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February 28, 2019

UNITED STATES OF AMERICA, ) IDI-38421  
 )  
 Contestant ) Involving 34 unpatented placer  
 ) mining claims located within  
 v. ) Power Site Classification 146,  
 ) Boise National Forest, Idaho  
 MINING RESOURCES, LLC, )  
 )  
 Contestee )

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UNITED STATES OF AMERICA, ) IDI-38488  
 )  
 Contestant ) Involving the Guardian Angels  
 ) (IMC 217554) unpatented placer  
 v. ) mining claim located within  
 ) Power Site Classification 146,  
 MONA L. LEIGH and VIRGIL O. ) Boise National Forest, Idaho  
 MOEHRING, )  
 )  
 Contestees )

**DECISION**

Appearances: For the United States: Alan J. Campbell, Esq., and Nicholas Pino, Esq., U.S. Department of Agriculture, Office of General Counsel.

For Mining Resources, LLC: Jason Madenford;

For Mona L. Leigh and Virgil O. Moehring: Mona L. Leigh.

Before: Andrew S. Pearlstein, Administrative Law Judge

### Summary of Decision

The United States of America, through the U.S. Forest Service ("Forest Service"), seeks an order prohibiting mining on a series of 35 unpatented placer mining claims located along the South Fork of the Payette River ("SFPR" or the "River") in the Boise National Forest ("BNF"), Idaho. The Forest Service brought this mining contest against the two Contestees or "Claimants" who own the subject claims: Mining Resources, LLC, which owns 34 claims, and the joint party of Mona L. Leigh and Virgil O. Moehring, which owns one claim. This case arises under the Mining Claims Rights Restoration Act of 1955 ("MCRRA," also known as "P. L. 359"), 30 U.S.C. §§ 621-625, which provides that public lands previously withdrawn from mining for the possible development of power sites are open for mining location subject to the results of a hearing to determine whether placer mining would substantially interfere with other uses of the land within the claims.

After hearing, I have concluded that the great preponderance of the evidence shows that placer mining would substantially interfere with other uses of the land within the claims and adjacent to them along the River, particularly uses involving recreation (kayaking, rafting, and camping), fisheries, cultural resources, and scenic values. These other uses have far greater economic and unquantifiable values than any potential value that could be derived from placer mining the claims. Therefore, in this Decision I conclude that placer mining should be completely prohibited on all the subject claims.

### Procedural Background

On February 1, 2017, Jason Madenford, on behalf of his company Mining Resources, LLC ("Mining Resources"), located 33 placer mining claims along the South Fork of the Payette River ("SFPR" or "the River") in the Boise National Forest, Boise County, Idaho. He located one additional claim on February 21, 2017.<sup>1</sup> Mr. Madenford then filed the notices of location for the group of 33 claims with the Boise County Recorder's Office in Idaho City on April 14, 2017, and the one remaining claim on May 4, 2017. He filed copies of the 34 notices of location with the U.S. Bureau of Land Management ("BLM") Idaho State Office in Boise a few days later.

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<sup>1</sup> Attachment 1 to this Decision is a list of Mining Resources' 34 claims with their names and BLM's numerical designations, and the single claim of Ms. Leigh and Mr. Moehring, taken from the Forest Service's Exhibit F-3, page 9.

Mona L. Leigh and her brother-in-law Virgil O. Moehring<sup>2</sup> located one claim on the SFPR, the Guardian Angels, on March 5, 2017, and filed the notice of location with BLM on March 21 and Boise County on April 14, 2017. Although the claims are in a National Forest, under the surface jurisdiction of the Forest Service, an agency of U.S. Department of Agriculture, BLM, an agency of the U.S. Department of the Interior, has jurisdiction over the underlying mineral estate.

All these claims are located within an area designated on the South Fork of the Payette River for potential hydropower development, known as Power Site Classification 146, established by order of the Secretary of the Interior in 1926. Following the procedures in the MCRRA, 30 U.S.C. § 621, BLM, on behalf of the Secretary of the Interior, notified the Federal Energy Regulatory Commission (“FERC”) and the Forest Service, the surface manager of the subject lands, of the location of these mining claims. BLM also notified the Claimants and advised them not to conduct any placer mining operations for 60 days pending responses from those two agencies. FERC responded that it had no objection to mining the claims since no power development was planned for the withdrawal area. However, on May 8, 2017, Cecilia R. Seesholtz, the Boise National Forest Supervisor, responded on behalf of the BNF that the Forest Service determined that placer mining would substantially interfere with other uses of the land and requested a hearing.

BLM, on behalf of the Contestant, the United States of America, through the Forest Service, then notified the Claimants – Mining Resources and Ms. Leigh – that a hearing will be required pursuant to the MCRRA.<sup>3</sup> BLM then referred the file to our office, the Departmental Cases Hearings Division (“DCHD”) in the Department’s Office of Hearings and Appeals (“OHA”), where it was assigned to me as the presiding administrative law judge. Under 43 C.F.R. § 3736.2(a), hearings held pursuant to the MCRRA are governed by the procedural rules applicable to

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<sup>2</sup> Mona L. Leigh and Virgil O. Moehring are joint owners of the subject Guardian Angels Claim, and a joint party or Contestee for the purposes of this proceeding. However, for convenience this Decision will generally refer to that party only as Ms. Leigh since only she actively appeared on behalf of both claimants as their representative at the hearing, signed all the key documents, and testified as a witness. Ms. Leigh and Mining Resources, represented by Jason Madenford, also generally took allied positions and cooperated in their presentations of evidence during the hearing. They may be referred to collectively in this Decision as “Claimants” or “Contestees.”

<sup>3</sup> Originally the Forest Service also notified another claimant along the SFPR, Rick Pergande, that his two claims would also be subject to a hearing and included in this proceeding. However, Mr. Pergande subsequently failed to file the annual maintenance fees for his claims, effectively abandoning them, resulting in the dismissal of Mr. Pergande as a Contestee in this proceeding in an order I issued on May 14, 2018.

general mining contests conducted by the Department. Under those procedures, found at 43 C.F.R. § 4.450 *et seq.*, I held a prehearing conference call with the parties on October 10, 2017. The Forest Service then filed a complaint asserting that the subject claims would substantially interfere with other uses of the land along the SFPR and requesting an order prohibiting placer mining on the claims. The Contestees filed answers in effect denying the Forest Service's allegations.

In another conference call we agreed on a schedule for the hearing and a visit to the site of the subject claims along the SFPR. The site visit took place on June 5, 2018, attended by counsel and staff of the BNF Lowman District Office, as well as Jason Madenford on behalf of Mining Resources, and Mona L. Leigh. The hearing convened in Boise, Idaho, on June 6 and continued through June 8, 2018. The Forest Service, represented by counsel, proffered eleven witnesses and a series of exhibits for the hearing, including a comprehensive "Geology, Mining, and Other Uses Report." (Ex. F-3). Jason Madenford represented Mining Resources at the hearing, and Ms. Leigh represented herself and Mr. Moehring. Participating cooperatively, Mr. Madenford and Ms. Leigh produced five witnesses (including themselves) and a series of exhibits consisting of documents and photographs. The stenographic transcript of the hearing consists of 725 pages.<sup>4</sup>

The record of the hearing closed on October 18, 2018, at the end of the post-hearing briefing period. Only the Forest Service submitted a post-hearing brief.

### Findings of Fact

#### - The South Fork Payette River Area and its Uses

The 35 mining claims that are the subject of this proceeding occupy a ten-mile stretch of the SFPR upstream and east of the small town of Lowman, Idaho, in the BNF. The city of Boise and its suburbs are about 75 road miles (only about 50 as the crow flies) southwest of Lowman. The drive can be made in less than two hours via alternative equal-length routes (State Highway 21 through Idaho City, or State Routes 17 and 55 through Banks). The River drains part of the western slope of the Sawtooth Range, then flows westward through Lowman to the towns of Crouch and Banks, Idaho, where it is joined, respectively, by the Middle and North Forks of the Payette River. Highway 21 runs parallel along the River's north bank in the claim

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<sup>4</sup> In this Decision, the stenographic transcript will be cited as "Tr." followed by the page number(s). Exhibits will be cited as "Ex." The Forest Service's exhibits are numbered with the letter "F" as a prefix. Mining Resources' are numbered with "M" and Ms. Leigh's as "L."

area, from milepost 73 to 83. The State of Idaho has designated Highway 21 from Boise through Lowman and beyond to Stanley as the Ponderosa Pines Scenic Byway. (Ex. F-3 at 2-3, Figs. 4,5).

The segment of the SFPR where the claims are located (the "River segment" or "claims segment") occupies a canyon of varying width, bordered by steep slopes in most areas, with some broader benches or terraces adjacent to the River. The River drops from an elevation of about 4,230 feet from the upper extent of the claims, about 380 feet to an elevation of 3,810 feet at the westernmost claim near the Mountain View Campground. (Ex. F-3 at 4-6, Figs 6-8).

The claims segment is heavily used by campers, kayakers, rafters, fishermen, tourists, and other recreationists during the summer and shoulder seasons. The SFPR is known for its scenic beauty, which, combined with accessibility from a paved highway, makes it an extremely popular destination for tourists from the Boise area and beyond. The Forest Service maintains three developed campgrounds and four dispersed camping sites in the River segment that host approximately 10,000 visitors each season, from May to October. There are three lodges offering overnight accommodations in the River segment. One of the campgrounds is adjacent to the natural Kirkham Hot Springs, where the Forest Service maintains a parking area and infrastructure to allow visitors to bathe in the hot springs. About 40,000 people visit the SFPR in the Lowman area each year. (Ex. F-3, App. G at 2; Tr. 32-39, 249-56).

In the Boise National Forest Land and Resource Management Plan (the "Forest Plan"), the Forest Service determined that the entire SFPR within the National Forest was eligible for protection as a wild and scenic river under the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287. To be considered for inclusion in the national system of wild and scenic rivers, a river segment must meet two criteria: (1) it is free-flowing and (2) it possesses at least one "outstandingly remarkable value" or "ORV" – such as exceptional scenery, recreational opportunities, geological features, fisheries, wildlife, historical sites, and cultural or archeological significance. The Forest Plan describes the main scenic and recreational ORVs present in the Lowman SFPR segment as follows:

**Scenic:** Portions of the South Fork Payette River area are dominated by the presence of the river and steep canyon landforms. The river has good water clarity, variety, and movement, falls, rapids, still pools, and hot springs. The river's water character is diverse. With the exception of the roadway, road cuts, and fill banks, the river offers a natural appearing setting. There is a dramatic contrast between

forested and non-forested slopes on the north and south aspects of the canyon. Highly dissected mountainous canyon landforms are present.

**Recreation:** This river offers a wide variety of recreation activities, including Sacajawea Hot Springs, Kirkham Hot Springs, and Pine Flats Hot Springs, dispersed camping, hiking, and trail riding (both motorized and non-motorized), and fishing, and, as part of the Payette River system, is known nationally for its excellent boating opportunities. Portions of this river fall within the Wildlife Canyon Scenic Byway or Ponderosa Pines Scenic Byway. Scenery viewing is a very popular recreational activity. Pine Flats and Kirkham Hot Springs are accessible year round, which makes them a popular winter activity.

(Ex. F-3, Appendix F at 1-2). The Forest Plan provides that the Forest Service implement management for river segments eligible for inclusion in the National Wild and Scenic River System with the goal to meet the requirements of the Wild and Scenic Rivers Act, by maintaining or enhancing outstandingly remarkable values, maintaining the river's free-flowing character, and accommodating public use and enjoyment while retaining the river's natural values. (Ex. F-3, Appendix F at 7; Tr. 43-44, 262-63).

The SFPR is perhaps best known for its river-running opportunities – kayaking and rafting. The River segment includes stretches of Class III and IV whitewater rapids as well as sections with eddies and relatively flat water. This variety of flow conditions and the River's clear water quality create very desirable conditions for all levels of kayakers. Experts can hone their skills on the technical sections, while beginners can practice basic maneuvers in the eddies and on the flatter sections. The SFPR is known nationally and internationally for its whitewater opportunities, along with other tributaries in the Payette system and other rivers in Idaho. (Tr. 77-79, 105-107, 130, 221).

The Payette River Company has its headquarters in the middle of the claims segment and runs commercial rafting and kayak trips on a daily or more frequent basis on the River from May to October. Over 3,000 customers booked trips with the Payette River Company in 2017. Cascade Raft and Kayak serves over 20,000 clients who float the subject River segment as well as downstream stretches and the other forks of the Payette. There are several designated launch and takeout sites in the claims segment. A typical trip will put in near the Hellende Campground at the upper end and run through the entire claims segment for a half day to a takeout site at the Mountain View campground or at Deadwood River, about two miles further

downstream. Other trips continue for a full day or overnight further down the SFPR to its junctions with the Middle Fork of the Payette at Crouch or the North Fork at Banks. (Tr. 77, 93, 212-14).

The SFPR in the segment where the claims are located is home to numerous fish species, including bull trout, which has been listed as a threatened species by the U.S. Fish and Wildlife Service ("FWS") under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* The FWS has designated the SFPR, among other waters in the Upper Snake River watershed, as critical habitat for the bull trout. Bull trout move from spawning areas on upstream tributaries into the claims segment which they use for forage and as a migration corridor. Other species present in the claims segment are native redband trout, cutthroat trout, whitefish, dace, and sculpin; and non-native rainbow and brook trout. While sport fishing is popular in the claims segment, the SFPR is not considered a major fishery by the State of Idaho Department of Fish and Game ("IFG"). (Ex. F-3, App. I at 1-3; Tr. 146-49).

The Idaho Department of Water Resources allows recreational dredge operators to obtain a "letter permit" for small dredges (maximum 15 HP engine and 5-inch hose intake) to work in the claims segment of the SFPR, open from June 30 to September 30. Due to its designation as critical habitat for a threatened species, the Environmental Protection Agency ("EPA") also requires small dredge operators to obtain a National Pollutant Discharge Elimination System ("NPDES") general permit under the Clean Water Act, to operate in the SFPR. In recent seasons, a few dredges have worked in the claims segment of the River with Idaho permits although they may not have obtained NPDES permits. Forest Service District Ranger John Kidd informs dredgers of these requirements when he interacts with them, but currently neither the State of Idaho nor the Forest Service strictly enforces the NPDES permit requirement. (Ex. M-3 at 1-2, 23; Tr. 49, 63-64).

The SFPR segment where the claims are located is important winter and early spring habitat for elk and deer. These big game species occupy lower elevation areas along the River in those seasons, and migrate to surrounding mountain areas in the summer. Elk and deer regularly use several established river crossings in the winter in the claims segment. Other sensitive wildlife species of concern in this River segment are bald eagle, osprey, and Columbia spotted frog. (Ex. F-3, App. J).

Excavations and archeological surveys have revealed Native American use of the SFPR corridor, including the claims segment, dating back at least 5,000 years. The area was used by the Northern Paiute and Northern Shoshone peoples and their ancestors for camping and hunting. More recent cultural and historical artifacts found in the area are the residue of European settlement, including sites related to

mining, transportation, logging, the Civilian Conservation Corps, and early Forest Service activities. Only about 7% of the claims area has been surveyed, but there are eight known archeological sites within or immediately adjacent to the 35 claims, and another nine within 400 meters of the River. Of those 17 sites, four are Native American and 13 are historic. Most sites are found in river terraces with less than 40% slopes. About 85 sites, of which most are Native American, are known within 400 meters of the SFPR from Crouch to Banner Summit, a stretch of about 65 miles, including the claims segment. (Ex. F-3, App. E at 3-5; Tr. 411-13, 435-38).

The Forest Service solicited public comment from the local community in the Lowman Connector publication, on whether placer mining should be permitted along this stretch of the SFPR. Local residents and visitors from afar submitted almost 500 comments, unanimously opposing allowing placer mining. In general, the commenters stressed the values of this area for recreation and scenic beauty. The commenters felt that placer mining at any significant scale would greatly reduce those values, to the economic and esthetic detriment of the area. (Ex. F-3, Appendix L; Tr. 44-45).

#### - The Placer Mining Claims in the SFPR Segment

Jason Madenford, on behalf of Mining Resources LLC, based in Star, Idaho, located 34 placer claims along the SFPR east of Lowman in February, 2017. The Location Notices he filed with BLM and the Boise County Recorder provide a metes-and-bounds description of the boundaries of each claim, the claim's name, a map of the claim and vicinity, and a notarized affidavit of the locator, Mr. Madenford. Most of the claims include the word "Payette" in the name, e.g. "Payette Gold" and "Payette Yields." BLM designated the serial number IDI-38421 for Mining Resources' series of 34 claims, and assigned individual claim numbers to each claim in a series starting with #IMC 217613. Mona L. Leigh and Virgil O. Moehring located their claim, the Guardian Angels, in March 2017. BLM assigned it serial number IDI-38488 and claim number IMC 217554. (Ex. F-3, App. A; See Attachment A to this Decision).

For convenience and the purposes of this hearing, the Forest Service numbered the 37 claims that were originally subjects of this proceeding, in sequence from west to east. The western group consists of Claims ##1-15; the central section consists of Claims ##16-24; and the eastern section of Claims ##25-37. The Leigh – Moehring Claim is #17. The two claims located by Rick Pergande that are now abandoned were numbered ##18 and 22. (Exs. F-2; F-3 at 4-6, Figs. 6-8).



Mining Resources' claims range in area from about 8 acres to the maximum allowed for a placer claim by a single locator, 20 acres. The Guardian Angels claim #17, located by two persons, consists of about 36 acres. The exact boundaries of many of the claims are not entirely clear since very few corner monuments have been maintained, and the banks and course of the River shift in many areas each year. Mr. Madenford based his locations on BLM's "shape files" derived from U.S. Geological Survey geographical information systems. Forest Service geologist Rick Wells generally followed Mr. Madenford's metes-and-bounds claim descriptions in mapping the claims. (Ex. F-3 at 52-53; Tr. 284-86, 359-65, 579-83, 600-01).

Most of Mining Resources' claims, especially in the eastern and central sections, have the bulk of their area south of the River, and extend northward across the River to either its northern bank or to the Highway 21 right-of-way. In the eastern section, where the Highway veers off somewhat from the River, most of the claims consist of 20 acres and span the River. Ms. Leigh's claim #17, however, only extends to near the River's southern bank, and does not encompass the waterway. (Ex. F-3 at 4-6).

Besides the claims that are the subject of this proceeding, there are two other active unpatented placer claims in the River segment, owned by friends or associates of Mr. Madenford. These are located adjacent to and west of Ms. Leigh's Claim #17, along a sharp southward bend in the River. Jarrod Bunker owns the 20-acre Guardians Corner claim, and Chris Christman the 17-acre Guardians Bend claim adjacent to the west. The Forest Service did not contest these two claims under the MCRRA after they were located in February 2016. There are also three other uncontested placer claims located downstream from the subject claims on the SFPR. Mr. Bunker and others have occasionally operated small suction dredges in the SFPR in this area during the past few seasons. These dredgers may have recovered small unverified quantities of fine gold. (Exs. F-3 at 10-11, M-2A, M-2B; Tr. 443-51).

#### - Geology, Mining History, and Mineral Potential of the Area

The SFPR corridor and the subject claims are in the geological structure known as the Idaho Batholith, a composite of granitic plutons of mostly Cretaceous age (140 to 65 million years ago) covering much of central Idaho. Mineralization in the region is derived from younger dikes and fissures of Tertiary age, known as the "porphyry belt" where lode mines have been located. The bedrock in the claims segment consists of weathered and hydrothermally altered granodiorite. Placer mining would take place in the River itself and in several levels of adjacent river benches or terraces, consisting of unconsolidated, generally poorly sorted, sands, gravels, cobbles, and some larger boulders, of Pleistocene (up to 1.8 million years

ago) and more recent Holocene age. Some quantities of fine placer gold and some other heavy metals and minerals, such as lead, have been transported by fluvial processes from higher elevations in the porphyry belt to the SFPR and its adjacent terraces. (Ex. F-3 at 15-18; Tr. 282).

Most of the subject claims extend up steep slopes on the south side of the River that would be impractical to mine. The soil in the claims segment is mostly unstable, weathered granite that is highly susceptible to erosion and slope failure. Slope failures occur in the area annually. A large forest fire in 1989 led to subsequent large slope failures along the River. The scars of one such landslide remain visible on the south bank of the River within the boundaries of Claim #23. Placer mining operations would therefore take place by dredging in the River itself and on the relatively flat benches or terraces along its banks. (Ex. F-3 at 18, 37, 39-41, Appendix B at 22-23; Tr. 287-91).

While there are seven known historic mines in the watershed that drain into the claims segment, only one is known to have produced any significant quantities of gold or other valuable minerals. That is the Birthday Mine, located about 2.3 miles northeast of Claim #37. It was a lode mine that produced over 1000 ounces of gold, as well as some copper, lead, and silver. Other productive historic mines are located south of the claims segment in the Idaho City – Boise Basin area, in the drainages of Mores and Grimes Creeks. There is evidence of past placer mining in one location in the claims segment, on Ms. Leigh's Guardian Angels Claim #17, where hand-sorted cobbles have been deposited along the River bank. (Ex. F-3 at 13-23, Fig. 9; Tr. 278-282).

Forest Geologist Rick Wells led the Forest Service's effort to gauge the mineral potential of the claims segment. The Forest Service took samples at 23 representative locations where gold could be expected to be found within the 37 original claims.<sup>5</sup> Thirteen samples (##1-13) were collected using a hand shovel and digging to a depth of about 2 feet. Four samples (##14-17) were collected with motorized excavating equipment to a depth of 9.5 feet and divided into separate horizons. The remaining samples (##18-23) were taken in the waterway – the River or a tributary – to a depth of up to about 7 inches. Counting the four samples divided into horizons, the Forest Service took a total of 31 samples. The Forest Service then processed the samples following established protocols to ensure security of the samples. (Ex. F-3, Appendix C; Tr. 293-98).

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<sup>5</sup> Four samples were taken on the now abandoned Rick Pergande claims (##18 and 22).

The weighed results yielded measurable amounts of gold in 21 of the 31 samples, although those showed only negligible grades of gold. The highest grade was found in sample #14c, taken at a depth of 7.5 – 8 feet on the abandoned Pergande claim #18 – a grade of 0.0028 ounces per cubic yard (oz/yd). This was an order of magnitude greater than the grade of any other sample. The average grade of all samples was 0.00018735 oz/yd. At the spot gold price on the date the report was prepared (May 19, 2018) of \$1,292.90 per ounce, the average grade equates to \$0.24 per cubic yard. Since the highest grade was found on an abandoned claim, the average value of gold on the remaining 35 subject claims is actually quite a bit lower – about \$0.11 per yard. The highest grade sample, taken from Mr. Pergande’s abandoned claim, had a value of \$3.59 per yard. (Ex. F-3, Appendix D at 1; Tr. 298-301, 398).

Mr. Wells and his team then analyzed the operational needs and the basic costs for three scenarios for hypothetical placer mining on the subject claims – small, medium, and large-scale operations. A small-scale operation was envisioned to employ two to four people using a small suction dredge in the waterway and a relatively small highbanker<sup>6</sup> setup to mine on the benches. Medium size operations were envisioned to employ 4-8 persons who would use larger equipment and move more material than in a small-scale operation. Large-scale operations would employ up to 14 people who would use still larger and more powerful processing and earthmoving equipment such as backhoes and excavators, with extensive supporting infrastructure. Settling ponds and tailings piles would be necessary and would require substantial reclamation. (Ex. F-3 at 27-36; Tr. 302-20).

Mr. Wells constructed detailed scenarios for placer mining operations on the subject claims, which first required calculating the mineable volumes of material on each claim, excluding areas too steep to mine. He then calculated the likely costs of mining this area, which included consideration of the costs of mining equipment (both new and used), labor, operations (including fuel and maintenance), capital costs for purchasing equipment, bonding, reclamation and contingencies. Certain costs, such as for environmental permitting, were not included. The bottom line is

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<sup>6</sup> A highbanker, or power sluice, consists of a sluice box with a hopper mounted on land, into which soil material is fed. The material is then screened and sprayed with water to break it up and wash down the heavier concentrates or black sands that could contain fine gold. A highbanker needs a water source, which could be pumped from the River. A suction dredge floats on the waterway surface and operates as a vacuum that pumps material from the stream bed into a sluice box above. It must be connected by a cable or rope to shore. The dredge is operated by a person in the water or an underwater diver. (Exs. F-3 at 31, L-7, L-8).

that the costs of placer mining the subject claims, even at the most economically efficient large scale for bank mining, astronomically exceed the expected revenue. The costs for suction dredging in the waterway ranged from about \$23 to \$57 per yard. Mining the bank terraces would cost from about \$29 to \$46 per yard for small and medium sized operations, but could cost as low as about \$9.50 to \$16.50 per yard for large scale operations. Nevertheless, all these cost scenarios far exceed the average revenue of \$0.24 or less on the subject claims. The costs also greatly exceed the value of the highest sample found, which was \$3.59 on an abandoned claim. (Ex. F-3 at 42-44, 50-53, *esp.* Tables 9-10 at 52-53, Appendix D; Tr. 304, 314-21).

Jason Madenford, the principal of Mining Resources and several related small companies, was a heavy equipment operator for the Ada County (Idaho) Highway District who now works essentially full time in the mining business. He or Mining Resources has had interests in 150 to 200 mining claims in Idaho over the past five years or so. After transferring or relinquishing many of those, Mining Resources currently owns about 55 additional claims in Idaho in addition to the 34 subject claims on the SFPR. He is involved with a partner in a placer mining project near Placerville, in the Idaho City - Boise Basin area south of Lowman, in which they plan to propose a formal plan of operations to the Forest Service. Mr. Madenford assists other miners with filing and recording claims and with their operations. He has derived some income from gold produced recovered from his claims, as well as by selling mining equipment, transferring claims, and providing consulting services to miners. Mr. Madenford does not yet have specific plans for developing the subject claims on the SFPR. He claims to have "discovered" some gold in samples taken with his highbanker on the banks of some of the claims. Any more specific plans will depend on the outcome of this hearing as well as any additional sampling and exploration work Mr. Madenford may conduct to indicate specific claims or areas that could yield potentially valuable quantities of gold or possibly other minerals. (Tr. 638-52, 673-82).

The Guardian Angels claim #17, located by Mona L. Leigh and her brother-in-law Virgil O. Moehring, consists of 36 acres south of the River along a south trending bend in the SFPR. The western side is relatively flat while the eastern area consists of a large hill sloping northward down to a narrow bench along the River. This claim also includes a bridge over the SFPR that leads to a dirt road along a small tributary, Archie Creek. Ms. Leigh engages in gold prospecting as a hobby as a member of the Northwest Gold Prospectors Club located in Parma, Idaho. She found a small amount of gold using hand tools in the western part of the claim. The Forest Service sample, taken in Archie Creek, found no gold. As noted above, there are hand sorted cobbles along the bank of the River just west of the bridge, apparently left by previous placer miners. Ms. Leigh's plans for this claim would be

for small-scale use of a highbanker and hand tools – an operation that would not require a notice of intent or plan of operations. Ms. Leigh also has an interest in a claim in the Idaho City area for which she inquired to the Forest Service about a plan of operations. (Ex. L-14; Tr. 698-708).

Ms. Leigh only plans to conduct small scale operations on her claim, and Mr. Madenford does not yet have a specific plan for his 34 claims. However, there is nothing to prevent them from changing their plans or transferring their claims to other persons who could try to develop the claims with medium or large-scale placer mining operations. (Tr. 652-53, 718-19).

Anyone planning to mine locatable minerals in a national forest must comply with 36 C.F.R. Part 228, Subpart A, which provides rules and procedures for mining operations to “be conducted so as to minimize adverse environmental impacts on National Forest System surface resources.” 36 C.F.R. § 228.1. The regulations require claimants, subject to certain exceptions, to file a “notice of intent to operate” for any proposed operation “which might cause significant disturbance of surface resources.” 36 C.F.R. § 228.4(a). A plan of operations is then required if the Forest Service determines that the operation will cause significant surface disturbance – generally if the operation involves the use of mechanized earthmoving equipment or the cutting of trees. An approved plan must minimize environmental impacts to the extent feasible and is subject to environmental protection standards regarding air quality, water quality, scenic values, fisheries, wildlife, road construction, and reclamation. 36 C.F.R. § 228.8. (Tr. 48, 66-67, 270).

#### - Placer Mining Conflicts with Other Uses

If two large-scale mining operations were conducted on the claims, they could generate jobs and income that could exceed the number of jobs and revenue that would be lost from the recreational activities of boating and camping. However, there is no reasonable economic prospect for sustaining such mining operations since, as seen above, the costs of mining would far exceed any possible anticipated revenue. This means that placer mining would produce no economic benefit for the local area or for society in general. Placer mining operations of any significant scale on this segment of the SFPR would, on the other hand, result in a substantial reduction in visitation for other uses – primarily rafting, kayaking, camping, fishing, and related tourism and recreational use. Thus, placer mining operations would result in an economic loss to businesses in the Lowman area that depend on recreational visitation, and a decrease in the welfare of society. Mining would also likely adversely affect real-estate values in the Lowman area for both

second homes or summer cabins, as well as for full-time residences. (Ex. F-3, App. K; Tr. 189-95, 204-09).

Placer mining on the subject claims along this segment of the SFPR would substantially interfere with other uses of the land – primarily all the recreational and esthetic uses described above. While only occasional small-scale mining of one or two claims would not necessarily substantially interfere with all those other uses, owners of valid claims are not restricted to conduct only such minimal operations. The claimants here could conduct more widespread operations on these 35 claims, or medium or larger-scale operations, or sell the claims to others who could do so. (Tr. 653, 719). They would have the right to extract minerals by any normal legal means, limited only by the Forest Service's regulatory authority to minimize environmental impacts. The main impacts of placer mining the subject claims and the ways that those impacts would substantially interfere with other uses of the land are listed in the following paragraphs.

Placer mining operations would physically occupy or directly interfere with the public use of BNF campgrounds, dispersed camping areas, scenic pullouts, and river launch and pull-out sites. Most of the claims are either immediately adjacent to these facilities, or to the access to those sites, or would be visible from or within earshot of BNF public use areas. (Ex. F-3 at 47-48).

For example, Claims ##1 and 2 are immediately adjacent to the Mountain View developed campground and its access road. Access to the claims would likely have to go through the campground. (Tr. 262). Claims ##3, 4, and 5 are adjacent to the Lowman Ranger Station and administrative facilities. Claims ##7-15 encompass at least eight scenic and River access pullouts on Highway 21. Claim #16 is immediately adjacent to the Kirkham Hot Springs campground and very popular day use area. The water well that supplies the campground is within the boundaries of Claim #16. Ms. Leigh's Claim #17 encompasses a bridge and access road that crosses the River along a tributary, Archie Creek. Claims ##19, 22, and several in the western section overlap or are immediately adjacent to designated dispersed camping areas and boat launching sites. Access to Claims ##27-30 would likely have to be through or immediately adjacent to the Helende Campground. Claim #37 includes a bridge that the Forest Service recently installed to replace a culvert near the mouth of Five Mile Creek to facilitate fish migration from the SFPR. (Exs. F-3, App. G and F-4 at 15-16; Tr. 256-270).

In addition, all 34 of Mining Resources' claims include the waterway, and Ms. Leigh's Claim #17 borders the River. Dredging or other mining operations in and adjacent to the waterway will often directly interfere with recreational rafting,

kayaking, and fishing, not to mention simply watching the river go by. Conflicts between floaters and dredgers has already occurred in the claims segment. Rafters and kayakers have had their route blocked by dredge lines or cables, creating a safety hazard. Occasionally dredgers set their cables to extend all the way across the River. River users have also been displaced by the dredgers' occupancy of favored swimming holes or rest stops, and associated noise, fueling, and waste disposal. While dredging can cause minor changes in the River's hydraulic characteristics, large scale placer mining with heavy equipment could cause major changes in the River's flow. Placer mining at the potential scale posed by 35 claims would greatly increase the frequency and degree of these conflicts with users of the River. (Tr. 81-85, 97, 221-27).

Even a single dredge will ordinarily operate continuously and will generate noise above ambient levels (slightly less than a lawnmower) for an extended period. The noise of small-scale dredging can interfere with other uses of the River and its banks in the immediate vicinity. The noise impact of course would increase dramatically with multiple operations and with larger scale development incorporating the use of heavy earth-moving equipment and power sluices. (Ex. F-3 at 46-47, App. G at 9-10).

The area of these 35 claims is largely unsurveyed for archeological and historic sites. All the claims include relatively flat benches that potentially harbor unknown sites. There are eight known sites within the claims and numerous others in close proximity. Mining on the benches and banks could irreversibly destroy or damage archeological sites of importance to the Shoshone-Paiute and Shoshone-Bannock Tribes, as well as historic sites of early European occupancy. (Ex. F-3, App. E at 4-8).

Placer mining in the claims segment of the SFPR with medium or large-scale operations, or mining multiple claims, would jeopardize the River's eligibility for designation as a wild and scenic river. Such operations could impede the River's free flow and cause the loss of the outstanding remarkable values of recreation and scenic quality. Medium or large-scale mining would create a conflict with the current BNF management plan to maintain the River's eligibility as a wild and scenic river. (Ex. F-3 at 45, App. F at 3-4; Tr. 262-64).

Placer mining at a medium scale of operations would increase turbidity and sedimentation in the SFPR, which would measurably adversely affect bull trout and other sensitive fish populations. Dredging also reduces the abundance of macro-invertebrates, which form the foundation for the fishery's food chain. Large scale operations would adversely affect a larger number of individual fish as well as cause

definite adverse impacts to water quality in the River. (Ex. F-3 at 48, App. I at 18 *et seq.*; Tr. 154-163).

### Discussion

#### - The MCRRA as Interpreted by the IBLA

The 35 subject claims are located in Power Site Withdrawal 146, rendering them subject to the Mining Claims Rights Restoration Act of 1955 ("MCRRA," also known as "P. L. 359"), 30 U.S.C. §§ 621-625. The MCRRA reopened lands withdrawn for power site development to mining location, subject to the results of a hearing to determine whether placer mining would substantially interfere with other uses of the land. In this case, upon the request of the Forest Service, the Secretary of the Interior (through BLM) followed the procedure in the MCRRA by notifying the claimants of the Department's intention to hold a hearing "to determine whether placer mining operations would substantially interfere with other uses of the land within the placer claim[s]." Placer mining operations were then suspended "until the Secretary has held the hearing and has issued an appropriate order."

The order issued by the Secretary shall provide for one of the following: (1) a complete prohibition of placer mining; (2) a permission to engage in placer mining upon the condition that the locator shall, following placer operations, restore the surface of the claim to the condition in which it was immediately prior to those operations; or (3) a general permission to engage in placer mining.

30 U.S.C. § 621(b).

The IBLA has construed the standards for determining whether placer mining would substantially interfere with other uses of the land within the claims, and discussed the circumstances warranting an "appropriate order" to be issued by the Secretary. The vast preponderance of the evidence in this case supports the position of the Forest Service that placer mining should be completely prohibited under any formulation of the standards for issuing an appropriate order. Nevertheless, I believe the criteria established by the IBLA are quite problematical and warrant some in-depth analysis for consideration in future cases arising under the MCRRA, even if some of this discussion may be characterized as *dicta* for the purposes of the present case.



a(*Milender I*), the Board departed from previous precedent and established a balancing test, for weighing the relative potential benefits of mining against the detrimental effects of mining on other substantial uses of the land.

The decision in each specific case, then, must reflect a reasoned and objective evaluation of potential detriments and benefits accruing from placer mining operations, with due regard for the extent to which such operations might be controlled, inhibited and/or mitigated by existing law and regulations.

*Id.* at 204.

The Board imposed this balancing test upon the assumption (stated without providing any support) that “all land has some use or value with which extensive, lawful placer mining operations would substantially interfere,” (underlining in original). *Id.* at 200. The Board believed this assumption had led it to prohibit placer mining in all but one of the previous MCRRA cases which it had previously decided.<sup>7</sup> *Milender I* also clarified that the potential placer mining operation should not be limited to that proposed by the claimant, but that they should also not be considered “unrestricted.” Rather: “The proper standard of evaluating the potential effect of placer mining on other land use is the extent to which legal, normal, operations, subject to regulatory restraint [such as the Forest Service regulations at 36 C.F.R. Part 228], might interfere with such uses.” *Id.* at 198. The Board remanded the *Milender* case to the Administrative Law Judge to reopen the hearing to apply the newly articulated standards for the limited purpose to determine “whether the potential interference with the use of the land for timber management is sufficient to warrant issuance of an order prohibiting mining.” *Id.* at 208.<sup>8</sup>

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<sup>7</sup> To the contrary, evidence received in this hearing indicated that there are likely other areas where placer mining would not *substantially* interfere with other uses of the land (although the record does not indicate whether they are within powersite withdrawals). Ms. Leigh, Jason Madenford, and the Northwestern Prospectors Club own placer mining claims and conduct operations in the Boise Basin - Idaho City - Mores Creek - Grimes Creek area about 25 miles southwest of Lowman, where their testimony indicates minimal interference with other potential uses of the land and waterways, such as boating, fishing, and other forms of recreation, as well as timber management or any other use. (Tr. 551, 621, 721). The same could be said for Ms. Leigh’s witness Danny Prochaska’s placer mining claim on Jordan Creek in the Owyhee Mountains. (Tr. 543).

<sup>8</sup> Administrative Judge Will A. Irwin dissented from the two-judge panel decision in *Milender I*, pointing out that nothing in the MCRRA “includes a weighing of the relative merits or value or public interest of placer mining and other uses of the land.” *Id.* at 213.

Upon the reopened hearing the ALJ ruled that placer mining would not substantially interfere with the use of the land within the claims for timber management, and that mining should be permitted on the condition that, following operations, the surface of the claims be restored to the condition in which they were immediately prior to the operations. The Forest Service appealed and asked the Board to reconsider the ruling in *Milender I* that applied a “balancing test” to determine whether placer mining should be allowed. The Board reaffirmed that:

To determine whether mining would “substantially interfere” with other uses of powersite lands within the meaning of the [MCRRA], the Department is required to engage in a weighing or balancing of the benefits of mining against the injury mining would cause to other uses of the land. Mining may be allowed where the benefits of mining outweigh the benefits of other uses.

*U.S. Forest Service v. Milender*, 104 IBLA 207 (1988) (*Milender II*). Although the record of the hearing contained “little information from which to guess at the ultimate value of the land for mining purposes,”<sup>9</sup> the Board found that placer mining should be allowed (subject to restoration) on one of the two claims at issue, and prohibited on the other claim for which the Forest Service had shown substantial interference with its use or value for timber management.

At the request of the Forest Service, the Board heard the *Milender II* appeal *en banc*. Five judges signed the majority opinion. Three filed a concurring opinion in which they emphasized that the claimant must bear the ultimate burden to overcome, by a preponderance of the evidence, the agency’s *prima facie* case showing substantial interference with other uses of the land. Judge Irwin again filed a compelling dissent, concluding that: “The balancing approach the majority adopts offers neither objectivity nor methodology and makes it impossible to predict how land-use values will be weighed against proposed placer mining values in future cases.” *Id.* at 253.<sup>10</sup> Judge Irwin instead proposed a straightforward application of

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Judge Irwin’s view, with which I fully agree, will be discussed further below with reference to his dissent in *Milender II*.

<sup>9</sup> 104 IBLA 220.

<sup>10</sup> Judge Irwin also cited the legislative history of the MCRRA which does not support the majority’s opinion that the primary purpose of the act was to encourage mining in powersite lands. Rather, the Senate report on the bill emphasized the conflicts between placer mining and the often environmentally sensitive powersite lands in river corridors that are primarily valuable for timber, recreation, grazing, and scenic resources. *Id.* at 246-

the language of the MCRRA that would focus the hearing only on whether placer mining would substantially interfere with other uses of the land within the claims. *Id.* at 254. He further asserted that: “Granting a general permission to engage in placer operations in the face of evidence demonstrating other land uses would be substantially interfered with would be outside the scope of the Secretary’s authority and would therefore be arbitrary and capricious. *Citizens to Preserve Overton Park v. Volpe*, *supra* [401 U.S. 402, 415-16 (1971)].”<sup>11</sup>

The wisdom of Judge Irwin’s dissents is illustrated by the struggles of the Board (and ALJs) to apply the “balancing test” in subsequent cases arising under the MCRRA. The balancing test has forced the contesting agency – BLM or the Forest Service – to present a *prima facie* case that attempts to evaluate the mineral potential of the claims under a newly invented standard: “The evidence need only show the possibility that the claim might contain a profitable mineral mining opportunity meriting further exploration of the claim.” *United States v. Eno*, 171 IBLA 69, 96 (2007). This amounts to essentially a mineral validity examination “light,” creating an apparent inconsistency with a basic principle of American mining law. Although the General Mining Law of 1872 still allows claimants to stake claims on open public lands, those claimants do not have the right to conduct actual mining operations unless they can show that mining will meet the “prudent man”<sup>12</sup> and “marketability”<sup>13</sup> tests. A claim is not valid unless it can meet those tests which show that the claim contains a valuable mineral deposit. “It is well settled that evidence of mineralization which may justify further exploration, but not the development of a mine, does not establish the discovery of a valuable mineral deposit.” *United States v. Martinek*, 166 IBLA 347, 417 (2005), quoting *United States v.*

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47. This led Congress, at the request of the Department, to make placer mining operations on these lands subject to an extremely potent procedure to limit or prohibit those operations – restrictions not applicable on any other public lands.

<sup>11</sup> The Board majority in *Milender II* disagreed with Judge Irwin and instead took the remarkable view that “there is simply no provision in the Act which requires the Secretary to prohibit placer mining even if he affirmatively finds that substantial interference with other uses will occur as a result.” 104 IBLA at 218-19. If that is so, what would be the point of demonstrating substantial interference with other uses of the land?

<sup>12</sup> A discovery of a valuable mineral deposit has been made “where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a successful mine.” *Castle v. Womble*, 19 L.D. 455, 457 (1894).

<sup>13</sup> The complementary “marketability” test provides that a valid mining claim is one in which the mineral deposit can be mined, removed, and marketed at a profit. *United States v. Coleman*, 390 U.S. 599, 602 (1968).

*Bagwell*, 143 IBLA 375, 393 (1998), citing *Barton v. Morton*, 498 F.2d 288, 291-92 (9<sup>th</sup> Cir. 1974).

Neither the agency nor the claimants will typically have sufficient opportunity and access to the claims to accurately assess their possible mineral value potential, or, in the vague terms of the IBLA, the “benefits of mining” the claims. As the Board recognized in *Milender II*, claimants will typically have little opportunity to present substantial evidence of mineral values since they are barred from conducting any placer mining operations while the hearing is pending. *Id.* at 223. While BLM or the Forest Service, with their expertise and resources, may be able to produce a general estimate of the mineral potential of the claims and the costs of mining, the agencies will not have the opportunity to conduct anywhere near the extent of sampling and analysis that is required in a mineral examination to truly determine whether the claimants have made a valid discovery of a “valuable mineral deposit.” 30 U.S.C. § 22.

The language of the MCRRA does not mention balancing or considering the mineral potential or benefits of mining the subject claims but speaks only in terms of whether placer mining would substantially interfere with other uses of the land encompassed by the claims. The Secretary must then issue an “appropriate order” based on the evidence received at the hearing. If the issue arises again on appeal, the IBLA will have the opportunity to revisit and perhaps reverse the holdings of the *Milender* decisions and adopt the views expressed in Judge Irwin’s dissents. In that event, the need to produce evidence of the mineral values or potential benefits of mining the subject claims would be eliminated. Nevertheless, since *Milender* remains currently binding precedent, I will analyze the evidence accordingly below.

#### - Evidence of Mineral Values on the Subject Claims

Despite the seemingly impossible task of trying to determine the mineral potential of 35 placer mining claims along the SFPR, Forest Service geologist Rick Wells led a team that produced a heroic effort culminating in a comprehensive “Geology, Mining and Other Uses Report.” (Ex. F-3).<sup>14</sup> This exhibit included appendices describing each of the various other uses of the lands with which placer mining would interfere.<sup>15</sup> To assess the mineral potential of the claims, Mr. Wells

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<sup>14</sup> The Report was also reviewed and certified by Clint Hughes, a Certified Mineral Examiner and Forest Geologist for the Payette National Forest.

<sup>15</sup> Appendices E, F, G, H, I, J, and K, contain evaluations of placer mining’s impacts on, respectively, cultural resources, wild and scenic river status, recreation, scenic values, fisheries, wildlife, and economic impacts in the claims segment on the SFPR. Exs. F-4, F-5, F-

and his team reviewed all available literature on the geology and historic mining in the Lowman area and surrounding Idaho batholith. This review showed very little productive mining in the watershed of the claims compared to other areas of the Idaho batholith, particularly the Boise Basin – Idaho City area to the south. As described above in the findings of fact, only one mine in the vicinity of the claims has a record of significant production, and it has not operated for decades.

The BNF team took 31 samples at 21 locations on the original 37 claims – at 19 locations on the 35 claims now at issue. As detailed above in the Findings of Fact, none showed significant gold values that could approach the costs of mining. Mr. Wells calculated some of the projected costs of mining in great detail for three levels of operations for all the claims. These far exceeded any indicated gold values on any claim, without even consideration of additional required costs such as for environmental permitting and transportation.

Although the extent of the Forest Service’s sampling could not approach that which would be required for a mineral validity examination, the results were not refuted by any substantial evidence presented by the claimants. Mr. Madenford testified that he had recovered some gold by dredging in the River at several locations before he located the claims. He also testified he would test for other valuable minerals besides gold, such as rare earth minerals. Mr. Madenford produced four photographs of fine gold and black sands purportedly recovered from some of the claims. However, he had no records of processing, methods, exact locations, actual values, or any other way to verify how, when, or where the gold depicted was obtained. He also had no evidence to support his pure speculation that there might be other valuable minerals present on the claims. Mr. Madenford’s associate, Jarrod Bunker, who owns a claim on the SFPR, testified that he mostly recovers lead fishing weights and bullets when he dredges or engages in metal-detecting. Ms. Leigh’s friend and witness, Lorraine Barbee, also mostly finds lead weights when gold panning in the area. (Tr. 484, 502-03, 583-589; Exs. M-12-A and 12-B).

Of course, as discussed above, under the *Milender* standard to consider the potential benefits of placer mining, none of the parties had a full opportunity to engage in the thorough sampling and processing of material that would be required to obtain an unimpeachable assessment of the mineral potential for each of the 35 claims. Nevertheless, the Forest Service evidence constitutes the preponderance – indeed essentially all – of the credible evidence that demonstrates, in the words of

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6, and F-12, consist respectively of duplicate copies of four appendices: the recreation, fisheries, cultural resources, and economic reports.

the IBLA, the lack of any “possibility that the claim[s] might contain a profitable mineral mining opportunity meriting further exploration of the claim[s].” *Eno, supra*, 171 IBLA at 96.

- Placer Mining Will Substantially Interfere with Other Uses of the Land

Although the Federal Energy Regulatory Commission confirmed that this segment of the SFPR was no longer being considered for a power site, the River does have many other substantial uses as described above in the Findings of Fact. Those are primarily tourism, recreation, whitewater floating, camping, fishing, and enjoying natural landscapes and scenic beauty. The vast preponderance of the evidence in this proceeding supports the proposition that placer mining the subject claims at any significant operational level will substantially interfere with these other uses of the land. Under the standards established by the IBLA, these other uses of the claims provide far greater recreational, esthetic, and economic benefits to the local area and society in general than could any level of placer mining activity. For these reasons I find in this Decision that placer mining should be completely prohibited on the claims.

This conclusion is supported by the testimony and evidence presented by the Forest Service, which was not appreciably challenged by that provided by the claimants, Mining Resources and Ms. Leigh. The dominant use of this River corridor and its management direction from the Forest Service is to enhance and maintain its exceptional values as a relatively accessible, yet still outstanding recreational and scenic resource. Although the River corridor is easily accessible from Highway 21 and less than a two-hour drive from the Boise metropolitan area, the SFPR provides visitors with a natural experience of remoteness, solitude, and scenic beauty, in addition to its world-renowned rafting and kayaking opportunities.

The testimony of the Forest Service expert witnesses was uniformly highly credible and informative, supported by written evidence in the form of reports or appendices to the Mineral Report. John Kidd, the District Ranger for the Lowman District in the Boise National Forest (“BNF”), described the campgrounds, administrative facilities, and other infrastructure in the claims segment and how placer mining would interfere with operation and maintenance of those BNF facilities. He testified that the current primary management focus for the SFPR in the Lowman District is to maintain the River’s wild and scenic eligibility designation and to “keep those qualities intact for the enjoyment of the people.” (Tr. 44). Mr. Kidd provided public notice of the hearing on the subject mining claims. The BNF

received hundreds of letters and comments, unanimously opposing mining activity in or along the SFPR. (Ex. F-3, Appendix L; Tr. 45).

Without repeating many of the factual findings given above, I will present just a few of the highlights of the Forest Service evidence. Danielle Highfill, the recreation program manager for the BNF, was the workhorse witness for the Forest Service, after Rick Wells. She prepared evaluations of placer mining's impacts on recreation (Exs. F-3, App. G; F-4), wild and scenic river designation (Ex. F-3, App. F), and scenic values (Ex. F-3, App. H). Ms. Highfill's reports and testimony highlighted many specific examples of how placer mining, even at relatively small scales, would interfere with recreational and tourism uses of the lands encompassed by the claims and those in their immediate vicinity. With regard to recreation, her report focused on four main categories of potential impacts of mining: physical interference (safety hazards); vehicle and personal access; noise; and physical occupancy of BNF user sites. Specific examples are given in the Findings of Fact. Ms. Highfill's report concludes as follows:

The increase in noise levels, change of scenery from machinery and site development, prolonged camping stays, overcrowding, possible contamination issues, lack of facilities, changing the access to the river, and safety of river users evidence that normal, legal development of these claims would substantially interfere with current established uses of this section of the South Fork of the Payette River. Mining would decrease the lure of the area that draws the public to the Forest. Mining would have a dramatic impact to recreation on the South Fork of the Payette River.

(Exs. F-3, App. G, and F-4 at 14).

Two experienced whitewater guides who are now also owners of local rafting and kayak companies passionately described the exceptional qualities of the SFPR in the claims segment for whitewater boating. Kenneth Long and Sean Glaucum operate raft and kayak trips daily throughout the summer and warmer spring and fall months. They have both experienced incidents of conflict with dredgers in the River. In addition to the general noise and appearance of mechanized equipment, the dredge lines have occasionally extended across the River, blocking the boaters' route and creating a safety hazard. (Tr. 81-82, 218-22). Another witness, Cam Johnson, who owns a cabin accessed through Claim #16, testified to avoiding his usual swimming hole and fishing spot when a dredge operator occupied the site for weeks. (Tr. 209). This testimony of local residents and whitewater guides regarding specific incidents buttressed the comprehensive reports and testimony of Ms.

Highfill demonstrating the great degree to which placer mining would interfere with the established recreational and economically beneficial uses of the SFPR, as well as jeopardize the River's continued eligibility as a wild and scenic river.

Scott Brandt, the Lowman District Fish Biologist, highlighted the River's designation as critical habitat for bull trout, which use the claims segment as a migratory corridor. His report and testimony concluded that significant mining development would increase sedimentation and turbidity in the waterway, and decrease fish's food supply, causing definite adverse impacts to the habitat for bull trout and other fish species in the River. (Exs. F-3, App. I and F-5; Tr. Brandt).

Susanna Osgood, a BNF Archaeologist and Heritage Manager, summarized the history of human occupation of the Lowman area and highlighted the limited extent to which archeological and historic sites have been surveyed. Her report and testimony informed us that while there are eight known archeological sites in or within 100 meters of the claims, there is a high probability of many more sites that are currently unknown. Even small-scale mining has the potential to destroy sites, which are considered sacred and not to be disturbed by the Shoshone-Bannock and Shoshone-Paiute Tribes, whose ancestors inhabited the area. (Exs. F-3, App. E and F-11).

The Forest Service also presented two witnesses who represent Idaho-based conservation organizations. John Robison, Director of Public Lands for the Idaho Conservation League, and Kevin Lewis, Executive Director of Idaho Rivers United, spoke for their membership and summed up the issues by emphasizing the recreational and scenic qualities of the SFPR and the adverse effects placer mining would have on those values. They cited literature that highlights the world-renowned whitewater qualities of the SFPR. While their organizations are not opposed to mining in general in appropriate areas, they persuasively asserted that placer mining the subject claims on the SFPR would be detrimental to the far superior recreational and scenic values provided by the River.

The Forest Service's final witness, Dr. Richard Marshall, prepared a report analyzing the potential economic consequences of mining the subject claims. Consistently with Mr. Wells' report, he concluded that since the costs of mining would exceed any potential revenue, there would be no economic benefit to the local area or society in general from allowing placer mining operations on these claims. To the contrary, he concluded there would be a significant economic loss of over \$500,000 to local businesses due to the reduction in rafting/kayaking and camping use in the claims segment. When other uses or factors that are not easily economically quantifiable are considered (such as scenic values and preservation of



archeological sites), Dr. Marshall's conclusion that there is no economic justification for allowing placer mining on these claims is further reinforced. (Exs. F-3, App. K, F-12; Tr. 195).

- Claimant's Evidence

Mr. Madenford and Ms. Leigh and their associates who testified expressed their experience of generally getting along well with river floaters and others who use the area. They seemed credible and sincere in describing their small-scale or recreational operations. I have no reason to doubt that they and most recreational gold seekers conduct their operations in a responsible manner. Mr. Madenford's witness, Jarrod Bunker, only engages in small-scale dredging or highbanking on a few weekends in the summer. (Tr. 484-85). Ms. Leigh's witness, Lorraine Barbee, only uses a gold pan and "snuffer" (a non-mechanized suction device). She enjoys being outdoors with her family. She testified that she often picks up trash left by other users of the area. Ironically, claim owners such as Mining Resources or Ms. Leigh could legally prohibit recreational panners such as Ms. Barbee from engaging in this activity on their claims.

Ms. Leigh's witness Danny Prochaska founded a company that designed and sold mining equipment, and is an active leader in three Idaho gold prospecting clubs. He mostly works his own claim in the Owyhee Mountains, on Jordan Creek where there do not appear to be other substantial uses by the public such as floating or fishing. Mr. Prochaska operates on a small scale without significant surface disturbance, so does not have a plan of operations. He is also involved in a claim owned by the Idaho Gold Processors' Association on Grimes Creek in the Idaho City area. That claim is used for camping and outings by club members. It does have a plan of operations in effect with BLM. By Mr. Prochaska's account, he and the club members get along fine with BLM and other users of the area. While Mr. Prochaska has recovered some gold from his claims, he does not profess to produce gold in any quantity that would describe a profitable commercial venture on his claims. (Tr. 540-53).

Jason Madenford was somewhat vague in describing his activities on his 34 claims and his plans for them. He and his company Mining Resources, and related companies, seem to be mostly in the business of acquiring and selling mining claims. He also assists other miners in their operations and in navigating the paperwork necessary for locating and maintaining claims. Mr. Madenford was insistent on his commitment to consult with Forest Service staff and to follow all rules and regulations in conducting his exploration activities and operations. He is aware that operations that cause significant surface disturbance would require an approved

plan of operations, but he was not familiar with the actual regulations that provide those rules, 36 C.F.R. Part 228. (Tr. 652 *et seq.*). Mr. Madenford testified he sometimes sells gold that he recovers on his claims, but he did not sell any gold in 2017. (Tr. 648-49). As mentioned above, he claims to have found some gold on the subject 34 claims but could not say how much or where or when with any specificity. Based on Mr. Madenford's testimony, Mining Resources' purpose in locating its 34 claims can only be considered speculative. Mr. Madenford may engage in some further exploration on the claims but seems more likely to hold them for sale or relinquish them, without any real plan to develop a successful commercial mining venture.

Mona L. Leigh was a credible and sympathetic witness who apparently sincerely enjoys small-scale gold prospecting, as an active member of the Northwest Gold Prospectors club. She would plan to use a high-banker on her Claim #17, which, at 36 acres, is larger than Mining Resources', since it was located by two persons. The western side is relatively flat and accessible by a bridge across the SFPR. The eastern side, on the other side of Archie Creek, is dominated by a steep hill sloping northward down to the River, that would be difficult to access. Ms. Leigh testified she found a small amount of gold on her claim, although it is not clear how she recovered it since her claim does not encompass the waterway. (Tr. 703-08). Both Ms. Leigh and Mr. Madenford acknowledged that although they may only intend to conduct small-scale operations, there is nothing to prevent them from selling their claims to others who could undertake larger scale development. (Tr. 653, 719).

The testimony of the Claimants and their witnesses indicates that the main benefit derived from their mining or prospecting activities is recreational or collateral to the actual discovery and production of a valuable mineral. Their activities are not apparently intended or realistically expected to eventually develop a profitable commercial mining venture. Certainly, non-mechanized gold prospecting or panning, such as that engaged in by Ms. Barbee would not substantially interfere with other uses of the SFPR. However, once recreational gold prospectors use mechanized equipment such as a dredge, the potential for interference with other non-mechanized uses is apparent. The Claimants here failed to show that the value or benefits of their activities that interfere with other uses of the land could exceed the dominant river-running, camping, and tourism-based uses of the River, established through the Forest Service's evidence. The principle behind the Mining Law of 1872, which allows citizens to locate mining claims on public lands, is to promote the advantageous commercial development of the country's mineral resources – not to provide recreational opportunities. Recreational gold prospecting may be allowed in appropriate areas without the necessity of formally

locating, filing, and paying maintenance fees for mining claims on the public lands of the United States.

- Application of the IBLA's MCRRA Balancing Test

Application of the balancing test articulated by the IBLA in the *Milender* decisions leads inexorably to the conclusion that placer mining should be completely prohibited on the subject claims along the SFPR. Most directly on point is the IBLA decision in *United States v. Phyrne Brown*, 124 IBLA 247 (1992). As in the instant case, the claimant had located claims in a power site withdrawal on a river (the Merced River in California) very popular for whitewater rafting and kayaking. Placer mining on the claims would also have directly interfered with the use of a developed BLM campground and boat launch and takeout sites. Also, as in the present case, the subject segment of the Merced River was determined to be eligible for designation as a wild and scenic river. The Board held that the benefits of recreation and tourism outweighed the benefits that could be obtained from placer mining although BLM itself estimated that \$3 million to \$5 million worth of gold could be recovered from the claims. *Id.* at 254.

In this case as well, the benefits of tourism and recreation on the claims segment of the SFPR far outweigh the benefits, if any, of placer mining. Moreover, unlike in *Brown*, the evidence in this case shows no potential for the recovery of significant amounts of gold from the claims that could exceed the costs of mining. The Forest Service presented a prima facie case to that effect that the Claimants failed to overcome. The benefits of whitewater rafting and kayaking, camping, scenery viewing, fisheries, cultural resources, and wildlife provide far greater economic and non-economic benefits to the local area and society than could placer mining the claims.

The only apparent benefit from placer mining related activity that the Claimants demonstrated was actually for their own recreation – small-scale gold prospecting and dredging rather than any realistic plan for development of a valuable mine. Small-scale gold prospecting and dredging is a valid recreational activity – but it can be done and is allowed by the State of Idaho in appropriate areas without formally locating mining claims on public lands. Ironically, if the claims remain valid, the owners could prohibit any other prospecting or dredging within them, thus prohibiting those activities throughout most of the subject segment of the SFPR. The State in fact does allow recreational dredging on this segment of the SFPR, although dredgers are also supposed to obtain a NPDES permit from the EPA due to the River's designation as critical bull trout habitat. In any event, on the SFPR the recreational activity of rafters, kayakers, campers and other tourists far

exceeds that of recreational gold prospectors. The vast preponderance of the evidence in this case supports issuing an order to completely prohibit placer mining on all the subject claims.

- Conclusion

Although most recreational or small-scale gold seekers may well act responsibly, the very nature of placer mining with mechanized equipment such as a dredge or highbanker, is antithetical to more passive, non-mechanized uses of a river corridor. Only one or two dredges operating occasionally in this 10-mile long segment of the SFPR may not substantially interfere with the dominant recreational uses of the River. However, this case involves 35 claims along this stretch of the River, and there is no restriction on their sale or full development at an industrial scale. Although the Forest Service could regulate the operation to minimize environmental impacts, the agency cannot prohibit mining on a valid claim.<sup>16</sup> Even at lower levels of operations, a single dredge operating continuously over an extended period could substantially interfere with recreational uses in the immediate vicinity. The impacts of noise, access, and occupancy will still exist. When the number of operations increases throughout the claims segment, those impacts accordingly increase exponentially.

The great preponderance of evidence tendered in this case – primarily by the Forest Service – shows that placer mining would substantially interfere with the dominant other uses and values of the land – whitewater recreation, camping, tourism, scenery viewing, fisheries, cultural resources, and the revenue from those activities flowing to the local economy. The evidence shows that the cost of mining the claims would far exceed any potential revenue. Any benefit derived from the Claimants' mining activities is itself primarily recreational (in the case of Ms. Leigh), or only remotely if at all connected to the actual production of gold (in the case of Mining Resources). The recreational and scenic uses and values of the land within the claims and in their immediate vicinity far exceeds the negligible, if any, benefit that could be derived from placer mining on these claims. The Forest Service

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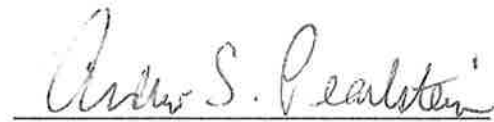
<sup>16</sup> Although placer mining may be allowed on claims within a powersite withdrawal under the MCRRA, the Forest Service or BLM may still subsequently contest the claims on the basis that there has not been discovery of a valuable mineral deposit within the claim. *Eno, supra*, 171 IBLA at 101. This appears to me to represent another inherent contradiction in the IBLA's extant interpretation of the MCRRA. How is it consistent with the intent of that act and the General Mining Law of 1872 to grant a general permission to engage in placer mining on a claim that may ultimately be determined to be invalid?

presented an overwhelming prima facie case to that effect. The Claimants did not undermine the Forest Service evidence in any significant way.

Accordingly, by this Decision, on behalf of the Secretary of the Interior, placer mining is completely prohibited on the 35 unpatented placer mining claims listed in Attachment A to this Decision.

Appeal Rights

Any party adversely affected by this Decision may file an appeal within 30 days of receipt with the Interior Board of Land Appeals, in accord with the procedures in 43 C.F.R. § 4.410 *et seq.*



Andrew S. Pearlstein  
Administrative Law Judge

See page 30 for distribution.

Distributed

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<b>Table 1: Summary of Mining Claims</b>				
Forest Service no.	BLM Serial no.	BLM Claim no.	Claim Name	Claimant
1	IDI-38421	IMC 217613	Payette Gold	Mining Resources LLC
2		IMC 217614	Payette Yields	Mining Resources LLC
3		IMC 217615	Payette Auric	Mining Resources LLC
4		IMC 217616	Payette Nuggets	Mining Resources LLC
5		IMC 217617	Payette Finds	Mining Resources LLC
6		IMC 217618	Payette Color	Mining Resources LLC
7		IMC 217619	Payette Deposits	Mining Resources LLC
8		IMC 217620	Payette Allow	Mining Resources LLC
9		IMC 217621	Payette Karats	Mining Resources LLC
10		IMC 217622	Payette Riches	Mining Resources LLC
11		IMC 217623	Payette Fever	Mining Resources LLC
12		IMC 217624	Payette Heavies	Mining Resources LLC
13		IMC 217625	Payette Placers	Mining Resources LLC
14		IMC 217626	Payette Riffles	Mining Resources LLC
15		IMC 217627	Yellow Payette	Mining Resources LLC
16		IMC 217628	Payette Bedrock	Mining Resources LLC
17	IDI-38488	IMC 217554	Guardian Angels	Mona Leigh, Virgil Moehring
18	IDI-38491	IMC 217581	PergsHolm4Pickers	Rick Pergande
19	IDI-38421	IMC 217659	Golden Riffles	Mining Resources LLC
20		IMC 217629	Pannin Payette	Mining Resources LLC
21		IMC 217630	Payette Ore	Mining Resources LLC
22	IDI-37491	IMC 217696	ScotlandHowiesAU	Rick Pergande
23	IDI-38421	IMC 217631	Lucky Payette	Mining Resources LLC
24		IMC 217632	Golden Payette	Mining Resources LLC
25		IMC 217633	Golden Yields	Mining Resources LLC
26		IMC 217634	Golden Auric	Mining Resources LLC
27		IMC 217635	Golden Nuggets	Mining Resources LLC
28		IMC 217636	Golden Finds	Mining Resources LLC
29		IMC 217637	Golden Galore	Mining Resources LLC
30		IMC 217638	Golden Color	Mining Resources LLC
31		IMC 217639	Golden Deposits	Mining Resources LLC
32		IMC 217640	Golden Alloy	Mining Resources LLC
33		IMC 217641	Golden Karats	Mining Resources LLC
34		IMC 217642	Golden Riches	Mining Resources LLC
35		IMC 217643	Golden Fever	Mining Resources LLC
36		IMC 217644	Golden Heavies	Mining Resources LLC
37		IMC 217645	Golden Placers	Mining Resources LLC

Claims shown in red are no longer active and have been dismissed from the hearing by OHA on May 14, 2018.