

Committee on Resources

Witness Testimony

**Testimony of Robert Deurloo Manager, Beartrack Mine
before the
U.S. House Committee on Resources
Subcommittee on Fisheries Conservation, Wildlife and Oceans
July 24, 1997**

My name is Bob Deurloo. I am the Manager of Meridian Gold Company's Beartrack Mine, which is located near Salmon, Idaho within the Salmon-Challis National Forest. The Beartrack Mine is situated near Napias Creek within the Panther Creek Drainage, which is tributary to the Salmon River.

The Beartrack Mine is a modern, state-of-the-art open-pit, heap leach gold mine. The Mine was approved by federal, state and local permitting authorities in 1992; mine development and construction began in 1994. The Mine has 160 employees, most of whom reside in the town of Salmon. Our payroll is in excess of \$6,000,000 annually, and we are a substantial contributor to the local and state economies.

Meridian Gold Company and the Beartrack Mine are committed to natural resource protection, including fish and wildlife conservation. In the course of permitting and operating the Beartrack Mine, Meridian Gold has committed to and achieved substantial environmental improvements aimed at restoring and enhancing resources that have been impaired by historic mining and forest management activities. Our successes have included the restoration of previously-degraded wetlands which required that we remove old placer and dredge tailings at a cost of over \$1,000,000, and the upgrading of existing forest roads to reduce sedimentation impacts and to improve traffic safety, at a cost of over \$2,000,000.

In addition, my Company utilizes state-of-the-art pollution prevention and waste minimization practices at the Beartrack Mine. For instance, Meridian has invested over \$1,000,000 in a water treatment plant to collect and contain sediment from stormwater that falls anywhere on the 700 acres covered by the Mine's facility. As a result, while the Main Salmon River may be brown and opaque during high flows or after a storm, its Napias Creek tributary runs cool and clear.

In the course of permitting and operating the Beartrack Mine, Meridian Gold has become very familiar with the National Marine Fisheries Service ("NMFS") and that agency's administration of the Endangered Species Act ("ESA"). The NMFS' listing of the Snake River chinook salmon as a threatened species on April 22, 1992, followed by the agency's designation of critical habitat for the species on December 28, 1993, led to extensive consultation activities under Section 7 of the ESA among NMFS, the U.S. Forest Service, and other federal agencies.

Meridian Gold supports the intent of the ESA, and the conservation and recovery of Snake River chinook salmon. My Company believes that NMFS must increase its credibility and public support to save the salmon, and that to do so the agency should focus on those factors which are most responsible for their demise. Furthermore, we believe NMFS should focus on doing its job with greater efficiency and timeliness. Too often, the agency's efforts are devoted more to procedural exercises (which themselves drag on at great cost in time and resources) than to efforts which yield on-the-ground benefits to the fish. To some extent, this may be the result of congressional direction; however, NMFS itself is likewise to blame for the problem.

The balance of my testimony focuses on four areas where Meridian Gold believes NMFS' performance can be improved: first, the agency's failure to analyze relative risk and focus on those actions posing the greatest threat to Snake River chinook salmon; second the timeliness of consultation actions; third, the designation of critical habitat for Snake River chinook salmon; and fourth, the draft "essential fish habitat" regulations recently promulgated by NMFS under the Magnuson-Stevens Act.

1.NMFS Should Focus Its Regulatory Activities Upon Those Activities Posing the Greatest Threat to the Snake River Chinook Salmon and Its Ultimate Recovery.

SNAKE RIVER chinook salmon face a range of threats and problems, ranging from commercial harvesting activities to freshwater habitat degradation. Meridian Gold believes it is widely acknowledged that the single greatest impact to the chinook is the federal hydroelectric dam system on the Columbia and Lower Snake rivers. The Federal Columbia River Power System has a devastating impact both on the ability of returning adult salmon to reach spawning grounds and on the ability of outmigrating salmon smolts to move down river and out to the Pacific. Any rational effort to promote the conservation and recovery of the Snake River chinook must start and focus upon the impacts from those dams.

A rational approach to addressing other impacts to salmon - such as the historic habitat degradation present in some parts of the salmon's historic range - must be based on a determination that such efforts will yield benefits to the fish. This assurance does not exist when NMFS allows dam operations and impacts to proceed with only incremental modifications. Unfortunately, however, NMFS' activities - at least in Idaho - seem to be based on an effort to uncouple the consideration of habitat impacts and mainstream migration barriers. NMFS is pursuing habitat issues in Idaho without fully acknowledging the role downstream dams play in limiting salmon survival and recovery prospects, and, indeed, without comprehensively addressing whether current spawning and rearing habitat conditions in Idaho are actually limiting factors on salmon conservation and recovery. The agency's apparent determination to soft peddle the impacts of the downstream dams while emphasizing relatively minor upstream habitat concerns seems discriminatory and highly political. Moreover, NMFS' approach seems inconsistent with the administration's present emphasis on "ecosystem management."

NMFS' approach in this regard is well illustrated by the Beartrack Mine consultations. Beartrack is located on Napias Creek approximately 6.5 miles above Napias Falls. In an area rich in written history, there exists no reliable written or oral reports of salmon ever occurring in Napias Creek above the Falls. The Napias Creek watershed in the area of the Mine is cut-off from access by spawning salmon by a physical and natural barrier. Nonetheless, NMFS has insisted upon assuming, for the purpose of determining the potential impact of the Mine on Snake River chinook salmon, that spawning salmon could ascend the impassable Napias Falls.

Agency regulation must be founded on fact and common sense to earn and enjoy public support. For either the regulated community or the general public to support NMFS' regulatory activities, the agency must be able to demonstrate that it is focusing on real, rather than peripheral or perceived issues. In the case of the Beartrack Mine, NMFS (and Meridian Gold and the federal action agencies) are expending a tremendous amount of time and fiscal resources on hypothetical fish and illusory fish impacts while the downstream dams continue to wreak havoc on the Snake River chinook salmon.

If NMFS wants to earn credibility and trust, it should demonstrate to the people of Idaho that its efforts are addressing real impacts to threatened and endangered species, and will measurably benefit the recovery of the fish. The agency should start to do so by evaluating all known impacts to listed fish and ranking them in terms of relative threat to the species, then focusing its regulatory efforts where they will yield tangible, measurable benefits to fish conservation and recovery.

2.NMFS Should Focus On Improving the Timeliness of Section 7 Consultations.

Under the regulations applicable to Section 7, a consultation should generally be completed within 135 days. Meridian Gold believes that NMFS achieves this performance rarely, if ever. Meridian Gold further believes that if NMFS focused more concretely on tangible, documentable threats to Snake River chinook salmon, rather than the types of issues described in this testimony, the agency would benefit from a significantly reduced workload and could then focus on timely evaluations that lead to real benefits in fishery conservation and recovery. We have been in consultation for over three years. Continued delays and uncertainty greatly increase the cost and risk of doing business in this region and we are re-directing our exploration dollars elsewhere. While this is fine with many people, our nation continues to have an insatiable demand for minerals.

3.Critical Habitat Designation For Snake River Chinook Salmon.

Meridian Gold believes that NMFS' approach to designating critical habitat under the ESA for Snake River chinook salmon is a good example of a well-intentioned action that has resulted in tremendous resource expenditures. At least in the case of the Beartrack Mine, these expenditures have not yielded measurable species conservation benefits. In 1993, NMFS designated virtually the entire Salmon River and its tributaries, except reaches above natural impassable falls, as critical habitat for Snake River chinook salmon. Much of the area within the area designated is not currently occupied by listed salmon. Under the ESA, the agency is required to make a finding that areas not occupied by the species at the time of designation are "essential to the conservation of the species" before it may designate those areas as critical habitat. 16 U.S.C. 1532(5)(A)(ii). NMFS has made no such finding; indeed, the agency has never (to Meridian Gold's knowledge) made any determination that the spawning habitat currently utilized by the depleted salmon runs is inadequate to provide for the conservation of the species if the dams downstream are dealt with in a manner that provides for increased escapement and return migration.

In the critical habitat rulemaking, NMFS acknowledged that it did not know whether the areas within the broad watershed designation possessed the biological and physical features essential to the species' conservation. 58 Fed. Reg. 68543, 68548 (Dec. 28, 1993). Instead of limiting the designation to the areas which NMFS knew provided such features, and which might clearly meet the regulatory criteria for critical habitat, NMFS chose to make an overbroad designation and then to "fine tune" it by site-specific determination on a case by case basis. This approach is inconsistent with the critical habitat designation regulations, and also extremely inefficient and resource intensive for the agency and the regulated community alike, as the Beartrack Mine's experiences demonstrate.

As discussed above, the Beartrack Mine is located on a reach of Napias Creek which is above a naturally impassable falls. Upper Napias Creek hosts no salmon, nor is there any known record of it ever having been used by salmon. It is clearly outside the currently occupied range of the species, and is outside the critical habitat designation (since it is above a naturally impassable falls). Nonetheless, NMFS persists in treating Upper Napias Creek as critical habitat, despite the fact that the best available data demonstrates that it is outside the critical habitat designation and despite the fact the agency has never made any finding that Upper Napias Creek is "essential to the conservation of the species."

In the original Section 7 consultation on the Beartrack Mine, the Salmon National Forest (the action agency) determined that Napias Falls was an impassable barrier to anadromous fish, and that Upper Napias Creek was therefore outside critical habitat. NMFS chose to disagree despite the lack of any concrete evidence to the contrary. Instead, NMFS took the position that based on a site visit by a NMFS staff biologist, there was a "possibility of chinook salmon once spawning upstream from" the Falls, and that NMFS would therefore assume the Falls were passable. That assumption would control until "conclusive data" was available to confirm the Falls were historically impassable. See NMFS Beartrack Mine Biological Opinion at 9 (Mar. 1994). NMFS thus set in motion an intensive evaluation of effects on "critical habitat" at the Mine's doorstep, when both the factual information and the critical habitat regulations themselves, limits the critical habitat to at least 6.5 miles downstream from the Mine.

The Beartrack Mine is now the focus of a second consultation.⁽¹⁾ To support this consultation, Meridian Gold committed substantial resources to document the lack of historical information demonstrating any utilization by salmon of Upper Napias Creek, and commissioned a series of studies which confirmed that Napias Falls was both impassable to salmon and a naturally-occurring feature. This information is clearly the best available scientific and commercial information, and corroborates the historical record, which includes a 1941 study reported by the Department of Interior's Bureau of Fisheries (Napias Falls is an "impassable cascades"), a 1965 stream inventory prepared by the Idaho Department of Fish & Game (attempts to establish anadromous runs of fish in Napias Creek would be "impractical" due to extremely steep gradient and numerous cascades and falls), and a 1986 Habitat Rehabilitation Report prepared for the Bonneville Power Administration which concludes that Napias Falls are a definite barrier to upstream salmon migration. Based on this information and record, Meridian Gold expected that NMFS would recognize that Upper Napias Creek was not critical habitat for salmon. However, NMFS still persists in treating Upper Napias Creek as critical habitat, despite the fact that all available information (and NMFS' own regulations) require a contrary determination.

Because of Meridian Gold's belief that NMFS' position in the Beartrack Mine consultation is not supported by the

available information before the agency, my Company has filed a petition for the redesignation of critical habitat in the area of Upper Napias Creek near the Mine. NMFS has made a determination that the petition may be warranted, and has published this finding in the Federal Register, seeking public comment on the redesignation. 62 Fed. Reg. 22903 (Apr. 28, 1997). Meridian Gold hopes that this examination will prompt the agency to recognize and remedy this situation.

4.NMFS' Recently Proposed "Essential Fish Habitat" Regulations Are Another Example of the Agency's Tendency To Misfocus Its Resources By Establishing Procedures Which Will Not Produce Tangible Benefits To Listed Species.

Earlier this year, NMFS promulgated draft regulations under the "essential fish habitat" provisions of the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act" or "Act"). 62 Fed. Reg. 19723 (Apr. 23, 1997). The proposed regulations set forth guidelines for the description and identification of essential fish habitat in fishery management plans, adverse impacts on essential fish habitat, and actions to conserve and enhance essential fish habitat.

The draft regulations will require consultation between federal agencies and NMFS when federal agency activities may adversely affect essential fish habitat. NMFS has also proposed expansive consultation procedures for federal agencies which will add yet another layer of review and source of delay to activities subject to the consultation requirements of the Endangered Species Act. The agency could - and should have - provided that where a consultation is required under both the ESA and the Magnuson-Stevens Act, the consultation procedures of the ESA will satisfy the consultation requirements of the Magnuson-Stevens Act. NMFS apparently has chosen not to do so, thus increasing its workload without reason or benefit to listed species conservation. To compound this problem, NMFS has exceeded its authority under the Magnuson-Stevens Act consultation provisions in this proposed rule.

The Magnuson-Stevens Act does not give NMFS the authority to require federal agency compliance with NMFS' recommendations in an essential fish habitat consultation, nor does it prohibit agency action which would degrade or harm such habitat, facts which NMFS recognizes in the preamble to the proposed regulations. See 62 Fed. Reg. at 19726. In this respect, the Magnuson-Stevens Act differs significantly from the ESA. However, in the proposed rule, NMFS would require federal agencies which choose not to adopt all recommendations received from NMFS to undergo a dispute resolution process. This is not a requirement of the Magnuson-Stevens Act, and its inclusion by NMFS is inappropriate. Under the Act the federal action agency has the authority and the responsibility to accept or reject NMFS recommendations received in consultation, and the rule should so reflect. Instead, NMFS has apparently chosen to go beyond its authority and attempt to force its views on other federal agencies in what by definition will be another contentious and resource intensive process. This is another unfortunate example of NMFS' tendency to adopt and pursue procedures which may expand the agency's control and authority but which do so at a tremendous resource cost without commensurate benefits to endangered species conservation.

In summary, the Beartrack Mine has complied with extensive federal, state, and local requirements to protect the environment and water quality. We see the dams continuing to churn up the fish and the nearest stray salmon is at least 7 miles from our operation. Yet, we continue to be subjected to never-ending regulation, restrictions, delays, and expense. We would like to see our collective efforts spent more wisely on addressing the real problems.

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1. ¹ The original Beartrack Mine biological opinion was challenged in Idaho Rivers United v. National Marine Fisheries Service, No. C94-1576R (W.D. Wash. Nov. 8, 1995). In November of 1995, the court remanded the opinion to the agencies directing them to better explain their conclusions of no jeopardy and no adverse modification of critical habitat in the biological opinion.