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Comments: I am submitting these comments on the Draft Environmental Impact Statement (DEIS) published by the Payette and Boise National Forest (Forest Service) for Midas Gold Idaho Inc.'s (MGII) proposed Stibnite Gold Project (SGP) in Valley County, Idaho. See 85 Fed Reg 49,649 (August 14, 2020).

The comment period was extended to October 28th, See 85 Fed Reg 62, 298 (October 2, 2020).

I. Introduction

A. Identity and Interest of Commenter

I am Michael Bogert, and I am employed as the General Counsel for Midas Gold Idaho, Inc. (MGII). Although I am an employee of the project proponent, these comments are my own as an interested individual.

I am a native Idahoan. I have served as Counsel to the Governor of Idaho and Counselor to the Secretary of the United States Department of the Interior. In my capacity as Counselor to the Secretary, I was involved in advising the Secretary and managing Indian Water Rights Settlements involving the Department of the Interior across all of the Western United States. My duties and obligations as a Federal trustee were to ensure that the interests of Federally recognized Tribes were protected and advanced within reasonable legal, policy and financial means.

Prior to serving as the Counselor to the Secretary, I served as the Regional Administrator for the United States Environmental Protection Agency (EPA), Region 10. Based in Seattle, EPA Region 10 consists of the states of Alaska, Idaho, Oregon, and Washington. Region 10 is responsible for leading EPA's partnerships with the 271 Federally recognized Tribes in the Region. Part of my official portfolio was to work directly with Region 10's Tribal government leadership to ascertain their needs and interests and then reconcile them with EPA's regulatory authority.

In my capacity as Counsel to the Governor of Idaho, I testified before the United States Senate Committee on Indian Affairs in support of the Snake River Water Rights Act of 2004, see S. REP. No. 108-636 (2004) (hearing on S. 2605, the Federal water rights settlement of the Nez Perce Tribe).

In 2018, I was appointed the General Counsel for Midas Gold Idaho, Inc. I was attracted to MGII's business vision of job creation while addressing the legacy issues of the Stibnite Mining District, an abandoned mining site that has been recommended by EPA for inclusion on the National Priorities List (NPL) as a designated Superfund site. The SGP will attract private capital for environmental solutions that are usually the burden of government. The SGP will develop a valuable resource while employing hundreds of Idahoans during the construction, operation, and restoration of the Project Site, and all with an ultimate goal of leaving this part of my native Idaho in far better environmental condition than presently exists.

B. Summary of Comments

The Stibnite Mining District has been subjected to extensive, contested litigation under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). In 2012, the Federal government engineered a settlement from CERCLA liability for its agencies and past operators and there are no future plans to clean up the remaining contaminated conditions on the Site.

The Stibnite Gold Project will address several important environmental and fish conservation strategies that were

suggested in a 2004 report to the Northwest Power and Conservation Council, the Salmon River Subbasin Management Plan. Among the long-term strategies that are key elements of the SGP are improved water quality and the reopening of currently blocked fish habitat in the Stibnite Mining District.

II. Comments

A. The Stibnite Mining District is, at its Core, a Proposed Superfund Site which has been Subject to Multiple Cleanup Efforts and then Abandoned

At an irreducible minimum, the Stibnite Mining District is an abandoned, then neglected, potential Superfund site. EPA proposed to list the site on the NPL in 2001, see National Priorities List for Uncontrolled Hazardous Waste Sites, Proposed Rule No. 37, 66 Fed. Reg. 47,612, 47,618 (Sept. 13, 2001) (below), and it has remained proposed for NPL listing since.

SEE LETTER SUBMISSION: Table 1 National Priorities List Proposed Rule No. 37, General Superfund Section

According to EPA, [ldquo]The NPL is primarily an information resource that identifies sites that warrant cleanup. It is a list of the worst hazardous waste sites identified by Superfund.[rdquo] See Environmental Protection Agency, Superfund Cleanup Process, at <https://www.epa.gov/superfund/superfund-cleanup-process> (last visited October 27, 2020). With regard to the Stibnite Site specifically, the EPA states that [ldquo][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.[rdquo] EPA, Stibnite/Yellow Pine Mining Areas, Stibnite ID, Cleanup Activities, at <https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.Cleanup&id=1000236#background> (last visited October 27, 2020).

The Stibnite Site has been subject to substantial cost recovery litigation under CERCLA. Multiple consent decrees emerged from these actions including Mobil Oil v. United States, Civ. No. 99-1467- A (D. Virginia) (consent decree filed June 26, 2000); United States v. Oberbillig (D. Idaho) (consent decree filed March 18, 2004); and United States v. Bradley Mining Company, Case No. 3:08-CV- 03968 TEH and United States v. Bradley Mining Company, Case No. 3:08-CV-05501 TEH (N.D. Ca.) (consent decree filed April 19, 2012). In some of the above-noted cost recovery litigation, the Site has been alleged to be a CERCLA [ldquo]facility[rdquo] as defined by Section 101 (9) of CERCLA, 42

U.S.C. [sect] 9601 (9). In Bradley Mining Company, the EPA extended CERCLA covenants not to sue to the United States Forest Service, the United States Department of Defense, United States Department of the Interior, EPA, and United States General Services Administration.

With the Bradley Mining Company consent decree, Federal agencies responsible for the contamination of the Stibnite Mining District settled their CERCLA liability. However, according to DEIS, [ldquo]elevated metals concentrations found in the surface water are unlikely to improve in the future without additional remediation which is not currently planned.[rdquo] See DEIS at p. 4.9-123. As this is written, I am unaware of any programmatic CERCLA remediation actions planned by the United States government in the Stibnite Mining District.

B. Idaho Tribes with an Interest in the Stibnite Mining District and Actions Called for in the Salmon River Subbasin Management Plan

At Chapter 4.24, the DEIS attempts to set forth the Tribal rights and interests that are implicated by the advancement of the Stibnite Gold Project (SGP). The DEIS claims that [ldquo]the SGP would affect tribal rights by preventing tribal access to tribal resources. According to the DEIS, Tribal rights guarantee access to

[ldquo]usual and accustomed[rdquo] traditional subsistence resources in areas.[rdquo] See DEIS at

p. 4.24-4. The quoted language is the [ldquo]fishing clause[rdquo] of Article 3 of the 1855 Stevens Treaty of the Nez Perce Tribe, which reads in pertinent part as follows:

The exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said Indians: as also the right of taking fish at all usual and accustomed places in common with citizens of the territory, and of erecting temporary buildings for curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land

Art. 3, Treaty with the Nez Percés, June 11, 1855, U.S.-Nez Perce, 12 Stat. 957 (ratified on Mar. 8, 1859) (emphasis added). [ldquo]The fishing clause of the Stevens Treaties guarantees to the Tribes a right to engage in off-reservation fishing.[rdquo] United States v. Washington, 853 F.3d 946, 962 (9th Cir. 2016).

Another Idaho tribe with an interest in the Stibnite Gold Project is the Shoshone-Bannock Tribes. Those Tribes[rsquo] off reservation treaty interests are exercised pursuant to Article IV of the Fort Bridger Treaty of 1868, which states:

The Indians herein named agree, when the agency house and other building shall be constructed on their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.

Art. IV, Treaty with the Eastern Band of Shoshonees and Bannack Tribe, July 3, 1868, 15 Stat. 673 (1869), reprinted in 2 Indian Affairs: Laws and Treaties 1020 (Charles J. Kappler ed. 1904) (emphasis added). The Nez Perce off-reservation treaty reservation rights extend to [ldquo]usual and accustomed[rdquo] places, and the Shoshone-Bannock Tribes[rsquo] off-reservation interests apply to [ldquo]occupied lands of the United States.[rdquo]

In 2004, the Nez Perce Tribe and the Shoshone-Bannock Tribes collaborated with state and Federal agencies, counties, agricultural interests, and other stakeholders to craft the Salmon River Subbasin Management Plan. This document was developed with Northwest Power and Conservation Council funding as a blueprint to protect and restore fish habitat in the Salmon River, a tributary to the Columbia River. See Salmon River Subbasin Management Plan, May 2004, Ecovista, contracted by Nez Perce Tribe Watershed Division and Shoshone-Bannock Tribes. See: https://www.nwcouncil.org/sites/default/files/Salmon_Subbasin_Management_Plan.pdf (Plan).

The Salmon River Subbasin Management Plan identified problems and proposed solutions to advance fish restoration in the Pacific Northwest. Among the many problem sets identified, the document dedicated particular focus to mining activities and noted that certain conditions at active, inactive and orphaned mine sites limited the distribution of important fish species. The Plan identified as a priority areas:

- [bull] Stibnite Mine;
- [bull] East Fork South Fork Salmon River;
- [bull] Meadow Creek; and
- [bull] Blowout Creek.

Plan at 53. The actions recommended for these priority areas included:

1. [ldquo]Ensure adequate riparian areas exist upstream and downstream of the affected site;[rdquo]
2. [ldquo]Implement alternative mitigation approaches such as slope recontouring, drainage rerouting, or export of waste material;[rdquo]
3. [ldquo]Clean up and stabilize (through planting) unconsolidated tailings piles at active, inactive, and orphan [mine] sites;[rdquo] and
4. [ldquo]Monitor and evaluate all mitigation activities[rdquo]

Plan at 52. These actions recommended in the Salmon Subbasin Management Plan are integrated into the Stibnite Gold Project proposed plan of Restoration and Operations.

C. Absent Development of the Stibnite Gold Project, there is No Present Path for Degraded Water Quality to Improve and Fisheries to Recover

1. Water Quality

In 1947, the Forest Service granted the Bradley Mining Company a discretionary Special Use Permit for large-scale tailings disposal the Meadow Creek area at the southern end of the Site in 1947. See

U.S. Forest Serv., Special Use Permit, Bradley Mining Co. Tailings Storage (Oct. 13, 1947). That a Forest Service Special Use Permit was necessary makes clear that the tailings would be placed on Federal land. 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) (emphasizing that [ldquo][i]t is to be understood that this area is on unpatented mining claims[rdquo]). Subsequently, over three million tons of tailings and ten million tons of subsequent spent ore, in all, were placed in an unlined facility in a valley that has come to be known as the Bradley Tailings Dump (or, more euphemistically, the [ldquo]Spent Ore Disposal Area[rdquo] or [ldquo]SODA[rdquo]).

The DEIS clearly shows the current state of water quality in the Stibnite Mining District. Chapter 3 of the DEIS Section 3.9.3.3.2 states that [ldquo]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.[rdquo] DEIS at p. 3.9-58.

a. Surface Water

In Section 3.9.3.3.2.1, the DEIS states that [ldquo]the late 1990[rsquo]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.[rdquo] DEIS at p. 3.9-58

Additionally, [ldquo]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.[rdquo] Further, [ldquo][t]he 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.[rdquo] DEIS at p. 3.9- 58-59.

b. Ground Water

The DEIS at Chapter 3, Section 3.9.3.3.2.2 states that [ldquo]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, [ldquo]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.[rdquo] DEIS at p. 3.9-59.

Subsequent to the construction of the SODA repository by the USFS and EPA, Midas Gold has identified to EPA the existence of elevated levels of arsenic and antimony in the Meadow Creek Valley area in locations downgradient from the SODA. Alluvial groundwater sampled in groundwater wells regularly show arsenic concentrations of 1,000 [ndash] 3,000 [micro]g/L; groundwater in well MWH-A07 regularly shows antimony concentrations of 600-1,600 [micro]g/L. One alluvial monitoring well (MWH-A19) near the repository cell constructed by the Forest Service in the Northwest Bradley dumps near the Yellow Pine Pit has measured particularly high arsenic concentrations; typically ranging from 3,000 to 6,000 [micro]g/L and as high as 6,670 [micro]g/L from a sample gathered in 2018. Similar levels of arsenic are consistently indicated, with a reading of 6,230 [micro]g/L from a sample gathered in late May 2019. The state of groundwater quality on the Stibnite Site is inferior, to say the least.

MGII[rsquo]s proposed Plan of Restoration and Operations will:

1. Remove legacy materials and manage water to provide long-term reduction in metal loading in ground and surface water. See DEIS Section 4.9.2.1.1.3 [ldquo]By removing, reprocessing, and properly disposing of these legacy waste materials, several existing sources of metals leaching would either be eliminated from the mine site or disposed in an on-site facility [hellip] where further degradation of water quality is less likely. The surface water and groundwater quality of the mine would be altered as a result of these actions,[rdquo] DEIS at p. 4.9-17; and
2. Under Action Alternative 2, legacy tailings and waste rock removal improves water quality in Meadow Creek Valley: [ldquo]Groundwater and surface water quality in the Meadow Creek Valley is predicted to improve due to reclamation activities associated with the spent ore disposal area and Bradley tailings compared to baseline. See DEIS at p. 4.12-104.

2. The Evolution of the Yellow Pine Pit and Fish Passage

Since the 1930s, the East Fork South Fork of the Salmon River has permanently blocked access by anadromous fish to the upper reaches of the East Fork South Fork Salmon River by the Yellow Pine Pit. The mining of what came to be known as the Yellow Pine Pit at the north end of the site began when the land was still in Federal ownership. Federal government land survey plats prior to patenting in the 1940s show the East and West pits already present and rapidly expanding. Mining methods at the time resulted in waste rock being removed and immediately placed onto land nearby[mdash]and also still in Federal ownership at the time. These areas were not patented until well after the pit was developed and fish passage cut off.

As contemporaneous accounts in 1939 Interior Department land records surveying the Federal lands subject to unpatented mining claims explain, [ldquo][t]his mining claim is being mined and developed by the Bradley Mining Company by means of two open pits, known respectively as the East and West pits. The ore is blasted by wagon drill, loaded by shovel into ten-ton trucks and hauled to the company[rsquo]s mill on Meadow Creek for

treatment.[rdquo] U.S. Dep[rsquo]t of the Interior, General Land Office, Field Notes, Mineral Survey No. 3357 at 15 (1939) (emphasis added) The area being described and mapped in these Interior Department land records from 1939 lie at the heart of the evolution of the Yellow Pine Pit and associated mine waste disposal areas. The Federal government countenanced the development of the Yellow Pine Pit which is responsible for, at least for the foreseeable future, permanent fish obstruction into southern reaches of the EFSFSR.

As a cornerstone of the SGP, and as a bridge to permanent restoration of surface water, fish will be temporarily routed around the impassable Yellow Pine Pit via an innovative tunnel and thereby reconnected with their natural spawning grounds. The DEIS specifically states that removing historical barriers to fish migration is beneficial to the population and providing long-term access to historically blocked habitat will result in increased species productivity. For example:

1. [ldquo]The Yellow Pine pit barrier would be removed in Mine Year -1 with the construction of the EFSFSR tunnel opening up 19.70 km of naturally accessible Chinook salmon critical habitat.[rdquo] DEIS at p. 4.12-68;
2. During the SGP closure and reclamation phases, [ldquo][t]he EFSFSR channel would be constructed to flow over the backfilled Yellow Pine pit. [hellip] Stream connectivity would be established across the backfilled Yellow Pine pit and natural fish passage would be available to the upper EFSFSR.[rdquo] DEIS at p. 4.12-11-12; and
3. Following closure and restoration of the SGP under Action Alternative 2, the net effect would be an increase in both quantity and quality of habitat for steelhead trout. [ldquo]Useable habitat would increase 12.7 percent over the SGP, a gain of approximately 2.8 km. The increase in steelhead trout IP habitat would occur in Mine Year 12 (decommissioning of EFSFSR tunnel) and Mine Year 17 (Meadow Creek DRSF/TSF channel construction).[rdquo] DEIS at p. 4.12-123.

III. Conclusion

The EPA has clearly recognized that attracting private capital for reuse and redevelopment of Superfund sites is worthy public policy, particularly as applied to NPL-listed Federal [ldquo]facilities.[rdquo] See Superfund Task Force Final Report, https://www.epa.gov/sites/production/files/2019-09/documents/sftfreport_v17-9-5_for508s.pdf at 57 ([ldquo]EPA will sustain its commitment to promoting redevelopment and reuse of federal property on the NPL [hellip] where there are opportunities for productive reuse.[rdquo])

As noted earlier, the Stibnite Mining District was proposed for NPL listing in 2001 and the current configuration of the PRO includes addressing existing contamination on Federal lands.¹ EPA has recognized that attracting private investment to abandoned CERCLA sites can ease the burden on the taxpayer, and so should the Forest Service in the context of the environmental benefits proposed by the Stibnite Gold Project Plan of Restoration and Operations. This innovative plan uses private capital to remediate, repair and restore historical mining impacts that were approved and, in some cases, funded by the Federal government. The SGP will not only permanently address legacy environmental impacts and restore permanent fish passage in a portion of the Salmon River Basin,

1. The Secretary of the Department of Agriculture (USDA) has delegated CERCLA authority under by Executive Order 12580, 52 Fed. Reg. 2923 (Jan. 29, 1987). The Secretary[rsquo]s authority has been delegated to the Chief of the Forest Service by 7 C.F.R. [sect] 2.60(a)(39), and then re-delegated by the Chief of the Forest Service to the Intermountain Region 4 Regional Forester. In addition, the Secretary[rsquo]s enforcement authority under CERCLA Section 106 has been delegated to the USDA Under Secretary for Natural Resources and Environment. but will do so while creating hundreds of local and regional jobs and generating significant tax revenues for all levels of government.

This is not to suggest that the Stibnite Gold Project should be relieved of any appropriate environmental review. But the present NEPA process should be framed by the reality that the Stibnite Mining District, in the succeeding years after the Federal government left the Site in the aftermath of making peace with itself under CERCLA, has no viable opportunity for long-term remediation.

The Federal government has no immediate plans to improve water quality or return fish to their traditional spawning grounds in the Stibnite Mining District other than its fair consideration of the Stibnite Gold Project. Simply put, the Stibnite Gold Project Plan of Restoration and Operations represents the only viable path forward for this brownfields site, and therefore should be approved in a timely manner by the USFS.