contaminant leaching into numerous site watersheds;
- Perpetuating Blowout Creek's seasonal sedimentation of Meadow Creek; and
- A missed once-in-a-generation opportunity to reconnect important anadromous fish habitat; and blocked since the 1930s with no alternative federal plan in the offing.

3. Although there is No Preferred Alternative Presented, Alternative 2 Best Fulfills the Purpose and Need of the Proposed Action

a. Modification of the Proposed Action Based on Public Comment

The DEIS is presented without a Preferred Alternative by the Forest Service. The Ninth Circuit has observed that "it is not uncommon for changes to be made in a FEIS after receipt of comments on a DEIS and further concurrent study." *Kootenai Tribe of Idaho v. Veneman,* 313 F.3d 1094, 1118 (9th Cir.2002). An agency can modify a proposed action in light of public comments received in response to a DEIS, see 40 C.F.R § 1503.4(a). "[A]gencies must have some flexibility to modify alternatives canvassed in the draft EIS to reflect public input without having to circulate a supplemental draft EIS describing the proposed action. . . or agencies as a practical matter may become hostile to modifying the alternatives to be responsive to earlier public comment." *California v. Block,* 690 F.2d 753, 770 (9th Cir.1982). *See also Half Moon Bay Fishermans' Ass'nv. Carlucci,* 857 F.2d 505, 508-09 (9th Cir.1988) (citing *California v. Block).*

National Mining Association provides these comments with the understanding that new information provided the Forest Service during the comment period may cause necessary adjustment to the proposed action under review. The CEQ guidance provides that a Preferred Alternative can lawfully be selected by the action agency stand absent further EIS review when: (1) the alternative is a "*minor variation* of one of the alternatives discussed in the draft EIS," and (2) the alternative is "*qualitatively within the spectrum of alternatives* that were discussed in the draft [EIS]." *See* Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations [hereinafter "Forty Questions"], 46 Fed. Reg. 18,026, 18,035 (Mar. 23, 1981) (emphasis added)., and that the Selected Alternative may be adjusted pursuant to public comment.

b. Alternative 2 Provides Superior Environmental Benefits

At a development cost of close to $20 million, Midas Gold submitted its PRO for the Stibnite Gold Project to the Forest Service in September 2016. The Forest Service subsequently provided a notice of intent to prepare an EIS in June, 2017, see 82 Fed. Reg. 25, 759 (June 5, 2017), thus beginning the process to seek the agency's approval to construct, mine, operate, and reclaim and restore the Stibnite Site. The project proponent developed Alternative 2 as a refinement to the original PRO that Midas Gold originally submitted to the Forest Service in 2016, and which forms the basis for Alternative 1.

Compared to the other Action Alternatives, there are superior environmental benefits and enhancements associated with Alternative 2 that are absent from the three other action alternatives.

Smaller Project Footprint: Alternative 2 eliminates the West End DRSF by partially backfilling the Hanger Flats Pit with development rock mined from the West End pit, which reduces the overall project footprint.

Also, Alternative 2 has a smaller overall footprint from Alternative 1 (3,533 acres for Alternative 1 versus 3,423 acres for Alternative 2 as shown in Tables C-1 and C-2 respectively of the DEIS). Reducing the project footprint is a meaningful way to minimize adverse environmental impacts consistent with the mandate in 36 CFR § 228.8.

Water Treatment: Alternative 2 explicitly includes an active water treatment facility that would assist achievement of water quality standards.

Safety Benefits: Alternative 2 avoids identified areas where avalanches and landslides could occur and enhances safety during construction and operations as well as reduces public and worker safety hazards. On-site lime kiln would minimize traffic.

Air Quality Benefits: The on- site lime kiln under Alternative 2 would reduce vehicular air emissions.

Environmental Restoration: Alternative 2's Meadow Creek Valley tailings storage facility (TSF), slated to be located where the old tailings and spent leached ore from

previous mining has already been deposited, would boost environmental benefits due to the associated waste and contaminant source removal activities that are an integral component of the planned reuse of this previously disturbed and currently contaminated site.

Also, the on-site lime kiln would also eliminate the site surface disturbance acres associated with a development rock storage facility (DRSF) to store the unmineralized limestone/marble development rock that has to be mined from the West End pit in order to extract the ore. Additionally, if lime has to be procured from a vendor, the source of the limestone or marble that would have to be mined as feedstock for an off-site lime kiln would result in off-site surface disturbance impacts.

Road Location: Alternative 2's road layout minimizes travel routes that parallel area fish-bearing streams. By avoiding roads adjacent to area streams, the potential for sedimentation into the streams and adverse impacts to aquatic habitats would be reduced.

Also, the road network proposed in Alternative 2 appears to reflect local stakeholders' travel patterns through the project area by providing seasonal access to Thunder Mountain through the mine site.

III. Conclusion

NMA appreciates the opportunity to provide these comments on the DEIS for the SGP. NMA strongly supports the project and believes the PRO provides an important opportunity to develop our nation's mineral resources in an environmentally responsible way. The project creates the potential for thousands of new high-paying jobs and significant tax and other revenues to support regional development and Idaho's economy. Moreover, the mineral deposits at issue are critical to our domestic manufacturing, infrastructure and defense needs. U.S. minerals production is critical to national security, technological innovation, domestic manufacturing, and economic growth.

If you have any questions regarding these comments, please contact me at 202/463-2627 or ksweeney@nma.org.

Sincerely,

Katie Sweeney