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September 17, 2012

RE: Golden Hand No. 1 and No. 2 Lode Mining Claims Draft EIS

Dear Supervisor Lannom,

Thank you for considering our comments on the Golden Hand No. 1 and No. 2 Lode Mining Claims Draft EIS. Our organizations have a long history of involvement with both mining and wilderness issues. As an alliance of state, regional, and national conservation organizations, we represent members from both around the state and across the country who have a deep personal interest in preserving the wilderness character of this area and protecting our land, water, fish, and wildlife from the harmful effects of mining operations. The following comments are submitted on behalf of the organizations listed below.

Since 1973, the Idaho Conservation League has worked to protect Idaho's clean water, wilderness, and quality of life through citizen action, public education, and professional advocacy. As Idaho's largest state-based conservation organization we represent over 20,000 supporters who have a deep personal interest in ensuring that mining operations are consistent with protecting our water, wildlands, and wildlife.

The Wilderness Society was founded in 1935 and for seventy-five years the organizational mission has been, "to protect wilderness and inspire Americans to care for our wild places. With approximately 450,000 members and supporters nationwide, including more than 1,500 Idaho residents, The Wilderness Society is concerned about projects and actions that may threaten wilderness protection and may diminish the character of our wild places.

EARTHWORKS evolved from the work of the Mineral Policy Center (MPC). MPC was founded by Phil Hocker, Mike McCloskey and former Secretary of the Interior Stewart L. Udall to help reform mining laws and practices in the U.S. Earthworks is a national nonprofit conservation organization dedicated to protecting communities and the environment from the adverse impacts of mineral development.

We appreciate the extension of the comment deadline on the DEIS and the willingness of Forest Service staff to discuss the project and tour the site. Members of our organizations' staff have hiked into the old Golden Hand mine site at Coin Creek and

floated both Big Creek and the Middle Fork of the Salmon River downstream of the project area. Our visits to the remote Wilderness have heightened our concerns about potential damages to the Wilderness resource and to sensitive creeks with endangered fish.

As we noted in our scoping comments, the historic mine activity from the first half of the last century, in the 1930s and 1940s, is beginning to heal with time. The predominating sensation for any visitor to the area is to be within a vast wilderness, albeit with a small intrusion from the olden days of prospectors and the early mechanized mining era. Even as the current proposal has been formulated, some old mine buildings have fallen over, other old parts of the mine site have fallen into disarray and the old roadways have grown over.

Our main concern regarding this project is the proposal is within a Federally-designated Wilderness area, the Frank Church – River of No Return Wilderness, and is in critical habitat for bull trout, steelhead, and Chinook salmon. There are potentially cumulative effects to wetlands, surface water and groundwater quality and other resources. In addition there are potential, long-term adverse impacts to water quality from reopening a mine adit which could release water or substances of unknown chemical properties.

We believe that the Forest Service has inappropriately dismissed several alternatives that could have better addressed Wilderness concerns and thus the Forest Service must conduct a Supplemental/Revised DEIS (SDEIS) to fully comply with NEPA.

The Golden Hand mine site was included in the Frank Church – River of No Return Wilderness at the time of designation, in 1980, because it was old, and of limited scale as an intrusion of human activity inside the wilderness. The expectation when the Wilderness was formalized by the U.S. Congress was for the Golden Hand mine site to become part of the Wilderness. It was not carved out to be an exception to the Wilderness. In time, the remnants of the mine site would recede into the Wilderness and be absorbed by the Wilderness. A high standard of protection must now be assured for the overall Wilderness character before any mechanized intrusion can be considered.

To avoid redundancy, we hereby adopt and incorporate into the administrative record all previous comments, appeals, letters, and communications submitted by any of the undersigned groups regarding the Golden Hand claims, mines, or proposals (including those related to the Walker Millsite). These comments must be specifically addressed and responded to in any Final EIS, as if they were fully set forth herein.

Our specific comments are included below.

Sincerely,

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**Idaho Conservation League, The Wilderness Society and Earthworks comments on the Golden Hand No. 1 and 2 Lode Mining Claims DEIS**

**The Golden Hand Project Violates the Wilderness Act**

AIMMCO proposes to conduct extensive operations in the Wilderness Area above and beyond what is allowed under the Wilderness Act and applicable Forest Service regulations, including the minimal tool analysis. These include expanding the scope of minimal tools to include chainsaws, dump trucks, flatbed trucks, pickup trucks, ATV/UTV, bulldozer, skid mounted core drill, and forklift.

Forest Service regulations state that: “Operations shall be conducted so as to protect National Forest surface resources in accordance with the general purposes of maintaining the National Wilderness Preservation System unimpaired for future use and enjoyment as wilderness and to preserve its wilderness character, consistent with the use of the land for mineral location, exploration, development, drilling and production . . . including, **where essential**, the use of mechanized transport, aircraft or motorized equipment.” 36 CFR § 228.15(b)(emphasis added).

The regulations therefore require that the Forest Service prove that **all** aspects of any proposed project are “essential.” Many of the aspects of the proposed action for the Golden Hand POO are unreasonable at this time, and thus not “essential.”

The leading mining and Wilderness case has interpreted 36 CFR § 228.15 to prohibit motorized access to a mine site in a wilderness area because it was not essential. In Clouser v. Espy, the Siskiyou National Forest approved a plan of operations for a mining claim subject to conditions, one of which was that the miners could only use non-motorized means of access to the claims. Clouser v. Espy, 42 F.3d 1522 (9<sup>th</sup> Cir. 1994), cert. denied sub nom. Clouser v. Glickman, 515 U.S. 1141 (1995). The Forest had determined, based on the fact that the agency’s mineral examiner had ridden a pack horse into the site, that “motorized access was not ‘essential’ to the mining operation under 36 C.F.R. § 228.15(b).” Id. at 1537. The Ninth Circuit upheld the Forest Service’s strict conditions, expressly recognizing that the agency’s requirements can result in the claims becoming invalid due to increased costs. “Although Forest Service decisions regarding access may indeed affect whether a claim is found to be ‘valid,’ that fact in no way alters 16 U.S.C. § 11349b)’s unequivocal delegation of authority to the Secretary of Agriculture.” Clouser, 42 F.3d at 1529. “Virtually all forms of Forest Service regulation of mining claims – for instance, limiting the permissible methods of mining and prospecting in order to reduce incidental environmental damage – will result in increased operating costs, and thereby will claim validity.” Clouser, 42 F.3d at 1530.

Here, at most, only drilling within the boundaries of the “known” deposits could be considered “essential” and “reasonable.”

In addition, and as required by agency directives, “where there are alternatives among management decisions, wilderness values shall dominate over all other considerations

except where limited by the Wilderness Act, subsequent legislation, or regulations.” Forest Service Manual Chapter 2320.3, p. 8. In this case, there is clearly an alternative of disturbance only within the already-delineated bounds of the known deposits. Thus, even if this Deposit is still valuable (which the evidence does not support that it is), any proposed disturbance to the Wilderness outside the known Deposits cannot be authorized.

The DEIS identifies three issues of unresolved conflict in the Proposed Action, starting with an assessment it “could result in a degradation of wilderness character” (Chapter 1, p14-15.) By any reading of the Wilderness Act of 1964 and the Central Idaho Wilderness Act, the proposed action *would* result in a degradation of wilderness character. The Forest Service is required by the Wilderness Act to preserve the wilderness character. The requirement in the Wilderness Act to establish “reasonable stipulations” to protect wilderness character applies to mineral leases and licenses. The DEIS does not meet the requirements of the Wilderness Act to project wilderness character.

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

The limitation on travel times and trip numbers does not appear to be based on any use of the Minimum Requirements Analysis, including a “minimum tool” analysis, or another analysis designed to protect wilderness character. The Minimum Decision Guide is Forest Service policy to determine the minimum of intrusion for non-conforming but “special provisions” allowed in the Wilderness Act. If the Minimum Decision Guide was not followed but there was another analysis substituted it does not appear to be referenced. Otherwise, the decision to only restrict about 25 percent of the maximum trips outlined by the operator appears to be an arbitrary decision.

As the DEIS describes in Chapter 2-2, consideration of non-mechanical access by foot and pack stock was dropped because mining in other wildernesses stipulated use of pack or foot access when it was more limited in scope. The travel for mine workers between the proposed mine exploration site at Coin Creek and the mine camp outside the wilderness on a daily or otherwise regular basis does not appear to have been considered for foot or pack access. While an argument can be made for staging drilling equipment and other mining equipment with motorized access, there appears to be no analysis of mine workers walking for about 1.5 hours or riding stock for about an hour to and from the exploration site four miles inside the wilderness, as miners have always done in remote areas. Walking or riding stock would limit daily or regular motorized travel trips, sometimes twice a day, and provide some additional margin of protection for wilderness character. Each year of operations could stage equipment at the beginning of the season and remove equipment not being wintered over, and then during the operating season

miners should walk or ride stock into the work site. Carrying lunch does not require motorized transport. Adjustments to the transport schedule could be analyzed for ongoing equipment needs, such as fuel or repairs, with human transport accomplished on foot or on stock.

Other considerations of equipment modifications should also be considered; to reduce impacts to wilderness character, such as electric vehicles, and wind or solar generators to power quiet electric equipment.

As the DEIS states in Chapter 3- 19-20, the differences between Alternatives B and C do not alter the four concerns associated with degraded wilderness character. It is recognized the modifications in Alternative C do not change the degradation of wilderness character from the proposed action but the DEIS does not propose any significant measures to lessen degradation.

The description of authorized administrative uses of motorized or mechanical equipment in the FC-RNR Wilderness in Chapter 3-20 neglects to mention most, if not all, of those authorizations were for fire control and fire management, which should be identified as emergency actions. The implication in the DEIS is the administrative actions are comparable to the proposed motorized mining operation, when the mining operation serves no emergency needs or management needs and the operation is concentrated in a relatively small area, 291 acres, compared to the vast 2.3 million acre wilderness. The mine operation is proposed to at least quadruple the amount of motorized intrusions into the wilderness on an annual basis, with a comparable cumulative effects on wilderness character – all in a 291-acre area compared to the 2.3 million acre wilderness. Any comparison of the mine motorized intrusions to emergency administrative actions for fire management are absurd and irrelevant, as well out-sized and out-classed by the proposed motorized mine activities. This illogical comparison is a further indication the DEIS does not adequately address the degradation of wilderness character as a critical concern.

The DEIS rightly determines both Alternatives B and C would cause irretrievable losses to the wilderness character, untrammeled conditions and to the wilderness experience during and after the proposed period of operation, Chapter 3-107. What the DEIS does not do is to suggest any measures to avoid these irretrievable losses. The DEIS confirms both Alternative B and C would set up the project area as sacrifice zone for wilderness character and wilderness experience.

The Forest Service is supposed to develop a range of alternatives to address major issues. For this project, Wilderness impacts is a major issue (DEIS p. 1-15)

The Forest Service developed Alternatives B and C, however the agency acknowledges that the effects to Wilderness resources are the same under each alternative.

There really is no pragmatic or substantially identifiable difference. DEIS 3-19.

NEPA requires the agency to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(E); 40 CFR § 1508.9(b). It must “rigorously explore and objectively evaluate all reasonable alternatives” to the proposed action. City of Tenakee Springs v. Clough, 915 F.2d 1308, 1310 (9<sup>th</sup> Cir. 1990). Indeed, NEPA’s implementing regulations recognize that the consideration of alternatives is “the heart of the environmental impact statement.” 40 CFR 1502.14, *quoted in Alaska Wilderness Recreation and Tourism Ass'n v. Morrison*, 67 F.3d 723, 729 (9<sup>th</sup> Cir. 1995).

In this case, the agency failed to meet this requirement because both action alternatives have almost identical impacts to wilderness. The Forest Service dismissed other alternatives (helicopter, winter, pack animals, etc.) that could have involved less disturbance to wilderness values. The Forest Service has not developed a mitigation program to help address wilderness issues which could have been part of an action alternative. For example, are there any other non-compatible wilderness uses in the larger area that could be phased out or ended as part of an alternative?

## Decision to be made

In response to the questions on Page S-6, the mining proponent should be notified of changes to the plan of operations which will avoid, minimize and mitigate impacts. Monitoring efforts should include impacts to wilderness characteristics.

## Issues and Concerns

On page S-6 in the DEIS, the Forest Service poses the question, “Can the concern be resolved through mitigation (avoiding, minimizing, rectifying, reducing or eliminating, or compensating for the proposed impacts) in all alternatives? Neither of the two action alternatives propose any plan to avoid, minimize, rectify, reduce, eliminate or compensate for the wilderness incursion issue, in violation of NEPA.

## Economic Analysis

The DEIS does not contain an economic analysis of potential costs/benefits from the proposed mine exploration and the potential economic losses from displacement of wilderness visitors, degraded wilderness experience and degraded wildlife and fish habitats. The historic value of mine production may be estimated at its high for gold extraction, from 1932-34 of 1368 ounces at top prices for 1934 at \$35 an ounce, appears to be about \$48,000, Appendix A-2. The risk to wilderness character, wildlife and fish habitat proposed by Alternative B and C, to permit and to expand exploration, is based on an historic value of about \$48,000. At today’s hugely expanded value of gold, more than \$1700 an ounce, the historic value of past extracted gold at today’s prices would exceed \$2.3 million. Before the proposed exploration moves forward with irretrievable degradation of wilderness character, great risk to fish and wildlife habitat and unknown

future reclamation costs, it would be critical for the SDEIS to assess the potential economic cost/benefits.

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

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

Instead, the proponent is proposing constructing 11 drill pads with 13-18 holes each and drilling down to 500 to 800 feet in depth. This entire scope of exploration is far beyond what was historically available and accessible to miners. Previous exploration was limited to surface sampling and some basic underground sampling accessed through hand work at the Ella Portal.

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

AIMMCO’s POO proposes work on Claim 1 far beyond what the court allowed to “corroborate preexisting exposures of a valuable mineral deposit” on that claim. On Claim 1, AIMMCO proposes to conduct significant drilling, excavating and bulk sampling work away from the Ella Portal, as well as work to re-open the Portal and conduct sampling inside the tunnel. However, AIMMCO’s 1987 assessment work proposal, which the court required the USFS to re-consider, only proposed to “use hand labor to clear the entry to the Ella Portal.” Decision at 3.

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

However, in the proposed POO, AIMMCO requests authorization to search for the requisite “exposure” away from the Ella Portal tunnel – via its drilling and trenching operations. Under the Wilderness Act, and the court’s Decision, however, such exposure



must have been made by the end of 1983. “A claimant must show that there was exposure prior to that date.” Decision at 8. In other words, it is now too late for AIMMCO to attempt to find new exposures of mineral deposits outside of the existing Ella Portal tunnel. Mineral deposits 500-800 feet deep certainly were not exposed during that period of exploration.

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

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

In this case, outside of its proposal to reopen the Ella Portal tunnel for sampling, AIMMCO is essentially asking for permission to conduct exploration operations in an attempt to locate additional mineral deposit(s). As Figure 2-1 of the DEIS shows, AIMMCO’s trenching and drilling operations would be far away from the Ella Portal – with no reasonable connection to the existing alleged exposure within the tunnel.

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

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

On Claim 2, AIMMCO proposes an extensive series of drilling, trenching, and excavation operations. However, it is unclear whether these operations are the same as

proposed by AIMMCO in its 1987 assessment work proposal. As the court's Decision points out, AIMMCO's basic challenge to the Forest Service's actions regarding Claim 2 was to the agency's denial of AIMCO's 1987 assessment work proposal. Decision at 9.

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

Thus, AIMMCO can only legitimately propose operations that result in less surface disturbance to Claim 2 than what it proposed in 1987. Of course, any disturbance must also comply with the limitations and restrictions discussed in these comments. Because neither the scoping notice nor the POO describes what was proposed in 1987, it is impossible to ascertain whether AIMMCO's proposal complies with the court's Decision.

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

Although it appears that AIMMCO is only proposing at this time what it considers was allowed by Judge Winmill to conduct limited assessment work to "corroborate preexisting exposures of a valuable mineral deposit," it must be remembered that AIMMCO has not shown that it has any rights to conduct anything more than what was specifically ordered by Judge Winmill. In other words, the Forest Service should not assume that American Independence Mine and Minerals (AIMMCO), the POO applicant, **still** has a "discovery of a valuable mineral deposit" in the Wilderness. Although the IBLA held that such a discovery did exist in 1983 and in the late 1980s, it is clear from the record in this case, that such a discovery no longer exists. As stated in the Forest Service's Surface Use Analysis (SUA), costs (including environmental compliance costs) to extract, develop, and market the limited deposit have risen considerably since the 1980s. SUA at 13. In addition, the price of diesel fuel and gold have fluctuated markedly since that time. Thus, it is highly doubtful that the deposit passes the Mining Law tests for validity. This is especially true since, as the SUA points out, the initial validity determination was highly suspect.

A discovery of a valuable mineral deposit is the essential requirement for a valid mining claim. The inherent value alone of a deposit is not enough to sustain its value; the claimant must presently, and at all relevant times, be able to extract, process and market the deposit at a profit. The profitability of a proposed mining venture is one of the main components of a valid discovery.

It must be remembered that the test focuses on the prudent **person**, not the prudent miner, and certainly not the claimant. The Interior Secretary has stated: "It is thus evident that

the willingness of a mining claimant, grounded only in the hope of success, to expend time and money in further efforts to develop a mine will not suffice.” U.S. v. Nevitt, A-30030 (July 28, 1964).

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

In addition to production costs, environmental compliance and reclamation costs must also be factored in the claimant’s economic analysis in order to prove the existence of a valuable mineral deposit. Since a sufficiently profitable mining operation must be proven for a deposit to be considered valuable, determining the costs of environmental compliance is a necessary precursor towards validating a discovery. Environmental cost factors, particularly within Wilderness, may be significant enough to preclude profitable mining operations and need to be carefully considered.

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

In this case, as noted in the SUA, it is highly doubtful that the revenues from the “Golden Hand Mine” sufficiently outweigh all of the necessary costs so as to have a sufficiently profitable mine. Indeed, the fact that AIMMCO has never conducted any mining is the best evidence of a lack of a current discovery. Here, the SUA noted that AIMMCO’s proposal for such limited drilling “seem[s] inconsistent with the goals one would expect of a mining company intent on optimizing data collection necessary to make a mine/no mine decision within a reasonable investment decision time frame.” SUA at 12.

In analogous situations, the federal courts have held that if mining claimants have held claims for several years and have attempted little or no development or operations, a presumption is raised that the claimants have failed to discover valuable mineral deposits or that the market value of the discovered minerals was not sufficient to justify the costs of extraction. Further, changed economic conditions can render a mineral claim invalid, even though it may have been valid at one point in the past. Public land should not be allowed to become “perpetually encumbered and occupied by a private occupant just because, at one time, he had a valuable mine” Mulkern v. Hammitt, 326 F.2d 896, 898 (9th Cir. 1964).

[T]herefore, even if at one time there was a valid mineral prospect on claimed land, changed economic conditions can destroy the validity of continued occupation of a purported claim. Mulkern v. Hammitt, 326 F.2d 896, 898 (9<sup>th</sup> Cir. 1964). Even a continued holding of the land for several years with little or no exploitation can raise a presumption that the original claim has been destroyed. United States v. Zweifel, 508 F.2d 1150, 1156 n. 5 (10<sup>th</sup> Cir. 1975). Bales v. Ruch, 522 F.Supp. 150, 153 (D.C. Cal. 1981).

Under the Mining Law, claim validity “cannot be based upon a discovery which existed only at some previous time.” Rocky Mtn. Min. L. Found., *American Law of Mining* § 35.08[3] (2d ed. 1993).

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

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

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

[F]ailure to undertake actual operations may be used as evidence that no prudent man would be justified in so doing. For instance, if mining claimants have held claims for several years and have attempted little or no development of actual operations, a presumption may be raised that there has been no discovery of a valuable mineral deposit. This was the case in *Cameron v. United States*, where six years had elapsed from the date of location to the date of hearing. ... [T]he most persuasive evidence as to what a man of ordinary prudence would do with a particular mining claim is what men have, in fact, done or are doing, not what a witness is willing to state that a prudent man would do. A third standard is that money expended on further exploration or further research, but not on initiation of actual operations, is evidence only that further exploration or research may be justified; it is not evidence that the mineral exposed is valuable, or that prudent men would be justified in initiating actual operations. U.S. v. Winegar, 16 IBLA 112, 127, 81 I.D. 370 (1974) (citations omitted).

The Interior Department’s rulings on such issues also firmly supports the view that the lack of mineral development for an extended period evidences a lack of a discovery. *See U.S. v. Milton Wichner*, 35 IBLA 240 (1978) (quoting U.S. v. Flurry, A-30887 (March 5, 1968) (“...the most persuasive evidence as to what a man of ordinary prudence would do with a particular mining claim is what men have, in fact, done or are doing, not what a

witness is willing to state that a prudent man would do.”); *see also* Rocky Mtn. Min. L. Found., American Law of Mining § 35.14[2][e] (2d ed. 1993) and cases referenced.

The fact that AIMMCO never proceeded with mining operations following completion of the Golden Hand FEIS on Claims 3 and 4 supports this case. Thus, it does not appear that AIMMCO still has the requisite “discovery” on the Golden Hand mine. As such, the Forest Service should deny any proposed use of the Wilderness and choose the No-Action Alternative.

## AIMMCO Has Not Demonstrated A Discovery On Both Claims

Even if AIMMCO can somehow still prove that the Golden Hand Mine satisfies the Mining Law’s tests for validity, it still must show that it has discovered a valuable mineral deposit on each claim – which it has not done. The Mining Law states that “no location of a mining claim shall be made until the discovery of the vein or lode **within the limits of the claim located.**” 30 U.S.C. § 23 (emphasis added). This explicit language requires that a discovery be made within the boundaries of *each and every* lode mining claim. “Each lode claim must be independently supported by a discovery of a valuable mineral within the limits of the location as it is marked on the ground.” *Lombardo Turquoise Milling & Mining Co. v. Hemanes*, 430 F. Supp. 429, 443 (D. Nev. 1977) *aff’d*, 605 F.2d 562 (9th Cir. 1979). The Forest Service must ensure compliance with this fundamental requirement before it can approve any operations. To date, this has not been done.

## AIMMCO’s “Valid Existing Rights” Are Very Limited

Even if AIMMCO has some “rights” in the Wilderness (which, outside of the limited activities allowed by Judge Winmill’s Decision, is highly doubtful) AIMMCO’s “rights” under the Mining Law apply only to the land overlying the “discovered” ore body.

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

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

declares that any and all rights to the federal lands granted under the Mining Law are contingent upon the location of valuable minerals within those lands.

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

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

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

## **SPECIFIC ENVIRONMENTAL AND RESOURCE CONCERNS**

### **Impacts from road construction and use**

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

The DEIS contains a description of the proposed fords for the tributary to Coin Creek and Coin Creek, however, the DEIS should also have more thoroughly considered alternatives including temporary culverts, temporary bridges, hardened fords and skylines. The Forest Service assumed that the additional motorized trips required to install and remove the bridge constitute a greater wilderness incursion than sourcing the rocks for the gabions from within the wilderness:

#### 2.3.4 Temporary Bridges in FC-RONR Wilderness

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

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

We believe that hauling material from outside the Wilderness is not only more appropriate but also may constitute a lesser incursion, even if more trips are needed. In dismissing this alternative, the Forest Service only states that this *may have necessitated further road maintenance* and *may have required adjustment to provide a safe approach onto the bridge* but without a detailed analysis the public will never know the answer. While some improvements to these fords are desired for future trail work, the ford itself would be much wider than the reclaimed road which would be narrowed to a single track (DEIS 2-16). The Forest Service should compare overbuilding these fords with a temporary bridge and improving just the width of ford needed for a single track trail.

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

Fording can increase sediment delivery in three ways: Wave action from fording vehicles eroding streambanks, tire rutting concentrating surface runoff on approaches, and water draining off vehicles and eroding approaches (Brown 1994). Fording streams can also temporally increase turbidity by mobilizing fine material in the substrate of the ford. This type of turbidity represents redistribution of fine sediment within the channel rather than increased sediment yield from sources outside the channel. Although suspended sediment can kill fish at high concentrations (Waters 1995), it is not usually considered an important source of mortality. Turbidity can reduce the ability of fish to locate food and can damage respiratory tissues (Waters 1995), but short-term increases in turbidity are most likely to result in simple avoidance of turbid water. DEIS 3-35.

The DEIS states that even the improved ford could create some turbidity:

The rocky, armored approaches would prevent sediment delivery caused by wave action, rutting, and water drainage from vehicles. There would be increased turbidity when vehicles crossed the fords stirring up fine material in the fords, but the plumes would likely be diffuse and settle out of the water column rapidly. DEIS 3-36.

Despite these issues, the Forest Service failed to conduct a thorough analysis of a temporary bridge as a reasonable alternative.

Furthermore, while the material to be used is from a previous disturbance, the waste rock pile is now a historic feature, similar to the Bunkhouse and other relics. Ironically, the Forest Service is requiring that timbers for the Ella Portal be obtained from outside the wilderness. The Forest Service should also require that rock for any ford reinforcement be obtained from outside the Wilderness.

### **Analysis needed on trees for timbers**

The DEIS contains no analysis regarding the source of trees for the Ella Portal or the potential number of trees needed. Although the number of trees may be quite small compared to a timber sale, tree removal is part of a commercial use. The Forest Service needs to ensure that the trees used are not whitebark pine, don't support cavity nesting species, are not adjacent to a goshawk nest, won't impact lynx, or otherwise violate Forest Plan standards or guidelines. We are particularly concerned that within the 10,101 acre project area, over 6,000 acres are considered Canada lynx source habitat capacity while over 5,000 acres constitute source habitat conditions (DEIS p. 3-56).

### **Mine waste**

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

We are also concerned about storage of mine waste from the Ella Portal on the existing flat disturbed area in front of the portal location (DEIS 3-38). We had noted in our scoping comments that chemical composition of the material that has collapsed at the mouth of the adit material needs to be assessed. We are also concerned that constructing a dump of mine waste in this area is inconsistent with protecting wilderness values as well as habitat protections needed by listed fish species that occupy this watershed. The plan for waste rock to be placed on the existing, flat work area is a stop-gap plan and not a waste rock storage plan.



As noted above, the Forest Service can only approve activities in the Wilderness that are “essential” to the operation. In other words, if an activity, even if essential to the overall operation, could feasibly be located outside the Wilderness, the agency is under an obligation to require that such activities occur outside the Wilderness. Arguments from the claimant that such restrictions cost too much are not sufficient to override the agency’s Wilderness duties. *See Clouser v. Espy*, 42 F.3d at 1529. The Ninth Circuit has clearly held that the agency can impose requirements that may adversely affect claim validity. “Virtually all forms of Forest Service regulation of mining claims – for instance, limiting the permissible methods of mining and prospecting in order to reduce incidental environmental damage – will result in increased operating costs, and thereby will claim validity.” *Clouser*, 42 F.3d at 1530.

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

## Species impacts

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

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

While the Forest Service focused on road construction as the major impact here, the agency neglected to take into account the length and intensity of human disturbance related to the drilling activities and their impacts on sensitive species, including goshawk, lynx and wolverines. On the Boise National Forest, the Forest Service wildlife specialist

acknowledged in the CuMo Exploration Project Record that exploration drilling impacts are the central concern about the Project's potential impacts on sensitive wildlife:

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

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

For some projects, the Forest Service directs the proponent to implement protective measures such as establishing a seasonal buffer around nest trees or dens:

No trees with active nests will be cut. DEIS p 2-20.

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

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

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

The Forest Service's own management guidelines for the northern goshawk recommend a 30-acre buffer around each nest where no adverse impacts may occur.<sup>1</sup> In addition, the timing of human activities in the larger Post Fledging Family Area should be limited to the period from October to February. The SDEIS needs to include timing restrictions on activities within these specific buffer areas.

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

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<sup>1</sup> See "Management recommendations for the northern goshawk in the southwestern United States," Reynolds, Richard T.; Graham, Russell T.; Reiser, M. Hildegard (1992). Gen. Tech. Rep. RM-217, Ft. Collins, CO: U.S. Department of Agriculture, Forest Service, Rocky Mountain Forest and Range Experiment Station. 90 pp.

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

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

## Water quality protections

We are still concerned about the use of fuels, lubricants, solvents, and other toxic chemicals being transported along streams, intermittent streams and drainages. Although the DEIS provides some details about the transportation of fuel and hazardous chemicals from the Walker Mill site to the Golden Hand Mine, there is little analysis of transportation along the South Fork Salmon River, East Fork South Fork Salmon River, Johnson Creek, or Lick Creek. The DEIS only states that the maximum shipment of fuel on Forest Roads #371 and #373 would be 500 gallons and that larger shipments (size undetermined) would use Johnson Creek Road or Lick Creek Road. We point out that Johnson Creek Road supports listed fish species and much of the road is in close proximity to the creek. Lick Creek is an important tributary of the Secesh River which also supports listed fish species. A diesel fuel spill along the road could adversely affect multiple life stages of listed fish species. The SDEIS needs to provide specific guidance regarding fuel load limits, road conditions, pilot car requirements, and spill kit requirements for these access routes. Spill clean up materials, fire fighting gear, and a spill response plan will be kept in all vehicles. Oil-absorbent booms should be strategically cached along each river crossing so they can be quickly deployed in the event of a transportation accident.

## Adit water

Although the DEIS predicts that there will not be any water quality threats from adit water, previous issues at the mine site call this into question. For example, the Golden Hand #3 and #4 DEIS on p. 3-85 had indicated elevated lead levels in water emanating from one of the adits. If this water is not currently expressing itself on the surface, the excavation work could redirect it to the surface where it could negatively impact Coin Creek through the introduction of sediment or chemical contaminants. The chemical

composition of the material inside the Ella portal is unclear, as is the potential water quality impacts if contaminants are released. Characterization of this subsurface flow should be completed as part of this analysis. We recommend installing a grid of piezometers to better understand these dynamics.

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

## Groundwater

The Forest Service must conduct a baseline study of the groundwater within the project area. Exploratory drilling of this nature has had unexpected consequences before, particularly if the drill hole is not completely cemented top to bottom:

Improperly plugged wells compromise aquifer integrity by destroying its natural isolation, and exposing it to potentially toxic materials from nearby formations.<sup>2</sup>

While the Forest Service states that the drill holes will be sealed, it does not describe the potential negative effects if the drill holes are not adequately sealed. Furthermore, there is no information on the track record for fully sealing drill holes or how the Forest Service will determine if drill holes are securely sealed. Factors to consider are the type of rock, whether the area is fractured, and whether aquifers are encountered. Contamination can be from a variety of sources, including introduction of fuel into the hole that stimulates bacterial growth and changes the redox potential which can lead to mobilization of metals, opening up reactive rock (like sulfides) to water and oxygen, and effects of introducing the mud itself which can result in pH changes, introduction of arsenic<sup>3</sup>, salts<sup>4</sup> and oxygen into a formerly anaerobic environment, acid mine drainage,<sup>5</sup> and cation exchange. In addition, lime and other additives from the cement mix may have adverse impacts on water quality. See Fate and Effects of Whole Drilling Fluids and Fluid Components in Terrestrial and Freshwater Ecosystems: A Literature Review, to EPA 1981. <http://nepis.epa.gov>

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<sup>2</sup> R. Kubichek, J. Cupal, S. Choi, W. Iverson and M. Morris. Identifying Groundwater Threats from Improperly Abandoned Boreholes, Electrical Engineering Department, University of Wyoming, Laramie, WY.

<sup>3</sup> Effect of Water Use on Arsenic Release to Well Water in a Confined Aquifer, M.B. Gotkowitz et al. Groundwater 42, no. 4: 568-575.

<sup>4</sup> Impact of Abandoned Wells on Groundwater, Tyler Gass, Lehr, J, and Heiss, H, EPA-600/3-77-095, August 1977, Ecological Research Services,

<sup>5</sup> Plaintiffs' Proposed Findings of Fact and Conclusions of Law Reply *Nunamta Aulukestai, et al. v. State of Alaska*, 3 AN-09-9173 CI, Pebble Trustees Plaintiffs Findings of Fact Reply FINAL2011 3 24. pdf

Even if the record contained the required analysis of the “drilling additives”, a full analysis of the chemical and physical nature of the materials brought to the surface by the drilling. At a minimum, the Forest Service needs to conduct a baseline study, establish a monitoring program and develop mitigation measures if needed to address these potential impacts.

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

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

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

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

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

Id.

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

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

Id. at \*17. This holds true for potential impacts to all resources from the Golden Hand operations, not just groundwater. As such the DEIS is deficient and the Supplemental/Revised DEIS (SDEIS) must meet these requirements.

## Acid Mine Drainage Issues

Acid mine drainage does not appear to be mentioned in this analysis. We have concerns regarding the potential for acid-mine drainage from the existing and future waste rock piles at the Golden Hand mines. All alternatives must meet the requirements of the Wilderness Plan, Organic Act and 228 regulations to "minimize adverse environmental impacts on surface resources" and take measures to address acid mine drainage or metals leaching.

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

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

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

content, could be encountered under this proposal especially through underground development.

The potential impacts from AMD generation are severe so the alternatives need to contain provisions for managing potentially acid generating (PAG) materials or addressing the long-term consequences should AMD or metals leaching develop. The Forest Service needs to fully analyze the potential impacts in the SEIS.

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

## Water quantity and water rights

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

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

We are also concerned about the status of the temporary water right. Without a valid water right, which is essential for the operation, the subject mining claims are not valid. As held by the IBLA:

Beyond a mere showing of [mineral] values, there must also be a showing that the mining claimant has a reasonable prospect of success in mining and removing the mineral at a profit. See In re Pacific Coast Molybdenum co., 75 IBLA 16, 90 I.D. 352 (1983). For example, if water is absolutely essential to the mining and milling processes, such that without it there is no possibility of successfully mining the claim, the presence or absence of water will be determinative of the existence of a discovery, quite apart from the values disclosed by sampling. See United States v. Osborne, 28 IBLA 13, 33-35 (1976), aff’d sub nom., Bradford Mining Corp. v. Andrus, Civ. No. LV-77-218 (D. Nev. Mar. 15, 1979). ... [The claimant] has not shown that sufficient water is available for appropriation to

meet [its processing needs]. Absent such a showing, I do not see how the finding of validity can be sustained ....

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

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

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

## Reclamation

The DEIS states that the operator shall conduct “defined restoration” at the end of each operating season, but fails to provide details on what is required (DEIS S-2). Given the amount of surface disturbance, proximity to streams, high snowpack in the area and remote location, it is vital that the Forest Service define seasonal closure steps in this analysis and monitor the site to ensure it is properly restored both seasonally and at the end of mining activities. For example, it is unclear if multiple drill rigs and pads will be operational at one time or if concurrent reclamation would only allow one drill rigs and pad to be operational at any one time.

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

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

## Surface occupancy

We do not support any surface occupancy on site or the use of the Bunkhouse as described in Alternative B because of the increased levels of disturbance.



As per minimum tool analysis, all vehicles to be used need to be directly applicable to the required work and cannot be used when there are other alternatives such as walking in and out of the site. As such, the workers should walk in and out of the site each day from Pueblo Summit along the existing trail. If a vehicle needed for a specific task has sufficient space for workers to ride in on it, then the vehicle is oversized for the task.

In addition to toilets at the worksite, the operator should also be required to store any temporary food reserves in bear-proof food containers.

## Season of use

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

## Fire safety

We also that the Forest Service develop an evacuation plan and identify potential safe zones in the event of a wildfire.

## Cumulative effects

We are concerned about the cumulative effects from not just this project within the Wilderness but also from other past, current and reasonably foreseeable future activities throughout the entire area. In particular, we are concerned about increasing use of OHVs in the Big Creek area upstream in the headwaters.

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

mentioned in the DEIS need to include checking for all regulated metals, sedimentation, turbidity, and groundwater flow at the mill site.

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

## Forest Service Needs to Analyze Minimum Tool Alternatives

We do not believe that the alternatives analyze represent the minimal tools to reasonably accomplish the purpose and need. The Forest Service needs to consider additional alternatives that would meet AIMMCO's need for reasonable access and reduced environmental impacts while staying consistent with the Minimum Tool responsibility provided by the Wilderness Act. As part of an environmental analysis, the Minimum Tool analysis should be conducted under the Minimum Requirements Decision Guide. A key, relevant provision of the guide is stated on the first page, "careful management is needed to minimize the impacts from human activities in wilderness, including grazing, access to private lands, **mining**, [emphasis added] management of fish and wildlife, fire and recreation. These activities have the potential to negatively impact the values that we are charged with protecting."

## Violation of the Forest Plan and the NFMA

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

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

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

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

It appears that both Alternative B and C will locate new roads, structures, and other facilities in RCAs. Unless the Forest Service determines, with full NEPA compliance, that there is absolutely “no alternative” to the location of all these facilities in the RCA, it must prohibit their placement in the RHCA. *See Hells Canyon Preservation Council v. Haines*, 2006 WL 2252554, \*7-\*10 (D. Or. 2006). *See also* Forest Plan Standard FRGU06 (“new roads and landings should be constructed out of RCAs wherever possible.”).

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

## The SDEIS should include a detailed Watershed Analysis

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

## Impacts of Increased Road Density on Priority Watersheds and Threatened Species

New roads built into a lightly roaded area can have a disproportionately negative impact on threatened populations by impacting the rare, relatively healthy habitat that exists within and downstream of the project area for bull trout, Chinook salmon, steelhead and westslope cutthroat trout.

While most of the road activity involves expanding trails into roads outside of riparian areas, some roadwork and more intensive trenching occurs within or adjacent to Riparian Conservation Areas. Coin Creek itself provides critical habitat for steelhead. Even

roadwork outside of riparian areas can lead to sedimentation during large precipitation events or in landslide prone areas.

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

Thomson and Lee<sup>6</sup> found that density of juvenile Chinook salmon decreased as the geometric mean road density increased among surveyed streams in the Upper Columbia River basin. They suggest that road density exceeding 0.4 mile per mile squared is a significant issue in any watershed. In addition, the negative effects of roads on bull trout habitat and population survival are well established, and recognized in the DEIS and throughout the scientific literature.<sup>7</sup> The Middle Fork of the Salmon River is designated as critical habitat in the draft critical habitat rule for bull trout, with the Big Creek populations designated as core populations. Any project within the range of a critical population of a listed species should eliminate adverse effects on habitats - not increase risk. Given the relatively low road density in the area, an excellent opportunity to preserve and improve the ecological integrity of bull trout habitat exists.

## Roads Analysis Needed

A Roads Analysis is required to inform decisions made after January 12, 2002. The goal of the Forest Service Transportation Policy (Roads Policy) is to promote prioritization. The Roads Policy is unambiguous, "When proposed road management activities [road construction, reconstruction and decommissioning] would result in changes in access, such as changes in current use, traffic patterns and road standards, or where there may be adverse effects on soil and water resources, ecological processes, or biological communities, those decisions must be informed by roads analysis (FSM 7712.1)." This project clearly alters access and has environmental impacts and therefore must be

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<sup>6</sup> Thompson, W. L. and D. C. Lee. Modeling relationships between landscape-level attributes and snorkel counts of Chinook salmon and steelhead parr in Idaho. *Can. J. Fish. Aquat. Sci.* 57:1834-1842.

<sup>7</sup> Lee, D.C., J.R. Sedell, B.E. Rieman, R.F. Thurow, J.E. Williams and others. 1997. Broad-scale assessment of aquatic species and habitats. Pp. 1057-1496, *In*: T.M. Quigley and S.J. Arbelbide, tech. eds. *Assessment of ecosystem components in the interior Columbia Basin and portions of the Klamath and Great Basins.* USDA Forest Service, Pacific Northwest Research Station. PNW-GTR-328. Portland, OR. Baxter, C. V., C. A. Frissell and F. R. Hauer. 1999. Geomorphology, logging roads, and the distribution of bull trout (*Salvelinus confluentus*) spawning in a forested river basin: implications for management and conservation. *Transactions of the American Fisheries Society* 128:854-867.

informed by a Roads Analysis. A Roads Analysis at the watershed scale would be most appropriate since it could be completed in conjunction with the watershed analysis that has not yet been completed for this project.

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

## Landslide Prone Areas

We have significant concerns about the construction of several temporary roads and drill pads in high to moderate landslide prone areas near Coin Creek (DEIS 3-46).

Although landslides are naturally occurring events, human caused disturbances such as road construction, reconstruction, drill pad construction and trenching can increase the potential for and occurrence of landslides. DEIS 3-44.

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

While the Forest Service proposes to utilize silt fences with steel posts and wire mesh backing below drill pads constructed in high to moderate landslide prone areas, the DEIS provides no documentation on the effectiveness of silt fences in stabilizing landslides.

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

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

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

## Bonding and Reclamation Requirements

The Forest Service’s 36 CFR part 228 regulations, as well as Payette Forest Plan Standard MIST06 require the Forest Service to establish an adequate reclamation bond. Bonding costs need to be detailed in the SDEIS for each alternative. The reclamation bond must be independent of the bond covering AIMMCO's Antimony Rainbow mine or any other AIMMCO operation.

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

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

The SDEIS needs to describe the reclamation process and all associated costs in detail. This analysis should include the volume and type of material to be moved, equipment needed, location for stockpiling, and sequence for reclamation. Many of the trails inside the Wilderness boundary have been covered by sediment aggrading from cut slopes and have been re-vegetated by alders and small scattered trees. During any trail or road construction, all topsoil, developing soil, and woody debris need to be salvaged and stockpiled for future reclamation. Reclamation by ripping these roads to mineral soil is unacceptable because of the loss of decades of soil development that has occurred since the trails were abandoned. Once roads are re-contoured, the topsoil, developing soil, and woody debris need to be replaced and reseeded with native vegetation. This reclamation of the area must take place concurrently with the mining operation as much as possible. Final reclamation, including all road obliteration, must as soon as possible after closure

of operation. Bonding figures should take into account long term water treatment if the adit water proves to be or becomes contaminated over time.

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

## Alternatives Should Minimize Adverse Environmental Impacts

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

## Access for other users

The entrance to the Wilderness at Pueblo Summit needs to be gated and locked when not in use for AIMMCO operations. Any spaces on either side of the gate need to be reinforced with boulders to restrict all unauthorized motorized use. Signs must be posted restricting all unauthorized vehicular access and stating the fines for violations.

## Noise Levels

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

Again, winter operations may be appropriate to limit noise and Wilderness visitor intrusion.

## Threatened and Endangered Species

Threatened and endangered species in this area include bull trout, Chinook salmon, steelhead, west slope cutthroat trout, lynx, and gray wolves. The US Forest Service must submit a biological assessment on all possible threats to listed species and the USFWS and NMFS, after full ESA consultation, can only approve the Project with a "no jeopardy" finding. No incidental takings permit should be allowed.

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

## Noxious Weeds

Alien invasive species are the second leading factor contributing to worldwide loss of biodiversity. Forty-nine percent of threatened, endangered, and sensitive species are threatened in part by alien invasive species. Noxious weeds infest 184,000 acres of the Payette and Boise National Forests and 4,600 additional acres of public lands every year.

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

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

The operator should be required to wash all equipment, including the undercarriage of vehicles, before entering the National Forest. We also recommend that all equipment, including boots and pant cuffs, need to be brushed before entering the site. Disturbed soil areas need to be reseeded with native plants, and then followed up with non-chemical



weeded control to prevent expansion of noxious weeds. A noxious weed monitoring and treatment program needs to be implemented as part of this project.

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

## Interpretation for Wilderness Users

If the Forest Service approves a proposed plan of operations, many Wilderness users will question how this operation could possibly be permitted in a Wilderness. Interpretive displays should be erected at the trailhead, at Big Creek and at the mining site explaining the validity of the mining claims in Wilderness and describing all the mitigation measures that are in place, a timeline for reclamation, as well as an illustration of what the site will look like once reclaimed. These displays should include a box for public feedback about the operation. Tours of the site to interested parties could also be offered. In addition, this information should be readily available on the Payette National Forest web site. The trail and mining site should remain open to the public as part of the POO so backcountry visitors can see for themselves how well all the mitigation measures work.

## Monitoring Efforts

If the DEQ has not yet assessed streams in the analysis area to determine if they are fully supporting beneficial uses, all uses must conform to anti-degradation laws and baselines should be maintained. Streams in the analysis area could be placed on a 303(d) list if exceed standards for sediment or temperature. Because streams in the analysis area are protected for bull trout spawning and rearing, water temperatures cannot exceed set daily averages.

The Forest Service should work with the Idaho Department of Environmental Quality to set a beneficial use reconnaissance program above, within, and directly below the mining claims on Coin Creek and along all other affected drainages. This program would establish a baseline for stream morphology (% fine, pool/drop ratios), aquatic invertebrates, and any in-stream fish habitat. These standards should be set before mining operations commence and monitored monthly. If these factors fall outside beneficial use parameters, further mitigation measures should be implemented.

Should the Forest Service allow road construction, access will be limited to a set number of trips per day or per week. The monitoring program should include checking mileage weekly to ensure compliance. Any overuse should be grounds for revoking the permit.

Should the project be approved, the Forest Service should have an experienced mineral exploration staffer on site every day throughout the operation, to ensure compliance with mitigation measures. All mechanical equipment should be inspected for oil and hydraulic

fuel leaks prior to operation and these inspections should also take place during operations. Communication links should be established with the Supervisor's Office to assure all mitigation is proceeding as required and in the event of emergencies.

## Air quality and vehicle type

Both alternatives B and C entail using a number of vehicles, including a 1940 era International Harvest 6x6 Truck with 7 cubic yards dump capacity and a 1940 era GMC 6x6 truck with a flatbed. One of the issues for this project is the protection of air quality within a Class I airshed and the minimization of human disturbance in the wilderness. The Forest Service has not compared how the fuel efficiency, exhaust and emissions from these 1940 era trucks compare with modern vehicles. It may well be that using more modern vehicles would reduce the fuel needs (and associated environmental cost with fuel transportation and storage), exhaust and overall emissions. The Forest Service needs to conduct this analysis as part of the SDEIS. On page 2-16 the Forest Service mentions that mechanical equipment would be fitted with devices to reduce emissions, but provides not other information.

## Forest Service and public costs

The SDEIS should add up and document all the costs for Forest Service staff for all monitoring and mitigation efforts and state if these costs are going to be borne by the public or the mining company. The total costs borne by the Forest Service for NEPA analysis, monitoring, mitigation and compliance should be included in the SDEIS and detailed whether the public or AIMMCO would carry those costs.

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

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

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

information and submitted the proposal for agency and public review, and then resubmitted the full-scale alternative proposal.

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

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

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

NICORE appeal decision at 4.

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

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

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

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

## Forest Service Needs to Analyze Additional Alternatives

The Forest Service failed to consider additional alternatives that would meet AIMM’s need for reasonable access and reduce environmental impacts to a greater extent than the proposed action alternatives. While the Forest Service briefly mentioned several other alternatives (non-mechanized, winter, temporary bridges), without analyzing them it is impossible to adequately compare their effectiveness in addressing issues. In addition, the use of portable containers as sumps instead of digging sump holes could help address the landslide issue. All sumps should have escape ramps for wildlife species.

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

## The Proposed Action Alternatives Violate the NFMA and NEPA

The Forest Service is violating National Forest Management Act’s (NFMA) requirement that all actions, such as mining, be consistent with the Forest Plan. NFMA’s Forest Plan consistency provision requires that resource plans and permits (such as a mining Plan or permit) *shall be* consistent with the Land and Resource Management Plan (Forest Plan). 16 U.S.C. § 1604(i); 36 C.F.R. § 219.10(e). See also, 36 C.F.R. Part 228 (mineral regulations enacted pursuant to the Organic Act).

The Forest Plan for the Payette National Forest was amended in 1995 through adoption of the "Interim Strategies for Managing Anadromous Fish-producing Watersheds in Eastern Oregon and Washington, Idaho and Portions of California" ("PACFISH"), and the

"Inland Native Fish Strategy" ("INFISH"). PACFISH and INFISH detail the standards and guidelines the Forest Service must follow to avoid adverse impacts to native fish, including salmon, steelhead and bull trout, all of which are present in the Golden Hand project area.

INFISH and PACFISH work, in part, through a system of Riparian Habitat Conservation Areas ("RHCAs"). These areas are "portions of watersheds where riparian-dependent resources receive primary emphasis, and management activities are subject to specific standards and guidelines." INFISH Decision Notice and Finding of No Significant Impact, 1995, p. A-4; PACFISH Decision Notice and Finding of No Significant Impact, 1995, p. C-6. The Payette Forest Plan, as amended by INFISH and PACFISH, imposes specific standards and guidelines that apply to all activities in RHCAs and to all activities that may degrade RHCAs, including specific standards and guidelines for "Minerals Management" and for "Roads Management."

The Forest Service is ignoring these standards because neither alternative B or C will comply with the Forest Plan, as amended. Portions of the proposed Golden Hand Mine operation, including road construction and reconstruction, drilling and trenching are located within Riparian Habitat Conservation Areas (RHCA) for several streams that contain threatened and sensitive fish species such as Bull trout, Chinook salmon, Steelhead trout, Westslope cutthroat trout and Redband trout. See pp. 3-113-114. Under both alternatives B and C the Forest Service would get around the Forest Plan and ESA consultation requirements by amending the Forest Plan to allow for activities that do not meet the PACFISH or INFISH standards. The Forest cannot simply amend the INFISH/PACFISH standards, which were set at the regional level and required by regional level ESA consultation documents.

Also, the Forest Service cannot simply amend Forest Plan requirements for protection and conservation of threatened and sensitive species simply to enable a mining project to proceed as the mining company prefers. The Forest Service must oversee and manage *all* activities on its lands (including mining) in compliance with other laws such as the Endangered Species Act and the National Forest Management Act. As stated by the Forest Service itself in the DEIS, implementation of any of the action alternatives will violate the Forest Plan and is not in compliance with several applicable environmental laws and regulations such as NFMA and the ESA.

In fact, the Forest Service will extensively violate the ESA by implementing either Alternative B or C. The Forest Service admits that Alternatives B and C will affect listed fish species and their habitat, yet neither alternative implements the Reasonable and Prudent Measures, terms, conditions or mitigation measures required by the numerous Biological opinions cited in the DEIS. See pp. 2-100 and 2-125-126.

Because the action is likely to affect listed fish species – bull trout, Chinook salmon and Steelhead trout – the Forest Service must request formal consultation on the project. 50 C.F.R. §§ 402.14(a) and (b), 402.02 (definition of formal consultation).

## No Unclassified Travelways Should Be Added to the Road System

Transportation management manual direction directs managers to, “emphasize maintenance and reconstruction of classified roads to meet road management objectives (FSM 7712.5). Give priority to upgrading the most heavily used roads to provide safe and efficient travel and reduce adverse environmental impacts (FSM 7703.2).” Given limited budgets and this clear direction, it seems both fiscally and ecologically irresponsible, and legally untenable, to increase the classified road system.

The Roads Policy manual direction accompanying this rule identifies unclassified roads as unneeded, and further prohibits reconstruction of unclassified roads. The roads status is mentioned briefly in the DEIS:

The road density and location indicator is rated at Functioning at Unacceptable Risk overall within the analysis area. DEIS p. 3-33.

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

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

## Conclusion

As noted throughout these comments, it is premature for the Forest Service to proceed forward with any action alternative at this time. The Forest Service needs to develop a SDEIS in order to adequately examine the validity of the mining claims, analyze far less intrusive alternatives, study the potential for acid mine drainage from existing and proposed waste rock piles, complete the required watershed and roads analyses, and fully address all of the issues and inadequacies noted herein. These issues need to be thoroughly analyzed and used to design a Plan of Operations consistent with Forest Service requirements.