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January 10, 2023

Linda Jackson, Payette Forest Supervisor
Stibnite Gold Project
500 North Mission Street, Building 2
McCall, ID 83638

RE: Stibnite Gold Project
Supplemental Draft Environmental Impact Statement
Forest Service, Region 4, Payette and Boise National Forests
Valley County, Idaho
EIS No. 20220154

Dear Ms. Jackson:

The National Mining Association (NMA) is submitting these comments on the Supplemental Draft Environmental Impact Statement (SDEIS) published by the Payette and Boise National Forests (collectively, Forest Service) for Perpetua Resources Idaho Inc.'s (Perpetua) proposed Stibnite Gold Project (SGP) in Valley County, Idaho.[1] The NMA filed comments on the Draft Environmental Impact Statement in October 2020 (2020 DEIS), and those comments are attached hereto and incorporated herein by reference. In summary, the NMA supports the SDEIS identified preferred alternative, referenced in the SDEIS as the "2021 MMP."

I. Introduction

The NMA is the only national trade organization that serves as the voice of the U.S. mining industry and the hundreds of thousands of American workers it employs before Congress, the federal agencies, the judiciary and the media, advocating for public policies that will help America fully and

[1] 87 Fed. Reg. 65,203 (October 28, 2022) (Notice of Availability).

responsibly utilize its vast natural resources. We work to ensure America has secure and reliable supply chains, abundant and affordable energy, and the American-sourced materials necessary for U.S. manufacturing, national security and economic security, all delivered under world-leading environmental, safety and labor standards.

Headquartered in Washington, D.C., the NMA has a membership of more than 250 companies and organizations involved in every aspect of mining, from producers and equipment manufacturers to service providers. These members include 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.[2] NMA members explore for and produce gold, silver, copper, molybdenum, uranium, lead, zinc, platinum, palladium, and rare earth and critical minerals such as antimony.

America's mining industry supplies the essential materials necessary for nearly every sector of our economy – from technology and healthcare to energy, transportation, infrastructure and national security. National security interests weigh heavily in moving forward with the SGP, which once permitted, will be the only domestic supply of antimony, an essential mineral for ammunition, explosives, and other technology needs. At present, the commodity market for antimony is controlled by China.

A. The Stibnite Gold Project is a Pioneering Mining Project that Restores a Legacy Site Abandoned by the Federal Government

As already noted in NMA's previous comments on the 2020 DEIS, the SGP is a pioneering approach to hardrock mining, given that restoring legacy abandoned mine lands is an upfront and integral part of the mining plan. And this pioneering approach is imperative to make progress on site cleanup since, after several failed attempts at cleanup driven by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980[3], (CERCLA), the federal government essentially abdicated cleanup responsibility of the Stibnite Mining District (district) in 2012. Poor ground and surface water quality generated from legacy contamination has been left behind, unabated. The unattended contaminated conditions on the Stibnite Site continued absent any CERCLA response actions by the federal government or any other responsible party since the 2012 *Bradley Mining Company* consent decree, discussed below, was finalized. No hope for site

[2] 30 U.S.C. §22 *et seq.*, as amended.
[3] Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C §§ 9601-9675)

improvements materialized until Perpetua, the SGP proponent, voluntary intervened to conduct cleanup activities.

In 2021, Perpetua entered into a voluntary Administrative Settlement Agreement and Order on Consent (ASAOC) with the U.S. Environmental Protection Agency (EPA) and the Forest Service to begin *pre-permitting* cleanup at Stibnite. Soon after the 2020 DEIS was published and the public comment closed, Perpetua began work on designing removal actions to improve water quality, with the first construction on such actions begun during summer, 2022.

NMA supports this model of abandoned mine site cleanup, and applauds Perpetua's stepping into the void established by the federal government, which first attempted to fully resolve its outstanding liability, and then abandoned and neglected the site. The permitting of the SGP will provide a long-sought remedy for this legacy site through the vehicle of responsible resource development.

B. Summary of Comments

NMA supports the Forest Service's preferred alternative, the 2021 MMP, and urges the agency to include it as the selected alternative in the subsequent Record of Decision. This alternative is superior in its promotion of both the cleanup of legacy mining and responsible mining of gold as well as antimony, a mineral critical to our national security.

Without the actions of Perpetua, there would be little hope for material cleanup of the Stibnite Mining District. The district has been permanently abandoned by the United States notwithstanding its role in America's victory in World War II. Furthermore, the federal agencies responsible for the cleanup of the district failed to require the construction of an impermeable cap, resulting in approximately 22,000 pounds of arsenic loading into the ground and surface water of the district. While recent case law indicates potential CERCLA liability exposure by the federal government remains notwithstanding the previous Stibnite consent decrees, the execution of the voluntary ASAOC by Perpetua coupled with construction and operation of the SGP is the only long-term restoration strategy for the site.

NMA's comments also reference two recent developments – a decision by the U.S. Court of Appeals for the Ninth Circuit in *Center for Biological Diversity et. al. v. U.S Fish and Wildlife Service et. al.* and a DOD announcement of an investment agreement award to Perpetua. As NMA explains, the Ninth Circuit decision in *Rosemont* does not alter the legal authority of the Forest Service to approve the SGP and the recent

announcement of the Department of Defense (DOD) investment in Perpetua does not interrupt the ongoing NEPA process.

II. Comments

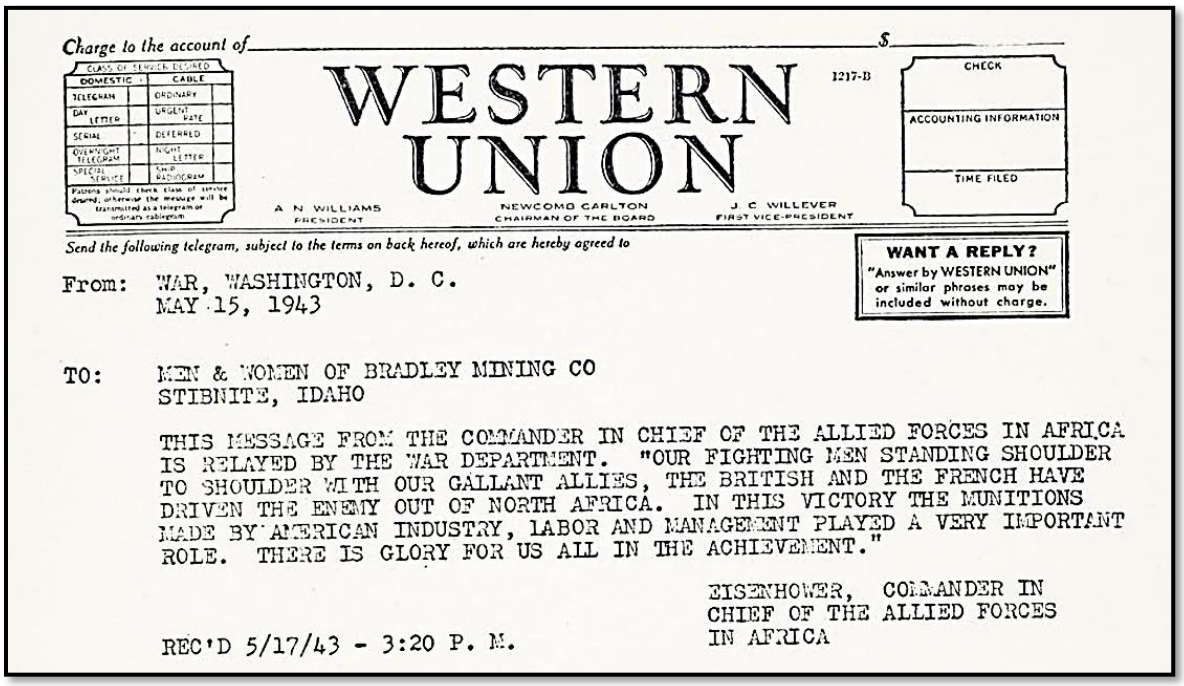
A. The SDEIS Does Not Fully Account for the Legacy History of the Stibnite Mining District and Abandonment of the Site by the Federal Government

1. The National Defense Legacy of the Stibnite Mining District

Section 1.3 of the SDEIS purports to summarize the origins of the contamination at the district and the later, limited, and incomplete efforts at site cleanup. The summary, however, fails to fully assess the horizon of federal government encouragement in developing the legacy conditions in the first instance and, later, the repudiation of responsibility by the United States for the contamination left behind. In the late 1930s, the United States was on the brink of the Second World War and supplies of critical and strategic minerals had been cut off by the Japanese invasion of China. On June 7, 1939, in anticipation of World War II, President Roosevelt signed the Strategic Materials Act (SMA). This bill authorized $100 million to be spent over the next four years for the purchase of stockpiles of mineral commodities that the Army and Navy Munitions Board had classified as "strategic."

In mid-1939, shortly after passage of the SMA, both the U.S. Bureau of Mines and the U.S. Geological Survey initiated exploration activities in studies within the district seeking to aid in discovery and development of antimony resources. Actively managed and funded government programs included expansive surface sampling, trenching, drilling and even underground development work and metallurgical testing that led to discovery and later developments of new deposits at Yellow Pine (the Homestake deposit), West End, Scout and several other prospects. The Stibnite area was considered a high priority by the federal government, despite its remote location and difficult logistics. The subsequent antimony development in this district played a critical role in the war efforts.

A few short days after the Nazi forces surrendered in North Africa during World War II, then-General Eisenhower sent the "Men & Women of Bradley Mining Co." a telegram thanking them for their contribution to the war effort, see below:



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Send the following telegram, subject to the terms on back hereof, which are hereby agreed to

WANT A REPLY?
"Answer by WESTERN UNION" or similar phrases may be included without charge.

From: WAR, WASHINGTON, D. C.
MAY 15, 1943

TO: MEN & WOMEN OF BRADLEY MINING CO
STIBNITE, IDAHO

THIS MESSAGE FROM THE COMMANDER IN CHIEF OF THE ALLIED FORCES IN AFRICA IS RELAYED BY THE WAR DEPARTMENT. "OUR FIGHTING MEN STANDING SHOULDER TO SHOULDER WITH OUR GALLANT ALLIES, THE BRITISH AND THE FRENCH HAVE DRIVEN THE ENEMY OUT OF NORTH AFRICA. IN THIS VICTORY THE MUNITIONS MADE BY AMERICAN INDUSTRY, LABOR AND MANAGEMENT PLAYED A VERY IMPORTANT ROLE. THERE IS GLORY FOR US ALL IN THE ACHIEVEMENT."

EISENHOWER, COMMANDER IN CHIEF OF THE ALLIED FORCES IN AFRICA

REC'D 5/17/43 - 3:20 P. M.

The mining production at the Stibnite Site was estimated to have saved a million American lives and shortened the war by a year.[4]

Government involvement did not end with the conclusion of World War II. 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.

On November 25, 1952, Bradley Mining Co. was awarded a DMEA contract for $53,000 to explore for antimony at the Yellow Pine Mine. The company held a second DMEA contract to explore for antimony and tungsten at the former Meadow Creek Mine. Exploration activity continued with government involvement including direct management of many aspects of the activities from the 1930s well into the Korean War period, including numerous other government-sponsored and managed exploration and development activities elsewhere in areas such as at Fern and Cinnabar near Stibnite.

[4] *See* 102 Cong. Rec. S4118 (March 7, 1956) ("The Government invested millions to build access roads and open up this mine. In the opinion of the Munitions Board, the discovery of that tungsten mine at Stibnite, Idaho, in 1942 shortened World War II by at least 1 year and saved the lives of a million American soldiers.")

2. The Federal Government Has Abandoned the Stibnite Site and Its Contaminated Conditions Remain Active

By various accounts, there are hundreds of thousands of abandoned hardrock mine features on federal lands that present a variety of safety and environmental hazards.[5] Issues at historic legacy mining sites stem from activities that predated the enactment of modern environmental protection laws and regulations. Over the last four decades there has been a sea-change in environmental awareness in all industrial activities including mining, ushering in numerous federal and state laws and regulations, environmental management systems, design standards, engineering controls, environmental monitoring requirements, best management practices, improved technology, training, and financial assurance. As a result of the progress during this timeframe, mining-related activities are now thoroughly protective of the environment and the public.

The Stibnite Site is one of these historic legacy sites abandoned by a long-gone operator but is different from many such others, given the active role of the federal government in facilitating production. As such, it also includes abandonment of the site – with complete legal protection – *by the United States government itself*. The site has been the object of several significant CERCLA consent decrees (CDs) filed in separate jurisdictions. Each case involved issues related to recovery of response costs and offensive litigation against the federal government by the non-federal potentially responsible person, or PRP.[6] A brief summary of the key CDs are discussed below. These CDs demonstrate the liability of the federal government and the failure of the government to ensure implementation of cleanup obligations.

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[5] The Government Accountability Office (GAO) recently estimated that there are at least 140,000 abandoned hardrock mine "features" (such as a tunnel) on lands under management of or control by the United States Department of Agriculture Forest Service (USFS) and the Department of the Interior's Bureau of Land Management (BLM) and Park Service. *See* UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, ABANDONED HARDROCK MINES, INFORMATION ON NUMBER OF MINES, EXPENDITURES, AND FACTORS THAT LIMIT TO ADDRESS HAZARDS (GAO-20-238) *Highlights* (March 2020).

[6] **5**Under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), potentially responsible parties ("PRPs") may be liable for response costs for cleanup actions to protect the public health, welfare, or the environment. CERCLA targets four broad categories of PRPs which may be held jointly and severally liable for the cost of cleanup. CERCLA Section 107 PRPs are:

1) Current owners and operators of a facility;
2) Former owners or operators of a facility at the time the hazardous substances were released;
3) Arrangers who arranged for the disposal or treatment of the hazardous substances; and
4) Transporters of the hazardous substances.

a. *Mobil Oil Corporation* (2000)

In *Mobil Oil Corporation v. United States of America*,[7] Mobil began certain cleanup actions pursuant to an administrative order on consent in addition to a voluntary consent order with the State of Idaho. In an offensive declaratory relief action, Mobil asserted that the United States was liable for contribution to the past response costs. At one point in the contested litigation, the District Court signaled that the government would be held to have been a PRP due to the federal interests in developing the Stibnite/Yellow Pine Site for the war effort.[8]

The U.S. Government ultimately released Mobil Oil Co. from future CERCLA response costs and provided the company $1.55 million as partial reimbursement for their response costs.[9] The United States and Mobil Oil exchanged covenants not to sue, though the United States reserved rights as to natural resource damages and a cause of action to enforce Mobil's "liability, not to exceed $1.1 million, for the costs for future response actions, including constructing an impermeable cap" at the Spent Ore Disposal Area (SODA). Additionally, Mobil Oil and the "settling federal agencies"—the USDA, Interior, and U.S. Department of Commerce—received contribution protection under CERCLA for past and future response costs.

b. *United States of America v. Bradley Mining Company* (2012)

Two other cases both titled *United States of America v. Bradley Mining Company*,[10] covered several additional sites in addition to the Stibnite Project. In the *Bradley* CD, the United States and other PRPs again exchanged covenants not to sue, with the exception of natural resource damages (among other exceptions). CERCLA contribution protection was again extended, this time to a menu of "settling federal agencies" which included the following:

- United States Department of Agriculture;
- United States Department of Defense;
- United States Department of the Interior;

[7] Civil Action No. 99-1467-A (E.D. Virginia) (filed June 26, 2000);
[8] Mot. Hrg. Tr., Mobil Oil Corp. v. United States, No. 99-1467-A (E.D. Va. Apr. 28, 2000) (Hilton, J.) ("It is clear to me that once the Bureau of Mines found the materials they were interested in, started encouraging the production of them that the Government ought to be responsible.") (emphasis added).
[9] Settlement Agreement, *Mobil Oil* (filed June 26, 2000).
[10] Case No. 3:08-CV-03968 TEH and Case No. 3:08-CV-05501 TEH (N.D. Cal.) (Consent Decree filed April 19, 2012).

- United States Environmental Protection Agency;
- United States General Services Administration; and
- "[A]ny 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 regard to the … the Stibnite Mine Site."[11]

These covenants minimized the likelihood of proactive cleanup activities. As a result, in characterizing the present state of the Stibnite Site, the EPA has stated that "[p]ast mining activities have deposited metals, spent and neutralized ore, waste rock, and mine tailings over half of the site. … Contaminants associated with mining operations include heavy metals and cyanide in area soil, groundwater, seeps and sediments."[12].

c. The "Impermeable Cap" on the Spent Ore Disposal Area Called for the *Mobil* Consent Decree Was Never Constructed Due to Agency Inaction

As noted above, the United States reserved future rights in the 2000 Mobil Oil Consent Decree, including the ability to require Mobil to build the impermeable cap or, alternatively, Mobil could have received a credit in the settlement for its construction. As of this date, neither has occurred. Recently, Idaho Congressional Representatives, Mike Simpson and Russ Fulcher, asked EPA why the cap was never constructed and noted the adverse impacts of the nonaction:

> It appear[s] that the "impermeable cap" called for at the SODA site in the Mobil Oil consent decree was never built. We are advised that as a result, an estimated ten tons of arsenic has loaded into Stibnite's surface and groundwater since the time from when the cap was supposed to have been in place. Can you please provide information as to why the cap was not built on SODA and if the federal government ever pursued Mobil Oil to build the impermeable cap on SODA as called for in the Mobil Oil consent decree?"[13]

In response, EPA admitted that the federal government has continued to reserve its right to right to require Mobil Oil to construct the cap. However,

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[11] *Bradley Mining Company* Consent Decree at 10.
[12] Environmental Protection Agency, "Stibnite/Yellow Pine Mining Areas, Stibnite ID, Cleanup Activities" (2021), https://cumulus.epa.gov
[13] *See* Letter from Representatives Simpson and Fulcher to Acting EPA Regional Administrator Michelle Pirzadeh (Feb. 2, 2022).

a precursor to the construction was an evaluation of the effectiveness of a sand filter topped by bedding and rip rap along the length of SODA in contact with the Meadow Creek channel that was the subject of a 1998 administrative order on consent between Mobil Oil, the Forest Service and EPA. According to EPA's response to Representatives Simpson and Fulcher, "To date, the EPA and USFS have not evaluated the effectiveness of the sand filter; therefore, we have not pursued Mobil Oil or any other potentially responsible parties to build the impermeable cap or to recover the $1.1 million for the cost of constructing such a cap."[14] Thus, after abdicating its cleanup responsibilities via the Stibnite Site in the *Mobil Oil* and *Bradley* Consent Decrees, the federal government additionally failed to follow up on what could have been a key response action that could have avoided further arsenic contamination in the district.

B. The Preferred Alternative is the Only Alternative that Ensures Legacy Site Conditions are Addressed and Thereby Reduces Legal Exposure of the Federal Government

The preferred alternative provides a solution to address legacy site conditions, especially water quality impacts. At the SODA area alone, the U.S. Geological Survey estimated in a 2015 study that this part of the Stibnite Site is responsible for the contribution of more than 700 pounds of antimony and 1100 pounds of arsenic into Meadow Creek every year.[15] That adds up to an estimated total of 22,000 pounds of arsenic into the Meadow Creek watershed since the year 2000 (date of the Mobil Oil CD). It is fair to assume those loading numbers would have been avoided if the cap had been constructed. At this area of the site, pursuant to Perpetua's mine plan, this contamination will be addressed in its business model akin to time critical removal with reprocessing of the ore-grade tailings at SODA and subsequent placement in a state-of-the-art tailings facility.

The EPA has recognized that attracting private capital to reuse and redevelop National Priority List facilities is worthy public policy, particularly as applied to formally designated Superfund sites. As demonstrated by the preferred alternative, it is clear that attracting private investment to abandoned, contaminated sites can ease the burden on the public treasury. Advancement of the SGP, particularly with its history of abandonment and

[14] *See* Letter from Michelle Pirzadeh, Acting EPA Regional Administrator to Mike Simpson and Russ Fulcher (February 17, 2022).
[15] See Etheridge, A., 2015; Occurrence and Transport of Selected Constituents in Streams near the Stibnite Mining Area, Central Idaho, 2012-14; Scientific Investigations Report, 2015-5166, U.S. Geological Survey.

neglect described above, remains the sole option for cleanup of this legendary legacy site.

1. Recent Case Law Developments Offer Additional Justification for the Preferred Alternative

As already noted above and in NMA's comments to the 2020 DEIS, national defense has played the dominant role in creating the long-standing legacy conditions in the district. But Stibnite's support of World War II as well as other war time efforts has, since the DEIS was published in 2020, become a credential with new legal import since the 2022 allocation of substantial CERCLA liability to the government pursuant to a 2017 decision by the U.S. Court of Appeals for the Tenth Circuit in *Chevron Mining, Inc. v. United States.*[16] In that case, the Tenth Circuit ruled soundly that "[f]or purposes of CERCLA . . . an owner includes the legal title holder of contaminated land," even the United States, and even when the land is subject to private mining claims.[17]*.*

In June 2022, pursuant to the *Chevron* decision, Federal Circuit Judge Paul Kelly, Jr., allocated 30 percent CERCLA liability (approximately $300 million for an estimated $1 billion cleanup) to the United States due to the contaminated conditions at the Questa Mine in New Mexico.[18] After reciting exhaustive findings of fact, Judge Kelly concluded as a matter of law that a significant factor in his allocation decision was "[t]he benefits received from the activities that caused the contamination, *including any benefits to national defense efforts*."[19] . As explained further below, the marked similarities between the histories of the Questa and Stibnite sites has import for evaluation of the SDEIS alternatives and provides support for the preferred alternative.

1. The Decision and Subsequent Liability Allocation in *Chevron Mining v. United States*

a. The *Chevron Mining* Court of Appeals Opinion

In *Chevron Mining*, the plaintiff successor to molybdenum mining operations at the Questa Site in New Mexico, filed suit against the United States seeking declaratory relief that the government was strictly liable as a PRP —

[16] 863 F.3d 1261 (10th Cir. 2017)
[17] Id. at 1273.
[18] *Chevron Mining, Inc., v. United States*, Findings of Fact and Conclusions of Law, Case No. 1:13-cv-00328-PJK-JFR at 34 ¶ 153 (emphasis added) (order filed June 28, 2022) (Findings).
[19] *Id.*

both as an "owner" of portions of and as an "arranger" of hazardous substance disposal for its equitable share of past, present, and future clean-up costs. The Justice Department vigorously argued that mere "bare legal title" of the National Forest Lands in which significant hazardous substance disposal occurred was insufficient to qualify it as a PRP "owner." The Tenth Circuit disagreed.

"[A]t a minimum, the term "owner" covers fee title holders for purposes of CERCLA liability, irrespective of any additional indicia of ownership. To find otherwise would be inconsistent with CERCLA's statutory scheme and an ordinary application of its terms."[20] The battle over *actual* liability, according to the Tenth Circuit, "requires any consideration of the extent and kind of an owner's involvement in hazardous substance production and disposal be made at the second stage of the CERCLA liability inquiry (*i.e.,* allocation under 42 U.S.C. § 9613(f)(1)), rather than the first (*i.e.,* precluding "owner" liability entirely)."[21]

In putting the nail in the coffin on ownership qualification (thus PRP status), the Tenth Circuit found that "the government actively encouraged mining activities on its lands when it passed the DPA and provided the initial loan to Molycorp, Chevron's corporate predecessor, to fund their molybdenum exploration and mining. For decades after that, the United States knew that Chevron was depositing millions of tons of waste rock and tailings on the surface estates, land over which the United States still held, at minimum, ownership via legal title."[22] A DEMA exploration program at Questa similar for what was afforded the Stibnite operator was discussed by the Tenth Circuit as an important indicator of more than mere passive ownership of federal lands subject to CERCLA clean up.

Accordingly, under *Chevron Mining*, where the federal government invested in exploration, provided Special Use permits for mining waste disposal and otherwise countenanced resource development resulting in unattended legacy conditions, the United States may bear liability as a PRP owner at the time of disposal of a hazardous substance *as well as* the *current* owner of lands where hazardous substances are present. The facts and legal outcome of *Chevron Mining* are important for a fuller context of the history of the district, particularly as explained in SDEIS Section 3.1.

[20] *Chevron Mining*, 863 F.3d at 1278.
[21] *Id.*
[22] *Id.*

b. The District Court CERCLA Liability Allocation and the Similarities of the Questa Mine Development with the Stibnite Mining District

Judge Kelley identified the following factors as critical to his CERLCA cost allocation:

1. The parties' land ownership throughout the operation of the Questa Site;
2. The parties' notice of, knowledge of, and acquiescence in, the activities that caused the contamination;
3. The degree of involvement by the parties in the generation, transport, and disposal of the waste;
4. The degree to which the parties directly oversaw or managed activity that contributed to the contamination; and
5. The benefits received from the activities that caused the contamination, including any benefits to national defense efforts and to the local economy of northern New Mexico.[23]

After calibrating these factors to the facts before him, Judge Kelley allocated under CERCLA approximately $300 million to the United States for its PRP share of the Questa cleanup.

The allocation determination in the *Chevron Mining* case provides yet another rationale why the SGP, with its comprehensive approach to resource development and site restoration, makes economic sense on two important fronts. First, the job creation opportunities from the SGP are unquestioned. Second, the NEPA alternatives analysis must account for forgone job creation (failure to take advantage of the potential economic benefit) along with the averted potential future legal exposure to the federal government from failing to further clean up the district through the vehicle of the SGP.

The latter is particularly critical to the alternatives analysis because a No Action Alternative is included in the SDEIS and remains procedurally available for determination by the Forest Service as the ROD selected alternative. Stated simply, notwithstanding the *Mobil Oil* and *Bradley* CDs, the Forest Service is similarly exposed to an allocation of CERCLA liability for Stibnite as was just allocated at Questa vis-à-vis "non-covenanted" parties such as, for example, Perpetua.

[23] Findings at 34 ¶ 153.

The factors employed by the District Court to allocate liability to the federal government for site cleanup could easily be applied to the Stibnite site. Each mining operation was developed on Forest Service land ("land ownership"). Each operation had investment by the DMEA lending program to encourage project development ("notice of, knowledge of, and acquiescence in, the activities that caused the contamination").

Importantly, each mine was subject to special use permitting by the Forest Service ("degree to which the parties directly oversaw or managed activity that contributed to the contamination"). For example, at Stibnite, the Forest Service granted Bradley a discretionary Special Use Permit for large-scale tailings disposal in the Meadow Creek area at the site in 1947.[24] That a Forest Service Special Use Permit was necessary makes clear that the tailings were placed on federal land.[25] Over three million tons of tailings and ten million tons of subsequent spent ore, in all, were placed in an unlined valley that has come to be known as the Bradley Tailings Dump now, SODA.

Finally, both Questa and Stibnite clearly "benefit[ted] national defense efforts." As related to Questa, Judge Kelly held that the federal government pursuit of the DEMA contract was due to "molybdenum's strategic value in the national defense effort."[26] The aforementioned 1947 telegram from then General Eisenhower is perhaps the most powerful endorsement of Stibnite's contribution to National defense.

Because the facts before the Tenth Circuit and Judge Kelly in *Chevron Mining* are remarkably similar to the development of the legacy conditions at the district, the FEIS must analyze the legal exposure for the United States that would be averted should the 2021 MMP become the Selected Alternative.

C. The Pre-Permitting Cleanup Commitment by Perpetua in its Voluntary CERCLA Administrative Settlement Agreement and Order on Consent

Section 2.3 of the SDEIS rightly frames a post-DEIS development, a voluntary investment by Perpetua in pre-permitting district cleanup, as a "reasonably foreseeable future action" (RFFA) nested in the cumulative

[24] U.S. Forest Serv., Special Use Permit, Bradley Mining Co. Tailings Storage (Oct. 13, 1947).
[25] *See* Letter from H.D. Bailey, Yellow Pine Mine, to I.W. Farrell, Supervisor, Boise National Forest, Re: U-Uses, Bradley Mining Co. Tailings Storage (Oct. 10, 1947) ("[i]t is to be understood that this area is on unpatented mining claims").
[26] See Findings of Fact and Conclusions of Law at 38 ¶ 167.

effects analysis impacting future environmental conditions.[27] However, the limited discussion of Perpetua's voluntary ASAOC does not provide a full horizon of the commitment by Perpetua to full site cleanup after the SGP is permitted and goes into production. The discussion below provides additional context relevant to the evaluation of the preferred alternative.

1. Perpetua's Administrative Settlement Agreement and Order on Consent

As a good faith down payment on its commitment to restore the district, the Stibnite ASAOC calls for a commitment by Perpetua of $7.5 million over the next four years (Phase I) to undertake CERCLA "time critical" removal actions (TCRAs) to address water quality concerns that have plagued the site for decades. As described below, the additional phases to cleanup under the ASAOC hinge on Perpetua securing its permitting and infrastructure to operate the Project.

The Stibnite ASAOC is framed by the prospect that CERCLA-driven cleanup can be completed by Perpetua *before* the SGP is permitted, and similar work may expand to other areas beyond the Project footprint during the future execution of the PRO. Importantly, the ASAOC appropriately and clearly reflects that Perpetua had no previous involvement in creating the contaminated conditions in current need of attention:

> Respondents assert that they and their predecessors have never constructed or operated a mine in the Stibnite Mining District. Respondents assert that they have no current mining operations and are presently funded entirely by investor capital that has been raised only through the prospect of future mining. *Respondents assert that they will not have on-going operating revenue unless they are able to commence future mining operations in the Stibnite Mining District*.[28]

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27 See SDEIS Section 2.3 at 2.7:

> In a reasonably foreseeable future action, certain legacy and existing mining impacts would be addressed as directed in the 2021 ASAOC described in Section 1.3, including installation of stream diversion ditches designed to avoid contact of water with sources of contamination and removal of approximately325,000 tons of development rock and tailings that are currently impacting water quality. These CERCLA response actions would occur under all alternatives considered in this analysis.

[28] Stibnite ASAOC at ¶ 4, p. 1 (emphasis added).

Additionally,

> In negotiating this ASAOC, the Agencies have taken into account Respondents' willingness to commit to certain pre-mining Phase 1 Work on a fixed timeline, *the fact that Respondents did not create the historic environmental issues at the Site*, Respondents' current status as start-up entities, and the specific Site characteristics, and *the opportunity to address some legacy mining impacts on NFS lands through private investment*.[29]

Finally, in setting the stage for the menu of site-specific time critical removal actions, the federal agency parties to the ASAOC acknowledge the "global" the problem set that as a matter of important public policy, may be addressed by this particular CERCLA settlement:

> The Agencies recognize that abandoned mine sites are a longstanding environmental problem, particularly in the Western United States. Returning a site of historic mining operations with legacy environmental issues to productive operations while addressing those legacy environmental issues has the potential to benefit the environment, economy, and local community.[30]

2. The Infrastructure of the ASAOC

a. The Phases of the ASAOC

The Stibnite Mining District ASAOC architecture is in four phases:

1. Phase 1 (Years 1-4) will involve TCRAs, a sub-category of CERCLA removal actions designed to address hazardous substance releases quickly and efficiently;[31]

2. An optional Bridge Phase (Year 5) will be available if permitting

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[29] Id. at ¶ 9, p. 2 (emphasis added).

[30] Id. ¶ 10, p. 2.

[31]. *See* EPA, GUIDANCE ON CONDUCTING NON-TIME-CRITICAL REMOVAL ACTIONS UNDER CERCLA (EPA/540-R-93-057) (Publication 9360.0-32) (August 1993) at 3-4:

> EPA has categorized removal actions in three ways: emergency, time-critical, and non-time-critical, based on the type of situation, the urgency and threat of the release or potential release, and the subsequent time frame in which the action must be initiated. Emergency and time-critical removal actions respond to releases requiring action within 6 months; non-time-critical removal actions respond to releases requiring action that can start later than 6 months after the determination that a response is necessary.

for the Project is successfully proceeding;

3. Further Site cleanup will be designed and developed in optional Phase 2 (years 6-9) if the SGP is permitted and becomes fully operational; and

4. Work similar in design to Phase 2 is intended to proceed in Phase 3 (years 10-20). Actions in Phases 2 and 3 will be "non-time critical removal actions" for which CERCLA affords more planning and implementation time.

b. Stibnite ASAOC Phase I

The key Phase I time TCRA actions set forth in the ASOAC's Statement of Work (SOW) are directed at:

1. Improving water quality through diversion actions in key areas of the Stibnite Site;[32]
2. Attacking legacy areas of the Stibnite Site where mine waste continues to plague current water quality;[33] and,
3. Reviewing of additional areas of the Site for potential future CERCLA response actions.[34]

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32. *See* SOW at Section 2.2, p. 2,"Stream Diversion Project:"

1. Diversion of Hennessy Creek around the Northwest Bradley Dumps;
2. Diversion work in DMEA Waste Rock Dump Area; and
3. Diversion of surface water to avoid the Smelter Flats/Hangar Flats source area.

33. *Id*. at pp. 2-5, Mine Waste TCRA:

1. Lower Meadow Creek Valley Tailings Removal Action (25,000 tons);
2. Bradley Man Camp Dumps Removal and On-Site Repository (200,000 tons); and
3. Northwest Bradley Dump Stream Waste Material Removal and Slope Stabilization (100,000 tons).

34. *Id*. at 5 "Adit Study," and at 10 "Site Characterization Report," which constitute additional key Phase 1 studies which are designed to inform future CERCLA Stibnite ASAOC response actions:

1. Studies at five adit areas: Bailey Tunnel, DMEA Adit, Bonanza Adit, Cinnabar Tunnel, and Meadow Creek Adit;
2. Site Characterization Report presenting data relevant to the areas of the site in the following areas:
   - Meadow Creek Mine Adit area;
   - Meadow Creek;

NMA concurs that only Phase I of the ASAOC fairly constitutes an RFFA for the cumulative effects analysis. That stated, the FEIS must account for any adjustments in the Phase I TCRAs directed by the CERCLA agencies that are designed to exceed the environmental performance of what was initially negotiated by Perpetua and the federal government on the face of the ASAOC. As Phase I of the ASAOC is being executed by Perpetua, it is reasonable to expect that work plans will be adjusted before final implementation and data collected (or projected) that will further inform the performance of this RFFA.

D. The *Rosemont* Decision by the United States Court of Appeals Does Not Change the Underlying Regulatory Authority of the Forest Service to Permit the Stibnite Gold Project

1. Summary of the Ninth Circuit Decision

On May 12, 2022 the United States Court of Appeals for the Ninth Circuit affirmed the U.S. District Court for the District of Arizona in the *Rosemont* case. The Ninth Circuit, by a split 2-1 decision, held that the Forest Service erred in approving the Rosemont mine plan of operations (MPO) that included rock waste and tailings disposal on 2,447 acres of unpatented mining claims.

Over a dissent, the majority panel determined that it did not know on the record before it whether the Service would have applied its surface use regulations under 36 CFR Part 228A (228A Regulations) to Rosemont's mine plan to allow such surface occupancy under the majority panel's legal

- Hecla Heap Leach & Pioneer tailings;
- Canadian Superior Heap Leach Pads (On-Off) area;
- Defense Minerals Exploration Administration (DMEA) Waste Rock Dump area;
- DMEA Adit area;
- Bradley Man Camp Waste Rock Dump area;
- Areas adjacent to and NE of the Yellow Pine Pit, including Monday Camp, Monday Camp Waste Rock Dump, and SE Bradley Waste Rock Dump;
- Areas adjacent to and SW of the Yellow Pine Pit, and the BMC NW Bradley Waste Rock Dump;
- Cinnabar Tunnel Adit area;
- Northwest Bradley Waste Rock Dumps/Hennessy Creek area;
- Northeast Bradley Northeast Oxide Dumps area;
- Bailey Tunnel outlet area;
- Bonanza Adit area (Sugar Creek); and
- Bonanza Dump.

interpretation. Although the applicability of the 228A Regulations to the Rosemont mine plan was briefed by the parties in the Ninth Circuit (and which the lower had ruled on), the majority remanded the case back to the Forest Service to determine if the mine plan could be approved using this valid regulatory authority.

Unfortunately, the decision misconstrued rights conveyed by the 1872 Mining Law to owners of unpatented claims and the use of surface resources to develop those claims. The Ninth Circuit questioned, but did not resolve, whether the Forest Service could authorize waste rock and tailings disposal either on mill site claims or on open Forest Service lands under the Forest Service's 228A mining regulations.

2. The 228A Regulations Remain Unchallenged and Valid after the Ninth Circuit Decision

On the *Rosemont* appeal, the Ninth Circuit majority held that the Forest Service unlawfully approved a mine plan of operations including the planned placement of waste rock and tailings on 2,447 acres of National Forest land because, according to the Court of Appeals, the Forest Service could not determine that the unpatented mining claims supporting that proposed surface use were valid because there was no evidence in the record that the mining claims were supported by the discovery of a valuable mineral deposit.

The outcome of the *Rosemont* appeal leaves the door open for the Forest Service to make the case that the waste rock placement on areas outside mining claim boundaries was valid under its regulations by which mine plans are reviewed and approved, specifically, the 228A Regulations. Accordingly, for purposes of the SDEIS exposition of federal authority to approve the Proposed Action, the status quo remains notwithstanding the result in *Rosemont*.

D. The Recent Department of Defense Award Affirms the National Security Interest in the Stibnite Gold Project

As discussed above, the district proved essential in winning the Second World War. A recent announcement by DOD shows the district's work in bolstering national defense is not over. During World War II, antimony was key to domestic production of tungsten steel and the hardening of lead bullets used in combat.[35] At that time, up to 90% antimony demand was

[35] *See U. S. International Trade Commission, Antimony: A Critical Material You've Probably Never Heard Of* at

fulfilled through domestic production. Today, antimony is used across numerous industrial sectors. As of 2020, the leading uses of antimony in the United States were in flame retardants, lead-acid batteries, as a key alloying material for strength, and antifriction alloys. Additionally, antimony is used in a variety of military applications, including night vision goggles, explosive formulations, flares, nuclear weapons production, and infrared sensors.[36]

The SDEIS, as did the 2020 DEIS, is unequivocal that the Forest Service Purpose and Need for the SGP NEPA review includes production of antimony. Specifically, it states that the need for the action is to:

> Consider approval of Perpetua's 2021 MMP for development of the SGP to mine gold, silver, and *antimony* deposits that, where feasible, would minimize adverse environmental impacts on NFS surface resources; and ensure that measures are included that provide for mitigation of environmental impacts and reclamation of the NFS surface disturbance.[37]

The SDEIS also emphasizes the anticipated significant production of antimony at the SGP:

> The contained metal content in the 2021 proven and probable mineral reserve of the property is approximately 4.819 million ounces of gold, 6.431 million ounces of silver, and *148.686 million pounds of antimony*. From the total ore currently planned to be mined the SGP is estimated to recover, over 15 years of mill production, 4.238 million ounces of gold, 1.710 million ounces of silver, and *115.342 million pounds of antimony*.[38]

Accordingly, the potential for SGP antimony production has consistently been integrated into the NEPA alternatives analysis.

On December 19, 2022, DOD announced that it awarded Perpetua a Technology Investment Agreement under Title III of the DPA to Perpetua.[39] Specifically, The DPA Investments Program will provide $24.8 million to Perpetua to complete environmental and engineering studies necessary to

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https://www.usitc.gov/publications/332/executive_briefings/ebot_a_critical_material_probably_never_heard_of.pdf (paper published October 2021).

[36] *Id.*

[37] *See* SDEIS at ES-1. (Emphasis added.)

[38] *Id*. at ES-8. (Emphasis added.)

[39] *DoD Issues $24.8M Critical Minerals Award to Perpetua Resources* (Dec. 19, 2022) at https://www.defense.gov/News/Releases/Release/Article/3249350/dod-issues-248m-critical-minerals-award-to-perpetua-resources/.

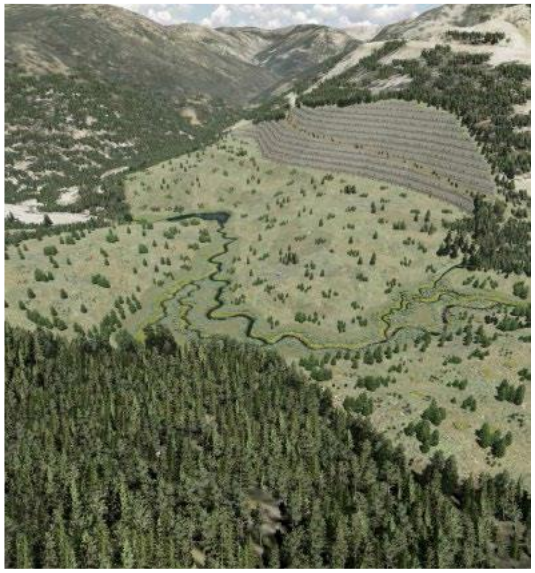
obtain a FEIS, a final Record of Decision, and other ancillary permits. Perpetua's DPA funding endorses the SGP's national defense credentials.[40] As noted above, review of the SGP's antimony production has been an integral part of the NEPA alternatives analysis from the start. As correctly stated by DOD, "[t]his award does not interrupt the ongoing National Environmental Policy Act (NEPA) review process, nor does a DPA Investment confer any right or benefit through the permitting process."[41]

E. The Identification of the Preferred Alternative in the SDEIS is an Appropriate Evolution to the NEPA Review of the Stibnite Gold Project

Perpetua's vision for the SGP is to undertake the restoration of the historically impacted site before, during, and after the development of a modern mining operation that produces gold, silver, and the strategic mineral antimony. Central to this vision is the commitment to environmental stewardship throughout the life of the Project. Perpetua's plan for the restoration and operation of the site means it will conduct site cleanup, mining, ore processing, and reclamation work at the site that will leave surface streams in better condition than what currently exists, for example, the before and after of the Stibnite Site's Yellow Pine Pit:

YELLOW PINE PIT (PRESENT)

[40] *See id.* ("Perpetua's Stibnite-Gold Project produced antimony trisulfide for the U.S. ammunition industrial base during World War II and the Korean War, and it is the sole domestic geologic reserve of antimony that can meet Department of Defense (DoD) requirements.").
[41] *Id.*



YELLOW PINE PIT (RENDERING)
(BACKFILL AND STREAM RESTORATION UPON CLOSURE)

In the DEIS, NMA supported Alternative 2 because compared to the other DEIS Action Alternatives there are superior environmental benefits and enhancements associated with Alternative 2 that were absent from the three other action alternatives, including a smaller overall environmental footprint, an active water treatment strategy, and safer site access, among others. Perpetua's 2021 MMP, the SDEIS preferred alternative includes several important changes that enhance and refine the SGP as compared to as Alternative 2 in the Forest Service's August 2020 DEIS, including:

1. A second phase of ore and mine waste characterization tests were performed to respond to comments on the DEIS. The Phase 2 waste characterization tests corroborate and thus validate the results of the Phase 1 tests presented in the DEIS;
2. An active water treatment facility has been added to the MMP. This treatment plant will operate throughout the mine life and during mine closure until the tailings are consolidated, which is estimated to occur in Mine Year 40;
3. Stibnite Lake was added to the MMP to minimize stream temperature fluctuation and to replace lake habitat for bull trout;
4. Numerous plans were developed and incorporated into the MMP including:
    - Aquatic Habitat Monitoring and Management Plan
    - Development Rock Management Plan

- Environmental Legacy Management Plan
- Environmental Monitoring and Management Plan
- Emergency Response Plan
- Explosives and Blasting Management Plan
- Fishways Operation and Management Plan
- Solid and Hazardous Waste Management Plan
- Spill Prevention, Control and Countermeasures Plan
- Stream and Wetlands Monitoring and Management Plan
- Transportation Management Plan
- Water Management Plan
- Water Quality Management Plan

5. Detailed drawings and cross sections showing the embankment design and downstream construction sequencing of the tailings embankment are included in Figures 2.4-10 and 2.4-11 of the SDEIS. The MMP does not include upstream construction for the embankment. The tailings embankment has a downstream construction design;

6. The impoundment will be fully lined. Prior to constructing the liner, an underdrain groundwater conveyance and collection system would be constructed. A composite liner system with a network of geosynthetic over liner drains would then be installed above the underdrain system;

7. A new site Wide Water Chemistry model was prepared and augmented with a hydrologic particle tracking model to fully integrate groundwater quality as a model input along with water quality inputs from the pit dewatering water, the pit backfill materials, the West End pit lake, and effluent from the water treatment plant;

8. The MMP includes a Temporary Closure Plan, Transportation Plan, a Spill Prevention, Control, and Countermeasures Plan, and an Emergency Response Plan.

9. The Fiddle Creek Development Rock Storage Facility was eliminated from the MMP, which reduces the SGP's surface disturbance by 168 acres; and

10. The ModPRO2 Plan of Operations and the MMP described in SDEIS provide sufficient information to include underground exploration as part of the MMP Proposed Action and to analyze the environmental impacts associated with the exploration decline.

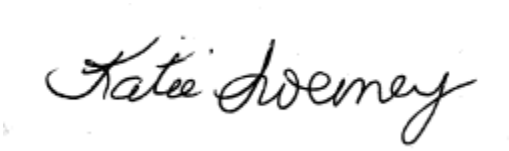
These changes respond to public comments received on the alternatives analyzed in the 2020 DEIS. Based on this appropriate NEPA evolution, the preferred alternative should become the selected alternative by the Forest Service.

III. Conclusion

The SGP's mine plan of operations is successfully evolving through its NEPA review. The proposed action has improved from what was originally a quality action grounded in science to an excellent action based on better information as a product of thorough public review in addition to the commitment of Perpetua to relentlessly develop the SGP to be the best it can be environmentally and economically. The Preferred Alternative, the 2021 MMP, provides the last and best hope for reinvigoration of the abandoned Stibnite Mining District.

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

Sincerely,



Katie Sweeney
Executive Vice President & General Counsel

Attachment (2020 SGP DEIS Comments)

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