

1 James R. Wheaton (State Bar No. 115230)
2 Iryna A. Kwasny (State Bar No. 173518)
3 Joshua Borger (State Bar No. 231951)
4 ENVIRONMENTAL LAW FOUNDATION
5 1736 Franklin Street, 9th Floor
6 Oakland, CA 94612
7 ph (510) 208-4555
8 fax (510) 208-4562

9 Roger Flynn, Appearance *Pro Hac Vice*
10 Jeffrey C. Parsons, Appearance *Pro Hac Vice*
11 WESTERN MINING ACTION PROJECT
12 2260 Baseline Rd., Suite 101A
13 Boulder, CO 80302
14 Tel: (303) 473-9618
15 Fax: (303) 786-8054
16 wmap@igc.org

17 Attorneys for Plaintiff Karuk Tribe of California

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

KARUK TRIBE OF CALIFORNIA,

Plaintiff,

vs.

UNITED STATES FOREST SERVICE;
JEFF WALTER, Forest Supervisor, Six
Rivers National Forest; **MARGARET**
BOLAND, Forest Supervisor, Klamath
National Forest,

Defendants.

) Civ. No. 04-4275 (SBA)

) **SECOND AMENDED COMPLAINT FOR**
) **DECLARATORY AND INJUNCTIVE**
) **RELIEF**

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2 INTRODUCTION

3 1. Plaintiff Karuk Tribe of California files this action for declaratory and injunctive relief
4 arising from defendants' improper management of suction dredge, mechanical sluicing, and other
5 mining operations in waterways and riparian areas within the Six Rivers and Klamath National
6 Forests in northern California. This suit challenges the United States Forest Service's failure to
7 comply with mandatory procedural and substantive requirements governing mining in streams,
8 rivers, and riparian areas. These violations include the agency's failure to comply with the
9 standards and guidelines of the Forest Plans for the Six Rivers and Klamath National Forests,
10 failure to ensure compliance with the federal Clean Water Act ("CWA"), failure to undertake
11 and complete the required environmental reviews under the National Environmental Policy Act
12 ("NEPA"), failure to comply with the procedural and substantive requirements of the
13 Endangered Species Act ("ESA"), and failure to abide by Forest Service public land and mining
14 statutes and regulations.

15 2. Plaintiff specifically challenges two Directives issued by the Forest Service regarding the
16 regulation of mining operations, including suction dredge mining operations in waterways and
17 riparian areas. These two directives are: (1) the May 26, 2004 memorandum from Jack A.
18 Blackwell, Regional Forester for the Pacific Southwest Region, to Forest Supervisors in that
19 Region, with the subject of "Forest Service Regulation of Suction Dredging Operations"; and (2)
20 the February 5, 2002 memorandum from Larry O. Gadt, Director of Minerals and Geology
21 Management of the Forest Service to the agency's Regional Foresters, with the subject of
22 "Northwest Forest Plan." These directives are also referred to herein as "the National/Regional
23 Directives." These National/Regional Directives violate the laws and regulations noted in
24 Paragraphs 1 and 6 herein.

25 3. Plaintiff also challenges a number of individual Forest Service decisions to allow suction
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1 dredge and other mining operations to occur pursuant to a Notice of Intent (“NOI”) instead of a
2 Plan of Operations (“PoO”). These individual Forest Service decisions were made in the
3 following documents: (1) May 25, 2004 letter from Alan Vandiver, District Ranger, Happy
4 Camp Ranger District, to Mr. Dave McCracken (*see also* May 13, 2004 letter from William
5 Metz, Acting Forest Supervisor, Six Rivers National Forest, to Mr. McCracken); (2) June 14,
6 2004 letter from Alan Vandiver to Nida Johnson; (3) June 15, 2004 letter from Alan Vandiver to
7 Robert A. Hamilton; and (4) June 15, 2004 letter from Alan Vandiver to Ralph R. Easley. These
8 determinations represent a pattern and practice of the Forest Service not to require PoOs in
9 special areas known as “Riparian Reserves” when the District Ranger or other agency official
10 determines that the individual proposed mining operation is not likely to cause significant
11 surface resource disturbance. None of these decisions/determinations were done in compliance
12 with the laws and regulations noted in Paragraphs 1 and 6 herein. In issuing the determination
13 letters noted in this paragraph and allowing these mining operations to proceed under a NOI
14 instead of a PoO, the Forest Service relied upon the National/Regional Directives.

15 4. Based upon the National/Regional Directives, in the year 2005, the Forest Service will
16 continue to authorize mining operations in Riparian Reserves (also known as Riparian Habitat
17 Conservation Areas) pursuant to NOIs instead of PoOs, as long as the District Ranger or other
18 agency official determines that the proposed mining operation is not “likely to cause significant
19 surface resource disturbance.” The May 26, 2004 Regional Directive states that: “Forests under
20 the Northwest Forest Plan should be aware that the MM-1 standard and guideline (requiring a
21 Plan of Operations for all mineral operations in riparian reserves) applies only when the
22 proposed activity is likely to cause significant surface resource disturbance.” May 26th Directive
23 at 2.

24 5. In addition, Plaintiff challenges a number of decisions issued by the Forest Service
25 authorizing mining operations pursuant to Plans of Operations submitted by prospective miners.
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1 These individual Forest Service decisions were made in the following documents: (1) February
2 6, 2004 letter from Chance Gowan, District Ranger, Salmon River Ranger District, to Lloyd
3 Ingle, approving and extending Mr. Lloyd's Plan of Operations for the Lucky Dog, Lucky Pup,
4 and Nancy Placer mining claims; (2) January 22, 2004 letter from Chance Gowan to Robert J.
5 Hana, approving Mr. Hana's Plan of Operations for the Rainbows End mining claim; (3) January
6 12, 2004 letter from Ray A. Haupt, District Ranger, Scott River Ranger District, to Michael
7 Carty, approving Mr. Carty's Plan of Operations for the Long Run mining claim; (4) May 12,
8 2004 letter from Ray Haupt to Jerry K. Rabenau, approving Mr. Rabenau's Plan of Operations
9 for the Snowdrift mining claim; (5) May 10, 2004 letter from Ray Haupt to Dave McCracken
10 and The New 49ers, Inc., approving Mr. McCracken/New 49ers' mining operations in the Scott
11 River Ranger District under a Plan of Operations. These determinations represent a pattern and
12 practice of the Forest Service to approve Plans of Operations without compliance with the laws
13 and regulations noted in Paragraphs 1 and 6 herein.

14 6. This suit arises under and alleges violations of the Endangered Species Act, 16 U.S.C. §§
15 1531 *et seq.* (2004), the National Forest Management Act (NFMA), 16 U.S.C. §§ 1600-1614
16 (2004); the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*; the Clean Water Act,
17 33 U.S.C. §§ 1251 *et seq.* (2004); the Forest Service Organic Administration Act of 1897
18 (Organic Act), 16 U.S.C. §§ 478, 551 (2004); the Administrative Procedure Act (APA), 5 U.S.C.
19 §§ 501-706 (2004); and the implementing regulations of these laws. The Forest Service's actions
20 and/or omissions are subject to judicial review under the ESA, 16 U.S.C. § 1540, and the APA, 5
21 U.S.C. §§ 702 and 706.

22 7. In compliance with 16 U.S.C. § 1540(g), on June 15, 2004, Plaintiff gave notice of the
23 ESA and other violations specified in this complaint and of its intent to file suit to defendants. A
24 Copy of this letter was attached to Plaintiff's original Complaint. Sixty days or more have
25 elapsed since the notices were properly served. The violations complained of in the notice letter
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1 are continuing, and have not been remedied. Defendants remain in violation of the ESA.
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3 JURISDICTION AND VENUE

4 8. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (federal
5 question); 1346 (United States as defendant); 1361 (mandamus); 2201 (declaratory relief); 2202
6 (injunctive relief); and the APA, 5 U.S.C. § 701 *et seq.* The citizen suit provision of the ESA
7 also establishes jurisdiction. 16 U.S.C. § 1540(g). There is a present and actual controversy
8 between the parties.

9 9. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e)(1), & (2) (2004),
10 as a substantial part of the lands/waters and events/omissions giving rise to this suit occur in this
11 District, and the headquarters and activities of the defendant Six Rivers National Forest is in this
12 District. The headquarters of the Six Rivers National Forest and the address of defendant Forest
13 Supervisor Jeff Walter, is in Eureka, California, in Humboldt County. The Orleans Ranger
14 District of the Six Rivers National Forest, which also has jurisdiction over a substantial part of
15 the lands and waters and events/omissions giving rise to this suit is located in Orleans,
16 California, in Humboldt County.

17 INTRADISTRICT ASSIGNMENT

18 10. As stated, a substantial part of the lands and waters and events/omissions giving rise to
19 this suit are located in Humboldt County. Therefore, this action should be assigned to the San
20 Francisco Division or the Oakland Division pursuant to Civil Local Rule 3-2(d).

21 PARTIES

22 11. The Karuk Tribe of California (“Tribe”) is a federally-recognized Indian Tribe. The
23 Tribe’s headquarters is located in Happy Camp, California. The Tribe has lived in northern
24 California since time immemorial. The stated mission of the Karuk Tribal Council is to promote
25 the general welfare of all Karuk people, to establish equality and justice for the Tribe, to restore
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1 and preserve Tribal traditions, customs, language and ancestral rights, and to secure for
2 themselves and their descendants the power to exercise the inherent rights of self-governance.
3 Among the many goals of the Tribe is the protection and restoration of native fish and wildlife
4 species that the Tribe has depended upon for traditional cultural, religious, and subsistence uses.
5 The center of the Karuk world is Katimin, where Masuhsava (the Salmon River) meets Ishkeesh
6 (the Klamath River).

7 12 The Tribe works to protect the wild salmon, steelhead, and other fish species, and the
8 water quality of the streams and rivers on the Six Rivers and Klamath National Forests. The
9 Tribe's Natural Resource Department works to protect, promote, and preserve the
10 cultural/natural resources and ecology upon which the Karuk People depend. Natural Resources
11 staff works in conjunction with agency personnel to ensure that the integrity of natural ecosystem
12 processes and traditional values are incorporated into current and future management strategies
13 within the Tribe's area of influence. Members, staff, and elected officials of the Tribe have been
14 involved in the Six Rivers and Klamath National Forests' planning process and have submitted
15 comments to, and otherwise corresponded with, the Forest Service regarding suction dredge and
16 other mining operations in these Forests. The Tribe is also a member of the Klamath River
17 Intertribal Fish and Water Commission, which works to promote and protect the interests of the
18 various Native American Tribes in northern California and southern Oregon in the management
19 and use of the Klamath River and its tributaries.

20 13. The Tribe brings this action on its own behalf and on behalf of its members who are
21 adversely affected by the actions of the Forest Service. The suction dredge and other mining
22 operations in and along the Salmon, Klamath, and Scott Rivers and their tributaries cause
23 permanent and/or long-lasting impacts to wildlife, fisheries, water quality, recreation, and visual
24 resources, as well as an adverse impact on the Tribe's and its members' ability to enjoy the
25 spiritual, religious, subsistence, recreational, wildlife, and aesthetic qualities of the areas affected
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1 by the mining operations. The Forest Service's failure to properly regulate mining operations
2 directly and adversely harms the Tribe and its members by, among other things, threatening and
3 causing injury to and death of fish, degrading the habitat of fish, degrading the water quality of
4 these streams and rivers, as well as degrading lands along these waterways in the Six Rivers and
5 Klamath National Forests.

6 14. The Tribe and its members are also harmed by the Forest Service's failure to follow the
7 public notice, review, and commenting requirements of NEPA regarding mining in and along the
8 Klamath, Salmon, and Scott Rivers and their tributaries, as well as by the Forest Service's failure
9 to consult with the Tribe on a government-to-government basis regarding mining in and along
10 the Klamath, Salmon, and Scott Rivers and their tributaries.

11 15. Defendant Jeff Walter is the Forest Supervisor of the Six Rivers National Forest and is
12 sued in his official capacity. Defendant Margaret Boland is the Supervisor for the Klamath
13 National Forest, and is sued in her official capacity.

14 16. Defendant United States Forest Service is an agency of the United States Department of
15 Agriculture. The Forest Service is responsible for implementing all laws and regulations relating
16 to the management of the Six Rivers and Klamath National Forests.

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18 **FACTUAL AND REGULATORY BACKGROUND**

19 Mining and Its Impacts to Aquatic Life and Water Quality in the Salmon and Klamath Basins

20 17. Many streams and rivers in the Six Rivers and Klamath National Forests support
21 populations of, and provide habitat for, wild salmon species. These species include Southern
22 Oregon/Northern California coho salmon (*Oncorhynchus kisutch*).

23 18. Southern Oregon/Northern California coho salmon is listed as "threatened" under the
24 ESA. In the Six Rivers and Klamath National Forests, the following threatened or endangered
25 species that may be affected by mining in these watersheds include, but are not limited to: (a)
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1 northern California/southern Oregon coho salmon (threatened); (b) bald eagles (threatened); and
2 (c) northern spotted owl (threatened).

3 19. Spring chinook and summer steelhead fish species are listed as “sensitive species” by the
4 Forest Service. In addition, green sturgeon and pacific lamprey are likely to be analyzed for
5 possible listing under the ESA.

6 20. Rivers and streams within the Six Rivers and Klamath National Forests that support and
7 provide habitat for wild salmon and the other species listed in the previous paragraph are popular
8 areas for suction dredge and other mining.

9 21. Suction dredging is an instream mining technique where streambed material is sucked up
10 through a hose and passed over a sluice to separate out gold. The waste material ("tailings"),
11 consisting of rocks, gravel, silt, and biota, is then discharged back into the stream in a different
12 area from which it was removed.

13 22. Suction dredges are high-pressure water pumps driven by powered motors that create
14 suction in a flexible intake pipe, commonly three to twelve inches in diameter.

15 23. Suction dredging disturbs stream channels and topography. Rocks, gravel, and silt are
16 scoured away and then deposited in a different location within a stream, often in previously
17 undisturbed areas. Large boulders, stumps, and rootwads in the stream may be moved before a
18 site is excavated, which reduces stream stability.

19 24. Fine sediment dispersed by suction dredging operations can infiltrate the gravelly areas
20 where salmon make their nests (redds). The sediment suffocates the eggs and prevents young
21 salmon from emerging. Sediment also reduces water clarity and affects the ability of young
22 salmon to see their food.

23 25. Sediment from suction dredging operations absorbs solar radiation and causes increased
24 water temperatures.

25 26. The suction dredge operations can be seen and/or heard on and around the streams and
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1 rivers where they are being operated.

2 27. Suction dredge operations in the streams and rivers of the Six Rivers and Klamath
3 National Forests cause significant disturbance of surface resources, direct injury to Southern
4 Oregon/Northern California coho salmon and the other fish species listed in paragraph 19, and
5 degrade their habitat, and cause or contribute to degradation of water quality.

6 28. Additional adverse effects to aquatic habitats, fish, and other aquatic life from suction
7 dredge mining include:

- 8 ◦ Entrainment by suction dredging can kill and indirectly increase mortality of fish,
9 particularly un-eyed salmonid eggs and early developmental stages.
- 10 ◦ Entrainment and disturbance by suction dredges can kill benthic invertebrates that
11 are the food source for salmonids and other fishes, thereby reducing available fish
12 food supply in the dredged stream area(s) for a period of weeks to months until
13 the area is re-colonized. Re-colonization may be much slower if dredged area is
14 extensive. Populations of invertebrates with limited distributions could be
15 eliminated.
- 16 ◦ Streambed destabilization can increase the mortality of incubating salmonid
17 embryos and benthic fish species such as sturgeon and lamprey. Destabilization
18 of the stream channel may occur because of channel excavations made by the
19 suction dredge and the piling of cobbles too large to pass through the dredge.
20 Such direct disturbance of the stream channel tends to destabilize natural
21 processes that mold stream channels. The resulting destabilization may increase
22 local scour and fill in parts of the streambed that were not directly disturbed.
- 23 ◦ Deposition of dredge tailings can decrease fish reproductive success by inducing
24 fish to spawn on unstable material.
- 25 ◦ Dredging can change surface substrate composition – which can affect in turn fish
26 and benthic invertebrate populations. Fish eggs and larvae could be smothered or
27 buried, and fish could lose the interstitial spaces between cobbles or boulder.
- 28 ◦ Dredging could frighten adult summer steelhead or spring Chinook and inhibit
29 migrations of these fish.
- 30 ◦ Disturbances during the summer may harm adult salmon and steelhead because
31 their energy supply is limited, and the streams they occupy can be near lethal
32 temperatures. Suction dredging may be synergistic with high stream temperatures
33 and other cumulative watershed effects that are being manifested – so that adverse
34 effects of dredging are increased.
- 35 ◦ Deposition of fine sediment can reduce availability of microhabitats used by
36 benthic fish such as sturgeon larvae and young sturgeon. Extensive deposition of
37 fine sediment can reduce invertebrate populations important for the food supply
38 of anadromous salmonids.

29. In addition, natural and human-induced conditions in the Klamath River and its

1 tributaries exacerbate the impacts to aquatic species. For example, there is a “thermal barrier” in
2 the Klamath that adversely impacts the migration of adult coho salmon upstream and migration
3 of juvenile coho salmon downstream. Suction dredge mining in these waters, particularly the
4 disturbance of the streambed and discharges of material into these waters, adds to this and other
5 problems facing coho salmon in their migration cycles.

6 30. In addition to suction dredge mining in these waterways, mining also occurs immediately
7 along and above these waters. A form of mining known as “highbanking” or “mechanized
8 sluicing” involves the removal, often by motorized heavy equipment such as backhoes or
9 bulldozers, of rock, dirt, plants and other materials from their natural location. This material is
10 then sent through mechanical equipment in an effort to remove fine particles of gold and other
11 metals. The resulting debris from the equipment is then deposited in and/or near the streambank.
12 Oftentimes, water is taken from the stream to facilitate this removal and deposition process.

13 31. This mechanized sluicing disturbs the riparian areas in which it takes place by among
14 other impacts, removal of portions of the streambanks and/or riparian area from its natural
15 location, disruption and/or removal of plant material, the creation of unnatural excavated areas
16 and/or discarded debris dumps.

17 The Failure to Properly Regulate Mining by the Forest Service

18 32. The Forest Service will allow in the coming months (pursuant to the National/Regional
19 Directives), and has allowed (via the determinations/decisions noted in Paragraph 3 above)
20 motorized suction dredge, mechanized sluicing, and other mining in and along these waterways
21 without requiring a PoO for each proposed mining operation (i.e., at the discretion of a Forest
22 Service official, such operations could proceed simply by submitting a NOI to the Forest
23 Service), and without conducting the required consultation with federal wildlife agencies such as
24 NOAA Fisheries and the Fish and Wildlife Service (FWS).

1 33. For example, in meetings with the Tribe, the Forest Service informed the Tribe that,
2 pursuant to the National/Regional Directives, as long as a Forest Service official (e.g., District
3 Ranger) determines that the proposed mining operation is not likely to cause significant surface
4 resource disturbance, the agency will allow suction dredge and other mining to occur without
5 following all of the requirements of the Forest Plans for the Six Rivers and Klamath National
6 Forests. The agency informed the Tribe that it believed the agency could accept a NOI from
7 mine operators, and was not required to require mining operators to submit a PoO. In accepting
8 a NOI for mining, instead of requiring the operator to submit a PoO, the agency does/did not
9 conduct the required NEPA and ESA reviews/consultation, does/did not conduct consultation
10 with the Tribe, provides/provided no public notice, and does/did not require compliance with the
11 CWA, ESA, and NFMA. Indeed, the Klamath National Forest has already issued such NOIs
12 during the summer of 2004, pursuant to the determinations/decisions noted in Paragraph 3 above.

13 34. Further, the agency has not prepared, and will not be preparing, the appropriate NEPA
14 document for each of these operations, let alone for combined or grouped operations (e.g., either
15 an Environmental Impact Statement, "EIS," or Environmental Assessment, "EA"). Along with
16 these failures, the Forest Service will allow these operations to proceed without the required
17 consultation with NOAA Fisheries/National Marine Fisheries Service (NMFS) and/or FWS, as
18 required by the ESA, 16 U.S.C. §§ 1531 *et seq.* (2004). Allowing these operations to proceed
19 also violates the CWA and NEPA, as the agency has no idea if these operations can comply with
20 the mandated CWA stream protection and permitting requirements.

21 35. Pursuant to the National/Regional Directives, as long as a Forest Service official (e.g.,
22 District Ranger) determines that the proposed mining operation is not likely to cause significant
23 surface resource disturbance, the Forest Service will allow mining operations to occur under
24 NOIs in the Riparian Reserves in the Klamath, Salmon, and Scott Rivers and their tributaries.
25 The agency does not require a PoO, does not prepare an EA or EIS under NEPA, and does not
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1 consult with any federal wildlife agency such as NOAA Fisheries or the FWS regarding the
2 mining to be conducted under an NOI.

3 36. In certain instances (i.e., the determinations/decisions noted in Paragraph 5 above), the
4 Forest Service has authorized mining operations in and along the Salmon, Klamath, and Scott
5 Rovers and their tributaries pursuant to an approved PoO. The issuance of these PoO approvals
6 was done without the preparation of either an EA or EIS under NEPA, without the required ESA
7 consultation and other ESA duties, and in violation of the CWA. In addition, these PoO
8 approvals did not comply with the Standards and Guidelines and other requirements of the
9 Northwest Forest Plan (“NFP”) and the Forest Plans for the Six Rivers and Klamath National
10 Forests (including the Minerals Management, wildlife/species, Native American, and water
11 quality provisions of these Plans).

12 37. The Forest Service has also allowed an unknown amount of mining conducted on mining
13 claims owned or controlled by the “New 49ers Club,” or its principal/General Manager, David
14 McCracken (collectively, the “New 49ers Club,” or “Club”). The Club’s webpage is
15 www.goldgold.com which details the Club’s and its members’ activities. This “Club” obtains its
16 primary revenues from its “members” that are allowed to mine the Club’s 60 or more miles of
17 mining claims in these waters. As stated on the Club’s website: “Our mission is to give you as
18 much hassle-free, proven gold prospecting opportunity as possible at a truly affordable price.”
19 <http://www.goldgold.com/generalinformation.htm>. In 2003, the Forest Service approved a PoO
20 for the Club that authorized the Club’s members to conduct suction dredge and/or mechanical
21 sluicing on the Klamath River and its tributaries. The Happy Camp Ranger District of the
22 Klamath National Forest decided to allow mining to proceed pursuant to a NOI from the Club for
23 its activities. *See* May 25, 2004 letter from Alan Vandiver listed in Paragraph 3. The Scott River
24 Ranger District of the Klamath National Forest approved the Club’s mining operations pursuant
25 to a PoO. *See* May 10, 2004 letter from Haupt to McCracken listed in Paragraph 5. In neither
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1 case (PoOs or NOIs) did the Forest Service comply with NEPA, the ESA, the CWA, NFMA,
2 Organic Act, or implementing regulations of these laws. The New 49ers Club is incorporated in
3 the State of California.

4 38. The Club has 75 or more members that may conduct mining operations on the Club's
5 mining claims in the Klamath and Six Rivers National Forests. The Club charges a membership
6 participation fee of \$3,500.00 for a full membership. See www.goldgold.com. According to the
7 Club's website, membership entitles the member to, among other benefits: "Access to around 60
8 linear miles of proven gold-producing properties. We have miles and miles of beautiful and
9 scenic creek, river and dry claims just waiting for members to pan, sluice, dry-wash, and metal
10 detect and/or dredge." <http://www.goldgold.com/memberprivileges.htm>. These "60 linear miles"
11 of waterways includes mining claims owned or controlled by the Club and/or its corporate
12 owners/directors/General Manager. These mining claims are along the Klamath, Salmon, and
13 Scott Rivers and their tributaries. The Forest Service does not control, or know the number of,
14 the persons and/or members that conduct suction dredge or other mining in the Club's "60 linear
15 miles of proven gold-producing properties." The majority of mining on these mining claims is
16 conducted by the members of the Club, not by the Club itself, nor by the Club's owners, officers,
17 directors, or General Manager. According to the Club's website: "Members may camp free and
18 mine on or near most of our mining properties in northern California as long as they like,
19 providing they are actively prospecting." <http://www.goldgold.com/memberprivileges.htm>.
20 Membership in the Club does not mean that the member is the owner of any of the mining claims
21 owned by the Club.

22 Failure to Comply with the Endangered Species Act

23 39. Section 7(a)(2) of the ESA requires all federal agencies, including the Forest Service, to
24 "insure that any action authorized, funded or carried out by such agency ... is not likely to
25 jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C.
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1 § 1536(a)(2) (2004). To assist the agencies in complying with this mandate, they must consult
2 with NOAA Fisheries/NMFS, the delegated agent of the Secretary of Commerce, or the FWS, as
3 the delegated agent of the Secretary of the Interior, whenever their actions “may affect” a listed
4 species. *Id.*; 50 C.F.R. § 402.14(a) (1986). Formal consultation results in a biological opinion
5 from NOAA/NMFS or FWS that determines if the action is likely to jeopardize the species; if so,
6 the opinion may specify reasonable and prudent alternatives that will avoid jeopardy and allow
7 the agency to proceed with the action. 16 U.S.C. § 1536(b)(3)(A) (2004). NOAA/NMFS or
8 FWS may also “suggest modifications” to the action during the course of consultation to “avoid
9 the likelihood of adverse effects” to the species even when not necessary to avoid jeopardy. 50
10 C.F.R. § 402.13 (1986).

11 40. The joint NOAA/NMFS and FWS regulations further require that federal agencies
12 reinstate formal consultation “where discretionary Federal involvement or control over the
13 action has been retained or is authorized by law and ... [i]f a new species is listed or critical
14 habitat designated that may be affected by the identified action.” 50 C.F.R. § 402.16 (1986).

15 41. Section 9(a)(1) of the ESA prohibits the “take” of threatened and endangered species. 16
16 U.S.C. § 1538(a)(1)(A)&(G) (2004). “Take” is defined to mean “harass, harm, pursue, hunt,
17 shoot, wound, kill, trap, capture, or collect.” 16 U.S.C. § 1532(19) (2004). The term “harm” is
18 further defined to include “significant habitat modification or degradation where it actually kills
19 or injures wildlife by significantly impairing essential behavioral patterns, including breeding,
20 feeding or sheltering.” 50 CFR § 17.3 (1975). Section 9’s “take” prohibition applies equally to
21 federal and local agencies as well as private parties. In this case, suction dredge and other
22 mining constitutes such a “taking” of threatened or endangered species.

23 42. The Forest Service is violating ESA § 7 by allowing mining activities that may jeopardize
24 the threatened Southern Oregon/Northern California coho, as well as the other species listed
25 above, in these watersheds without complying fully with the NFP, the Forest Plans for the Six
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1 Rivers and Klamath National Forests, and completing adequate consultation with NOAA
2 Fisheries/NMFS and/or FWS. The Forest Service has not completed a biological
3 assessment/biological evaluation nor obtained a biological opinion for mining activities within
4 Riparian Reserves on the Six Rivers and Klamath National Forests. The Forest Service has and
5 is violating the ESA.

6 43. The Forest Service has also failed to adequately analyze the effects of mining in Riparian
7 Reserves on these species. Mining activities in Riparian Reserves are adversely affecting coho
8 salmon and other species, both directly and cumulatively. *See* Grunbaum (USFS), Summary of
9 Fisheries Issues Concerning Suction Dredge Mining, USFS April 20, 2004. This report was
10 publicly distributed at an April 20, 2004 meeting with Tribal officials, agency staff, and the
11 public. The Forest Service has failed to provide documentation of significant impacts caused by
12 mining in Riparian Reserves and ignored the individual and cumulative effects of multiple
13 impacts spread out over time and location.

14 44. The failure to analyze the impacts of mining on threatened and endangered species under
15 the ESA is compounded by the agency's failure to analyze and protect against the impacts to
16 other aquatic species such as Steelhead, Chinook, Green Sturgeon, and Pacific Lamprey (as well
17 as other species on the Forest Service's Sensitive Species list). Most or all of these species are
18 "sensitive species" or otherwise protected under Forest Service regulations and/or California law.
19 As such, the Forest Service cannot allow activities that will adversely affect these species
20 without full compliance with all these requirements – something that has yet to occur.

21 45. The agency must take extra measures to ensure protection of these species, including
22 consultation with NOAA/NMFS and/or FWS and safeguarding against a "take," in compliance
23 with the ESA. For example, no mining applicant/operator listed in Paragraphs 3 and 5 above
24 applied for an NPDES permit or provided the Forest Service with all the information necessary
25 for the agency to determine the impact of pollution resulting from the mining operations on
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1 water quality and listed species, making it impossible for the Forest Service to ensure
2 compliance with the ESA and the CWA.

3 46. Finally, the Forest Service has not determined whether mining activities will result in the
4 destruction or adverse modification of designated critical habitat for coho and other species.
5 Such destruction or adverse modification of critical habitat for these species is prohibited by the
6 ESA and cannot be allowed by the Forest Service. In this case, mining activities such as suction
7 dredge mining and highbanking/mechanical sluicing results in this destruction or adverse
8 modification of critical habitat for coho and other species, and, thus, cannot be allowed under the
9 ESA. These mining activities can harm stream functions necessary for coho survival. These
10 functions include proper temperature, sediment delivery, and streambank and substrate stability.

11 47. The Forest Service's failure to consult with NOAA Fisheries/NMFS and/or FWS about
12 the impacts of mining activities in the watersheds which are inhabited by these species violates
13 the ESA. The cumulative impact of land management practices, including mining, in watersheds
14 on these two National Forests continues to pose threats to these species. *See* Grunbaum (2004).
15 The Forest Service may not allow activities to proceed that may affect these species until it has
16 completed a legally valid consultation that properly addresses and protects against these impacts.
17 Because the consultation process has yet to be properly initiated and concluded, the Forest
18 Service may not authorize or allow any activities that may affect these species.

19 Failure to Comply with the Organic Act of 1897

20 48. Regulation of mining in the Six Rivers and Klamath National Forests is governed by a
21 number of statutes, regulations, policies, and planning documents. The Organic Act of 1897
22 authorizes the Forest Service to promulgate regulations for the national forests “to regulate their
23 occupancy and use and to preserve the forests thereon from destruction.” 16 U.S.C. § 551 (2004).
24 The Forest Service’s regulations governing operations authorized by the 1872 Mining Law (30
25 U.S.C. §§ 22-47 (2004)) are found at 36 CFR Part 228 subpart A (“228A regulations”), which
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1 require “all [mining] operations shall be conducted so as, where feasible, to minimize adverse
2 environmental impacts on National Forest resources.” 36 CFR § 228.8 (1974). “Operations” is
3 defined in relevant part as “[a]ll functions, work, and activities in connection with prospecting,
4 exploration, development, mining or processing of mineral resources and all uses reasonably
5 incident thereto, including roads and other means of access on lands subject to the regulations in this
6 part.” 36 CFR § 228.3(a) (1974).

7 49. The 228A regulations state that in proposing a mining operation, the applicant must fully
8 describe “measures to be taken to meet the requirements for environmental protection in §
9 228.8.” 36 CFR 228.4(c)(3) (1974). These requirements for environmental protection state that
10 the “[o]perator shall comply with all applicable Federal and State water quality standards,
11 including regulations issued pursuant to the Federal Water Pollution Control Act, as amended
12 (33 U.S.C. 1151, *et seq.*)[the Clean Water Act].” 36 CFR § 228.8(b) (1974). The 228A
13 regulations also require that “in addition to compliance with water quality and solid waste
14 disposal standards required by this section, operator shall take all practicable measures to
15 maintain and protect fisheries and wildlife habitat which may be affected by the operations.” 36
16 CFR § 228.8(e) (1974). Thus, the 228A regulations impose an affirmative duty on the mining
17 applicant to provide the Forest Service with sufficient information to demonstrate the ability to
18 comply with the CWA and protect fisheries. In allowing or authorizing (pursuant to the
19 National/Regional Directives and the determinations/decisions listed in Paragraphs 3 and 5
20 above) suction dredge, mechanical sluicing and other mining in the affected waters without
21 meeting the requirements noted in this paragraph, the agency has violated the Organic Act and its
22 implementing regulations, especially 36 CFR Part 228A.

23 50. The Forest Service considers the suction dredge and mechanical sluicing mining
24 activities of the members of the New 49ers Club, and the Club itself, to be authorized by the
25 Mining Law of 1872, 30 U.S.C. §§ 22-47 (2004), and regulated under 36 CFR Part 228A.

1 Similarly, the Forest Service considers the suction dredge and mechanical sluicing mining
2 activities of non-members of the New 49ers Club, including private individuals and/or
3 “members” of other similarly situated mining clubs, groups, or associations, to be authorized by
4 the Mining Law of 1872 and regulated under 36 CFR Part 228A.

5 51. The Forest Service does not consider any of the mining activities described in the
6 preceding paragraph as a “special use” to be regulated pursuant to 36 CFR Part 251. The Forest
7 Service does not consider the actions of the New 49ers Club in charging membership and/or
8 participation fees for the access and use of the Club’s mining claims to be a “commercial
9 activity” as defined at 36 CFR § 251.51 (1980). The Forest Service has not required, nor does it
10 intend to require, the New 49ers Club, or any of its members, to apply for, and obtain, a special
11 use authorization pursuant to Part 251 to conduct suction dredge or mechanical sluicing mining
12 operations in and along the Klamath, Salmon, and Scott Rivers and their tributaries.

13 52. Recreational mining by the members of the Club, or by any person, is not authorized by
14 the Mining Law of 1872. The selling of memberships by the Club as a precondition to allowing
15 members to conduct mining operations on the Club’s mining claims is not authorized by the
16 Mining Law of 1872 and is not a *bona fide* mining operation under the 1872 Mining Law. The
17 primary purpose for the Club’s location and holding of its mining claims is not for the Club itself
18 to conduct mining operations.

19 53. The suction dredge and mechanical sluicing mining operations conducted by the Club’s
20 members are conducted primarily for recreational enjoyment, and not to obtain substantial
21 revenues above and beyond the total financial cost to the members to conduct such operations.
22 Suction dredge and mechanical sluicing mining by Club members are not conducted primarily as
23 profit making enterprises.
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1 54. At a minimum, “members” of the New 49ers Club must obtain an approved PoO and
2 other required permits, certifications, approvals and authorizations prior to conducting any
3 suction dredge and/or mechanical sluicing/highbanking.

4 55. Additionally, the New 49ers Club itself must obtain a valid Special Use Authorization
5 under 36 CFR Part 251 for its actions in allowing its members’ use of, and access to, the Club’s
6 mining claims. The New 49ers Club is conducting a “commercial use or activity” as defined at
7 36 CFR § 251.51 (1980) (“any use or activity on National Forest System lands (a) where an entry
8 or participation fee is charged, or (b) where the primary purpose is the sale of a good or service,
9 and in either case, regardless of whether the use or activity is intended to produce a profit.”).

10 Failure to Comply with the National Forest Management Act

11 56. In addition to required compliance with the Organic Act and the Part 228A and 251
12 regulations, the Forest Service must ensure that all activities authorized on the national forests
13 comply with the Forest Plan for that particular forest. The NFMA requires that all Forest Service
14 projects and activities "shall be consistent with the land management plans." 16 U.S.C. § 1604(i)
15 (2004). The Forest Service must follow the Standards and Guidelines set forth in the Six Rivers
16 and Klamath Forest Plans at the project-decision level.

17 57. The Forest Plans for the Six Rivers and Klamath National Forests, along with the NFP,
18 contains the Aquatic Conservation Strategy (“ACS”), which is designed to protect aquatic habitat
19 affected by activities on public forest land. The Forest Plans for the Six Rivers and Klamath
20 National Forests, written after the NFP was issued, incorporate the NFP. *See, e.g.*, Klamath Plan
21 at 1-1. Thus, the requirements of the NFP, as well as the Six Rivers and Klamath Forest Plans,
22 apply to the actions and decisions of officials of the Six Rivers and Klamath National Forests.
23 The ACS includes standards, guidelines, and objectives that require management of forests to
24 “maintain and restore” properly functioning aquatic habitat.

1 58. The Six Rivers Forest Plan establishes a set of Aquatic Conservation Strategy Objectives
2 which must be met:

3 Forest lands will be managed to: 1. Maintain and restore the distribution, diversity, and
4 complexity of watershed and landscape-scale features to ensure protection of the aquatic
5 systems to which species, populations and communities are uniquely adapted. ... 3.
6 Maintain and restore the physical integrity of the aquatic system, including shorelines,
7 banks, and bottom configurations. 4. Maintain and restore water quality necessary to
8 support healthy riparian, aquatic, and wetland ecosystems. Water quality must remain
9 within the range that maintains the biological, physical, and chemical integrity of the
10 system and benefits survival, growth, reproduction, and migration of individuals
11 composing aquatic and riparian communities. 5. Maintain and restore the sediment
12 regime under which aquatic ecosystems evolved. Elements of the sediment regime
13 include the timing, volume, rate, and character of sediment input, storage, and transport.

14 Six Rivers Plan at IV-110. The Klamath Forest Plan has similar Aquatic Conservation Strategy
15 Objectives. Klamath Plan at 4-6.

16 55. “Management actions that do not maintain the existing condition or lead to improved
17 conditions in the long term would not ‘meet’ the intent of the Aquatic Conservation Strategy and
18 thus, should not be implemented.” Six Rivers Plan at IV-110. The Forest Service’s analysis
19 shows that mining activities will not “maintain and restore” aquatic habitat, and in many cases,
20 will actively hinder restoration of the watersheds which are already highly degraded. *See*
21 Grunbaum (USFS), Summary of Fisheries Issues Concerning Suction Dredge Mining, USFS
22 April 20, 2004.

23 60. Riparian Reserves (“RRs”) are a key component of the ACS, the NFP, and the Six Rivers
24 and Klamath Forest Plans. For example, in the Klamath Forest Plan, the Minerals Management
25 Standards and Guidelines for mining in Riparian Reserves include MA 10-33 and MA-34. These
26 provisions state:

MA10-33 Mineral operations proposed within RR’s shall require a written
authorization before start of development as part of the plan of operation,
lease, sale contract or permit. **Notices of intent for mineral operations
under 36 CFR 228 shall not constitute authorization to operate within
a RR.**

1 MA10-34 Require a reclamation plan, approved Plan of Operations and reclamation
2 bond for all minerals operations that include RRs. ...

3 Klamath Forest Plan at 4-111 (emphasis added). The Six Rivers Forest Plan has a similar
4 requirement that all mineral operations in Riparian Reserves cannot proceed without an approved
5 PoO, reclamation plan, and reclamation bond. Six Rivers Plan at IV-49.

6 61. Suction dredge mining is a “mineral operation” for the purposes of the Six Rivers,
7 Klamath, and Northwest Forest Plans. Highbanking or mechanical sluicing is a “mineral
8 operation” for the purposes of the Six Rivers, Klamath, and Northwest Forest Plans.

9 62. For fish bearing streams such as the Salmon, Klamath and Scott Rivers and their
10 tributaries, Riparian Reserves are defined as:

11 Riparian Reserves [RRs] consist of the stream and the area on each side of the stream
12 extending from the edges of the active stream channel to the top of the inner gorge, or to
13 the outer edges of the 100-year floodplain, or to the outer edges of riparian vegetation, or
14 to a distance equal to the height of two site-potential trees, or 300 feet slope distance (600
feet total, including both sides of the stream channel), whichever is greatest.

15 Six Rivers Forest Plan at IV-45; Klamath Forest Plan at 4-108.

16 63. Suction dredge mining occurs within Riparian Reserves as defined in the previous
17 paragraph. Highbanking or mechanical sluicing most likely occurs within the boundaries of the
18 Riparian Reserve, as well. All of mining operations authorized pursuant to the
19 determinations/decision listed in Paragraphs 3 and 5 are either suction dredge operations,
20 highbanking, or mechanical sluicing.

21 64. The Forest Service is violating the intent of the Aquatic Conservation Strategy Objectives
22 and is violating the Minerals Management Standards and Guidelines of the Six Rivers and
23 Klamath Forest Plans (and the NFP), by allowing the mining operations listed in Paragraph 3 to
24 occur in Riparian Reserves without requiring an approved PoO, reclamation plan and
25 reclamation bond (including the environmental protection, public review and NEPA
26 requirements of these Plans). Further, the approvals of the PoOs listed in Paragraph 5 fail to

1 comply with all of these requirements. In addition, the Forest Service is violating the intent of
2 the ACS by permitting mining activities, including so-called “recreational” suction dredging, that
3 degrade and do not restore conditions in Riparian Reserves.

4 65. Under these Standards and Guidelines, the agency does **not** have the discretion to allow
5 mining under NOIs within RRs. “Notices of intent for mineral operations under 36 CFR 228
6 shall not constitute authorization to operate within a RR.” Klamath Plan at 4-111. A PoO,
7 reclamation plan and reclamation bond is required for each proposed mineral operation in
8 Riparian Reserves under the applicable Forest Plans, even if the agency believes an individual
9 operation would not result in significant disturbance (the test for requiring a Plan in areas outside
10 Riparian Reserves). Here, relying on the National/Regional Directives, both the Six Rivers and
11 Klamath National Forest have stated to the Tribe that they believe they have the discretion to
12 accept NOIs from mine operators, rather than require a PoO for all mining proposals with
13 Riparian Reserves. Such a position violates the Forest Plans for these Forests and the NFMA and
14 Organic Act and their implementing regulations.

15 66. Individually and cumulatively, the impacts from suction dredge and other mining in and
16 along these waters is significant. *See Grunbaum* (“Because of the potential significance of
17 suction dredging in waters with threatened species, suction dredge operators are required to file a
18 POP [Plan of Operations] that must be analyzed by the FS to determine terms and conditions
19 necessary for protection of surface resources prior to approval.”).

20 67. “Watershed analysis is required prior to management activities, except minor activities
21 such as those Categorical Excluded under NEPA (and not including timber harvest).” Klamath
22 Plan, Chp. 4-25, 6-26. “Within Key Watersheds, require restoration and mitigation measures in
23 mineral operating plans as needed to prevent degradation of the riparian resource. Also require a
24 performance bond sufficient enough to restore the damaged area.” Chp. 4-26, 6-37. “Watershed
25 analyses must be completed before initiating actions within a Key Watershed, except that in the
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1 short term, until watershed analysis can be completed, minor activities such as those that would
2 be categorically excluded under NEPA regulations (except timber harvest) may proceed if they
3 are consistent with Aquatic Conservation Strategy Objectives and Riparian Reserves and
4 standards and guidelines are applied. Timber harvest, including salvage, cannot occur in Key
5 Watersheds without a watershed analysis.” Chp. 4-26, 6-38. The Forest Service has not
6 conducted, and does not intend to conduct the required Watershed Analysis for each of the
7 suction dredge, highbanking and mechanical sluicing operations listed in Paragraphs 3 and 5 in
8 violation of the Klamath (and Six Rivers) Forest Plans and the NFMA accordingly. Pursuant to
9 the National/Regional Directives, the Forest Service will not conduct a Watershed Analysis for
10 any future mining operation in a RR conducted pursuant to a NOI.

11 68. By failing to comply with and implement the Minerals Management Standards and
12 Guidelines and to meet the intent of the ACS, the Forest Service has failed to ensure that its
13 management actions and/or inactions are based on and consistent with the NFP and the Six
14 Rivers and Klamath Forest Plans, in violation of the NFMA, 16 U.S.C. § 1604(i) (2004). The
15 Forest Service has therefore acted arbitrarily, capriciously, and contrary to law.

16 69. The NFMA imposes additional substantive duties on the Forest Service, one of which is
17 the duty to “provide for diversity of plant and animal communities.” 16 U.S.C. 1604(g)(3)(B)
18 (2004). Regulations at 36 CFR § 219.19 (2000) ensures such diversity by “maintain[ing] or
19 restor[ing] ecological sustainability to provide a sustainable flow of uses, values, products, and
20 services.” *See also* 36 CFR 219.20(a)(2)(i), (b) (2000). In further implementing this statutory
21 directive, the regulations state, “Plan decisions affecting species diversity must provide for
22 ecological conditions that the responsible official determines provide a high likelihood that those
23 conditions are capable of supporting over time the viability of native and desired non-native
24 species well distributed throughout their ranged within the plan area.” 36 CFR 219.20(b)(2)(i)
25 (2000). “Species viability” is defined as “[a] species consisting of self-sustaining and interacting
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1 populations that are well distributed through the species' range. Self-sustaining populations are
2 those that are sufficiently abundant and have sufficient diversity to display the array of life
3 history strategies and forms to provide for their long-term persistence and adaptability over
4 time.” 36 CFR 219.36 (2000).

5 70. This duty to ensure viable, or self-sustaining, populations, applies with special force to
6 “sensitive” species. “Sensitive species were identified by the Regional Forester due to concerns
7 for the viability of their populations. These concerns were evidenced by significant current or
8 predicated downward trends in population numbers, density, and/or habitat quality and quantity.”
9 Klamath Plan, Chp. 3-8. Forest Service sensitive species in the Klamath National Forest include
10 Great gray owl, Willow Flycatcher, Northern goshawk, American marten, Pacific fisher, Western
11 pond turtle, and American Peregrine Falcon. Chapter 4-28, 8-17. The Forest Service must
12 evaluate the possible effects of suction dredge and other mining on “sensitive” species. In order
13 to prevent harm to sensitive species, the FS is required to “[r]eview all Forest Service planned,
14 funded, executed or permitted programs and activities for possible effects on TE&S [threatened,
15 endangered, and sensitive] species.” Klamath Plan, Chapter 4-27, 8-3. The Klamath Plan further
16 states that “[s]treams and lakes will be managed to maintain or improve habitat for aquatic
17 species, especially TE&S species.” Chapter 4-33, 9-1. To protect biological diversity, the Forest
18 Service must “[m]anage to maintain the structure, composition, and function of forest, rangeland,
19 and aquatic ecosystems within the range of natural variability. Implement management actions
20 in a manner that complements ecological processes and promotes long-term sustainability.”
21 Klamath Plan Chp. 4-22, 6-1.

22 71. To achieve the Klamath Forest Plan’s mandate to protect biological diversity, especially
23 sensitive species, the FS must “[c]ollect information on Sensitive species to assess population
24 distribution and habitat associations. Identify suitable habitat for each Sensitive species at the
25 Forest scale. Inventory a portion of the suitable habitat each year. Assess habitat conditions at
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1 occupied sites. Based on the assessment, use appropriate management techniques to maintain or
2 enhance habitat suitability.” Klamath Forest Plan, Chapter 4-28, 9-19. The Klamath Plan further
3 requires that surveys be taken prior to a project’s implementation to prevent impact to “sensitive”
4 species. *See* Klamath Forest Plan, page 4-22, 6-8 (emphasis added) (“Sensitive species: Project
5 areas should be surveyed for the presence of Sensitive species *before* project implementation. If
6 surveys cannot be conducted, project areas should be assessed for the presence and condition of
7 Sensitive species habitat.”).

8 72. The Klamath Forest Plan mandates that the agency utilize the aforementioned
9 information to avoid impacts to sensitive species in implementing projects. *See* Klamath Forest
10 Plan, page 4-28, 8-18 (“Avoid or minimize impacts to Sensitive species where possible. If
11 impacts cannot be avoided, analyze the potential effects on the population or its habitat within
12 the landscape and on the species as a whole. Projects should not jeopardize species viability or
13 create significant trends toward the need for Federal listing (FSM 2670.22) of Sensitive
14 species.”) The Plan further states that projects should review opportunities to benefit aquatic
15 habitat. “Project-level planning should review the opportunities available to improve or maintain
16 aquatic habitat. Through the interdisciplinary process, the cause of the problem should be
17 identified and treated as well as the effects. In-stream restoration measures are usually
18 considered short-term and will be accompanied by riparian and upslope restoration to achieve
19 long-term watershed restoration. Prioritize projects as follows: 1) Protection vs. mitigation. 2)
20 Long-term vs. short-term. 3) Benefits TE&S species. 4) Benefits multi-species (flora and fauna).
21 5) Benefits other species.” Ch. 4-33, 9-4.

22 73. Similarly, the Forest Plan for the Six Rivers National Forest directs the Forest Service to
23 review the impacts to, and protect, sensitive species. In order to implement this directive, the
24 Plan mandates that project proposals evaluate their effects on “sensitive” species. Six Rivers
25 Forest Plan, Chapter IV-2 (“Habitat to support threatened and endangered species will remain
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1 protected in accordance with recovery plans while the habitat needs of sensitive species will be
2 addressed at the landscape and project proposal level through the environmental analysis
3 process.”). “**All proposed projects** that involve disturbance to wildlife habitat and have the
4 potential to impact listed or sensitive wildlife species will be evaluated to determine if any listed
5 species are present. Where such species are present, a biological evaluation will be used to
6 determine the potential effect on the species, and the environmental assessment will prescribe
7 mitigation measures consistent with Forest management objectives. Proposed actions **will be**
8 **prohibited** if they are found likely to adversely affect the continued existence of the species or
9 the maintenance of viable populations throughout their existing range.” Six Rivers Plan at IV-
10 101 (emphasis added).

11 74. “Biological assessments/evaluations for endangered, threatened, proposed, candidate and
12 sensitive species will be prepared for **every** project to determine if the project “may effect” these
13 animals. This evaluation will determine the effects of the proposed activity on these species and
14 their habitat (designated habitat area), including beneficial effect or likely to adversely effect. A
15 field reconnaissance to determine if a species is present or expected should be completed as part
16 of the biological evaluation process if the species or suitable habitat is likely to occur in the
17 project area.” Six Rivers Plan IV-101, 8-4 (emphasis added).

18 75. “Site specific habitat management plans are **required** for federally listed threatened and
19 endangered species to protect and enhance essential habitat, and to explain allowable, desired
20 and planned management activities within each area. Habitat area (designated) management
21 plans will be completed, as part of the biological evaluation process, for Sensitive wildlife
22 species that may be affected by proposed management activities.” Six Rivers Plan IV-101, 8-5
23 (emphasis added).

24 76. The Forest Service must also consider the impacts to “species-at-risk” in developing
25 plans for the “maintenance or restoration of ecosystems.” *See* 36 CFR § 219.20(a)(1)(ii),
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1 (a)(2)(ii)(B) (2000). “Species-at-risk” may include sensitive species and state-listed endangered
2 species. 36 CFR § 219.36 (2000). The Klamath Forest Plan mandates that the Forest Service
3 “[c]oordinate with the California Department of Wildlife on the management of State-listed T&E
4 [threatened and endangered] species. Projects should be designed to maintain or improve State-
5 listed species habitat.” Klamath Forest Plan, Chapter 4-27, 8-6.

6 77. In failing to adequately review, and protect against, the impacts from suction dredge and
7 other mining in and along the Klamath, Salmon, and Scott Rivers and their tributaries, the Forest
8 Service violated the above noted 36 CFR Part 219 regulations, the Forest Plans of the Six Rivers
9 and Klamath National Forests, and the NFMA.

10 78. Regarding the impacts from mining on the Tribe’s and its’ members cultural, religious,
11 historical, and subsistence uses of the affected waterways, the Forest Service must “[p]rovide for
12 Native American needs for collection and/or use of traditional resources.” Klamath Plan Ch. 4-
13 64, 24-24. In so doing, the agency must “[c]onsult and coordinate on all projects that have the
14 potential to affect Native American values.” Ch. 4-64, 24-27.

15 79. The FS must “[c]onsult and coordinate on projects that have the potential to affect Native
16 American values.” Six Rivers Plan IV-116, 10-2. “Programs and activities should be
17 administered to have regard for and be sensitive to traditional Indian religious beliefs and
18 cultural practices.” Six Rivers Plan IV-116, 10-7. Neither the Six Rivers nor Klamath National
19 Forests notified the Tribe as to the location of the mining operations authorized as noted in
20 Paragraphs 3 and 5. In allowing and/or approving suction dredge and other mining, the Forest
21 Service did not comply with these Forest Plan requirements, in violation of the NFMA and the
22 agency’s consultation and trust duties owed to the Tribe.

23 80. The Klamath Plan’s map for Management Area 8 (see appendix to the Klamath Forest
24 Plan) indicates that some of proposed or likely mining activities are in “cultural areas.” This
25 includes the Klamath River between Happy Camp and Somes Bar, and especially in and around
26

1 Some Bar itself. The designated “cultural areas” “have significant historic, as well as
2 contemporary, spiritual values for the Karuk Tribe of California. These areas are to be managed
3 to maintain special Native American values.” Klamath Plan Ch. 4-101. One of the goals of the
4 “cultural areas” is “to preserve and protect the solitude and privacy of Native American users.”
5 *Id.* “The integrity of the area for use by the Karuk Tribe of California is maintained in a manner
6 consistent with their custom and culture.” *Id.* Pursuant to this section, the agency should “not
7 direct recreational use to Native American cultural areas. River-related recreational use will be
8 managed to minimize conflicts.” Klamath Plan Ch. 4-101, MA8-5. Furthermore, “[d]eveloped
9 recreational activities shall not be planned within cultural areas.” Ch. 4-102, MA8-6. The
10 Klamath Plan also states that “[p]rotection of these areas from religious intrusions or damage to
11 the area should be coordinated with the Karuk Tribe of California.” Ch. 4-102, MA 8-9. Finally,
12 the agency must “[m]anage mineral exploration within the cultural areas to maintain identified
13 cultural values. Surface disturbances that adversely impact Native American values shall be
14 mitigated wherever possible.” Ch. 4-102, MA 8-10.

15 81. In failing to adequately review, protect against, and notify the Tribe of, the impacts to the
16 Tribe’s uses and interests in the affected waters from the above noted suction dredge and other
17 mining in and along the Klamath, Salmon, and Scott Rivers and their tributaries, the Forest
18 Service violated the Forest Plans of the Six Rivers and Klamath National Forests, the NFMA, as
19 well as the trust and consultation responsibilities owed to the Tribe.

20 Failure to Comply with the Clean Water Act

21 82. The Forest Service must also ensure compliance with the CWA, 33 U.S.C. § 1151, *et seq.*
22 (2004). Under Section 313 of the CWA, 33 U.S.C. § 1323 (2004), if a proposed mining operation
23 cannot comply with state water quality standards, the Forest Service cannot approve the operation.
24 Section 313 requires compliance with “all Federal, State, interstate, and local requirements” for
25 the discharge or runoff of pollutants on federal land. *Id.* This section places a duty on federal
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1 agencies to comply with federal CWA requirements, in addition to state water quality standards.
2 CWA § 313 applies to both point source and nonpoint source discharges on federal lands and
3 waters.

4 83. The outfall from in-stream placer mining equipment is a point source discharge under the
5 CWA that cannot proceed without a Section 402 of the CWA (National Pollutant Discharge
6 Elimination System or NPDES) permit. When mining activities release pollutants from a
7 discernable conveyance into a river or stream, that conveyance is a point source subject to
8 NPDES regulation. The Forest Service and EPA have stated that suction dredge miners must
9 apply for an NPDES permit in order to allow the Forest Service to fully process the miner's PoO.

10 [I]t is apparent the Forest Service decision on your plan of operations is dependent upon
11 your obtaining the necessary NPDES permit. If certification is denied or EPA does not
12 grant the NPDES permit, the Forest Service cannot process or approve your plan of
13 operations.

14 ...

15 We are suspending work on your plan of operations and the environmental assessment
16 until: 1) we are notified you have received a NPDES permit, or 2) you have applied for a
17 NPDES permit, and EPA has informed you what alternatives and mitigation measures
18 you would be required to follow to comply with the Clean Water Act.

19 February 20, 2001 letter from the Nez Perce National Forest to Daniel Templeton, an applicant
20 for approval of a PoO for suction dredge mining.

21 84. The United States Justice Department, in the federal lawsuit representing the Forest
22 Service as defendant in a case brought by Mr. Templeton, confirmed this legal requirement:

23 The Forest Service has informed Plaintiff that, before the Plan [of Operations] can be
24 processed and approved, he must (1) apply for and obtain from the U.S. Environmental
25 Protection Agency ("EPA") a National Pollutant Discharge Elimination System
26 ("NPDES") permit pursuant to section 402 of the Clean Water Act ("CWA"); (2) apply
for and obtain from the Army Corps of Engineers ("Corps") a discharge permit pursuant
to section 404 of the CWA; and (3) request and obtain a water quality certification from
the State of Idaho pursuant to section 401 of the CWA. Plaintiff's suggestion that the
identified permits are either not required or that the requirement has been waived are
without merit.

1 Dan Templeton v. United States, Civ. 02-320-C-EJL (D. Idaho). United States of America's
2 Reply Memorandum in Support of Motion for Judgment on the Pleadings, at 3, dated May 28,
3 2004.

4 85. The Forest Service cannot approve any mining activity before the information and data
5 necessary for CWA NPDES and/or section 404 permits have been obtained. Under the CWA,
6 the Forest Service was obligated to assure itself that an NPDES permit was obtained before
7 permitting the requested activity. The Forest Service cannot meet its duty under 36 CFR Part
8 228A (or 36 CFR Part 251) and the CWA to ensure that the project will comply with the CWA
9 without understanding the specific nature of the discharges.

10 86. In addition, portions of the Klamath, Salmon and Scott Rivers are listed under section
11 303(d) of the CWA as being "impaired." An impaired waterbody is one that is not meeting
12 water quality standards and/or not supporting the designated beneficial uses of the waterbody.
13 The State of California has listed the Klamath River as impaired for Temperature, Nutrients and
14 Dissolved Oxygen. The Salmon River is listed as impaired for Temperature and Nutrients. The
15 Scott River is listed as impaired for Temperature and Sediment.

16 87. Suction dredge mining increases the temperature of the water body receiving the
17 discharge from the suction dredge. Sediment is discharged from the suction dredge. Under the
18 CWA and Forest Service regulations discussed above, the Forest Service cannot allow or
19 otherwise authorize any mining that will cause or contribute to a violation of water quality
20 standards or violate the State's antidegradation requirements. By allowing or authorizing the
21 suction dredge operations noted above to increase the temperature and sediment loading to these
22 waters, the Forest Service has violated these requirements.

23 88. The Forest Service has not required applicants for NOIs or Plans of Operations (or 36
24 CFR Part 251 special use authorizations) to obtain NPDES permits from the State of California
25 or EPA. The Forest Service has not ensured that all discharges from the mining operations noted
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1 in Paragraphs 3 and 5 (or will authorize pursuant to the National/Regional Directives) will
2 comply with all applicable water quality standards and requirements, in violation of the CWA,
3 the Organic Act, and their implementing regulations.

4 Failure to Comply with the National Environmental Policy Act

5 89. NEPA requires federal agencies to prepare an EIS for any proposed major action that
6 may significantly affect the quality of the environment. 42 U.S.C. § 4332(2)(C) (2004). The
7 Council on Environmental Quality (CEQ) promulgated uniform regulations to implement NEPA
8 which are binding on all federal agencies. 40 C.F.R. §§ 1500.3 (1978), 1507.1 (1978).

9 90. Pursuant to the CEQ regulations, if a proposed action would normally be expected to
10 have a significant impact on the environment, an EIS must be prepared. 40 C.F.R. § 1501.4
11 (1978). If a proposed action is neither one normally requiring an EIS nor one that may be
12 categorically excluded, the agency must prepare an EA. 40 C.F.R. §§ 1501.3 (1978), 1501.4
13 (1978), 1508.9 (1978). An EA must provide sufficient information and analysis to determine
14 whether the agency must prepare an EIS, or in the alternative, a finding of no significant impact
15 (FONSI). 40 C.F.R. §1508.9 (1978).

16 91. NEPA is our basic national charter for protecting the environment. 43 U.S.C. § 4321 *et*
17 *seq.* (2004); 40 C.F.R. §1500.1(a) (1978). Compliance with NEPA ensures that the Forest
18 Service will carefully consider the environmental impacts of its actions and that this information
19 will be made available to the public for comment, *before* such actions occur. *See* 40 C.F.R. §
20 1501.2 (1978).

21 92. In violation of NEPA, the Forest Service has not prepared either an EIS or an EA for the
22 suction dredge, mechanical sluicing and other mining operations noted above that it has
23 authorized on the Salmon, Klamath, and Scott Rivers and their tributaries. The Forest Service
24 has not provided, nor does it intend to provide, notice to the general public and the Tribe, nor
25 provided an opportunity for public and Tribal comment, on each suction dredge or mechanical
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1 sluicing mining operation that has been, or will be, allowed to occur in and along the Klamath,
2 Salmon and Scott Rivers and their tributaries.

3 93. In addition to the NEPA requirements for each individual mining operation, the
4 cumulative impact from the combined suction dredge, mechanical sluicing, and other mining in
5 and along the Klamath, Salmon, and Scott Rivers and their tributaries, requires the preparation of
6 an EIS prior to the approval or authorization of any such operation.

7
8 **CLAIMS FOR RELIEF**

9 **COUNT ONE**

10 **ESA VIOLATION**

11 94. Plaintiff realleges all preceding paragraphs.

12 95. Section 7(a)(2) of the ESA prohibits agency actions that jeopardize the survival of listed
13 species or that destroy or adversely modify their critical habitat. 16 U.S.C. § 1536(a)(2) (2004).

14 To assist in complying with this duty, federal agencies, like the Forest Service, must consult with
15 the Service whenever they take an action that "may affect" a listed salmonid species or the
16 species' critical habitat. 16 U.S.C. § 1536(a)(2) (2004); 50 C.F.R. § 402.14(a) (1986).

17 96. The Forest Service is violating § 7(a) of the ESA, 16 U.S.C. § 1536(a) (2004), and its
18 implementing regulations, by failing to consult with NOAA Fisheries and the FWS regarding the
19 effects of the above noted suction dredge and other mining operations in Riparian Reserves that
20 "may affect" threatened salmon and other listed species and /or their critical habitat.

21 97. The Forest Service's failure to consult with these agencies and failure to ensure that its
22 actions do not jeopardize the continued existence of listed species violate § 7(a)(2) of the ESA,
23 16 U.S.C. § 1536(a)(2) (2004), and its implementing regulations.

24 98. The Forest Service's failure to prevent the "take" of threatened and endangered species
25 by the above noted suction dredge and other mining violates ESA Section 9. 16 U.S.C. § 1538
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1 (2004). Such violations are subject to judicial review under 16 U.S.C. § 1540(g) (2004).

2 99. The National/Regional Directives' failure to require compliance with the ESA in
3 authorizing mining operations in Riparian Reserves pursuant to only an NOI violates these above
4 noted provisions of the ESA.

5 100. The Forest Service's violation of the ESA, including its failure to consult with these
6 agencies and failure to ensure that its actions do not jeopardize the continued existence of listed
7 species also is arbitrary, capricious, and not in accordance with law, in violation of the APA, 5
8 U.S.C. § 706 (2004) and ESA, 16 U.S.C. § 1531 *et seq.* (2004), and is subject to judicial review
9 under 5 U.S.C. § 701 *et seq.* (2004) and 16 U.S.C. § 1540 (2004).

10 **COUNT TWO**

11 **NFMA VIOLATION**

12 101. Plaintiff realleges all preceding paragraphs.

13 102. The NFMA requires that all Forest Service projects and activities "shall be consistent
14 with the land management plans." 16 U.S.C. § 1604(i) (2004). The Forest Service must follow
15 the Standards and Guidelines set forth in the Six Rivers, Klamath and Northwest Forest Plans at
16 the project-decision level.

17 103. Standards and Guidelines of the NFP and the Six Rivers and Klamath National Forest
18 Plans require that all mining operations in Riparian Reserves must have an approved PoO,
19 reclamation plan and bond. These approved PoOs must comply with all requirements of the
20 Forest Plans, CWA, ESA, NFMA, Organic Act and implementing regulations.

21 104. The Forest Service has allowed (via the determinations/decisions listed in Paragraph 3),
22 and will allow (via the National/Regional Directives), suction dredge and other mining
23 operations to proceed in Riparian Reserves without the required approved plans of operation,
24 reclamation plans and bonds. The Six Rivers and Klamath National Forests, and the
25 National/Regional Directives, have taken the position that the acceptance of NOIs from mining
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1 operators, rather than requiring Plans of Operations, is within the discretion of the agency and
2 that the agency does not have to comply with the Forest Plans' requirement that all operators are
3 required to submit Plans of Operation for approval. Such a position violates these Forest Plans
4 (and the NFP) and the NFMA.

5 105. The Forest Service's authorization of the mining operations listed in Paragraph 5 via
6 PoOs without the full compliance with the Forest Plans/NFMA and NEPA, CWA, ESA, Organic
7 Act and implementing regulations, also violates these laws and regulations.

8 106. The Forest Service's actions and/or omissions were unlawfully withheld, not in
9 accordance with the law, without observance of procedures required by law, and are arbitrary
10 and capricious within the meaning of the APA. 5 U.S.C. §§ 702, 706 (2004).

11 **COUNT THREE**

12 **NFMA VIOLATION**

13 107. Plaintiff realleges all preceding paragraphs.

14 108. In failing to adequately review, and protect against, the impacts from the approved
15 suction dredge and other mining in and along the Klamath, Salmon, and Scott Rivers and their
16 tributaries, the Forest Service violated the above noted 36 CFR Part 219 and other regulations,
17 the Forest Plans of the Six Rivers and Klamath National Forests, and the NFMA. In addition, in
18 failing to adequately review, protect against, and consult with the Tribe regarding the impacts to
19 the Tribe's uses and interests in the affected waters from the approved suction dredge and other
20 mining in and along the Klamath, Salmon, and Scott Rivers and their tributaries, the Forest
21 Service violated the Forest Plans of the Six Rivers and Klamath National Forests, and the
22 NFMA. The Forest Service's continued application of the National/Regional Directives in
23 approving mining operations also violates these requirements.

24 109. The Forest Service's actions and/or omissions were unlawfully withheld, not in
25 accordance with the law, without observance of procedures required by law, and are arbitrary
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1 and capricious within the meaning of the APA. 5 U.S.C. §§ 702, 706 (2004).

2 **COUNT FOUR**

3 **TRIBAL TRUST AND NFMA VIOLATION**

4 110. Plaintiff realleges all preceding paragraphs.

5 111. In failing to adequately review, and protect against, the impacts from the approved
6 suction dredge and other mining in and along the Klamath, Salmon, and Scott Rivers and their
7 tributaries on the Karuk Tribe and its members, the Forest Service violated the Forest Plans of
8 the Six Rivers and Klamath National Forests, and the NFMA. In addition, in failing to
9 adequately review, protect against, and consult with the Tribe regarding the impacts to the
10 Tribe's uses and interests in the affected waters from the approved suction dredge and other
11 mining in and along the Klamath, Salmon, and Scott Rivers and their tributaries, the Forest
12 Service violated the Forest Plans of the Six Rivers and Klamath National Forests, the NFMA, as
13 well as the trust and consultation responsibilities owed to the Tribe. The Forest Service's
14 continued application of the National/Regional Directives in approving mining operations also
15 violates these requirements.

16 112. The Forest Service's actions and/or omissions were unlawfully withheld, not in
17 accordance with the law, without observance of procedures required by law, and are arbitrary
18 and capricious within the meaning of the APA. 5 U.S.C. §§ 702, 706 (2004).

19 **COUNT FIVE**

20 **ORGANIC ACT AND FOREST SERVICE MINING REGULATIONS VIOLATION**

21 113. Plaintiff realleges all preceding paragraphs.

22 114. The Organic Act of 1897 authorizes the Forest Service to promulgate regulations for the
23 national forests "to regulate their occupancy and use and to preserve the forests thereon from
24 destruction." 16 U.S.C. § 551 (2004). The Forest Service's regulations governing operations
25 authorized by the 1872 Mining Law are found at 36 CFR Part 228A, which require "all [mining]
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1 operations shall be conducted so as, where feasible, to minimize adverse environmental impacts on
2 National Forest resources.” 36 CFR § 228.8 (1974). The Part 228A regulations state that in
3 proposing a mining operation, the applicant must fully describe “measures to be taken to meet
4 the requirements for environmental protection in § 228.8.” 36 CFR 228.4(c)(3) (1974). These
5 requirements for environmental protection state that the “[o]perator shall comply with all
6 applicable Federal and State water quality standards, including regulations issued pursuant to the
7 Federal Water Pollution Control Act, as amended (33 U.S.C. 1151, *et seq.*)[the Clean Water
8 Act].” 36 CFR § 228.8(b) (1974). The 36 CFR Part 228A regulations also require that “in
9 addition to compliance with water quality and solid waste disposal standards required by this
10 section, operator shall take all practicable measures to maintain and protect fisheries and wildlife
11 habitat which may be affected by the operations.” 36 CFR § 228.8(e) (1974). In allowing or
12 authorizing suction dredge, mechanical sluicing and other mining operations noted above in the
13 affected waters without meeting the requirements noted in this (and above) paragraph(s) for each
14 individual or group mining operation, the agency has violated the Organic Act and its
15 implementing regulations, especially 36 CFR Part 228A. The Forest Service’s continued
16 application of the National/Regional Directives in approving mining operations also violates
17 these requirements.

18 115. The Forest Service's actions and/or omissions were unlawfully withheld, not in
19 accordance with the law, without observance of procedures required by law, and are arbitrary
20 and capricious within the meaning of the APA. 5 U.S.C. §§ 702, 706 (2004).

21 **COUNT SIX**

22 **VIOLATION OF THE CLEAN WATER ACT AND RELATED REGULATIONS**

23 116. Plaintiff realleges all preceding paragraphs.

24 117. The Forest Service has not ensured that all discharges from mining operations it has (via
25 the determinations/decisions listed in Paragraphs 3 and 5) or will authorize or allow will comply
26

1 with all applicable water quality standards and requirements, in violation of the CWA, the
2 Organic Act, and their implementing regulations. The National/Regional Directives' failure to
3 require PoOs in Riparian Reserves (with the required compliance with all CWA requirements)
4 also violates these requirements.

5 118. The Forest Service cannot approve or allow any mining activity before the information
6 and data necessary for CWA NPDES and/or section 404 permits have been obtained. Under the
7 CWA, the Forest Service is obligated to assure itself that an NPDES permit was obtained before
8 permitting the requested activity. The Forest Service cannot meet its duty under 36 CFR Part
9 228A, NEPA, and the CWA to ensure that the project will comply with the CWA without an
10 understanding of the specific nature of the discharges.

11 119. The Forest Service's actions and/or omissions were unlawfully withheld, not in
12 accordance with the law, without observance of procedures required by law, and are arbitrary
13 and capricious within the meaning of the APA. 5 U.S.C. §§ 702, 706.

14 **COUNT SEVEN**

15 **VIOLATION OF NEPA**

16 120. Plaintiff realleges all preceding paragraphs.

17 121. NEPA requires federal agencies to prepare an EIS for any proposed major action that
18 may significantly affect the quality of the environment. 42 U.S.C. § 4332(2)(C) (2004). The
19 CEQ promulgated uniform regulations to implement NEPA which are binding on all federal
20 agencies. 40 C.F.R. §§ 1500.3 (1978), 1507.1 (2004).

21 122. Pursuant to the CEQ regulations, if a proposed action would normally be expected to
22 have a significant impact on the environment, an EIS must be prepared. 40 C.F.R. § 1501.4
23 (2004). If a proposed action is neither one normally requiring an EIS nor one that may be
24 categorically excluded, the agency must prepare an EA. 40 C.F.R. §§ 1501.3 (2004), 1501.4
25 (2004), 1508.9 (2004). An EA must provide sufficient information and analysis to determine
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1 whether the agency must prepare an EIS, or in the alternative, a finding of no significant impact
2 (FONSI). 40 C.F.R. §1508.9 (2004).

3 123. In violation of NEPA, the Forest Service has not prepared either an EIS or an EA for
4 suction dredge, mechanical sluicing and other mining operations that it either has authorized (via
5 the determinations/decisions listed in Paragraphs 3 and 5) or will authorize in the future
6 (pursuant to the National/Regional Directives) on the Salmon, Klamath, and Scott Rivers and
7 their tributaries. Nor has the Forest Service prepared the required EIS (or even an EA) reviewing
8 the cumulative impacts from all the anticipated or allowed/approved mining operations (and
9 other past, present and reasonably foreseeable actions/impacts) in and along the Klamath,
10 Salmon and Scott Rivers and their tributaries.

11 124. The Forest Service's actions and/or omissions were unlawfully withheld, not in
12 accordance with the law, without observance of procedures required by law, and are arbitrary
13 and capricious within the meaning of the APA. 5 U.S.C. §§ 702, 706 (2004).

14 **COUNT EIGHT**

15 **ORGANIC ACT AND SPECIAL USE REGULATIONS VIOLATION**

16 125. Plaintiff realleges all preceding paragraphs.

17 126. The Forest Service's determination that suction dredge, mechanical sluicing and other
18 mining operations described above are to be governed by the 36 CFR 228A regulations, rather
19 than under the agency's special use regulations at 36 CFR Part 251, violates the Organic Act, 16
20 U.S.C. § 551 (2004), and its implementing special use regulations, 36 CFR Part 251. The Forest
21 Service's failure to require a special use authorization for "commercial use or activities" and/or
22 mining activities conducted by the New 49ers Club, and/or their members violates the Organic
23 Act, 16 U.S.C. § 551 (2004), and its implementing special use regulations, 36 CFR Part 251.
24 The Forest Service's decision(s) to allow suction dredge and mechanical sluicing mining
25 activities to be conducted by the New 49ers Club, and/or their members without compliance with
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1 the 36 CFR Part 251 regulations violates the Organic Act and these regulations. Included within,
2 and/or in addition to, the failure to comply with the 36 CFR Part 251 regulations, is the agency's
3 failure to comply with the CWA, NFMA, and NEPA provisions and implementing regulations
4 described above.

5 127. The Forest Service's actions and/or omissions were unlawfully withheld, not in
6 accordance with the law, without observance of procedures required by law, and are arbitrary
7 and capricious within the meaning of the APA. 5 U.S.C. §§ 702, 706 (2004).

8 REQUEST FOR RELIEF

9 For the foregoing reasons, the Tribe respectfully requests that this court:

10 A. Declare that the Forest Service has violated the ESA, the NFMA, the Organic Act, the
11 CWA, NEPA, the implementing regulations and policies of these laws, and the agency's trust
12 and consultation responsibilities owed to the Tribe;

13 B. Enjoin the Forest Service from allowing, authorizing or approving mining or mineral
14 operations in Riparian Reserves and the waters of the Klamath, Salmon, and Scott Rivers and
15 their tributaries until the Forest Service has complied with the ESA, the NFMA, the Organic Act,
16 the CWA, NEPA, the implementing regulations of these laws, and the agency's consultation and
17 trust responsibilities owed to the Tribe. This includes, at a minimum, enjoining the Forest
18 Service from allowing, authorizing or approving mining or mineral operations in Riparian
19 Reserves and the waters of the Klamath, Salmon, and Scott Rivers and their tributaries without:
20 (1) an approved PoO, reclamation plan and bond for each individual or group proposed mining
21 or mineral operation pursuant to 36 CFR part 228 subpart A, or (2) additionally or in the
22 alternative, without an approved special use authorization and related requirements for each
23 commercial use or activity and/or mineral operation pursuant to 36 CFR Part 251. For either of
24 these types of authorizations, the agency must conduct the required ESA consultation, NEPA
25 analysis, have the required information and assurance that all CWA requirements will be met by
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1 each mining or mineral operation, and must ensure compliance with the Forest Plans and other
2 NFMA, Organic Act, CWA, ESA, NEPA, and implementing regulation requirements;

3 C. Award the Tribe its reasonable fees, costs, expenses, and disbursements, including
4 attorneys' fees under the ESA, 16 U.S.C. § 1540, the Equal Access to Justice Act, 28 U.S.C. §
5 2412, and any other applicable federal law; and

6 D. Grant such additional relief as this court deems equitable and just.

7
8 Respectfully submitted this 31st day of January, 2005.

9
10 /s/ James R. Wheaton

11 James R. Wheaton (State Bar No. 115230)
12 Iryna A. Kwasny (State Bar No. 173518)
13 Joshua Borger (State Bar No. 231951)
14 ENVIRONMENTAL LAW FOUNDATION
15 1736 Franklin Street, 9th Floor
16 Oakland, CA 94612
17 Tel: (510) 208-4555
18 Fax: (510) 208-4562

19
20 /s/ Roger Flynn

21 Roger Flynn (Colo. Bar # 21078) Appearance *Pro Hac Vice*
22 Jeffrey C. Parsons (Colo. Bar # 30210) Appearance *Pro Hac Vice*
23 WESTERN MINING ACTION PROJECT
24 2260 Baseline Rd., Suite 101A
25 Boulder, CO 80302
26 Tel: (303) 473-9618
Fax: (303) 786-8054
wmap@igc.org

Attorneys for the Karuk Tribe of California

Address of Plaintiff:

Karuk Tribe of California
64236 Second Ave.
Happy Camp, CA 96039