

Permitee/Applicant Involvement with Section 7 Consultation

[Draft Preamble] (Assumes current 402.08 is repealed)

§ 402.06 Designation of non-Federal representative. This proposed section would condense the current regulations to allow the designated non-Federal representative to be involved in all levels of consultation instead of being limited to, under existing terminology, informal consultations and the preparation of biological assessments.

These proposed regulations have combined consultation provisions in order to eliminate informal consultations. Allowing the designated Federal representative to be involved at all stages of consultation will result in a more efficient, timely, and effective consultation process. However, the ultimate responsibility for compliance with section 7 of the Act would remain with the Federal agency.

§ 402.07 Role of applicants. This new section to the regulations to make it clear that the applicant has the opportunity to be involved, along with the Federal agency, in all aspects of the consultation process that arise from the applicant's proposed action. The Federal agencies, however, need to be cognizant of other laws regarding issues such as national security, classified information, confidentiality, and maintenance of privileges. When conflicts with other laws occur, the Federal agencies will continue to involve the applicants to whatever extent is practicable.

§ 402.06 Designation of non-Federal representative.

A Federal agency may, with the consent of the applicant, if any, designate a non-Federal representative for all matters pertaining to consultation consistent with the needs of the Service and the Federal agency to comply with the requirements of other applicable laws such as those pertaining to national security, classified information, confidentiality, and maintenance of privileges.. The ultimate responsibility for compliance with section 7 remains with the Federal agency.

§ 402.07 Role of applicants.

An applicant has a right to be involved in the consultation process consistent with the needs of the Service and the Federal agency to comply with the requirements of other applicable laws such as those pertaining to national security, classified information, confidentiality, and maintenance of privileges.



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January 12, 2018

Mr. Keith B. Lannom
Forest Supervisor
Payette National Forest
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McCall, ID 83638

Via: USPS Certified Mail Return Receipt No. 7015 0640 0002 6736 8885 and
Email: klannom@fs.fed.us

Subject: Request for Non-Federal Representative Designation Pursuant to 50 CFR § 402.08 for the Midas Gold Idaho, Inc., Stibnite Gold Project

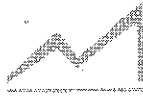
Dear Mr. Lannom,

On behalf of Midas Gold Idaho, Inc. (Midas Gold), I am requesting formal non-Federal representative designation under 50 CFR §402.08 by the United States Forest Service (USFS) so we may undertake an appropriate and active role in developing an efficient Section 7 consultation between you, the other Federal action agencies and the Services on the Stibnite Gold Project (SGP or Project). According to the *Endangered Species Consultation Handbook* (Handbook), "[t]he [Endangered Species Act] [S]ection 7 process achieves greatest flexibility when coordination between all involved agencies and non-Federal representatives, and the Services, begins early."

Non-Federal representative designation of Midas Gold is an important step for Midas Gold and the Federal agencies to achieve an open and effective dialog during the critical early stages of Section 7 consultation on this Project. This is particularly true for the Endangered Species Act (ESA or Act) analysis of the potential Project impacts on Snake River spring/summer Chinook salmon (*Oncorhynchus tshawytscha*), Snake River Basin steelhead (*O. mykiss*), and Columbia River bull trout (*Salvelinus confluentus*), which will require close coordination and dialog with the USFS and the Services. Therefore, Midas Gold requests non-Federal representative designation by the USFS so that we may effectively participate in informal consultation and preparation of the biological assessment.

Background

On August 18, 2017, Midas Gold applied for applicant status under the ESA for the Project. In a



letter dated December 14, 2017 (attached), the USFS approved Midas Gold's applicant status and provided a general description of the roles and the ESA process. Applicant status provides Midas Gold with certain rights and responsibilities, but these primarily address the formal consultation process and do not fully address Midas Gold's interest in interactions during the earlier stages of the Section 7 consultation process under the Act such as informal consultation and biological assessment preparation.

In your December 14, 2017, letter, you stated that the USFS expects the three-federal action agencies (USFS, Army Corps of Engineers, and the Environmental Protection Agency), the Services (U.S. Fish and Wildlife Service [USFWS], and National Oceanographic and Atmospheric Administration [NOAA] Fisheries) to all work together effectively with Midas Gold and its contractors on this Section 7 consultation. Midas Gold welcomes this expectation, shares this goal and looks forward to working closely with these agencies during Section 7 consultation consistent with ESA regulations and agency policies.

Rationale for Non-Federal Representative Designation of Midas Gold

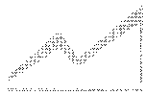
Designation of Midas Gold as a non-Federal representative under 50 CFR §402.08 is warranted for several reasons.

First and most importantly, designation of Midas Gold as a non-Federal representative is consistent with the USFS's December 14, 2017, letter approving Midas Gold's applicant status and the intent of the ESA and its implementing regulations. By law, Section 7 consultation is a cooperative effort involving affected parties engaged in analyzing effects posed by proposed actions on listed species and critical habitats. The Handbook specifically emphasizes this point, and demonstrates the latitude available within Section 7 to allow applicants and agencies to work together during the process:

Section 7 consultation is a cooperative process. The Services do not have all the answers. Actively seek the views of the action agency *and its designated representatives*, and involve them in your opinion preparation, especially in the development of reasonable and prudent alternatives, reasonable and prudent measures, terms and conditions to minimize the impacts of incidental take, and conservation recommendations. (USFWS/NMFS 1998, pp. 1-2 to 1-3 [emphasis added])

Accordingly, designation of governments, applicants, and other agencies as non-Federal representatives by lead federal agencies, including the USFS, is widespread, commonly practiced, and is not precedential.¹ As clearly articulated above, it is *encouraged* by the Services.

¹ The plain language of the regulation presumes that once applicant status is approved for an involved party such as Midas Gold, then non-Federal representative designation is an appropriate follow-on for ESA purposes. "If a permit or license applicant is involved *and is not the designated non-Federal representative*, then the applicant and the Service must agree on the choice of the designated non-Federal representative" (50 CFR 402.08 [emphasis added]). By its plain language, the regulation



Second, direct and open dialog between Midas Gold and the Federal action agencies and the Services during informal consultation is essential to fully explore technically and economically feasible alternatives and measures that, if necessary, might be considered to avoid or reduce adverse effects and benefit the species and reflected in the biological assessment.

As outlined in *Forest Service Guidance for Including "Applicants" in ESA Section 7 Consultation*, "There is a clear need for early, regular and fully-informed coordination among federal agencies and applicants, in order to as completely as possible inform the consultation, resolve conflicts, and design the project to minimize adverse effects" (USFS 2017). Midas Gold's collaborative involvement in informal consultation is consistent with our intent for restoration of the SGP site, especially for the ultimate benefit to the three Federally listed fish species and their habitats. In many guidance documents and on the Services websites, agencies and applicants are encouraged to start with informal consultation whenever possible, to allow for early consideration of listed species in project design to resolve problems as they are identified. It is fundamental that the earlier problems are identified, the earlier they will be resolved.

Third, there is no better fountainhead of knowledge about the proposed action to be reviewed under the ESA than Midas Gold. As the applicant and developer of the Project, Midas Gold is uniquely knowledgeable about the Project and in the position to best inform the Federal action agencies and the Services to fulfill their obligations under the ESA. This unique position is a result of Midas Gold's thorough and complete understanding of the Project and the potential/alternative design modifications and operational procedures that, if necessitated, could reduce the impact of the Project on the Federally listed fish species and designated critical habitat. Midas Gold seeks to integrate this knowledge and understanding with the Services' expertise and understanding of the needs for conservation of these species to best achieve a solution.

Conclusion

Over the past 5 years, Midas Gold has been engaged in developing baseline data for these species and their habitat, and the restoration plans for the Project including design features to be used during and after active mining to address opening access to stream habitat closed since the 1930s. Midas Gold has been collaborating closely with state and Federal agencies responsible for the management of these species to develop the baseline studies and

information to address these species and their habitat. Midas Gold has a team of specialist contractors (who have been working with the USFS on various elements of the Project, including fish passage, stream and wetland restoration, and other elements of the developing

affords a project applicant protection to concur with the designation of a non-Federal representative if it is not the applicant itself. This suggest that applicant status and designation as a non-Federal representative is the norm and not an exception for project proponents such as Midas Gold.



Aquatic Mitigation Plan) who can help bring the best available science to the consultation process and the biological assessment

Because of its focus on stream habitat restoration and enhancement, the Project can ultimately play a positive role in the restoration and recovery of salmonid and other species in the Upper East Fork of the South Fork of the Salmon River. We look forward to continued collaboration with the USFS and the other Federal and state agencies to this end and to support a more informed, timely, and efficient Section 7 consultation process. Non-Federal representative designation of Midas Gold under 50 CFR §402.08 will help ensure meeting this objective.

Sincerely,
Midas Gold Idaho, Inc.

Laurel Sayer
President and CEO

cc: Patty McGrath, USEPA
Lynne Hood, USEPA
Greg Martinez, USACE
Marve Griffith, USACE

Literature Cited:

U.S. Fish & Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS), 1998, *Endangered Species Consultation Handbook, Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act*, March.

U.S. Forest Service (USFS), 2017, *Guidance for Including "Applicants" in ESA Section 7 Consultation*

Forest Service – Rocky Mountain Region, accessed December 28, 2017, at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd496394.pdf



File Code: 6220
Date: March 14, 2018

Laurel Sayer
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Laurel Sayer

This letter responds to your January 12, 2018, request to be designated a Non-Federal Representative for Endangered Species Act Section 7 Consultation on the U.S. Forest Service's approval of a plan of operations for the Stibnite Gold Project (Plan). While you have already been identified as an "applicant" for purposes of the Section 7 Consultation, the U.S. Forest Service is further designating Midas Gold Inc. as a "Non-Federal Representative."

As a Non-Federal Representative, Midas Gold Idaho Inc. will be involved in the informal consultation process between the Federal action agencies (U.S. Forest Service – lead, Army Corps of Engineers, and Environmental Protection Agency) and regulatory agencies (National Marine Fisheries Service and U.S. Fish and Wildlife Service). Under 50 CFR §402.08, the U.S. Forest Service is required to furnish guidance and supervision, and to independently review and evaluate the scope and contents of the biological assessment. The obligation to initiate and complete consultation on the federal action of approving the portions of the Stibnite Gold Plan on National Forest System (NFS) lands remains with the Forest Service and regulatory agencies.

Our goal for designating Midas Gold Idaho, Inc. as a Non-Federal Representative is to have an inclusive informal consultation process that results in an objective analysis conducted by AECOM, reviewed and approved by the Federal action agencies, and accepted by the regulatory agencies in a timely manner. To achieve that objective for the informal consultation process, we anticipate that Midas Gold Idaho, Inc. will:

- Submit analyses to be considered for use in the biological assessment,
- Participate in meetings, calls, and discussions as subject matter experts to develop the proposed action and mitigation actions, as requested by the Federal action agencies or the regulatory agencies, and
- When requested, provide comments and reviews of documents to the U.S. Forest Service for consideration and dissemination to the other Federal action agencies or the regulatory agencies,

Consistent with the Stibnite Gold project agreement between Midas Gold Idaho, Inc. and U.S. Forest Service dated March 17, 2017 and with 50 CFR §402.08, we will proceed as follows:

- AECOM, the 3rd party NEPA contractor will prepare the biological assessment under the direction of the U.S. Forest Service,



- The U.S. Forest Service will direct the analysis for the Biological Assessment with input from Midas Gold Idaho, Inc, as requested by the U.S. Forest Service,
- The U.S. Forest Service will lead all communications with the Federal action agencies and the regulatory agencies, with engagement from Midas Gold Idaho, Inc; however, it may be necessary for the Federal action and regulatory agencies to have meetings or parts of meetings with only Federal agencies in attendance,
- The U.S. Forest Service will make the final determination of when the biological assessment is complete and ready for submission to the regulatory agencies to initiate formal consultation, and
- The Federal action agencies will be the arbiters of any disputes or disagreements.

We anticipate that the approval of the Stibnite Gold Plan will require formal consultation with the regulatory agencies under Section 7 of the Endangered Species Act and applicable regulations. The Non-Federal Representative's role is in informal consultation. Therefore, once formal consultation is initiated, applicant roles will apply. Formal consultation will start when the U.S. Forest Service submits a draft biological assessment with a Likely to Adversely Affect determination for review the regulatory agencies.

We request that Midas Gold Idaho, Inc. identify a single point of contact that will represent Midas Gold Idaho, Inc. for the informal consultation process. As the lead Federal action agency, the Forest Service point of contact for the Section 7 consultation is Clayton Nalder for fisheries and June Galloway for wildlife. If you have questions please contact Piper Goessel, Project Manager at (208) 634-0760.

Sincerely,



KEITH B. LANNOM
Forest Supervisor

cc: Valerie Porter AECOM, Lynn Hood USACE, Patty McGrath USEPA, Marve Griffith USEPA, Bill Lind NMFS, Greg Hughes USFWS, Dave Rosenkrance, Kathryn Conant, Lee Jacobson, Piper Goessel, Andy Brunelle



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March 28, 2018

Mr. Keith B. Lannom
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McCall, ID 83638

Via: USPS Certified Mail Return Receipt No. 7017 1070 0001 0736 2516 and
Email: klannom@fs.fed.us

Subject: Response to U.S. Forest Service Letter Designating Midas Gold Idaho, Inc., as Non-Federal Representative for ESA Informal Consultation for the Stibnite Gold Project

Dear Mr. Lannom,

This responds to your letter dated March 14, 2018, in which the U.S. Forest Service designated Midas Gold Idaho, Inc. (Midas Gold) as the Non-Federal Representative (NFR) under 50 CFR §402.08 for informal consultation under Section 7 of the Endangered Species Act (ESA) for the Stibnite Gold Project (SGP or Project). This designation was made in response to Midas Gold's request dated January 12, 2018, pursuant to 50 CFR §402.08. It follows the U.S. Forest Service's earlier designation of Midas Gold as having applicant status for the formal consultation process under Section 7 of the ESA for the Project.

Midas Gold is pleased to be designated as an NFR and embraces this role and its responsibilities. As stated in our January 12, 2018, request, we maintain that NFR status is an important step that promotes open and effective dialogue between Midas Gold and the Federal action agencies during the critical early stages of Section 7 consultation on this Project. We fully expect that the Section 7 informal consultation for the SGP will be, as defined by the applicable agency rules and guidance, a cooperative effort involving affected parties engaged in analyzing and reasonably minimizing effects posed by proposed actions on listed species and critical habitats, and open to Midas Gold in all respects pursuant to 50 CFR §402.08. Midas Gold plans to be fully and actively engaged.



We understand from our direct discussions with the U.S. Fish & Wildlife Service and National Marine Fisheries Service (Services) recently in Portland that the Services welcome early collaboration on the proposed action, so we are, in their words, “smart from the start.” This ESA consultation will concern actions by three Federal agencies—the U.S. Forest Service, U.S. Environmental Protection Agency, and the U.S. Army Corps of Engineers. Timely and open informal consultation involving all, with clear roles and a common understanding of the process and endpoints, will be critical.

We assume that the U.S. Forest Service has provided the NFR designation to Midas Gold to facilitate a direct and open dialogue between Midas Gold and the Federal action agencies and the Services during informal consultation. That dialogue will be essential for us to collaboratively explore technically and economically feasible alternatives, inform the consultation, resolve conflicts, and design the project to reasonably minimize adverse effects. This matches closely with your goal, as stated in your March 14, 2018, letter, of having Midas Gold be involved with an inclusive informal consultation process. We consider it premature to conclude that a biological assessment for the SGP will contain a Likely to Adversely Affect determination, but we do expect and will do our part as the applicant in formal consultation that follows timely completion of the informal process.

Your letter stated that the U.S. Forest Service anticipates that Midas Gold will: submit analyses to be considered; participate in meetings, calls, and discussion as subject matter experts to develop the proposed action and mitigation actions; provide comments and reviews of documents; provide input on the analysis for the biological assessment; and engage with the U.S. Forest Service in its communications with the Federal action agencies and regulatory agencies (the Services).

For Midas Gold to operate effectively in the role of NFR as provided in 50 CFR §402.08 and other ESA agency rules and guidance, there must be effective and open dialogue, objective analysis, and transparency in the process. Key information must be shared generously both ways to ensure that the process will be successful. With that in mind, Midas Gold emphasizes the following coordination points that we believe will be essential to our effective involvement:

- Initial Meeting: Participation in this meeting is important to develop mutually agreed upon expectations for the process, an overall schedule, understanding of the Action Area, the covered species, description of the proposed action, and other matters essential to a well-designed informal consultation process.
- Review of an Annotated Outline for the Biological Assessment (BA): This review opportunity will allow Midas Gold to jointly understand the contents of the BA, the baseline for the analysis, and other content details of the draft BA document.
- Technical Approach for Effects Analysis: Incorporating Midas Gold’s subject matter experts in this process is important so that we understand the available data, possible methodologies, and technical analysis that will be used in the Effects Analysis for the species and data available from Midas Gold and other various sources. This coordination will ensure use of the best scientific and commercial data available.



- Review of Preliminary Versions of the Draft BA: Joint review by the Federal action agencies and Midas Gold at this critical juncture will be essential in understanding any outstanding effects that might be addressed by Midas Gold through Project design, operational measures, and monitoring.

Midas Gold believes that these coordination points provide effective components for our engagement in the process, and a way to measure progress. We expect that these would be, as you described in your letter, supplemented by other meetings, calls, and discussions in what remains an informal process. Midas Gold looks forward to being actively engaged by the USFS in all communications with the Federal action agencies and the regulatory agencies during informal consultation, recognizing that it may be necessary for the Federal action agencies and Services to have some meetings or parts of meetings with only the Federal agencies involved. Midas Gold will continue to actively engage and meet with agency management, officials, elected representatives and other stakeholders as we deem necessary and appropriate.

Midas Gold's representative for the informal consultation process under Section 7 of the ESA for the SGP will be Mr. Alan Haslam, VP Permitting, or his designee. Midas Gold's technical team includes several engineers, fisheries scientists, fish passage specialists, water quality specialists, and other discipline leads who will act as our contributing subject matter experts during the informal consultation process. The U.S. Forest Service is already working effectively with many of these people, as are the other Federal action agencies and the regulatory agencies. We look forward to continuing this collaborative and productive relationship for a timely and successful completion of Section 7 requirements. Finally, we ask that informal consultation on the SGP begin immediately.

Sincerely,

Laurel Sayer
President and CEO
Midas Gold Idaho, Inc.

cc: Piper Goessel, USFS
Valerie Porter, AECOM
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