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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

NEZ PERCE TRIBE,

Plaintiff,

v.

MIDAS GOLD CORP., MIDAS GOLD IDAHO, INC., IDAHO GOLD RESOURCES COMPANY, LLC, And STIBNITE GOLD COMPANY,

Defendants.

No. 01:19-cv-307-BLW

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO STAY LITIGATION (ECF No. 15)

INTRODUCTION

Plaintiff Nez Perce Tribe ("Tribe") brought this Clean Water Act ("CWA") enforcement case in August 2019, identifying eight different "point source" discharges at the Stibnite mine site in the headwaters of the East Fork South Fork Salmon River ("EFSF Salmon River"), for which Defendants Midas Gold Corp. and its three wholly-owned subsidiaries (jointly, "Midas Gold") have failed to obtain any CWA discharge permit(s), even though they have owned or controlled the lands and mining claims with those discharge points for the last decade. The Tribe seeks to compel Midas Gold to obtain proper CWA permit(s) for the unpermitted discharges, which continue to pollute the EFSF Salmon River and its tributaries with antimony, arsenic, and other toxics and heavy metals, but which Midas Gold has done nothing to remediate.

Midas Gold now asks the Court to stay this litigation based on speculation that it may enter into an Administrative Order on Consent ("AOC") with the U.S. Environmental Protection Agency ("EPA") to designate the eight point sources under the Superfund statute, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), for site investigation and remediation activities, at some undetermined point in the future. Midas Gold contends that CERCLA Section 113(h), 42 U.S.C § 9613(h), will divest the Court of jurisdiction once that happens—so the Court might as well stay the case now.

But Midas Gold has not fully or accurately described its plans to the Court. Rather than promptly remediating pollution at the Stibnite site, Midas Gold intends to use its proposed AOC to delay meaningful remediation action until after it has conducted new gold mining operations under its proposed Stibnite Gold Project, lasting two decades or longer. Midas Gold insists it will receive approval from the U.S. Forest Service to move forward with the decades of gold mining

that will supposedly fund cleanup under the AOC in the future—but without acknowledging the numerous uncertainties involved with such approval, or the risks and uncertainties of its proposed mining activities, which have already caused substantial delays in the permitting process. *See* Declaration of Emmit Taylor, Jr., submitted herewith (detailing history of Midas Gold's Stibnite proposal and reasons for the Tribe's opposition to it). Midas Gold also ignores the fact that such decades-long delay is wholly inconsistent with Congressional intent that Section 113(h) promote rapid cleanup of polluted sites.

In short, Midas Gold asks the Court to halt this CWA litigation based on multiple levels of speculation about things it hopes will happen in the indefinite future, but which in truth are doubtful. Meanwhile, Midas Gold plans to do nothing about its unpermitted point source discharges under the CWA, which are causing ongoing injury to water quality and the Tribe. The Tribe thus asks the Court to deny the motion to stay.

STATEMENT OF RELEVANT FACTS

The Nez Perce Tribe

Since time immemorial, the Nez Perce people—the *Nimiipuu*—have occupied a geographic area encompassing a large part of what is today Idaho, Oregon, and Washington. *See* Complaint, ECF No. 1, ¶¶ 13-20 & Map 1. The territory exclusively occupied by the Nez Perce—over 13 million acres—stretched from the Bitterroot Mountains on the east, to the Blue Mountains of northeastern Oregon and southeast Washington on the west. *Id.* The Nez Perce also traveled far beyond their exclusive homeland to fish, hunt, gather, and pasture—frequently going east to buffalo county, in what is today the state of Montana, and west along the Snake and Columbia rivers to the Pacific Ocean. *Id.*

Nez Perce Tribal citizens actively maintain their connection to the land, water, and resources of this vast geography. *See* Taylor Decl. ¶¶ 2-8 & Exh. 2. Seasonal rounds and migration patterns for cultural and subsistence uses are carefully coordinated to take full advantage of the abundant fish, wildlife, and available root crops. *Id.* These annual cycles correspond not only to the resource needs of the Nez Perce and the seasonal availability of their resources but also to the ceremonial activities and social gatherings that occur throughout the year. The Nez Perce's intimate knowledge and continuous use of their homeland over millennia has created a unique and reverential bond between people and place that defines Nez Perce culture and identity. *Id.*

In order to protect its people, culture, and way of life, the Nez Perce Tribe entered into a treaty with the United States government in 1855. *See* Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957 ("1855 Treaty"). The 1855 Treaty reserved to the Tribe, for its "exclusive use and benefit," 7.5 million acres of its more than 13-million-acre homeland, including an area spanning present-day north-central Idaho, southeast Washington, and northeast Oregon. *See* Compl. ¶ 13. The 1855 Treaty also reserved to the Tribe certain rights central to maintaining its culture and way of life, including:

> the right of taking fish at all usual and accustomed places in common with citizens of the Territory; and of erecting temporary buildings for curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

1855 Treaty, art. 3.

The Tribe's 1855 Treaty was quickly followed, however, by the discovery of gold within the Tribe's reservation boundaries in 1860, and by the rapid influx of non-Indian

miners onto the Tribe's newly established reservation. These scofflaw miners disregarded instructions to vacate the land, and the Tribe's reservation was quickly and illegally overrun. *See* Taylor Decl. Exh. 2 (Nez Perce Tribe Resolution NP 19-016). The United States government responded by negotiating a new treaty with the Tribe—one that would reduce the size of the Tribe's reservation and, thereby, it hoped, reduce conflicts between the Tribe and mining prospectors. Those negotiations culminated in another treaty in 1863, in which the Tribe ceded to the United States approximately ninety percent of the lands it had reserved in 1855, including all of the known mining lands within its 1855 Treaty reservation boundaries. *See* Treaty with the Nez Perces, June 9, 1863, 14 Stat. 647 ("1863 Treaty"). The 1863 Treaty, often referred to as the "Steal Treaty," established the modern boundaries of the Nez Perce Reservation. The 1863 Treaty also preserved the rights reserved in the 1855 Treaty for the Nez Perce Tribe to hunt, fish, gather, and pasture on open and unclaimed land off-reservation, within its homeland. *Id.* at art. 8.

History of the Stibnite Site

Beginning early in the twentieth century, miners again arrived in the Tribe's homeland to seek their fortunes—this time along the EFSF Salmon River and an area in its headwaters they would name the Stibnite Mining District, after the mineral stibnite.

Since time immemorial, the Tribe has fished, hunted, gathered, and pastured in the Stibnite area, and all along the EFSF Salmon River. *See* Compl. ¶¶ 16-22 & Map 2; Taylor Decl. ¶¶ 2-8 & Exh. 2. The Stibnite site is within the area adjudicated by the Indian Claims Commission to have been exclusively used and occupied by the Tribe, and over which the Tribe has Treaty-reserved rights and resources. Compl. ¶ 16.

Since then, miners and mining companies have come and gone from the Stibnite Mining District, extracting almost one million ounces of gold and over two million ounces of silver, along with tungsten and antimony. What they have left is a legacy of mining pits, tailings piles, and other heavily disturbed sites that continue to discharge pollutants into the headwaters of the EFSF Salmon River.

Midas Gold's Proposed Stibnite Mining Project

Midas Gold is the latest mining company to seek its fortune in the Stibnite Mining District. Although Midas Gold did not incorporate in Canada until 2011, its affiliates began acquiring mining patents in the Stibnite Mining District in 2009. Compl. ¶ 45.

Over the last decade, Midas Gold has planned and proposed the construction of a massive gold mine, the Stibnite Gold Project ("Mine") in a portion of the Stibnite Mining District. *See* Taylor Decl., ¶ 41 (describing Stibnite proposal based on Midas Gold's September 2016 "Plan of Restoration and Operations" or "PRO"). It has also simultaneously recruited investors, and branded itself as an environmentally responsible company and steward of the Stibnite Mining District, claiming publicly that it will clean up the legacy of destruction and pollution at the site.

Yet, since Midas Gold first began acquiring mining claims in the Stibnite Mining District a decade ago, it has done nothing to address the known and ongoing pollutant discharges from its claims into the EFSF Salmon River and tributaries. *See* Compl. ¶¶ 26-28, 45-48. Instead of complying with its legal obligation under the CWA to acquire National Pollutant Discharge Elimination System ("NPDES") permits for the discharges and to address the pollutant discharges, Midas Gold has spent the last decade trying to convince regulatory agencies and the public that the cleanup of pollution at the Mine site cannot and will not occur until the Mine is

permitted and generating profits. That is the same message Midas Gold is presenting to this Court. *See* Opening Br., ECF No. 15-1, at 4, 7-9.

Midas Gold's promise to "restore" the Stibnite site may be a powerful public relations ploy—but it is not accurate. In truth, Midas Gold has no plans to restore the site to anything approximating its pre-mining condition. *See* Compl. ¶ 47 & Map 3. The full details of Midas Gold's proposal continue to shift over time, but analysis of its September 2016 PRO—which Midas Gold submitted to the U.S. Forest Service to launch the National Environmental Policy Act ("NEPA") process for eventual permitting of its proposed Mine—underscores that Midas Gold's proposal will significantly expand mining disturbance and degradation at the Stibnite site and leave a legacy of environmental threats and contamination enduring into perpetuity. *See* Taylor Decl. ¶ 41 & Exh. 1 (Tribe's scoping comments on PRO).

For one thing, contrary to its suggestions to this Court and the public, Midas Gold's mining plan is not limited to re-disturbing the current Mine site. *Id.* Only 40 percent of Midas Gold's Mine will cover previously disturbed ground, while 60 percent of the Mine (or 800 acres) will cover currently undisturbed wildlife habitat. *Id.* Further, Midas Gold may expand the Mine after its initial permitting, so the Mine's footprint could expand as well.

Although Midas Gold makes a point of claiming to the Court that it will address one of the larger point source discharges identified in the Tribe's Complaint—the legacy mining pit known as the "Glory Hole" (also known as the "Yellow Pine Pit")—the company fails to advise the Court that its PRO proposes to excavate and leave two new mining pits, which will become pit lakes on the landscape in perpetuity. *See* Compl. ¶ 47 & Map 3; Taylor Decl. ¶ 41 & Exh. 1. Additionally, the PRO proposes to fill three valleys with 450 million tons of mine tailings and

waste rock, *id.*, which again will endure in perpetuity and almost certainly require wastewater treatment long after Midas Gold has finished mining the site.

On top of these long-lasting adverse impacts at the Stibnite site, Midas Gold's proposal threatens much larger ecological disruption and degradation, just so Midas Gold can profit from its proposed gold mining. Access to the remote Stibnite site is difficult even in summer, and Midas Gold has responded to heavy criticism of its earlier plan to use the EFSF Salmon River Road—a dirt road that runs through Yellow Pine—because of the high risks of adverse impacts to Endangered Species Act ("ESA") listed salmon, steelhead, and bull trout there.[1] Midas Gold's September 2016 PRO thus proposed to construct an all-season access road—the "Burntlog Road"—from Warm Lake through three Inventoried Roadless areas and along a high ridge forming the boundary of the Frank Church-River of No Return Wilderness to reach the Mine site. *See* Taylor Decl. ¶ 41(c) & Exh. 2. Midas Gold also proposes to construct an upgraded electric transmission line corridor in a different area in order to provide year-round electrical power at the site. *Id.*

As the Tribe explained in its scoping comments to the Forest Service on the PRO, these new industrial infrastructure developments pose significant ecological threats and adverse impacts to the Tribe's interests, and greatly increase the risk of landslides and other mass wasting failures into the South Fork Salmon River and other fish-bearing streams with salmon, steelhead

[1]As explained in the Taylor Declaration, the Tribe and others previously challenged Midas Gold's planned use of the EFSF Salmon River Road to access the Mine site for its exploration project, called the "Golden Meadows Exploration Project," because of the threats to endangered fish. *See* Taylor Decl. ¶¶ 21-38; *see also* Complaint, *Idaho Conservation League and Nez Perce Tribe v. U.S. Forest Service et al.*, No. 14-cv-156-EJL (D. Idaho April 22, 2014). Midas Gold thus shifted focus away from using the EFSF Salmon River Road for its mining proposal, although it is unclear whether and to what extent it may intend to use that road in the future.

and bull trout. *See* Taylor Decl. ¶ 41. Given these and many other resource and environmental conflicts and restrictions, it is doubtful that the Forest Service can lawfully approve a permit for the proposed PRO under the National Forest Management Act ("NFMA"), ESA, and other applicable laws and legal requirements.

It is also questionable whether constructing and maintaining the new road and powerline corridor are technically and economically feasible. They will require Midas Gold to expend substantial capital just for these facilities, along with its proposed new infrastructure at the Mine site, before it begins any gold mining operations. Midas Gold has yet to demonstrate that it has the capability to carry out these ambitious plans—even assuming the Forest Service were to permit the Mine.

Under the September 2016 PRO, Midas Gold does propose a limited "restoration" plan that entails restoring fish passage on the EFSF Salmon River above the Glory Hole, by diverting the river into a tunnel during Mine construction and operations, then rerouting it over the filled-in Glory Hole after Mine closure, and reprocessing some of the historic mine tailings at the Mine site. But these restoration plans are dwarfed by the scale of disturbance associated with Midas Gold's proposed mining plan. The restoration plan is also based on dubious claims about Midas Gold's capabilities to contain the new waste contamination it will generate. And Midas Gold's proposed mining plan does not include any restoration at the historic Cinnabar Mine site within the Stibnite Mining District, which is discharging elevated levels of mercury into the EFSF Salmon River via Sugar Creek.

In summary, Midas Gold's proposal is to "clean up" a disturbed and polluted site by further disturbing it and by tripling the amount of mine tailings and waste rock stored at the site.

Mine operations, therefore, could very well end up adding to, not simply subtracting from, the contamination and water quality issues at the Mine site.

Status of Mine Permitting

Midas Gold's motion to stay presumes the U.S. Forest Service will approve its PRO and allow development of the Mine in the near future, but the available facts indicate otherwise. Since Midas Gold submitted the PRO to the U.S. Forest Service in September 2016, the only formal step that the U.S. Forest Service has taken to move forward with permitting and the associated NEPA process is to publish a "scoping" notice in June 2017, and hold scoping meetings in July 2017. *See* Taylor Decl. ¶ 43.

More than three years after the PRO was submitted, the Forest Service has still not even completed a draft Environmental Impact Statement ("EIS") for the Mine proposal. *Id.* The Forest Service's timeframes for completing the NEPA process have thus been repeatedly extended, with a draft EIS now projected for release in early 2020. *Id.* ¶ 49.

After a draft EIS is finally issued, public comment and hearings will be required—and are expected to be contentious, in light of the significant and growing opposition to the proposed Mine from local communities, conservation groups, the Tribe, and others.[2] Contrary to Midas Gold's belief that its mining plan will be approved, the EIS process will have to evaluate a reasonable range of alternatives (including the "no action," *i.e.*, no Mine, alternative) and thoroughly address potential adverse impacts to wilderness and roadless areas, hydrology and

[2] The Forest Service released a "Scoping Report" in January 2018 that summarizes the many critical comments about Midas Gold's proposal and deep concerns about adverse and irreversible impacts to fish and wildlife, wilderness and roadless areas, watersheds, and other values. That report is available on the Payette National Forest's Stibnite Mine website at: https://www.fs.usda.gov/nfs/11558/www/nepa/105403_FSPLT3_4183174.pdf.

sedimentation risks, impacts to sensitive or ESA listed fish and wildlife, and a host of requirements imposed by the Payette Forest Plan. *See, e.g.,* Taylor Decl. Exh. 1 (Tribe scoping comments identifying these and other issues). Approval from the U.S. Fish and Wildlife Service and NOAA Fisheries will also be required under the ESA, since so many ESA-listed fish and wildlife species are potentially impacted by the Mine. Again, there is thus no assurance that the Mine will ever be permitted, as Midas Gold presumes in its motion to stay.

Unknown Status of the Proposed AOC

While it is highly questionable whether Midas Gold will ever be permitted to pursue the Mine proposal, it is important for the Court to recognize that it is also impossible to predict whether Midas Gold will ever enter into a formal AOC with EPA and other agencies that complies with CERCLA, which of course is the predicate of its stay motion.

As explained in Argument Section II below, Midas Gold's motion to stay is not supported by any competent evidence before the Court showing even that an AOC is certain or may be imminent. By contrast, the Tribe is filing herewith the Declaration of Amanda Rogerson, recounting facts known to the Tribe from a Freedom of Information Act ("FOIA") request the Tribe sent EPA about the status of the negotiations with Midas Gold over an AOC, and attaching relevant documents.

These FOIA documents indicate that AOC discussions between Midas Gold and EPA began only in April 2019—not back in early 2018, as Midas Gold contends in its brief. *See* Rogerson Decl. ¶¶ 5-9 & Exhs. 2-4. These materials also do not support Midas Gold's assertion that it qualifies as a CERCLA "bona fide prospective purchaser" ("BFPP") with respect to the Stibnite site. *See* Opening Br. at 4, fn. 1. According to the FOIA documents, Midas Gold made

this assertion to EPA in February 2019, but EPA's June 2019 letter disputed that Midas Gold had substantiated its claim that it qualified as a BFPP. *See* Rogerson Decl. ¶¶ 6-7 & Exhs. 2-3.

While Midas Gold has not provided the Court with any of the draft Statements of Work ("SOWs") that it believes will result in a valid AOC under CERCLA, the FOIA documents indicate that Midas Gold's original proposal was limited to just two locations with mining pollution at the Stibnite site, and EPA responded in its June 2019 letter with significant concerns about the adequacy of Midas Gold's proposal. *See* Rogerson Decl. ¶¶ 7-8 & Exhs. 3-4.

More recently, Midas Gold provided the Tribe with a draft SOW dated August 1, 2019, which apparently expands its proposal to include the point source discharges identified by the Tribe in its notice letter and Complaint. *Id.* ¶ 4 & Exh. 1. But that draft SOW still fails to address the full extent of mining contamination and pollution discharges at the Stibnite site. *Id.*

Moreover, the draft SOW reveals that Midas Gold's proposal will not result in any quick or assured cleanup of even the point source discharges at issue. Rather, Midas Gold proposes to conduct site investigation and feasibility studies that may span the life of the 20+ year Mine, before any remedial action alternatives are even identified. *See* Rogerson Decl. Exh. 1 at 1, 4-24, 33-34. The draft SOW imposes no deadlines for any remediation activities to occur, because Midas Gold intends to move forward with its planned mining activities before any remediation alternatives are identified and approved. *Id.* at 1, 7-8. As the draft SOW states:

> In September 2016, Midas Gold filed a Plan of Restoration and Operations ("PRO") with the United States Forest Service ("USFS") for the redevelopment of Stibnite, and plans to undertake mining, mineral processing and restoration activities on portions of the Site that will result in landscape-scale changes to many of the existing Site features. As such, the scope and timing and sampling and other elements of the RI/FS [Remedial Investigation and Feasibility Study] will consider potential mining activities in the PRO, any modifications and subsequent remediation.

Id. at 1. *See also id.* at 8 ("The Work Plan will take in to [sic] consideration for [sic] the timing and scope of potential mining and processing activities associated with the PRO").

This means that the point sources identified in the Tribe's Complaint may not be remediated until many decades from now, when the Mine is closed. Given the uncertainties recounted above about the likelihood that the Mine will be permitted and operate as proposed by Midas Gold, this also means that any AOC could be illusory in promising remediation that is unlikely to ever happen.

Recently, the Tribe notified EPA that it would decline EPA's invitation to directly participate as a signatory in AOC negotiations between EPA, the U.S. Forest Service, state of Idaho, and Midas Gold; but, rather, will consult directly with EPA. *See* Rogerson Decl. ¶ 10. The Tribe anticipates additional consultations with EPA during the pendency of those discussions, and has not received information indicating that an AOC is likely to be finalized regarding the Stibnite site in the immediate future. *Id.* Because the AOC involves multiple parties, and because of the sheer size and complexity of the mining contamination at the Stibnite site that should be addressed under any CERCLA remedial agreement, it is thus highly uncertain whether or when an adequate AOC may be finalized.

Meanwhile, Midas Gold is taking no action to address its ongoing CWA violations, as identified in the Complaint herein. The Tribe has no reason to believe that Midas Gold has even begun to draft a NPDES permit application, the first step for it to comply with its CWA duties. Neither has Midas Gold proposed taking any action to remediate, treat, or limit the unlawful pollution discharges from the eight point sources identified in the Tribe's Complaint.

ARGUMENT

I. LEGAL STANDARDS FOR A STAY OF LITIGATION.

"A district court has discretionary power to stay proceedings in its own court under *Landis v. North American Co.*, 299 U.S. 248, 254 (1936)." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005). "Where it is proposed that a pending proceeding be stayed, the competing interests which will be affected by the granting or refusal to grant a stay must be weighed." *Id.* at 1110. These include: (a) the possible harm the non-moving party may suffer from a stay, (b) the hardship or inequity the movant may suffer in being required to go forward, and (c) "the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *Id.*

"The proponent of a stay bears the burden of establishing its need." *Clinton v. Jones*, 520 U.S. 681, 708 (1997). A party seeking a stay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else." *Landis*, 299 U.S. at 255.

Applying these standards here, Midas Gold's motion to stay must be denied. As explained below, movant has not even presented competent evidence to support its requested stay, much less compelling circumstances to warrant a stay. Moreover, a stay would prejudice the Tribe and is unjustified under the circumstances.

II. THE MOTION TO STAY SHOULD BE DENIED BECAUSE IT LACKS COMPETENT EVIDENTIARY FOUNDATION.

The Court should first deny Midas Gold's motion to stay, for the fundamental reason that it relies on speculation instead of facts or evidence. Midas Gold has thus utterly failed to shoulder its heavy burden of demonstrating compelling facts to warrant a stay.

Notably, the stay motion is supported only by two declarations filed by Midas Gold—from its attorney Preston Carter and its consultant Andrew Koulermos—and three exhibits. *See* ECF Nos. 15-2 to 15-4. Examination reveals none of these provide competent evidentiary foundation for the facts alleged in the motion to stay.

The Carter Declaration and its attached exhibits simply recount communications from Midas Gold's counsel asking if the Tribe would agree to stay the case, and thus provide no independent facts or evidentiary foundation for the motion. *See* ECF No. 15-4. Another of the exhibits is a Communications Agreement between Midas Gold and the Tribe from 2017, *see* ECF No. 15-3, which is irrelevant and provides no facts or evidence to support the stay request.

That leaves only the Koulermos Declaration and its Exhibit A to support the motion to stay. *See* ECF No. 15-2. In Paragraph 1, Mr. Koulermos simply states he was hired by Midas Gold as a consultant in June 2019, but he provides no foundation for his authority to speak for Midas Gold, nor for his purported factual or expert knowledge and qualifications to attest to anything relevant here. The Koulermos Declaration thus lacks foundation required by Federal Rules of Evidence 602 and 701 to 705.

Neither does Mr. Koulermos provide any competent evidentiary foundations for his assertions in paragraph 2 of his declaration concerning what was supposedly said or transpired at various meetings or conference calls involving EPA and others in summer 2019 regarding a proposed draft SOW intended to lead to an AOC. In addition, those statements contain obvious hearsay. *See* Koulermos Decl. ¶ 2(b) ("I was advised that EPA intended to use a model template and guidance"); *id.* ¶ 2(e) ("On July 13,2019, EPA responded that it was interested in pursuing conversations"); *id.* ¶¶ 2(f) & (h) (both addressing conference calls "to discuss" proposed

SOWs). Midas Gold has made no effort to justify these hearsay statements, which the Court must disregard under Federal Rules of Evidence 801 and 802.[3]

Moreover, while paragraphs 2 and 3 of the Koulermos Declaration discuss different draft SOWs that were allegedly circulated between EPA and Midas Gold in July 2019, Mr. Koulermos failed to provide any of the draft SOW versions mentioned in his declaration. Instead, Exhibit A to the Koulermous Declaration (ECF No. 15-2, pages 6-111) comprises about 100 pages of EPA's 2016 guidance materials for AOCs, which are not otherwise discussed in the motion to stay—and apparently were provided just to make it seem like the motion has factual support that is actually lacking.

Reflecting this lack of evidentiary foundation, the Background section in Midas Gold's opening brief contains multiple pages of asserted facts with no citations at all. For instance, Midas Gold's factual assertions concerning its involvement with the Stibnite site have no factual or evidentiary support. *See* Opening Br. at 7-9. The discussion of Midas Gold's "commitment to community involvement" cites only its own self-serving news release from its website. *Id.* at 9-10 & n. 5. Numerous factual assertions about Midas Gold's "engagement with the Nez Perce Tribe" likewise have no factual or evidentiary support or citations. *Id.* at 11-12.

Midas Gold also repeatedly cites its proposed PRO, yet it did not provide a copy of that document to the Court either—citing instead to its own website, where it says the PRO is "publicly available." *See id.* at 7, n. 4. But the link Midas Gold provides goes to a PowerPoint

[3] Based on these evidentiary defects, the Tribe objects to and moves to strike the Koulermos Declaration.

presentation, not the actual PRO.[4] Midas Gold evidently prefers that the Court review a public relations document instead of the actual plan, which is far more environmentally damaging than Midas Gold portrays.

Similarly, Midas Gold simply cites a web link for an "archived video stream" of a Senate committee hearing in summer 2018, which includes a statement by its President Laurel Sayer, to support its factual allegations to the Court about Midas Gold's finances, *see* Opening Br, at 16 & n. 10. Again, this is not competent evidence with supporting factual foundation before the Court, and should be disregarded.[5]

In summary, because the motion to stay does not have a proper evidentiary foundation or reasonable factual support, Midas Gold has failed to carry its burden of demonstrating compelling facts for a stay. The requested stay should be denied on that ground alone.

III. SPECULATION ABOUT A POSSIBLE AOC DOES NOT SATISFY THE REQUIREMENTS FOR GRANTING A STAY.

The Ninth Circuit has cautioned that a stay should only be granted if it appears likely other proceedings will be concluded within a "reasonable time" relative to the urgency of the claims presented to the court, and that a "reasonable time" is not indefinite and should be short.

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[4] The actual PRO is available on the U.S. Forest Service's website at https://www.fs.usda.gov/project/?project=50516 (last visited October 31, 2019).

[5] Midas Gold's assertion that it lacks "significant assets or ongoing income stream," *see* Opening Br. at 16, is also belied by its own statements to investors. Its most recent (unaudited) "interim financial statements"—downloaded from its website—claim it had $32.8 million in cash and cash equivalent assets as of June 30, 2019, and $71.7 million in "non-current assets," including "exploration and evaluation assets." *See* Rogerson Decl. Exh. 5. Midas Gold makes no effort to justify why it could not expend even a small fraction of its over $30 million in cash on seeking CWA permits for its unpermitted discharges at issue here—much less take steps to prevent or treat them.

See Leyva v. Certified Grocers of California, Ltd., 593 F.2d 857, 864 (9th Cir. 1979); *Dependable Hwy. Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066-67 (9th Cir. 2007).

Here, Midas Gold seeks an open-ended stay, based on its unsupported claim that negotiations with EPA over an AOC "have been cordial, fruitful, and continue to this day." *See* Opening Br. at 8. But as noted above, Midas Gold seems to exaggerate the course and status of its negotiations with EPA over an AOC. *See* Rogerson Decl. ¶¶ 5-9 and Exhs. 2-4. Moreover, the fact remains that there is no final AOC in place, and Midas Gold's arguments that one is likely are speculative. As explained above, it could be months or even years before an AOC is final—if one is reached at all.

Midas Gold's arguments that a final AOC would divest the Court of jurisdiction under CERCLA Section 113(h) are thus premature and do not justify a stay now. As another district court ruled in similar circumstances, a "motion to stay on the basis of anticipated mootness [of claims] is premature." *Adams v. Teck Cominco Alaska, Inc.*, A04-49 CV(JWS), 2005 WL 8159243, at *1 (D. Alaska Dec. 16, 2005).[6]

Neither has Midas Gold demonstrated that it would suffer undue hardship or prejudice in the absence of a stay. It argues that "[e]ach quarter of Project operational delay costs Midas approximately $1.5 million in permitting costs . . . and $2.6 million for MGII personnel and consultants. . . ." *See* Opening Br. at 16. But this lawsuit has not caused any delays in the permitting process for the Mine. The substantial delays that have occurred since Midas Gold

[6] *See also Duarte Nursery, Inc. v. U.S. Army Corps of Engineers*, 2:13-CV-02095-KJM-DB, 2017 WL 2721988 (E.D. Cal. June 23, 2017) (denying stay in CWA action where appeal was pending on relevant legal issue but "it is unclear" when it would be decided and legal validity of appeal was doubtful); *Am. Canoe Ass'n, Inc. v. Carrollton Utilities*, 3:01-CV-35, 2002 WL 1291820 (E.D. Ky. Mar. 1, 2002) (denying stay of CWA action where defendant's alleged "substantial compliance" was disputed and penalties could be ordered for past violations).

submitted the PRO in 2016 cannot be blamed on the Tribe or this case, and the "considerable hardship" from costs associated with extended permitting claimed by Midas Gold are irrelevant to the motion to stay.

Other than these alleged costs, the only hardship Midas Gold complains about is that "litigation is always a distraction" and "diverts time and attention from business leadership." *See* Opening Br. at 17. But the inconvenience or expense of defending a lawsuit is not, alone, sufficient to prove hardship or inequality to warrant a stay. *See Lockyer v. Mirant Corp.*, 398 F.3d at 1112. "[B]eing required to defend a suit . . . does not constitute a 'clear case of hardship or inequity'." *Dependable Hwy.*, 498 F.3d at 1066. Again, then, Midas Gold has failed to carry its burden of showing undue hardship or prejudice to warrant a stay.

IV. THE TRIBE WOULD BE HARMED BY A STAY.

By contrast, the Tribe faces substantial injury and prejudice if a stay is granted. The unlawful discharges from the eight unpermitted point sources identified in the Complaint are continuing, and contributing to water quality violations that threaten aquatic life and fish in the EFSF Salmon River and affected tributaries. *See* Compl. ¶¶ 48-88 & Exhs. A-D (detailed facts, data, and photos of the eight discharge points). Some of the point sources are major problems—like the Glory Hole—but others are smaller discrete point sources that might be addressed relatively quickly and easily, if Midas Gold were ordered to comply with its CWA duties.

Where a lawsuit seeks to prevent continuing environmental harm, a delay can be particularly damaging. *See Sierra Club, Hawaii Chapter v. City & Cty. of Honolulu*, No. CV. 04-00463-DAE-BMK, 2007 WL 2694489, at *4 (D. Haw. Sept. 11, 2007) (denying a motion to stay a CWA citizen suit pending settlement negotiations in another CWA case where the stay could

inhibit "prompt injunctive relief to stop the water pollution"). *See also Hawai'i Wildlife Fund v. County of Maui*, 24 F. Supp. 3d 980, 992 (D. Haw. 2014) ("If a court were to grant an indefinite stay in circumstances such as those now before this court, a defendant would be able to buy itself potentially years of further pollution")[7]; *Ramirez v. City Fibers, Inc.*, 217CV01300ABAGRX, 2018 WL 6981837, at *2 (C.D. Cal. July 19, 2018) (declining to stay CWA action over stormwater pollution discharges). Likewise here, a stay is not warranted in light of the ongoing pollution from the point sources identified in the Tribe's Complaint.

V. STAYING THE LITIGATION WILL DETRACT FROM THE ORDERLY COURSE OF JUSTICE.

Finally, the orderly course of justice will not be served here by a stay, but will be impaired. A stay would not "simplify . . . the case's issues, questions of proof, and questions of law." *Lockyer,* 398 F.3d at 1110. Rather, a stay would simply put off the resolution of those issues, potentially into the far-off future, if Midas Gold has its way. There will be adequate opportunity for Midas Gold to argue the Court has lost jurisdiction over this case if and when a final AOC does ever occur; and the Tribe can present its defenses at that time. But the potential for a jurisdictional bar under CERCLA Section 113(h) is not a present legal controversy the Court has to address, since there is no final AOC in place and no firm evidence that one is forthcoming. Until such time as one may arise, this case should proceed rapidly to the merits.

[7] The Ninth Circuit affirmed the district court's grant of summary judgment in *Hawai'i Wildlife Fund v. County of Maui,* 866 F.3d 737 (9th Cir. 2018) (amended opinion), and the Supreme Court granted a writ of certiorari on whether discharges to groundwater there are actionable under the CWA, *see* 021919 FEDSC, 18-260 (Feb. 19, 2019). But those appellate proceedings do not involve the district court's denial of stay in the cited opinion.

CONCLUSION

For the foregoing reasons, Plaintiff Nez Perce Tribe respectfully prays the Court deny Midas Gold's Motion to Stay Litigation.

DATED this 30th day of October 2019.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on this 30th day of October, 2019, I electronically filed the foregoing PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO STAY LITIGATION and the accompanying DECLARATIONS OF EMMIT TAYLOR, JR. and AMANDA ROGERSON (and all exhibits thereto) through the CM/ECF system, which caused the following opposing parties or counsel to be served by electronic means as more fully reflected on the Notice of Electronic Filing:

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