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12 **UNITED STATES DISTRICT COURT**  
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

14 **KARUK TRIBE OF CALIFORNIA,**

15 )  
16 Plaintiff,

17 vs.

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

21 Defendants  
22 )

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

INTRODUCTION

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

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

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

2 JURISDICTION AND VENUE

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

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

16 INTRADISTRICT ASSIGNMENT

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

20 PARTIES

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

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

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

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

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

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

## 16 17 FACTUAL AND REGULATORY BACKGROUND

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

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

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

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

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

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

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

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

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

22 21. Sediment from suction dredging operations absorbs solar radiation and causes water  
23 temperature to increase.

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

1 23. Suction dredge operations in the streams and rivers of the Six Rivers and Klamath  
2 National Forests cause significant disturbance of surface resources, direct injury to Southern  
3 Oregon/Northern California coho salmon and the other fish species listed in paragraph 14, and  
4 degrade their habitat, and cause or contribute to degradation of water quality.

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

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

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

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

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

#### 16 The Failure to Properly Regulate Mining by the Forest Service

17 28. The Forest Service intends to allow in the coming months, and has allowed, motorized  
18 suction dredge, mechanized sluicing, and other mining in and along these waterways without  
19 requiring a Plan of Operations (“PoO”) for each proposed mining operation (i.e., such operations  
20 could proceed simply by submitting a Notice of Intent (NOI) to the Forest Service), and without  
21 conducting the required consultation with federal wildlife agencies such as NOAA Fisheries and  
22 the Fish and Wildlife Service (“FWS”).

23 29. For example, in meetings with the Tribe, the Forest Service informed the Tribe that the  
24 agency would be allowing suction dredge and other mining to occur without following the  
25 requirements of the Forest Plans for the Six Rivers and Klamath National Forests. The agency  
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1 informed the Tribe that it believed the agency could accept only a Notice of Intent (NOI) from  
2 mine operators, and was not required to require mining operators to submit a Plan of Operation  
3 (PoO). In accepting an NOI for mining, instead of requiring the operator to submit a PoO, the  
4 agency does not conduct the required NEPA and ESA reviews/consultation, does not conduct  
5 consultation with the Tribe, provides no public notice, and does not require compliance with the  
6 CWA, ESA, and NFMA. Indeed, the Klamath National Forest has already issued such NOIs  
7 during the summer of 2004.

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

16 31. The Forest Service intends to allow mining operations to occur under NOIs in and along  
17 the Klamath, Salmon, and Scott Rivers and their tributaries. The agency does not require a PoO,  
18 does not prepare an EA or EIS under NEPA, does not require a Section 401 Certification under  
19 the CWA, and does not consult with any federal wildlife agency such as NOAA Fisheries or the  
20 FWS regarding the mining to be conducted under an NOI.

21 32. The Forest Service has also allowed an unknown amount of mining conducted on mining  
22 claims owned or controlled by the “New 49ers Club,” or its principal/General Manager, David  
23 McCracken (collectively, the “New 49ers Club,” or “Club”). The Club’s webpage is  
24 [www.goldgold.com](http://www.goldgold.com) which details the Club’s and its members’ activities. This “Club” obtains its  
25 primary revenues from its “members” that are allowed to mine the Club’s 60 or more miles of  
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1 mining claims in these waters. As stated on the Club’s website: “Our mission is to give you as  
2 much hassle-free, proven gold prospecting opportunity as possible at a truly affordable price.”  
3 <http://www.goldgold.com/generalinformation.htm>. In 2003, the Forest Service approved a PoO  
4 for the Club that authorized the Club’s members to conduct suction dredge and/or mechanical  
5 sluicing on the Klamath River and its tributaries. In 2004, the Klamath National Forest accepted  
6 an NOI from the Club for its activities. In neither case (Plan(s) of Operation or NOIs) did the  
7 Forest Service conduct the required NEPA review and ESA consultation. The New 49ers Club is  
8 incorporated in the State of California.

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

1 Membership in the Club does not mean that the member is the owner of any of the mining claims  
2 owned by the Club.

3 34. On information and belief, other similarly-situated mining “clubs,” groups, or  
4 associations conduct similar commercial activities on the Klamath, Salmon, and Scott Rivers and  
5 their tributaries. The illegalities alleged in this Complaint regarding the Forest Service’s actions  
6 or omissions involving the New 49ers Club apply equally to any similar agency action or  
7 omission involving any other mining club, group, or association.

8  
9 Failure to Comply with the Endangered Species Act

10 35. Section 7(a)(2) of the ESA requires all federal agencies, including the Forest Service, to  
11 “insure that any action authorized, funded or carried out by such agency ... is not likely to  
12 jeopardize the continued existence of any endangered species or threatened species.” 16 U.S.C.  
13 § 1536(a)(2) (2004). To assist the agencies in complying with this mandate, they must consult  
14 with NOAA Fisheries/NMFS, the delegated agent of the Secretary of Commerce, or the FWS, as  
15 the delegated agent of the Secretary of the Interior, whenever their actions “may affect” a listed  
16 species. *Id.*; 50 C.F.R. § 402.14(a) (1986). Formal consultation results in a biological opinion  
17 from NOAA/NMFS or FWS that determines if the action is likely to jeopardize the species; if so,  
18 the opinion may specify reasonable and prudent alternatives that will avoid jeopardy and allow  
19 the agency to proceed with the action. 16 U.S.C. § 1536(b)(3)(A) (2004). NOAA/NMFS or  
20 FWS may also “suggest modifications” to the action during the course of consultation to “avoid  
21 the likelihood of adverse effects” to the species even when not necessary to avoid jeopardy. 50  
22 C.F.R. § 402.13 (1986).

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

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

11 38. The Forest Service is violating ESA § 7 by allowing mining activities that may jeopardize  
12 the threatened Southern Oregon/Northern California coho, as well as the other species listed  
13 above, in these watersheds without complying fully with the Northwest Forest Plan (“NFP”), the  
14 Forest Plans for the Six Rivers and Klamath National Forests, and completing adequate  
15 consultation with NOAA Fisheries/NMFS and/or FWS. The Forest Service has not completed a  
16 biological assessment/biological evaluation nor obtained a biological opinion for mining  
17 activities within Riparian Reserves on the Six Rivers and Klamath National Forests, therefore  
18 violating the ESA.

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

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

10 41. The agency must take extra measures to ensure protection of these species, including  
11 consultation with NOAA/NMFS and/or FWS and safeguarding against a "take," in compliance  
12 with the ESA. For example, no mining applicant has applied for an NPDES permit or provided  
13 the Forest Service with information necessary for the agency to determine the impact of pollution  
14 resulting from the mining operations on water quality and listed species, making it impossible for  
15 the Forest Service to ensure compliance with the ESA and the CWA.

16 42. Finally, the Forest Service has not determined whether mining activities will result in the  
17 destruction or adverse modification of designated critical habitat for coho and other species.  
18 Such destruction or adverse modification of critical habitat for these species is prohibited by the  
19 ESA and cannot be allowed by the Forest Service. In this case, mining activities such as suction  
20 dredge mining and highbanking/mechanical sluicing results in this destruction or adverse  
21 modification of critical habitat for coho and other species, and, thus, cannot be allowed under the  
22 ESA. These mining activities can harm stream functions necessary for coho survival. These  
23 functions include proper temperature, sediment delivery, and streambank and substrate stability.

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

#### 7 Failure to Comply with the Organic Act of 1897

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

20 45. The 228A regulations state that in proposing a mining operation, the applicant must fully  
21 describe “measures to be taken to meet the requirements for environmental protection in §  
22 228.8.” 36 CFR 228.4(c)(3) (1974). These requirements for environmental protection state that  
23 the “[o]perator shall comply with all applicable Federal and State water quality standards,  
24 including regulations issued pursuant to the Federal Water Pollution Control Act, as amended  
25 (33 U.S.C. 1151, *et seq.*)[the Clean Water Act].” 36 CFR § 228.8(b) (1974). The 228A  
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1 regulations also require that “in addition to compliance with water quality and solid waste  
2 disposal standards required by this section, operator shall take all practicable measures to  
3 maintain and protect fisheries and wildlife habitat which may be affected by the operations.” 36  
4 CFR § 228.8(e) (1974). Thus, the 228A regulations impose an affirmative duty on the mining  
5 applicant to provide the Forest Service with sufficient information to demonstrate the ability to  
6 comply with the CWA and protect fisheries. In allowing or authorizing suction dredge,  
7 mechanical sluicing and other mining in the affected waters without meeting the requirements  
8 noted in this paragraph, the agency has violated the Organic Act and its implementing  
9 regulations, especially 36 CFR Part 228A.

10 46. The Forest Service considers the suction dredge and mechanical sluicing mining  
11 activities of the members of the New 49ers Club, and the Club itself, to be authorized by the  
12 Mining Law of 1872, 30 U.S.C. §§ 22-47 (2004), and regulated under 36 CFR Part 228A.  
13 Similarly, the Forest Service considers the suction dredge and mechanical sluicing mining  
14 activities of non-members of the New 49ers Club, including private individuals and/or  
15 “members” of other similarly situated mining clubs, groups, or associations, to be authorized by  
16 the Mining Law of 1872 and regulated under 36 CFR Part 228A.

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

1 48. Recreational mining by the members of the Club, or by any person, is not authorized by  
2 the Mining Law of 1872. The selling of memberships by the Club as a precondition to allowing  
3 members to conduct mining operations on the Club’s mining claims is not authorized by the  
4 Mining Law of 1872 and is not a *bone fide* mining operation under the 1872 Mining Law. The  
5 primary purpose for the Club’s location and holding of its mining claims is not for the Club itself  
6 to conduct mining operations.

7 49. The suction dredge and mechanical sluicing mining operations conducted by the  
8 members of the Club are conducted primarily for recreational enjoyment, and not to obtain  
9 substantial revenues above and beyond the total financial cost to the members to conduct such  
10 operations. Suction dredge and mechanical sluicing mining by Club members are not conducted  
11 primarily as profit making enterprises.

12 50. At a minimum, “members” of the New 49ers Club must obtain an approved PoO and  
13 other required permits, certifications, approvals and authorizations prior to conducting any  
14 suction dredge and/or mechanical sluicing/highbanking.

15 51. Additionally, the New 49ers Club itself must obtain a valid Special Use Authorization  
16 under 36 CFR Part 251 for its actions in allowing its members’ use of, and access to, the Club’s  
17 mining claims. The New 49ers Club, and/or similarly situated and operated and organized  
18 mining clubs, groups or associations, are conducting a “commercial use or activity” as defined at  
19 36 CFR § 251.51 (1980) (“any use or activity on National Forest System lands (a) where an entry  
20 or participation fee is charged, or (b) where the primary purpose is the sale of a good or service,  
21 and in either case, regardless of whether the use or activity is intended to produce a profit.”).

22 Failure to Comply with the National Forest Management Act

23 52. In addition to required compliance with the Organic Act and the Part 228A and 251  
24 regulations, the Forest Service must ensure that all activities authorized on the national forests  
25 comply with the Forest Plan for that particular forest. The NFMA requires that all Forest Service  
26



1 projects and activities "shall be consistent with the land management plans." 16 U.S.C. § 1604(i)  
2 (2004). The Forest Service must follow the Standards and Guidelines set forth in the Six Rivers  
3 and Klamath Forest Plans at the project-decision level.

4 53. The Forest Plans for the Six Rivers and Klamath National Forests, along with the NFP,  
5 contains the Aquatic Conservation Strategy ("ACS"), which is designed to protect aquatic habitat  
6 affected by activities on public forest land. The Forest Plans for the Six Rivers and Klamath  
7 National Forests, written after the NFP was issued, incorporate the NFP. *See, e.g.*, Klamath Plan  
8 at 1-1. Thus, the requirements of the NFP, as well as the Six Rivers and Klamath Forest Plans,  
9 apply to the actions and decisions of officials of the Six Rivers and Klamath National Forests.  
10 The ACS includes standards, guidelines, and objectives that require management of forests to  
11 "maintain and restore" properly functioning aquatic habitat.

12 54. The Six Rivers Forest Plan establishes a set of Aquatic Conservation Strategy Objectives  
13 which must be met:

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

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

55. "Management actions that do not maintain the existing condition or lead to improved  
conditions in the long term would not 'meet' the intent of the Aquatic Conservation Strategy and  
thus, should not be implemented." Six Rivers Plan at IV-110. The Forest Service's analysis

1 shows that mining activities will not “maintain and restore” aquatic habitat, and in many cases,  
2 will actively hinder restoration of the watersheds which are already highly degraded. *See*  
3 Grunbaum (USFS), Summary of Fisheries Issues Concerning Suction Dredge Mining, USFS  
4 April 20, 2004.

5 56. Riparian Reserves (RRs) are a key component of the ACS, the NFP, and the Six Rivers  
6 and Klamath Forest Plans. For example, in the Klamath Forest Plan, the Minerals Management  
7 Standards and Guidelines for mining in Riparian Reserves include MA 10-33 and MA-34. These  
8 provisions state:

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

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

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

17 57. Suction dredge mining is a “mineral operation” for the purposes of the Six Rivers,  
18 Klamath, and Northwest Forest Plans. Highbanking or mechanical sluicing is a “mineral  
19 operation” for the purposes of the Six Rivers, Klamath, and Northwest Forest Plans.

20 58. For fish bearing streams such as the Salmon, Klamath and Scott Rivers and their  
21 tributaries, Riparian Reserves are defined as:

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

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

2 59. Suction dredge mining occurs within Riparian Reserves as defined in the previous  
3 paragraph. Highbanking or mechanical most likely occurs within the boundaries of the Riparian  
4 Reserve, as well.

5 60. The Forest Service is violating the Aquatic Conservation Strategy Objectives and the  
6 Minerals Management Standards and Guidelines of the Six Rivers and Klamath Forest Plans  
7 (and the NFP), by allowing mining to occur in Riparian Reserves without requiring an approved  
8 PoO, reclamation plan and reclamation bond (including the environmental protection, public  
9 review and NEPA requirements of these regulations). In addition, the Forest Service is violating  
10 the intent of the ACS by permitting mining activities, including so-called “recreational” suction  
11 dredging, that degrade and do not restore conditions in Riparian Reserves.

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

23 62. Individually and cumulatively, the impacts from suction dredge and other mining in and  
24 along these waters is significant. *See Grunbaum* (“Because of the potential significance of  
25 suction dredging in waters with threatened species, suction dredge operators are required to file a  
26

1 POP [Plan of Operations] that must be analyzed by the FS to determine terms and conditions  
2 necessary for protection of surface resources prior to approval.”).

3 63. “Watershed analysis is required prior to management activities, except minor activities  
4 such as those Categorically Excluded under NEPA (and not including timber harvest).” Klamath  
5 Plan, Chp. 4-25, 6-26. “Within Key Watersheds, require restoration and mitigation measures in  
6 mineral operating plans as needed to prevent degradation of the riparian resource. Also require a  
7 performance bond sufficient enough to restore the damaged area.” Chp. 4-26, 6-37. “Watershed  
8 analyses must be completed before initiating actions within a Key Watershed, except that in the  
9 short term, until watershed analysis can be completed, minor activities such as those that would  
10 be categorically excluded under NEPA regulations (except timber harvest) may proceed if they  
11 are consistent with Aquatic Conservation Strategy Objectives and Riparian Reserves and  
12 standards and guidelines are applied. Timber harvest, including salvage, cannot occur in Key  
13 Watersheds without a watershed analysis.” Chp. 4-26, 6-38. The Forest Service has not  
14 conducted, and does not intend to conduct the required Watershed Analysis for each of the  
15 proposed suction dredge and mechanical sluicing operations in the Six Rivers and Klamath  
16 National Forests – in violation of the Klamath (and Six Rivers) Forest Plans and the NFMA  
17 accordingly.

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

23 65. The NFMA imposes additional substantive duties on the Forest Service, one of which is  
24 the duty to “provide for diversity of plant and animal communities.” 16 U.S.C. 1604(g)(3)(B)  
25 (2004). Regulations at 36 CFR § 219.19 (2000) ensures such diversity by “maintain[ing] or  
26

1 restor[ing] ecological sustainability to provide a sustainable flow of uses, values, products, and  
2 services.” *See also* 36 CFR 219.20(a)(2)(i), (b) (2000). In further implementing this statutory  
3 directive, the regulations state, “Plan decisions affecting species diversity must provide for  
4 ecological conditions that the responsible official determines provide a high likelihood that those  
5 conditions are capable of supporting over time the viability of native and desired non-native  
6 species well distributed throughout their ranged within the plan area.” 36 CFR 219.20(b)(2)(i)  
7 (2000). “Species viability” is defined as “[a] species consisting of self-sustaining and interacting  
8 populations that are well distributed through the species' range. Self-sustaining populations are  
9 those that are sufficiently abundant and have sufficient diversity to display the array of life  
10 history strategies and forms to provide for their long-term persistence and adaptability over  
11 time.” 36 CFR 219.36 (2000).

12 66. This duty to ensure viable, or self-sustaining, populations, applies with special force to  
13 “sensitive” species. “Sensitive species were identified by the Regional Forester due to concerns  
14 for the viability of their populations. These concerns were evidenced by significant current or  
15 predicated downward trends in population numbers, density, and/or habitat quality and quantity.”  
16 Klamath Plan, Chp. 3-8. Forest Service sensitive species in the Klamath National Forest include  
17 Great gray owl, Willow Flycatcher, Northern goshawk, American marten, Pacific fisher, Western  
18 pond turtle, and American Peregrine Falcon. Chapter 4-28, 8-17. The Forest Service must  
19 evaluate the possible effects of suction dredge and other mining on “sensitive” species. In order  
20 to prevent harm to sensitive species, the FS is required to “[r]eview all Forest Service planned,  
21 funded, executed or permitted programs and activities for possible effects on TE&S [threatened,  
22 endangered, and sensitive] species.” Klamath Plan, Chapter 4-27, 8-3. The Klamath Plan further  
23 states that “[s]treams and lakes will be managed to maintain or improve habitat for aquatic  
24 species, especially TE&S species.” Chapter 4-33, 9-1. To protect biological diversity, the FS  
25 must “[m]anage to maintain the structure, composition, and function of forest, rangeland, and  
26

1 aquatic ecosystems within the range of natural variability. Implement management actions in a  
2 manner that complements ecological processes and promotes long-term sustainability.” Klamath  
3 Plan Chp. 4-22, 6-1.

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

15 68. The Klamath Forest Plan mandates that the agency utilize the aforementioned  
16 information to avoid impacts to sensitive species in implementing projects. *See* Klamath Forest  
17 Plan, page 4-28, 8-18 (“Avoid or minimize impacts to Sensitive species where possible. If  
18 impacts cannot be avoided, analyze the potential effects on the population or its habitat within  
19 the landscape and on the species as a whole. Projects should not jeopardize species viability or  
20 create significant trends toward the need for Federal listing (FSM 2670.22) of Sensitive  
21 species.”) The Plan further states that projects should review opportunities to benefit aquatic  
22 habitat. “Project-level planning should review the opportunities available to improve or maintain  
23 aquatic habitat. Through the interdisciplinary process, the cause of the problem should be  
24 identified and treated as well as the effects. In-stream restoration measures are usually  
25 considered short-term and will be accompanied by riparian and upslope restoration to achieve  
26

1 long-term watershed restoration. Prioritize projects as follows: 1) Protection vs. mitigation. 2)  
2 Long-term vs. short-term. 3) Benefits TE&S species. 4) Benefits multi-species (flora and fauna).  
3 5) Benefits other species.” Ch. 4-33, 9-4.

4 69. Similarly, the Forest Plan for the Six Rivers National Forest directs the Forest Service to  
5 review the impacts to, and protect, sensitive species. In order to implement this directive, the  
6 Plan mandates that project proposals evaluate their effects on “sensitive” species. Six Rivers  
7 Forest Plan, Chapter IV-2 (“Habitat to support threatened and endangered species will remain  
8 protected in accordance with recovery plans while the habitat needs of sensitive species will be  
9 addressed at the landscape and project proposal level through the environmental analysis  
10 process.”). “**All proposed projects** that involve disturbance to wildlife habitat and have the  
11 potential to impact listed or sensitive wildlife species will be evaluated to determine if any listed  
12 species are present. Where such species are present, a biological evaluation will be used to  
13 determine the potential effect on the species, and the environmental assessment will prescribe  
14 mitigation measures consistent with Forest management objectives. Proposed actions **will be**  
15 **prohibited** if they are found likely to adversely affect the continued existence of the species or  
16 the maintenance of viable populations throughout their existing range.” Six Rivers Plan at IV-  
17 101 (emphasis added).

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

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

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

14 73. In failing to adequately review, and protect against, the impacts from suction dredge and  
15 other mining in and along the Klamath, Salmon, and Scott Rivers and their tributaries, the Forest  
16 Service violated the above-noted 36 CFR Part 219 regulations, the Forest Plans of the Six Rivers  
17 and Klamath National Forests, and the NFMA.

18 74. Regarding the impacts from mining on the Tribe’s and its’ members cultural, religious,  
19 historical, and subsistence uses of the affected waterways, the Forest Service must “[p]rovide for  
20 Native American needs for collection and/or use of traditional resources.” Klamath Plan Ch. 4-  
21 64, 24-24. In so doing, the agency must “[c]onsult and coordinate on all projects that have the  
22 potential to affect Native American values.” Ch. 4-64, 24-27.

23 75. The FS must “[c]onsult and coordinate on projects that have the potential to affect Native  
24 American values.” Six Rivers Plan IV-116, 10-2. “Programs and activities should be  
25 administered to have regard for and be sensitive to traditional Indian religious beliefs and  
26



1 cultural practices.” Six Rivers Plan IV-116, 10-7. Neither the Six Rivers nor Klamath National  
2 Forests have notified the Tribe as to the location of individual proposed and/or approved suction  
3 dredge and mechanical sluicing mining operations that may or will occur starting July 1, 2004.  
4 In allowing and/or approving suction dredge and other mining, the Forest Service did not comply  
5 with these Forest Plan requirements, in violation of the NFMA and the agency’s consultation and  
6 trust duties owed to the Tribe.

7 76. The Klamath Plan’s map for Management Area 8 (see appendix to the Klamath Forest  
8 Plan) indicates that some of proposed or likely mining activities are in “cultural areas.” This  
9 includes the Klamath River between Happy Camp and Somes Bar, and especially in and around  
10 Somes Bar itself. The designated “cultural areas” “have significant historic, as well as  
11 contemporary, spiritual values for the Karuk Tribe of California. These areas are to be managed  
12 to maintain special Native American values.” Klamath Plan Ch. 4-101. One of the goals of the  
13 “cultural areas” is “to preserve and protect the solitude and privacy of Native American users.”  
14 *Id.* “The integrity of the area for use by the Karuk Tribe of California is maintained in a manner  
15 consistent with their custom and culture.” *Id.* Pursuant to this section, the agency should “not  
16 direct recreational use to Native American cultural areas. River-related recreational use will be  
17 managed to minimize conflicts.” Klamath Plan Ch. 4-101, MA8-5. Furthermore, “[d]eveloped  
18 recreational activities **shall not** be planned within cultural areas.” Ch. 4-102, MA8-6 (emphasis  
19 added). The Klamath Plan also states that “[p]rotection of these areas from religious intrusions  
20 or damage to the area should be coordinated with the Karuk Tribe of California.” Ch. 4-102,  
21 MA 8-9. Finally, the agency must “[m]anage mineral exploration within the cultural areas to  
22 maintain identified cultural values. Surface disturbances that adversely impact Native American  
23 values shall be mitigated wherever possible.” Ch. 4-102, MA 8-10.

24 77. In failing to adequately review, protect against, and notify the Tribe of, the impacts to the  
25 Tribe’s uses and interests in the affected waters from suction dredge and other mining in and  
26

1 along the Klamath, Salmon, and Scott Rivers and their tributaries, the Forest Service violated the  
2 Forest Plans of the Six Rivers and Klamath National Forests, the NFMA, as well as the trust and  
3 consultation responsibilities owed to the Tribe.

4 Failure to Comply with the Clean Water Act

5 78. The Forest Service must also ensure compliance with the CWA, 33 U.S.C. § 1151, *et seq.*  
6 (2004). Under Section 313 of the CWA, 33 U.S.C. § 1323 (2004), if a proposed mining operation  
7 cannot comply with state water quality standards, the Forest Service can not approve the operation.  
8 Section 313 requires compliance with “all Federal, State, interstate, and local requirements” for  
9 the discharge or runoff of pollutants on federal land. *Id.* This section places a duty on federal  
10 agencies to comply with federal CWA requirements, in addition to state water quality standards.  
11 Additionally, CWA § 313 applies to both point source and nonpoint source discharges on federal  
12 lands and waters.

13 79. Section 401 of the CWA also requires that the applicable state certify that any activity  
14 receiving a federal “license or permit” will comply with state water quality standards.  
15 CWA Section 401 requires that the state “certify” that all discharges from a federally-authorized  
16 project meet water quality requirements. 33 U.S.C. § 1341(a) (2004).

17 Any applicant for a Federal license or permit to conduct any activity including,  
18 but not limited to, the construction or operation of facilities, which may result in  
19 any discharge into the navigable waters, shall provide the licensing or permitting  
20 agency a certification from the State in which the discharge originates or will  
originate . . . that any such discharge will comply with the applicable provisions  
of sections 1311, 1312, 1312, 1316, and 1317 of this title.

21 ...  
22 No license or permit shall be granted until the certification required by this  
section has been obtained or has been waived .... No license or permit shall be  
granted if certification has been denied by the State....

23 33 U.S.C. § 1341(a)(1) (2004). Certification applies to all federal licenses and permits for  
24 activities which may result in a discharge. Forest Service approval of a mining PoO is a license  
25

1 or permit subject to Section 401. Forest Service approval of a special use authorization pursuant  
2 to 36 CFR Part 251 is a license or permit subject to Section 401.

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

9 A federal agency (Forest Service) cannot issue a permit or license or approve a plan of  
10 operations unless the certification has been obtained or waived. If certification is denied,  
11 the permit or license cannot be granted and a proposed plan of operations cannot be  
12 approved Section 401(a)(2), 33 U.S.C. 1341(a)(1).

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

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

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

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

26 The Forest Service has informed Plaintiff that, before the Plan [of Operations] can be  
processed and approved, he must (1) apply for and obtain from the U.S. Environmental  
Protection Agency ("EPA") a National Pollutant Discharge Elimination System  
("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 82. The Klamath and Six Rivers National Forests have authorized suction dredge and other  
5 mining without obtaining the required 401 certification from applicants for mining approval.

6 83. The Forest Service cannot approve any mining activity before the information and data  
7 necessary for CWA NPDES and/or section 404 permits have been obtained. Under the CWA,  
8 the Forest Service was obligated to assure itself that an NPDES permit was obtained before  
9 permitting the requested activity. The Forest Service cannot meet its duty under 36 CFR Part  
10 228A (or 36 CFR Part 251) and the CWA to ensure that the project will comply with the CWA  
11 without an understanding of the specific nature of the discharges.

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

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

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

6 Failure to Comply with the National Environmental Policy Act

7 87. NEPA requires federal agencies to prepare an Environmental Impact Statement (“EIS”)  
8 for any proposed major action that may significantly affect the quality of the environment. 42  
9 U.S.C. § 4332(2)(C) (2004). The Council on Environmental Quality (“CEQ”) promulgated  
10 uniform regulations to implement NEPA which are binding on all federal agencies. 40 C.F.R. §§  
11 1500.3 (1978), 1507.1 (1978).

12 88. Pursuant to the CEQ regulations, if a proposed action would normally be expected to  
13 have a significant impact on the environment, an EIS must be prepared. 40 C.F.R. § 1501.4  
14 (1978). If a proposed action is neither one normally requiring an EIS nor one that may be  
15 categorically excluded, the agency must prepare an Environmental Assessment. 40 C.F.R. §§  
16 1501.3 (1978), 1501.4 (1978), 1508.9 (1978). An EA must provide sufficient information and  
17 analysis to determine whether the agency must prepare an EIS, or in the alternative, a finding of  
18 no significant impact (FONSI). 40 C.F.R. §1508.9 (1978).

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

23 90. In violation of NEPA, the Forest Service has not prepared either an EIS or an EA for  
24 suction dredge, mechanical sluicing and other mining operations that it either has authorized or  
25 intends to authorize in 2004 on the Salmon, Klamath, and Scott Rivers and their tributaries. The  
26

1 Forest Service has not provided, nor does it intend to provide, notice to the general public and  
2 the Tribe, nor provided an opportunity for public and Tribal comment, on each suction dredge or  
3 mechanical sluicing mining operation that has been, or will be, allowed to occur in and along the  
4 Klamath, Salmon and Scott Rivers and their tributaries in 2004.

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

9  
10 **CLAIMS FOR RELIEF**

11 **COUNT ONE**

12 **ESA VIOLATION**

13 92. Plaintiff realleges all preceding paragraphs.

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

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

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

23 95. The Forest Service's failure to consult with these agencies and failure to ensure that its  
24 actions do not jeopardize the continued existence of listed species violate § 7(a)(2) of the ESA,  
25 16 U.S.C. § 1536(a)(2) (2004), and its implementing regulations.

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

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

8 **COUNT TWO**

9 **NFMA VIOLATION**

10 98. Plaintiff realleges all preceding paragraphs.

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

15 100. Standards and Guidelines of the NFP and the Six Rivers and Klamath National Forest  
16 Plans require that all mining operations in Riparian Reserves must have an approved PoO,  
17 reclamation plan and bond.

18 101. The Forest Service has allowed, and will allow, suction dredge and other mining  
19 operations to proceed in Riparian Reserves without the required approved plans of operation,  
20 reclamation plans and bonds. The Six Rivers and Klamath National Forests have taken the  
21 position that the acceptance of NOIs from mining operators, rather than requiring Plans of  
22 Operations, is within the discretion of the agency and that the agency does not have to comply  
23 with the Forest Plans' requirement that all operators are required to submit Plans of Operation  
24 for approval. Such a position violates the Forest Plans and the NFMA.

25 102. The Forest Service's actions and/or omissions were unlawfully withheld, not in  
26

1 accordance with the law, without observance of procedures required by law, and are arbitrary  
2 and capricious within the meaning of the APA. 5 U.S.C. §§ 702, 706 (2004).

3 **COUNT THREE**

4 **NFMA VIOLATION**

5 103. Plaintiff realleges all preceding paragraphs.

6 104. 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 and other regulations, the Forest Plans of the  
9 Six Rivers and Klamath National Forests, and the NFMA. In addition, in failing to adequately  
10 review, protect against, and consult with the Tribe regarding the impacts to the Tribe's uses and  
11 interests in the affected waters from suction dredge and other mining in and along the Klamath,  
12 Salmon, and Scott Rivers and their tributaries, the Forest Service violated the Forest Plans of the  
13 Six Rivers and Klamath National Forests, the NFMA, as well as the trust and consultation  
14 responsibilities owed to the Tribe.

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

18 **COUNT FOUR**

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

20 106. Plaintiff realleges all preceding paragraphs.

21 107. The Organic Act of 1897 authorizes the Forest Service to promulgate regulations for the  
22 national forests "to regulate their occupancy and use and to preserve the forests thereon from  
23 destruction." 16 U.S.C. § 551 (2004). The Forest Service's regulations governing operations  
24 authorized by the 1872 Mining Law are found at 36 CFR Part 228A, which require "all [mining]  
25 operations shall be conducted so as, where feasible, to minimize adverse environmental impacts on  
26



1 National Forest resources.” 36 CFR § 228.8 (1974). The Part 228A regulations state that in  
2 proposing a mining operation, the applicant must fully describe “measures to be taken to meet  
3 the requirements for environmental protection in § 228.8.” 36 CFR 228.4(c)(3) (1974). These  
4 requirements for environmental protection state that the “[o]perator shall comply with all  
5 applicable Federal and State water quality standards, including regulations issued pursuant to the  
6 Federal Water Pollution Control Act, as amended (33 U.S.C. 1151, *et seq.*)[the Clean Water  
7 Act].” 36 CFR § 228.8(b) (1974). The 36 CFR Part 228A regulations also require that “in  
8 addition to compliance with water quality and solid waste disposal standards required by this  
9 section, operator shall take all practicable measures to maintain and protect fisheries and wildlife  
10 habitat which may be affected by the operations.” 36 CFR § 228.8(e) (1974). In allowing or  
11 authorizing suction dredge, mechanical sluicing and other mining in the affected waters without  
12 meeting the requirements noted in this (and above) paragraph(s) for each individual or group  
13 mining operation, the agency has violated the Organic Act and its implementing regulations,  
14 especially 36 CFR Part 228A.

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

## 18 **COUNT FIVE**

### 19 **VIOLATION OF THE CLEAN WATER ACT AND RELATED REGULATIONS**

20 109. Plaintiff realleges all preceding paragraphs.

21 110. The Forest Service has not ensured that all discharges from mining operations it has or  
22 will authorize or allow will comply with all applicable water quality standards and requirements,  
23 in violation of the CWA, the Organic Act, and their implementing regulations.

24 111. The Klamath and Six Rivers National Forests have authorized or will authorize suction  
25 dredge and other mining without obtaining the required 401 certification from applicants for  
26

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

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

## 10 **COUNT SIX**

### 11 **VIOLATION OF NEPA**

12 113. Plaintiff realleges all preceding paragraphs.

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

17 115. Pursuant to the CEQ regulations, if a proposed action would normally be expected to  
18 have a significant impact on the environment, an EIS must be prepared. 40 C.F.R. § 1501.4  
19 (1978). If a proposed action is neither one normally requiring an EIS nor one that may be  
20 categorically excluded, the agency must prepare an EA. 40 C.F.R. §§ 1501.3 (1978), 1501.4  
21 (1978), 1508.9 (1978). An EA must provide sufficient information and analysis to determine  
22 whether the agency must prepare an EIS, or in the alternative, a finding of no significant impact  
23 (FONSI). 40 C.F.R. §1508.9 (1978).

24 116. In violation of NEPA, the Forest Service has not prepared either an EIS or an EA for  
25 suction dredge, mechanical sluicing and other mining operations that it either has authorized or  
26

1 intends to authorize in 2004 on the Salmon, Klamath, and Scott Rivers and their tributaries. Nor  
2 has the Forest Service prepared the required EIS for the cumulative impacts from all the  
3 anticipated or allowed/approved mining in and along the Klamath, Salmon and Scott Rivers and  
4 their tributaries.

5 117. 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 **COUNT SEVEN**

### 9 **ORGANIC ACT AND SPECIAL USE REGULATIONS VIOLATION**

10 118. Plaintiff realleges all preceding paragraphs.

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

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

4 REQUEST FOR RELIEF

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

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

9 B. Enjoin the Forest Service from allowing, authorizing or approving mining or mineral  
10 operations in Riparian Reserves and the waters of the Klamath, Salmon, and Scott Rivers and  
11 their tributaries until the Forest Service has complied with the ESA, the NFMA, the Organic Act,  
12 the CWA, NEPA, the implementing regulations of these laws, and the agency's consultation and  
13 trust responsibilities owed to the Tribe. This includes, at a minimum, enjoining the Forest  
14 Service from allowing, authorizing or approving mining or mineral operations in Riparian  
15 Reserves and the waters of the Klamath, Salmon, and Scott Rivers and their tributaries without:  
16 (1) an approved PoO, reclamation plan and bond for each individual or group proposed mining  
17 or mineral operation pursuant to 36 CFR part 228 subpart A, or (2) additionally or in the  
18 alternative, without an approved special use authorization and related requirements for each  
19 commercial use or activity and/or mineral operation pursuant to 36 CFR Part 251. For either of  
20 these types of authorizations, the agency must conduct the required ESA consultation, NEPA  
21 analysis, have the required Certification under section 401 of the CWA for each proposed mining  
22 or mineral operation, and have the required information and assurance that all CWA  
23 requirements will be met by each mining or mineral operation;

24 C. Award the Tribe its reasonable fees, costs, expenses, and disbursements, including  
25 attorneys' fees under 16 U.S.C. § 1540, and any other applicable federal law; and  
26

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

2  
3 Respectfully submitted this \_\_\_\_\_ day of October, 2004.

4  
5  
6 \_\_\_\_\_  
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19 \*Application for admission to the Northern District of California is pending.

20 \*\*Application for admission pro hac vice to be submitted.

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24  
25  
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