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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' COMBINED RESPONSE/REPLY BRIEF ON CROSS-MOTIONS FOR SUMMARY JUDGMENT** (*Dkt. Nos. 17, 20, 24*)

INTRODUCTION

In their summary judgment briefings (*Dkt. Nos. 21 & 22*), the Forest Service and AIMMCO adopt an "anything goes" reading of AIMMCO'S 1987 Request and seek to ignore the Court's instruction in its 2002 Decision that: "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.

In the prior litigation, AIMMCO represented to the Court: "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." AIMMCO's Statement of Undisputed Facts, *AIMMCO v. USDA*, Dkt. #48, ¶ 35 (available at FS084165). Similarly, the Court's 2002 Decision found AIMMCO's proposals were as follows: "On claim 1, AIMMCO proposed to use hand labor to clear the entry to the Ella Portal. On claim 2, AIMMCO proposed mapping, sampling, trenching, and drilling to confirm the existence of mineral-bearing xenolith." FS027695. Yet now AIMMCO—with the Forest Service's unlawful approval—seeks far more extensive work in the Wilderness than previously asserted.

As explained below, the Court should enforce its prior ruling. It should disallow AIMMCO's new trenching and drilling on Claim #1, and reverse and remand to the Forest Service with instructions that, on Claim #1, the agency may approve only reopening the Ella Portal. For Claim #2, the Court should remand and order the agency not to approve any trenching or drilling without first determining that each trench and/or drill pad is tied to a preexisting exposure of the Glory Hole deposit on Claim #2, and is necessary to support validity.

The Court should also reverse the Forest Service's decision authorizing hundreds of unnecessary motor vehicle incursions in and out of the Wilderness each operating season. There

is no dispute that motorized activity in wilderness is allowed only when proven essential, and no dispute that AIMMCO's shift changes and other miscellaneous trips can be accomplished by non-motorized means instead—and are thus nonessential. The Forest Service tries to carve out an exception to allow this flurry of non-essential vehicle trips, but the agency points to no law or regulation supporting its exception. Further the agency continues to rely on incorrect and unsupported points to downplay the benefits of cutting 70% of AIMMCO's motorized travel.

The Forest Service has also violated NEPA. The agency improperly narrowed the "purpose and need" of the project so it would have no choice but to approve all of AIMMCO's new and expanded surface disturbing activities. Further, the agency has failed to show a reasonable basis for refusing to develop any alternatives that could allow AIMMCO a fair opportunity to prepare for validity while meaningfully reducing degradation of the Wilderness.

Finally, the Court should reverse and remand for the Forest Service's failure to protect Riparian Conservation Areas (RCAs), as required by the Forest Plan. As approved, AIMMCO will construct trench pits and roads within protected RCAs, even though there are other alternatives. Further, it is unclear from the record whether AIMMCO's drill pads avoid the RCAs, and the Court should remand to the agency to clarify.

ARGUMENT

I. The Court Should Enforce The 2002 Decision And Limit AIMMCO's Surface Disturbing Activities.

A. The Project Is an Expansion Beyond the 2002 Decision and 1987 Request.

In its 2002 Decision in *AIMMCO v. USDA*, this Court overturned the Forest Service's denial of AIMMCO's 1987 Assessment Work Request, directed the Forest Service to give AIMMCO a fair opportunity to prepare for a validity hearing, and required the Forest Service and AIMMCO to strike a balance, instructing: "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.

The Court specifically found those surface disturbing proposals to be as follows: "On claim 1, AIMMCO proposed to use hand labor to clear the entry to the Ella Portal. On claim 2, AIMMCO proposed mapping, sampling, trenching, and drilling to confirm the existence of mineral-bearing xenolith." FS027695.

The Court's description is supported by AIMMCO's Statement of Undisputed Facts in that case, filed by AIMMCO's counsel—including Mr. Lombardi, who authored the 1987 Request. AIMMCO represented to the Court: "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." FS084165.

The Court's description is further supported by the 1987 Request itself. While the 1987 Request does not identify the precise location or number of trenches and drill pads, it is clear that AIMMCO's request to drill and trench only targeted the Glory Hole formation. FS031217–19. There was no request to sample, drill, or trench to target the Ella formation. *Id.* For the Ella, the request was limited to: "We propose, for assessment work on the Ella, to open the Ella Portal by hand labor. Waste rock will be placed upon the existing dump and no significant surface disturbance should result." FS031218.

Thus, based on the language of the 1987 Request, AIMMCO's representations to the Court, and the 2002 Decision, AIMMCO sought to do nothing more on Claim #1 than reopen the Ella. All drilling and trenching was to target the Glory Hole formation (not the Ella or any other alleged exposure). The Court should thus enforce its 2002 Decision and limit AIMMCO's

surface disturbing activities on Claim #1 to reopening the Ella Portal, and allow trenching and drilling (if any) on only Claim #2.[1]

B. The Court Should Reject Defendants' Unreasonable Interpretation of the 1987 Proposal and the 2002 Decision.

Disregarding AIMMCO's representations in the prior litigation, the Forest Service and AIMMCO now seek to dismiss the 1987 Request as "vague," which they use as an excuse to start over with a clean slate, unbound by it or the 2002 Decision. Under the Forest Service's and AIMMCO's reading of the 1987 Request and 2002 Decision, the company may submit a new wish-list proposal, and no matter how much drilling or trenching it proposed, it would comply with the Court's instructions so long as it was scaled back just a little bit before approval. The Court should reject this unreasonable interpretation of the 2002 Decision and 1987 Request.

In the 2002 Decision, the Court instructed the parties to reach a balance and specifically directed: "both sides must give way. AIMMCO must reduce its surface disturbing proposals." FS027703 (emphasis added). The Court did not make this statement in a vacuum, in reference to some unknown, future surface disturbing proposals AIMMCO might make. Rather, the Court issued this instruction where it overturned the Forest Service's denial of the 1987 Request. *See id.* The activities proposed in the 1987 Request, and AIMMCO's representations about it, were directly at issue before the Court and may not now be ignored.

The Forest Service takes issue with what it describes as Plaintiffs' "narrow interpretation" of the 2002 Decision—even though the Forest Service initially had the very same

[1] Specifically, drill pads 1, 2, and 4 (and nearby trenching) should be disallowed because they neither are on Claim #2 nor target the Glory Hole; rather, they are on Claim #1 and target the Ella. *See* FS081976; AIMMCO's Opening Br. at 10; AIMMCO's SOF ¶ 25. The Court should also disallow drill pads 4, 5, 6, 7, and 8 (and nearby trenching), because even though AIMMCO says they target the Glory Hole, they are located on Claim #1. *See id.* The Court should also disallow the off-claim drill pad (pad 3), because it is not on Claim #2 and may be used it to target the Ella. *See* AIMMCO's Opening Br. at 10; Fed. Defs.' Opening Br. at 17.

interpretation. In 2009, District Ranger Harper notified AIMMCO that the Forest Service had reviewed AIMMCO's new 2007 proposal, the Court's 2002 Decision, and files dating back to the 1987 Request—and concluded that 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. In a follow-up letter, District Ranger Harper emphasized the Forest Service's position that "the 1987 request is the logical starting point for discussions." FS034481 (emphasis added). This is the only reasonable interpretation of the 2002 Decision.

The Forest Service seeks to fault Plaintiffs for focusing on the Harper letters from 2008 and 2009 without giving equal attention to later correspondence. *See* Fed. Defs.' Opening Br. at 17–18. But that is precisely the point: in the 2008-09 correspondence, the Forest Service raised serious concerns with AIMMCO's new proposals, which District Ranger Harper said "carried an ever increasing scope of work making difficult to determine what AIMMCO believes is minimally necessary." *Id.* In District Ranger Harper's April 15, 2009, letter, the Forest Service explained what information would be needed to support the project:

> [T]he administrative record for any approval of a proposed plan of operations will have to document the factual information that underpins AIMMCO's proposed operations on claims 1 and 2 in the wilderness. In short, this means that the record will have to contain sufficient information to show that operations are reasonable and necessary to confirm and corroborate preexisting exposures of a valuable mineral deposit. At a minimum, the record will need to contain a map showing the preexisting exposures, a description of the exposures, and a narrative explanation of how AIMMCO's proposed work is intended to confirm and corroborate these preexisting exposures.

FS006548.

Rather than provide all of that information, AIMMCO's response on June 11, 2009, warned the agency not to "arbitrarily substitute their judgment" for AIMMCO's, and urged that the agency "not 'second guess' the geologic details of the AIMMCO plan." FS034487–90. At

this point, the Forest Service caved. As urged by AIMMCO, the agency moved forward with AIMMCO's expanded proposal without "second guessing" it, such as by examining how it related to the 1987 Request and was reasonably necessary to corroborate preexisting exposures.

It is true that the 2007 proposal—the one Ranger Harper had such serious concerns with—was later refined to eliminate two drill pads (and associated roads) on Claim #2. But merely eliminating these two drill pads is a far cry from starting with the 1987 Request and following the Court's instructions to reduce and focus it, as Ranger Harper had properly advocated. On Claim #1, no drill pads or trenches were eliminated during the negotiations between AIMMCO and the Forest Service. *See* FS006162 (map of AIMMCO's 2007 proposal, depicting the same seven drill pads and trench pits on Claim #1 as now approved).

The record thus confirms that the agency's initial response to AIMMCO's expanded plans correctly followed the 2002 Decision and 1987 Request; but under pressure, the Forest Service caved to AIMMCO's demands for new and expanded operations, contrary to the 2002 Decision. Accordingly, the Court should enforce the terms of its prior decision, and reverse and remand the Forest Service's approval of the project.

II. Even If The 1987 Request Is Not A Ceiling, The Drilling And Trenching Still Violate the 2002 Decision, Wilderness Act, And Other Laws.

Even if the Court did not intend for the 1987 Request as described in the 2002 Decision to be the starting place from which AIMMCO must "reduce" and "focus" its proposal, the Forest Service's approval of AIMMCO's expanded drilling and trenching activities still fails to comply with that Decision, the Wilderness Act, and other public land and mining laws. The Forest Service arbitrarily and capriciously signed off on each trench and drill pad without properly considering whether each is related to a preexisting exposure and is necessary to prepare for a validity hearing—which many of these activities are not, as set forth below.

A. On Claim #1, the Forest Service Should Have Approved Only Reopening the Ella Portal Using Hand Labor; No Confirmation Work Is Necessary.

Not only are the approved trenches and drill pads on Claim #1 a significant expansion beyond the 1987 Request, but they are not reasonable and necessary for AIMMCO to have a fair opportunity to prepare for a validity hearing. For Claim #1, the 2002 Decision held the IBLA used the wrong standard (the "present exposure" test) to assess whether there was the requisite pre-1983 Withdrawal exposure of a valuable mineral deposit. FS027700–01. The Court highlighted that the IBLA, in applying the wrong standard, did not consider the "40 samples, taken in 1935 from within the Ella Portal tunnel" during the validity hearing and remanded as to Claim #1 to IBLA for a rehearing on the validity of Claim #1. *Id.*

The 2002 Decision thus did not order the Forest Service to allow more work on Claim #1 to prepare for the validity hearing. It simply remanded the issue of Claim #1's validity back to the IBLA, with instructions to base its validity determination on AIMMCO's already-proffered evidence of validity—the 40 samples from 1935. *Id.* That hearing has yet to occur.

Thus, regarding Claim #1, in accordance with the 2002 Decision, AIMMCO's previous assertions of validity based on the 1935 samples, and the 1987 proposal, AIMMCO should be allowed to reopen the Ella Portal using hand tools—and nothing more.

B. On Claim #2, the Forest Service Improperly Approved Extensive New Motorized Operations Without Verification of a Pre-Withdrawal Exposure.

Unlike with Claim #1, the Court did order in its 2002 Decision that AIMMCO be allowed to complete further assessment work on Claim #2 before the new validity hearing on Claim #2. FS027695. The Court found IBLA's decision that AIMMCO failed prove the mineral on Claim #2 was marketable was:

> based heavily on the lack of samples submitted by AIMMCO from claim 2. That failure was due to the Forest Service's rejection of AIMMCO's 1987 assessment work request. Later in this decision, the Court finds that the Forest Service must

> allow AIMMCO to do some assessment work to support its position in the validity hearing.

FS027701.

However, neither the IBLA nor the 2002 Decision found AIMMCO had shown a preexisting exposure on Claim #2 (*see id.*), and the Forest Service cannot simply assume such. As the Court recognized: "A claimant must show that there was an exposure prior to that [withdrawal] date." FS027700. Lacking verification in the record that AIMMCO satisfied this burden, the Court remanded to IBLA "for a rehearing on whether AIMMCO has shown an exposure of mineral on claim 2 sometime prior to December 31, 1983." FS027701.

This conforms with the Forest Service's view of the law regarding pre-Withdrawal exposures on each claim, as expressed in a 2009 letter to AIMMCO:

> It is our understanding that any proposed surface disturbance must be for the purpose of supporting an assertion that a valuable mineral deposit was physically disclosed on claims 1 and 2 prior to the date of withdrawal for the Forest Service to approve a plan of operations to allow that surface disturbance.

FS006548. The agency noted that the pre-Withdrawal exposure connected to the proposed work on Claim #2 was actually found on "Glory Hole on claims 3 and 4." *Id*. The Forest Service, thus, asked AIMMCO in 2009 to "fully explain the connection between the company's proposed plan and the record regarding the preexisting physical exposures to be confirmed and corroborated." *Id.* "At a minimum, the record will need to contain a map showing the preexisting [pre-Withdrawal] exposures [and] a description of the exposures." *Id.*

AIMMCO's response asserted that "outcrops" on Claim #2 represent the required exposure, as an extension of the mineral deposit exposed on Claims #3 and #4: "These outcrops were sampled by Carol Thurmond and Pat O'Hara in 1987." FS034492. AIMMCO also stated:

"Since 2003 AIMMCO conducted a soil geochemical program to determine the extent of the vein system relative [to the] known outcrops." FS034491.

Yet this data obtained after 1983 cannot be used to show the requisite pre-Withdrawal exposure. As the Forest Service stated to AIMMCO: "'The date of the exposure of the source of the sample and not the date of the taking of the sample is determinative of whether or not a sample is proper evidence.' *Skaw v. U.S.*, 13 Cl.Ct. 7, 29 (Fed. Cir. 1984)." FS006548. The agency further quoted a leading IBLA case for this rule, *U.S. v. Foresyth*, 15 IBLA 43, 50 (1970):

> [W]e cannot consider the drilling, sampling, and other activities pursued on the claims after [the date of withdrawal] for any purpose other than the extent to which such geological investigations may tend to support an assertion that valuable deposits of minerals had been physically disclosed within the boundaries of each of the claims prior to that date.

FS006547–48. This Court confirmed this: "Certainly a claimant would not meet this test if he merely showed exposure as of some date after December 31, 1983." FS027700.

At best, the record shows inferred mineralization on Claim #2 resulting from AIMMCO's sampling conducted after the 1983 Withdrawal. In fact, the only exposure of the so-called "Glory Hole" mineralization is on Claims #3 and #4, with AIMMCO alleging that its post-1983 sampling shows that the mineral deposit on Claim #3 extends into Claim #2. The Forest Service asked AIMMCO: "Is your proposal intended to validate inferred extension of the Glory Hole deposit from claims 3 and 4 onto claim 2 and, if so, how?" FS006549. AIMCCO responded in the affirmative by pointing to its 1987 sampling and 2003 soil analysis as proof of the exposure on Claim #2. FS034491. AIMMCO admitted: "The preexisting exposures are the inferred extension of the mineralized structure north of the Glory Hole onto Golden Hand claim no. 2 and the mineralized and altered outcrops on the upper road of claim no. 2." FS034494. As noted

above, these "outcrops" were first sampled by AIMMCO in 1987, long after the 1983 Withdrawal precluded the use of such evidence of an exposure. FS034492.

Geologic inference from an exposure on one claim does not qualify as proof of an exposure of a valuable mineral on an adjacent claim, and does not provide any rights in a withdrawn area on the adjacent claim. The IBLA requires that "valuable deposits of minerals had been physically disclosed within the boundaries of each of the claims prior to that [withdrawal] date." *U.S. v. Foresyth*, 15 IBLA 43, 50 (1970) (quoted in Forest Service letter to AIMMCO (FS006547–48)). In another case rejecting the claimant's proposal to drill in a withdrawn area, the IBLA held that:

> We find no fault with the refusal to permit core drilling. Once land has been withdrawn from mineral entry, drilling may only be permitted where it constitutes an effort to confirm the pre-existing discovery of a valuable mineral deposit. *See United States v. Mavros*, 122 IBLA 297, 310-11 (1992). At the very least, there must be a showing that there has been an exposure of valuable minerals before permission may be granted to determine the extent thereof. *Id*. at 313. There is no evidence that the core drilling proposed by appellants would have been anything more than an effort to uncover a valuable mineral deposit.

U.S. v. Crowley, 124 IBLA 374, 378, 1992 WL 448540, **5 (IBLA 1992).

Thus, the fundamental question of whether AIMMCO had evidence showing the exposure of the valuable mineral deposit prior to the 1983 Withdrawal must first be answered before the Forest Service can approve the extensive drilling and trenching operations on Claim #2. Here, AIMMCO only proffered statements about samples and testing from 1987 and 2003 for its exposures on Claim #2. Thus, the agency's approval of the Project cannot stand.

Even if AIMMCO has a pre-Withdrawal exposure on one portion of Claim #2, that does not automatically translate into rights to conduct extensive drilling and trenching operations across Claim #2 (and further onto Claim #1 as approved). These extensive operations are more akin to exploration to find new deposits, rather than to confirm preexisting exposures. While a

claimant may conduct some limited confirmation activities of a previously exposed valuable mineral deposit within a withdrawn area, it cannot search for new exposures. *U.S. v. Parker,* 82 IBLA 344, 384, 1984 WL 51886 **22 (cited in 2002 Decision at 10) (upholding the denial of the claimant's proposal to conduct additional drilling to search for valuable minerals, while allowing the opening of a collapsed portal "in order to permit examination of workings developed prior to withdrawal.").

This highlights a key distinction between allowing limited work to verify a preexisting discovery, such as opening a blocked portal, versus allowing what is essentially an extensive exploration project to search for new mineral deposits. As the IBLA held, "if the claimant had driven an adit which exposed valuable mineral prior to withdrawal, the claimant should be allowed to reopen a caved portion of the adit to take samples of the mineral he had previously exposed." *U.S. v. Mavros*, 122 IBLA 297, 1992 WL 138469, **11. *See also Lehmann v. Salazar*, 602 F.Supp.2d 146, 64 (D.D.C. 2009) *aff'd* 377 Fed. Appx. 28 (D.C.Cir. 2010) ("While [a claimant in a withdrawn area] must be allowed to enter the contested claims to take samples of the mineral it had previously exposed or to sample a previously disclosed valuable mineral deposit, the BLM need not allow [that claimant] to seek new exposures."). Similarly, the 2002 Decision recognized that any right AIMMCO may have to perform confirmation work is limited to preexisting exposures, and the Court instructed must "focus only on work that is necessary to support validity." FS027703.

AIMMCO's extensive drilling and trenching on the northern side of Claim #2 (and extending onto Claim #1), plus the adjacent off-claim drill pad—all far from the Glory Hole on Claims #3 and #4—is akin to new exploration. The Forest Service was arbitrary and capricious

in approving the activities without showing how they are tied to preexisting exposures, and even if they are, how they are limited to that which is necessary to prepare for a validity hearing.

C. The Forest Service's Reliance on the MRDG Is Misguided; the MRDG Further Confirms the Lack of Scrutiny Applied to the Project.

Neither the ROD nor EIS ever mention the 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 exposures. Pls.' Opening Br. at 27–28. Further, neither document includes any analysis of whether each drill pad and trench on Claims #1, #2, and beyond is connected to preexisting exposure; whether each pad and trench is necessary to prepare for a validity hearing; and whether each pad and trench comports with the Court's instructions to reduce and focus AIMMCO's activities. *Id.*

The Forest Service's two-page Surface Use Determination ("SUD") for Claims #1 and #2 also fails to address these issues, and stands in stark contrast to the thirty-page SUD the Forest Service prepared for Claims #3 and #4. *See* Pls.' SOF ¶ 15; Pls.' Opening Brief at 17–18. Unlike the SUD for Claims #1 and #2, the SUD for Claims #3 and #4 scrutinized each proposed drill site and trench. *Id.*

In response, the Forest Service and AIMMCO rely heavily on the MRDG. *See* Fed. Defs.' Opening Br. at 13. But the MRDG does not address these issues. While the MRDG mentions the 2002 Decision a few times, it omits the Court's specific direction that AIMMCO must give way and reduce and focus its proposed activities, and never mentions the 1987 proposal. *See* FS017671; FS017675; FS017676; FS017681. And like the ROD, EIS, and SUD, the MRDG includes no analysis whether specific drill pads and trenches relate to preexisting exposures; whether they are necessary to support validity; and whether they comport with the specific instructions in the 2002 Decision.

The MRDG thus does not make up for the flaws in the ROD, EIS, and SUD. Rather, it suffers from the same flaws, and further confirms that the Forest Service abandoned its initial position that the 1987 Request is the logical starting point, but then caved in to AIMMCO's demand that it not "'second guess' the geologic details of the AIMMCO plan" (FS034490), and proceeded to approve AIMMCO's expanded proposal without addressing the agency's concerns that it "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.

The Court should reverse for the Forest Service's arbitrary and capricious decision to approve each trench and drill pad without scrutiny in the MRDG or elsewhere in the record.

III. The Forest Service Authorized Unnecessary Motor Vehicle Trips and Other Use of Motorized Equipment.

Under the Wilderness Act, Forest Service regulations, and the Wilderness Management Plan for the Frank Church Wilderness, the use of motor vehicles and other motorized equipment must be limited to only that which is proven essential. *See* Pls.' Opening Br. at 19–21. The Forest Service admits that shift changes and other motorized activities are not essential, but repeats the same unfounded and illogical points made in the EIS to support its decision to allow them anyway. *See* Fed. Defs.' Opening Br. at 18–19.

As described in the EIS, shift changes will account for around 400 motor vehicle trips per operating season, or 1,200 motor vehicle trips over the three-year project. *See* Pls.' SOF ¶ 26. This represents around 70% of all motor vehicle incursions into the Wilderness approved under the Project. *Id.* In the EIS, the Forest Service admits 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 1,200 non-essential motor vehicle trips because it determined that eliminating them would supposedly have more impacts to wilderness.

This decision is arbitrary and capricious, and contrary to law, for two reasons. First, the agency has not pointed to any law or regulation that carves out an exception to the requirements from the Wilderness Act (16 U.S.C. § 1133(d)(3)), Forest Service regulations (36 C.F.R. § 228.15(b)), and the Wilderness Management Plan (Standard XIII.E.2 at FS003774) that motorized activity is limited to that which is proven essential. The Court thus must reject the Forest Service's unlawful allowance of the non-essential motor vehicle trips for shift changes.

Second, the agency's approval is factually erroneous. In the EIS, the Forest Service asserted that cutting the motor vehicle trips for shift changes will only "slightly reduce the number of motorized incursions." FS080425. This is simply wrong, as shift changes account for 70% of all motor vehicle incursions. SOF ¶ 26. Cutting these 1,200 trips will reduce the wilderness impacts from motorized activity. *See* FS080477–79 (identifying adverse impacts to wilderness character from noise and dust from motor vehicles, the presence of motor vehicles, and even the knowledge that motor vehicles are driving in the Wilderness). Also, the project will not take longer, because AIMMCO can use additional worker shifts to compensate for any longer commute times. In fact, the agency found that eliminating motorized shift changes "would likely result in a three shift day." FS080425. Additionally, the Forest Service tries to downplay the benefits, asserting "[s]tock and walking are marginally quieter than motorized equipment," without any support for why walking is only marginally quieter than driving 1940s era pickups. FS080426. Thus, the agency had no reasonable basis for asserting wilderness impacts would be greater if it cut more than two-thirds of AIMMCO's motor vehicle incursions.

IV. NEPA Violations.

A. The EIS Improperly Limits the Purpose and Need of the Project.

An EIS must specify "the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. §§ 1502.10(d), 1502.3. The ROD and EIS acknowledged that the 2002 Decision, along with other laws and regulations, "define the purpose and need for the Forest Service response to [AIMMCO's] proposed plan of operations." FS081956 (ROD); FS080391 (EIS). But in the purpose and need section of both documents, the Forest Service misstated the 2002 Decision as follows:

> On August 12, 2002, the U.S. District Court in Idaho ordered the Forest Service to complete the Environmental Impact Statement (EIS) on AIMMCO's proposed operating plan for Golden Hand No. 3 and No. 4 lode mining claims. That decision was signed on May 1, 2003 and was vacated on March 14, 2011. The court also directed that in regards to Golden Hand No. 1 and No. 2 lode mining claims 'the Forest Service must recognize AIMMCO's right to prepare for (a) validity hearing, and allow work to that end, while requiring adherence to all applicable rules and regulations.

FS080392. There is no mention of the fact that the Court specifically overturned the agency's denial of the 1987 Request, no description of that prior proposal, and no reference to the Court's 2002 instructions that AIMMCO must give way and reduce and focus its surface disturbing proposals. In fact, these are not mentioned anywhere in the ROD or EIS. *See* Pls.' SOF ¶ 18.

An agency's determination of the purpose and need of a project must comport with the record. *City of Carmel-by-the-Sea v. United States Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997) ("an agency cannot define its objectives in unreasonably narrow terms"). "If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy [NEPA]." *Simmons v. United States Army Corps of Eng'rs*, 120 F.3d 664, 666 (7th Cir. 1997).

Plaintiffs continually raised their concerns that the project exceeds the 1987 Request and fails to comply with the 2002 Decision, including that work on Claim #1 should be limited to

reopening the Ella Portal. *See*, *e.g.*, FS006678–680 (2010 scoping comments); FS080282–83 (2012 comments on draft EIS); FS083831–35 (2015 objections to draft ROD). But from the outset, the Forest Service was unwilling to consider anything else. *See* FS006638–39 (dismissing Plaintiffs' scoping comments because the 2002 Decision "was not specific in what activities would be allowed").

Armed with this self-limiting purpose and need, the agency was intent on moving forward with a predetermined outcome—to approve all of AIMMCO's drilling and trenching. Thus, the fundamental issue following the 2002 Decision, about how the project should be limited, was never included in the EIS; and the content of the EIS failed to foster the informed decisionmaking and public participation required by NEPA.

B. Failure to Consider a Reasonable Range of Alternatives.

The Forest Service's decision to consider only two action alternatives was not reasonable. Degradation of wilderness character was identified by the agency as one of three significant "issues" in the EIS. FS080420. Despite the Forest Service's efforts to distinguish the *Muckleshoot* case, the agency cannot escape its own conclusions in the EIS that the two action alternatives—with identical drilling and trenching—result in "essentially the same" impact to wilderness and have "no pragmatic or substantially identifiable difference." FS080479–80. As the Ninth Circuit has held, this violates NEPA. *See Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 813 (9th Cir. 1999) (per curiam) (EIS violated NEPA where agency considered only no action alternative along with two virtually identical alternatives).

Had the Forest Service considered any alternatives that reduced AIMMCO's drilling and trenching—such as by allowing only reopening the Ella on Claim #1—then it would have at least considered an alternative that meaningfully reduces impacts to wilderness character. This is obviously a viable alternative, as it is what AIMMCO requested in 1987. But instead, the Forest

Service only considered the two action alternatives that both included the same amount of new and expanded drilling and trenching. Pls.' SOF ¶ 30.

The failure to consider a reduced motor vehicle alternative also violated NEPA. Such an alternative was clearly viable, as the agency admitted shift changes, and other vehicle trips, could instead be accomplished by non-motorized means. But the Forest Service dismissed this viable alternative based on its incorrect assertions that it would only "slightly" reduce motorized incursions and that the project would take longer, and by speculating that walking is only marginally quieter than driving 1940s era pickups. The agency should have considered this as an alternative, as it would substantially reduce AIMMCO's motor vehicle incursions (1,200 less trips, or 70% of all trips), would not require the project to take longer (by using additional shift changes), and would reduce cumulative impacts to the Wilderness.

V. NFMA Violations for Failure to Protect Riparian Conservation Areas.

As a preliminary matter, the Forest Service's and AIMMCO's reliance on the *Idaho Conservation League* case is misplaced. In that case, the mining exploration project was approved while the locations of each road segment, drill pad, and other support structures and facilities were not yet known; the locations would be determined later, as the project unfolded. *See Idaho Conservation League v. U.S. Forest Serv.*, No. 1:11-cv-341-EJL, 2012 WL 3758161 at *19–22 (D. Idaho. Aug. 29, 2012). Later, the mining company would have to propose and obtain approval from the Forest Service for each specific road and pad location, and the court found the Forest Service had "set forth a plan for approving any encroachments into an RCA that is unavoidable and the monitoring and mitigation efforts to be used." *Id.* at *22.

Here, on the other hand, the Forest Service has already approved the specific locations of AIMMCO's roads, drill pads, trench pits, and other RCA incursions at issue.

A. Trench Pits in RCAs.

The Forest Service violated NFMA and the Forest Plan by authorizing trench pits within the protected RCA, which includes the land to 300 feet of either side of Coin Creek and its tributaries. *See* FS080397 (map showing trenching areas within RCA). The Forest Service and AIMMCO admit some of the trench pits "are located within RCAs" (AIMMCO's Opening Br. at 29), but argue that they are not structures or "support facilities" subject to the requirements of Forest Plan Standard MIST08. However, the Forest Plan's definition of "facility" broadly includes "buildings, utility structures, bridges, dams, or communication systems component, or other constructed features." FS000575 (emphasis added).

AIMMCO's trench pits are "other constructed features" and, thus, support facilities triggering MIST08. AIMMCO will construct the pits, then use them to obtain rock chip samples. This is supported by the ROD, which describes AIMMCO's trench pits as follows:

> Rock chip samples will be collected from three pits excavated to bedrock (Figure 2-1). Constructed pits will occur within roadways with a dimension of approximately 6 feet wide by 15 feet long by 10 feet deep.

FS081974 (emphasis added).

Considering the constructed trench pits as "facilities" is further supported by *Gifford Pinchot Task Force v. Perez*, 2014 WL 3019165 (D.Or. 2014), where the court specifically rejected the Forest Service's argument that "support facilities" such as temporary mine excavations had to be either "permanent" or "constructed" in the classic sense. Rather, the court held that the equivalent of MIST08 applied to these facilities because they were "installed, or established to perform some particular function or to serve or facilitate some particular end." *Id*. *21. That is the case for the trench pits here, which will be dug and used for obtaining samples.

Thus, MIST08 applies to the trench pits, and the Forest Service violated this binding standard by failing to locate them outside RCAs unless no alternative exists. FS000138. There

is an alternative: the Forest Service could have approved only the trench locations that are outside of the RCA. This would eliminate only some of the trench pit areas proposed by AIMMCO (*see* FS080397); AIMMCO could still conduct extensive trenching in its proposed locations outside the RCAs, while protecting ecologically important riparian areas along Coin Creek protected by the Forest Plan. The agency never considered this alternative.

The Forest Service cannot simply accept AIMMCO's assertion that it had absolute rights under the Mining Law to locate its trenches wherever they would maximize its exploration plans. There is no "1872 Mining law exemption" from the Forest Plan and the NFMA. *See Hells Canyon Preservation Council v. Haines*, 2006 WL 2252554, *7-*10 (D. Or. 2006) (ROD for mining plan violates Forest Plan standards); *Rock Creek Alliance v. Forest Service*, 703 F.Supp.2d 1152, 1184 (D. Montana 2010) ("[T]he agency's decision [ROD approving mine] will be set aside if the Plaintiffs show that the decision violates the Forest Plan.").

B. Locating Roads in RCAs.

AIMMCO's argument that the approved 0.7 miles of road "reconstruction" within the RCA does not trigger MIST08 is wrong. While the EIS loosely describes the roadwork as the reconstruction of preexisting or unauthorized roads, the road construction will occur on what are currently classified by the Forest Service as trails, not roads. Access to the project site from the Wilderness boundary starts at the Pueblo summit "trailhead," and follows "Forest Service Trail #013" for three miles to the site and into the RCA. FS080473, FS080474 (map of trails and roads); FS080475. By converting and constructing Forest Service Trail #013 into a road, AIMMCO is "locating" new roads, triggering MIST08.

And there is an alternative to allowing all of the roads AIMMCO proposed in RCAs. The Forest Service could have disallowed converting the trail segment that leads to the Ella Portal to a road. This trail segment starts near the Golden Hand bunkhouse and cabin, and runs through

the RCA to reach the Ella. *See* FS080397 (project map). AIMMCO could still use this segment as a trail to access the Ella Portal (and reopen the Ella with hand tools); and AIMMCO could still build its other proposed road segments (even though some are in RCAs) to access the majority of its drill pads and trench areas, because most of these are not along the Ella trail segment. *See id.*

C. Drill Pads 1, 2, and 3.

The record is unclear about whether drill pads 1, 2, and 3 near the Ella Portal AIMMCO are located in the RCA. The EIS states all drill pads will be at least 200 feet away from streams (FS080500); however, the RCA extends to 300 feet (*see* FS080490). It is unclear from the map in the ROD and EIS, as drill pads 1, 2, and 3 appear to straddle the boundary of the RCA. FS080397; FS081976. And while there is a miscellaneous, one-page document in the record in which the Forest Service states "All proposed drill pads are located outside of RCAs," there is no explanation, and it is unclear whether the drill pads are at least 300 feet away from the streams, or whether this statement relied on the mistaken assumption that 200 feet was enough to keep them out of RCAs. *See* FS028845.

In such a situation, this Court should remand the issue back to the agency for resolution. That is what the court did in *Rock Creek Alliance*, 703 F.Supp.2d at 1187–88.

CONCLUSION

For these reasons, the Court should grant Plaintiffs' Motion for Summary Judgment, deny the Forest Service's and AIMMCO's Motions, and vacate, reverse, and remand the Golden Hand EIS and ROD.

Dated this 19th day of April, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of April, 2016, I filed the foregoing PLAINTIFFS' COMBINED RESPONSE/REPLY BRIEF ON CROSS MOTIONS FOR SUMMARY JUDGMENT electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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