August 6, 2004

Jeff Burch
Grand Mesa, Uncompahgre, and Gunnison National Forest
Supervisor's Office
2250 Highway 50
Delta, CO 81416

Dear Jeff,

I would like to thank you and the Forest Service for this opportunity to comment on the proposed Robin Redbreast Unpatented Lode Claim Mining Plan of Operations.

Unfortunately, I did not learn of the comment deadline until early this week as Earthworks is not on your notice list. I understand the deadline passed earlier this week. However, I hope you will still accept our comments as part of the process of deciding whether to approve this mine proposal.

Earthworks hopes that you will deny this mine proposal and believes that you have statutory authority to do so as outlined in the comments submitted by Samuel Sorkin, Esq., Public Lands Director of High Country Citizens' Alliance. Earthworks agrees with and incorporates Sorkin's comments into this letter. (A copy of Mr. Sorkin's comments is attached.)

In addition, we urge the Forest Service, in conducting its economic analysis on the mine proposal, to examine in a full and comprehensive manner the current and future economic value of recreation (without this mine proposal) the Uncompahgre Wilderness brings to the area, and the adverse economic impact the mine proposal would have on the region, especially the recreation industry. Earthworks believes that the economic benefit to the region – if any – would be negligible at best and certainly not worth the risk of damage to the Uncompahgre Wilderness.

Sincerely,

Roger Featherstone
Southwest Circuit Rider
Earthworks
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July 30, 2004

Jeff Burch
Grand Mesa, Uncompahgre, and Gunnison National Forest
Supervisor's Office
2250 Highway 50
Delta, Colorado 81416

Dear Jeff:

On behalf of the undersigned organizations, I would like to thank you and the Forest Service for this opportunity to comment on the proposed Robin Redbreast Unpatented Lode Claim Mining Plan of Operations (PO).

In a Freedom of Information Act request dated June 18, High Country Citizens' Alliance requested a number of documents related to the proposed PO, including the PO itself. In a response dated July 19 James Free, District Ranger responded that:

> We are required to provide the submitters of the business information with notification of the FOIA request and give them reasonable time to respond with objections to its release. We expect a response from the applicants by July 26, 2004. We will make a decision regarding release of this information after we received [sic] that response.

In light of this delay we appreciate your expressed willingness to accept a supplement to this comment letter after the originally scheduled comment deadline, reflecting our consideration of the requested documents. Accordingly, we reserve the right to submit such a supplement, if necessary after the original comment deadline.

I. Introduction

The stunning natural and cultural resources of the Uncompahgre Wilderness attract visitors seeking a wide array of recreational opportunities. These visitors are part of the extensive tourism industry that has become vital to the local economies of the Gunnison Valley.

In addition to offering scenic splendor to human visitors, the Uncompahgre Wilderness provides important habitat for rare and sensitive plant and animal species, as well as big game species. It is important, therefore, that the Forest Service take steps to conserve these resources for both their recreational and ecological values.

The Forest Service should not even consider the proposed PO until the pending IBLA case challenging claim validity has been resolved. In the event that the claims are ultimately upheld as valid, priority should be given to purchasing the mining rights from the operators. If however the Forest Service does choose to proceed with processing, it should deny the PO if it is unreasonable, or, alternatively, make any modifications necessary to protect the various environmental, recreational, and cultural resources of the Uncompahgre Wilderness. Any approved PO must contain adequate mitigation and reclamation measures necessary to protect wilderness resources.

II. The Forest Service Should Not Process the Proposed Plan of Operations Unless Claim Validity is Affirmed

In an opinion dated July 31, 2003, an administrative law judge found that the mineral operators had indeed met their burden of showing a valuable mineral discovery under the mining law. That decision is now under review by the Interior Board of Land Appeals (IBLA). The Forest Service should not process the proposed PO until claim validity is no longer contested. Should the claim ultimately be held invalid, the withdrawal of the land in question from mineral entry in accordance with its wilderness designation would preclude any subsequent relocation of the claim, and any further development of the site. At a minimum, the Forest Service should suspend consideration of the proposed PO pending the outcome of the IBLA case. In addition, any conclusion of validity by the IBLA may be challenged in federal court.

III. If the Claim is Ultimately Upheld as Valid, the Forest Service Should Seek Funding Sources to Purchase the Mineral Rights from the Operators

If the operators ultimately prove their claim is valid, the Forest Service should pursue all possible avenues of funding to acquire the mining rights, such as the Land and Water Fund and the Wilderness Land Trust. Given the priceless wilderness values at stake mineral purchase should be given top priority, and considered as an alternative in any eventual DEIS.

IV. The Forest Service Should Reject the Proposed Plan of Operations if it is Unreasonable

Under its 36 C.F.R. § 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). In the upcoming DEIS the Forest Service should select the requisite no-action alternative as the preferred alternative if it determines the proposed PO to be unreasonable.

V. The Forest Service Must Limit Its Approval to Only What Is "Reasonable" and Should Conduct A Surface Use Analysis

Even if the agency might approve some activities, it can only approve was is reasonable. "[T]he Forest Service clearly has the power to reject an unreasonable plan, and to impose conditions on the mining activity." Baker v. United States Department of Agriculture, 928 F. Supp. 1513, 1518 (D. Idaho 1996).

The "reasonableness" of the plan of operations and the duty of the agency to protect surface resources are expressly linked together. According to the agency's mining regulations, upon receipt of a plan of operations: "[t]he authorized officer shall . . . analyze the proposal, *considering the economics of the operation* along with the other factors in determining the reasonableness of the requirements for surface resource protection." 36 C.F.R. § 228.5 (emphasis added).

In this case, the Forest Service would be violating its duties under the Organic Act and Part 228 regulations if it approved a plan without sufficient evidence that it was economic and therefore reasonable. At a minimum, the agency should not approve the PO until it is satisfied that the project is economically and environmentally reasonable. The federal government must uphold the legal requirement that a claimant has filed a reasonable PO utilizing valid claims in order to satisfy its own obligation to minimize adverse environmental impacts. See United States v. Barrows, 404 F.2d 749, 750 (9th Cir. 1968) (finding that the district court did have jurisdiction to grant the Government's motion for a conditional restraining order to prevent irreparable injury to national forest land pending the outcome of administrative proceedings concerning the validity of a mining claim).

Indeed, this is the same approach recently employed by the Illinois Valley Ranger District of the Siskiyou National Forest in Oregon in its consideration of the NICORE Mine, by the Big Timber Ranger District of the Gallatin National Forest in Montana in its consideration of the Lodestar Mine proposal, and by the Krassel Ranger District of Payette National Forest in its consideration of the Golden Hand proposal.

The analysis conducted on the recent Golden Hand mine proposal in Idaho is particularly enlightening. There the Forest Service detailed its requirement to approve only "reasonably incident" activities to a mining operation in its review of a proposed mining operation:

> Activity or facilities that are "reasonably incident" will vary depending on the stage of mining activity. Through case law that has evolved since 1955, the reasonably incident standard has been interpreted to include only activity or facilities that are an integral, necessary, and logical part of an operation whose scope justifies the activity or facilities. Activities that are "reasonably incident" would be expected to be closely tied to, and be defined within, what would be reasonable and customary for a given stage of mining activity. *Such levels of activity would include initial prospecting, advanced exploration, predevelopment, and actual mining*. Each stage is defined by an increasing level of data and detail on the mineral deposit that, in total, contribute to an increasing probability that the deposit can be mined profitably. Each stage also has an increasing impact on the land.

Surface Use Analysis of the Plan of Operations on the Golden Hand No. 3 and No. 4 Lode Claims, at 2-3, January 2003, Appendix B to The Golden Hand No. 3 and No. 4 Lode Mining Claims Proposed Plan of Operations, Draft EIS (Payette National Forest)(hereinafter "Golden Hand SUA")(emphasis added). In that case, the Forest Service detailed how the agency was limited to approving only "what would be reasonable and customary for a given stage of mining activity." Id. at 3.

The Forest Service also recognized that this duty to limit approvals to what was necessary for the given stage of mining was intricately connected with the agency's duty to protect forest resources from mining:

> The logic of sequencing is also obvious to the Forest Service whose charge is the management of surface resources: Keep it small, to the extent practicable, and build, if warranted, from there. In other words, minimize the amount of disturbance to surface resources in order to prevent unnecessary destruction of the forests, and to ensure to the extent feasible that disturbance is commensurate with each level of development.
>
> That simple principle is of paramount interest to the Forest Service that, by its Organic Act, is responsible on lands in the National Forest System "to regulate their occupancy and use to preserve the forest thereon from destruction." Equally important, the principle has been articulated by the 9th Circuit Court in *United States v. Richardson*, 599 F.2d 290 (9th Cir. 1979), *cert. denied.* The Court clearly articulated that mining is a sequential process composed on logical steps. Further, *mining activity that would cause significant surface disturbance on lands in the National Forest System must be related to a logical step in that process and the steps must be in the proper sequence*.

Golden Hand SUA at 25-26 (emphasis added). The SUA was adopted and confirmed in the Record of Decision (ROD) for the Golden Hand Mine and upheld on appeal to the Regional Forester. Indeed, that ROD specifically rejected an alternative that involved activities that were ahead of the "logical sequence" of mining. In that case, the Forest Service limited its approval of further ore body evaluation that fit the logical sequence and deferred approval of further development work until the limited ore body evaluation was completed.

Similarly, at the NICORE in Oregon, the Northwest Regional Office followed accepted Forest Service practice in denying the full-scale mining alternative, affirming the Siskiyou National 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. 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.

The Forest Service in Colorado regularly conducts SUAs to determine, among other issues, the reasonableness of the proposed operation. This was recently done for two mines in the Pike San Isabel National Forest – the Dreamtime Mine and Blue on Black Mine. The GMUG National Forest should follow this approach.

In this case, the Forest Service should not approve the mining plan without significant additional information demonstrating the economic viability of the project. At a minimum, the Forest Service should approve only information gathering, and not the full-scale mining proposed by the claimant. The Forest Service is under no obligation to approve such an operation until the claimant has provided sufficient information to convince the Forest Service that the project is viable and that the claim is indeed valid.

VI. Alternatively, the Forest Service Should Make Substantial Changes to the Proposed Plan of Operations Before Giving Approval

The Forest Service has ample statutory and regulatory authority to require modifications to the PO before granting its approval.[1] As noted by the Tenth Circuit Court of Appeals,

> . . . the Forest Service has relied on these provisions, as well as many other considerations, in a variety of cases where it restricted mining activities on national forest land. See, e.g., Duncan Energy Co. v. United States Forest Service, 50 F.3d 584, 586 (8th Cir.1995) (Forest Service required conditions and protective measures on proposed plan of mining operations citing requirements of National Environmental Policy Act, 16 U.S.C. § 551, and 36 C.F.R. § 251.50(a)); Clouser v. Espy, 42 F.3d 1522, 1529-30, 1533-36 (9th Cir.1994) (Forest Service regulated means of access to mining claims on national forest citing its authority under 16 U.S.C. § 251 and 16 U.S.C. § 478; declined to review

[1] See, e.g., 16 U.S.C. § 551 (Forest Service must protect national forest land from destruction and depredation); 16 U.S.C. § 478 (miners must comply with rules and regulations covering national forests); 16 U.S.C. § 1604(i) (permits relating to use and occupancy of national forest system lands must be consistent with the land management plan for that specific forest); 36 C.F.R. § 228.4(f) (mining operations may require environmental analysis considering varying environmental impacts); 36 C.F.R. § 228.5 (Forest Service may require changes in plan necessary to "meet the purpose of the regulations in this part"); 36 C.F.R. § 228.8 (mining operations on forest land must be conducted to minimize adverse environmental impacts); 36 C.F.R. § 228.12 (when reviewing means of access to mining claims in proposed plans, Forest Service must specify all "conditions reasonably necessary to protect the environment and forest surface resources")

mining plan of operations until BLM determined claim's validity citing agency rule in Forest Service Manual; required modifications prior to approval of mining plan of operations citing its authority under 36 C.F.R. § 228.5(a)); United States v. Weiss, 642 F.2d 296, 298 (9th Cir.1981) (Forest Service has power to regulate mining operations on national forest land under 16 U.S.C. §§ 478 and 551); United States v. Richardson, 599 F.2d 290, 292 (9th Cir.1979) (Forest Service sought injunction of mining operations on forest land causing unwarranted surface destruction under 30 U.S.C. § 612); Baker v. United States Dep't of Agriculture, 928 F.Supp. 1513, 1515 (D.Idaho 1996) (Forest Service required restrictions on mining operations plan citing requirements of Endangered Species Act and the National Environmental Policy Act).

Park Lake Resources Ltd. Liability Co. v. U.S., 197 F.3d 448, 451-52 (10th Cir. 1999). The Forest Service should modify the proposed PO in order to comply with the Wilderness Act and the National Forest Management Act.

A. The Proposed Plan of Operations Would Violate the Wilderness Act

The Wilderness Act states generally that:

> [Wilderness areas] shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, [and] the preservation of their wilderness character . . ..

16 U.S.C. § 1131(a). It also establishes guidelines for agency management of the wilderness areas:

> Except as otherwise provided in this chapter each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character. Except as otherwise provided in this chapter, wilderness areas shall be devoted to the public purposes of recreation, scenic, scientific, educational, conservation, and historical use.

16 U.S.C. § 1133(b). Relevant Forest Service regulations elaborate on this guideline, stating 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 C.F.R. § 228.15(b)(emphasis added). The regulations therefore require that the Forest Service deny any motorized activity within the wilderness boundary, except where such access has been proven "essential."

The leading mining and wilderness case has interpreted 36 C.F.R. § 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 several 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 (9th Cir. 1994), cert. denied sub nom. Clouser v. Glickman, 515 U.S. 1141 (1995). The Forest Service 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 proposed PO calls for two types of motorized incursion into the wilderness area. According to the Notice of Intent, "[h]elicopter access is proposed for approximately two days per month to ferry equipment and supplies," and "[a] rubber tired Bobcat sized loader and slusher would be used at the mine site for surface preparation and underground mining and hauling." Here, as in Clouser, the site is accessible by pack horse, and motorized access is therefore not "essential." Indeed, the proposed PO calls for ground access to the mine site by foot, horseback, and mule-train. Motorized access would therefore violate the Wilderness Act, and would necessarily compromise wilderness values, disrupting both ecological and recreational values.

B. The Proposed Plan of Operations Would Violate the National Forest Management Act

The proposed PO would violate National Forest Management Act's (NFMA) requirement that all actions, such as mining, be consistent with Land and Resource Management Plans (Forest Plans).[2] Regarding access to mine sites within wilderness areas, the Grand Mesa, Uncompahgre, and Gunnison (GMUG) Forest Plan, in relevant part, states that the Forest Service will "[p]rovide for reasonable access of the type necessary to the purpose of proposed operations . . .." Forest Plan, at III – 53. Again, as under the Wilderness Act, the Forest Service only has the authority to allow access that it can prove "necessary" to the proposed operation.

As discussed above, motorized access is not necessary to reach the Robin Redbreast mine site, as evidenced by the proposed PO's reliance on foot, horse, and mule-train traffic to the site. Any motorized access is therefore not "necessary" to the proposed operation, and if allowed by the Forest Service would violate NFMA.

VII. The Forest Service Must Complete the Monitoring for Management Indicator Species As Required by the Forest Plan Before Approving any Plan of Operations

The Forest Service should not approve any PO for the Robin Redbreast Mine prior to completing the monitoring of management indicator species (MIS) habitat capability, productivity, and population numbers using the methodology of an annual five-project monitoring effort as required by the Forest Plan. Forest Service regulations require the agency to maintain viable populations of wildlife species:

> Fish and Wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area…A viable population shall be regarded as one which has the estimated numbers and distribution of

[2] See 16 U.S.C. § 1604(i); 36 C.F.R. § 219.10(e); see also, 36 C.F.R. § 228 (mineral regulations enacted pursuant to the Organic Act).

> reproductive individuals to insure its continued existence is well distributed in the planning area.

36 C.F.R. § 219.19. The Forest Plan is the instrument by which the Forest Service implements this requirement.[3] Under the GMUG Forest Plan, the Forest Service has an affirmative duty to monitor the "[h]abitat Capability for MIS & population trends." Forest Plan at IV – 8.

NFMA provides that project level decisions, such as issuing a special use permit, must conform to the Forest Plan, stating, "[r]esource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans." 16 U.S.C. 1604(i).[4] In a recent opinion, the Tenth Circuit specifically contemplated the application of 36 C.F.R. 219.19's monitoring requirements to project-level decisions. Utah Environmental Congress v. Bosworth, 372 F.3d 1219 (10th Cir. 2004). Affirming its prior reasoning in Colorado Environmental Coalition v. Dombeck, 185 F.3d 1162 (10th Cir. 1999) the court stated,

> . . . in Dombeck, after noting that the Forest Service implements the Forest Plan through individual projects and that these projects must be consistent with the Forest Plan, we applied § 219.19 to a project level action. This application is in accord with the analysis of other circuits. See, e.g., Sierra Club v. Martin, 168 F.3d 1, 6 (11th Cir.1999) (recognizing that although § 219.19 applies to the "formulation of Forest Plans rather than to specific projects proposed," the duties of the Forest Service "continue throughout the Plan's existence") . . ..

Utah Environmental Congress, 372 F.3d at 1224-25 (internal citations omitted). Here, the court applies the requirements of § 219.19 to specific projects, through the operation of the Forest Plan.

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[3] See 36 C.F.R. § 219.11(d) (A Forest Plan must contain "[m]onitoring and evaluation requirements that will provide a basis for periodic determination and evaluation of the effects of management practices."

[4] Forest Service regulations and guidance reinforce this mandate. See, e.g. 36 C.F.R. § 219.10(e) ("the Forest Supervisor shall ensure that . . . all outstanding and future permits, contracts, cooperative agreements, and other instruments for occupancy and use of affected lands are consistent with the [land and resource management] plan"); FS Manual 1922.41(1) (Forest Supervisor is required to "Confirm and document that the proposed management decisions are consistent with the management direction in the forest plan"); FS Handbook 1909.12(5.3) ("All administrative activities affecting the National Forest must be based on the forest plan (36 C.F.R. § 219.10(e)").

This interpretation of the MIS monitoring requirements is supported by the recent Region 2 Appeal Decision concerning the Ward Lake Vegetation Management Projects. In that decision, the Deputy Regional Forester found that the MIS monitoring for the GMUG was deficient, and held that "[t]he Forest should provide evidence that habitat capability and MIS populations trends are being monitored as required by the Forest Plan." Ward Lake Decision at 1 (emphasis added). The Decision thus affirmed the Forest Service's duty to conduct MIS monitoring under the GMUG forest plan and the overarching regulatory regime.

In another GMUG project, the Missionary Ridge Burned Area Timber Salvage Project, the Forest Service has been enjoined from conducting the project, pending judicial review of the Record of Decision. Colorado Wild v. United States Forest Service, Civil Action No. 03-Z-2592 (D. Colo.). Judge Weinshienk's analysis in that order states the MIS monitoring obligation succinctly:

> . . . unless it is technically infeasible *and* not cost-effective, the Forest Service has an obligation to collect and analyze quantitative population data, both actual and trend, for MIS. *Further, this requirement applies at both the forest-plan level and the project level.* Section 219.19(a)(2) of the regulations states that "[p]lanning alternatives shall be stated and evaluated in terms of both amount and quality of habitat and of animal population trends of the management indicator species." Section 219.19(a)(6) requires that "[p]opulation trends of the management indicator species will be monitored and relationships to habitat changes determined." Section 219.26 mandates that, in planning for forest diversity of animal communities, "[i]nventories shall include quantitative data making possible the evaluation of diversity in terms of its prior and present condition." "*[T]aken together, [these] regulations require the Forest Service to gather quantitative data on MIS and use it to measure the impact of habitat changes on the Forest's diversity.*"

Id (quoting Sierra Club v. Martin, 168 F.3d 1,7 (11th Cir. 1999)) (internal citations omitted) (emphasis added).

With regard to the current mining proposal, The Gap Analysis Project (GAP) habitat models executed by the United States Geological Survey (USGS) predict that the Robin

Redbreast Claim falls within the habitat of several MIS, including Canada lynx, mule deer, elk, bighorn sheep, boreal western toad, marten, white-tailed ptarmigan, and river otter. The monitoring for all of these species required under the Forest Plan should be completed before any PO is approved. Without such monitoring the Forest Service cannot know how the project will affect the viability of these MIS, which it must maintain in accordance with 36 C.F.R. § 219.

VIII. The Forest Service Must Ensure that Any Approved Plan of Operations Would Not Jeopardize any Endangered, Threatened, or Sensitive Species

Looking to the predictions of the USGS GAP models, the claim site contains potential habitat for numerous endangered, threatened, and sensitive species. The Canada lynx is listed as threatened under the Endangered Species Act (ESA), listed by the Colorado Division of Wildlife (CDOW) as endangered, and classified as sensitive by the Forest Service. The boreal western toad is a candidate for ESA protection, listed by CDOW as endangered, and listed by the Forest Service as sensitive. The river otter is listed by CDOW as threatened and by the Forest Service as sensitive. Finally, the marten and white-tailed ptarmigan are both listed by the Forest Service as sensitive.

The Forest Service should conduct a detailed survey of the site for occurrences of all of these species, and should not allow activities in the vicinity of any sightings. In addition, the Forest Service should not allow any destruction of habitat for these endangered, threatened, and sensitive species.

IX. The Forest Service Should Require a Showing that all Requisite Permits and Rights Have Been Acquired Before Approving Any Plan of Operations

A. Without a Water Right, the Plan of Operations Cannot be Approved.

In the Notice of Intent, the Forest Service states that "[w]ater rights for use of water from Porphyry Creek will need to be obtained." Without a water right for any potential mining, a discovery does not exist. 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, and more importantly, the lack of a water right to operate the mine would require the federal government to deny any proposed mining operation. In Far West Exploration, Inc, the Interior Department stated "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." 100 IBLA 306, 309 (1987). Thus, without evidence that the claimant has a water right to make use of the water needed to process the minerals, the Forest Service cannot approve the plan of operations, and indeed, without such proof, should not waste valuable agency resources processing such a plan.

B. The Agency Cannot Approve a Plan of Operations Without a Showing that the Applicant has Obtained All Necessary Clean Water Act Permits

The Forest Service must also ensure compliance with the Clean Water Act (CWA), 33 U.S.C. § 1151, *et seq*. Under section 313 of the CWA, if a proposed mining operation cannot comply with state water quality standards, the Forest Service cannot approve the operation. 33 U.S.C. § 1323. Section 313 requires compliance with "all Federal, State, interstate, and local requirements" for the discharge or runoff of pollutants on federal land. Id. This section places a duty on federal agencies to comply with federal CWA requirements, in addition to state water quality standards. Additionally, section 313 applies to both point source and non-point source discharges on federal lands and waters.

Section 401 of the CWA also requires that the applicable state "certify" that all discharges from a federally-authorized project meet water quality requirements:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1312, 1316, and 1317 of this title.
> . . .
> No license or permit shall be granted until the certification required by this section has been obtained or has been waived . . .. No license or permit shall be granted if certification has been denied by the State . . ..

33 U.S.C. § 1341(a)(1). Certification applies to all federal licenses and permits for activities which may result in a discharge. Forest Service approval of a mining plan of operations is a license or permit subject to Section 401. Forest Service approval of a special use authorization pursuant to 36 C.F.R. § 251 is a license or permit subject to Section 401.

The proposed mine will involve a discharge under the CWA that cannot proceed without a CWA Section 402 (National Pollutant Discharge Elimination System or NPDES) permit.

When mining activities release pollutants from a discernable conveyance, they are subject to NPDES regulation, as are all point sources. The Forest Service and EPA have stated that miners must apply for an NPDES permit in order to allow the Forest Service to fully process the miner's PO:

> A federal agency (Forest Service) cannot issue a permit or license or approve a plan of operations unless the certification has been obtained or waived. If certification is denied, the permit or license cannot be granted and a proposed plan of operations cannot be approved Section 401(a)(2), 33 U.S.C. 1341(a)(1).
>
> [I]t is apparent the Forest Service decision on your plan of operations is dependent upon your obtaining the necessary NPDES permit. If certification is denied or EPA does not grant the NPDES permit, the Forest Service cannot process or approve your plan of operations.
>
> . . .
>
> We are suspending work on your plan of operations and the environmental assessment until: 1) we are notified you have received a NPDES permit, or 2) you have applied for a NPDES permit, and EPA has informed you what alternatives and mitigation measures you would be required to follow to comply with the Clean Water Act.

February 20, 2001 letter from the Nez Perce National Forest to Daniel Templeton, an applicant for approval of a PO for suction dredge mining.

The United States Justice Department, representing the Forest Service as defendant in a federal case brought by Mr. Templeton, confirmed this legal requirement:

> The Forest Service has informed Plaintiff that, before the Plan [of Operations] can be processed and approved, he must (1) apply for and obtain from the U.S. Environmental Protection Agency ("EPA") a National Pollutant Discharge Elimination System ("NPDES") permit pursuant to section 402 of the Clean Water Act ("CWA"); (2) apply for and obtain from the Army Corps of Engineers ("Corps") a discharge permit pursuant to section 404 of the CWA; and (3) request and obtain a water quality certification from the State of Idaho pursuant to section 401 of the CWA. Plaintiff's suggestion that the identified permits are either not required or that the requirement has been waived are without merit.

Dan Templeton v. United States, Civ. 02-320-C-EJL (D. Idaho). United States of America's Reply Memorandum in Support of Motion for Judgment on the Pleadings, at 3, dated May 28, 2004.

In addition, the Forest Service cannot approve any mining activity before the information and data necessary for CWA NPDES and/or section 404 permits have been obtained. Under the CWA, the Forest Service is obligated to assure itself that NPDES and 404 permits are obtained before permitting the requested activity. The Forest Service cannot meet its duty under 36 C.F.R. § 228A (or 36 C.F.R. § 251) and the CWA to ensure that the project will comply with the CWA without an understanding of the specific nature of the discharges.

C. The Forest Service Cannot Allow a Mining Operation that Does Not Comply With Other Applicable Federal, State, and County Permitting and Licensing Processes

36 C.F.R. § 228.8 states, in relevant part, that:

> All operations shall be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest surface resources, including the following requirements:
>
> (a) Air Quality. Operator shall comply with applicable Federal and State air quality standards, including the requirements of the Clean Air Act, as amended (42 U.S.C. 1857 et seq.).
>
> (b) Water Quality. Operator shall comply with applicable Federal and State water quality standards, including regulations issued pursuant to the Federal Water Pollution Control Act, as amended (33 U.S.C. 1151 et seq.).
>
> (c) Solid Wastes. Operator shall comply with applicable Federal and State standards for the disposal and treatment of solid wastes. All garbage, refuse, or waste, shall either be removed from National Forest lands or disposed of or treated so as to minimize, so far as is practicable, its impact on the environment and the forest surface resources. All tailings, dumpage, deleterious materials, or substances and other waste produced by operations shall be deployed, arranged, disposed of or treated so as to minimize adverse impact upon the environment and forest surface resources.

The Forest Service should require that the operators obtain all required permits and licenses before considering a PO, including: Department of the Army Permit for dredge and fill of wetlands or waters of the United States; permit from the Colorado Department of Public Health and Environment addressing storm water run off; Environmental Protection Agency approval of spill prevention, control, and countermeasures plan; Colorado Division of Minerals 110 limited impact permit; and a Hinsdale County conditional use permit. Absent even a single required permit or license, the Forest Service should not consider any submitted PO.

D. The Forest Service Should Not Approve Any Plan of Operations that Allows for Residence Within the Wilderness Area

The Notice of Intent indicates that the Robin Redbreast operators are proposing to house four to five workers in the existing cabin. Under no circumstances should the Forest Service allow such use. As an initial matter, under the Mining Law, permanent residence may be allowed only under an approved operating plan. U.S. v. Langley, 587 F.Supp. 1258 (E.D. Cal. 1984); U.S. v. Burnett, 750 F.Supp. 1029 (D. Idaho 1990). Thus, unless and until the claimant has an approved mining plan, he should not, under any circumstances, be allowed to remain on, nor maintain any structures on, the claim.

Further, under the Multiple Use Mining Act of July 23, 1955, mining claims "shall not be used, prior to a patent therefore, for any purposes other than prospecting, mining, or processing operations and uses reasonably incident thereto." 30 U.S.C. § 612. In the winter, the claims would likely be covered with significant snowfall, which would likely prevent mining altogether. A permanent residence would not respect the seasonal operability of the mine and would therefore violate 30 U.S.C. § 612.

X. The Forest Service Must Include All Mitigation and Reclamation Measures Necessary to Protect Wilderness Values in the Plan of Operations

The Wilderness Act states generally that:

> [Wilderness areas] shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, [and] the preservation of their wilderness character . . ..

16 U.S.C. § 1131(a).

In addition to the limitations on disturbance in the Wilderness, the Forest Service is also under a general obligation to "minimize adverse environmental impacts" to Forest 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." Id. The Forest Service therefore has both the duty and ample authority to require an effective regime of mitigation measures in order to protect forest and wilderness values.

A. Acid Mine Drainage

The Forest Service must require mitigation measures adequate to minimize the effects of acid mine drainage (AMD). Waste rock, vein and host rock could all possess acid generating potential, or high base metal or sulfide content. Because of the severity of potential impacts from AMD, the PO should contain provisions for managing potentially acid generating (PAG) materials and addressing the long-term consequences should AMD or metals leaching develop. The placement of PAG material in unlined waste rock piles may result in AMD or metals leaching into surface or groundwater. The Forest Service should identify the depth to groundwater at the mine site, and determine baseline data on surface and groundwater quality.

The PO should also include adequate measures to address likely sludge or slime releases from the mine workings.

The PO should include provisions for routing water from the mine workings around the waste rock piles. As a precautionary measure, settling ponds should be constructed below the site to collect any flows (including sludge or slime). Water quality monitoring should be required before any release occurs from the settling ponds. The DEIS should evaluate the impacts of additional surface disturbance due to the necessary construction of these settling ponds, and the additional reclamation work and reclamation bond that the ponds would require.

The PO should also include provisions for a cover system over the waste rock piles to address long-term infiltration should exploration activities in the mine intercept additional flows, or should groundwater monitoring indicate elevated metals or acid generation. The reclamation bond should account for these additional costs.

The Forest Service should require an extensive monitoring program. At a minimum, surface and groundwater quality should be sampled and analyzed on a monthly basis. Further monitoring should require geochemical testing for all samples collected during exploration. Materials selected for sampling should include waste rock, overburden, and ore/subore. Furthermore, all geochemical analysis should be completed according to the provisions of the BC AMD Task Force, Draft Technical Guide, Vol. 1 (1989). The PO must describe actions to be taken should sampling indicate the development of AMD, including provisions that require the cessation of operations. Additional geochemical analysis will be critical in evaluating the potential economic feasibility of mining activities.

Finally, all water uses must conform to antidegradation laws and baselines should be maintained. Streams in the analysis area should be placed on a 303(d) list if they exceed

standards for sediment, temperature, pH, salinity, dissolved metals, or nitrogen compounds and ions.

B. Noise Levels

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 the site. Intrusive machinery, if allowed at all, must be used only when no other reasonable tool exists. All equipment should operate under 78 decibels when measured at a distance of 50 feet, the standard used for snowmobiles in Yellowstone National Park.

C. Cultural and Historic Resources

Prior to approving any further mining activity the Forest Service should conduct a thorough inspection of the entire claim, and any other national forest land where disturbance is possible, for cultural and historic artifacts. Also, the operators should continually inspect the site for additional artifacts. No activity should be allowed where it threatens any discovered cultural or historic resources.

D. Forest Service Roads and Trails

The proposed PO calls for livestock staging and use at the Middle Fork trail head (#243), and twice daily traffic on trails to Porphyry Basin (## 243, 227). Also proposed are daily pickup truck trips on Forest Service roads to the trailhead. The Forest Service should monitor the

effects of this increased usage, and require the operators to perform any maintenance necessary to prevent erosion or other deterioration of the roads and trails, particularly where it could lead to sediment loading in water sources.

E. Endangered, Threatened, and Sensitive Species

The US Forest Service must submit a biological assessment on all possible threats to listed species and the USFWS must approve the report with a "no jeopardy" finding. No incidental takings permit should be allowed. Wildlife trees and snags should be left standing as much as possible. The DEIS should include diameter limits on the size of timbers to be cut on claims.

F. 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.

The most efficient way to deal with alien non-native species is to prevent incursions into intact habitats that act 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 mining operation increases the possibility that noxious weeds will infest the surrounding area, as roads, trails, and rivers have been identified as the primary conduits for noxious weed species transport and establishment.

As a precautionary measure, any pack animals should be given only certified weed free feed 96 hours before entering and while inside the GMUG, and their hides and hooves should be cleaned thoroughly. The PO should specify that saddles and tack must also be cleaned off upon each entry. Equipment should be washed off with a pressurized hose to dislodge noxious weed seeds before entering the GMUG.

G. Interpretation for Wilderness Users

If the Forest Service approves a PO, many wilderness users will question how this operation could possibly be permitted in a Wilderness Area. Interpretive displays should be erected at the trailhead and mining site explaining the validity of the mining claims in Wilderness Areas 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 GMUG National Forest web site. The trail and mining site should remain open to the public so backcountry visitors can see for themselves how well all the mitigation measures work.

H. Hazardous Materials, Air Pollution, and Fire Management

If the Forest Service approves a PO for the Robin Redbreast Mine, it should require that the operators transport fuel in Department of Transportation approved tanks at quantities not to

exceed 250 gallons. A Spill Prevention, Containment, and Countermeasures plan should be required given the sensitive nature of this watershed. Fuel containment equipment, including chemical absorbers and booms to intercept stream transport need to be on site. Regularly inspected fire extinguishers need to be placed in all vehicles. The PO needs to describe the location and storage requirements for explosives. Extracted material needs to be wetted down and covered during transport to the mill site to minimize air pollution from dust.

The PO should require that caches of hand tools be required in addition to other fire prevention measures. The specific hand tools that should be required include a Pulaski, axe, fire rake, McLeod, fire flag, and shovel.

I. Reclamation

The Forest Service must require all reclamation measures necessary to restore the site as nearly as possible to its original wilderness condition. The Forest Plan designates the area containing the Robin Redbreast Claim under Management Prescription 8C, providing generally that:

> All resource management activities are integrated in such a way that current human use leaves only limited and site specific evidence of their passing. Areas with evidence of unacceptable levels of past use are rehabilitated and the affected area restored.

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36 C.F.R. § 228.15 (d) places a positive obligation on the operators to complete an extensive reclamation of the site, stating:

> On all mining claims validly established on lands within the National Wilderness Preservation System, the operator shall take all reasonable measures to remove any structures, equipment and other facilities no longer needed for mining purposes in accordance with the provisions in § 228.10 and restore the surface in accordance with the requirements in § 228.8(g).

To ensure that the operators meet this substantial requirement, the Forest Service should require them to post a sizeable bond. The bond must be substantial 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 transported into the area. The waste rock and tailings should be fully encapsulated by an impermeable cap on top and a lining beneath to prevent acid mine drainage, and the bond should account for associated costs. The bonding should reflect the impacts to the sensitive nature of this site and any listed species inhabiting the area. 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 PO 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. Reclamation should proceed during operations to the extent feasible, and final reclamation must occur as soon as possible after closure of operation.

XI. Conclusion

As noted throughout these comments, it is premature for the Forest Service to process the PO at this time, absent final resolution in the pending IBLA case. If the Forest Service is unable to purchase the mineral estate and it decides to process the PO, the Forest Service should analyze far less intrusive alternatives to the current proposal, study the potential for acid mine drainage, should complete the required wildlife, species, and roads impact analyses, and should reject any plan that is unreasonable or lacking any of the necessary permits. The Forest Service should

only consider a proposal that is compliant with Federal, State, and County regulations governing environmental, recreational, cultural, and historical resources in the Uncompahgre Wilderness. The Forest Service should ensure that any PO given approval contains adequate mitigation and reclamation measures so as to minimize adverse impacts to these resources.

Sincerely,

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