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Comments: Comments of Joseph Fox on Stibnite Gold Project EIS #50516 - Jan. 8, 2023

My name is Joseph Fox, and I am writing in strong OPPOSITION to the proposed Perpetua Resources (formerly Midas Gold) project. Since 1981 I have intermittently lived in McCall. Since the late 1980s I've owned property on Rio Vista Blvd and pay property taxes. I was a smokejumper at the McCall base for twenty years and have brought my wife and three boys here every year for summers and winter breaks. The Perpetua Resources' project would devastate natural areas and ruin attributes that make McCall a remarkable place for tourism and raising families.

My objections fall into four categories elaborated below: 1) illegal irreversible and irretrievable commitment of resources prohibited by NEPA prior to the conclusion of the full EIS process; 2)) insufficiency of analysis under NEPA; 3) inappropriate delegation of the NEPA responsibility to the project proponent, creating inherent bias in the analysis; 4) violation of the public trust principle. I request that the Forest Service 1) provide the public a complete set of correspondence and documents relating to the recent Department of Defense grant of \$24 million to the proponent and include full discussion and analysis of the grant in the pending SDEIS process; 2) undertake analysis to remedy the many remaining deficiencies under NEPA; 3) commence a vigorous internal audit of inappropriate bias in favor of Perpetua (formerly Midas Corp.), an audit conducted by the USDA's Office of Inspector General; and 4) conduct a thorough analysis of whether approval of this project violates the Forest Service's singular and unique duties under the public trust principle to protect crucial natural resources for the benefit of present and future generations.

Irreversible and irretrievable commitment of resources under NEPA

In December, 2022, as this NEPA process was ongoing (and far from final), it was reported that the Dept of Defense granted \$24 million to Perpetua for the purpose of securing permits for (or including) this very proposal. It is hard to imagine a more blatant irreversible and irretrievable commitment of resources that is prohibited by NEPA. 40 CFR 1502.16. The money, once granted, is obviously irreversible and irretrievable. The purpose of the funding is to secure the very approval that the entire NEPA process is designed to inform. The fact that it was DOD, rather than the Forest Service, granting the funds is of no consequence because the federal "family" is all one under the unitary executive theory, and the actions of a sister agency are directly attributable to the Forest Service. This funding action is designed to steamroll the project prior to the completion of NEPA, and it has likely already influenced both decision-makers and investors.

Under NEPA, the Forest Service must not determine whether to issue a permit until its NEPA process concludes. Yet, a sister agency (DoD) has issued this massive funding to apparently gain approvals that the Forest Service, by law, cannot decide until the NEPA process concludes. The statute prohibits such commitments for the very purpose of not allowing agencies and applicants to gain momentum that would taint a decision subject to conclusion of NEPA analysis. This funding certainly suggests a predetermined outcome on the part of the federal government to approve the project, and positions the entire NEPA process as an invalid post-hoc rationalization. By funding \$24 million towards the very end that this NEPA process is geared to inform, the federal government has already presented the project as a fait accompli. Such remarkable flouting of NEPA is difficult to correct at this point and throws into question the legitimacy of the entire NEPA process.

While likely a matter that will be included in later litigation challenging the project, at this point the public deserves to know the precise details of the grant and have available to it all correspondence between agency (DOD) officials and the Forest Service and the applicant concerning the grant. The grant decision also requires full

elaboration in the present SDEIS. While a FOIA request could force federal actors to divulge this information, the Forest Service has an independent duty under NEPA to provide this swiftly, as it has crucial bearing on the NEPA process as a whole.

Separately, and apart from the infirmity of the Forest Service's NEPA process, it is altogether unknown whether DOD complied with NEPA in making this grant. That is a separate analysis, and one that the public lacks information on at this point. The DOD should plainly state to the public its own NEPA process (or exemptions, if applicable) surrounding this grant, and that information should be included in the SDEIS so that the public can fully assess the consequences of this jaw-dropping decision.

Insufficient discussion of environmental impacts

Many in Idaho recall the legacy of pollution left by the last time Idaho produced antimony. The Sunshine Mine and Bunker Mine still bequeath toxic metal runoff to the watersheds of northern Idaho. This SDEIS fails to provide rational analysis of the impacts of the project on vital natural resources including fisheries, air, waters, soils, forests, and wetlands. There is, moreover, a failure to present a complete and coherent climate impacts analysis.

The SDEIS insufficiently addresses direct, indirect, and cumulative impacts regarding carbon emissions. The climate crisis is now an emergency with different parameters than when the Forest Service commenced its process. Its analysis fails to reflect the all-out urgency of the climate situation. Internationally accepted science shows that society must decarbonize rapidly and achieve 45% emissions reduction by 2020 (a mere 7 years remaining) - or risk pushing the planet into runaway heating. Moreover, there is no analysis of the potential role this vast landscape can play in carbon sequestration if restored without further mining.

Inappropriate delegation of the NEPA responsibility to Midas Corp.; predetermining the outcome; using NEPA process as post-hoc rationalization for a decision already made

Several years ago during the NEPA process, the Forest Service inappropriately allowed Midas Corp (and now Perpetua Resources) to undertake the environmental analysis and inform the public. While this may be an entrenched practice in the federal government, it makes a mockery out of the purpose and letter of NEPA. An EIS must inform the government's decision whether to allow this project to go forward. An EIS is not intended as an advocacy piece developed by the proponent or its consultants. Developing the EIS remains singularly the Forest Service's responsibility. Allowing the private project proponent (or its consultants) any significant role in the process introduces inherent bias that infects the final analysis in a systemic fashion and irreparably taints the decision-making process. The remedy for this is to set the SDEIS aside and pause the process while the Inspector General conducts a process investigation to both identify the points of influence and set a corrective strategy for a renewed NEPA process.

Relatedly, the Forest Service appears to have pre-determined the outcome of this NEPA process long ago. Under NEPA, the Forest Service must not determine whether to issue a permit until its NEPA process concludes. The totality of website information, documents, and informal conversations between citizens and the Forest Service clearly point to the Forest Service's pre-made decision to approve this project and to use the NEPA process, in alliance with Midas Corp. (and now Perpetua Resources) to justify the decision. As noted above, the DOD grant only underscores this conclusion. In short, the Forest Service has already made its decision to approve this project. Such premature decision-making violates the most basic rule of NEPA prohibiting the agencies from deciding the matter prior to the full completion of NEPA's process. I request a full investigation of the Inspector General into this aspect of the Forest Service's process.

Violation of the Public Trust Principle

It is undisputed that federal forest lands are held in public trust. The U.S. Forest Service, as trustee, must manage these lands for the exclusive benefit of present and future generations of citizens, who are the sole beneficiaries of the public trust. The whole purpose of the trust is to harness the otherwise vast power of government and direct it for the benefit of the people, rather than for the political allies of those who may be sitting in government and holding this immense power. A trust imposes a rigorous set of fiduciary obligations, both procedural and substantive in nature. These are separate and apart from statutory obligations and have constitutional underpinnings. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 453 (1892).

While separate, the duties must be fulfilled as part of the NEPA process. The Forest Service has violated multiple duties under the public trust. Above all, the Forest Service has never even assessed what public trust duties apply in this context. It must do an assessment and full evaluation prior to making the final decision whether or not to approve this project.

Duty of loyalty to the public and duty not to make decisions for the primary benefit of a private party

The whole purpose of the public trust principle is to make government work for the people, who after all, give all governmental officials their authority. The duty reaches its pinnacle in the context of natural resources that are crucial to a region. Fish, waters, wildlife, forests, the airshed, and public lands are all public trust assets and vulnerable to devastation by this project.

The trustee's duty is to make decisions to benefit the public. Case Law makes clear that a public trustee may not make decisions for the primary benefit of a private party. *Lake Michigan Fed'n. v. U.S. Army Corps of Engineers*, 742 F.Supp. 441, 446 (N.D. Ill. 1990). Yet the entirety of the NEPA analysis makes clear that the Forest Service is positioned to do just that if it approves the Stibnite mine. It fails to state how the public can benefit. Indeed the gold produced does not go to the U.S. (nor the antimony, the production of which remains speculative at best). The public trust interests of fishing, recreation, aesthetics, and biodiversity would be irreparably harmed to provide profits to a private corporation seeking to exploit public-owned resources - the exact opposite of what the public trust requires. The Forest Service's overriding, unapologetic justification for this project is to benefit Perpetua Resources in patent violation of the public trust requirement to not make decisions for the primary benefit of a private party. It is unclear why the Forest Service seems to support this project over the interests of the public, but it is quite possible that, for years, the political appointees of the Forest Service have been politically biased to favor the proponent. To remedy this perceived bias, the Forest Service should request an internal audit by the Inspector General to determine whether the fundamental duty of loyalty to the public has been compromised.

Duty Against Substantial Impairment

The most basic substantive duty of a public trustee is to prevent substantial impairment to the trust resources, which must be held as an endowment for the benefit of future generations as well as present ones. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 453 (1892). This duty, arising as an inherent right of the people, and having constitutional underpinnings, is separate and beyond NEPA, which imposes just a procedural mandate. See generally See Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 WAKE FOREST J. L. Env. Pol. 281 (2014).

Clearly the EIS contemplates severe, irreversible substantial impairment of the fisheries, waters, and public lands (for the reasons stated in the prior Joint Letter, comments of conservation groups, tribes, and the City of McCall and not reiterated here). In allowing this vast - and for all practical purposes permanent - destruction, the Forest Service grossly violates its most fundamental duty under the public trust principle. Yet it gives no mention of this flagrant violation.

Duty to Exercise Prudence and Caution in Managing Trust Resources

The fisheries at issue here are on the brink of extinction, and this project would threaten to destroy a last stronghold of habitat. It is appalling that the Forest Service would consider some fish tunnel a safeguard. This is an idea appropriate for cartoons, not for fiduciary management. The public vests power in the agencies so that the agencies can bring rigor and expertise to fiduciary management decisions. The Forest Service, blatantly working in concert with the proponent to push this project through, has utterly shoved aside its procedural duty to exercise utmost prudence and caution in managing public trust resources.

Duty to Restore the Resources

A public trustee has the continuing duty to assess steps to protect trust assets and restore the resource where it has been damaged. Here the Forest Service has failed to rigorously assess its duty to restore areas in the mining zone already damaged by its past mismanagement. To carry out this trust obligation, the Forest Service must develop a full plan of restoration that is separate and apart from the profit interests so relentlessly promoted by Perpetua. For all of these reasons, I ask that the Forest Service, under the supervision of the Inspector General, conduct a separate trust analysis independent of any influence exerted by Perpetua Corp.