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18

19 **UNITED STATES DISTRICT COURT**  
20 **NORTHERN DISTRICT OF CALIFORNIA**  
21 **SAN FRANCISCO DIVISION**

21 KARUK TRIBE OF CALIFORNIA, )  
22 )  
23 Plaintiff, )  
24 v. )  
25 UNITED STATES FOREST SERVICE, )  
26 JEFF WALTER, Forest Supervisor, Six Rivers )  
National Forest; MARGARET BOLAND, )  
27 Forest Supervisor, Klamath National Forest, )  
28 Defendants. )

Civ. No. 04-4275 (SBA)

**DEFENDANTS' PARTIAL  
MOTION TO DISMISS  
PLAINTIFF'S SECOND  
AMENDED COMPLAINT  
AND MEMORANDUM  
IN SUPPORT**

Date: April 26, 2005  
Time: 1:00 p.m.  
Courtroom 3, 3rd Floor

1 **MOTION**

2 Defendants the United States Forest Service (“Forest Service”), Jeff Walter in his official  
3 capacity as Forest Supervisor of the Six Rivers National Forest (“SRNF”), and Margaret Boland  
4 in her official capacity as Forest Supervisor of the Klamath National Forest (“KNF”)  
5 (collectively, “Defendants”), hereby move to dismiss Plaintiff’s claims against the Six Rivers  
6 National Forest pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. This motion  
7 is noticed for 1:00 p.m. on April 26, 2005. Defendants have conferred with counsel for Plaintiff,  
8 who oppose this motion.

9 Defendants ask that this motion be granted because none of the final agency actions  
10 identified in Plaintiff’s second amended complaint took place on the Six Rivers National Forest,  
11 and Jeff Walter, Forest Supervisor of the Six Rivers National Forest is not properly a Defendant  
12 in this actions. As explained below, Defendants respectfully request that this Court grant their  
13 motion.

14  
15 **MEMORANDUM**

16 **I. INTRODUCTION**

17 This case involves challenges under seven federal statutes to the regulation of suction dredge  
18 mining –a mechanical method of instream mining –on the Six Rivers and Klamath National Forests  
19 in northern California. Plaintiff, the Karuk Tribe of California (“Plaintiff” or “the Tribe”), alleges  
20 violations of the Clean Water Act (CWA), Endangered Species Act (ESA), National Environmental  
21 Policy Act (NEPA), National Forest Management Act (NFMA), Organic Administration Act of 1897  
22 (Organic Act), and various regulations.

23 Specifically, Plaintiff’s second amended complaint challenges four Forest Service  
24 determinations to allow mining operations to be conducted under notices of intent (NOIs), rather  
25 than requiring plans of operation (PoOs) for those operations. Plaintiff also challenges five  
26 instances in which the agency did require PoOs, contending the agency failed to comply with the  
27 additional requirements a PoO allegedly triggers: analysis under NEPA, consultation under the  
28 ESA, and permit requirements under the CWA.

1 All of the nine mining determinations challenged by Plaintiff were made by officials of the  
2 Klamath National Forest and the operations pursuant to the challenged determinations all occurred  
3 within the Klamath National Forest. Because Plaintiff does not challenge any determination made  
4 by officials of the Six Rivers National Forest, Defendant Jeff Walter, Forest Supervisor for the Six  
5 Rivers National Forest must be dismissed from this litigation.

## 6 **II. PROCEDURAL BACKGROUND**

7 Plaintiff, the Karuk Tribe of California, filed its Complaint for Declaratory and Injunctive  
8 Relief in this case on October 8, 2004. (Docket No. 1) On October 15, 2004, Plaintiff filed an  
9 Amended Complaint for Declaratory and Injunctive Relief. (Docket No. 3) The Amended  
10 Complaint broadly challenged the Forest Service's regulation of suction dredge mining on the  
11 Klamath and Six Rivers National Forests, asserting that the Forest Service was permitting mining  
12 on both Forests in violation of the ESA (Count One), NFMA (Counts Two and Three), Organic Act  
13 (Counts Four, Seven), CWA (Count Five), NEPA (Count Six), and various regulations. See Pl.'s  
14 Am. Compl. ¶ 1.

15 Plaintiff's first amended complaint failed to identify any specific mining operations where  
16 the Forest Service had allegedly acted illegally, as is required for judicial review under the  
17 Administrative Procedure Act (APA). Moreover, Plaintiff sought to bring a claim under the CWA  
18 citizen suit provision, but failed to provide 60-day notice as required by that statute. Thus, on  
19 December 14, 2004, Defendants filed a motion to dismiss Plaintiff's first amended complaint.  
20 (Docket No. 17).

21 On January 19, 2005, prior to the adjudication of Defendants' motion to dismiss, the parties  
22 entered a stipulation under which Defendants would dismiss their motion to dismiss without  
23 prejudice, and Plaintiff would file a second amended complaint challenging specific instances of  
24 mining operations which they believed violated the law. (Docket No. 20)

25 On January 31, 2005, Plaintiff filed its second amended complaint. (Docket No. 29) There  
26 Plaintiff identified nine specific mining operations it believes violated the law. 2<sup>nd</sup> Am. Comp. at  
27 ¶¶ 3, 5. Plaintiff also dropped its claims under the citizens suit provision of the CWA.  
28

1 **III. STANDARD OF REVIEW**

2 Jurisdiction is a threshold issue that should be addressed before considering the merits. Steel  
3 Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-96 (1998); McCarthy W. Constructors v. Phoenix  
4 Resort Corp., 951 F.2d 1137, 1140 (9th Cir. 1991). “Defects in subject matter jurisdiction may be  
5 raised at any time, by the parties or by the court on its own motion, and may never be waived.”  
6 Cripps v. Life Ins. Co. of N. Am., 980 F.2d 1261, 1264 (9th Cir. 1992). The burden of proving  
7 subject matter jurisdiction in this case rests upon Plaintiff, which is the “party invoking the federal  
8 court’s jurisdiction.” Thompson v. McCombe, 99 F.3d 352, 353 (9th Cir. 1996). If the court finds  
9 that it lacks subject matter jurisdiction, then it “shall dismiss the action.” Fed. R. Civ. P. 12(h)(3).

10 The Ninth Circuit permits the attachment of materials outside of the pleadings under a  
11 12(b)(1) motion to dismiss for the sole purpose of proving jurisdictional matters. See, e.g.,  
12 McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988) (“[W]hen considering a motion to  
13 dismiss pursuant to rule 12(b)(1) the district court is not restricted to the face of the pleading, but  
14 may review any evidence . . . to resolve factual disputes concerning the existence of jurisdiction.”).  
15 Consideration of materials outside the pleadings for the purposes of addressing jurisdiction under  
16 12(b)(1) does not convert the motion to dismiss into one for summary judgment. Biotics Research  
17 Corp. v. Heckler, 710 F.2d 1375, 1379 (9th Cir. 1983).

18 **IV. ARGUMENT**

19 **A. All Claims Against the Six Rivers National Forest Must be Dismissed Because**  
20 **Plaintiff has Failed to Identify any Final Agency Action Taken by an Officer of**  
21 **that Forest.**

22 Under the APA, this Court is without jurisdiction over the Six Rivers National Forest unless  
23 a specific final agency action by that forest has been challenged. Plaintiff, despite twice amending  
24 its complaint, has not identified a final agency action taken by officials of the Six Rivers National  
25 Forest. All claims against Defendant Walter, as Forest Supervisor for the Six River’s National  
26 Forest, must therefore be dismissed from this litigation.

27 Plaintiff’s claims in this litigation are all subject to judicial review under the standards set  
28 forth in the APA. Three of the statutes invoked by Plaintiff –NEPA, NFMA, and the Organic Act–  
do not contain a waiver of sovereign immunity or create a private right of action. See Marsh v.

1 Oregon Natural Res. Council, 490 U.S. 360, 377 n.23 (1989) (no private cause of action under  
2 NEPA); Ecology Ctr., Inc. v. United States Forest Serv., 192 F.3d 922, 924 (9th Cir. 1999) (same  
3 as to NFMA); see also 16 U.S.C. §§ 473-475, 477-482, 551 (same as to Organic Act). Thus, review  
4 of claims under those statutes may only proceed, if at all, pursuant to the APA, 5 U.S.C. §§ 701-706.  
5 See, e.g., ONRC Action v. Bureau of Land Management, 150 F.3d 1132, 1135 (9th Cir. 1998)  
6 (reviewing alleged NEPA violation under the APA); Ecology Ctr., 192 F.3d at 924 (reviewing  
7 alleged NFMA violation under APA); Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 471  
8 (9th Cir. 2000) (reviewing Organic Act claim under APA).

9 Both the CWA and the ESA include citizen suit provisions creating independent causes of  
10 action. See 33 U.S.C. § 1365(a) (authorizing certain citizen suits under CWA); 16 U.S.C. §  
11 1540(g)(1) (same under ESA). Courts reviewing claims brought under the ESA citizen suit  
12 provision still apply the APA standard of review. See Southwest Ctr. for Biological Diversity v.  
13 United States Bureau of Reclamation, 143 F.3d 515, 522 (9th Cir. 1998); Friends of Endangered  
14 Species, Inc. v. Jantzen, 760 F.2d 976, 981-82 (9th Cir. 1985); Cabinet Mountains Wilderness v.  
15 Peterson, 685 F.2d 678, 685 (D.C. Cir. 1982). Additionally, where CWA claims are brought under  
16 the Federal facilities provision, 33 U.S.C. § 1323, rather than the citizen suit provision, courts in the  
17 Ninth Circuit apply the APA standard of review. See Idaho Sporting Cong. v. Thomas, 137 F.3d  
18 1146, 1153 (9th Cir. 1998) (state antidegradation standard made applicable to Forest Service through  
19 33 U.S.C. § 1323 and reviewable under APA); Oregon Natural Res. Council v. United States Forest  
20 Serv., 834 F.2d 842, 843 (9th Cir. 1987) (claim that timber sale on Forest Service land violated state  
21 water quality standards was reviewable under APA).

22 The APA waives the United States' sovereign immunity only as to discrete final agency  
23 actions. 5 U.S.C. § 704. See Ecology Ctr., 192 F.3d at 924. Plaintiffs may not “seek *wholesale*  
24 improvement of [a] program by court decree . . . respondent must direct its attack against some  
25 particular ‘agency action’ that causes it harm.” Lujan v. National Wildlife Fed’n, 497 U.S. 871, 891  
26 (1990) (emphasis in original). Moreover, under the APA, the remedy of injunctive relief is available  
27 only when the court has jurisdiction over the claims and parties before it. Department of the Army  
28 v. Blue Fox, Inc., 525 U.S. 255, 261 (1999).

1 After initially failing to identify any individual mining operations, Plaintiff amended its  
2 complaint to identify nine individual operations, four NOIs and five PoOs. See 2<sup>nd</sup> Am. Compl. at  
3 ¶¶ 3, 5. All of these specific determinations were made by officials of the Klamath National Forest,  
4 and all operations pursuant to those determinations took place on the Klamath National Forest. See  
5 Declaration of Linda West, attached hereto as Exhibit 1. Despite not identifying any allegedly  
6 illegal decision by Defendant Walter or any other official of the Six Rivers National Forest, Plaintiff  
7 asks this Court to impose an injunction barring all mining in Riparian Reserves in the Six Rivers  
8 National Forest, an area that comprises approximately 14 percent of the land within the Six Rivers  
9 National Forest.<sup>1/</sup> Without a final agency action taken by Defendant Walter or any other official of  
10 the Six Rivers National Forest, this Court is without jurisdiction over Defendant Walter and the Six  
11 Rivers National Forest, and all claims against Defendant Walter must be dismissed.

## 12 VII. CONCLUSION

13 For the foregoing reasons, this Court should grant Defendants' partial motion dismiss and  
14 should dismiss to claims against Defendant Walter and the Six Rivers National Forest. A proposed  
15 order is attached hereto.

16 Respectfully submitted this 17th day of March, 2005,

17  
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23 <sup>1/</sup> The Forest Service manages 960,000 acres of National Forest System land on the Six  
24 Rivers National Forest. See Exhibit F to Defendants [first] Motion to Dismiss (docket no. 17) at  
25 at III-11. On the Six Rivers, about 141,509 acres (14.7%) are classified as “[r]iparian.” Defs.’  
26 Ex. F at IV-iii. This figure probably underestimates Riparian Reserves, however, because it does  
27 not include Riparian Reserves which overlap with some other land use allocations, such as Late  
28 Successional Reserves. See id. at IV-ii (figures shown for Riparian Reserves “only reflect those  
Riparian Reserves that are interspersed throughout the matrix”). To arrive at the figure of  
141,509 acres, the Riparian Reserves interspersed in the matrix (103,476) were added to  
Riparian Reserves listed as overlapping administratively withdrawn areas (4,730) and adaptive  
management areas (33,303). Id. at IV-iii. Where two such allocations overlap, “the standards  
and guidelines of both allocations apply.” Id. at IV-ii.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on March 17, 2005, I electronically filed the foregoing PARTIAL  
3 MOTION TO DISMISS AND MEMORANDUM IN SUPPORT with the Clerk of the Court  
4 using the CM/ECF system which will send notification of such filing to the following:

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