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18 **UNITED STATES DISTRICT COURT**
19 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
20 **OAKLAND DIVISION**

21 **KARUK TRIBE OF CALIFORNIA,**)

22 Plaintiff,)

23 vs.)

24 **UNITED STATES FOREST SERVICE;** and)
25 **MARGARET BOLAND,** Forest Supervisor,)
26 Klamath National Forest,)

27 Defendants.)

28 The New 49'ers, Inc. and Raymond W. Koons,)

29 Defendant-Intervenors.)

**PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT AND MEMORANDUM IN
SUPPORT THEREOF**

Date: June 21, 2005
Ctrm: 3, 3d Floor
Time: 1 p.m.
Judge: Hon. Sandra B. Armstrong

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1 Pursuant to Fed. R. Civ. Pro. 56, Plaintiff Karuk Tribe of California (“Karuk Tribe” or
2 “Tribe”) respectfully submits this motion for summary judgment. Hearing on this motion is
3 schedule for June 21, 2005 at 1 p.m.

4 Summary judgment is appropriate since there are no genuine issues of material fact and
5 Plaintiff is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v.
6 Catrett, 477 U.S. 317, 322-23 (1986). The parties agreed, with this Court’s approval, that this
7 case should be resolved upon Plaintiff’s motion for summary judgment and the responses and
8 replies thereto.¹ See March 29, 2005 Joint Case Management Statement; Civil Case Management
9 Conference Minutes dated April 27, 2005. Plaintiff seeks declaratory relief and an injunction
10 prohibiting the Defendant Forest Service from authorizing or otherwise allowing mining
11 operations to be conducted in Riparian Reserves without the submission and approval of a Plan
12 of Operations covering such operations in accordance with the National Forest Management Act
13 (“NFMA”), 16 U.S.C. §§ 1600 *et seq.* (2004), the National Environmental Policy Act (“NEPA”),
14 42 U.S.C. §§ 4321 *et seq.* (2004), and the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531
15 *et seq.* (2004).

17 I. STATEMENT OF THE ISSUES

18 This case involves the Forest Service’s regulation (or lack thereof) of mining operations
19 in and along numerous streams and rivers in northern California. The primary issues presented
20 are: (1) whether the Forest Service violated the NFMA in authorizing suction dredging and other
21 forms of mining in a specially protected class of national forest lands and waters known as
22 “Riparian Reserves” via minimal “Notices of Intent,” (“NOIs”) despite having promulgated
23

24 ¹ To narrow the issues for this Court’s resolution, Plaintiff moves for summary judgment on a
25 subset of the issues raised in its Second Amended Complaint. Issues not raised in this Motion
26 and Memorandum are excised from this case. See Hells Canyon Preservation Council v. U.S.
Forest Service, 403 F.3d 683 (9th Cir. 2005).

1 binding Forest Plans that require that all mining operations in Riparian Reserves must be
2 regulated via protective “Plans of Operations” (“PoOs”); and (2) whether the agency violated the
3 substantive and procedural requirements of the ESA, NEPA, as well as the NFMA in authorizing
4 the mining operations.

5 **II. INTRODUCTION**

6 This lawsuit challenges the Forest Service's failure to comply with mandatory procedural
7 and substantive requirements governing mining in Riparian Reserves in the national forests of
8 northern California, especially the Klamath National Forest (“KNF”). Specifically, Plaintiff
9 challenges a number of individual Forest Service decisions authorizing suction dredge and other
10 mining operations under NOIs instead of PoOs. These determinations represent a pattern and
11 practice of the Forest Service not to require PoOs in Riparian Reserves when the District Ranger
12 or other agency official unilaterally determines that the individual proposed mining operation is
13 not likely to cause significant surface resource disturbance. In authorizing suction dredge mining
14 without the required PoOs, the agency relied upon two National and Regional Directives.²

15 The NFMA requires all national forests to adopt a Forest Plan. Under the NFMA, all
16 activities within the forest must comply with the Forest Plan. Here, the KNF’s Forest Plan
17 requires all mining operations in Riparian Reserves to be conducted under PoOs and not NOIs.
18 The agency’s selective refusal to comply with their own Forest Plans, which were promulgated
19 through public notice and comment, undermines the clear language of the NFMA and the very
20 purpose of having a Forest Plan.
21

22
23 ² These two directives are: (1) the May 26, 2004 memorandum from Jack A. Blackwell, Regional
24 Forester for the Pacific Southwest Region, to Forest Supervisors in that Region, with the subject
25 of “Forest Service Regulation of Suction Dredging Operations”, AR 0218-220; and (2) the
26 February 5, 2002 memorandum from Larry O. Gadt, Director of Minerals and Geology
Management of the Forest Service to the agency’s Regional Foresters, with the subject of
“Northwest Forest Plan.” AR 0216-217. These directives are referred to herein as “the
National/Regional Directives or Memos.”

1 Defendants' violations further include their issuing mining authorizations without
 2 undertaking and completing the required environmental reviews under the NEPA, and complying
 3 with the procedural and substantive requirements of the ESA. In addition, Plaintiff challenges
 4 the National/Regional Directives issued by the Forest Service which direct field offices to
 5 authorize mining in Riparian Reserves without a PoO.

7 **III. FACTUAL BACKGROUND**

8 Rivers and streams within the Klamath and Six Rivers National Forests that support and
 9 provide habitat for wild salmon and other species are popular areas for suction dredge and other
 10 mining. For example, in just one of the challenged NOIs, the Forest Service authorized suction
 11 dredge and other mining on 35 miles of the Klamath River and its tributaries. AR 031-040.

12 In Siskiyou Regional Educ. Project v. Rose, 87 F. Supp.2d 1074, 1081-82 (D. Or. 1999),
 13 the Court described how suction dredge mining operates:

14 Suction dredges utilize high pressure water pumps driven by gasoline-powered
 15 motors which create suction in a flexible intake pipe (2-12" diameter). A mixture
 16 of streambed sediment and water is vacuumed into the intake pipe and passed
 17 over a sluice box mounted on a floating barge. Dense particles (including gold)
 are trapped in the sluice box. The remainder of the entrained material is
 discharged into the stream as 'tailings' or 'spoils', which can form large piles
 where dredges have remained in one location long.

18 *see also* AR 0418-0422 (Forest Service summary of the mechanics of suction dredge mining).

19 The adverse impacts of suction dredging are also well documented, as stated by
 20 the court in Siskiyou:

21 [S]uction dredging causes sedimentation when the streambed is disturbed and
 22 when tailings are discharged; ... sedimentation can be lethal to aquatic species;
 23 fish are attracted to sediment and tailings when nesting; these tailings are unstable
 24 and eggs may suffocate when stream flows destroy the nest; ... amphibian eggs
 are susceptible to harm from sedimentation; if stream materials are moved during
 dredging, older fish may suffer adverse impacts....

25 87 F. Supp.2d at 1102-03 (quoting a Forest Service Report on suction dredge mining known as
 26

1 the “Harvey Report”). The Court specifically acknowledged that the Forest Service’s “Harvey
2 report also warns of potential cumulative impacts from multiple suction dredge operations.” Id.
3 at 1103. “This [Forest Service] report points out that suction dredging can negatively affect
4 aquatic resources, can greatly alter stream channels, and mobilize fine sediments.” Id. at 1108.
5 Lastly, suction dredge operations can be seen and/or heard on and around the streams and rivers
6 where they are being operated. Def. Answer ¶26. Suction dredging also disturbs stream channels
7 and topography. Def. Answer ¶23. Rocks, gravel, and silt are displaced and deposited in various
8 locations within a stream, including in previously undisturbed areas. Id. Fine sediment dispersed
9 by suction dredging operations can infiltrate the gravelly areas where salmon make their nests
10 (redds). Def. Answer ¶24.

12 According to the Forest Service Fisheries Biologist who has studied the adverse affects of
13 suction dredging in the Klamath River Basin, suction dredge operations cause significant
14 disturbance of surface resources, direct injury to Southern Oregon/Northern California Coho
15 salmon and other fish species, degrade their habitat, and cause or contribute to degradation of
16 water quality. Grunbaum, Summary of Fisheries Issues Concerning Suction Dredge Mining,
17 April 2004. AR 294-299 (hereinafter “Grunbaum Report”).

18 According to the Grunbaum Report, at AR 295, additional adverse effects to aquatic
19 habitats, fish, and other aquatic life from suction dredge mining include:

- 20 ◦ Entrainment by suction dredging can kill and indirectly increase mortality of fish,
21 particularly un-eyed salmonid eggs and early developmental stages.
- 22 ◦ Entrainment and disturbance by suction dredges can kill benthic invertebrates that
23 are the food source for salmonids and other fishes, thereby reducing available fish
24 food supply in the dredged stream area(s) for a period of weeks to months until
25 the area is re-colonized. Re-colonization may be much slower if dredged area is
26 extensive. Populations of invertebrates with limited distributions could be
eliminated.
- Streambed destabilization can increase the mortality of incubating salmonid
embryos and benthic fish species such as sturgeon and lamprey. Destabilization
of the stream channel may occur because of channel excavations made by the
suction dredge and the piling of cobbles too large to pass through the dredge.

1 Such direct disturbance of the stream channel tends to destabilize natural
2 processes that mold stream channels. The resulting destabilization may increase
3 local scour and fill in parts of the streambed that were not directly disturbed.

- 4 ◦ Deposition of dredge tailings can decrease fish reproductive success by inducing
5 fish to spawn on unstable material.
- 6 ◦ Dredging can change surface substrate composition – which can affect in turn fish
7 and benthic invertebrate populations. Fish eggs and larvae could be smothered or
8 buried, and fish could lose the interstitial spaces between cobbles or boulder.
- 9 ◦ Dredging could frighten adult summer steelhead or spring Chinook and inhibit
10 migrations of these fish.
- 11 ◦ Disturbances during the summer may harm adult salmon and steelhead because
12 their energy supply is limited, and the streams they occupy can be near lethal
13 temperatures. Suction dredging may be synergistic with high stream temperatures
14 and other cumulative watershed effects that are being manifested – so that adverse
15 effects of dredging are increased.
- 16 ◦ Deposition of fine sediment can reduce availability of microhabitats used by
17 benthic fish such as sturgeon larvae and young sturgeon. Extensive deposition of
18 fine sediment can reduce invertebrate populations important for the food supply
19 of anadromous salmonids.

20 The streams and rivers in the KNF and Six Rivers National Forest (“SRNF”) support
21 populations of, and provide habitat for, wild salmon species. Def. Answer ¶17. These species
22 include Southern Oregon/Northern California Coho salmon (*Oncorhynchus kisutch*), a
23 “threatened” species under the ESA. *Id.*; 62 Fed. Reg. 24588 (May 6, 1997). Spring chinook
24 and summer steelhead fish species are listed as “sensitive species” by the Pacific Southwest
25 (California) Region of the Forest Service. Def. Answer ¶19.

26 Despite the admitted adverse effects of suction dredge mining, Defendants have allowed
and will allow in the coming months motorized suction dredge and mechanized sluicing
operations in and along waterways in the KNF without requiring a PoO for each proposed
mining operation and without conducting the required consultation with federal wildlife agencies
such as NOAA Fisheries and the Fish and Wildlife Service (“FWS”). Defendants claim their
actions are authorized pursuant to the National/Regional Directives. In authorizing the mining
pursuant to the NOIs, instead of requiring the operators to submit a PoO, Defendants failed to

1 conduct the required NEPA and ESA reviews/consultations, failed to consult with the Tribe, as
2 well as failed to otherwise comply with the applicable Forest Plans and NFMA.

3 Defendants authorized an unknown amount of mining conducted on mining claims leased
4 or controlled by intervenors New 49'ers, Inc. This corporation obtains its primary revenues from
5 its "members" that are authorized to mine on leased mining claims in these waters. In 2003, the
6 agency approved a PoO for the New 49'ers that authorized their members to conduct suction
7 dredge and/or mechanical sluicing on the Klamath River and its tributaries. Def. Answer ¶37.
8 However, in 2004, the Klamath National Forest authorized similar mining via a NOI for the New
9 49'ers. *See* May 25, 2004 letter from District Ranger Alan Vandiver to New 49'ers. AR 029.

10 In the 2004 New 49'ers NOI, Defendants authorized (on the Happy Camp Ranger District
11 alone) "an estimated 35 miles of stream course where dredging could be conducted." AR 033.
12 Up to 10 dredges per river mile on the Klamath River have been authorized in this one NOI
13 alone. AR 034. In addition, the miners are allowed to conduct "mechanical sluicing" which
14 involves, in part, pumping water out of the river to scour streamside gravel and soil deposits
15 outside of the stream. AR 035. The Forest Service does not know any of the specific locations
16 within the 35 stream miles where "members" of the New 49'ers will be operating. The only
17 location descriptions in the NOI are two generalized maps submitted by the New 49'ers covering
18 almost the entire middle Klamath River Basin. AR 039-040. In addition to the NOI for the New
19 49'ers, the Forest Service also authorized mining operations pursuant to NOIs for numerous
20 other mining operations in the Klamath River Basin. AR 067-083.

21 In none of these instances did Defendants require a PoO, prepare any biological
22 assessments or conduct any consultation under the ESA for the challenged operations, provide
23 any prior public notice or ability to comment or conduct the required environmental impact
24 reviews under NEPA, or provide any prior notice or consultation with the Karuk Tribe on the
25 specific proposed operations.

IV. STANDARD OF REVIEW

1
2 A court will overturn the agency's decisions if they were "arbitrary, capricious, an abuse
3 of discretion, or otherwise not in accordance with law." Blue Mountains Biodiversity Project v.
4 Blackwood, 161 F.3d 1208, 1211 (9th Cir. 1998) (quoting the APA, 5 U.S.C. § 706(2)(A)). The
5 agency's decisions must be "fully informed and well-considered." Save the Yaak Committee v.
6 Block, 840 F.2d 714, 717 (9th Cir.1988). The court "need not forgive a 'clear error of
7 judgment.'" Blue Mountains, 161 F.3d at 1208, *quoting* Marsh v. Oregon Natural Resources
8 Council, 490 U.S. 360, 378 (1989). "[A]n order may not stand if the agency has misconceived
9 the law." Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80, 94 (1943). "An
10 agency's action is arbitrary and capricious ... if the agency's decision is contrary to the governing
11 law. 5 U.S.C. § 706(2)." Lands Council v. Powell, 395 F.3d 1019, 1026 (9th Cir. 2005).

V. STANDING OF THE KARUK TRIBE

12
13 The Karuk Tribe of California is a federally-recognized Indian Tribe. Def. Answer ¶ 11.
14 The Tribe has lived in northern California since time immemorial. *See* Declaration of Leaf
15 Hillman, Vice-Chair of the Karuk Tribe, at ¶3. A primary concern of the Tribe is the protection
16 and restoration of native fish and wildlife species that the Tribe has depended upon for
17 traditional cultural, religious, and subsistence uses. *Id.* The center of the Karuk world is
18 Katimin, where Masuhsava (the Salmon River) meets Ishkeesh (the Klamath River). *Id.*

19 The Tribe works to protect the wild salmon, and other fish species, and the water quality
20 of the streams and rivers on the KNF and SRNF. *Id.* ¶4. The Tribe's Natural Resource
21 Department works to protect, promote, and preserve the cultural/natural resources and ecology
22 upon which the Karuk People depend. *Id.*

23 The Tribe brings this action on its own behalf and on behalf of its members who are
24 adversely affected by the actions of the Forest Service. The suction dredge and other mining
25 operations in and along the Klamath River and its tributaries cause significant and/or long-lasting
26

1 impacts to wildlife, fisheries, water quality, recreation, and visual resources, as well as an
 2 adverse impact on the Tribe's and its members' ability to enjoy the spiritual, religious,
 3 subsistence, recreational, wildlife, and aesthetic qualities of the areas affected by the mining
 4 operations. *See* Declaration of Toz Soto, Tribal Fisheries Biologist, at ¶¶6, 7;³ Dec. of Hillman.
 5 ¶¶5, 6. The Forest Service's failure to properly regulate mining operations directly and adversely
 6 harms the Tribe and its members by, among other things, threatening and causing injury to and
 7 death of fish, degrading the habitat of fish, degrading the water quality of these streams and
 8 rivers, as well as degrading lands along these waterways in the KNF and SRNF. *See* Dec. of
 9 Hillman, ¶¶6, 8; Dec. of Soto, ¶¶6,7,9,10.

10 The Tribe and its members are also harmed by the agency's failure to follow the public
 11 notice, review, and commenting requirements of NEPA and the ESA regarding such mining, as
 12 well as by Defendants' failure to consult with the Tribe on a government-to-government basis
 13 regarding this mining. *See* Dec. of Hillman, ¶7; Dec. of Soto, ¶8..

14 VI. ARGUMENT

15 A. Defendants violated their Forest Plans and, thus, the NFMA by authorizing mining 16 in Riparian Reserves through NOIs instead of PoOs.

17 1. *The NFMA's requirement to comply with applicable and binding Forest Plans*

18 In response to public concern over damage to natural resources on national forests,
 19 Congress enacted the NFMA in 1976. 16 U.S.C. §§ 1600 *et seq.* NFMA's central feature is a
 20 detailed planning regimen. Each national forest must develop and adopt a comprehensive land
 21 and resource management plan ("Forest Plan") to ensure that NFMA's substantive protections
 22 are carried out on the ground. The Forest Plan serves as a blueprint that controls management
 23 decisions by establishing mandatory management prescriptions and land allocations that govern

24
 25 ³ Attached to Mr. Soto's Declaration are a few photographs which graphically depict the
 26 environmental damage caused by just a single suction dredge mining operation. The sediment
 plume and impacts to aquatic habitat are plainly visible.

1 land and resources use on that particular forest. NFMA requires the Forest Plans to include
 2 standards and direction to meet substantive and procedural duties under NFMA. *See Idaho*
 3 *Conservation League v. Mumma*, 956 F.2d 1508, 1511 (9th Cir. 1992) (describing Forest Plan
 4 requirements); *Citizens for Env'tl. Quality v. United States*, 731 F. Supp. 970, 977 (D. Colo.
 5 1989) (stating that a Forest Plan “defines the ‘management direction’ for the forest. It constitutes
 6 a program for all natural resource management activities and establishes management
 7 requirements to be employed in implementing the plan.”) (citation omitted).

8 Under NFMA, the Forest Service must demonstrate that site-specific actions, such as
 9 mining projects, are consistent with the Forest Plan for the entire forest. 16 U.S.C. § 1604(i).
 10 The Ninth Circuit has consistently upheld Section 1604(i)’s requirement that all Forest Service
 11 decisions comply with the Forest Plan. *See Neighbors of Cuddy Mountain v. U.S. Forest Svc.*,
 12 137 F.3d 1372, 1377-38 (9th Cir. 1998) (ruling that Forest Service violated forest plan standard
 13 requiring minimum five percent old growth forest); *Friends of Southeast's Future v. Morrison*,
 14 153 F.3d 1059 (9th Cir. 1998) (NFMA violation where agency failed to follow forest plan).

15 District courts in the Ninth Circuit uniformly require compliance with the Forest Plan.
 16 *See Siskiyou*, 87 F. Supp. 2d 1074 (failure to comply with Forest Plan standards and guidelines
 17 for mining in Riparian Reserves); *Wilderness Soc'y v. Bosworth*, 118 F.Supp.2d 1082, 1097 (D.
 18 Mt. 2000) (Forest Service violated forest plan standard requiring ten percent old growth); *Pacific*
 19 *Rivers Council v. Thomas*, 873 F.Supp. 365, 372 (D. Idaho 1995)(discussing requirements of
 20 Forest Plan and ESA related to mining operations).

21 2. *The Klamath and Northwest Forest Plans require Plans of Operations*
 22 *for mining operations in Riparian Reserves*

23 The Northwest Forest Plan (“NFP”) was promulgated in response to the decline of
 24 wildlife and wildlife habitat throughout the region. The legal authorities under which the NFP
 25 was promulgated include the NFMA, which requires the Forest Service to ensure a diversity of
 26 species on national forest lands, 16 U.S.C. § 1604(g)(3)B), and the ESA, which requires all

1 agencies to take such actions as may be necessary to protect species listed as “threatened” or
2 “endangered” under the ESA. 16 U.S.C. § 1536(a). In 1994, the Secretaries of Agriculture and
3 Interior issued a Record of Decision (“ROD”) to adopt the NFP. The NFP amended the regional
4 guides and the region’s forest plans, including the KNF. NFP ROD at 12.⁴

5 The KNF is governed by the KNF Forest Plan as well as by the NFP of 1994. KNF at 1-
6 1, (relevant portions of the KNF Plan are attached as Exhibit 1). In upholding the NFP, the
7 federal court warned that “[i]f the plan as implemented is to remain lawful the monitoring,
8 watershed analysis, and mitigating steps called for by the [Northwest Forest Plan] will have to be
9 faithfully carried out, and adjustments made if necessary.” Seattle Audubon Society v. Lyons,
10 871 F. Supp. 1291, 1322 (W.D. Wash. 1994), aff’d, 80 F.3d 1401 (9th Cir. 1996).

11 The NFP established a protected class of federal lands and waters known as “Riparian
12 Reserves,” which comprise the streambed and the riparian area on either side of streams, rivers,
13 and lakes. NFP ROD at 9.⁶ Suction dredge mining occurs within Riparian Reserves:

14
15
16 ⁴ The relevant portions of the NFP ROD was attached as Exhibit A to the Federal Defendants’
December 14, 2004 Motion to Dismiss.

17 ⁶ The NFP and KNF Plan contain the Aquatic Conservation Strategy (“ACS”), which is
18 designed to protect aquatic habitat affected by activities on public forest land. The ACS includes
19 standards, guidelines, and objectives that require management of forests to “maintain and restore
20 riparian and aquatic ecosystems and protect fish habitat on federal land.” Siskiyou, 87 F.Supp.2d
21 at 1079. The ACS is designed to “improve[] the health of the region’s aquatic ecosystems.” NFP
22 ROD at 9. *See also* Pacific Coast Federation v. National Marine Fisheries Service, 265 F.3d
23 1028, 1031-1032 (9th Cir. 2001). “The ACS also has binding standards and guidelines that
24 restrict certain activities within areas designated as riparian reserves or key watersheds.
25 Additionally, the ACS has nine objectives designed to maintain or restore properly functioning
26 aquatic habitats.” Id. at 1032.

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

5 KNF Forest Plan at 4-108 (AR 016); NFP ROD at 9. Riparian Reserves are “portions of
 6 watersheds where riparian-dependent resources receive primary emphasis and where special
 7 standards and guidelines apply.” KNF Forest Plan, at 4-106;⁷ *see* NFP ROD at 7 (describing
 8 environmental protection goals of Riparian Reserves).

9 The NFP requires that all mineral operations in Riparian Reserves require a PoO to
 10 protect these resources:

11 **Require a reclamation plan, approved Plan of Operations, and reclamation**
 12 **bond for all mineral operations that include Riparian Reserves.** Such plans
 13 and bonds must address the costs of removing facilities, equipment, and materials;
 14 recontouring disturbed areas to near pre-mining topography; isolating and
 15 neutralizing or removing toxic or potentially toxic materials; salvage and
 replacement of topsoil; and seedbed preparation and revegetation to meet Aquatic
 Conservation Strategy objectives.

16 NFP ROD at C-34 (emphasis added).

17 The KNF Forest Plan similarly requires that mineral operations in Riparian Reserves can
 18 only operate under PoOs, not NOIs:

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

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

24
 25 ⁷ Portions of the KNF Forest Plan were attached as Exhibit D to the Federal Defendants’
 26 December 14, 2004 Motion to Dismiss.

1 KNF Forest Plan at 4-111 (emphasis added). AR 017. Suction dredge mining is a “mineral
2 operation” for the purposes of the Klamath and Northwest Forest Plans. Def. Answer at ¶61.

3
4 3. *Defendants violated the NFMA by authorizing mining pursuant to NOIs instead of PoOs*
5 *in Riparian Reserves.*

6 Defendants have violated and continue to violate the NFP and the KNF Forest Plan by
7 authorizing mining operations in Riparian Reserves without requiring an approved Plan of
8 Operations, reclamation plan and reclamation bond. The agency does **not** have the discretion to
9 allow mining under NOIs. **“Notices of intent for mineral operations under 36 CFR 228 shall**
10 **not constitute authorization to operate within a RR.”** Klamath Plan at 4-111; AR 017
11 (emphasis added). Therefore, Defendants must require a PoO for mining operations in Riparian
12 Reserves under the KNF Forest Plan and the NFP, even if the agency may believe that an
13 individual operation would not result in significant disturbance by itself.

14 In contrast, for mining operations occurring outside of Riparian Reserves, any person
15 who proposes to “conduct operations which might cause disturbance of surface resources” must
16 submit a NOI to do so. 36 C.F.R. § 228.4(a)(2)(1974, amended 2004).⁸ If the Forest Service
17 determines that any operation “is causing or will likely cause a significant disturbance of surface
18 resources,” then the miner must submit a PoO to the agency. 36 C.F.R. § 228.4(a)(1)(1974,
19 amended 2004). A PoO must contain information such as where mining may occur, how the
20 miner will access the site, and measures to protect the environment. 36 C.F.R. § 228.4(c)(1974,

21 _____
22 ⁸ The Klamath Forest Plan specifically acknowledges the different regulatory structures for
23 mining operations inside and outside of Riparian Reserves. As noted above, mining within
24 Riparian Reserves is governed by Standard and Guideline MA10-33 and MA10-34. AR 017.
25 However, the general mining requirement outside of these areas is governed by Management
26 Direction 19-1, which states that such mining be regulated “according to the 36 CFR 228
regulations.” AR 012. Notably, the Standards and Guidelines for Riparian Reserves (MA10-33
and -34) make no mention of any reliance on the 228 regulations.

1 amended 2004). The Forest Service must prepare a NEPA analysis before approving a plan of
2 operations. 36 C.F.R. § 228.4(f)(1974, amended 2004).⁹

3 Here, however, Defendants take the position that they can ignore the Riparian Reserve
4 PoO requirements and other Forest Plan mandates and—at their sole discretion—authorize
5 mining under NOIs instead of PoOs. The agency’s defense to its noncompliance with the Forest
6 Plans is the National and Regional Directives.¹⁰ Defendants argue that, regardless of the NFMA
7 and Forest Plan requirements, its generalized mining regulations at 36 CFR § 228.4(a) (1974
8 amended 2004) give it the discretion to allow mining pursuant to NOIs if Defendants unilaterally
9 decide that a mining project would not cause significant surface disturbance. *See* Defendants’
10 [initial] Motion to Dismiss, at 11-12. Defendants argue that requiring PoOs in Riparian Reserves
11 in compliance with the Forest Plans (instead of allowing mining via the minimal NOIs), “would
12 be contrary to existing law or regulation” – i.e., 36 CFR § 228.4(a). *Id.*

13 This argument contradicts Congress’s clear statutory mandate that all “resource plans and
14 permits, contracts, and other instruments for the use and occupancy of National Forest System
15 lands shall be consistent with the land management plans.” 16 U.S.C. § 1604(i). Here, the KNF
16 approved a Forest Plan after notice and comment that required mining operations in Riparian
17 Reserves to operate pursuant to PoOs, not merely NOIs. National Forests may not arbitrarily
18 decide which sections of their Forest Plans they will or will not follow depending on the
19

20
21 ⁹ Mining activities that do not cause disturbance of any surface resources are not required to
submit a NOI or PoO. 36 CFR § 228.4 (1974, amended 2004).

22 ¹⁰ At the outset, it should be noted that these memoranda do not have the force of law and are not
23 entitled to deference by federal courts. *See Western Radio Services Co. v. Espy*, 79 F.3d 896,
24 901 (9th Cir.1996) (Forest Service Handbook was not binding law because it had not been issued
25 as a regulation in the C.F.R. or been published in the Federal Register); *Southwest Center for*
Biological Diversity v. U.S. Forest Service, 100 F.3d 1443, 1450 (9th Cir.1996); *Brock v.*
26 *Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986); *Williams v. Dombeck*, 151
F. Supp.2d 9, 36 (D.D.C. 2001) (applying the Brock analysis to the Forest Service’s NEPA
procedures and finding they are not binding regulations.).

1 circumstance. To hold otherwise would render the notice and comment and the resulting Forest
2 Plans, and the NFMA, entirely meaningless.

3 Defendants' position essentially nullifies entire sections of the two Forest Plans.
4 According to Defendants, if a generalized nation-wide regulation allows mining to occur under
5 NOIs instead of PoOs, the local agency official is free to ignore the requirements of the Forest
6 Plan and the NFMA. Such a view contradicts the very purpose of the NFMA forest-planning
7 requirement—to set standards applicable to **local** conditions and resource needs that generalized
8 national regulations do not cover.

9 The agency's actions also contradict its own previous position resulting from the court's
10 Order in the Siskiyou NFMA case. The Forest Service has prepared a Draft Environmental
11 Impact Statement covering suction dredge mining just across the state line in the Siskiyou
12 National Forest. *See* Draft Environmental Impact Statement, Suction Dredge Activities, Siskiyou
13 National Forest, December 2001 ("Suction Dredge DEIS"). Portions attached as Exhibit 2.¹¹ In
14 that comprehensive document, the agency specifically recognized the controlling nature of the
15 Siskiyou decision and required that all mining operations in Riparian Reserves be conducted
16 pursuant to PoOs, not NOIs. DEIS at pp. 5-7. Further, the Siskiyou National Forest, in a letter to
17 mining applicants, stated that "we have no choice but to follow the direction contained in the
18 NWFP [NFP]" and was obligated under the Siskiyou decision to require PoOs in Riparian
19 Reserves. April 24, 2000 letter from Acting Forest Supervisor Thomas K. Reilly to Robert and
20 Lisa Barton, attached as Exhibit 3.¹² Despite these admissions, the National and Regional
21

22 ¹¹ The DEIS is included in the "Literature Review" contained in AR Document # 92 and is
23 therefore part of the administrative record.

24 ¹² This letter was sent to Larry Gadt, the agency Minerals officer who authored the challenged
25 National Directive. Thus, because this document was before the decisionmaker, it is properly
26 part of the record. *See* Thompson v. United States Dep't of Labor, 885 F.2d 551, 555 (9th Cir.
1989); Environmental Defense Fund, Inc. v. Blum, 458 F. Supp. 650, 661 (D.D.C. 1978).

1 Directives reversed position and, without any underlying support, now direct the field offices to
2 ignore the Forest Plan requirements.¹³

3 The Ninth Circuit and numerous other federal courts have squarely rejected Defendants'
4 argument. As noted above, the Ninth Circuit has consistently ruled that the mandates of the
5 Forest Plan are binding requirements on agency decisionmaking. In each case, despite the
6 applicability of general national regulations, the Court found that the specific and locally-tailored
7 requirements of the Forest Plan must be met. *See Neighbors of Cuddy Mountain v. U.S. Forest*
8 *Svc.*, 137 F.3d at 1377-38 (9th Cir. 1998); *Friends of Southeast's Future v. Morrison*, 153 F.3d
9 1059 (9th Cir. 1998). The fact that there were national regulations dealing with old growth
10 forests and wildlife—the subject of the specific Forest Plan provisions in those cases—did **not**
11 override the agency's duties under the Forest Plan.

12 In *Siskiyou*, 87 F. Supp.2d 1074, 1088 (emphasis added), the court held that the Forest
13 Service violated its Forest Plans by issuing NOIs instead of PoOs for mining operations in
14 Riparian Reserves:

15 Defendants [Forest Service] failed to require a plan of operations for any of the
16 mining operations on Silver Creek during the 1998 mining season in violation of
17 the LRMP Standard and Guideline MA7-10 [similar to the NFP and Klamath
18 Forest Plans' requirement to require PoOs in Riparian Reserves]. The Forest
19 Service must comply with the requirements of their Forest Plans, and failure to
20 comply violates NFMA. *See Friends of Southeast's Future v. Morrison*, 153 F.3d
21 1059, 1070-1071 (9th Cir.1998). **The court finds that defendants' decision to**
22 **allow mining operations to proceed within a [Riparian Reserve] without**
23 **approved plans of operation was arbitrary and capricious, an abuse of**
24 **discretion, or otherwise not in accordance with law.**

25 ¹³ Such inconsistency is the hallmark of arbitrary and capricious decisionmaking. *U.S. v. Mead*,
26 533 U.S. 218, 228 (2001), *citing Skidmore v. Swift*, 323 U.S. 134, 139-40 (1944) (Inconsistency
is an indication of unpersuasiveness); *Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual*
Automobile Ins. Co., 463 U.S. 29, 42 (1983) (there is a presumption of judicial review “against
changes in current policy that are not justified by the rulemaking record.”); *Mt. Graham Red*
Squirrel v. Madigan, 954 F.2d 1441, 1457 (9th Cir. 1992) (court refused to give deference to
agency “expertise” when its position fluctuated).

1 This ruling is especially instructive since the Forest Service argued in that case that requiring
2 PoOs in Riparian Reserves would “conflict” with the 228 regulations. Id. at 1080.

3 Other circuits have also held that the requirements of a Forest Plan are not nullified by
4 general agency regulations. The Eleventh Circuit Court of Appeals specifically held that the
5 Forest Service was required to comply with the Forest Plan’s mandate to gather data on sensitive
6 species, despite the fact that the national regulations did not require such actions. Sierra Club v.
7 Martin, 168 F.3d 1, 5 (11th Cir. 1999). “While it is true that the regulations make no such
8 demand, the Forest Plan explicitly does so.” Id. Relying on the NFMA §1604(i)’s consistency
9 requirement, the court went on to hold that the failure to abide by the Forest Plan’s data
10 requirement – despite the national regulation’s allowance for discretionary compliance with the
11 data gathering requirement – is arbitrary and capricious. Id. at 4-5.

12 Overall, the agency cannot nullify whole sections of promulgated Forest Plans, including
13 the NFP promulgated by the Secretary of Agriculture with authority over the U.S. Forest Service,
14 via the simple issuance of internal directives. “[I]f the Forest Service seeks to amend Standard
15 and Guideline MA7-10 [the Riparian Reserve PoO requirement], it must go through the proper
16 procedures, which require notice and public participation. See Arizona Cattle Growers
17 Association v. Cartwright, 29 F.Supp.2d 1100, 1115 (D. Ariz. 1998).” Siskiyou, 87 F.Supp.2d at
18 1087 (citations omitted). None of these procedures were followed in the issuance of the National
19 and Regional Directives challenged in this case.

20 In Siskiyou, the agency realized that, if it wanted to avoid the requirement for PoOs in
21 Riparian Reserves and eliminate the “conflict” with the 228 regulations, it had to follow
22 established NEPA and other public participation and environmental review procedures to
23 formally amend the Forest Plan. Id.; *see also* Suction Dredge DEIS at 5-7. Here, instead of
24 meeting these duties, the agency simply issued the internal directives and required the individual
25 Forest officials to ignore the Forest Plans.

1 By failing to comply with and implement the Forest Plan, the agency violated the NFMA,
 2 16 U.S.C. § 1604(i). The Forest Service has therefore acted arbitrarily, capriciously, and
 3 contrary to law in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).
 4

5 4. *Defendants violated additional requirements of the KNF Forest Plan including the*
 6 *failure to survey for and protect sensitive species, consult with Plaintiff prior to*
 7 *authorizing mining operations and otherwise protect Tribal resources.*

8 The NFMA and the Forest Plans impose additional substantive and procedural duties on
 9 the Forest Service, one of which is the duty to “provide for diversity of plant and animal
 10 communities.” 16 U.S.C. §1604(g)(3)(B) (2004). This duty applies with special force to
 11 “sensitive” species. “Sensitive species were identified by the Regional Forester due to concerns
 12 for the viability of their populations. These concerns were evidenced by significant current or
 13 predicated downward trends in population numbers, density, and/or habitat quality and quantity.”
 14 KNF Forest Plan, Chp. 3-8. Exhibit 1.¹⁴

15 In order to prevent harm to sensitive species, the agency is required to “[r]eview all
 16 Forest Service planned, funded, executed or permitted programs and activities for possible
 17 effects on TE&S [threatened, endangered, and sensitive] species.” KNF Forest Plan, Chapter 4-
 18 27 at 8-3. Forest Service sensitive species in the KNF include Spring Chinook Salmon and
 19 Summer Steelhead. Def. Answer ¶19.¹⁵ The record is devoid of evidence that the agency
 20
 21

22 ¹⁴ The entire KNF Forest Plan, including the pages now submitted with this Motion, was
 23 submitted by the agency as part of the administrative record. However, the agency only
 24 submitted hardcopies of a few pages to the court.

25 ¹⁵ *See also* KNF Forest Plan, at 4-22, 6-8 (emphasis added) (“Sensitive species: Project areas
 26 should be surveyed for the presence of Sensitive species *before* project implementation. If
 surveys cannot be conducted, project areas should be assessed for the presence and condition of
 Sensitive species habitat.”); “Avoid or minimize impacts to Sensitive species where possible. If

1 conducted any meaningful review of the impact of the challenged suction dredge mining
2 operations on sensitive species and their habitat.

3 Suction dredge mining also adversely impacts the Tribe's and its' members cultural,
4 religious, historical, and subsistence uses of the affected waterways. *See* Dec. of Hillman. ¶¶5, 6,
5 8. The Forest Service must “[p]rovide for Native American needs for collection and/or use of
6 traditional resources.” KNF Forest Plan Ch. 4-64, 24-24. In so doing, Defendants must
7 “[c]onsult and coordinate on all projects that have the potential to affect Native American
8 values.” Klamath Plan Ch. 4-64, 24-27. Here, there is no indication in the record that the
9 agency provided prior notification of the specific locations of the challenged mining operations.
10 *See* Dec. of Hillman. ¶¶7,8.

11 Defendants also authorized mining operations in designated Tribal “cultural areas.” *See*
12 KNF Forest Plan’s map for Management Area 8, KNF at 4-124. This is an area on the Klamath
13 River between Happy Camp and Somes Bar. These “cultural areas” “have significant historic, as
14 well as contemporary, spiritual values for the Karuk Tribe of California. These areas are to be
15 managed to maintain special Native American values.” KNF Plan Ch. 4-101. One of the goals
16 of the “cultural areas” is “to preserve and protect the solitude and privacy of Native American
17 users.” *Id.* “The integrity of the area for use by the Karuk Tribe of California is maintained in a
18 manner consistent with their custom and culture.” *Id.* “Protection of these areas from religious
19 intrusions or damage to the area should be coordinated with the Karuk Tribe of California.” Ch.
20 4-102 at MA 8-9. Despite these requirements, the mining authorization given to The New 49’ers
21 includes mining in this cultural area. AR 040 (map submitted by the New 49’ers).

22
23
24
25 impacts cannot be avoided, analyze the potential effects on the population or its habitat within
26 the landscape and on the species as a whole.” KNF Forest Plan at 4-28 at 8-18.

1 **B. Defendants Violated the Endangered Species Act**

2 In authorizing the challenged mining operations, the Forest Service failed to comply with
3 the strict requirements of the ESA. The ESA is the nation’s pre-eminent wildlife conservation
4 statute. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978); *Thomas v. Peterson*, 753 F.2d
5 754, 765 (9th Cir. 1985). The Supreme Court explicitly held that the ESA requires federal courts
6 “to strike a balance of equities on the side of” species facing potential extinction.

7 Congress has spoken in the plainest of words, making it abundantly clear that the balance
8 has been struck in favor of affording endangered species the highest of priorities, thereby
9 adopting a policy which it described as “institutionalized caution.”

10 TVA, 437 U.S. at 194. As this Court has stated: “The plain intent of Congress in enacting the
11 ESA was to halt and reverse the trend toward species extinction, whatever the cost.” Pacific
12 Coast Federation of Fisherman’s Associations v. U.S. Bureau of Reclamation, 138 F.Supp.2d
13 1228, 1240 (N.D. Cal. 2001) *quoting TVA*, 437 U.S. at 184.

14 This Court has detailed the strict requirements of Section 7 of the ESA. Pacific Coast
15 Federation, 138 F. Supp.2d at 1240-42. Section 7(a)(2) of the ESA requires all federal agencies,
16 including the Forest Service, to “insure that any action **authorized**, funded or carried out by such
17 agency ... is not likely to jeopardize the continued existence of any endangered species or
18 threatened species.” 16 U.S.C. § 1536(a)(2) (2004) (emphasis added). “One would be hard
19 pressed to find a statutory provision whose terms were any plainer than those in § 7 of the
20 Endangered Species Act.” Pacific Coast Federation, at 1240 *quoting TVA*, 437 U.S. at 173.

21 In complying with this mandate, the Forest Service must consult with NOAA Fisheries,
22 the delegated agent of the Secretary of Commerce, or the FWS, as the delegated agent of the
23 Secretary of the Interior, whenever their actions “may affect” a listed species. *Id.* “If the answer
24 is affirmative, the agency must prepare a ‘biological assessment’ to determine whether such
25 species ‘is likely to be affected’ by the action.” *Id.* Formal consultation results in a biological
26

1 opinion from NOAA or FWS that determines if the action is likely to jeopardize the species; if
2 so, the opinion may specify reasonable and prudent alternatives that will avoid jeopardy and
3 allow the agency to proceed with the action. 16 U.S.C. § 1536(b)(3)(A) (2004). NOAA or FWS
4 may also “suggest modifications” to the action during the course of consultation to “avoid the
5 likelihood of adverse effects” to the species even when not necessary to avoid jeopardy. 50
6 C.F.R. § 402.13 (1986).

7 The Ninth Circuit has stressed the importance of strict agency compliance with the
8 procedures mandated by Section 7 of the ESA and its implementing regulations:

9 The strict substantive provisions of the ESA justify more stringent enforcement of
10 its procedural requirements, because the procedural requirements are designed to
11 ensure compliance with the substantive provisions. ... If a project is allowed to
12 proceed without substantial compliance with those procedural requirements, there
can be no assurance that a violation of the ESA’s substantive provisions will not
result. The latter, of course, is impermissible.

13 Thomas v. Peterson, 753 F.2d at 764 (emphasis in original); *see also* Pacific Rivers Council v.
14 Thomas, 30 F.3d 1050 (9th Cir. 1994) (enjoining mining and other activities for failure to
15 reinitiate consultation upon listing of salmonid species).

16 The Forest Service violated Section 7 of the ESA by allowing mining operations that may
17 affect the threatened Southern Oregon/Northern California Coho salmon, among other listed
18 species, without completing adequate consultation with NOAA Fisheries and/or FWS.¹⁶ For the
19 purposes of Section 7, the triggering “agency action”:

20 “[M]eans “all activities or programs of any kind authorized, funded, or carried
21 out, in whole or in part, by Federal agencies”, including “actions directly or
22 indirectly causing modifications to the land [or] water.” 50 CFR §402.02. *See* 50
23 CFR §402.03 (“Section 7 ... [applies] to all actions in which there is discretionary
Federal involvement or control”). Both the Supreme Court and the Ninth Circuit
have construed this term broadly.”

24
25 ¹⁶ The agency has already admitted that its issuance of the PoOs in 2004 violated the ESA, based
26 on Plaintiff’s allegations that the agency failed to consult with NOAA Fisheries and the FWS, as
well as the failure to protect critical habitat for Coho salmon. *See* April 22, 2005 Stipulation for
Partial Settlement, signed by this Court on April 26, 2004.

1
2 Pacific Coast Federation, 138 F.Supp.2d at 1240, *quoting* Thomas, 753 F.2d at 763.

3 The Forest Service has control over the subject mining operations and the requirement
4 that operations proceed pursuant to PoOs. Siskiyou, 87 F.Supp.2d at 1085-87. The agency
5 “authorized” the various suction dredge and other mining operations described in the NOIs. For
6 example, in the decision letter sent in response to the New 49’ers NOI, the District Ranger stated
7 that “I have determined that your proposed operations would not require a Plan of Operations.
8 You may begin your mining operations when you obtain all applicable State and Federal permits.
9 This **authorization** expires December 31, 2004.” AR 029 (emphasis added).

10 Defendants have not completed a biological assessment nor obtained a biological opinion
11 for the challenged mining activities within Riparian Reserves, therefore violating the ESA.
12 There is nothing in the record that evidences the agency’s compliance with its consultation duties
13 under the ESA regarding its authorization of the challenged mining operations.

14 Defendants have failed to adequately analyze the effects of mining in Riparian Reserves
15 on these species. Mining activities in Riparian Reserves are adversely affecting the threatened
16 Coho salmon and other species, both directly and cumulatively. *See* Grunbaum Report AR 294-
17 299; *see also* Soto (Karuk Tribe of California Department of Natural Resources), Summary of
18 Issues and Potential Impacts on Salmon River Salmonids and Other Non-salmonid Species From
19 Suction Dredging in the Salmon River, Klamath River and Tributaries, June, 2004 (attached to
20 Declaration of Soto). Defendants have also failed to review the individual and cumulative
21 effects of multiple impacts spread out over time and location.

22 Further, the agency has not determined whether the authorized mining activities will
23 result in the destruction or adverse modification of designated critical habitat for the Coho,
24 which includes the Klamath River and its tributaries. 64 Fed. Reg. 24049 (May 5, 1999). In this
25 case, mining activities such as suction dredge mining results in “destruction or adverse
26

1 modification” of “critical habitat” for the Coho and cannot be allowed under the ESA. 16 U.S.C.
2 § 1536(a)(2). *See* Grunbaum Report; Siskiyou, 87 F. Supp.2d at 1102-03.

3 The cumulative impact of land management practices, including mining, in affected
4 watersheds continues to pose threats to these species. *See* Grunbaum Report; *see also* Dec. of
5 Soto. Defendants may not allow activities to proceed that may affect these species until it has
6 completed a legally valid assessment and consultation that properly addresses and protects
7 against these impacts. Because the consultation process has yet to be properly initiated and
8 concluded, Defendants may not proceed with any activities that may affect these species.

9 **C. Defendants Violated the National Environmental Policy Act**

10 Defendants’ failure to prepare either an Environmental Assessment (“EA”) or
11 Environmental Impact Statement (“EIS”) for the challenged mining operations violates NEPA.
12 NEPA is an action-forcing statute. Its sweeping commitment is to “prevent or eliminate damage to
13 the environment and biosphere by focusing government and public attention on the environmental
14 effects of proposed agency action.” Marsh v. Oregon Natural Resources Council, 490 U.S. 360,
15 371 (1989). It requires the federal agency to ensure “that the agency will inform the public that it
16 has indeed considered environmental concerns in its decision making process.” Baltimore Gas and
17 Electric Company v. NRDC, 462 U.S. 87, 97 (1983). NEPA requires that the Forest Service take a
18 “hard look” at the environmental impacts of any mine proposal. Blue Mountains Biodiversity
19 Project v. Blackwood, 161 F.3d 1208, 1211 (9th Cir. 1998).

20
21 NEPA’s disclosure goals are two-fold: (1) to insure that the agency has carefully and
22 fully contemplated the environmental effects of its action, and (2) “to insure that the public has
23 sufficient information to challenge the agency.” Robertson v. Methow Valley Citizens Council,
24 490 U.S. 332, 349 (1989); Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1151 (9th Cir.
25 1998). By focusing the agency’s action on the environmental consequences of its proposed
26 action, NEPA “ensures that important effects will not be overlooked or underestimated only to

1 be discovered after resources have been committed or the die otherwise cast.” Robertson, 490
2 U.S. at 349.

3 “A threshold question in a NEPA case is whether a proposed project will ‘significantly
4 affect’ the environment, thereby triggering the requirement for an EIS.” Blue Mountains
5 Biodiversity Project, 161 F.3d at 1212 (citing 42 U.S.C. § 4332(2)(C)). “As a preliminary step,
6 an agency may prepare an EA to decide whether the environmental impact of a proposed action
7 is significant enough to warrant preparation of an EIS.” Id. (citing 40 C.F.R. § 1508.9). “The
8 purpose of an EA is to provide the agency with sufficient evidence and analysis for determining
9 whether to prepare an EIS or to issue a [Finding of No Significant Impact].” Metcalf v. Daley,
10 214 F.3d 1135, 1143 (9th Cir. 2000) (citing 40 C.F.R. § 1508.9). “Because the very important
11 decision whether to prepare an EIS is based solely on the EA, the EA is fundamental to the
12 decision-making process.” Id.; see 40 C.F.R. § 1500.1(b); Idaho Sporting Congress, 137 F.3d at
13 1151. “[T]he public must be given an opportunity to comment on draft EAs and EISs.”
14 Anderson v. Evans, 314 F.3d 1006, 1016 (9th Cir. 2002); Citizens for Better Forestry v. U.S.
15 Dept. of Agriculture, 341 F.3d 961, 970 (9th Cir. 2003).

16 NEPA applies to the Forest Service’s approval of multiple mining projects. As stated by
17 the Siskiyou court:

18 [P]laintiff has raised substantial questions whether multiple mining operations ...
19 may have a significant effect. In such circumstances, an EA is warranted to
20 determine whether these multiple mining operations will have a significant effect
on the human environment.

21 Siskiyou, 87 F.Supp.2d at 1103. In that case, the court ordered the Forest Service to prepare an
22 EA for a much smaller number of mining operations with far less environmental impacts. The
23 agency had authorized only three NOI suction dredge operations and two NOIs for mining with
24 minimal hand tools. Id. at 1102. Here, for the New 49’ers operations alone, the agency
25 authorized mining on up to 35 miles of the Klamath River and its tributaries, with up to 10
26

1 dredges per river mile. AR 033-34. Even if all of the “members” of the New 49’ers do not
2 utilize all of these authorized stream miles at one time, outside of these limitations, the NOI, as
3 authorized by the Forest Service, does not specifically limit the number of dredges that may
4 operate in the Klamath Basin within the Happy Camp, CA, Ranger District. This impact does
5 not even include the numerous other challenged mining operations authorized by the Happy
6 Camp Ranger District of the Forest Service. AR 067-82.

7
8 Despite this, and despite the agency’s own admission of the cumulative environmental
9 impacts caused by multiple mining operations, none of the required NEPA analysis and
10 opportunities for public review have occurred. As acknowledged by Defendants, the direct,
11 indirect, and cumulative impacts have not been addressed by any EA or EIS. Def. Answer ¶34.
12 Defendants never even notified the public that they were authorizing this level of mining in
13 Riparian Reserves, let alone allowed for public comment.¹⁷ Based on these fundamental
14 violations of NEPA, the Forest Service’s authorization of mining is illegal and cannot stand.

15 **D. Appropriateness of Injunctive Relief**

16 Based on the above noted violations of the ESA, NFMA, and NEPA, this Court should
17 enjoin the Forest Service from any further violations of these laws. The appropriate remedy for
18 violation of the ESA is an injunction against any action not in compliance with the ESA:

19 “Given a substantial procedural violation of the ESA in connection with a federal
20 project, [therefore], the remedy must be an injunction of the project pending
21 compliance with the ESA.” *Thomas, supra*, 753 F.2d at 764. The Ninth Circuit
22 has held that the failure to complete a biological assessment or to consult
23 concerning a federal project are substantial procedural violations justifying an
24 injunction.

25 Pacific Coast Federation, 138 F.Supp. 2d at 1248.

26 ¹⁷ The agency has already admitted that its issuance of the PoOs in 2004 violated NEPA, based on Plaintiff’s allegations that the agency failed to follow NEPA’s public notice and comment and environmental review requirements. *See* Joint Stipulation for Partial Settlement and Order signed April 26, 2005.

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2 In addition, the above noted violations of the NFMA and NEPA also warrant injunctive
3 relief – particularly due to the above noted potential for significant environmental harm that
4 results from multiple mining projects. “When the proposed project may significantly degrade
5 some human environmental factor, injunctive relief is appropriate.” National Parks &
6 Conservation Association v. Babbitt, 241 F.3d 722, 737 (9th Cir. 2001). “[I]n *Sierra Club v.*
7 *Marsh*, 872 F.2d 497 (1st Cir.1989), then-Circuit Judge Breyer held that, because NEPA is a
8 purely procedural statute, the requisite harm is the failure to follow the appropriate procedures.
9 *See [Marsh]* at 500 (because NEPA can do no more than require the agency to produce and
10 consider a proper EIS, the harm that NEPA intends to prevent is imposed when a decision to
11 which NEPA obligations attach is made without the informed environmental consideration that
12 NEPA requires). *Marsh* also justifies injunctive relief in this case.” National Parks, 241 F.3d at
13 737, n.18. “[H]arm to the environment may be presumed when an agency fails to comply with
14 the required NEPA procedure.” Davis v. Mineta, 302 F.3d 1104, 1115 (10th Cir. 2002).

15 **VII. CONCLUSION**

16 Plaintiff respectfully requests this Court to grant this Motion for Summary Judgment.
17 Plaintiff requests that this Court enter an order declaring that the Forest Service’s authorization
18 of mining in Riparian Reserves with only a NOI violates the NFMA, that the National and
19 Regional Directives and their implementation violates the NFMA, and that the agency’s
20 authorization of the challenged NOIs violates the ESA and NEPA. The Plaintiff also requests an
21 injunction prohibiting the agency from authorizing or otherwise allowing mining in Riparian
22 Reserves in violation of these laws. More specifically, Plaintiff requests that the Forest Service
23 be enjoined from authorizing any mining operation without: (1) requiring a PoO for each
24 proposed mining operation in Riparian Reserves; (2) preparing either an EA or EIS reviewing the
25 individual and cumulative impacts from proposed mining in Riparian Reserves; and (3) fully
26 complying with the procedural and substantive provisions of Section 7 of the ESA.

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2 Respectfully submitted this 29th day of April, 2005.

3
4 /s/ Joshua Borger

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26

CERTIFICATE OF SERVICE

27 I certify that on April 29, 2005, I electronically filed the foregoing Plaintiff's Motion for
28 Summary Judgment and Memorandum in Support Thereof with the Clerk of the Court, using the
29 CM/ECF system, which will send notification of such filing to the following:

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/s/ Joshua Borger

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