

Christopher H. Meyer [ISB No. 4461]
Preston N. Carter [ISB No. 8462]
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, Idaho 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300
chrismeyer@givenspursley.com
prestoncarter@givenspursley.com

Ronald J. Tenpas (*admitted pro hac vice*)
Margaret Peloso (*admitted pro hac vice*)
Corinne Snow (*admitted pro hac vice*)
VINSON & ELKINS LLP
2200 Pennsylvania Avenue NW, Suite 500 West
Washington, DC 20037-1701
Office: (202) 639-6791
Fax: (202) 330-5328
rtenpas@velaw.com
mpeloso@velaw.com
csnow@velaw.com

Attorneys for Defendants

**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.

Case No.: 01:19-cv-00307-BLW

**DEFENDANTS' MOTION FOR LEAVE
TO AMEND THEIR ANSWER**

Pursuant to Federal Rule of Civil Procedure 15(a), Defendants move this Court for leave to file an Amended Answer. Specifically, Defendants wish to amend their description of the ownership of the Hangar Flats Tailings Pile. Upon review of documents during the discovery process of this case, Defendants have determined that parts of the Hangar Flats Tailings Pile and one of the seeps accompanying it—one of the alleged point source discharges at issue in this case—are not located on patented mining claims owned by Stibnite Gold Company, and are instead located on land owned by the United States and subject to an unpatented mining claim held by Defendant Idaho Gold Resources Company. The proposed Amended Answer is attached as Exhibit 1 and a redline showing changes from the original answer is attached as Exhibit 2. This Motion is supported by the accompanying Brief in Support of Defendants' Motion for Leave to Amend their Complaint.

Dated: August 18, 2020

Respectfully submitted,

Ronald J. Tenpas (*admitted pro hac vice*)
Margaret Peloso (*admitted pro hac vice*)
Corinne Snow (*admitted pro hac vice*)
VINSON & ELKINS LLP
2200 Pennsylvania Ave. NW, Ste 500 West
Washington, DC 20037-1701
Office: (202) 639-6791
Fax: (202) 330-5328
rtenpas@velaw.com
mpeloso@velaw.com
csnow@velaw.com

/s/ Preston N. Carter
Christopher H. Meyer [ISB No. 4461]
Preston N. Carter [ISB No. 8462]
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, ID 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300
chrismeyer@givenspursley.com
prestoncarter@givenspursley.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on August 18, 2020, I filed the foregoing document 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:

Amanda Wright Rogerson
Bryan Hurlbutt
Laurence J. Lucas
ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
Counsel for Plaintiff

Michael Lopez
NEZ PERCE TRIBE
P.O. Box 305
Lapwai, ID 83540
Counsel for Plaintiff

/s/ Preston N. Carter
Preston N. Carter

EXHIBIT 1

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Christopher H. Meyer [ISB No. 4461]
Preston N. Carter [ISB No. 8462]
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, Idaho 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300
chrismeyer@givenspursley.com
prestoncarter@givenspursley.com

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Margaret Peloso (*admitted pro hac vice*)
Corinne Snow (*admitted pro hac vice*)
VINSON & ELKINS LLP
2200 Pennsylvania Avenue NW, Suite 500 West
Washington, DC 20037-1701
Office: (202) 639-6778
Fax: (202) 330-5328
rtenpas@velaw.com
mpeloso@velaw.com
csnow@velaw.com

Attorneys for Defendants

**UNITED STATES DISTRICT COURT
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.

Case No.: 01:19-cv-307

**DEFENDANTS' FIRST AMENDED
ANSWER TO PLAINTIFF'S
COMPLAINT**

Defendants, by and through undersigned counsel, hereby answer Plaintiff's Complaint, ECF No. 1, on information and belief as follows:

NATURE OF THE ACTION

1. Defendants admit that Plaintiff has filed a civil action under 33 U.S.C. § 1365(a), the citizen enforcement provision of the Federal Water Pollution Control Act, also known as the Clean Water Act, but deny that Plaintiff is entitled to any relief from Defendants. Defendants admit that Midas Gold Corp. ("MGC") is a Canadian corporation; that Idaho Gold Resources Company, LLC ("IGRC"), and Midas Gold Idaho, Inc. ("MGII"), are subsidiaries of MGC; and that Stibnite Gold Company ("SGC") is a subsidiary of IGRC.
2. Defendants admit none of Defendants hold any NPDES permits for any of the alleged point sources. The remainder of this paragraph contains legal conclusions and questions of law to which no response is required.
3. The allegation that Defendants are "illegally" discharging the listed metals is a legal conclusion for which no response is required. Defendants admit that IGRC and SGC hold patented and unpatented mining claims in the area the Plaintiff has designated as "the Site,"¹ and that aluminum, arsenic, antimony, cyanide, iron, manganese, mercury, and thallium have entered the East Fork South Fork ("EFSF") Salmon River and its

¹ The Complaint is unclear on the definition of its term "the Site," at one point defining the term as the land comprising the proposed new mining activities, but at another stating that it contains 28,477 acres of land, an area that far exceeds the size of the proposed mine and instead reflects the total of all the Defendants' patented and unpatented holdings ("District Holdings") in the Stibnite-Yellow Pine Mining District ("District"). To avoid confusion, the Answer will construe the term as referring to the District.

tributaries from some of those mining claims at concentrations above applicable water quality criteria. Defendants further admit the listed elements can negatively impact the health of fish, other aquatic biota, birds, mammals, and humans at certain concentrations. Defendants lack knowledge or information sufficient to admit or deny the allegations concerning the Tribe's claimed aboriginal homeland or harm to its resources.

4. Defendants admit none of the Defendants hold any NPDES permits. Defendants admit that IGRC, and SGC hold patented or unpatented mining claims in the District, that aluminum, arsenic, antimony, cyanide, iron, manganese, mercury, and thallium have entered the EFSF Salmon River and its tributaries from some of those properties, and that such contributions have occurred for at least five years and are ongoing on at least one of those properties. To the extent that this paragraph alleges that the Defendants have engaged in "discharges" as that term is defined in the CWA, such allegation is a legal conclusion to which no response is required.
5. Defendants admit that precursor entities to IGRC and SGC began acquiring land and mineral interests in the District in 2009, but deny that any precursors to MGC and MGII engaged in any such actions. Defendants admit that IGRC holds the patented or unpatented mining claims in the District on which sit: the Bradley Tailings Pile, Keyway Dam, and the associated seeps; the DMEA Adit outlet, the DMEA Waste Rock Dump, and the associated seeps; the Bonanza Adit outlet and seep; and part of the Hangar Flats Tailings Pile and one of the associated seeps. Defendants admit that SGC holds the patented or unpatented mining claims on which sit: the Glory Hole; the Bailey Tunnel outlet and seep; the Cinnabar Tunnel outlet and seep; part of the Hangar

Flats Tailings Pile and one of the associated seeps; and the Meadow Creek Adit outlet and seep. Defendants deny that MGC or MGII holds the patented or unpatented mining claims on which the alleged point sources are located. Defendants deny that SGC holds the patented or unpatented mining claims on which sit: the Bradley Tailings Pile, Keyway Dam, and associated seeps; the DMEA Adit outlet, DMEA Waste Rock Dump, and associated seeps; the Bonanza Adit outlet and seep; and part of the Hangar Flats Tailings Pile and one of the associated seeps. Defendants deny that IGRC holds the patented or unpatented mining claims on which sit: the Glory Hole, the Bailey Tunnel outlet and seep; the Cinnabar Tunnel outlet and seep; part of the Hangar Flats Tailings Pile and one of the associated seeps; and the Meadow Creek Adit outlet and Seep. The allegations of operational control are legal conclusions to which no response is required. Defendants admit that MGII has conducted exploratory drilling on portions of the District Holdings. Defendants admit that precursors to IGRC have conducted exploratory drilling in portions of the District Holdings. Defendants deny that SGC or MGC, or their precursors, have conducted exploratory drilling in the District Holdings. Defendants admit that MGII has proposed constructing a gold mine in a portion of the District Holdings on behalf of itself, SGC, and IGRC, and that those entities have not yet secured the permits and approvals required for the proposed mine. Defendants deny that MGC has proposed constructing a gold mine in the District Holdings.

6. Defendants admit none of the Defendants hold any NPDES permits for the alleged point sources. Defendants admit that, over the past ten years, IGRC, SGC, and precursors to those entities have acquired interests in patented lands and unpatented mining claims in the District. Defendants admit that each of them has extensively

studied the District Holdings' history, hydrology, and water quality since the date of their respective formations. Defendants admit that metals have entered the EFSF Salmon River and its tributaries from some of the properties in the District Holdings, and that such contributions are ongoing on at least one of those properties. Defendants deny that MGC and MGII own, hold, or have owned or held, any property interests in the District. To the extent that this paragraph alleges that the Defendants have engaged in: (1) "discharges," of (2) "pollutants," from (3) "point sources," as those terms are defined in the CWA, such allegations are legal conclusions to which no response is required. The allegations of operational control are also legal conclusions to which no response is required. Defendants deny that they have not taken action to address the alleged sources of pollution in the District Holdings.

7. This paragraph describes the relief the Plaintiff is seeking and contains legal conclusions to which no response is required.

JURISDICTION AND VENUE

8. This paragraph sets forth Plaintiff's jurisdictional allegations that present legal conclusions and questions of law to be determined solely by the Court, to which no answer is required. To the extent that a response is required, Defendants agree that this Court currently has jurisdiction under 33 U.S.C. § 1365(a).
9. This paragraph sets forth legal conclusions and questions of law to which no answer is required. To the extent that a response is required: Defendants admit that IGRC and SGC hold patented and unpatented mining claims in the District, and that aluminum, arsenic, antimony, cyanide, iron, manganese, mercury, and thallium have entered the EFSF Salmon River and its tributaries from some of those properties; that such

contributions are ongoing on at least one of those properties; and that none of the Defendants hold any NPDES permits for the alleged point sources. To the extent that this paragraph alleges that the Defendants have engaged in “discharges” as that term is defined in the CWA, such allegations are legal conclusions to which no response is required.

10. This paragraph sets forth legal conclusions and questions of law to which no answer is required.
11. Defendants admit that the Tribe provided Defendants, EPA, and Idaho Department of Environmental Quality officials with notice of its intent to sue sixty days prior to filing the Complaint, and they admit that neither the EPA nor the Idaho Department of Environmental Quality has commenced an action against the Defendants seeking to address alleged CWA violations. The remainder of the allegations in this paragraph are legal conclusions to which no answer is required.
12. This paragraph sets forth Plaintiff’s venue allegations that present legal conclusions and questions of law to which no answer is required. To the extent that a response is required, Defendants agree that venue is proper in this Court.

PARTIES

Nez Perce Tribe

13. Defendants admit that the Nez Perce Tribe is a federally-recognized Indian tribe with headquarters on the Nez Perce Reservation in Lapwai, Idaho. The Defendants lack sufficient information to admit or deny the remainder of the allegations in paragraph 13.

14. Defendants lack sufficient information to admit or deny the allegations in paragraph 14.
15. This paragraph sets forth Plaintiff's legal conclusions and questions of law to which no answer is required. To the extent a response is required, the Defendants lack sufficient information to admit or deny the allegations in paragraph 15.
16. The allegation that Defendants are responsible for point source pollution discharges is a legal conclusion to which no response is required. Defendants lack sufficient information to admit or deny the remaining allegations in paragraph 16.
17. Defendants lack sufficient information to admit or deny the allegations in this paragraph or to attest to the accuracy of Map 1.
18. Defendants admit that the majority of the District Holdings consists of unpatented mining claims on public land, but deny that the land is in the Payette National Forest. Defendants admit that the unpatented mining claims are on land that the Payette National Forest administers. Defendants lack sufficient information to admit or deny the remaining allegations in paragraph 18.
19. Defendants admit that Snake River spring/summer Chinook salmon, Snake River steelhead, and bull trout are listed as "threatened" under the Endangered Species Act. Defendants admit that the Tribe has worked to recover the species listed in paragraph 19 in the South Fork Salmon River watershed, including in the EFSF Salmon River. Defendants lack sufficient information to admit or deny the remaining allegations in paragraph 19.

20. Defendants admit that Plaintiff has taken actions to monitor and restore salmon populations in the South Fork Salmon River Watershed, but Defendants lack knowledge of the details of those programs or their asserted expenditures.
21. Defendants lack sufficient information to admit or deny the allegations in paragraph 21.
22. Defendants admit the allegations in paragraph 22.
23. Defendants lack sufficient information to admit or deny the allegations in paragraph 23.
24. To the extent this paragraph alleges that Defendants are liable for: (1) “point source,” (2) “discharges,” of (3) “pollutants,” as those terms are defined in the CWA, such allegations are legal conclusions to which no response is required. However, Defendants admit that metals have entered the EFSF Salmon River and its tributaries from properties in the District Holdings, increasing the quantity of those elements in the affected waters. Defendants lack sufficient information to admit or deny the remaining allegations in paragraph 24.
25. To the extent a response is required, Defendants lack sufficient information to admit or deny the allegations in paragraph 25.

Midas Gold

26. Defendants admit that IGRC and MGII are subsidiaries of MGC, and that SGC is a subsidiary of IGRC. Defendants admit that IGRC and SGC hold patented and unpatented mining claims in the District, and that metals have entered the EFSF Salmon River and its tributaries from some of those properties, and that such contributions are ongoing from at least one of those properties. Defendants deny that

MGC or MGII hold any property interests in the District. To the extent that this paragraph alleges that the Defendants have engaged in: (1) “discharges,” of (2) “pollutants,” as those terms are defined in the CWA, and to the extent it alleges that such discharges are “illegal,” such allegations are legal conclusions to which no response is required. The allegations of operational control are legal conclusions to which no response is required. Plaintiff’s definition of its term “Midas Gold” for use in the Complaint is not a factual allegation to which a response is required.

27. Defendants admit that MGII and IGRC are wholly owned subsidiaries of MGC. Defendants admit that SGC is a wholly owned subsidiary of IGRC and deny that it is owned directly by MGC.
28. To the extent that the paragraph so alleges, Defendants deny that MGC engages in direct exploration and development activities, but admit that such activities occur through MGC’s direct and indirect subsidiaries. Defendants admit the remaining allegations in paragraph 28.

APPLICABLE LEGAL REQUIREMENTS

29. This paragraph sets forth legal conclusions to which no response is required. Defendants admit that the quoted portions of the CWA have been quoted correctly.
30. This paragraph sets forth legal conclusions to which no response is required. Defendants admit that the quoted portions of the CWA have been quoted correctly.
31. This paragraph sets forth legal conclusions to which no response is required. Defendants admit that the quoted portions of the CWA have been quoted correctly.
32. This paragraph sets forth legal conclusions to which no response is required. Defendants admit that the quoted portions of the CWA have been quoted correctly.

33. This paragraph sets forth legal conclusions to which no response is required.

Defendants admit that the quoted portions of the CWA have been quoted correctly.

34. This paragraph sets forth legal conclusions to which no response is required.

35. This paragraph sets forth legal conclusions to which no response is required.

36. This paragraph sets forth legal conclusions to which no response is required.

BACKGROUND FACTS

East Fork South Fork Salmon River Watershed

37. Admitted.

38. Defendants deny that MGC or MGII own or hold any property interests in the District, but admit that SGC and IGRC hold such interests. Defendants further admit that the District Holdings contains many of the streams that comprise the headwaters of the EFSF Salmon River, including Meadow Creek, Sugar Creek, West End Creek, and Fiddle Creek, as illustrated on Map 2. Defendants admit that within the District Holdings, the EFSF Salmon River cascades into the Glory Hole mining pit, where it pools until eventually flowing out through a channel on the pit's north side. Defendants admit the remaining allegations in paragraph 38, but note that the Glory Hole was constructed prior to World War II.

39. Admitted.

40. Defendants deny that MGC or MGII own or hold any property interests in the District, but admit that SGC and IGRC hold such interests. Defendants admit the remaining allegations in paragraph 40.

41. Defendants admit that the EFSF Salmon River provides habitat to other fish and wildlife species, but lack sufficient information to admit or deny the remaining allegations in paragraph 41.
42. Defendants deny that MGC or MGII own or hold any property interests in the District, but admit that SGC and IGRC hold such interests. Defendants admit the remaining allegations in paragraph 42.

Midas Gold's Site

43. Defendants deny that MGC or MGII own or hold any property interests in the District. Defendants admit the paragraph otherwise correctly describes the District Holdings.
44. Defendants admit that paragraph 44 accurately describes the history of portions of the District Holdings.
45. Defendants admit that precursor entities to IGRC and SGC began acquiring land and mineral interests in the District in 2009, but deny that any precursors to MGC and MGII engaged in any such actions. Defendants admit that MGII and precursor entities to IGRC conducted exploration activities in the District, but deny that SGC, MGC, or their precursors, took such actions. Defendants admit that they or their corporate precursors have extensively studied the District Holdings' water resources. Defendants admit that, since 2012, either IGRC or SGC, or one of their precursors, has held an interest in each patented and unpatented mining claim within the District Holdings. More specifically, Defendants admit that IGRC holds the patented or unpatented mining claims on which sit: the Bradley Tailings Pile, Keyway Dam, and the associated seeps; the DMEA Adit outlet, the DMEA Waste Rock Dump, and the associated seeps; the Bonanza Adit outlet and seep; and part of the Hangar Flats

Tailings Pile and one of the associated seeps. Defendants admit that SGC holds the patented or unpatented mining claims on which sit: the Glory Hole; part of the Hangar Flats Tailings Pile and one of the associated seeps; the Bailey Tunnel outlet and seep; the Cinnabar Tunnel outlet and seep; and the Meadow Creek Adit outlet and seep. Defendants deny that MGC or MGII holds the patented or unpatented mining claims on which the alleged point sources are located. Defendants deny that SGC holds the patented or unpatented mining claims on which sit: the Bradley Tailings Pile, Keyway Dam, and associated seeps; the DMEA Adit outlet, DMEA Waste Rock Dump, and associated seeps; the Bonanza Adit outlet and seep; and part of the Hangar Flats Tailings Pile and one of the associated seeps. Defendants deny that IGRC holds the patented or unpatented mining claims on which sit: the Glory Hole, the Bailey Tunnel outlet and seep; and part of the Hangar Flats Tailings Pile and one of the associated seeps; the Cinnabar Tunnel outlet and seep; and the Meadow Creek Adit outlet and Seep. The allegation that the District Holdings contain point source discharges is a legal conclusion to which no response is required.

46. Defendants admit that MGII, on behalf of IGRC and SGC, has performed all the actions alleged in paragraph 46. Defendants deny that IGRC or SGC have directly performed the alleged actions, and deny that MGC has performed such actions either directly or indirectly.
47. Defendants admit that MGII proposes to engage in the mining activities described in paragraph 47. Defendants deny that IGRC, MGC, or SGC have proposed to mine or re-mine the area, though Defendants admit that all of the patented and unpatented mining claims MGII intends to develop are held by either IGRC or SGC. Defendants

admit that Map 3 illustrates the Proposed Mine as described in the Plan of Restoration and Operations submitted to the U.S. Forest Service in September 2016.

48. Defendants admit that each patented and unpatented mining claim in the District Holdings is held by either IGRC or SGC, and that metals have entered the EFSF Salmon River and its tributaries from some of those properties, and that such contributions are ongoing from at least one of those properties. Defendants deny that MGC or MGII holds any of the patented or unpatented mining claims in the District. To the extent that this paragraph alleges that the Defendants have engaged in: (1) “discharges” of (2) “pollutants” from (3) “point sources,” as those terms are defined in the CWA, such allegations are legal conclusions to which no response is required. The allegation that Defendants are violating the CWA is a legal conclusion to which no response is required. Defendants admit that Map 4 accurately depicts the locations of the alleged point sources. Defendants admit that they do not hold any NPDES permits for the alleged point sources.

Glory Hole

49. Defendants admit that the feature Plaintiff has designated as the “Glory Hole” (or “Yellow Pine Pit”) is an open mining pit, though deny that it was excavated during World War II, as it was opened earlier. Defendants admit that the “Glory Hole” is located on patented mining claim(s) held by SGC. Defendants deny that IGRC, MGC, or MGII hold any of the patented mining claim(s) on which the “Glory Hole” is located. Defendants admit that MGII and precursors to IGRC have conducted exploratory drilling under and around the Glory Hole, but deny that any other Defendant, including IGRC as currently constituted, has conducted such drilling.

Defendants admit that MGII proposes to re-mine the “Glory Hole,” but deny that IGRC, MGC, or SGC intend to actively participate in the proposed mining activities.

50. Defendants admit the allegations in paragraph 50, but Defendants lack sufficient knowledge to admit or deny that the small channel directs water into the historical streambed of the EFSF Salmon River.

51. Defendants admit that the Glory Hole collects sediments. Defendants lack sufficient knowledge to admit or deny the remaining allegations in paragraph 51.

52. Defendants admit that significant quantities of mining-related sediments have built up in the bottom of the Glory Hole as it has captured contaminated sediments washing down from upstream sources within the District over the years. Defendants admit that the Glory Hole’s walls contain metals in the host rock that erode into the Glory Hole and contribute additional sediment to the bottom. Defendants admit that the Glory Hole’s walls contain seeps, and that metals flow into the Glory Hole from some of those seeps. To the extent that this paragraph alleges that the Defendants have engaged in: (1) “discharges” or (2) “pollutants,” as those terms are defined in the CWA, such allegations are legal conclusions to which no response is required. The Defendants lack sufficient information to either admit or deny the remaining allegations in paragraph 52.

53. Defendants admit that data collected by MGII shows that metal loads some distance downstream of the Glory Hole are 30 percent to 50 percent higher than those measured upstream. Defendants admit that, in 2015, the U.S. Geographical Survey estimated that the Glory Hole Reach of the EFSF Salmon River, as defined by the U.S. Geographical Survey, contributed an average of 2,150 pounds of arsenic, 1,010 pounds

of antimony, and 617 pounds of dissolved manganese into the EFSF Salmon River annually, from 2012-2014, but deny that these results are conclusive as to the Glory Hole being the source of the metals. To the extent that this paragraph alleges that the monitoring data shows increased levels of “pollutants,” as defined by the CWA, that term is a legal conclusion to which no response is required. Defendants deny the remaining allegations in paragraph 53.

54. Defendants admit that metals have entered the Glory Hole from seeps in its walls and that those metals have entered the EFSF Salmon River on a daily basis for at least the past five years preceding the date of the Complaint. Defendants deny that they have failed to take adequate steps to stop the alleged discharges, but admit that metals will continue to enter the Glory Hole and EFSF Salmon River from seeps in the Glory Hole’s walls unless control measures are implemented. Defendants admit that MGII has had access to the “Glory Hole” area since January 1, 2015, but deny an earlier right of access. Defendants admit that SGC or SGC’s precursors have had access to the “Glory Hole” area for the past five years, but deny that MGC or IGRC have had such access. The allegation of control is a legal conclusion to which no response is required. To the extent that this paragraph alleges: (1) “discharges,” of (2) “pollutants,” as those terms are defined by the CWA, such allegations are legal conclusions to which no response is required.
55. This paragraph sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants admit that they do not hold any NPDES permits for the alleged point sources.

Bradley Tailings Pile & Keyway Dam

56. Defendants admit that the feature Plaintiff has designated as Bradley Tailings Pile is a legacy mine tailing deposit site located upstream of the “Glory Hole,” adjacent to Meadow Creek, and that Meadow Creek is a perennial tributary of the EFSF Salmon River. Defendants admit that part of the Bradley Tailings Pile is on a patented mining claim held by IGRC. Defendants deny that SGC, MGC, or MGII hold the patented mining claim on which the Bradley Tailings Pile is partially located.
57. Admitted.
58. Defendants admit that the Bradley Tailings Pile is not capped with an impermeable layer, so rain and snow melt infiltrate it and come into contact with the contaminated tailings. Defendants further admit that water from the Keyway Dam emerges from three seeps at the base of the dam. Defendants admit that some of the water from those seeps flows overland into the Keyway Marsh, which is a delineated wetland. Defendants lack sufficient information to either admit or deny the remaining allegations in paragraph 58.
59. Defendants admit that monitoring data show that water from the three Keyway Dam seeps enters the Keyway Marsh and that this water contains elevated levels of aluminum, antimony, arsenic, cyanide, iron, manganese, and mercury. Defendants lack sufficient information to either admit or deny the remaining allegations in paragraph 59.
60. Defendants lack sufficient information to admit or deny the allegations in paragraph 60.
61. Defendants admit that MGII has had access to the Bradley Tailings Pile and Keyway Dam area since January 1, 2015, but deny an earlier right of access. Defendants admit

that IGRC or its precursors have had access to the area for the past five years. Defendants admit that SGC and MGC have had the same right as the general public to access those portions of the Bradley Tailings Pile that are located on lands subject to unpatented claims, but deny that SGC or MGC have had access to those portions of the area located on IGRC's patented lands. The allegation of control is a legal conclusion to which no response is required. Defendants deny that they have failed to take adequate steps to stop the alleged discharges at the Bradley Tailings Pile and Keyway Dam. Defendants lack sufficient information to admit or deny the remaining allegations in paragraph 61.

62. This paragraph sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants admit that they do not hold any NPDES permits for the alleged point sources.

Hangar Flats Tailings Pile

63. Defendants admit that the feature Plaintiff has designated as the Hangar Flats Tailings Pile is a legacy deposit site that sits adjacent to Meadow Creek, just northwest and downstream of the Bradley Tailings Pile, but deny that the feature is a "tailings pile." Defendants admit that part of the Hangar Flats Tailings Pile is located on a patented mining claim held by SGC. Defendants deny that MGC, MGII, or IGRC hold the patented mining claims on which part of the Hangar Flats Tailings Pile is located.
64. Defendants deny that the feature the Plaintiff has designated as the Hangar Flats Tailings Pile is comprised entirely of mine tailings, though admit that the feature is on the location of a historic tailings disposal. Defendants lack sufficient information to admit or deny that the feature continues to contain tailings. Defendants admit that

portions of the feature contain elevated concentrations of arsenic, antimony, aluminum, iron, manganese, and mercury. Defendants admit that the pile is not capped, so that rain and snow melt infiltrate it, and that there are two seeps near the base of the feature containing the listed metals. Defendants lack sufficient information to admit or deny the remaining allegations in paragraph 64.

65. Defendants admit that monitoring data shows that these seeps contain metals, including aluminum, antimony, arsenic, cyanide, iron, manganese, mercury, and thallium, that flow, on occasion, into the floodplain of Meadow Creek. Defendants admit that water from one seep associated with the Hangar Flats Tailings Pile has been seen flowing overland into Meadow Creek on one occasion, in May 2014. To the extent that this paragraph alleges that Defendants have: (1) “discharged,” (2) “pollutants,” as those terms are defined in the CWA, such terms are legal conclusions that do not require a response. Defendants lack sufficient information to admit or deny the remaining allegations in paragraph 65.

66. Defendants admit that MGII has had access to the area since January 1, 2015, but deny an earlier right of access. Defendants admit that SGC or its precursors have had access to those portions of the area located on its patented mining claims for the past five years. Defendants deny that IGRC and MGC have had access to those parts of the area that are located on SGC’s patented claims. Defendants admit that IGRC or its precursors have had access to those portions of the area on which it holds unpatented claims for the past five years, and that MGC and SGC have had the same access as members of the general public to the portions of the area located on those unpatented claims. The allegation of control is a legal conclusion to which no response is required.

Defendants deny that they have failed to take adequate steps to stop the alleged discharges at the Hangar Flats Tailings Pile. Defendants lack sufficient information to admit or deny the remaining allegations in paragraph 66.

67. This paragraph sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants admit that they do not hold any NPDES permits for the alleged point sources.

Bailey Tunnel

68. Defendants admit that the Bailey Tunnel is a tunnel that was constructed around 1943 to divert the EFSF Salmon River around the Glory Hole and into one of its perennial tributaries, Sugar Creek, and that the Bailey Tunnel has been abandoned since 1955 when the EFSF Salmon River stopped flowing through the Tunnel. Defendants admit that the Bailey Tunnel is located on a patented mining claim(s) held by SGC, but deny that any other Defendant holds that patented claim. Defendants admit that, at times, water containing elevated concentrations of metals exits the Bailey Tunnel and reaches Sugar Creek, but note that, to the extent that the paragraph alleges “discharges” as defined under the CWA, such allegation is a legal conclusion that does not require a response. Defendants admit that MGII has conducted exploratory drilling several hundred feet from the tunnel, but deny that any other Defendant has drilled in the vicinity.

69. Defendants admit that monitoring data from the mouth of Bailey Tunnel show that water exiting the tunnel contains antimony, arsenic, iron, and manganese. Defendants admit that this water flows into Sugar Creek. To the extent that the paragraph alleges:

(1) “discharges” of (2) “pollutants,” as those terms are defined in the CWA, such terms are legal conclusions that require no response.

70. Defendants admit that water from the Bailey Tunnel has carried metals into Sugar Creek, intermittently, for the five years preceding the date of the Complaint, that such flows are recurring, and that such flows will continue unless control measures are implemented. Defendants admit that MGII has had access to the area since January 1, 2015, but deny an earlier right of access. Defendants admit that SGC or its precursors have had access to the area for the past five years, but deny that IGRC or MGC have had such access. The allegation of control is a legal conclusion to which no response is required. To the extent that this paragraph alleges “discharges” as defined by the CWA, that term is a legal conclusion to which no response is required. Defendants deny that they have failed to take adequate steps to stop the alleged discharges from the Bailey Tunnel.

71. This paragraph sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants admit that they do not hold any NPDES permits for the alleged point sources.

DMEA Adit & DMEA Waste Rock Dump

72. Defendants admit that the Defense Minerals Exploration Administration (“DMEA”) Adit and DMEA Waste Rock Dump are located between the “Glory Hole” and the Bradley Tailings Pile on land subject to an unpatented mining claim held by IGRC. Defendants deny that MGII, MGC, or SGC hold any of the mining claim(s) on which the DMEA Adit and DMEA Waste Rock Dump are located. Defendants admit that

adits are small, exploratory tunnels bored into the mountainside, sometimes miles long, which are typically graded such that water drains out through the adit opening.

73. Defendants admit that water from the base of the DMEA Adit contains aluminum, arsenic, antimony, iron, mercury, and manganese. Defendants admit water samples at a seep downgradient from the DMEA Waste Rock Dump contain aluminum, antimony, arsenic, iron, manganese, and mercury, and that water from this seep reaches the EFSF Salmon River. Defendants lack sufficient information to admit or deny the remaining allegations in paragraph 73. To the extent that this paragraph alleges: (1) “discharges” of (2) “pollutants,” as those terms are defined by the CWA, such terms are legal conclusions to which no response is required.
74. Defendants lack sufficient information to admit or deny the allegation that pollutants from the DMEA Adit and the DMEA Waste Rock Dump have flowed to the EFSF Salmon River continuously for at least five years preceding the date of the Complaint. Defendants lack sufficient information to admit or deny the allegation that the alleged discharges are recurring or that they will continue unless control measures are implemented. Defendants admit that MGII has had access to the area since January 1, 2015, but deny an earlier right of access. Defendants admit that IGRC or its precursors have had access to this area for the past five years, but deny that MGC or SGC have had any access beyond that available to members of the general public. The allegation of control is a legal conclusion to which no response is required. Defendants deny that they have failed to take adequate steps to stop the alleged discharges from the DMEA Adit and DMEA Waste Rock Dump. To the extent that this paragraph alleges: (1)

“discharges” of (2) “pollutants,” as those terms are defined by the CWA, such allegations are legal conclusions to which no response is required.

75. This paragraph sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants admit that they do not hold any NPDES permits for the alleged point sources.

Bonanza Adit

76. Defendants admit that a small seep, originating as a small pond on a bench on a hillside that has been excavated across its face by legacy exploration activities, exists near the Bonanza Adit. Defendants lack sufficient information to admit or deny that the seep has any hydrological connection to the Bonanza Adit. Defendants admit that the Bonanza Adit seep is located on an unpatented mining claim held by IGRC, but deny that MGII, MGC, or SGC hold the unpatented mining claim on which the seep is located. Defendants deny drilling in the near vicinity of the Bonanza Adit.
77. Defendants deny that monitoring data show that the Bonanza Adit seep flows at a low volume year-round out of a pond, downhill, across a road, and onto the floodplain of Sugar Creek. Defendants admit that, on at least several occasions during the five years preceding the date of the Complaint, water from the Bonanza Adit seep carried metals, including aluminum, antimony, arsenic, cyanide, iron, manganese, and mercury, into the Sugar Creek floodplain. To the extent that this paragraph alleges: (1) “discharges” of (2) “pollutants,” as those terms are defined by the CWA, such allegations are legal conclusions to which no response is required.
78. Defendants lack sufficient information to admit or deny the allegations in paragraph 78.

79. Defendants deny that metals from the Bonanza Adit have flowed continuously into Sugar Creek for the five years preceding the date of the Complaint. Defendants admit that MGII has had access to the area since January 1, 2015, but deny an earlier right of access. Defendants admit that IGRC or its precursors have had access to this area for the past five years, but deny that MGC or SGC have had any right of access beyond that available to the general public. The allegation of control is a legal conclusion to which no response is required. Defendants deny that they have failed to take adequate steps to stop the alleged discharges from the Bonanza Adit. Defendants lack sufficient information to admit or deny the remaining allegations in paragraph 79. To the extent that this paragraph alleges: (1) “discharges” of (2) “pollutants,” as those terms are defined by the CWA, such terms are legal conclusions to which no response is required.

80. This paragraph sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants admit that they do not hold any NPDES permits for the alleged point sources.

Cinnabar Tunnel

81. Defendants admit that the Cinnabar Tunnel is a legacy adit located on a hillside east of the EFSF Salmon River, upstream of the Glory Hole, but deny that it is located in the middle of a hillside. Defendants admit that water emerges from the tunnel as a seep. Defendants admit that the Cinnabar Tunnel is located on land subject to an unpatented mining claim held by SGC. Defendants deny MGC, MGII, or IGRC hold the unpatented mining claim(s) on which the Cinnabar Tunnel is located. Defendants

admit that MGII has conducted exploratory drilling in the vicinity, but deny that any other Defendant has conducted such drilling.

82. Defendants admit that water from the Cinnabar Tunnel flows to the EFSF Salmon River at three identifiable points. Defendants admit that water from the Tunnel contains antimony and arsenic. To the extent that this paragraph alleges: (1) “discharges” of (2) “pollutants,” as those terms are defined by the CWA, such allegations are legal conclusions to which no response is required.
83. Defendants admit that water containing antimony and arsenic from the Cinnabar Tunnel has regularly reached the EFSF Salmon River for at least five years preceding the date of this Complaint. Defendants admit that MGII has had access to the area since January 1, 2015, but deny an earlier right of access. Defendants admit that SGC or its precursors have had access to the area for the past five years, but deny that MGC or IGRC have had any right of access beyond that held by the general public. The allegation of control is a legal conclusion to which no response is required. Defendants deny that they have failed to take adequate steps to stop the alleged discharges from the Cinnabar Tunnel, that the alleged discharges are recurring, and that they will continue unless control measures are implemented. To the extent that this paragraph alleges: (1) “discharges” of (2) “pollutants,” as those terms are defined by the CWA, such allegations are legal conclusions to which no response is required.
84. This paragraph sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants admit that they do not hold any NPDES permits for the alleged point sources.

Meadow Creek Adit

85. Defendants admit that there is a seep located near the Meadow Creek Mine Adit above the heap leach pile at the base of the Hangar Flats hillside, upstream of the Glory Hole, adjacent to Meadow Creek. Defendants lack sufficient information to admit or deny that the seep is hydrologically connected to the Meadow Creek Mine Adit. Defendants admit that the seep is located on a patented mining claim held by SGC. Defendants deny that IGRC, MGC, or MGII hold the patented mining claim on which the Meadow Creek Adit is located. Defendants admit that MGII has conducted exploratory drilling in the area, but deny that any other Defendants have engaged in such conduct.
86. Defendants admit that monitoring data from the seep sampling show that it contains aluminum, antimony, arsenic, iron, manganese, and mercury. Defendants deny that monitoring data show that water from the seep reaches the EFSF Salmon River. To the extent that this paragraph alleges: (1) “discharges” of (2) “pollutants,” as those terms are defined in the CWA, such allegations are legal conclusions to which no response is required.
87. Defendants admit that water from the seep enters a drainage ditch at the base of the hillside during spring snowmelt season. Defendants lack sufficient information to admit or deny that Nez Perce Tribal staff observed water from the alleged seep entering the EFSF Salmon River in May 2018 and lack sufficient information to admit or deny that water from the seep has reached the EFSF Salmon River on numerous occasions when hydrologic conditions were similar. Defendants admit that MGII has had access to the area since January 1, 2015, but deny an earlier right of access. Defendants admit that SGC or its precursors have had access to portions of the area, including the Meadow Creek Adit seep, for the past five years, but deny that it has had any right to

access, beyond that held by the general public, to parts of the area subject to mining claims held by other entities. Defendants admit that IGRC has had access to portions of the area for the past five years, but deny that it has had access to the patented claim on which the adit seep is located. Defendants deny that MGC has had any right of access to the area beyond that held by the general public. The allegation of control is a legal conclusion to which no response is required. To the extent that this paragraph alleges “discharges” as defined by the CWA, that term is a legal conclusion to which no response is required. Defendants deny that they have failed to take adequate steps to stop the alleged discharges from the Meadow Creek Adit. Defendants lack sufficient information to admit or deny the remaining allegations in paragraph 87.

88. This paragraph sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants admit that they do not hold any NPDES permits for the alleged point sources.

CLAIM FOR RELIEF

89. In response to paragraph 89, Defendants repeat their response to Paragraphs 1 through 88.
90. This paragraph contains legal conclusions to which no response is required.
91. Defendants reassert their responses to paragraphs 54, 61, 66, 70, 74, 79, 83, and 87.
92. This paragraph contains legal conclusions to which no response is required.
93. This paragraph contains legal conclusions to which no response is required.
94. This paragraph contains legal conclusions to which no response is required.
95. To the extent that they do not form part of natural background conditions, Defendants admit that the listed metals could qualify as “pollutants” under the CWA.

96. Defendants admit that the EFSF Salmon River, Meadow Creek, Sugar Creek and, to the extent that it qualifies as an adjacent wetland under 40 C.F.R. § 122.2, the Keyway Marsh are navigable waters under the CWA.
97. This paragraph contains legal conclusions to which no response is required.
98. Defendants admit that IGRC holds the patented or unpatented mining claims on which sit: the Bradley Tailings Pile, Keyway Dam, and the associated seeps; the DMEA Adit outlet, the DMEA Waste Rock Dump, and the associated seeps; the Bonanza Adit outlet and seep; and part of the Hangar Flats Tailings Pile and one of the associated seeps. Defendants admit that SGC holds the patented or unpatented mining claims on which sit: the Glory Hole; the Bailey Tunnel outlet and seep; part of the Hangar Flats Tailings Pile and one of the associated seeps; the Cinnabar Tunnel outlet and seep; and the Meadow Creek Adit outlet and seep. Defendants deny that MGC or MGII hold the patented or unpatented mining claims on which the alleged point sources are located. Defendants deny that SGC holds the patented or unpatented mining claims on which sit: the Bradley Tailings Pile, Keyway Dam, and associated seeps; the DMEA Adit outlet, DMEA Waste Rock Dump, and associated seeps; the Bonanza Adit outlet and seep; and part of the Hangar Flats Tailings Pile and one of the associated seeps. Defendants deny that IGRC holds the patented or unpatented mining claims on which sit: the Glory Hole, the Bailey Tunnel outlet and seep; part of the Hangar Flats Tailings Pile and one of the associated seeps; the Cinnabar Tunnel outlet and seep; and the Meadow Creek Adit outlet and seep. Defendants admit that MGII plans to conduct further mineral operations in a portion of the District Holdings, but deny that the other Defendants have such plans.

99. This paragraph contains legal conclusions and prayers for relief to which no response is required.

100. This paragraph contains legal conclusions and prayers for relief to which no response is required. To the extent a response is required, Defendants deny the allegations in paragraph 100.

DEFENDANTS' ADDITIONAL STATEMENTS AND DEFENSES

1. The United States is a necessary party that must be joined to this action in order for the Court to afford complete relief among the parties in relation to the alleged point sources located on unpatented mining claims, because the land underlying such claims is owned in fee by the U.S. Forest Service (“USFS”). Alleged point sources on unpatented mining claims in this action include the DMEA Adit & Waste Dump, the Bonanza Adit, the Cinnabar Tunnel, part of the Hangar Flats Tailings Pile and one of the associated seeps, and portions of the Bradley Tailings Pile.
2. Defendants are not accountable under the Clean Water Act for discharges originating from lands on which they hold unpatented mining claims. Under the Clean Water Act, an entity cannot be held liable for a discharge if it is in compliance with the Act’s permitting requirements. 33 U.S.C. § 1311(a). Only entities that own or operate a point source are required to obtain permits for discharges. *See, e.g.*, Idaho Admin. Code 58.01.25.010.62. Lands subjected to unpatented mining claims, however, are owned in fee by the United States and the claim holder cannot engage in actions that substantially disturb the surface estate without the permission of the USFS. *See generally* 36 C.F.R. § 228 Subpart A. Absent permission from the USFS to manage discharges on lands subject to unpatented claims, the claim holder cannot be said to

“own” or “operate” facilities located on the claim, and thus is not liable under the Clean Water Act for discharges occurring on the unpatented claim.

3. The Complaint fails to plead a veil-piercing claim against MGC, which does not hold any of the mining claims composing the District Holdings. As a result, in order for MGC to be liable for any of the alleged discharges, Plaintiff must establish that MGC operates at least one facility on which a point source is located. Doing so requires showing that MGC officers or employees, in their capacities as representatives of MGC, engage in direct operational control of pollution-related activities at the facility. *See United States v. Bestfoods*, 524 U.S. 51, 66–68 (1998). Merely establishing that MGC directs the activities of some other entity that operates a facility does not suffice to establish operator liability. *Id.*
4. Defendants are not liable for pollutants carried to waters of the United States by natural processes. *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1071 (9th Cir. 2011) (holding stormwater runoff that is not collected or channeled is not a discharge from a point source), *rev'd on other grounds sub nom. Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597 (2013); *Cty. of Maui v. Hawaii Wildlife Fund*, 18260 (S. Ct. 2019) (considering whether discharges to groundwater can lead to CWA liability).

EXHIBIT 2

EXHIBIT 2

Christopher H. Meyer [ISB No. 4461]
Preston N. Carter [ISB No. 8462]
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, Idaho 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300
chrismeyer@givenspursley.com
prestoncarter@givenspursley.com

Ronald J. Tenpas (*admitted pro hac vice*)
Margaret Peloso (*admitted pro hac vice*)
Corinne Snow (*admitted pro hac vice*)
VINSON & ELKINS LLP
2200 Pennsylvania Avenue NW, Suite 500 West
Washington, DC 20037-1701
Office: (202) 639-6778
Fax: (202) 330-5328
rtenpas@velaw.com
mpeloso@velaw.com
csnow@velaw.com

Attorneys for Defendants

**UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO**

NEZ PERCE TRIBE,

Plaintiff,

v.

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

~~Defendant.~~Defend
ants.

Case No.: 01:19-cv-307

**DEFENDANTS' FIRST AMENDED
ANSWER TO PLAINTIFF'S
COMPLAINT**

Defendants, by and through undersigned counsel, hereby ~~answers~~ answer Plaintiff's

Complaint,

ECF No. 1, on information and belief as follows:

NATURE OF THE ACTION

1. Defendants admit that Plaintiff has filed a civil action under 33 U.S.C. § 1365(a), the citizen enforcement provision of the Federal Water Pollution Control Act, also known as the Clean Water Act, but deny that Plaintiff is entitled to any relief from Defendants. Defendants admit that Midas Gold Corp. ("MGC") is a Canadian corporation; that Idaho Gold Resources Company, LLC ("IGRC"), and Midas Gold Idaho, Inc. ("MGII"), are subsidiaries of MGC; and that Stibnite Gold Company ("SGC") is a subsidiary of IGRC.
2. Defendants admit none of ~~the~~ Defendants hold any NPDES permits for any of the alleged point sources. The remainder of this paragraph contains legal conclusions and questions of law to which no response is required.
3. The allegation that ~~the~~ Defendants are "illegally" discharging the listed metals is a legal conclusion for which no response is required. Defendants admit that IGRC and SGC hold patented and unpatented mining claims in the area the Plaintiff has designated as "the Site,"¹ and that aluminum, arsenic, antimony, cyanide, iron,

¹ The Complaint is unclear on the definition of its term "the Site," at one point defining the term as the land comprising the proposed new mining activities, but at another stating that it contains 28,477 acres of land, an area that far exceeds the size of the proposed mine and instead reflects the total of all the Defendants' patented and unpatented holdings ("District Holdings") in the Stibnite-Yellow Pine Mining District ("District"). To avoid confusion, the Answer will construe the term as referring to the District.

manganese, mercury, and thallium have entered the East Fork South Fork (“EFSF”) Salmon River and its tributaries from some of those mining claims at concentrations above applicable water quality criteria. ~~The~~ Defendants further admit the listed elements can negatively impact the health of fish, other aquatic biota, birds, mammals, and humans at certain concentrations. ~~The~~ Defendants lack knowledge or information sufficient to admit or deny the allegations concerning the Tribe’s claimed aboriginal homeland or harm to its resources.

4. Defendants admit none of the Defendants hold any NPDES permits. Defendants admit that IGRC, and SGC hold patented or unpatented mining claims in the District, that aluminum, arsenic, antimony, cyanide, iron, manganese, mercury, and thallium have entered the EFSF Salmon River and its tributaries from some of those properties, and that such contributions have occurred for at least five years and are ongoing on at least one of those properties. To the extent that this paragraph alleges that the Defendants have engaged in “discharges” as that term is defined in the CWA, such allegation is a legal conclusion to which no response is required.
5. Defendants admit that precursor entities to IGRC and SGC began acquiring land and mineral interests in the District in 2009, but deny that any precursors to MGC and MGII engaged in any such actions. Defendants admit that IGRC holds the patented or unpatented mining claims in the District on which sit: the Bradley Tailings Pile, Keyway Dam, and the associated seeps; the DMEA Adit outlet, the DMEA Waste Rock Dump, and the associated seeps; ~~and~~ the Bonanza Adit outlet and seep; and part of the Hangar Flats Tailings Pile and one of the associated seeps. Defendants admit that SGC holds the patented or unpatented mining claims on which sit: the Glory Hole;

the Bailey Tunnel outlet and seep; the Cinnabar Tunnel outlet and seep; part of the Hangar Flats Tailings Pile and one of the associated seeps; and the Meadow Creek Adit outlet and seep. Defendants deny that MGC or MGII holds the patented or unpatented mining claims on which the alleged point sources are located. Defendants deny that SGC holds the patented or unpatented mining claims on which sit: the Bradley Tailings Pile, Keyway Dam, and associated seeps; the DMEA Adit outlet, DMEA Waste Rock Dump, and associated seeps; ~~and~~ the Bonanza Adit outlet and seep; and part of the Hangar Flats Tailings Pile and one of the associated seeps. Defendants deny that IGRC holds the patented or unpatented mining claims on which sit: the Glory Hole, the Bailey Tunnel outlet and seep; the Cinnabar Tunnel outlet and seep; part of the Hangar Flats Tailings Pile and one of the associated seeps; and the Meadow Creek Adit outlet and Seep. The allegations of operational control are legal conclusions to which no response is required. Defendants admit that MGII has conducted exploratory drilling on portions of the District Holdings. Defendants admit that precursors to IGRC have conducted exploratory drilling in portions of the District Holdings. Defendants deny that SGC or MGC, or their precursors, have conducted exploratory drilling in the District Holdings. Defendants admit that MGII has proposed constructing a gold mine in a portion of the District Holdings on behalf of itself, SGC, and IGRC, and that those entities have not yet secured the permits and approvals required for the proposed mine. Defendants deny that MGC has proposed constructing a gold mine in the District Holdings.

6. Defendants admit none of the Defendants hold any NPDES permits for the alleged point sources. Defendants admit that, over the past ten years, IGRC, SGC, and

precursors to those entities have acquired interests in patented lands and unpatented mining claims in the District. Defendants admit that each of them has extensively studied the District Holdings' history, hydrology, and water quality since the date of their respective formations. Defendants admit that metals have entered the EFSF Salmon River and its tributaries from some of the properties in the District Holdings, and that such contributions are ongoing on at least one of those properties. Defendants deny that MGC and MGII own, hold, or have owned or held, any property interests in the District. To the extent that this paragraph alleges that the Defendants have engaged in: (1) "discharges," of (2) "pollutants,-" from (3) ~~points~~ "point sources,-" as those terms are defined in the CWA, such allegations are legal conclusions to which no response is required. The allegations of operational control are also legal conclusions to which no response is required. Defendants deny that they have not taken action to address the alleged sources of pollution in the District Holdings.

7. This paragraph describes the relief the Plaintiff is seeking and contains legal conclusions to which no response is required.

JURISDICTION AND VENUE

8. This paragraph sets forth Plaintiff's jurisdictional allegations that present legal conclusions and questions of law to be determined solely by the Court, to which no answer is required. To the extent that a response is required, Defendants agree that this Court currently has jurisdiction under 33 U.S.C. § 1365(a).
9. This paragraph sets forth legal conclusions and questions of law to which no answer is required. To the extent that a response is required: Defendants admit that IGRC and SGC hold patented and unpatented mining claims in the District, and that aluminum,

arsenic, antimony, cyanide, iron, manganese, mercury, and thallium have entered the EFSF Salmon River and its tributaries from some of those properties; that such contributions are ongoing on at least one of those properties; and that none of the Defendants hold any NPDES permits for the alleged point sources. To the extent that this paragraph alleges that the Defendants have engaged in “discharges” as that term is defined in the CWA, such allegations are legal conclusions to which no response is required.

10. This paragraph sets forth legal conclusions and questions of law to which no answer is required.
11. Defendants admit that the Tribe provided Defendants, EPA, and Idaho Department of Environmental Quality officials with notice of its intent to sue sixty days prior to filing the Complaint, and they admit that neither the EPA nor the Idaho Department of Environmental Quality has commenced an action against the Defendants seeking to address alleged CWA violations. The remainder of the allegations in this paragraph are legal conclusions to which no answer is required.
12. This paragraph sets forth Plaintiff’s venue allegations that present legal conclusions and questions of law to which no answer is required. To the extent that a response is required, ~~Defendant agrees~~ Defendants agree that venue is proper in this Court.

PARTIES

Nez Perce Tribe

13. Defendants admit that the Nez Perce Tribe is a federally-recognized Indian tribe with headquarters on the Nez Perce Reservation in Lapwai, Idaho. The Defendants lack

sufficient information to admit or deny the remainder of the allegations in paragraph 13.

14. ~~The~~ Defendants lack sufficient information to admit or deny the allegations in paragraph 14.

15. This paragraph sets forth Plaintiff's legal conclusions and questions of law to which no answer is required. To the extent a response is required, the Defendants lack sufficient information to admit or deny the allegations in paragraph 15.

16. The allegation that ~~the~~ Defendants are responsible for point source pollution discharges is a legal conclusion to which no response is required. ~~The~~ Defendants lack sufficient information to admit or deny the remaining allegations in paragraph 16.

17. ~~The~~ Defendants lack sufficient information to admit or deny the allegations in this paragraph or to attest to the accuracy of Map 1.

18. Defendants admit that the majority of the District Holdings consists of unpatented mining claims on public land, but deny that the land is in the Payette National Forest. Defendants admit that the unpatented mining claims are on land that the Payette National Forest administers. ~~The~~ Defendants lack sufficient information to admit or deny the remaining allegations in paragraph 18.

19. Defendants admit that Snake River spring/summer Chinook salmon, Snake River steelhead, and bull trout are listed as "threatened" under the Endangered Species Act. Defendants admit that the Tribe has worked to recover the species listed in paragraph 19 in the South Fork Salmon River watershed, including in the EFSF Salmon River. ~~The~~ Defendants lack sufficient information to admit or deny the remaining allegations in paragraph 19.

20. Defendants admit that Plaintiff has taken actions to monitor and restore salmon populations in the South Fork Salmon River Watershed, but Defendants lack knowledge of the details of those programs or their asserted expenditures.
21. ~~The~~ Defendants lack sufficient information to admit or deny the allegations in paragraph 21.
22. ~~The~~ Defendants admit the allegations in paragraph 22.
23. ~~The~~ Defendants lack sufficient information to admit or deny the allegations in paragraph 23.
24. To the extent this paragraph alleges that ~~the~~ Defendants are liable for: (1) “point source,” (2) “discharges,” of (3) “pollutants,” as those terms are defined in the CWA, such allegations are legal conclusions to which no response is required. However, Defendants admit that metals have entered the EFSF Salmon River and its tributaries from properties in the District Holdings, increasing the quantity of those elements in the affected waters. ~~The~~ Defendants lack sufficient information to admit or deny the remaining allegations in paragraph 24.
25. To the extent a response is required, ~~the~~ Defendants lack sufficient information to admit or deny the allegations in paragraph 25.

Midas Gold

26. Defendants admit that IGRC, MGII and MGII are subsidiaries of MGC, and that SGC is a subsidiary of IGRC. Defendants admit that IGRC and SGC hold patented and unpatented mining claims in the District, and that metals have entered the EFSF Salmon River and its tributaries from some of those properties, and that such contributions are ongoing from at least one of those properties. Defendants deny that

MGC or MGII hold any property interests in the District. To the extent that this paragraph alleges that the Defendants have engaged in: (1) “discharges,” of (2) “pollutants,” as those terms are defined in the CWA, and to the extent it alleges that such discharges are “illegal,” such allegations are legal conclusions to which no response is required. The allegations of operational control are legal conclusions to which no response is required. Plaintiff’s definition of its term “Midas Gold” for use in the Complaint is not a factual allegation to which a response is required.

27. Defendants admit that MGII and IGRC are wholly owned subsidiaries of MGC. Defendants admit that SGC is a wholly owned subsidiary of IGRC and deny that it is owned directly by MGC.
28. To the extent that the paragraph so alleges, Defendants deny that MGC engages in direct exploration and development activities, but admit that such activities occur through MGC’s direct and indirect subsidiaries. Defendants admit the remaining allegations in paragraph 28.

APPLICABLE LEGAL REQUIREMENTS

29. This paragraph sets forth legal conclusions to which no response is required. Defendants admit that the quoted portions of the CWA have been quoted correctly.
30. This paragraph sets forth legal conclusions to which no response is required. Defendants admit that the quoted portions of the CWA have been quoted correctly.
31. This paragraph sets forth legal conclusions to which no response is required. Defendants admit that the quoted portions of the CWA have been quoted correctly.
32. This paragraph sets forth legal conclusions to which no response is required. Defendants admit that the quoted portions of the CWA have been quoted correctly.

33. This paragraph sets forth legal conclusions to which no response is required.

Defendants admit that the quoted portions of the CWA have been quoted correctly.

34. This paragraph sets forth legal conclusions to which no response is required.

35. This paragraph sets forth legal conclusions to which no response is required.

36. This paragraph sets forth legal conclusions to which no response is required.

BACKGROUND FACTS

East Fork South Fork Salmon River Watershed

37. Admitted.

38. Defendants deny that MGC or MGII own or hold any property interests in the District, but admit that SGC and IGRC hold such interests. Defendants further admit that the District Holdings contains many of the streams that comprise the headwaters of the EFSF Salmon River, including Meadow Creek, Sugar Creek, West End Creek, and Fiddle Creek, as illustrated on Map 2. Defendants admit that within the District Holdings, the EFSF Salmon River cascades into the Glory Hole mining pit, where it pools until eventually flowing out through a channel on the pit's north side. ~~The~~ Defendants admit the remaining allegations in paragraph 38, but note that the Glory Hole was constructed prior to World War II.

39. Admitted.

40. Defendants deny that MGC or MGII own or hold any property interests in the District, but admit that SGC and IGRC hold such interests. ~~The~~ Defendants admit the remaining allegations in paragraph 40.

41. ~~The~~ Defendants admit that the EFSF Salmon River provides habitat to other fish and wildlife species, but lack sufficient information to admit or deny the remaining allegations in paragraph 41.
42. Defendants deny that MGC or MGII own or hold any property interests in the District, but admit that SGC and IGRC hold such interests. ~~The~~ Defendants admit the remaining allegations in paragraph 42.

Midas Gold's Site

43. Defendants deny that MGC or MGII own or hold any property interests in the District. ~~The~~ Defendants admit the paragraph otherwise correctly describes the District Holdings.
44. Defendants admit that paragraph 44 accurately describes the history of portions of the District Holdings.
45. Defendants admit that precursor entities to IGRC and SGC began acquiring land and mineral interests in the District in 2009, but deny that any precursors to MGC and MGII engaged in any such actions. Defendants admit that MGII and precursor entities to IGRC conducted exploration activities in the District, but deny that SGC, MGC, or their precursors, took such actions. Defendants admit that they or their corporate precursors have extensively studied the District Holdings' water resources. Defendants admit that, since 2012, either IGRC or SGC, or one of their precursors, has held an interest in each patented and unpatented mining claim within the District Holdings. More specifically, Defendants admit that IGRC holds the patented or unpatented mining claims on which sit: the Bradley Tailings Pile, Keyway Dam, and the associated seeps; the DMEA Adit outlet, the DMEA Waste Rock Dump, and the

associated seeps; ~~and~~ the Bonanza Adit outlet and seep; and part of the Hangar Flats Tailings Pile and one of the associated seeps. Defendants admit that SGC holds the patented or unpatented mining claims on which sit: the Glory Hole; part of the Hangar Flats Tailings Pile and one of the associated seeps; the Bailey Tunnel outlet and seep; the Cinnabar Tunnel outlet and seep; and the Meadow Creek Adit outlet and seep. Defendants deny that MGC or MGII holds the patented or unpatented mining claims on which the alleged point sources are located. Defendants deny that SGC holds the patented or unpatented mining claims on which sit: the Bradley Tailings Pile, Keyway Dam, and associated seeps; the DMEA Adit outlet, DMEA Waste Rock Dump, and associated seeps; ~~and~~ the Bonanza Adit outlet and seep; and part of the Hangar Flats Tailings Pile and one of the associated seeps. Defendants deny that IGRC holds the patented or unpatented mining claims on which sit: the Glory Hole, the Bailey Tunnel outlet and seep; and part of the Hangar Flats Tailings Pile and one of the associated seeps; the Cinnabar Tunnel outlet and seep; and the Meadow Creek Adit outlet and Seep. The allegation that the District Holdings contain point source discharges is a legal conclusion to which no response is required.

46. Defendants admit that MGII, on behalf of IGRC and SGC, has performed all the actions alleged in paragraph 46. Defendants deny that IGRC or SGC have directly performed the alleged actions, and deny that MGC has performed such actions either directly or indirectly.
47. Defendants admit that MGII proposes to engage in the mining activities described in paragraph 47. Defendants deny that IGRC, MGC, or SGC have proposed to mine or re-mine the area, though Defendants admit that all of the patented and unpatented

mining claims MGII intends to develop are held by either IGRC or SGC. Defendants admit that Map 3 illustrates the Proposed Mine as described in the Plan of Restoration and Operations submitted to the U.S. Forest Service in September 2016.

48. Defendants admit that each patented and unpatented mining claim in the District Holdings is held by either IGRC or SGC, and that metals have entered the EFSF Salmon River and its tributaries from some of those properties, and that such contributions are ongoing from at least one of those properties. Defendants deny that MGC or MGII holds any of the patented or unpatented mining claims in the District. To the extent that this paragraph alleges that the Defendants have engaged in: (1) “discharges” of (2) “pollutants” from (3) “~~points~~ point sources,” as those terms are defined in the CWA, such allegations are legal conclusions to which no response is required. The allegation that Defendants are violating the CWA is a legal conclusion to which no response is required. ~~The~~ Defendants admit that Map 4 accurately depicts the locations of the alleged point sources. Defendants admit that they do not hold any NPDES permits for the alleged point sources.

Glory Hole

49. Defendants admit that the feature Plaintiff has designated as the “Glory Hole” (or “Yellow Pine Pit”) is an open mining pit, though deny that it was excavated during World War II, as it was opened earlier. Defendants admit that the “Glory Hole” is located on patented mining claim(s) held by SGC. Defendants deny that IGRC, MGC, or MGII hold any of the patented mining claim(s) on which the “Glory Hole” is located. Defendants admit that MGII and precursors to IGRC have conducted exploratory drilling under and around the Glory Hole, but deny that any other

Defendant, including IGRC as currently constituted, has conducted such drilling.

Defendants admit that MGII proposes to re-mine the “Glory Hole,” but deny that IGRC, MGC, or SGC intend to actively participate in the proposed mining activities.

50. Defendants admit the allegations in paragraph 50, but Defendants lack sufficient knowledge to admit or deny that the small channel directs water into the historical streambed of the EFSF Salmon River.

51. Defendants admit that the Glory Hole collects sediments. Defendants lack sufficient knowledge to admit or deny the remaining allegations in paragraph 51.

52. Defendants admit that significant quantities of mining-related sediments have built up in the bottom of the Glory Hole as it has captured contaminated sediments washing down from upstream sources within the District over the years. Defendants admit that the Glory Hole’s walls contain metals in the host rock that erode into the Glory Hole and contribute additional sediment to the bottom. Defendants admit that the Glory Hole’s walls contain seeps, and that metals flow into the Glory Hole from some of those seeps. To the extent that this paragraph alleges that the Defendants have engaged in: (1) “discharges” of (2) “pollutants,” as those terms are defined in the CWA, such allegations are legal conclusions to which no response is required. The Defendants lack sufficient information to either admit or deny the remaining allegations in paragraph 52.

53. Defendants admit that data collected by MGII shows that metal loads some distance downstream of the Glory Hole are 30 percent to 50 percent higher than those measured upstream. Defendants admit that, in 2015, the U.S. Geographical Survey estimated that the Glory Hole Reach of the EFSF Salmon River, as defined by the U.S.

Geographical Survey, contributed an average of 2,150 pounds of arsenic, 1,010 pounds of antimony, and 617 pounds of dissolved manganese into the EFSF Salmon River annually, from 2012-2014, but deny that these results are conclusive as to the Glory Hole being the source of the metals. To the extent that this paragraph alleges that the monitoring data shows increased levels of “pollutants,” as defined by the CWA, that term is a legal conclusion to which no response is required. Defendants deny the remaining allegations in paragraph 53.

54. Defendants admit that metals have entered the Glory Hole from seeps in its walls and that those metals have entered the EFSF Salmon River on a daily basis for at least the past five years preceding the date of the Complaint. Defendants deny that they have failed to take adequate steps to stop the alleged discharges, but admit that metals will continue to enter the Glory Hole and EFSF Salmon River from seeps in the Glory Hole’s walls unless control measures are implemented. Defendants admit that MGII has had access to the “Glory Hole” area since January 1, 2015, but deny an earlier right of access. Defendants admit that SGC or SGC’s precursors have had access to the “Glory Hole” area for the past five years, but deny that MGC or IGRC have had such access. The allegation of control is a legal conclusion to which no response is required. To the extent that this paragraph alleges: (1) “discharges,” of (2) “pollutants,” as those terms are defined by the CWA, such allegations are legal conclusions to which no response is required.
55. This paragraph sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants admit that they do not hold any NPDES permits for the alleged point sources.

Bradley Tailings Pile & Keyway Dam

56. Defendants admit that the feature Plaintiff has designated as Bradley Tailings Pile is a legacy mine tailing deposit site located upstream of the “Glory Hole,” adjacent to Meadow Creek, and that Meadow Creek is a perennial tributary of the EFSF Salmon River. Defendants admit that part of the Bradley Tailings Pile is on a patented mining claim held by IGRC. Defendants deny that SGC, MGC, or MGII hold the patented mining claim on which the Bradley Tailings Pile is partially located.
57. Admitted.
58. Defendants admit that the Bradley Tailings Pile is not capped with an impermeable layer, so rain and snow melt infiltrate it and come into contact with the contaminated tailings. Defendants further admit that water from the Keyway Dam emerges from three seeps at the base of the dam. Defendants admit that some of the water from those seeps flows overland into the Keyway Marsh, which is a delineated wetland. Defendants lack sufficient information to either admit or deny the remaining allegations in paragraph 58.
59. Defendants admit that monitoring data show that water from the three Keyway Dam seeps enters the Keyway Marsh and that this water contains elevated levels of aluminum, antimony, arsenic, cyanide, iron, manganese, and mercury. Defendants lack sufficient information to either admit or deny the remaining allegations in paragraph 59.
60. Defendants lack sufficient information to admit or deny the allegations in paragraph 60.

61. Defendants admit that MGII has had access to the Bradley Tailings Pile and Keyway Dam area since January 1, 2015, but deny an earlier right of access. Defendants admit that IGRC or its precursors have had access to the area for the past five years. Defendants admit that SGC and MGC have had the same right as the general public to access those portions of the Bradley Tailings Pile that are located on lands subject to unpatented claims, but deny that SGC or MGC have had access to those portions of the area located on IGRC's patented lands. The allegation of control is a legal conclusion to which no response is required. Defendants deny that they have failed to take adequate steps to stop the alleged discharges at the Bradley Tailings Pile and Keyway Dam. Defendants lack sufficient information to admit or deny the remaining allegations in paragraph 61.

62. This paragraph sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants admit that they do not hold any NPDES permits for the alleged point sources.

Hangar Flats Tailings Pile

63. Defendants admit that the feature Plaintiff has designated as the Hangar Flats Tailings Pile is a legacy deposit site that sits adjacent to Meadow Creek, just northwest and downstream of the Bradley Tailings Pile, but deny that the feature is a "tailings pile." Defendants admit that part of the Hangar Flats Tailings Pile is located on a patented mining claim held by SGC. Defendants deny that MGC, MGII, or IGRC hold the patented mining claims on which part of the Hangar Flats Tailings Pile is located.

64. Defendants deny that the feature the Plaintiff has designated as the Hangar Flats Tailings Pile is comprised entirely of mine tailings, though admit that the feature is on

the location of a historic tailings disposal. Defendants lack sufficient information to admit or deny that the feature continues to contain tailings. Defendants admit that portions of the feature contain elevated concentrations of arsenic, antimony, aluminum, iron, manganese, and mercury. Defendants admit that the pile is not capped, so that rain and snow melt infiltrate it, and that there are two seeps near the base of the feature containing the listed metals. Defendants lack sufficient information to admit or deny the remaining allegations in paragraph 64.

65. Defendants admit that monitoring data shows that these seeps contain metals, including aluminum, antimony, arsenic, cyanide, iron, manganese, mercury, and thallium, that flow, on occasion, into the floodplain of Meadow Creek. Defendants admit that water from one seep associated with the Hangar Flats Tailings Pile ~~seeps~~ has been seen flowing overland into Meadow Creek on one occasion, in May 2014. To the extent that this paragraph alleges that Defendants have: (1) “discharged,” (2) “pollutants,” as those terms are defined in the CWA, such terms are legal conclusions that do not require a response. Defendants lack sufficient information to admit or deny the remaining allegations in paragraph 65.

66. Defendants admit that MGII has had access to the area since January 1, 2015, but deny an earlier right of access. Defendants admit that SGC or its precursors have had access to those portions of the area located on its patented mining claims for the past five years. Defendants deny that IGRC and MGC have had access to those parts of the area that are located on SGC’s patented claims. Defendants admit that IGRC or its precursors have had access to those portions of the area on which it holds unpatented claims for the past five years, and that MGC and SGC have had the same access as

members of the general public to the portions of the area located on those unpatented claims. The allegation of control is a legal conclusion to which no response is required. Defendants deny that they have failed to take adequate steps to stop the alleged discharges at the Hangar Flats Tailings Pile. Defendants lack sufficient information to admit or deny the remaining allegations in paragraph 66.

67. This paragraph sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants admit that they do not hold any NPDES permits for the alleged point sources.

Bailey Tunnel

68. Defendants admit that the Bailey Tunnel is a tunnel that was constructed around 1943 to divert the EFSF Salmon River around the Glory Hole and into one of its perennial tributaries, Sugar Creek, and that the Bailey Tunnel has been abandoned since 1955 when the EFSF Salmon River stopped flowing through the Tunnel. Defendants admit that the Bailey Tunnel is located on a patented mining claim(s) held by SGC, but deny that any other Defendant holds that patented claim. Defendants admit that, at times, water containing elevated concentrations of metals exits the Bailey Tunnel and reaches Sugar Creek, but note that, to the extent that the paragraph alleges “discharges” as defined under the CWA, such allegation is a legal conclusion that does not require a response. Defendants admit that MGII has conducted exploratory drilling several hundred feet from the tunnel, but deny that any other Defendant has drilled in the vicinity.
69. Defendants admit that monitoring data from the mouth of Bailey Tunnel show that water exiting the tunnel contains antimony, arsenic, iron, and manganese. Defendants

admit that this water flows into Sugar Creek. To the extent that the paragraph alleges: (1) “discharges” of (2) “pollutants,” as those terms are defined in the CWA, such terms are legal conclusions that require no response.

70. Defendants admit that water from the Bailey Tunnel has carried metals into Sugar Creek, intermittently, for the five years preceding the date of the Complaint, that such flows are recurring, and that such flows will continue unless control measures are implemented. Defendants admit that MGII has had access to the area since January 1, 2015, but deny an earlier right of access. Defendants admit that SGC or its precursors have had access to the area for the past five years, but deny that IGRC or MGC have had such access. The allegation of control is a legal conclusion to which no response is required. To the extent that this paragraph alleges “discharges” as defined by the CWA, that term is a legal conclusion to which no response is required. Defendants deny that they have failed to take adequate steps to stop the alleged discharges from the Bailey Tunnel.

71. This paragraph sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants admit that they do not hold any NPDES permits for the alleged point sources.

DMEA Adit & DMEA Waste Rock Dump

72. Defendants admit that the Defense Minerals Exploration Administration (“DMEA”) Adit and DMEA Waste Rock Dump are located between the “Glory Hole” and the Bradley Tailings Pile on land subject to an unpatented mining claim held by IGRC. Defendants deny that MGII, MGC, or SGC hold any of the mining claim(s) on which the DMEA Adit and DMEA Waste Rock Dump are located. Defendants admit that

adits are small, exploratory tunnels bored into the mountainside, sometimes miles long, which are typically graded such that water drains out through the adit opening.

73. Defendants admit that water from the base of the DMEA Adit contains aluminum, arsenic, antimony, iron, mercury, and manganese. Defendants admit water samples at a seep downgradient from the DMEA Waste Rock Dump contain aluminum, antimony, arsenic, iron, manganese, and mercury, and that water from this seep reaches the EFSF Salmon River. Defendants lack sufficient information to admit or deny the remaining allegations in paragraph 73. To the extent that this paragraph alleges: (1) “discharges” of (2) “pollutants,” as those terms are defined by the CWA, such terms are legal conclusions to which no response is required.
74. Defendants lack sufficient information to admit or deny the allegation that pollutants from the DMEA Adit and the DMEA Waste Rock Dump have flowed to the EFSF Salmon River continuously for at least five years preceding the date of the Complaint. Defendants lack sufficient information to admit or deny the allegation that the alleged discharges are recurring or that they will continue unless control measures are implemented. Defendants admit that MGII has had access to the area since January 1, 2015, but deny an earlier right of access. Defendants admit that IGRC or its precursors have had access to this area for the past five years, but deny that MGC or SGC have had any access beyond that available to members of the general public. The allegation of control is a legal conclusion to which no response is required. Defendants deny that they have failed to take adequate steps to stop the alleged discharges from the DMEA Adit and DMEA Waste Rock Dump. To the extent that this paragraph alleges: (1)

“discharges” of (2) “pollutants,” as those terms are defined by the CWA, such allegations are legal conclusions to which no response is required.

75. This paragraph sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants admit that they do not hold any NPDES permits for the alleged point sources.

Bonanza Adit

76. Defendants admit that a small seep, originating as a small pond on a bench on a hillside that has been excavated across its face by legacy exploration activities, exists near the Bonanza Adit. Defendants lack sufficient information to admit or deny that the seep has any hydrological connection to the Bonanza Adit. Defendants admit that the Bonanza Adit seep is located on an unpatented mining claim held by IGRC, but deny that MGII, MGC, or SGC hold the unpatented mining claim on which the seep is located. Defendants deny drilling in the near vicinity of the Bonanza Adit.

77. Defendants deny that monitoring data show that the Bonanza Adit seep flows at a low volume year-round out of a pond, downhill, across a road, and onto the floodplain of Sugar Creek. Defendants admit that, on at least several occasions during the five years preceding the date of the Complaint, water from the Bonanza Adit seep carried metals, including aluminum, antimony, arsenic, cyanide, iron, manganese, and mercury, into the Sugar Creek floodplain. To the extent that this paragraph alleges: (1) “discharges” of (2) “pollutants,” as those terms are defined by the CWA, such allegations are legal conclusions to which no response is required.

78. Defendants lack sufficient information to admit or deny the allegations in paragraph 78.

79. Defendants deny that metals from the Bonanza Adit have flowed continuously into Sugar Creek for the five years preceding the date of the Complaint. Defendants admit that MGII has had access to the area since January 1, 2015, but deny an earlier right of access. Defendants admit that IGRC or its precursors have had access to this area for the past five years, but deny that MGC or SGC have had any right of access beyond that available to the general public. The allegation of control is a legal conclusion to which no response is required. Defendants deny that they have failed to take adequate steps to stop the alleged discharges from the Bonanza Adit. Defendants lack sufficient information to admit or deny the remaining allegations in paragraph 79. To the extent that this paragraph alleges: (1) “discharges” of (2) “pollutants,” as those terms are defined by the CWA, such terms are legal conclusions to which no response is required.

80. This paragraph sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants admit that they do not hold any NPDES permits for the alleged point sources.

Cinnabar Tunnel

81. Defendants admit that the Cinnabar Tunnel is a legacy adit located on a hillside east of the EFSF Salmon River, upstream of the Glory Hole, but deny that it is located in the middle of a hillside. Defendants admit that water emerges from the tunnel as a seep. Defendants admit that the Cinnabar Tunnel is located on land subject to an unpatented mining claim held by SGC. Defendants deny MGC, MGII, or IGRC hold the unpatented mining claim(s) on which the Cinnabar Tunnel is located. Defendants

admit that MGII has conducted exploratory drilling in the vicinity, but deny that any other Defendant has conducted such drilling.

82. Defendants admit that water from the Cinnabar Tunnel flows to the EFSF Salmon River at three identifiable points. Defendants admit that water from the Tunnel contains antimony and arsenic. To the extent that this paragraph alleges: (1) “discharges” of (2) “pollutants,-” as those terms are defined by the CWA, such allegations are legal ~~conclusion~~conclusions to which no response is required.
83. Defendants admit that water containing antimony and arsenic from the Cinnabar Tunnel has regularly reached the EFSF Salmon River for at least five years preceding the date of this Complaint. Defendants admit that MGII has had access to the area since January 1, 2015, but deny an earlier right of access. Defendants admit that SGC or its precursors have had access to the area for the past five years, but deny that MGC or IGRC have had any right of access beyond that held by the general public. The allegation of control is a legal conclusion to which no response is required. Defendants deny that they have failed to take adequate steps to stop the alleged discharges from the Cinnabar Tunnel, that the alleged discharges are recurring, and that they will continue unless control measures are implemented. To the extent that this paragraph alleges: (1) “discharges” of (2) “pollutants,-” as those terms are defined by the CWA, such allegations are legal ~~conclusion~~conclusions to which no response is required.
84. This paragraph sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants admit that they do not hold any NPDES permits for the alleged point sources.

Meadow Creek Adit

85. Defendants admit that there is a seep located near the Meadow Creek Mine Adit above the heap leach pile at the base of the Hangar Flats hillside, upstream of the Glory Hole, adjacent to Meadow Creek. Defendants lack sufficient information to admit or deny that the seep is hydrologically connected to the Meadow Creek Mine Adit. Defendants admit that the seep is located on a patented mining claim held by SGC. Defendants deny that IGRC, MGC, or MGII hold the patented mining claim on which the Meadow Creek Adit is located. Defendants admit that MGII has conducted exploratory drilling in the area, but deny that any other Defendants have engaged in such conduct.
86. Defendants admit that monitoring data from the seep sampling show that it contains aluminum, antimony, arsenic, iron, manganese, and mercury. Defendants deny that monitoring data show that water from the seep reaches the EFSF Salmon River. To the extent that this paragraph alleges: (1) “discharges” of (2) “pollutants,-” as those terms are defined in the CWA, such allegations are legal conclusions to which no response is required.
87. Defendants admit that water from the seep enters a drainage ditch at the base of the hillside during spring snowmelt season. Defendants lack sufficient information to admit or deny that Nez Perce Tribal staff observed water from the alleged seep entering the EFSF Salmon River in May 2018 and lack sufficient information to admit or deny that water from the seep has reached the EFSF Salmon River on numerous occasions when hydrologic conditions were similar. Defendants admit that MGII has had access to the area since January 1, 2015, but deny an earlier right of access. Defendants admit that SGC or its precursors have had access to portions of the area, including the Meadow Creek Adit seep, for the past five years, but deny that it has had any right to

access, beyond that held by the general public, to parts of the area subject to mining claims held by other entities. Defendants admit that IGRC has had access to portions of the area for the past five years, but deny that it has had access to the patented claim on which the adit seep is located. Defendants deny that MGC has had any right of access to the area beyond that held by the general public. The allegation of control is a legal conclusion to which no response is required. To the extent that this paragraph alleges “discharges” as defined by the CWA, that term is a legal conclusion to which no response is required. Defendants deny that they have failed to take adequate steps to stop the alleged discharges from the Meadow Creek Adit. Defendants ~~lacks~~ lack sufficient information to admit or deny the remaining allegations in paragraph 87.

88. This paragraph sets forth legal conclusions to which no response is required. To the extent that a response is required, Defendants admit that they do not hold any NPDES permits for the alleged point sources.

CLAIM FOR RELIEF

89. In response to paragraph 89, Defendants repeat their response to Paragraphs 1 through 88.
90. This paragraph contains legal conclusions to which no response is required.
91. Defendants reassert their responses to paragraphs 54, 61, 66, 70, 74, 79, 83, and 87.
92. This paragraph contains legal conclusions to which no response is required.
93. This paragraph contains legal conclusions to which no response is required.
94. This paragraph contains legal conclusions to which no response is required.
95. To the extent that they do not form part of natural background conditions, Defendants admit that the listed metals could qualify as “pollutants” under the CWA.

96. Defendants admit that the EFSF Salmon River, Meadow Creek, Sugar Creek and, to the extent that it qualifies as an adjacent wetland under 40 C.F.R. § 122.2, the Keyway Marsh are navigable waters under the CWA.
97. This paragraph contains legal conclusions to which no response is required.
98. Defendants admit that IGRC holds the patented or unpatented mining claims on which sit: the Bradley Tailings Pile, Keyway Dam, and the associated seeps; the DMEA Adit outlet, the DMEA Waste Rock Dump, and the associated seeps; ~~and~~ the Bonanza Adit outlet and seep; and part of the Hangar Flats Tailings Pile and one of the associated seeps. Defendants admit that SGC holds the patented or unpatented mining claims on which sit: the Glory Hole; the Bailey Tunnel outlet and seep; part of the Hangar Flats Tailings Pile and one of the associated seeps; the Cinnabar Tunnel outlet and seep; and the Meadow Creek Adit outlet and seep. Defendants deny that MGC or MGII hold the patented or unpatented mining claims on which the alleged point sources are located. Defendants deny that SGC holds the patented or unpatented mining claims on which sit: the Bradley Tailings Pile, Keyway Dam, and associated seeps; the DMEA Adit outlet, DMEA Waste Rock Dump, and associated seeps; ~~and~~ the Bonanza Adit outlet and seep; and part of the Hangar Flats Tailings Pile and one of the associated seeps. Defendants deny that IGRC holds the patented or unpatented mining claims on which sit: the Glory Hole, the Bailey Tunnel outlet and seep; part of the Hangar Flats Tailings Pile and one of the associated seeps; the Cinnabar Tunnel outlet and seep; and the Meadow Creek Adit outlet and seep. Defendants admit that MGII plans to conduct further mineral operations in a portion of the District Holdings, but deny that the other Defendants have such plans.

99. This paragraph contains legal conclusions and prayers for relief to which no response is required.

100. This paragraph contains legal conclusions and prayers for relief to which no response is required. To the extent a response is required, Defendants deny the allegations in paragraph 100.

DEFENDANTS' ADDITIONAL STATEMENTS AND DEFENSES

1. The United States is a necessary party that must be joined to this action in order for the Court to afford complete relief among the parties in relation to the alleged point sources located on unpatented mining claims, because the land underlying such claims is owned in fee by the U.S. Forest Service ("USFS"). Alleged point sources on unpatented mining claims in this action include the DMEA Adit & Waste Dump, the Bonanza Adit, the Cinnabar Tunnel, part of the Hangar Flats Tailings Pile and one of the associated seeps, and portions of the Bradley Tailings Pile.
2. Defendants are not accountable under the Clean Water Act for discharges originating from lands on which they hold unpatented mining claims. Under the Clean Water Act, an entity cannot be held liable for a discharge if it is in compliance with the Act's permitting requirements. 33 U.S.C. § 1311(a). Only entities that own or operate a point source are required to obtain permits for discharges. *See, e.g.*, Idaho Admin. Code 58.01.25.010.62. Lands subjected to unpatented mining claims, however, are owned in fee by the United States and the claim holder cannot engage in actions that substantially disturb the surface estate without the permission of the USFS. *See generally* 36 C.F.R. ~~Part 228A~~ § 228 Subpart A. Absent permission from the USFS to manage discharges on lands subject to unpatented claims, the claim holder cannot be

said to “own” or “operate” facilities located on the claim, and thus is not liable under the Clean Water Act for discharges occurring on the unpatented claim.

3. The Complaint fails to plead a veil-piercing claim against MGC, which does not hold any of the mining claims composing the District Holdings. As a result, in order for MGC to be liable for any of the alleged discharges, Plaintiff must establish that MGC operates at least one facility on which a point source is located. Doing so requires showing that MGC officers or employees, in their capacities as representatives of MGC, engage in direct operational control of pollution-related activities at the facility. *See United States v. Bestfoods*, 524 U.S. 51, 66–68 (1998). Merely establishing that MGC directs the activities of some other entity that operates a facility does not suffice to establish operator liability. *Id.*
4. Defendants are not liable for pollutants carried to waters of the United States by natural processes. *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1071 (9th Cir. 2011) (holding stormwater runoff that is not collected or channeled is not a discharge from a point source), *rev'd on other grounds sub nom. Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597; ~~133 S. Ct. 1326, 185 L. Ed. 2d 447~~ (2013); *Cty. of Maui v. Hawaii Wildlife Fund*, 18260 (S. Ct. 2019) (considering whether discharges to groundwater can lead to CWA liability).

Christopher H. Meyer [ISB No. 4461]
Preston N. Carter [ISB No. 8462]
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, Idaho 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300
chrismeyer@givenspursley.com
prestoncarter@givenspursley.com

Ronald J. Tenpas (*admitted pro hac vice*)
Margaret Peloso (*admitted pro hac vice*)
Corinne Snow (*admitted pro hac vice*)
VINSON & ELKINS LLP
2200 Pennsylvania Avenue NW, Suite 500 West
Washington, DC 20037-1701
Office: (202) 639-6791
Fax: (202) 330-5328
rtenpas@velaw.com
mpeloso@velaw.com
csnow@velaw.com

Attorneys for Defendants

**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.

Case No.: 01:19-cv-00307-BLW

**BRIEF IN SUPPORT OF DEFENDANTS’
MOTION FOR LEAVE TO AMEND THEIR
ANSWER**

INTRODUCTION

Midas Gold Corp., Midas Gold Idaho, Inc., Idaho Gold Resources Company, LLC (“IGRC”), and Stibnite Gold Company (“SGC”) (collectively, “Defendants”) move for leave to amend their Answer to more accurately describe the ownership of some of the properties and mining claims at issue in this litigation. As discussed below, this motion should be granted because it has been filed in good faith, has been timely filed, will not prejudice the Plaintiff Nez Perce Tribe (“Tribe”), and is not futile.

BACKGROUND

The Tribe filed this Clean Water Act (“CWA”) citizen suit against Defendants on August 8, 2019. The Tribe’s Complaint alleges that the Defendants violated the CWA because they own and/or operate eight areas of historical mining activity, or point sources, from which pollutants have allegedly discharged into navigable waters without a permit. Tribe’s Complaint ¶ 97. These point sources are alleged to be located on lands subject to a number of patented and unpatented mining claims, held by the Defendants, and distributed across 29,827 acres in Valley County, Idaho. *Id.* ¶ 43.

The Complaint made no attempt to distinguish between Defendants or their individual holdings, and it accuses each Defendant of owning and operating each of the alleged point sources. *See, e.g.*, Tribe’s Complaint ¶ 5. Of the Defendants, only IGRC and SGC hold mining interests in the Stibnite Mining District, and these two entities each separately hold their own separate set of claims. *See Answer* ¶ 5. As a result, the Defendants’ Answer addressed the ownership of the land and holders of the mining claims underlying each point source, some of which are located on two or more different parcels of land or claims. *See, e.g., id.* ¶ 98. Regarding one of the alleged point sources—the Hangar Flats Tailings Pile (“Pile”)—the Answer stated that the entirety of the Pile

and two seeps that the Tribe's Complaint associated with the Pile were located on land subject to patented mining claims owned by SGC. Answer ¶ 63. Upon further review, the Defendants have determined that part of the Pile and one of the associated seeps are located on an adjacent tract of National Forest System land owned and operated by the United States and United States Forest Service ("USFS") and subject to an unpatented mining claim held by IGRC. Pursuant to this Court's Order of August 10, 2020, parties have until August 18, 2020 to file amended pleadings. Dkt. No. 42.

ARGUMENT

As established in this Court's Order of February 11, 2020, motions to amend filed by the court's deadline will be considered under Federal Rule of Civil Procedure 15(a). Dkt. No. 36 at 2, n.2. Federal Rule of Civil Procedure 15(a) establishes a "liberal amendment policy" for pleadings, *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir. 1992), under which courts should grant leave to amend "freely 'when justice so requires.'" *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc) (quoting Fed. R. Civ. P. 15(a)). "[T]his policy is to be applied with extreme liberality." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990); see also *Griggs v. Pace Am. Grp., Inc.*, 170 F.3d 877, 880 (9th Cir. 1999) (noting that inferences should be drawn "in favor of granting the motion"). When determining whether to allow amendment, courts consider "the presence of any of four factors: bad faith, undue delay, prejudice to the opposing party, and/or futility." *Griggs*, 170 F.3d at 880. The burden is on the nonmovant to show bad faith, prejudice, unduly delay, or futility. *Allred v. Home Depot USA, Inc.*, No. 1:17-CV-00483-BLW, 2018 WL 4762992, at *2 (D. Idaho Oct. 2, 2018).

Here, Defendants have not acted in bad faith and have gained no advantage from the portions of the Answer requiring amendment. Defendants only recently became aware of the mis-

statement in the Answer and are moving to quickly correct the previous response in order to ensure that it more accurately reflects the ownership of the land underlying the point sources at issue in this case.

The Tribe will not suffer prejudice as a result of the proposed amendment nor will the proceedings experience undue delay. When considering prejudice, courts consider whether the amendment will delay the proceedings or require additional discovery. *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001). The burden is on the nonmovant to show prejudice or undue delay. *Allred*, 2018 WL 4762992, at *2. Prejudice due to undue delay normally only exists when a party “drastically changes its litigation theory.” *Id.* (quoting *AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 953 (9th Cir. 2006)). The proposed amendment is relatively minor and will cause no delay in these proceedings and the only issues to which it relates—the ownership of the lands and mining claims at issue—is already at issue in this case and already subject to extensive discovery. In this case, fact discovery is still underway and has just been extended by a new court ordered scheduling order that was jointly proposed by the parties. *See* Dkt. No. 41; Dkt. No. 42. Additionally, the time period between the original Answer and the Amended Answer—here, seven months—is identical to the time period in *Allred*, in which this Court approved a plaintiff’s motion to amend her Complaint. *Allred*, 2018 WL 4762992, at *2.

Finally, the proposed amendment is not futile. An amendment is futile when “no set of facts can be proved under the amendment . . . that would constitute a valid and sufficient claim or defense.” *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 656 (9th Cir. 2017) (quoting *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988)). Here, Defendants can (and have in the

course of discovery) produce documentation proving the proper ownership of the properties and mining claims at issue in this case.

CONCLUSION

For the reasons stated above, the motion for leave is timely, is not futile, has been made in good faith, and it imposes no undue prejudice or burden on the Tribe. Defendants respectfully request that the Court grant their motion for leave to file the Amended Answer, which is attached as Exhibit 1 and in redline showing changes in Exhibit 2 to the motion.

Respectfully submitted,

/s/ Preston N. Carter

Ronald J. Tenpas (*admitted pro hac vice*)
Margaret Peloso (*admitted pro hac vice*)
Corinne Snow (*admitted pro hac vice*)
VINSON & ELKINS LLP
2200 Pennsylvania Ave. NW, Ste 500 West
Washington, DC 20037-1701
Office: (202) 639-6791
Fax: (202) 330-5328
rtenpas@velaw.com
mpeloso@velaw.com
csnow@velaw.com

Christopher H. Meyer [ISB No. 4461]
Preston N. Carter [ISB No. 8462]
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, ID 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300
chrismeyer@givenspursley.com
prestoncarter@givenspursley.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on this 18th day of August 2020, I filed the foregoing document 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:

Amanda Wright Rogerson
Bryan Hurlbutt
Laurence J. Lucas
ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
Counsel for Plaintiff

Michael Lopez
NEZ PERCE TRIBE
P.O. Box 305
Lapwai, ID 83540
Counsel for Plaintiff

/s/ Preston N. Carter

Preston N. Carter