Bryan Hurlbutt (ISB # 8501)
Laurence ("Laird") J. Lucas (ISB # 4733)
ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024
(208) 342-8286 (fax)
bhurlbutt@advocateswest.org
llucas@advocateswest.org

Roger Flynn (*pro hac vice*) (Colo. Bar # 21078)
WESTERN MINING ACTION PROJECT
P.O. Box 349
Lyons, CO 80540
(303) 823-5738
(303) 823-5732 (fax)
wmap@igc.org

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

IDAHO CONSERVATION LEAGUE, THE WILDERNESS SOCIETY, EARTHWORKS, FRIENDS OF THE CLEARWATER, WILDERNESS WATCH, Plaintiffs, vs. LANNOM, KEITH B., Payette National Forest Supervisor, and U.S. FOREST SERVICE, Defendants.	No. 01:15-cv-246 **PLAINTIFFS' OPENING BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Plaintiffs seek summary judgment reversing and remanding the Forest Service's June 2015 approval of the "Golden Hand Project", a mineral confirmation project in the Frank Church–River of No Return Wilderness Area. Contrary to this Court's prior ruling in *American Independence Mines & Minerals, Co., et al. v. United States Department of Agriculture, et al.*, No. 1:00-cv-00291-BLW (D. Idaho) ("*AIMMCO v. USDA*"), the Forest Service has authorized extensive drilling, bulldozing, vehicle traffic, and other motorized activity in the Wilderness for the next three years.

In *AIMMCO v. USDA*, the Court ordered the Forest Service to allow AIMMCO access to Golden Hand mineral Claims #1 and #2, but directed that AIMMCO's operations must be very limited. *See* FS027693 (Mem. Decision, *AIMMCO v. USDA*, Dkt. # 49 (D. Idaho Aug. 12, 2002)). Specifically, the Court directed AIMMCO to scale back operations it initially proposed in 1987: "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." FS027703.

Ignoring the Court's instructions, the Forest Service approved a substantially expanded and different proposal, which will result in more surface disturbance, motorized activity, and degradation of the Wilderness compared to what AIMMCO proposed in 1987. By allowing AIMMCO to embark on this expanded, highly-motorized fishing expedition to search for minerals more than 30 years after the Frank Church Wilderness was withdrawn from further mineral entry, the Forest Service violated the Wilderness Act, other public lands laws, and NEPA.

The Forest Service also failed to protect ecologically important "Riparian Conservation Areas" in the Wilderness from AIMMCO's drill pads, waste pits, and trenches in violation of the Forest Plan for the Payette National Forest.

The Court should thus grant Plaintiffs' summary judgment motion, and vacate and remand the Forest Service's decision approving the Golden Hand Project.

STATEMENT OF RELEVANT FACTS[1]

Overview Of The Challenged ROD And EIS For The Golden Hand Project.

On June 19, 2015, the Forest Service signed the Record of Decision (ROD) approving the Golden Hand Project, based on the December 2014 Final Environmental Impact Statement (EIS). SOF ¶ 16.[2] The ROD authorizes AIMMCO to conduct operations inside the Frank Church Wilderness to prepare for validity hearings for Golden Hand lode mining Claims #1 and #2. *Id.*

Project activities would occur over 3 field seasons, which typically last four months per year during summer and fall. SOF ¶ 17. AIMMCO would use a bulldozer and other motorized earth-moving equipment, drill rigs, and other machinery within the Frank Church Wilderness to: reconstruct 4 miles of road; drill up to 18 holes (on Claims #1 and #2, and beyond); excavate several pit trenches down to bedrock (on Claim #1 and Claim #2); and reopen the "Ella Portal" (a caved mine adit on Claim #1). *Id.* *See also* FS081976 (map depicting operations). To carry

---

[1] Pursuant to the Case Management Order (Dkt. #15) ¶ 11, and Local Rule 7.1(b)(1), Plaintiffs submit a Separate Statement of Undisputed Facts ("SOF") herewith, which includes a more detailed description of the Golden Hand Project and the Forest Service's decision process approving it. Administrative Record documents are cited according to the Forest Service's designation of "FS" before the page number.

[2] Plaintiffs submitted extensive comments and objections on the EIS and ROD and have exhausted administrative remedies. *See* FS006674–699; FS080267–273; FS080274–0317; FS083824–84407. Plaintiffs have proven their standing through the comments, objections, and accompanying declarations of John Robison, Craig Gehrke, Gary MacFarlane, Bonnie Gestring, and John McCarthy, which attest how important protecting wilderness values is to them and how they will be harmed by the Project, as approved by the Forest Service.

out these surface-disturbing activities, AIMMCO would use large pickup trucks and other motor vehicles to drive 3 miles into the Wilderness and back out 571 times each field season. *Id.*

AIMMCO's 1987 Proposal, And This Court's 2002 Order To Scale Back The Proposal.

The Frank Church Wilderness was withdrawn from further mineral entry on January 1, 1984, as provided for in the Wilderness Act. *See* 16 U.S.C. § 113(d)(3). Because mineral operations within withdrawn wilderness may only proceed upon the claimant's establishment of valid rights existing prior to the 1984 deadline, the Forest Service commenced a validity contest on February 15, 1987, challenging the validity of the 8 Golden Hand Claims (including Claims #1 and #2). *See* FS027695. In response, AIMMCO submitted its 1987 Assessment Work Request to the Forest Service, seeking to do appraisal and other limited work to support its claim of validity to Claims #1, #2, #3, and #4. *Id. See also* FS031217–19.

On Claim #1, AIMMCO made a very limited proposal to use hand labor to clear the entry to the caved Ella Portal. *See* FS027695. On Claim #2, AIMMCO proposed more activities (mapping, sampling, trenching, and drilling) all specifically targeting the "Glory Hole" deposit. *Id. See also* AIMMCO's Statement of Undisputed Facts, *AIMMCO v. USDA*, Dkt. #48, ¶ 35 ("The stated purpose of the 1987 Assessment Work Request was to confirm and corroborate the mineral bearing xenolith on the 'Glory Hole' (Claims 2, 3, and 4) and to remove caved material from the Ella Portal in Claim 1.").

The Forest Service disallowed the surface-disturbing proposals as inconsistent with the Wilderness Act, and allowed only the mapping and sampling proposals on Claim #2. *See* FS027695. AIMMCO responded by filing the *AIMMCO v. USDA* lawsuit in 1988.[3] *Id.* In the

[3] The lawsuit was first filed as *American Independence Mines and Minerals Company v. Lyng, et al.,* Civ. No. 88-1250 (D. Idaho Jul. 21, 1988). The litigation was stayed while the validity determination proceeded. *See* FS027695. AIMMCO filed a motion to reactivate the

meantime, the Interior Board of Land Appeals (IBLA) found Claims #1 and #2 to be invalid. *See* FS027695–97. On Golden Hand Claim #1, the IBLA ruled that there was no present exposure, because the Ella Portal had collapsed. *See* FS027696. On Golden Hand Claim #2, the IBLA assumed there was an exposure, but ruled that AIMMCO failed to satisfy the marketability test necessary to prove claim validity, relying on the lack of samples submitted by AIMMCO. *See* FS027696–97.

In *AIMMCO v. USDA*, this Court reversed the ruling for Claim #1, holding that IBLA improperly required a "present" exposure and ignored evidence of a prior mineral exposure. FS027700. The Court also reversed the IBLA ruling for Claim #2, holding that AIMMCO's failure to submit samples was due to the Forest Service's rejection of the 1987 Assessment Work Request. FS027701. The Court then reversed the Forest Service's denial of AIMMCO's 1987 Assessment Work Request. FS027701–04.

Based on the 1872 Mining Act, this Court held that, "AIMMCO must be allowed a fair opportunity to prove the validity of its claims." FS027702. But it further directed: "At the same time, the Forest Service is authorized to require AIMMCO to adhere to all rules and regulations governing the Payette National Forest and the Frank Church Wilderness." *Id.* The Court observed:

> It does not appear that either party has attempted to strike this balance. For its part, the Forest Service denied AIMMCO's request without citing any specific rules, and without investigating mitigation measures. For its part, AIMMCO insisted on using various earth-moving machines, claiming that because it used these machines before withdrawal, it had the right to use them after withdrawal.

FS027703.

---

lawsuit, and this Court agreed, ordering that the lawsuit be given a new number, Civil No. 00-291-S-BLW. *See* FS027698.

The Court proceeded to explain that the right "balance cannot be struck in this case by a Court-imposed result. It can only be reached by the parties themselves, guided by the directions contained in this decision." *Id.* The Court then gave the following direction:

> To reach that balance, both sides must give way. 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. The Forest Service must recognize AIMMCO's right to prepare for the validity hearing, and allow work to that end, while requiring adherence to all applicable rules and regulations.

Id. (emphases added).

Finding that "the Forest Service has not applied this balanced perspective," the Court reversed the agency's partial denial of AIMMCO's 1987 Assessment Work Request, and remanded "to the Forest Service with directions to work out a solution with AIMMCO pursuant to the direction given above." *Id.*

AIMMCO's Expanded Proposal; Forest Service Initial Pushback And Later Acquiescence.

Instead of following this Court's instructions to begin with the 1987 Assessment Work Request and work with the Forest Service to scale back, reduce, and modify that proposal, AIMMCO submitted a far different and expanded proposal to the Forest Service on September 4, 2007. *See* SOF ¶ 10. In 1987, AIMMCO proposed to do some drilling and trenching on Claim #2 all targeting the Glory Hole, and only to reopen the Ella Portal using hand tools on Claim #1. SOF ¶ 8. But in 2007, AIMMCO proposed motorized drilling and trenching on both Claims #1 and #2, plus additional drilling outside of either Claim, and was no longer targeting the Glory Hole on Claim #2. SOF ¶¶ 8, 10.

The Forest Service pushed back against AIMMCO's new and expanded proposal. By letter dated September 23, 2008, District Ranger Joe Harper notified AIMMCO that the Forest Service concluded AIMMCO "proposes activities that are beyond the scope of the 1987

Assessment Work Request, beyond the court's ruling on claims 1 and 2, and do not conform to the court's direction that both parties give way and strike a balance between their respective interests." FS033013. District Ranger Harper added that each proposal AIMMCO has made since 1987 for Claims #1, #2, #3, and #4 "carried an ever increasing scope of work making it difficult to determine what AIMMCO believes is minimally necessary to validate historic physical mineral exposures." *Id.*

In a followup later to AIMMCO dated January 27, 2009, District Ranger Harper reiterated the Forest Service's position that to comply with the Court's 2002 Decision the parties must start with the 1987 proposal:

> We agree that Judge Winmill did not order that a specific work plan be followed. However, the only work plan before the court and before the Forest Service that had been proposed to "confirm and corroborate pre-existing exposures of a valuable mineral deposit" was the 1987 assessment work request submitted in a letter from your counsel, David Lombardi. Mr. Lombardi made it clear that the work proposed in that letter, if permitted prior to the mineral examination, would have satisfied the company's needs for information that would verify the discovery of a valuable mineral deposit. Given that assertion, the only point in my last two letters is that the 1987 request is the logical starting point for discussions.

FS034481.

Despite this initial position, the Forest Service ultimately caved to AIMMCO's demands and proceeded to prepare the EIS and issue the ROD approving a slightly modified version of AIMMCO's new and expanded proposal. *See* SOF ¶¶ 14, 16.

Notably, even though the Forest Service acknowledged in the ROD and EIS that approval of the Project is to be guided by the Court's 2002 Decision in *AIMMCO v. USDA*, both the ROD and the EIS failed to even mention the Court's specific instructions to "reduce" and "focus" AIMMCO's operations, and never disclosed what AIMMCO proposed in 1987. SOF ¶ 18. Nevertheless, both documents asserted that the new and expanded Project complies with the

Court's 2002 Decision and is the minimum operations necessary. FS081960; FS080423, FS080470.

New And Expanded Surface Disturbing Activities, And Excessive Motorized Activity.

On Claim #1, AIMMCO previously proposed in 1987 only to reopen the Ella Portal for sampling using hand tools. SOF ¶ 8. Now on Claim #1, the Forest Service has authorized AIMMCO to use a motorized excavator to reopen the Portal for sampling, to construct 7 drill pads (and associated support facilities) to drill far below the surface; and to excavate pit trenches to collect rock chips from below the surface at various locations on Claim #1. SOF ¶ 19.

On Claim #2, AIMMCO proposed in 1987 to conduct drilling and trenching targeting the "Glory Hole" exposure found on Claims #3 and #4 across the southern boundary of Claim #2. SOF ¶ 8. As now approved, AIMMCO will construct 3 drill pads and excavate trenches all toward the northern portion of Claim #2 and away from the Glory Hole. SOF ¶ 20.

Additionally, the ROD authorized AIMMCO to construct an off-claim drill pad located in the Wilderness, but on neither Claim #1 nor #2. SOF ¶ 8. This drill pad was not proposed in 1987. *See id.* The off-claim drill pad is located on what was previously known as Claim #5, which the IBLA determined to be an invalid mining claim. SOF ¶ 21. Based on the information in the EIS, it does not appear that AIMMCO ever appealed the determination that Claim #5 is invalid. *See* FS080463–64.

The Forest Service also authorized AIMMCO to reconstruct and maintain 4 miles of road (which is currently trail) in the Wilderness so AIMMCO can access each drill pad, trench pit, and the Ella Portal, causing further surface disturbance. SOF ¶ 22.

To carry out these surface disturbing activities, AIMMCO will create a flurry of motorized activity in the Wilderness. AIMMCO will use a bulldozer, loader, jackhammer, and

drill rig, among other motorized equipment, to clear drill pads, construct 4,000-gallon mud pits, rebuild roads, excavate trenches, and obtain core and rock chip samples. SOF ¶ 23–25. AIMMCO will also use large pickup trucks to drive 3 miles into the Wilderness and 3 miles back out to transport workers and supplies to the Claims. SOF ¶ 26. On average, AIMMCO will make 5 to 6 daily motor vehicle trips during the 100-day operating season each year. *Id.*

The ROD authorized AIMMCO to immediately begin to develop a Final Plan of Operations so it can start its surface-disturbing activities as soon as weather conditions permit, which is usually in July of each year. *See* FS081971; FS080454.[4]

ARGUMENT

I. The Forest Service Violated the Wilderness Act, NFMA, and the Organic Act by Authorizing Excessive Surface Disturbance in Wilderness.

Directly contravening this Court's order in *AIMMCO v. USDA*—to allow AIMMCO access to Golden Hand Claims #1 and #2 but to "reduce" and "focus" the mining operations it proposed in 1987—the Forest Service has approved a substantially expanded proposal. AIMMCO's extensive road building, drilling, trenching, and associated motorized operations will result in substantially more surface disturbance and negative impacts to wilderness character and forest resources than would the mining company's 1987 proposal. Nevertheless, the Forest Service signed off on the Project, without even acknowledging this Court's instructions.

A. AIMMCO Has Only Limited Rights To Access Claims #1 And #2.

Congress passed the Wilderness Act in 1964 to set aside federal lands as wilderness areas, where "wilderness" is defined "in contrast to those areas where man and his own works

[4] Plaintiffs have tried to expedite this case to get resolution on the merits before July of 2016. Plaintiffs also have had, and intend to continue having, discussions with the Forest Service and AIMMCO aimed at preventing surface-disturbing activities from moving forward prior to resolution on the merits. However, Plaintiffs reserve the right to seek an injunction if necessary.

dominate the landscape . . . as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain." 16 U.S.C. § 1131(c).

Under the Wilderness Act, the Frank Church Wilderness was withdrawn from mineral entry on January 1, 1984, "[s]ubject to valid rights then existing." *See id.* § 1133(d)(3). Federal mining and public land laws, such as the 1872 Mining Law, 30 U.S.C. §§ 21–42, and the Wilderness Act, 16 U.S.C. § 1131 *et seq.*, do not allow mining claimants within withdrawn lands to search for new exposures of mineral deposits. Instead, as held by this Court, AIMMCO is limited to work "to confirm and corroborate preexisting exposures of a valuable mineral deposit." FS027700 (Mem. Decision, *AIMMCO v. USDA*) (emphasis added).

In line with the Wilderness Act and this Court's 2002 order, the governing Management Plan for the Frank Church Wilderness includes a binding standard, Standard XIII.E.1, which provides: "Reasonable access is allowed to valid mineral claims established before December 31, 1983. Such access is only for essential and exclusive use for the valid mining operations." FS003374 (FC-RONR Wilderness Management Plan) (emphases added). Under the National Forest Management Act (NFMA), projects approved by the Forest Service must be consistent with standards in the governing land management plan. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.15(b).

Thus, under the Wilderness Act, NFMA, and the Court's 2002 Decision, any mineral operations on Golden Hand Claims #1 and #2 must target only preexisting mineral exposures AIMMCO had already uncovered prior to January 1, 1984, and must be limited to only operations that are necessary and essential to confirm and corroborate those exposures.

Additionally, any rights AIMMCO may have to access Claims #1 and #2 are further conditioned by environmental protections in mining and public land laws. This includes the

Wilderness Act requirement that the Forest Service preserve wilderness character (including natural conditions and solitude) in designated wilderness. 16 U.S.C. § 1133(b). Similarly, Organic Act regulations require the Forest Service to minimize adverse environmental impacts of mining operations, 36 C.F.R. § 228.8, and protect wilderness surface resources to be unimpaired for future use and enjoyment, *id.* at § 228.15(b). In line with these mandates, the Forest Service's wilderness management guidance instructs the agency to prioritize wilderness values over other values when making management decisions. 36 C.F.R. § 293.2(c); Forest Serv. Manual Chapter 2320.3 (FS027102–03).

In recognition of these laws and regulations, when this Court remanded the Forest Service's denial of AIMMCO's 1987 proposal on Claims #1 and #2 and ordered the Forest Service to give AIMMCO an opportunity to prepare for a validity hearing, the Court specifically directed: "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." FS027703.

B. The Forest Service Approved Excessive Surface Disturbing Activities.

Rather than reducing and focusing the 1987 proposal, AIMMCO expanded and shifted its proposal, and the Forest Service approved it. In both the ROD and the EIS, the Forest Service acknowledged that the Project was to be guided by the Court's 2002 Decision in *AIMMCO v. USDA*. SOF ¶ 18. However, in both the ROD and EIS, the Forest Service failed to even mention this Court's specific instructions to "reduce the scope of its surface disturbing proposals" and "focus only on work that is necessary to support validity" of preexisting mineral exposures AIMMCO discovered prior to January 1, 1984. *Id.* And in both the ROD and EIS, the

Forest Service failed to offer any explanation how the approved Project complies with these instructions—which it does not.

1. Substantially Increasing Disturbance On Claim #1 Without Explanation.

On Golden Hand Claim #1, AIMMCO previously proposed to do nothing more than reopen the Ella Portal (the entry to a collapsed mine adit) using hand tools, which would cause very minimal surface disturbance. *See* SOF ¶ 8. But now, in addition to reopening the Ella Portal, the Forest Service authorized AIMMCO to build 7 drill pads to conduct motorized core drilling and use a bulldozer to excavate trench pits on Claim #1 outside of the Portal, causing significant surface disturbance. SOF ¶¶ 19, 24, 25. Additionally, the Forest Service has authorized AIMMCO to reconstruct and maintain roads and stream fords to access the drill pads and trenches with motorized equipment, causing even further surface disturbance on Claim #1. SOF ¶ 22. *See also* FS081976 (map depicting approved operations).

This is a substantial increase in the amount of surface disturbing activities compared to what AIMMCO proposed on Claim #1 in 1987. Each of these mineral activities beyond reopening the Ella Portal (as well as the associated road building for each activity) violate the Court's 2002 Decision directing the Forest Service to "reduce" the extent of surface-disturbing activities.

Furthermore, the Forest Service failed to provide any explanation why drilling and trenching on Claim #1 is now "essential" or "necessary" to valid rights, as required by the Court's 2002 Decision, the Wilderness Act, and related laws and regulations set forth above. Previously, in 1987 and up through the Court's 2002 Decision, all AIMMCO sought to do to prove the validity of Claim #1 was to reopen the Ella Portal. Now the Forest Service is allowing AIMMCO to drill and trench, and rebuild roads to access the drill and trench sites, on Claim #1

without indicating in the ROD or EIS how each drill pad and each trench relates to any preexisting mineral exposure uncovered by AIMMCO before the 1984 deadline, and without explaining how each drill site and trench pit is now somehow essential, when none of these surface-disturbing activities were essential before.

Thus, the Forest Service's approval of AIMMCO's plan to construct drill pads, dig trench pits, and rebuild associated roads on Golden Hand Claim #1 is arbitrary and capricious and violates this Court's 2002 Decision, the Wilderness Act, NFMA, and related laws and regulations set forth above. The Court should enter summary judgment for Plaintiffs on these grounds.

2. New Surface Disturbing Activities On Claim #2 Without Explanation.

Unlike on Claim #1, AIMMCO did propose in 1987 to do some drilling and trenching on Claim #2. SOF ¶ 8. It is unclear from the 1987 proposal how much drilling and trenching AIMMCO proposed on Claim #2, or precisely where that drilling and trenching was to occur; however, the Claim #2 drilling and trenching proposed in 1987 was intended to target the Glory Hole exposure. *See* SOF ¶ 8. The Glory Hole is found on Claims #3 and #4 across the southern boundary of Claim #2. SOF ¶ 20.

But now, the Forest Service authorized AIMMCO to construct drill pads and dig trenches on the opposite side of the claim—including at the far northern boundary. SOF ¶ 20. None of the drilling or trenching approved now will occur near the southern boundary. *Id.* By shifting its focus on Claim #2 away from the Glory Hole, AIMMCO will cause substantial surface disturbance and other wilderness degradation by clearing drilling pads, digging trenches, and reconstructing roads outside of the locations AIMMCO previously proposed to drill and trench on Claim #2. *See id.*; SOF ¶ 22; FS081976 (map depicting approved operations).

As with Claim #1, the Forest Service failed to provide any explanation how each drill pad and trench on Claim #2 is now "essential" or "necessary" to valid rights, as required by the Court's 2002 Decision, the Wilderness Act, and other related laws and regulations set forth above. Even though AIMMCO is now targeting a different area on Claim #2, nowhere in the ROD or EIS does the Forest Service address how each drill pad and trench pit targets a previously uncovered mineral exposure. Further, the ROD and EIS fail to explain why any of these new drill pads and trenches are now essential when previously (in 1987 and through the Court's 2002 decision) all AIMMCO proposed to prepare for a validity determination on Claim #2 was to target the Glory Hole on the opposite side of the Claim.

The Forest Service's decision to allow AIMMCO to construct drill pads, trench pits, and associated road on Golden Hand Claim #2 is, therefore, arbitrary and capricious and violates this Court's 2002 Decision, the Wilderness Act, NFMA, and related laws and regulations set forth above, requiring reversal by this Court.

3. Allowing An Off-Claim Wilderness Drill Pad, On Neither Claim #1 Nor #2.

The Forest Service is also allowing AIMMCO to construct and operate a drill pad (depicted as drill site #3 on maps in the ROD and EIS) and associated facilities (including a mud pit) in the Wilderness outside the boundary of either Claim #1 or #2. SOF ¶ 21. *See also* FS081976 (map depicting operations). This drill pad and related infrastructure would be located on what was previously known as Claim #5, which has been ruled to be an invalid claim. *Id.* This drill pad was not proposed in the 1987 Assessment Work Request. *Id.*

According to the Forest Service, allowing the off-claim drill pad avoids the need to build additional roads elsewhere. FS081958. This arguably may be true; however, the Forest

Service's approval of this drill pad suffers from the same defects as its approval of the drill pads and trench pits on Claims #1 and #2.

The off-claim drill pad was not proposed in 1987 and represents an increase in the amount of surface disturbance compared to what AIMMCO proposed back then. Additionally, nowhere in the ROD or EIS did the Forest Service demonstrate that this drill pad targets a previously uncovered exposure. And even if it does, nowhere in the ROD or EIS did the Forest Service explain how this drill pad is now essential or necessary when previously no drilling was necessary near drill site #3 for AIMMCO to prepare for a validity determination on Claims #1 and #2. The Forest Service's approval of this drill pad is arbitrary and capricious, and should be set aside for these reasons.

Furthermore, even if the off-claim drill pad does target some preexisting exposure and is now somehow necessary to prove validity, AIMMCO has no right to conduct new mining activities outside the boundaries of its pre-withdrawal claims.

> [T]he national forest land in which the mining claims are located was at one time open to the public for exploration, prospecting, and the extraction of minerals; however, the land was subsequently withdrawn from mineral entry under the Wilderness Act . . . so that only persons establishing that they discovered a valuable mineral deposit prior to the withdrawal possess a valid right to mine claims there (a 'valid claim').

Clouser v. Espy, 42 F.3d 1522, 1524–25 (9th Cir. 1994) (emphasis added). In other words, because unclaimed lands cannot possibly be covered by a valid claim, they are no longer "subject to the statutory rights enumerated in the General Mining Law." *Kosanke v. Dep't of Interior*, 144 F.3d 873, 874 (D.C. Cir. 1998).

Under the Mining Law, the discovery of a valuable mineral deposit must occur "within the limits of the claim located." 30 U.S.C. § 23. "To make the claim valid, or to invest the locator with a right to the possession, it was essential that the land be mineral in character and

that there be an adequate mineral discovery within the limits of the claim as located." *Cameron v. U.S.*, 252 U.S. 450, 456 (1920). "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 Mining & Milling Co. v. Hemanes*, 430 F. Supp. 429, 443 (D. Nev. 1977) *affirmed* 605 F.2d 562 (9th Cir. 1979).

AIMMCO does not have rights to unclaimed land after the land was withdrawn (i.e., closed to mineral entry) in 1984. The fact that its nearby claims may be valid, even if eventually found to be true, does not grant AIMMCO rights to enter lands for drilling that have been withdrawn. "[T]he validity of a claim has always been determined by an inquiry into that particular claim, not by an examination of the individual's other claims." *Baker v. U.S.*, 613 F.2d 224, 229 (9th Cir. 1980). Thus, AIMMCO does not have a "right to possession" on unclaimed lands within a withdrawn area. *Cameron*, 252 U.S. at 456.

The Wilderness Act does create a narrow exception which allows for an activity, "including prospecting, for the purpose of gathering information about mineral or other resources" on withdrawn wilderness lands "if such activity is carried on in a manner compatible with the preservation of the wilderness environment." 16 U.S.C. § 1133(d)(2). It is questionable, however, whether such allowance for "prospecting" was intended to extend beyond the January 1, 1984 deadline for the establishment of valid mining claims (i.e., the discovery of valuable mineral deposits) within Wilderness areas. 16 U.S.C. § 1133(d)(3). In any event, AIMMCO's plan for the off-claim drill pad and waste sump is not "compatible with the preservation of the wilderness environment."

When it designated the Frank Church Wilderness (PL 96-312, 94 Stat 948, 96th Cong. (1980)), Congress declared, these "wildlands in central Idaho lying within the watershed of the

Salmon River—the famous 'River of No Return'—, constitute the largest block of primitive and undeveloped land in the conterminous United States and are of immense national significance." *Id.* § 2(a)(1). Congress further declared, "these wildlands" should be designated wilderness "to provide statutory protection for the lands and waters and the wilderness-dependent wildlife and the resident and anadromous fish which thrive within this undisturbed ecosystem." *Id.* § 2(a)(2).

Contrary to preserving this wilderness environment, AIMMCO will use motorized earth-moving equipment to clear land and construct the off-claim drill pad and a 4,000-gallon mud waste pit; will operate a motorized drill rig 24/7; and will drive large pickup trucks to and from the drill pad multiple times a day. *See* SOF ¶¶ 23–26. As the Forest Service concluded in the ROD: "The actual use and knowledge of these activities will adversely impact the Wilderness character by compromising the natural integrity and untrammeled conditions of the [Frank Church] Wilderness." FS081960 (emphasis added).[5]

For these reasons, this Court should reverse the Forest Service's approval of AIMMCO's off-claim drill pad.

4. Other Documents In The Administrative Record Confirm These Flaws.

The Forest Service's initial response to AIMMCO's expanded proposal is telling. *See* SOF ¶¶ 11–13. When AIMMCO first proposed the new and expanded plan in 2007, District Ranger Harper responded by letter notifying AIMMCO that the Forest Service had reviewed the Court's 2002 Decision and files dating back to AIMMCO's 1987 proposal to "conclude that

[5] In the Central Idaho Wilderness Act of 1980 (P.L. 96-312, 94 Stat. 948, 96th Cong. (1980)), Congress created a specific exception for the Clear Creek Special Mining Management Zone. *Id.* § 5(d)(1). Under that exception, notwithstanding the provisions of the Wilderness Act (including closing wilderness areas after December 31, 1983), prospecting, exploration, and mining in the Special Mining Management Zone "shall be considered a dominant sue of such land and shall be subject to such laws and regulations as are generally applicable to National Forest System lands not designated as wilderness or other special management areas." *Id.* Congress did not include any similar exception applicable to the Golden Hand Claims.

AIMMCO's 2007 PoO proposes activities that are beyond the scope of the 1987 Assessment Work Request, beyond the court's ruling on claims 1 and 2, and do not conform to the court's direction that both parties give way and strike a balance between their respective interests." FS033013.

In a followup letter, District Ranger Harper reiterated the Forest Service's position that AIMMCO's "1987 request is the logical starting point for discussions" and that AIMMCO's counsel had "made it clear that the work proposed in that letter . . . would have satisfied the company's needs for information that would verify the discovery of a valuable mineral deposit." FS034481.

In a later letter, District Ranger Harper explained that the Forest Service still did not have enough information to proceed "largely because we are not sure we can identify the preexisiting exposures AIMMCO intends to confirm and corroborate on both claims, and how the proposed drilling is tied to these exposures." FS006548. In this letter, District Ranger Harper provided a list of questions. SOF ¶13. AIMMCO's response letter provided some information allegedly connecting each of AIMMCO's drilling proposals to alleged preexisting exposures on Claims #1 and #2. *Id.* However, AIMMCO's response did not address whether the new plan reduces the amount of surface disturbance compared to the 1987 proposal; nor did it explain why the extensive new operations not previously proposed in 1987—even if they do relate to some preexisting mineral exposure—are now somehow necessary to prepare for a validity determination when they were not necessary before.

Nevertheless, the Forest Service abandoned its initial position and proceeded to prepare the EIS for AIMMCO's new and expanded proposal. SOF ¶ 14. And in 2014, the Forest Service prepared a two-page Surface Use Determination which concluded—after only 3 paragraphs of

analysis—that AIMMCO's new proposal complies with the Court's 2002 Decision and is the next logical and sequential step in the development of AIMMCO's mineral resources. SOF ¶ 15.

By contrast, the Forest Service prepared a thirty-page Surface Use Analysis in 2003 scrutinizing AIMMCO's proposal to conduct similar operations (including drilling and trenching) on Golden Hand Claims #3 and #4. FS016362–6408. There, the Forest Service specifically evaluated whether different elements of AIMMCO's proposal were necessary and logical next steps. FS016370–79. For example, the Forest Service analyzed the necessity of each proposed drill site on Claims #3 and #4. FS016376. The Forest Service determined that only one of AIMMCO's proposed drill sites was located within an area of inferred mineralization and concluded: "AIMM's proposal to drill other holes nearly 700 feet away from the Glory Hole and outside the geologic structure cannot be construed as anything other than rank exploration until drilling at intervening sites demonstrates continuity of the deposit." *Id.* The Forest Service also concluded that the information available was insufficient to show that AIMMCO's proposed trenching on Claims #3 and #4 was necessary, and that the trenching appeared to be "well beyond the indicated and inferred reserves and outside the geologic structure." *Id.* There is no similar level of analysis in the two-page Surface Use Determination the Forest Service prepared for Claims #1 and #2. *See* SOF ¶ 15.

In sum, the Forest Service has authorized AIMMCO to embark on substantially different and expanded mineral operations in the Wilderness from what AIMMCO initially proposed in 1987 without explanation. The Forest Service's decision is arbitrary and capricious, fails to comply with this Court's 2002 order, and violates the agency's duties under the Wilderness Act, NFMA, the Organic Act, and regulations and guidance adopted under these laws. These mandates limit mineral confirmation activities to only essential activities targeting mineral

deposits uncovered prior to 1984, and further require the preservation of wilderness character and the environment and the prioritization of wilderness over other values. *See* Supra I.A.

II. The Forest Service Violated The Wilderness Act, NFMA, And The Organic Act By Authorizing Unnecessary Motor Vehicle Trips And Other Motorized Activities.

Not only does the Golden Hand Project increase the footprint of surface disturbance in the Frank Church Wilderness over what AIMMCO proposed in 1987, but to carry out the Project, AIMMCO would create a flurry of motorized industrial activity over the next three years that will further degrade the Wilderness far beyond what the company previously proposed. Specifically, the Forest Service authorized AIMMCO to make 571 motor vehicle trips into the wilderness each year (1,713 total motorized trips), and to use a bulldozer, jackhammer, loader, drill rig, and other heavy motorized machines. *See* SOF ¶¶ 23–26. The Forest Service failed to restrict AIMMCO's motorized use to the minimum necessary, authorizing many motorized activities the agency admitted could instead be achieved by non-motorized means.

A. Motorized Use Must Be Minimized To That Which Is Proven Essential.

The Forest Service's duties to preserve wilderness character, to limit mining activities to those essential to valid rights, to minimize mining impacts to forest resources, and to prioritize wilderness values over all others, as discussed above at Supra I.A with regard to surface disturbing mining activities in wilderness, also apply to the use of motorized equipment and motor vehicles in wilderness. But there are further, specific requirements regarding the use of motor vehicles and other motorized equipment in wilderness.

The Wilderness Act prohibits the use of motor vehicles except as otherwise specifically provided by law or as necessary to meet the minimum requirements for the administration of wilderness. 16 U.S.C. § 1133(c). While mining is incompatible with wilderness, and while the Wilderness Act ultimately withdrew wilderness lands from entry and appropriation under the

mining laws, prospectors were given until midnight on December 31, 1983 to locate mining claims. 16 U.S.C. § 1133(d)(3). Such activities are "subject, however, to such reasonable regulations governing ingress and egress" including allowing mechanized equipment "where essential." *Id.* (emphasis added). And "where valid mining claims . . . are wholly within a designated national forest wilderness area, the Secretary of Agriculture shall, by reasonable regulations consistent with the preservation of the area as wilderness, permit ingress and egress to such surrounded areas by means which have been or are being customarily enjoyed with respect to other such areas similarly situated." *Id.* § 1134(b).

The Ninth Circuit has affirmed the Forest Service's authority to limit means of access to claims within a Wilderness—even to the point that the claim itself cannot be profitably developed. "[I]n 16 U.S.C. § 1134(b) [Congress] has empowered Agriculture to make decisions regarding a particular issue that happens to have collateral consequences for claim validity." *Clouser v. Espy*, 42 F.3d at 1529 (requiring pack mule access to claims complies with Wilderness Act and Mining Law).

Similarly, Forest Service regulations instruct the agency to ensure that operations in wilderness are conducted so as to maintain wilderness "unimpaired" for future use and enjoyment and to preserve wilderness character, and require the Forest Service to limit the use of mechanized transport and motorized equipment for mineral activities to only when it is "essential." 36 C.F.R. § 228.15(b) (emphasis added).

Likewise, the governing Wilderness Management Plan for the Frank Church includes a binding standard, Standard XIII.E.2, which provides" "Reasonable access will be located to have the least lasting impact in wilderness values. To accomplish this, the use of motorized access by ground or air to claims shall be authorized only when proven essential. Road, trail, bridge, or

aircraft landing area construction or improvements is limited to those clearly identified as essential to the operation." FS003774 (FC-RONR Wilderness Management Plan) (emphasis added).

Thus, while the Forest Service can authorize AIMMCO to perform some motorized activities in the Wilderness, those activities must be strictly limited to the minimum essential.

B. The Forest Service Approved Unnecessary Motorized Activities.

The Forest Service authorized AIMMCO to make 571 motor vehicle incursions each year (3 miles into the Wilderness and 3 miles back out) to transport workers, supplies, and equipment to Claims #1 and #2 and to the off-claim drill site. SOF ¶ 26. Each year, this will amount to an average of 5-6 trips per day during the expected 100-day drilling season. *Id.* AIMMCO will primarily use two large pickup trucks. *Id.* The majority of the 5-6 daily vehicle incursions—around 4 daily trips—will be to transport workers in the two pickup trucks twice per day for shift changes. *Id.*

In addition to the pickup truck traffic, the Forest Service authorized AIMMCO to use a variety of other vehicles and motorized equipment in the Frank Church Wilderness, including a bulldozer, an excavator, a forklift, a loader, a skid mounted core drill, and generators. SOF ¶ 23. AIMMCO will use this equipment to reconstruct over four miles of road, to construct 11 drill pads (and a 4,000-gallon mud pit at each pad), to drill 13 to 18 core holes 500 to 800 feet underground, to excavate several trenches to bedrock, and to pump water from Coin Creek. SOF ¶¶ 23–25.

In approving these activities, the Forest Service failed to limit motorized activity to that which is proven essential, failed to preserve wilderness character and natural conditions, failed to prioritize wilderness values, and failed to minimize adverse environmental impacts in violation

of the Wilderness Act, the Organic Act, the NFMA, and the relevant rules, Wilderness Management Plan, and guidance established under these laws.

First, as demonstrated above at Supra I.B, the Forest Service unlawfully authorized AIMMCO to carry out excessive drilling, trenching, and associated road reconstruction on Claim #1, Claim #2, and beyond, which the Forest Service has not shown AIMMCO has a valid right to perform. The use of motor vehicles and motorized equipment to carry out any of these excessive mineral operations has not been proven essential to valid mining rights and cannot be authorized.

Second, even if AIMMCO does have a valid right to carry out all of the mineral operations approved in the ROD, the Forest Service failed to limit motor vehicle traffic and the use of motorized equipment to only that which was proven essential. At a minimum, the Forest Service violated these requirements by authorizing hundreds of unnecessary annual motor vehicle trips to transport workers during shift changes.

Twice per day during active operations, AIMMCO would use two trucks to bring workers into and out of the wilderness during shift changes (which adds up to 4 truck trips per day). SOF ¶ 26. In the EIS, the Forest Service admitted that these motor vehicle trips are not necessary and that shift changes can instead be accomplished by non-motorized means, such as walking or riding pack animals. *See* FS080425–26. But the Forest Service decided to allow these motor vehicle trips anyway, claiming in the EIS that using non-motorized shift changes would only "slightly reduce the number of motorized incursions" and could lengthen the duration of the Project. *Id.* The Forest Service tried to further downplay the benefits of non-motorized shift changes in the EIS by asserting that walking and using stock animals would be only "marginally quieter" than driving 1940s era 6x6 pickup trucks. *Id.*

The Forest Service's decision to allow motorized shift changes is flawed for two reasons. First, the Wilderness Act, the governing Wilderness Management Plan, and the Forest Service's mining regulations limit motorized access to only that which is proven essential. 16 U.S.C. § 1133(d)(3); FS003774; 36 C.F.R. § 228.15(b). Here, the EIS admitted that shift changes can be accomplished by non-motorized means—meaning they are not essential. But the Forest Service authorized these motorized trips anyway, based on other factors and not based on whether the are essential. Therefore, the Forest Service's approval of the motorized shift changes was unlawful.

Second, even looking at the factors the Forest Service did consider when it authorized motorized shift changes, the Forest Service still got it wrong. The Forest Service concluded that there would be "no clear benefit to wilderness character" if shift changes and other miscellaneous trips were accomplished by foot and horse instead of by motor vehicle. FS080425. Based on the descriptions in the EIS, 400 of AIMMCO's 571 of annual motorized incursions into the Wilderness will be for shift changes. *See* SOF ¶ 26. This represents 70% of all motor vehicle incursions; yet the Forest Service erroneously claimed that eliminating these motorized trips would only "slightly" reduce motorized incursions. FS080425. Similarly, there is no basis for the assertion in the EIS that walking and riding stock animals is only "marginally quieter" than using large, old pickup trucks. FS080425–26. And as to Project duration, the EIS inconsistently claimed the Project will take longer if non-motorized shift changes are used, while at the same time it acknowledged that AIMMCO can use more workers and more shifts. *See id*. Thus, the Forest Service failed to provide a reasonable basis for allowing hundreds of motorized trips each year that can instead be accomplished by non-motorized means.[6]

[6] While the most flagrant failure concerns the motorized shift changes, the Forest Service also authorized other motor vehicle trips which it admitted could be accomplished by non-

Additionally, the Forest Service authorized AIMMCO to use a motorized excavator to open the Ella Portal, even though AIMMCO proposed in 1987 to use non-motorized hand tools to accomplish this same activity. SOF ¶¶ 8, 19. Using the motorized excavator is not essential, and the Forest Service's decision to allow AIMMCO to use a motorized excavator to clear the Portal is arbitrary and capricious.

Furthermore, it its 2002 Decision in *AIMMCO v. USDA*, the Court specifically warned that AIMMCO should not count on using the same earth-moving machines it used prior to withdrawal, stating: "It does not appear that either party has attempted to strike [a] balance. . . . For its part, AIMMCO insisted on using various earth-moving machines, claiming that because it had used these machines before withdrawal, it had the right to use them after withdrawal." FS027702–03. But now, the Forest Service authorized AIMMCO to use an array of earth-moving machines. *See* FS080453–54 (table listing motorized and mechanized equipment).

In sum, the Forest Service authorized substantial motorized activity in the Wilderness, including unnecessary motorized activity, in violation of the Wilderness Act, NFMA, and Organic Act, and the Court should enter summary judgment for Plaintiffs on these grounds.

III. The Forest Service Failed To Protect Riparian Areas In Violation Of NFMA.

"Riparian zones are among the biosphere's most complex ecological systems and also among the most important for maintaining the vitality of the landscape and its rivers." FS000453 (Payette Forest Plan, App. B). "Aquatic and riparian systems are easily affected by land management activities on the surrounding hillslopes." *Id.* Accordingly, the Forest Service established Riparian Conservation Areas (RCAs) in the Payette National Forest, which include

---

motorized means too, including trips for core sample transport and for miscellaneous supply and overhead transport. *See* FS080425

the zone to 300 feet to either side of a forested stream or 150 feet to either side of an intermittent forested stream. FS080490; FS000453–54.

Forest Service management activities that occur within RCAs are subject to specific goals, objectives, standards, and guidelines. FS000453. NFMA and its implementing regulations require agencies to ensure their actions, including authorizing mining, are consistent with the applicable Forest Plan for each national forest. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.15(b). *See also Hells Canyon Pres. Council v. Haines*, 2006 WL 2252554, *7–10 (D. Or. 2005) (finding ROD for mining operations violates Forest Plan and other standards).

Two standards that apply to minerals management in the Payette National Forest, "MIST08" and "MIST09", prohibit locating structures, support facilities, roads, and solid and sanitary waste facilities in RCAs unless there is "no alternative." FS000138–39. MIST08 states:

> 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 and other management activities.

FS000138. Similarly, MIST09 directs the Forest Service to "[p]rohibit solid and sanitary waste facilities in RCAs", and "if no alternative to locating mine waste (waste rock, spent ore, tailings) facilities in RCAs exists," then to take listed steps to prevent, monitor, and mitigate potential impacts. FS000139.

The Golden Hand site is dissected by Coin Creek and its tributaries and includes protected RCAs. SOF ¶ 27. *See also* FS081976 (map depicting operations and RCAs). The Forest Service authorized AIMMCO to reconstruct 0.7 miles of road in RCAs; to locate some of its latrines in RCAs; and to locate some of the trench pits (with associated waste rock piles) in RCAs. *Id.* The Ella Portal is located adjacent to an RCA, and AIMMCO is authorized to store

waste rock in lifts outside the Portal. *Id.* And while drill pads would be located at least 200 feet from stream channels, drill pads and associated support facilities (including 4,000-gallon capacity mud sumps) are not excluded from the RCA zone 200-300 feet from streams. *Id.*

Neither the ROD nor the EIS evaluated whether there are alternatives to these RCA incursions, in violation of MIST08 and MIST09. The Minerals and Geology Technical Report in the Administrative Record did review Project compliance with some Forest Plan minerals standards, and stated that approved road construction and drill sites in RCAs comply with MIST08 because of mitigation measures that will be employed. FS016692. But the Report failed to evaluate in the first place whether there are alternatives to locating the roads and drill pads in RCAs, in violation of MIST08. The Report failed to even consider MIST09. And the report failed to evaluate whether other RCA incursions (latrines, trench pits, and waste rock piles from the trench pits and from the Ella Portal) comply with MIST08 and MIST09. FS016691–93.

For example, in a recent case interpreting essentially the same requirement in a different national forest, the federal court held that waste pits (or sumps) associated with mineral drilling were "support facilities" that could not be located in the protected riparian area, absent an express analysis that no other alternative to locating the facilities in the riparian area existed. *Gifford Pinchot Task Force v. Perez*, 2014 WL 3019165, *16–21 (D.Or. 2014) (location of sumps in riparian area violated the Forest Plan and thus the NFMA). Similarly here, the Forest Service failed to expressly analyze whether there were alternatives to approved incursions in RCAs, in violation of the Forest Plan and NFMA.[7]

[7] It is unclear from the ROD and EIS precisely which drill pads (and associated mud pits), trench pits (and associated waste rock piles), and other facilities and structures are approved in RCAs. This lack of clarity further shows the Forest Service's failure to comply these standards. Nowhere in the EIS or ROD did the Forest Service clearly identify the incursions AIMMCO is

IV. The Forest Service's EIS Is Inadequate In Violation of NEPA.

The Forest Service violated NEPA, 42 U.S.C. § 4321 *et seq.*, and its implementing regulations, because the EIS failed to take the required "hard look" at the Project, its impacts, and alternatives, and are based upon misstatements, errors, and omissions which render the EIS grossly deficient under NEPA.

A. Failure To Disclose And Consider Important Information.

"NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 CFR § 1500.1(b). This review must be supported by detailed data and analysis—unsupported conclusions violate NEPA. *See Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998); *Northern Plains v. Surf. Transp. Brd.*, 668 F.3d 1067, 1075 (9th Cir. 2011).

The Forest Service concluded that the Golden Hand Project complies this Court's 2002 Decision and the Wilderness Act. FS081960 (ROD) ("My decision will impact the Wilderness character in the area . . . but has been determined to be the minimum necessary for the administration of the area considering the outstanding legal rights in the project area and the 2002 Court decisiion."). However, the ROD and EIS misleadingly omit critical information which should have been disclosed to the public and which is necessary to support these determinations, in violation of NEPA.

For example, the Forest Service failed to disclose the specific direction the Court provided in its 2002 Decision. SOF ¶ 18. Each time the ROD and EIS mentioned the Court's 2002 decision, the documents omitted the Court's specific direction to "reduce" surface

---

permitted to make in RCAs, let alone perform the necessary alternatives analysis before allowing each RCA incursion.

disturbing activities from what AIMMCO proposed in 1987 and to "focus" only on activities necessary to prove validity of preexisitng exposures. *Id.* The Forest Service also failed to disclose the details of AIMMCO's 1987 proposal in the ROD or EIS. *Id.* Due to these omissions, the ROD and EIS misleadingly suggested that AIMMCO was seeking approval for the same activities it had proposed in 1987 and that the Forest Service was required by the Court's 2002 Decision to approve those activities.

The Forest Service also violated NEPA by failing to take a hard look at the Project and whether it complies with the Court's specific instructions. *See* SOF ¶ 18. Nowhere in the ROD or EIS did the Forest Service disclose or consider the locations and amount of surface disturbance AIMMCO proposed in 1987, and nowhere did the Forest Service compare that to the surface disturbance now approved under the Project. This information is necessary to determine whether the approved Project reduces the amount of surface disturbance as specifically directed by the Court's 2002 Decision, and as required to protect and preserve wilderness character and the environment under the Wilderness Act, and other public land laws and regulations.

Similarly, nowhere in the ROD or EIS did the Forest Service disclose or consider the existence and location of preexisting exposures uncovered by AIMMCO prior to the Wilderness Act deadline of January 1, 1984. And nowhere did the Forest Service indicate whether and how each drill pad and trench pit is focused on a preexisting exposure, or whether and how each pad and trench is somehow necessary to proving validity of these preexisting exposures. This information is essential to evaluating whether AIMMCO's operations are focused only on activities needed to prove validity of preexisting exposures, as required by the Court's 2002 Decision, the Wilderness Act, and other public land laws and regulations.

B. Failure To Consider A Reasonable Range Of Alternatives.

The consideration of alternatives is the "heart" of an EIS. 40 C.F.R. § 1502.14. 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); *see also* 40 C.F.R. § 1508.9(b). The agency must "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a). An agency's failure to examine a reasonable alternative renders an EIS inadequate. *Alaska Survival v. Surface Tranp. Bd.*, 705 F.3d 1073, 1087 (9th Cir. 2013).

Alternatives are to be derived from the EIS's "purpose and need" section, which defines "the underlying purpose and need to which an agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13; *City of Carmel-by-the-Sea v. U.S. Dep't of Tranp.*, 123 F.3d 142, 1155 (9th Cir. 1997). Here, the stated purpose and need was to comply with legal requirements to respond to AIMMCO's proposal and "to minimize adverse environmental impacts." FS081958. The Forest Service violated NEPA's alternatives requirement by failing to consider viable alternatives which would have allowed AIMMCO to prepare for validity while substantially reducing the significant adverse impacts of the Project on wilderness character, forest resources, and RCAs. Instead, the Forest Service considered only 2 alternatives (in addition to a no action alternative), both of which authorized AIMMCO's new and expanded drilling, trenching, and associated road reconstruction. SOF ¶ 29–30.

The Wilderness Act and agency guidance direct the Forest Service to protect wilderness character and to give wilderness values priority over other values. 16 U.S.C. § 1133(b); 36 C.F.R. § 293.2(c). Yet the Forest Service admitted that for the 2 action alternatives considered in the EIS, "[t]here is really no pragmatic or substantially identifiable difference" in the effects on

wilderness character and that effects are "essentially the same." SOF ¶ 31. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.,* 177 F.3d 800, 813 (9th Cir.1999) (per curiam) (EIS violated NEPA when the two action alternatives considered in detail were "virtually identical").

At a minimum, the Forest Service should have considered AIMMCO's 1987 proposal as an alternative, as this would have involved less surface disturbing mineral activities, and less associated access, and is clearly a viable alternative since it is what AIMMCO previously proposed. But it did not, in violation of NEPA. The Forest Service also should have considered a scaled-back version of the 1987 proposal as the Court instructed in *AIMMCO v. USDA*.

The Forest Service also should have considered a reduced-motor vehicle alternative to minimize wilderness impacts to wilderness, which as already discussed at Supra II.B, the Forest Service admitted was viable but rejected without reasonable explanation.

The Forest Service also failed to adequately review alternative project operations that would avoid locating roads, structures, support facilities, and waste facilities in RCAs to comply with the Forest Plan. That was the finding in *Gifford Pinchot*, where the Forest Service failed to consider the reasonable alternative of locating drilling waste sumps/pits away from the protected riparian areas. 2014 WL 3019165 at *40 (finding a violation of both the NFMA and NEPA).

CONCLUSION

For these reasons, the Court should grant Plaintiffs' Motion for Summary Judgment, and vacate, reverse, and remand the Golden Hand EIS and ROD.

Dated this 23rd day of February, 2016

Respectfully submitted,

/s/ Bryan Hurlbutt
Bryan Hurlbutt
Roger Flynn

Attorneys for Plaintiffs