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

KARUK TRIBE OF CALIFORNIA, Plaintiff, **v.** **UNITED STATES FOREST SERVICE**; **MARGARET BOLAND**, Forest Supervisor, Klamath National Forest, Defendants.	Civ No. 04-4275 (SBA) **PLAINTIFF'S CONSOLIDATED REPLY ON SUMMARY JUDGMENT** Date: June 21, 2005 Ctrm: 3, 3rd Floor Time: 1 p.m. Judge: Hon. Saundra B. Armstrong

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I. INTRODUCTION

Plaintiff Karuk Tribe of California ("Karuk Tribe" or "Tribe") respectfully submits this consolidated reply to the response briefs submitted by the Defendant U. S. Forest Service and Defendant-Intervenors New 49'ers, Inc. et al. ("New 49'ers, Inc." or "the miners"). The Tribe will separately respond in opposition to the pending motions regarding the administrative record and other matters filed by the Forest Service and New 49'ers, Inc.

The Forest Service and New 49'ers, Inc. raise a number of varying and often contradictory responses to the Karuk Tribe's motion and memorandum for summary judgment. However, all of the arguments boil down to one central argument – that the agency's actions regarding suction dredge mining in the rivers and streams of northern California, and the mining operations themselves, are essentially immune from compliance with federal public land and environmental laws. These arguments, if adopted by this Court, would preclude protections for threatened species and water quality and eliminate public review of scores of mining operations conducted on the public's lands and waters.

These efforts to shield mining operations from public scrutiny and environmental laws are based on erroneous interpretations of federal law, ignore the agency's own evidence in the administrative record, and ignore controlling precedent from the Supreme Court and Ninth Circuit. The agency and mining operators have failed to show why the requirements of the Endangered Species Act ("ESA"), National Forest Management Act ("NFMA"), and the National Environmental Policy Act ("NEPA") do not apply to mining operations in these waters.

Under the government's and miners' view, the agency's unilateral determination that a single mining operation by itself will not cause significant environmental damage – a finding made without any public notice or review – somehow eliminates any and all review of the cumulative damage from the scores of approved operations and eliminates the agency's duties to protect threatened and at-risk fish species and sensitive aquatic and riparian environments. Based on this theory, as long as the local Forest official, after private discussions with the mining operator, determines in his or her own discretion that a mine will not have significant impacts by

itself, that decision is immune from compliance with the ESA, NFMA, and NEPA. Such a position fundamentally contradicts these laws and cannot withstand judicial review.

II. CORRECTION OF MISLEADING FACTUAL PRESENTATIONS

Both the Forest Service and the miners present a number of misleading factual statements. First, in an effort to downplay the cumulative impacts from all the suction dredge operations on the Klamath River and its tributaries, the agency states that there will be only an "average daily level of 10 suction dredges dispersed over the entire area." Forest Service Response ("FS Resp.") at 8. However, a review of the Notice of Intent ("NOI") submitted by the New 49'ers, Inc. alone shows that this "average" is not a binding commitment and is only an "estimate" of how many dredges may be operating in the Klamath River at one time. AR 0033. The only self-imposed limit is "ten (10) dredges per river mile" on 35 miles of the Klamath River. AR 0034. The agency's authorization letter does not contain any further limits. AR 029.[1]

The large number of dredges at any one time (subject only to the 10 per mile restriction) is important for this case due to the agency's failure to review the cumulative impacts from all of these dredges on the river environment and on the traditional and cultural uses of the river by members of the Karuk Tribe.[2] The few reaches of the Klamath River that The New 49'ers, Inc. pledges to avoid are only a small fraction of the 35 miles of the River approved for mining. *See* New 49'ers NOI. AR 0033-34.

For another mining operation, the agency tries to deflect attention away from the unlimited suction dredging by pointing to the miner's pledge not to use "mechanized earthmoving equipment such as bulldozers and backhoes." AR 0070 (Johnson NOI); FS Resp. at 9. The agency neglects to mention that the Johnson instream suction dredge operation will occur on over a dozen separate mining claims spread across a large stretch of the Klamath River. AR

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[1] The New 49'ers arguments regarding "fish protection measures" and "local guidelines" directed by the Forest Service conflicts with the primary legal argument by both defendants that the agency has no involvement with, control over, or discretion when it comes to NOI decisionmaking. 49'ers Resp. at 17.

[2] Neither response brief discusses how designated tribal cultural areas will be protected from the various mining operations. *See* Karuk Opening Brief at 18.

0068, 0073 (map).[3] Outside of a small river stretch near Independence Creek, the entire river reach in this region is opened for mining. The fact that bulldozers and backhoes will not be used does not mean, as the agency implies, that these operations, and especially their cumulative impacts, should be unregulated.[4]

Another factual misrepresentation regards the assertion that the Tribe was fully consulted in the Forest Service's decisionmaking for all of the authorized mining in the Klamath River and its tributaries. *See* 49'ers Resp. at 17. At best, the Tribe was invited to a few meetings with the agency and The New 49ers, Inc. that included general discussions prior to the start of the 2004 mining season. *See* FS Resp. at 19-20.[5] Notably, the "mitigation" measures referred to by the agency involve The New 49'ers, Inc.'s NOI to the Orleans Ranger District of the Six Rivers National Forest, which was withdrawn and is not part of this case. AR 043, 053; FS Resp. at 20.[6]

Most of the other meetings which the agency argues satisfy the strict consultation requirements of the Klamath Forest Plan all occurred **after** mining had commenced. FS Resp. at

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[3] These claims are a mixture of lode claims, which encompass an area of up to 1500 feet by 600 feet each (slightly over 20 acres each), 30 U.S.C. § 23, and placer claims, which cover 20 acres each, 30 U.S.C. § 35.

[4] The agency's focus on the lack of "backhoes and bulldozers" is irrelevant since Forest Service regulation applies to any operation that "causes a surface disturbance." 69 Fed. Reg. 41428, 41429 (July 9, 2004). As stated by the challenged May 26, 2004 Regional Directive, "A suction dredge is mechanized earthmoving equipment and such operations are not exempt from this requirement under 36 CFR 228.4(a)(2)." Regional Directive at 1 (attached as Exhibit I to the federal defendants' original motion to dismiss).

[5] The "meetings" for which both defendants rely upon were not done in accordance with the agency's responsibilities to consult with the Karuk Tribe on a "government-to-government" basis, as required by federal law and the Klamath Forest Plan, at 4-64, 4-101, 102 (attached to the Tribe's opening brief). *See also* Presidential Executive Memorandum entitled "Government to Government Relations with Native American Tribal Government", 59 Fed. Reg. 22951 (April 9, 1994). These "meetings" were attended by The New 49'ers, Inc. and were not in any way conducted by the agency as confidential government-to-government consultation.

[6] Even this "withdrawal" is of dubious benefit. As admitted by The New 49'ers, Inc., the withdrawal of the "group" NOI simply meant that individual members of The New 49'ers needed to seek individual approval for suction dredge operations on the Salmon River. Indeed, The New 49'ers Inc. specifically stated that any limitation on "dredge densities" that are so highly-touted in the defendants' response briefs were being "eliminated." AR 0042.

19-20. These "meetings" were post-approval, only occurred after mining commenced, and only to ascertain compliance with the NOIs. Id. The agency cannot credibly argue that inviting the Karuk Tribe on a field trip long after the mine was approved equates to pre-approval, pre-mining consultation as required by the Klamath Forest Plan. *See* Karuk Opening Brief at 18.

For even the meetings that pre-date the mine approvals, the Tribe was never given the opportunity to review or comment upon The New 49'er's NOI prior to the agency's approval. In that case, The New 49'ers submitted their proposal on May 24, 2004 and the Forest Service issued its authorization letter the very next day, May 25th. AR 029.

Further, neither the Forest Service nor The New 49'ers can point to any "meetings" on the other mining operations challenged in this case. For example, the Tribe was never informed of the Johnson operations covering miles of the Klamath River and its tributaries. AR 0067-0073. The same is true for the other challenged agency NOI decisions. AR 074-083.

Overall, neither defendant has adequately refuted the Record evidence presented by the Tribe that the Tribe was not properly consulted prior to the agency's NOI decisions. Attempts to minimize the severity of suction dredge impacts via citation to a few selected "mitigation" measures fails to demonstrate that the agency complied with its duties under the ESA, NFMA and NEPA to review and protect against impacts to protected fish species and Tribal interests.

III. THE FOREST SERVICE VIOLATED THE NFMA

Both defendants argue that this Court cannot order compliance with the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600 *et seq.*. The New 49'ers, Inc. first argues that the NFMA does not apply to mining operations at all – a position that the agency has never even attempted to argue. Regarding application of the NFMA, both defendants claim that the provisions of the Klamath Forest Plan ("KFP") and the Northwest Forest Plan ("NFP") are not applicable due to an alleged "conflict" with generalized national regulations. All of these NFMA arguments are without merit and should be rejected.

A. The NFMA Applies to Mining Operations

The New 49'ers, Inc. spends considerable energy arguing that the NFMA does not even apply to mining operations conducted in the national forests. 49'ers Resp. at 3-9. This claim

relies primarily on an assortment of arguments related to public land and mining law that have never been upheld to eliminate application of the NFMA to hardrock mining operations.

At the outset, it should be noted that the federal government has not argued that the NFMA does not apply to mining operations and does not so argue in this case. As such, The New 49'ers, Inc.'s attempt to justify the agency's actions on the inapplicability of the NFMA should be rejected. "It is well settled that a court may not uphold an agency action on grounds not relied on by the agency. National R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407, 420 (1992) (*citing* SEC v. Chenery Corp., 318 U.S. 80, 88 (1943)." Friends of the Wild Swan v. Fish & Wildlife Serv., 896 F. Supp. 1025, 1027 (D. Or. 1995). *See also*, Alameda Water & Sanitation Dist. v. Browner, 9 F.3d 88 (10th Cir. 1993) (intervenor may not offer additional reasons, not asserted by the federal agency, to support the agency's action).

Even if this Court were to consider The New 49'ers, Inc.'s attempt to strip away the NFMA, this argument is meritless. The miners ignore the federal court decisions that have directly applied the NFMA to mining operations and instead rely heavily on one case dealing with oil and gas leasing and interpreting the Multiple Use Sustained Yield Act. Mountain States Legal Foundation v. Andrus, 499 F.Supp. 383, 395 (D. Wy. 1980). 49'ers Resp. at 8. The quoted discussion regarding the NFMA was acknowledged by that court to be dicta and the case had nothing to do with the NFMA and hardrock mining – the dispute in this case.

The miners also rely on the Surface Resources and Multiple Use Act of 1955, 30 U.S.C. § 612 (b), for the proposition that Forest Service regulation of mining cannot "materially interfere" with mining-related operations. 49'ers Resp. at 1, 5. However, a correct reading of that provision shows that the "material interference" standard applies to the "right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof" and **not** to the regulation of mining itself. 30 U.S.C. § 612 (b). The provision specifically states that "any **use** of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as to not endanger or materially interfere" with mining. Id. (emphasis added). This provision deals with other "uses" of mining claims by the government or its "permittees or licensees" and does not restrict agency regulation of mining

itself. *See* United States v. Curtis-Nevada Mines, Inc., 611 F.2d 1277 (9th Cir. 1980)(thoroughly discussing how the law was meant to actually expand the public's rights to recreate and otherwise use mining claims, subject to the limitation that **such use** would not "materially interfere" with mining). *See also* Clouser v. Espy, 42 F.3d 1522, 1530 (9th Cir. 1994)(affirming Forest Service's "material impact" on access to and use of mining claims).

In raising these meritless arguments, The New 49'ers Inc. ignore the direct statement by the U.S. Supreme Court that mining operations are regulated under the NFMA:

> In 1976 two pieces of legislation were passed that called for the development of federal land use management plans affecting unpatented mining claims in the national forests. Under the … National Forest Management Act (NFMA), the Forest Service under the Secretary of Agriculture is responsible for the management of the surface impacts of mining on federal forest lands.

California Coastal Com'n v. Granite Rock Co., 480 U.S. 572, 586 (1987)(citations omitted). It is impossible to reconcile this statement from the Supreme Court with The New 49'ers claim that "the NFMA has nothing to do with mining." 49'ers Resp. at 6.

The miners also try to dismiss the two leading federal court decisions that have specifically applied the NFMA to the regulation of mining. In Siskiyou Regional Education Project v. Rose, 87 F.Supp. 2d 1074 (D. Or. 1999), the court held that the NFMA applied to mining and indeed directly held that suction dredge mining was required to comply with the Standards and Guidelines of the applicable Forest Plans. "The Forest Service must comply with the requirements of their Forest Plans, and failure to comply violates NFMA." Id. at 15.

In Pacific Rivers Council v. Thomas, 873 F.Supp. 365, 372 (D. Idaho 1995), the federal court also ruled that NFMA requirements apply to mining operations. Contrary to The New 49'ers, Inc.'s claims, 49'ers Resp. at 8-9, the court went into considerable detail to support its decision to enjoin mining operations pending the agency's compliance with the NFMA. In that case, like the present one, the Forest Service did not argue that the NFMA did not apply, rather it was the mining industry intervenors. The court based its conclusion on a number of factors:

> First, each of the LRMPs at issue states that anadromous fish, habitat, and water resources are to be protected and enhanced. Accordingly, although the National Forest Management Act does not specifically mandate that mining activities be included in LRMPs, LRMPs would be meaningless with respect to effective fish, habitat, and water

> management if the effects of mining activities were not factored into the long-range plans. Second, upon review of the LRMPS at issue, the court sees that mining activities are discussed in the plans, and terms and conditions on such activities, including mitigation measures, are provided for in the plans.

Id. at 372-373. Like the Forest Plan in that case, the KFP and the NFP contain "terms and conditions" regulating mining operations that must be met. *See* Graf, *The Application of Takings Law to the Regulation of Unpatented Mining Claims*, 24 Ecology Law Quarterly 57, 88-90, 105-110 (1997)(discussing Forest Service's authority under the NFMA to require additional limitations on mining to protect sensitive lands and waters). In promulgating the Riparian Reserve requirements of the Forest Plans, the agency has determined that, due to the sensitive and valuable nature of riparian ecosystems in the Northwest, and the threats posed by instream mining, additional protections are required.

Lastly, The New 49'ers, Inc. ignores the fact that the requirements of the NFP were also promulgated under the authority of the ESA, which requires all agencies to take such actions as may be necessary to protect species listed as "threatened" or "endangered" under the ESA. 16 U.S.C. § 1536(a). The NFP specifically stated that the Standards and Guidelines at issue in this case were based on the ESA, as well as the NFMA and other statutes. NFP Record of Decision ("ROD") at 5 (attached to the federal defendants' original motion to dismiss). Overall, there is no credible argument that Forest Plan requirements are inapplicable to mining.

B. The Forest Service Must Comply with the Forest Plans

The agency argues that compliance with the KFP and the NFP is not required because such compliance would "conflict with the Forest Service mining regulations and the General Mining Law of 1872." FS Resp. at 10. The government maintains that its decision to exempt mining from Forest Plan (and NFMA) compliance should be given "deference" by this court. FS Resp. at 10-11. However, the agency's attempt to manufacture a "conflict" is not supported by the record or the law and it should not be given deference for a policy decision made without any public review and in direct contradiction of its previous positions and federal court decisions.

1. The National and Regional Directives Are Not Entitled to Deference

Based on the Forest Service's about-face regarding the Plan of Operations ("PoO") requirement in Riparian Reserves, it deserves no deference from this Court. "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." INS v. Cardoza-Fonesca, 480 U.S. 421, 446 n. 30 (1987) (*quoting* Watt v. Alaska, 451 U.S. 259, 273 (1981)). "[I]f the [agency] has abused its discretion in failing to follow its own prior standards, then we need not defer to [its] anomalous interpretation. Oil, Chemical and Atomic Workers Int'l Union, Local 1-547 v. NLRB, 842 F.2d 1141, 1143 n.1 (9th Cir. 1988)." Western States Petroleum Ass'n. v. E.P.A., 87 F.3d 280, 283 (9th Cir. 1996).

The agency also tries to argue that the two directives are not "final agency actions" that can be reviewed by this Court since "no legal consequences flow from the issuance of the memoranda." FS Resp. at 12, n. 10. Contrary to the agency's implications, however, the two directives constitute reviewable final agency action under the APA, because they mark the consummation of the agency's decisionmaking process, and have direct and appreciable legal consequences. Pacific Coast Federation of Fishermen's Assn. v. NMFS, 253 F.3d 1137, *amended on denial of rehearing*, 265 F.3d 1028 (9th Cir. 2001). *See also* Appalachian Power Co. v. U.S. EPA, 208 F.3d 1015, 1020-22 (D.C. Cir. 2000)(rejecting agency's attempt to insulate directives from judicial review). The government cannot have it both ways – arguing that the directives deserve deference, but when shown that deference is not warranted, it shifts its position and claims that the directives are not "final agency action" and thus are unreviewable.[7]

The Forest Service's position regarding mining in Riparian Reserves has shifted throughout the last decade. As stated in the 2001 Draft Environmental Impact Statement ("DEIS") for suction dredging issued by the neighboring Siskiyou National Forest, in response to the Siskiyou decision, the agency realized that it was required to regulate mining pursuant to

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[7] This argument on the lack of a "final agency action" repeats the government's initial motion to dismiss. By stipulation, that motion was dismissed pending the Tribe's filing of the Second Amended Complaint. Once that Amended Complaint was filed specifically challenging the two directives, the agency decided to not renew its motion, although it had the opportunity to do so.

approved PoOs, not NOIs.. DEIS at 5 (attached to the Tribe's opening brief).[8] After Siskiyou, the agency clearly required all mining operations proposed in Riparian Reserves, including suction dredge operations, to submit a PoO for approval. Id.

Then, without ever notifying the public, the agency issued the two challenged directives, stating that it could allow mining in Riparian Reserves without a PoO and without any compliance with other laws such as the ESA. These directives, which never even mention the Siskiyou case, are based on the agency's perceived "conflict" between the requirement for PoOs in Riparian Reserves and the discretion generally afforded forest officials in authorizing mining via NOIs under the general mining regulations at 36 CFR § 228.4(a). FS Resp. at 11-13. Notably, the DEIS discussed and rejected any apparent "conflict" between the PoO requirements in the Forest Plans and the 228 regulations. "Many believed, and some still believe, that MM-1 is in conflict with the regulations in 36 CFR 228 which describes which types of operations need to file NOIs or POOs, and significantly, which do not." DEIS at 5. The agency's decision in the DEIS was to require PoOs in Riparian Reserves – finding no "conflict" with the 228 regulations.

The Forest Service correctly applied the Siskiyou ruling in preparing the suction dredge DEIS and in informing miners that the Forest Plan standards must be followed. The agency's actions in bypassing the Forest Plan requirements, and ignoring Siskiyou, are not entitled to any deference. *See*, Louisiana Public Service Corp.v. FERC, 184 F.3d 892, 897 (D.C. Cir. 1999) ("[f]or the agency to reverse its position in the face of precedent it has not persuasively distinguished is quintessentially arbitrary and capricious.").

2. There Is No "Conflict" Between the Forest Plans and the Mining Law or the 228 Regulations

The Ninth Circuit has repeatedly held that once a forest plan is adopted, all resource plans, permits, contracts, or other decisions for the use of the national forest must be consistent with the plan. *See* Lands Council v. Powell, 395 F.3d 1019, 1033-34 (9th Cir. 2005); 16 U.S.C. § 1604(i); Karuk Opening Brief at 9. In Siskiyou, the court correctly applied that legal standard,

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[8] The DEIS is considered by the Forest Service to be part of the administrative record in this case.

finding that the Forest Service violated NFMA when it approved mining operations in violation of the Forest Plan PoO requirement. 87 F.Supp.2d at 1087-88.

Here, there is no dispute that the MM-1 (from the NFP) and MA 10-33 and MA 10-34 (KFP) remain in effect. These standards require plans of operation for mining activities in Riparian Reserves. Karuk Opening Brief at 11-12. There should also be no dispute, that as the Ninth Circuit has stated, these standards are "binding." Pacific Coast Federation of Fishermen's Assn. v. NMFS, 265 F.3d 1028, 1032 (9th Cir. 2001).

Accordingly, the only circumstance in which these standards would not apply to suction dredge placer mining operations is if either standard is "contrary to existing law or regulation," or would "require the agencies to take actions for which they do not have authority." Regional Directive at 1 (attached as Exhibit H to the federal defendants' original motion to dismiss).[9] The agency's directive asserts that MM-1, for example, is contrary to its mining regulations. Id. This position is premised on its view that if the national regulations give the local agency official the discretion to allow mining via a NOI, the Forest Plans' mandate requiring PoOs in sensitive Riparian Reserves is automatically "in conflict" with those regulations.

This argument fails to show a significant "conflict" between the Mining Law, the 228 regulations, and the Forest Plans. The Mining Law of 1872, the Organic Act of 1897, and the NFMA all give the Forest Service the authority to regulate mining on national forest lands. 30 U.S.C. § 23 (Mining Law provision mandating that all mining must proceed "under regulations prescribed by law"); 16 U.S.C. § 551 (Organic Act); Granite Rock, 480 U.S. at 585 (1987) (discussing NFMA). Contrary to the implications of defendants, none of the Forest Plan standards in this case even remotely approach a "prohibition" on mining. *See* 49'ers Resp. at 4.

Contrary to the lengthy discussions on the "rights" of claimholders under the Mining Law, especially by The New 49'ers, Inc., nothing in MM-1 or MA10-33 and 34 destroys any rights miners may enjoy related to Forest Service lands. Instead, any such rights are already necessarily limited by the legal objectives that Congress codified in, among

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[9] The agency has never argued that it "does not have the authority" to require PoOs.

other laws, NFMA and the ESA. *See* Baker v. United States, 928 F.Supp. 1513, 1520 (D. Id. 1996) (Forest Service must consult under the ESA before approving a plan of operations even though doing so would mean it could not meet its regulatory duty to act on a proposed PoO within 90 days).

The Ninth Circuit has squarely held that the requirement to submit and operate under an approved PoO does not violate the Mining Law or any "rights" held by miners. U.S. v. Weiss, 642 F.2d 296 (9th Cir. 1981). All such "rights" are held subject to the agency's paramount regulatory authority. In recognizing mining claims as a "unique form of property," the Supreme Court has held:

> The United States, as owner of the underlying fee title to the public domain, maintains broad powers over the terms and conditions upon which the public lands can be used, leased, and acquired. … [Mining] Claimants thus must take their mineral interests with the knowledge that the Government retains substantial regulatory power over those interests.

U.S. v. Locke, 471 U.S. 84, 104-105 (1985). In a recent decision by the U.S. Court of Federal Claims, the court denied a "takings" claim by the holder of mining claim – ruling that since the claimant is not free to operate in violation of federal environmental laws, no compensable property right exists to challenge the reasonable exercise of such federal authority. Reeves v. U.S., 54 Fed. Cl. 652, 672-674 (2002). *See also,* Graf, *The Application of Takings Law to the Regulation of Unpatented Mining Claims*, 24 Ecology Law Quarterly 57 (1997). As the Ninth Circuit has stated:

> Virtually all forms of Forest Service regulation of mining claims--for instance, limiting the permissible methods of mining and prospecting in order to reduce incidental environmental damage--will result in increased operating costs, and thereby will affect claim validity.

Clouser v. Espy, 42 F.3d at 1530. In that case, the Forest Service lawfully rejected the claimant's proposed motorized access and limited mining access to pack mules.

Here, it cannot be credibly argued that requiring a PoO pursuant to MM-1, MA 10-33 and 34 violates the Mining Law or any "rights" of mining claimants. The fact that an individual mine's impacts may not be "significant" does not categorically create a "conflict" with the Mining Law and the 228 regulations. The Ninth Circuit's decision in Weiss does not in any way

support this proposition and indeed held the opposite – that NOI and PoO approvals do not conflict with the Mining Law. Weiss at 297 ("the initiation or continuation of such an operation ['any mining operation that is likely to cause a disturbance of surface resources'] is subject to the approval of the Forest Service.").

Further, there is certainly no "conflict" between these standards and the 228 regulations. The Supreme Court's decision in Granite Rock is instructive on this issue. There, the Court noted that if regulations are meant to be exclusive of other laws, then the regulations should specify that intent. 480 U.S. at 583. The Supreme Court specifically interpreted the Forest Service mining regulations as "devoid of any expression of intent" to preempt certain other laws. Id. at 582. Instead, as the Supreme Court noted, the mining regulations explicitly contemplate compliance with "special acts of Congress," 36 C.F.R. § 228.2, and with state and other federal laws concerning air, water quality, and solid waste. Granite Rock, 480 U.S. at 583, citing 36 C.F.R. §§ 228.8(a),(b),(c); *see also* Friends of the Earth v. U.S. Navy, 841 F.2d 927, 936 (9th Cir. 1988) (holding that Forest Service mining regulations do not preempt state permit conditions that ensure that damage to shoreline is minimized).

The Ninth Circuit has itself recognized that even a supposed "conflict" between the Mining Law and Forest Service regulation does not undermine the agency's ability to deny proposed mining operations. *See* United States v. Richardson, 599 F.2d 290 (9th Cir.1979), *cert. denied*, 444 U.S. 1014 (1980)(upholding Forest Service decision to deny exploration operations). Clouser specifically acknowledged Richardson as "recognizing the conflict between mining and forest land policies and holding that the district court may properly enjoin unreasonable destruction of surface resources." 42 F.3d at 1530.

In addition to any lack of significant "conflict" with the Mining Law, MM-1, MA10-33 and 34 are not "contrary" to any part of the mining regulations. These standards are limited to Riparian Reserves, a small subset of national forest lands. The 228 regulations apply to all national forest lands in the western states. The requirement for PoOs in Riparian Reserves is not "contrary" to the regulations simply because they impose additional procedural obligations. The Forest Service cannot ignore the requirements of its Forest Plan, even when those requirements

may be more demanding than other Forest Service regulations. Sierra Club v. Martin, 168 F.3d 1, 4-5 (11th Cir. 1999).

Neither the NFP nor any germane law define what "contrary" means. The plain meaning of "contrary" is "being opposite to or in conflict with." Webster's Ninth New Collegiate Dictionary 285 (1989). Accordingly, court decisions concerning federal preemption of state law are instructive. Under those cases, a conflict exists "when it is impossible to comply with both state and federal law" or when the state law is an obstacle to accomplishing the objectives of Congress. Granite Rock, 480 U.S. at 581. *See* Lands Council v. Powell, 395 F.3d at 1033-34 (analyzing whether forest plan standards "necessarily conflict," which would render only one effective).

Here, it is not impossible to comply with MM-1, MA10-33 and 34, and the mining regulations. MM-1, MA10-33 and 34 establish a procedural requirement that a PoO is required for mining operations in discrete areas on certain national forests. All other aspects of the mining regulations continue to apply to Riparian Reserves, to the rest of the Klamath National Forest, and to all other national forests. The simple requirement to operate under an approved PoO also does not stand as an obstacle to accomplishing the objectives of Congress. To the contrary, MM-1, MA 10-33 and 34 implement the objective of Congress in the NFMA, and the intent of Secretaries of Agriculture and Interior in promulgating the NFP, to protect species and their habitat under the ESA. Indeed, the mining regulations specifically contemplate that any mining on Forest Service lands must comply with other laws. 36 C.F.R. § 228.8. (1974).

The defendants' attempts to distinguish the leading federal case on suction dredging, Siskiyou, are ineffective. The agency argues that Siskiyou did not involve the application of PoO requirements for Riparian Reserves since the case dealt with the neighboring Siskiyou National Forest. FS Resp. at 13-14. However, there really is no distinction between the MA7-10 standard in that case and the MA 10-33 and 34 standards in the KFP (and of course, the MM-1 standard of the NFP applies to both forests). Indeed, the KFP goes further than the Siskiyou Plan stating that "Notices of intent for mineral operations under 36 CFR 228 shall not constitute authorization to operate within a RR [Riparian Reserve]." MA10-33.

The agency actually admits that Siskiyou supports the Tribe's position. The Forest Service states that the Siskiyou "court found that because the stricter MA7-10 standard had not been expressly amended, the agency was compelled to require PoOs in SRAs [supplemental resource areas]." FS Resp. at 13. Here, there is no dispute that the agency has never sought to amend the KFP or NFP. Nor is there dispute that the KFP requirement for PoOs in Riparian Reserves is the same requirement as MA7-10 for SRAs in the Siskiyou Forest Plan. Yet the agency still maintains that the court's rationale is not applicable to the Klamath National Forest. As stated by the Siskiyou court, and here admitted by the agency, until the agency properly amends the controlling Forest Plan, the standards apply. Siskiyou, 87 F.Supp.2d at 1087.

Here, instead of amending the KFP and NFP to eliminate the PoO requirement in Riparian Reserves, the agency simply issued its memorandum to the field offices directing them to ignore the PoO requirements in the Forest Plans. The agency has attempted to bypass the court's holding in Siskiyou, and with it the Forest Plans and the NFMA, via the directives. Such a scheme was held to violate the law in Siskiyou and should be similarly held in this case.[10]

Lastly regarding the agency's NMFA defense, the Forest Service argues that it has complied with the procedural and substantive duties to protect sensitive species and consult with and protect Tribal interests. FS Resp. at 17-21. Much of the government's defense mimics its argument that the decision not to require a PoO is not an "action" and thus is immune from compliance with environmental laws. *See* below sections on the ESA and NEPA. Interestingly, however, the agency does not argue that compliance with these Forest Plan requirements is somehow "contrary" or "in conflict" with the mining regulations, even though it would have substantive effect on mining operations.

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[10] The agency also attempts to distinguish Sierra Club v. Martin, 168 F.3d 1 (11th Cir. 1999), which held that the Forest Service was required to comply with the obligations of the applicable Forest Plan even when the national regulations did not require the actions mandated by the Forest Plan. FS Resp. at 14. The agency argues that, unlike Martin, the Mining Law grants certain "rights" to mine claimants. Id. However, as noted above, the only alleged "right" implicated in this case is the "right" to proceed without a PoO. As noted, however, such a "right" to be free from PoO requirements does not exist. *See* Weiss and Clouser.

In any event, as noted above in the factual discussion, the agency's and the miners' few references to some limited restrictions placed on suction dredge operations conducted by The New 49'ers' members does not mean that the agency has met the Forest Plan sensitive species and Tribal requirements for stream reaches not covered by the limited restrictions. This is especially true since these restrictions do not apply to the 13 mining claims covered by the Johnson NOI, among others. As noted above, even these "consultation" meetings with the Tribe were primarily conducted **after** mining had commenced. Further, there is no mention in the agency's brief that the Forest Service ever sought to protect the designated "cultural areas" specified as "Management Area 8" in the KFP. *See* Karuk Opening Brief at 18.

Although much of the previous discussion focuses on the agency's response, some rebuttal of The New 49'ers, Inc.'s response is needed. The miners take an even more extreme view of the law, arguing that the KFP and NFP standards "are simply *ultra vires*" based on their view that Forest Plan mining requirements under the NFMA are illegal. 49'ers Resp. at 10. As explained above, however, the Forest Service, the Supreme Court, and the federal cases that have ruled on this question **all** have held that the NFMA, and Forest Plans, are applicable to mining.

Lastly, the miners argue that the fact that California requires a minimal state or region-wide suction dredge permit automatically eliminates federal authority. 49'ers Resp. at 4 n.2. However, the Forest Service's recognition of state mining regulation is not sufficient to supplant federal regulations. Indeed, the California Department of Fish and Game regulations explicitly state that compliance with its regulations do not relieve any person of complying with federal laws. "Nothing in any permit issued pursuant to these regulations. . . relieves the permittee of the responsibility of complying with applicable federal, State, or local laws or ordinances." Cal. Code Regs. title 14, § 228(g)(2004). Therefore, Fish and Game did not intend to create such an overarching regulatory scheme as to eliminate the need for further regulations.[11] The Forest Service's own Regional Directive challenged in this case states that: "State dredging regulations are concurrent with federal regulations. They do not replace or supercede the Forest Service

[11] The U.S. Supreme Court has also recognized the overlapping nature of federal and state mining laws, such that a mine operator must properly comply with both sets of regulations. Granite Rock, 480 U.S. 572, 583 (1987).

regulations." May 26, 2004 Directive (attached as Exhibit I to the federal defendants' original motion to dismiss).

Further, the Forest Service's own correspondence with Fish and Game and federal mining permittees demonstrate the inadequacy of California's permit program with respect to compliance with federal law. In particular, a November 19, 2004 letter from Defendant Margaret Boland, Klamath National Forest Supervisor to Ryan Broddick, Director of California Fish and Game, describes the multiple deficiencies in California's suction dredge permit program with respect to federal regulations. Defendant Boland states:

> The Forest Service is concerned that the current suction dredging regulations create administrative challenges to the Six Rivers and Klamath National Forests, and may cause direct impacts to several fish species on the Klamath and Six Rivers National Forests. Forest Service fisheries biologists reviewed the 2004 California regulations for suction dredging and found temporal overlaps between suction dredging and coho and Chinook salmon, steelhead trout, green sturgeon, and lamprey spawning periods and the egg-alevin developmental phases.

November 19, 2004 letter from Forest Supervisor Boland to Director Broddick (AR 0300). In response to these substantial concerns, however, Fish and Game declined to institute any immediate changes to its suction dredge regulations. *See* February 24, 2005 letter from Donald B. Koch, Regional Manager, Fish and Game to Defendant Boland. AR 0304.

Similarly, in a letter from the Six Rivers National Forest to Dave McCracken, General Manager of The New 49'ers, Inc., the Forest Service stated that:

> Due to the anadromous fisheries in the lower Salmon River the stability of spawning gravels for fish redds is a major concern. Redds can be lost if loose tailing piles erode away by steam course action while eggs are still present. Your NOI and the California Fish and Game Suction Dredge regulations fall short of addressing mitigations for this issue.

May 13, 2004 letter from William D. Metz, Acting Six Rivers National Forest Supervisor to Dave McCracken, General Manager of The New 49'ers, Inc. (AR 0051-0052). As such, contrary to the arguments put forth by the miners in this case, the mere possession of a California Fish and Game suction dredge permit does not satisfy federal regulatory requirements, whether under 36 C.F.R. Part 228 or the ESA.

In sum, this court should hold that standards MM-1, MA10-33 and 34 are not contrary to the mining regulations and the Mining Law. Rather, the Forest Plan standards and the mining regulations can and should be read together to give effect to both. Thus, the agency violated NFMA when it allowed mining in Riparian Reserves without requiring an approved PoO.

IV. THE AGENCY VIOLATED THE ENDANGERED SPECIES ACT

A. The Endangered Species Act Applies in This Case

The miners argue that the ESA cannot apply in this case due to an unreported District of Oregon federal court decision addressing the listing of Southern Oregon/Northern California (SONC) coho salmon as a threatened species. 49'ers Resp. at 24 *citing* California State Grange v. Department of Commerce, Case No. 02-CV-6044-HO. However, while the court in that case did find infirmities with the federal government's listing of SONC coho, it specifically left that listing in place pending a new government review of the listing. The Miners also recognize that "the court did not set aside the listing while the decision was remanded…." 49'ers Resp. at 24. Thus, despite the miners' reliance on the unreported District of Oregon case, the relevant fact remains that the SONC coho is still listed under the ESA and that statute applies in full force.

That the ESA still applies to the Forest Service's actions in this case is confirmed by the agency's legal positions in this case. For instance, the Forest Service admitted in their Answer to Plaintiff's Complaint that the SONC coho is still listed under, and therefore entitled to the full protection of, the ESA. Forest Service Answer at ¶ 17. Further, the April 26, 2005 Order approving the Joint Stipulation for Partial Settlement in this case states that "Defendants agree that each of the challenged PoOs were approved without compliance with the ESA, NEPA, and their implementing regulations." April 26, 2005 Order at 2. This Stipulation and Order confirms the applicability of the ESA in this case to the SONC coho.[12] This Court should reject the miners' attempts to argue otherwise.

[12] Further, as noted above regarding the NFMA, The New 49'ers, Inc. cannot base its defense of the government's actions on grounds not raised (and indeed contradicted) by the agency.

B. Consultation Under the ESA is Required in This Case

While not taking the position that SONC coho are not listed, the Forest Service does argue that "the conduct of mining under an NOI is not agency action under Section 7." FS Resp. at 21. Similarly, the miners also assert that even if the ESA applies, no Section 7 consultation duties apply to the approval of mining under an NOI. 49'ers Resp. at 23. In particular, the miners argue that there is no "agency action" for which the Forest Service would have been required to consult because "the Forest Service has no discretion" when authorizing mining operations via a NOI. Id.

The position taken by the Forest Service and the miners is not supportable. Under established Ninth Circuit case law, the Forest Service's discretionary determination as to whether mining will be regulated under a NOI or a PoO triggers the ESA's Section 7 requirements. In Turtle Island Restoration Network v. National Marine Fisheries Service, 340 F.3d 969 (9th Cir. 2003), the Ninth Circuit, in relying on the Section 7 regulations, held:

> The Fisheries Service and the FWS jointly promulgated the ESA implementing regulations, which state in relevant part, that "Section 7 and the requirements of this part apply to all action in which there is *discretionary Federal involvement or control*." 50 C.F.R. § 402.03 (emphasis added). This court has held that the discretionary control retained by the federal agency must have the ability to inure to the benefit of a protected species. Environmental Prot. Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073 (9th Cir. 2001). If no discretion to act is retained, than consultation would be a meaningless exercise. Sierra Club v. Babbit, 65 F.3d 1502, 1509 (9th Cir. 1995). Stated another way, "where there is no agency discretion to act, the ESA does not apply." Natural Resources Defense Council [v. Houston], 146 F.3d [1118], 1125-26 [9th Cir. 1998].

Turtle Island Restoration Network, 340 F.3d at 974.

Further, in U.S. v. Weiss, 642 F.2d 296 (1981), a seminal mining law regulation case where the 9th Circuit upheld the Forest Service's ability to regulate mining activities on the National Forests, the court spoke directly to the issue and unequivocally confirmed the Forest Service's discretion with respect to authorization of mines operating under a NOI. In so doing, the court held that "[u]nder the [Forest Service mining] regulations, the Forest Service must be notified of any mining-related operation that is likely to cause a disturbance of surface resources. **The initiation or continuation of such an operation is subject to the approval of the Forest**

Service." Weiss at 297 (emphasis added). The Ninth Circuit did **not** say that only operations causing "significant" disturbance were "subject to the approval of the Forest Service."

In NWF v. FEMA, 345 F.Supp.2d 1151 (W.D. Wash. 2004), the court engaged in an extensive discussion on the meaning of "agency action" for purposes of Section 7, recognizing the ESA regulations' definition of "action" as having been defined broadly to include "(c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) **actions directly or indirectly causing modifications to the land, water, or air.**" NWF, 345 F.Supp.2d at 1169 *citing* 50 C.F.R. § 402.02 (emphasis added). This Court has confirmed that "Both the Supreme Court and the Ninth Circuit have construed this term broadly." Pacific Coast Fed. v. Bureau of Reclamation, 138 F.Supp.2d 1228, 1240 (N.D. Cal. 2001).

In the present case, the Forest Service's determination that the subject mining operations require only NOI's instead of protective PoOs is the type of discretionary agency action for which Section 7 consultation applies. The miners argue that no discretion exists for the Forest Service approving NOI's. However, they downplay the fact that there is a level of mining below an NOI for which the Forest Service truly has no discretion. If the activity will not cause surface disturbance, for instance, then no NOI is required. *See* 36 C.F.R. § 228.4 (2004). However, according to these regulations, once a mining operation rises to the level of requiring an NOI, the Forest Service's discretionary authority to require a PoO kicks in, along with the ESA's Section 7 consultation requirements.[13]

The Forest Service argues that the agency's decision to regulate mining via a NOI rather than a PoO is "insufficient federal action to trigger section 7 consultation obligations." FS Resp. at 22. Notably, the Forest Service thus concedes that **some** federal action has occurred, but argues that it is somehow "insufficient" to trigger Section 7. This position is also unsupportable, given the Forest Service's own statements that the agency's approval of a NOI constitutes an

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[13] Contrary to the assertions by the agency and the miners, the revised 228.4(a) regulations in 2004 do not in any way speak to the issue in this case – the application of the ESA, NFMA and NEPA to mining operations in Riparian Reserves. These revisions simply clarified that all mining operations except those that do not cause **any** surface disturbance are subject to agency regulation. 69 Fed. Reg. 41428-41431 (July 9, 2004).

"authorization." *See* Pl. Brief at 21 *quoting* a letter from the Forest Service approving The New 49'ers NOI (AR 029).[14]

The Forest Service's "insufficient" action argument is also contravened by the authority upon which the Forest Service relies. For instance, the Forest Service relies heavily on Sierra Club v. Babbitt, 65 F.3d 1502 (9th Cir. 1995). However, the facts in Sierra Club were fundamentally different. In Sierra Club, the court held that no discretionary agency action existed for the agency to allow road construction pursuant to a legally binding contract signed and committed to **before** the ESA was even passed. Specifically, the court presented the issue as such: "To what extent does Section 7 apply where the BLM granted right-of-way by contract to a private party *before* passage of the ESA *and* the agency's continuing ability to influence the private conduct is limited to three factors unrelated to the conservation of the threatened spotted owl." Sierra Club at 1508 (emphasis in original).

Thus, in Sierra Club, the agency was bound to allow the road, and had no discretion that could in any way "inure to the benefit of a protected species." Turtle Island, 340 F.3d at 974. The case at bar is distinct. Here, the Forest Service has discretion to require a protective PoO, which would undoubtedly benefit species, as the mining operation would be required to protect species such as the coho. *See* 36 CFR § 228.8(e)(requiring operators to "protect fisheries and wildlife habitat which may be affected by the operations"). The Record shows that the Forest Service specifically rejected The New 49'ers, Inc.'s NOI for mining on the Salmon River due in part to concerns for the threatened coho. AR 0O51-0052 (prohibiting any mining until

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[14] The Forest Service attempts to dismiss this direct self-contradiction of its current legal position that the approval of an NOI is not an "authorization" or approval of any kind by chalking it up to the drafter "inartfully wording" the cited letter. *See* FS Resp. at 23. Such post-hoc litigating positions of agency counsel cannot be used to support the underlying agency actions. "[T]he post hoc rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action." American Textile Manufacturers Institute v. Donovan, 452 U.S. 490, 539 (1981). *See also* Tovar v. U.S. Postal Service, 3 F.3d 1271, 1281 (9th Cir. 1993); Natural Resources Defense Council v. U.S. Department of Interior, 113 F.3d 1121, 1127 (9th Cir. 1997). Further, the Record demonstrates the heretofore common understanding that the Forest Service must exercise its discretion to approve an NOI. *See* June 3, 2004 Letter from Maria McCracken of The New 49'ers, Inc. to the Forest Service ("We would like to make a correction to our Notice of Intent which was recently approved on May 25, 2004"). AR 0028.

protections for the coho were ensured, among other requirements). Just as important, the requirement for a PoO triggers consultation with NOAA Fisheries, the federal wildlife agency charged with review and protection of threatened salmon species.

The Forest Service also inappropriately relies on Environmental Prot. Info. Ctr. (EPIC) v. Simpson Timber, 255 F.3d 1073, 1081 (9th Cir. 2001) for the proposition that the Forest Service's decision as to whether to require a PoO or a NOI is insufficient to trigger Section 7. In that case, the court held that the agencies were not required to **re-initiate** Section 7 consultation on a previously issued permit when a new species is listed under the Act. The court based its decision not requiring re-initiation of consultation on a finding that "nowhere in the various permit documents did the FWS retain discretionary control to make new requirements to protect species…" EPIC at 1081.

Thus, the Forest Service arguments are premised upon inapplicable caselaw. The case at bar is not one like Sierra Club and EPIC where the agency had absolutely no discretionary authority that could potentially be used to benefit a listed species. Here, the Forest Service has the discretion to require a protective PoO, and pursuant to the ESA and implementing regulations detailed above, that discretion triggers Section 7 consultation.

The record, and indeed the defendants' briefs, are replete with references to the Forest Service's discretionary authority over suction dredge mining. In addition to the rejection of the Salmon River NOI based on environmental and species concerns, AR 0051-0052, on numerous occasions, the defendants describe the agency's decision to allow mining via a NOI or PoO as a "conclusion", FS Rsp. at 7, 8, 10, 49'ers Resp. at 2; a "finding", FS Resp. at 9; a "determination," FS Resp. at 16, 22, 49'ers Resp. at 15, 16, 18, 19; and a "judgment." 49'ers Resp. at 19 (further noting that the NOI decision "reflect[s] the need for significant judgment and expertise" by the Forest Service.).

The miners' last argument with respect to the ESA asserts that Section 7 consultation is not necessary due to an alleged a lack of proof of harm to listed species. 49'ers Resp. at 24-25. However, and without belaboring the point, the Record contains ample evidence demonstrating distinct and serious harm caused to fish species, including listed SONC coho, by suction

dredging. Most notably, the Forest Service's own Grunbaum Report describes in detail these impacts. *See* Karuk Brief at 4 (listing Grunbaum Report conclusions), and Grunbaum Report itself (AR 295). Given this Record evidence, this Court should reject the miners repeated attempts to downplay so dramatically the significant impacts of their under-regulated instream mining operations. In any event, as this Court has held, the standard is whether the numerous mining operations "may affect" the listed species, not that actual negative impacts have been proved. Pacific Coast Fed. v. Bureau of Reclamation, 138 F.Supp.2d at 1240-41.[15]

V. THE AGENCY VIOLATED NEPA

The agency argues that its approval of mining pursuant to a NOI does not trigger any obligations under NEPA. FS Resp. at 23; *see also* 49'ers Resp. at 19. In support of this position, both the Forest Service and the miners rely heavily on an analogy to the Bureau of Land Management ("BLM") mining regulations and the cases interpreting those regulations, such as Sierra Club v. Penfold, 857 F.2d 1307 (9th Cir. 1988) and Mineral Policy Center v. Norton, 292 F.Supp.2d 30 (D.D.C. 2003).

However, there are critical distinctions between the BLM and Forest Service regulations, particularly with regard to the extent to which they vest discretion with the respective agencies that fatally flaw this comparison. Most importantly, the BLM regulations do **not** vest discretion in the BLM as to whether to require a PoO or not. There is no discretionary determination to be made by the BLM as to whether the surface disturbance will be "significant" or not, as with the Forest Service. To the contrary, the BLM regulations provide a categorical 5-acre cutoff rule. If a mining operation is proposed for less than 5 acres, it proceeds under a NOI, without regard to

[15] The defendants are under the mistaken view that if the Tribe cannot prove that every single suction dredge operation will threaten the coho, then ESA protections do not apply. In addition to ignoring the "may affect" standard under the ESA, this argument ignores the undisputed fact that the Forest Service failed to review the cumulative impacts from the 35 miles of suction dredging authorized via The New 49'ers NOI, let alone from the miles of river dredging encompassed by the Johnson NOI, among others.

its site-specific impacts. 43 C.F.R. § 3809.21 (2001). If on the other hand, the operation creates surface disturbance greater than 5 acres, it requires a PoO – period. Id. [16]

In both Penfold and Mineral Policy Center, the courts held that NEPA did not apply to mining operations/exploration consisting of less than 5 acres because the regulations had deprived the BLM of all discretion in the matter; regardless of the site-specific impacts. If it was less than 5 acres, the BLM could not require a PoO. Mineral Policy Center held that because the BLM mining regulations specifically state that no approval is required before a 5-acre or less Notice operation can commence, NEPA did not apply. Id. at 56. In so holding, the court reasoned that "In order for NEPA to apply to non-federal projects, the federal agency must engage in some 'affirmative conduct.'" Id. at 55 n.31 *quoting* State of Alaska v. Andrus, 429 F.Supp. 958 (D. Alaska 1977).

Under the NEPA regulations, major federal action refers to activities "regulated or approved by federal agencies." 40 CFR §1508.18(a)(1978). "Such approval may occur through 'permit or other regulatory decision….'" Sierra Club v. Hodel, 848 F.2d 1068, 1089 (10th Cir. 1988) *quoting* 40 CFR §1508.18(b)(4)(1978). "The distinguishing feature of 'federal' involvement is the ability to influence or control the outcome in material respects." Id. *quoting* W. Rodgers, *Environmental Law* 763 (1977). Here, the Forest Service's decision whether to require a PoO certainly "influences or controls the outcome" of the permitting process and the scope of environmental protection.

The Forest Service regulations at hand are fundamentally distinct from the BLM mining regulations in this regard. The Forest Service regulations provide no categorical 5-acre cutoff. Rather, they specifically vest the Forest Service with the discretion to determine whether a

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[16] In 2001, the BLM mining regulations, 43 C.F.R. Part 3809, were amended. Under the previous version examined in Penfold, the regulations provided a categorical 5-acre cutoff rule for all mining operations. In 2001, the regulations were changed so as to restrict this 5-acre categorical cutoff to exploration projects only. These amended regulations were considered in Mineral Policy Center. For purposes of the case at bar, this distinction is irrelevant, as the critical fact is that in both Penfold and Mineral Policy Center, the courts held that NEPA does not apply where the mining regulation categorically permits a mining/exploration operation of less than 5 acres, leaving no discretion with the federal agency (BLM) charged with carrying out that regulation.

proposed NOI mining operation will cause significant disturbance, thus requiring a PoO. This is the "affirmative conduct" missing in Mineral Policy Center and Penfold.

Indeed, the Record before this Court demonstrates this discretionary process at work. For instance, the Record contains two letters from two different National Forests in response to a virtually identical NOI submission, one accepting the NOI mining operation as not causing "significant" surface disturbance, and one rejecting the NOI as having the potential to cause "significant" surface disturbance and thus requiring a Plan of Operations.

On May 25, 2004, the Klamath National Forest authorized mining pursuant to a NOI from The New 49'ers, Inc., stating that "[u]pon review of your Notice of Intent, and according to 36 CFR 228.4 (Plan of Operations—Notice of Intent—Requirements), I have determined that your proposed operations would not require a Plan of Operations." May 25, 2004 letter from Alan Vandiver, Happy Camp District Ranger, Klamath National Forest to Dave McCracken, General Manager, The New 49'ers. (AR 029). Conversely, on May 13, 2004, the Six Rivers National Forest rejected a NOI from The New 49'ers, Inc., stating that "[u]pon review of your NOI and according to 36CFR228.4 Plan of Operations—Notice of Intent—Requirements, I have determined that a number of your proposed activities as described in the NOI would likely cause significant disturbance of surface resources and would require a Plan of Operations." May 13, 2004 letter from William D. Metz, Acting Six Rivers Forest Supervisor to Dave McCracken, General Manager, The New 49'ers, Inc. (AR 0051-0052).

A review of the two Notices of Intent, one accepted and one rejected, demonstrates that they are, in relevant respects, virtually identical. *Compare* AR0031-0038 (Klamath National Forest proposed NOI) with AR0054-0060 (Six Rivers National Forest proposed NOI). Thus, the Record in this case demonstrates that the Forest Service actions in determining whether an NOI will cause "significant" surface disturbance is "affirmative conduct" for which NEPA applies, and is not within the scope of the regulatory exceptions to NEPA addressed in Penfold and Mineral Policy Center.

The Federal Defendants also attempt to salvage their legal position that NEPA does not apply by couching the issue as one of whether Plaintiff has proved that significant surface impacts will in fact occur. FS Resp. at 24 n.19; 25-26. In so doing, the Forest Service tries to

distinguish this case from that presented in Siskiyou, 87 F.Supp.2d 1074, based on the scale of the environmental impact.

For instance, the Forest Service admits that "[t]he Siskiyou court did rule on the particular facts of that case, that while acceptance of an NOI is not a major federal action, the plaintiffs had presented evidence that the NOI's challenged there, when considered together, warranted evaluation in a single EA. Id. at 1102 ('three of the projects involved the use of five or six inch suction dredges to move 40-50 cubic yards of streambed material in eight difference claims.')" FS Resp. at 24 n.19.

However, the Forest Service ignores the fact that the Record in this case demonstrates an **even greater** impact from just The New 49'ers, Inc.'s NOI alone on the Klamath National Forest (not even including the multiple additional NOI's approved by the agency). The New 49'ers, Inc.'s NOI (approved by the Klamath National Forest), states that "[d]redges range from quite small 2-inch models up to 6-inch dredges along the creeks – **and up to 8-inch models** on the Klamath River." AR0033 (emphasis added). Further, this NOI alone proposes suction dredging on 35 miles of stream course, a dredge density of no more than ten (10) dredges per river mile and an average of 10 active dredges per day, with each dredge removing an estimated ¼ cubic yard of material each day. AR 0033-0034.

While the dredges in the Siskiyou case whose cumulative impacts triggered NEPA were to remove 40-50 cubic yards over the entire dredge season, the 10 "average" dredges approved just under this one NOI on the Klamath would excavate this same volume in a mere 20 days of operation at ¼ cubic yards per day. The Record in this case amply demonstrates the proof the agency says is necessary to fall within the purview of the Siskiyou court's holding. As such, this Court, like was done in Siskiyou, should hold that, at a minimum, the cumulative effect of all of this suction dredging triggers the Forest Service's duty to conduct a proper NEPA analysis.

VI. CONCLUSION

Accordingly, this Court should grant the Karuk Tribe's motion for summary judgment and issue the appropriate relief as discussed in the Tribe's Opening Brief, at 24-25.

Respectfully submitted this 24th day of May, 2005.

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CERTIFICATE OF SERVICE

I certify that on May 24, 2005, I electronically filed the foregoing Plaintiff's Reply with the Clerk of the Court, using the CM/ECF system, which will send notification of such filing to the following:

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