UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-16801

KARUK TRIBE OF CALIFORNIA,
Plaintiff/Appellant

v.

UNITED STATES FOREST SERVICE, *et al.*,
Defendant/Appellees

and

THE NEW 49'ERS, INC., *et al.*,
Defendant/Intervenors/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTHERN CALIFORNIA
HONORABLE SAUNDRA B. ARMSTRONG, PRESIDING
(Case No: 04-CV-04275-SBA)

BRIEF OF DEFENDANTS/INTERVENORS/APPELLEES THE NEW 49'ERS, INC. AND RAYMOND W. KOONS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Civil Procedure, Defendant/Intervenor/Appellees The New 49’ers, Inc. states that it has no parent companies, subsidiaries or affiliates that have issued shares to the public.

Statement of Jurisdiction

Defendant/Intervenor/Appellees The New 49'ers, Inc. and Raymond W. Koons (hereafter, the "Miners") state that they agree with the facts presented in appellant's statement of jurisdiction. However, the Miners note that the Tribe's "information and belief" assertion that "the agency's violations of the ESA have continued unabated since [2004]" (Karuk Br. 7) is false, for the Tribe and its allies procured a California statute placing an indefinite moratorium on suction dredge mining, which became effective August 6, 2009. (*See* infra Point I.) In particular, the State of California has outlawed suction dredge mining unless and until the California Department of Fish and Game has completed an update to its previous environmental review of the practice, and updated, if necessary, its extensive regulations concerning the practice. (*See* Cal. Fish and Game Code § 5653.1 (2009).)

For this and other reasons, this appeal presents an entirely abstract and hypothetical question of how mining under a now-superceded state regulatory regime might be further addressed by the U.S. Forest Service in light of its responsibilities under the federal Endangered Species Act ("ESA"), 16 U.S.C. § 1531-44. Thus the Miners urge this Court to dismiss the appeal on jurisdictional grounds.

Counterstatement of Issues Presented for Review[1]

1. Whether this appeal should be dismissed as moot.

2. Whether this appeal should be dismissed or summarily affirmed on the alternative ground that the Forest Service did conduct an ESA consultation process covering future suction dredge mining operations within the Klamath National Forest, and the Tribe failed to raise any objection to the adequacy of such consultations before the District Court.

3. Whether the U.S. Forest Service may be said to "authorize" suction dredge mining by private parties on privately-held mining claims, mining that the agency has properly determined is not likely to involve any significant disturbance of surface resources.

4. Whether, even if the Forest Service somehow "authorized" mining within the meaning of the Endangered Species Act, and the existing consultation record were not constructed cover the four specific mining operations at issue, the Forest Service nonetheless adequately complied with its responsibilities under ESA § 7 though local District Ranger determinations of insignificance.

5. Whether the U.S. Forest Service could be held to violate an ESA consultation obligation with respect to a species whose ESA listing has been declared unlawful.

6. Whether this Court, in exercising review *de novo*, should consider certain supplementary materials rejected by the District Court.

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[1] In its opening brief, the Karuk Tribe of California presents a broad issue as to "whether the District Court erred in denying the Tribe's Summary Judgment Motion" (Karuk Br. 2), but presents no argument as to most of the issues resolved by the District Court. The Tribe has therefore waived any appeal as to issues other than the application of the Endangered Species Act to the "notice of intent" procedure employed under 36 C.F.R. § 228.4 (2004).

Statement of the Case

This case involves suction dredge mining on privately-held mining claims established under federal law. The mining consists of *individuals* using motorized vacuum pumps on small floats to vacuum gold from the bottom of streams *by hand*. A comprehensive scheme of California state regulation prohibits operations whenever there is any potential for appreciable negative impacts on anadromous fish, including the coho salmon listed under the federal Endangered Species Act which form the predicate for the Tribe's action.[2] Because the mining cannot proceed when fish eggs are in the gravel, the only imaginable impact on salmon is positive, for the mining generates clean, loose gravel they favor for spawning.

A comprehensive scheme of Forest Service regulations requires miners to provide a "notice of intent" whenever they "might cause disturbance of surface resources"; the local District Ranger then determines whether or not the disturbance "will likely cause significant disturbance of surface resources". In this case the local District Ranger determined, with the assistance of two Forest Service biologists focused upon fish impacts, that four specific mining operations were not likely to cause any significance

[2] The Tribe also asserts, in passing, that small-scale underwater mining might somehow adversely affect *birds* (Tribal Br. 3 n.2); the Tribe cheapens and discredits important federal environmental laws with such frivolous assertions.

disturbance to the resource. The Tribe asserts that the District Ranger's determinations constituted "agency action" requiring formal consultations pursuant to § 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2).

COUNTERSTATEMENT OF FACTS AND PROCEDURAL AND REGULATORY HISTORY

A. The Factual Record Before the District Court Concerning Impacts of Suction Dredge Mining.

The Supreme Court has repeatedly warned that litigation over Forest Plans must avoid "abstract disagreements over administrative policies", and instead seek to resolve claims of "more manageable proportions, [with their] . . . factual components fleshed out, by some concrete action". *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 736 (1998) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967) and *Lujan v. National Wildlife Federation*, 487 U.S. 871, 892 (1990)). Every mining claim is different, and the record reflects detailed site-specific determinations, review of which was supposed to be the starting point for judicial review of the final agency action, and discussion of which is entirely absent from the Tribe's brief.

In this case, the specific disputes now before the court consist of Forest Service determinations made in a series of four letters written in 2004 by the District Ranger in the Happy Camp Ranger District of the Klamath

National Forest. (ER108,[3] 123, 130 & 137; *see* Karuk Br. 4.) While the Forest Service's brief refers to the Six Rivers National Forest and notes that part of the Klamath National Forest extends into southern Oregon (Forest Service Br. 14-15), none of the conduct challenged on this appeal has any connection with the Six Rivers National Forest or the State of Oregon.

The administrative record reflects an extraordinarily detailed and site-specific analysis of the mining by the District Ranger, Forest Service biologists, and others. (*E.g.*, SER23-25 (Tribe, Miners and Forest Service meet); MER2 (notice of intent reflects factors discussed at meeting); *see also* MER10-12 ("ongoing meetings").) The local forest service ranger consulted biologists, fully considered highly-localized issues and developed local guidelines. (SER12-13 (ranger's memorandum describes process); MER9 (biologist notes the Miners' agreement to special fish protection measures); MER6 (local guidelines).)

The Miners' notices of intent identify creek-specific areas particularly suitable to fish habitat to be avoided. (MER3-4.) They identify areas where specific reclamation techniques will be employed. (MER4.) The record

[3] Citations in the form "ER___" refer to documents in the Tribe's Excerpts of Record; citations in the form "SER___" refer to documents in the Forest Service's Supplemental Excerpts of Record; and citations in the form "MER___" refer to documents in the Miners' Excerpts of Record, filed herewith.

reflects that the Miners carefully tailored their operations to avoid impact by modifying them in accordance with evolving micro-habitat concerns (MER1), action that would be impossible under more cumbersome regulatory schemes. The local ranger (and fisheries biologist) carefully verified that miners were in fact operating consistent with their notices of intent. (SER05; *see also* SER07 (NOAA Fisheries involvement), SER11.) The Tribe was intimately involved in these efforts. (*See* SER07-08.)[4]

The Forest Service has, consistent with Forest Manual Section 2817.10 (MER43-44), documented "the basis for the determination that a plan is not required". The Manual (which was employed here (*see* MER11)) emphasizes that "[t]he determination of what is significant can come only from a fair, reasonable and consistent evaluation of operations *on a case-by-case basis. Significant is a site-sensitive term* . . .". FSM 2817.11 (MER44-45).

[4] The Miners sought to supplement the Administrative Record with even more detailed information concerning the local District Ranger's activities (MER118-139), but the District Court struck such testimony from the record on grounds unrelated to the nature of such testimony. *See Karuk*, 379 F. Supp.2d at 1090-91. As explained *infra* Point VI, the McCracken Declaration is appropriate background material to assist the Court in understanding the extraordinary, site-specific negotiations between the Tribe, the Miners, the Forest Service, and others that produced the District Ranger's determinations.

By contrast, the Tribe approaches the issue by reference to vague and general factual allegations about *potential* effects of the activity of suction dredge mining in general, untethered to any specific mining operation. In particular, the Tribe singles out a highly-biased literature summary by a single biologist opposed to suction dredge mining (the "Grunbaum Report"[5])—even though his concerns with respect to these specific projects were all addressed. For all of the verbiage concerning *potential* impacts of suction dredge mining, *the Tribe has never been able to identify a single incident in which a suction dredge miner has ever injured a single fish or fish egg.*

Beyond the absence of any site-specific adverse effects whatsoever on listed species, the record is also clear that no cumulative impact arises from the activity. In part this is because all traces of any particular summer's activity vanish during high winter flows, which redistribute loose stream gravels in a highly dynamic fashion. (MER52; *see infra* Point VI concerning this document.) In response to all of the biologist speculation about potential cumulative effects, the Forest Service commissioned a study

[5] The record reflects input by two District Fisheries biologists, Bernis and Grunbaum, whose "opinions varied widely on the effect of dredge operations on fisheries" and "were not able to come to agreement". (SER12). The Tribe presents only the views of Mr. Grunbaum; the District Ranger received and integrated both opinions in his assessments (*id.*).

that attempted to identify any link between levels of mining activity and anadromous fish populations. Specifically, the Service engaged Professor Peter B. Bayley, of the Department of Fish & Wildlife at Oregon State University, to conduct a comprehensive study to assess asserted cumulative impacts on fish populations in the Siskiyou National Forest just over the border in Oregon. His Final Report was issued in April 2003. (MER35-36.[6]) Unlike most of the evidence proffered by the Tribe, his work represents a scientific study that has attempted to *measure* the asserted cumulative impacts of suction dredge mining (as opposed to merely speculating about possible effects):

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[6] The administrative record contains a "Suction Dredge Literature review as of December 6, 2004", which "was focused on references completed between 1998 to the present". (MER19-36 (excerpts.)) While the Forest Service did not include copies of the actual studies themselves in the administrative record, the Miners assume that the list of studies means that such studies may be considered part of the administrative record, and therefore include some of them in the Excerpts of Record.

However, the District Court specifically refused to supplement the administrative record with the Bayley study, presented to the Court as an exhibit to the Declaration of Joseph Greene (MER93-109), which the District Court struck from the record. *Karuk*, 379 F. Supp. at 1090-91. Greene reviewed the six-page "Summary of Fisheries Issues Concerning Suction Dredge Mining" assembled by Grunbaum, attempting to put his unsupported concerns in the context of the actual underlying scientific literature. (*See also* MER110-117.) Such testimony was plainly appropriate to "explain technical terms or complex subject matter". *Southwest Center for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1450 (9th Cir. 1996).

> "Localized, short-term effects of suction dredge mining have been documented in a qualitative sense. However, on the scales occupied by fish populations such local disturbances would need a strong cumulative intensity of many operations to have a measurable effect. Local information reveals that most suction dredge miners adhere more or less to guidelines that have recently been formalized by the Forest Service and generally in . . . Oregon, but there are individual cases where egregious mismanagement of the immediate environment has occurred, particularly with respect to damaging river banks in various ways. This analysis cannot account for individual transgressions, and a study to do so at the appropriate scale would be very expensive if feasible.
>
> *"Given that this analysis could not detect an effect averaged over good and bad miners and that a more powerful study would be very expensive, it would seem that public money would be better spent on encouraging compliance with current guidelines than on further study"*. (MER36 (emphasis added).)

This study corroborated the findings of numerous prior cumulative impact studies. (*See, e.g.*, MER32 ("The only attempt to measure cumulative effects of dredging on fish and invertebrates (Harvey 1986) suggested that a moderate density of dredges does not generate detectable cumulative effects"); MER25-26 (six 6" dredges on 2 km stream and 40 dredges on 11 km stretch had "no additive effects"); MER29-30 (no cumulative effects from twenty-four 3" to 6" dredges along 15 km stretch); MER57 (California state EIS finds no significant effects.).) Notwithstanding the absence of any credible scientific evidence of any cumulative impacts whatsoever, the local District Ranger developed threshold limits on dredges/mile of river,

exceedence of which would prevent use of the "notice of intent" procedure. (*See* SER12, SER21.)

Ultimately, the notion that this small-scale mining activity could jeopardize the continued existence of any species of anadromous fish is idiotic. During the great California gold rush, and for decades thereafter, gold miners washed entire hillsides into California rivers and streams, while salmon runs continued at record levels. It was not until fishermen developed the technology to catch and every fish everywhere that anadromous species were ever threatened. A single fisherman pulling in a single fish manifestly "affects the species" more than all of the suction dredge mining ever conducted in the Klamath River.

B. The Nature of the Regulatory Regime.

1. The Nature and Importance of State Regulation.

In 1994, the California Department of Fish and Game completed a comprehensive Environmental Impact Review, the functional equivalent of an environmental impact statement under NEPA, concerning the environmental impacts of suction dredging within the State. In fact, the Forest Service's programmatic biological assessment, conducted pursuant to the ESA for future suction dredge mining with the Klamath National Forest declared:

> "The effects of mining as a result of suction dredging has been described in the Final Environmental Impact Report for the Adoption of Regulations for Suction Dredge Mining (CDFG 1994), *and this document has tiered to that report.* (MER14.)

Not only did the agency rely upon the California FEIR, but the actual District Ranger who made the challenged decisions knew and was familiar with this FEIR and others. His notes confirm that "[t]here are at least 3 S[t]ate of California, Department of Fish and Game Environmental Impact Reports (EIRs) that tie to the dredge permit *and indicate there is no significant disturbance if the permit regulations are followed*". (MER11; emphasis added.) However, the District Court struck the FEIR from the record based on the Forest Service's erroneous representation to the Court that the document "was not considered by the Forest Service". *Karuk*, 379 F. Supp.2d at 1091.

The 1994 EIR noted many positive effects of suction dredge mining (MER51.) It concluded that adoption of the California regulations "will reduce . . . effects to the environment to less than significant levels and no deleterious effects on fish" (*id*. at 57). The regulations adopted through the FEIR process divide each and every body of water within California into eight different classes ranging from "no dredging permitted at anytime" to "open to dredging throughout the year". (14 Cal. Code Reg. § 228.5(a).)

The regulations also control the size of allowable equipment (*see, e.g.*, *id.* § 228(e)), and impose restrictions on the methods of operation (*id.* § 228(f)).

In its environmental analyses of suction dredge mining conducted in the Klamath National Forest pursuant to the Endangered Species Act, the National Marine Fisheries Service correctly explained that

> ". . . the State of California controls suction dredge mining activity through regulations that address annual operating periods, river reach locations available for mining, and equipment that may be used. These regulations are designed to minimize suction dredge impacts on anadromous salmonids, including the SONC coho salmon and KMP steelhead." (MER18.)

Such regulations provide important constraints to suction dredge mining within the Klamath National Forest which help establish an "environmental baseline" (*see* 50 C.F.R. § 402.02) of utterly insignificant environmental effects. The local District Ranger expressly took account of the state regulatory limitations in reaching the decisions now challenged. (SER13.)

Subsequent to reaching agreements with the Miners and the Forest Service confirming the adequacy of the voluntary restrictions incorporated into the notices of intent, the Karuk Tribe commenced a lawsuit in California state court asserting, among other things, that the listing of the coho salmon subsequent to the 1994 EIR constituted new information requiring an update to the EIR. The case settled with a consent decree requiring the California Department of Fish and Game to update its environmental analyses, and

amend regulations if necessary, within eighteen months. *Karuk Tribe v. California Dep't of Fish and Game*, No. RG211597 (Alameda Cty. Dec. 20, 2006). When the Department failed to do so, further litigation ensued, and the Tribe and its political allies ultimately procured the passage of a California statute, Senate Bill 670, which placed an indefinite moratorium in outlawing suction dredge mining in California until the Department completed its environmental analysis and amended regulations. (A copy of the Senate Bill is included as an Addendum to this Brief.)

2. Federal Regulation

a. The pertinent federal statutes concerning mining and Forest Service regulation.

The general Congressional policy favoring mining remains that set forth in the 1872 Mining Laws: "all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase . . .". 30 U.S.C. § 22.[7] In addition, ". . . so long as they comply with the laws of the United States . . . [miners] shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their operations". 30 U.S.C. § 26. These statutes constitute a Congressional authorization of suction dredge mining on the public lands.

[7] These policies were first established in the Act of July 26, 1866 (14 Stat. 251).

The federal courts have recognized that the Miners and others throughout California hold federally-established rights in their mining claims, which constitute private "property in the fullest sense of the word". *Bradford v. Morrison*, 212 U.S. 389, 395 (1909); *see also United States v. Shumway*, 199 F.3d 1093, 1100 (9th Cir. 1999) (discussing scope of legal interests represented in mining claims); *United States v. Rizzinelli*, 182 F. 675, 681 (1910) (miners hold a "distinct but qualified property right" with "possessory title").

The Organic Administration Act of 1897 later authorized the Secretary of Agriculture to prescribe rules and regulations to prevent "depredations upon the public forests and national forests", 16 U.S.C. § 551, but also provides that the foregoing authority

> "shall not be construed as prohibiting any person . . . from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof. Such persons must comply with the rules and regulations covering such national forests"

16 U.S.C. § 478. The Ninth Circuit has noted the foregoing statutory authority as pertinent in resolving "conflict between rights to prospect and develop mineral resources on public lands and the powers and duties of the United States Forest Service to manage the surface resources . . .". *United States v. Brunskill*, 792 F.2d 938, 939 (9th Cir. 1986).

The next relevant legislative initiative came with the Surface Resources and Multiple Use Act of 1955 ("Multiple Use Act"), Pub.L. 84-167, 69 Stat. 367, now codified at 30 U.S.C. §§ 611-12. This time, Congress addressed the appropriate balance between mining rights and regulations issued under the Organic Act by declaring that the miner's rights

> ". . . shall be subject, prior to issuance of patent therefore, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof . . . *[p]rovided, however*, [t]hat any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as to not endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto . . ." 30 U.S.C. § 612(b).

In light of this and other statutory authority, the Ninth Circuit has repeatedly admonished the Forest Service that it "lack[s] authority effectively to repeal the [Mining Law of 1872] by regulations" unreasonably restrictive of mining rights. *See United States v. Shumway*, 199 F.3d 1093, 1107 (9th Cir. 1999). Forest Service Manual Chapter 2813.14 confirms that "rules and regulations may not be applied so as to prevent lawful mineral activities or to cause undue hardship on bona fide prospectors and miners".

b. The discretionary authority of the Forest Service as set forth in the Part 228 regulations.

The Forest Service has exercised its authority under the Organic Act to promulgate regulations set forth at 36 C.F.R. Part 228. Under those

regulations, mining activity within the National Forests is divided into three categories.

First, there are mining activities which are of sufficiently small scale that there is no appreciable risk that they might impact surface resources, such as activities that do not "involve the use of mechanized earth moving equipment such as bulldozers or backhoes". 36 C.F.R. § 228.4(a)(2)(iii) (2004). These activities may proceed without any notice to the Forest Service. *Id.* § 228.4(a)(2) (2004).

Second, where mining "*might* cause disturbance of surface resources", miners are to provide a "notice of intent" to the Forest Service. *Id.* § 228.4(a) (2004) (emphasis added). While the notice of intent is supposed to be submitted in advance of operations—"notice of intent is required from any person *proposing* to conduct operations" (*id.*; emphasis added)—no rule or law or even Forest Service Manuel (MER33-34) forbids operations after the notice is given. As set forth below, the entire historical design of the notice of intent procedure was to provide mere "notice", not any sort of application for permission to proceed.

After receiving a notice of intent, the local District Ranger is then to make a determination within fifteen days as to whether the activities described in the notice "will likely cause significant disturbance of surface

resources". *Id.* § 228.4(a)(2)(iii) (2004). In all of the mining activities at issue on this appeal, the District Ranger made no such determination.

Third, where the District Ranger makes a determination that the activity will likely cause a significant disturbance, a "plan of operations" is required. *Id.* § 228.4(a). This is the highest level of scrutiny, which requires full environmental analysis. *Id.* § 228.4(f). As a practical matter, the requirement of a plan of operations is the death knell for mining activity, for it requires a scale of planning effort the Forest Service cannot possibly achieve.[8] It is only in the third category of activities that the Forest Service has attempted to limit the Miners' rights to mine on their mining claims.

These regulations recognize the unique nature of the property rights involved, and afford the Forest Service no discretionary authority to stop activities with less than significant effects.

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[8] Before the District Court, the Miners presented testimony from a miner in the adjacent National Forest to the north, who described the Forest Service's utter inability to review and approve plans of operations. (MER60-61; *see also infra* Point IV (noting massive scale of effort required to approve such plans.) The testimony also explained in detail why the Miners regard certain findings in *Siskiyou Regional Education Project v. Rose*, 87 F. Supp.2d 1074 (D. Or. 1999), now emphasized by the Tribe (Karuk Br. 9, 11), as the product of collusion between Forest Service officials opposed to mining and the local environmental community. (MER66-70.) The District Court struck this testimony from the record (*Karuk*, 379 F. Supp.2d at 1091), but "sustained the Miners' objection" to the Tribe's references to the factual findings in *Rose* (*id.* at 1089). Before this Court, the Tribe continues to emphasize the findings without mentioning the District Court's ruling.

The history of the regulations leaves no doubt that Congress did not intend to permit the Forest Service to ensnare small-scale mining activities in the plan of operation procedure. Indeed, Congress intervened in the regulatory process to create the "notice of intent" procedure in the Part 228 regulations precisely to enable miners to avoid compliance with lengthy environmental reviews that would effectively cripple or kill mineral development, which requires a constant cycle of exploration, location, and exploitation.

The Forest Service initially promulgated the Part 228 (then Part 252) Organic Act regulations as a proposed rule in 1973. 38 Fed. Reg. 34,817 (Dec. 19, 1973). This provoked a Congressional oversight hearing during which members of Congress made clear their opposition to Forest Service mining regulations which would entangle small-scale miners in NEPA-style planning exercises. *See generally Proposed Forest Service Mining Regulations: Hearings before the Subcommittee on Public Lands, House Committee on Interior and Insular Affairs*, 93rd Cong., 2d Sess. 1-4 (Mar. 7-8, 1974). Testimony before the Subcommittee confirmed that even back in 1974, under a "plan of operation" approach, it would often be impossible to comply with NEPA processes consistent with the "length of the field season" (*id.* at 37); the industry noted, however, "no objection to a

notification procedure which would alert the Forest Service to the expected activities" (*id.* at 41).

During the hearings, the Forest Service initially defended the position that each and every mineral operation would require an approved plan of operations. *See id.* at 10 (Testimony of Forest Service Chief); *see also* proposed 36 C.F.R. § 252.7, 38 Fed. Reg. at 34,818 (with certain exceptions, "[n]o operations shall be conducted unless they are in accordance with an approved plan of operations . . ."). Thereafter, the Forest Service conformed to Congressional intent and amended the proposed regulations to add a "notice of intent provision" which would suffice for non-significant operations. 39 Fed. Reg. 26,038, 26,039 (July 16, 1974) (proposed 36 C.F.R. § 252.4). The final rule was adopted August 28, 1974. 39 Fed. Reg. 31,317 (Aug. 28, 1974).[9]

[9] The Forest Service conducted an EIS in connection with the adoption of these regulations in which the Forest Service specifically rejected the alternative of requiring a plan of operation for all mining activities not only because of "undue hardships on the operator", but also because it would "require additional qualified personnel in the Forest Service to implement and administer these regulations", and result in "a reduced rate of exploration and discovery of mineral deposits with attendant shortages of some minerals and increased costs to society". (MER47) The District Court rejected the Miners' attempt to supplement the administrative record with this EIS based on Defendants' representation that the EIS was not considered in connection with the decisions at issue, *Karuk*, 379 F. Supp.2d at 1091, but the document remains important as historical evidence, akin to

Congress has recently asked the National Research Council to reassess the adequacy of this regulatory framework, and its Committee reported back that "BLM and the Forest Service are appropriately regulating these small suction dredge mining operations under current regulations as casual use or causing no significant impact, respectively". NRC, *Hardrock Mining on Federal Lands* 96 (Nat'l Academy Press 1999).

C. The History of ESA Consultation and Listing Status

The Tribe correctly notes that the coho were listed as "threatened" in 1997. 62 Fed. Reg. 24588 (May 6, 1997). Remarkably, even though its brief focuses upon the Service's compliance with the Endangered Species Act, the Tribe makes no mention of the record concerning such compliance.

In particular, the Tribe omits to disclose that subsequent to the listing, the Forest Service completed an Endangered Species Act biological assessment on May 20, 1997, concluding that the Service's "issuance of Plans of Operation associated with suction dredging may affect but is not likely to adversely affect anadromous fish species or their habitat". (MER16.) Thereafter, on July 31, 1997, the National Marine Fisheries service issued an opinion that "the effects of permitting suction dredging within the KNF [Klamath National Forest], taken together with cumulative

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legislative history, demonstrating the importance of the notice of intent procedure in implementing federal mining policy.

effects and the effects of the environmental baseline, are not likely to jeopardize the continued existence of [SONC coho salmon]. (MER17.)

This record is properly understood as reflecting the conclusion that, on a programmatic basis, the practice of suction dredging in the Klamath National Forest, whether proceeding in association with "plans of operation" or "notices of intent" (*see* MER13) has no discernible adverse impact on endangered salmon, consistent with all available scientific information.

Thereafter, a suit was brought challenging the coho listing, and it was declared unlawful. *California State Grange v. Department of Commerce*, No. 02-CV-6044-HO, Tr. at 21 (Jan. 11, 2005) (MER71-92). While the *Grange* court did not vacate the listing, and the agency eventually re-listed the coho, there was no lawful listing at the time of the District Court's ruling challenged on this appeal. The District Court refused to consider the *Grange* court ruling. *See Karuk*, 379 F. Supp.2d at 1092.

Summary of Argument

This is not an appropriate case for the exercise of appellate jurisdiction. The Tribe has succeeded in outlawing suction dredge mining in all of California, and unless and until the California Department of Fish and Game completes extensive environmental analyses and updated regulations demanded by the Tribe, the mining will not continue. The Court is being

asked to give an improper advisory opinion to the Tribe and Forest Service concerning the hypothetical application of the ESA to future decisions that, if they ever occur, will occur under a different regulatory regime.

To make matters worse, the Tribe and Forest Service act as if there were no ESA consultation at all, presenting a record to this Court that all but ignores a 1997 consultation plainly intended to cover future suction dredge mining within the Klamath National Forest. That consultation reached in the inevitable and painfully obvious conclusion that such mining could not jeopardize the continued existence of listed salmon.

As to the narrower question on which the Tribe and Forest Service seek their advisory opinion—whether a district ranger's review of "notices of intent" submitted by miners constitutes "agency action" within the meaning of § 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2)—it is apparent that the Forest Service does not take the sort of affirmative action required to trigger application of the statute at all. The Forest Service's discretion has been carefully limited by powerful Congressional policies promoting mineral resource development, and the 36 C.F.R. Part 228 regulations reflect that absent a district ranger determination of significance, the Forest Service has no authority to regulate the operations.

The Tribe asks this Court to hold, in substance, that each and ever time a federal agency demands information from a citizen about the citizen's activity in areas where listed species may be present, that activity is now one that proceeds only by permission of the federal agency, thereby triggering the application of the ESA, and many other other statutes as well. Under this theory, no activity would be sufficiently *de minimus* to avoid triggering costly and time-consuming formal ESA consultation, such as each time a backcountry hiker signs a log in a Ranger Station, or camps at a Forest Service campsite, or each time the Karuk Tribe holds a ceremonial gathering in the Forest. As a practical matter, positions such as the Tribe's are literally rotting and burning the National Forests to the ground, and making a mockery of the important purposes of federal environmental laws, because actual, on-the-ground conservation efforts are put aside in favor of mandatory but pointless paper-pushing.

Significantly, the Tribe does not challenge the merits of any of the four specific determinations of insignificance made by the District Ranger, and would probably be estopped from doing so by its intimate involvement in those decisions. The Tribe fails to present any evidence that small-scale mining operations, carefully and voluntarily limited through ongoing cooperative arrangements between stakeholders, have any actual effect on

listed species whatsoever. The whole point of the restrictions is to avoid mining when fish are present and might be injured. For this reason, the Tribe's claims fail even without regard to the "agency action" question.

Finally, the Tribe and Forest Service attempt to fashion their test case for an ESA violation based on a "species" listing that had, by the time of the District Court's ruling, been declared unlawful. It would be inconsistent with the very rule of law, and yet another improper advisory opinion, to hold the Forest Service violated the ESA without any lawfully listed species being present to provide a predicate for such a holding.

The Miners also argue that the District Court erred by declining to consider additional materials beyond the administrative record certified by the Forest Service, particularly in the many cases where the certification was manifestly erroneous.

Argument

I. THIS COURT SHOULD NOT VENTURE TO GIVE AN ADVISORY OPINION ON THE NOW-SUPERCEDED FACTS OF THIS CASE.

As noted above, the activity challenged by the Tribe has now been outlawed within the State of California pending an update to the California Department of Fish and Game's 1994 Environmental Impact Review and potential changes to the extensive state regulations concerning suction

dredge mining within the State. Because "a new statutory enactment has removed the basis or need for relief," *Smith v. University of Washington Law School*, 233 F.3d 1188, 1194 (9th Cir. 2000), the case is now moot.

The Tribe asks this Court to enter relief that would presumably require the Service to engage in ESA procedures without regard to the future factual context (the important regulations concerning suction dredge mining) that are entirely distinct from the 2004 facts upon which the Tribe predicated its action. It has long been the law that the federal courts do not issue advisory opinions. *Muskrat v. United States*, 219 U.S. 346 (1911).

In simple terms, the Tribe asks this Court to speculate that factual circumstances may someday require additional ESA procedures, and the Forest Service may someday fail to engage in such procedures—a wholly abstract and improper inquiry. *Cf., e.g., Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994) ("Federal courts are not authorized to address such theoretical possibilities"). When and if suction dredging is again permitted within the State of California, under regulations the scope of which cannot now be known, the Tribe may present a concrete case or controversy concerning the lawfulness of such decisions as the Forest Service may make.

II. THE APPEAL SHOULD BE DISMISSED OR SUMMARILY AFFIRMED ON THE ALTERNATIVE GROUND THAT THE TRIBE FAILED TO IDENTIFY ANY DEFICIENCIES IN THE FOREST SERVICE'S CONSULTATION PROCESS.

The Tribe seeks relief declaring the Forest Service to have violated the ESA by not completing a "legally valid assessment and consultation that properly addresses, and protects against," alleged impacts of suction dredge mining on listed coho salmon. (Karuk Br. 38.) But the Tribe offers no explanation as to any deficiencies in the Service's programmatic assessment and the NMFS "no jeopardy" opinion concerning future suction dredge mining within the Klamath National Forest, and offered no such evidence before the District Court. Indeed, the Tribe simply asserts, contrary to fact, that the Forest Service violated § 7 by allowing mining to proceed "without conduct the required consultation" *at all*. (*See* Karuk Br. 23.)

In substance, the Tribe and Forest Service acted as if no ESA consultations had occurred, seeking and obtaining an advisory opinion on whether or not Forest Service review of notices of intent constituted "agency action" for ESA purposes. (*See* Point III *infra*.) The Miners can only speculate as to why the Forest Service stipulated to a violation of the ESA with respect to certain plans of operations notwithstanding an entirely adequate ESA consultation record (*cf.* MER58-70 noting hostility to mining interests within Forest Service), but the Forest Service's stipulation

manifestly does not address the remaining claims now at issue, and this Court conducts *de novo* review as to the agency's compliance with the ESA based on the "whole record" (5 U.S.C. § 706), which here includes a consultation covering the actions complained of.

Nor does the Tribe identify any specific evidence of environmental harm or impact arising from the four small-scale mining operations still challenged. Absent some showing of some impact not previously covered by the existing § 7 opinion, the Tribe has no case for an ESA violation. These unusual circumstances underscore the wisdom of dismissing this case on jurisdictional grounds and awaiting a genuine case or controversy and when if suction dredge mining is again allowed to proceed in the Klamath National Forest.

III. THE FOREST SERVICE CANNOT BE SAID TO HAVE AUTHORIZED SMALL-SCALE MINING WITHIN THE MEANING OF THE ESA AND ITS IMPLEMENTING REGULATIONS.

Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), applies to "agency action", that is, actions that the federal agency has the power to control under the governing statutes and regulations. *See also* 50 C.F.R. § 402.02 (definition of agency "action"); § 402.03 ("Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control"). Even assuming *arguendo* that this appeal

is not properly dismissed, the mere receipt and evaluation of a "notice of intent" by the Forest Service is not an action of the Forest Service.

It is important to understand that the Tribe's repeated assertions that mining "operations may not proceed until the agency has made this decision" evaluating the notice of intent (Karuk Br. 31; *see also* Forest Service Br. 22[10]) are false. As noted above, the entire notice of intent procedure was designed, under close Congressional oversight, to avoid any entanglement with any approval process whatsoever. The regulations do not purport to forbid any mining operations pending district ranger review of the notice of intent;[11] it is, after all, a "*notice* of intent", not an application for any type of permission or authority.

The notices are, in substance, a courtesy by the private mining operator to the Forest Service, and, as the Forest Service explains, a means

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[10] In an unfortunate misstatement concerning the notice of intent procedure, the Forest Service Brief says that if the district ranger determines no plan of operations "will be required, the miner may proceed with the mining operation". (Forest Service Br. 22; *see also id.* at 27.) There is no such restriction in the regulations.

[11] The current Part 228 regulations make it even clearer that mining operations are not prohibited pending district ranger review of notices of intent. *See, e.g.*, 36 C.F.R. § 228.4(a)(4) (2009) ("If the District Ranger determines that any operation is causing or is likely to cause significant disturbance of surface resources, the District Ranger shall notify the operator that the operator must submit a proposed plan of operations for approval and that the operations can not be conducted until a plan of operations is approved.").

by which miners can obtain advice as to the scope of impacts that may invoke regulatory authority.[12] This Court has explained that the giving of such advice by the Forest Service cannot be construed as "agency action" for purposes of § 7(a)(2). *Marbled Murrelet v. Babbett*, 83 F.3d 1068, 1074-75 (9th Cir. 1996). Indeed, as this Court explained, "[p]rotection of endangered species would not be enhanced by a rule which would require a federal agency to perform the burdensome procedural tasks mandated by section 7 simply because it advised or consulted with a private party." *Id.* A contrary rule would discourage "desirable communication" and "protection of threatened and endangered species would suffer". *Id.*

The Tribe seizes upon "you may begin" language in one of the District Ranger's letters as connoting "authorization", but the District Ranger's inexact expressions concerning the regulations cannot overturn their plain terms. The formal position of the agency is that review of a notice of intent authorizes nothing, and inexact expressions from the District Ranger—or the agency's appellate counsel—are not determinative. *Cf. National Association of Home Builders v. Defenders of Wildlife*, 551 U.S.

[12] The Miners' voluntary decision not to further pursue a notice of intent within the Six Rivers National Forest (not relevant to any of the challenged decisions on this appeal) after obtaining advice from that Forest is an example of how this process works. It cannot, as the Tribe suggests (Karuk Br. 32), be construed as demonstrating that such advice "authorizes" the activity.

644 (2007) (ignoring "stray statement" in Federal Register notice given "Congress' admonition that in reviewing agency action, 'due account shall be taken of the rule of prejudicial error,' 5 U.S.C. § 706).

As explained above, the presence of mining claims and the important property rights associated with them, and Congressional action to foster mining, severely constrain the Forest Service's regulatory jurisdiction. The regulatory regime designed by the Forest Service specifically (and repeatedly) disavows any authorization or approval of mining activities where such activities do not pose a threat to surface resources.

While this Court has not addressed whether or not review of a mining "notice of intent" constitutes "agency action" for ESA purposes, it has decided that review of a mining "notice of intent" is not "action" for purposes of the National Environmental Policy Act (NEPA). *Sierra Club v. Penfold*, 857 F.2d 1307, 1312-14 (9th Cir. 1988). The case concerned a Bureau of Land Management (BLM) set of procedures precisely analogous to those employed by the Forest Service here, under which mining activities were divided into the same three categories: (1) mines requiring plan approval; (2) mines requiring notice; and (3) casual mines not requiring notice. *Id.* at 1309. There, as here, miners who do not comply with the notice requirement are subject to potential enforcement actions. *Id.*

at 1309-10. The applicable regulations and BLM Manual provided a substantive review of the notice and feedback to the miners concerning potential additional regulatory requirements, just as the 36 C.F.R. Part 228 regulations and Forest Service Manual do here. *Id.* at 1313 & n.10.

As the Ninth Circuit explained, for "notice" mines, BLM did not "require approval before an operation can commence developing the mine". *Id.* at 1314. Nor do the Part 228 regulations require any Forest Service approval. *See* 36 C.F.R. § 228.4(b) (limiting operations for mines with unapproved plan of operations); *see also* FSM 2817.10 (MER43-44; no approval to commence operations specified where no plan of operations required).[13] The Ninth Circuit expressly rejected the argument that because the BLM could determine to shut down mining with significant adverse effects revealed by the notice, NEPA applied, because under NEPA, federal action "do[es] not include bringing judicial or administrative civil or criminal enforcement proceedings". *Penfold*, 857 F.2d at 1314 (quoting 40 C.F.R. § 1508.18(a)).

[13] The Forest Service's own rationale for eschewing NEPA procedures for insignificant mining operation is similar to, but not identical with *Penfold's* reasoning. As the Forest Service explained in a May 26, 2004 memorandum to Forest Supervisors (SER28-30), "[i]f the District Ranger's conclusion is that a Plan of Operations is not required, there is no decision, and, hence, no federal action. Under these circumstances, NEPA and ESA are not triggered for the Forest Service." (SER29.)

This Court has already determined that the ESA is to be interpreted the same way, most recently in *Western Watersheds Project v. Matejko*, 468 F.3d 1099, 1102 (9th Cir. 2006). In the *Matejko* case, environmentalists challenged the U.S. Bureau of Reclamation's decision not to regulate certain "vested rights-of-way held by private landowners to divert water for irrigation uses". *Id.*[14] The Court reiterated the broad principle that an agency's decision not to exercise regulatory jurisdiction was not "agency action" for purposes of § 7(a)(2), explaining that although "'agency action' is to be construed broadly, Ninth Circuit cases have emphasized that section 7(a)(2) consultation stems only from "affirmative actions". *Id.* at 1107-08. Where, as here, the challenged activity is authorized under long-standing federal statutes, not agency discretion, § 7(a)(2) consultation is not required.

Other Ninth Circuit ESA authority confirms that such "affirmative actions" must be predicated upon the exercise of discretionary agency authority. For example, in *Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995), this Court rejected a "failure to consult" claim where the U.S. Bureau

[14] Like federal mining claims, the private rights in question in *Matejko* arose from the same Act of July 26, 1866 (14 Stat. 251). *See id.* at 1103 (identifying 1866 statutes involved). Indeed, § 9 of the 1866 Act puts "rights to the use of water for mining" on the same footing as the rights addressed in *Matejko*. *Id.*

of Land Management conducted an environmental assessment and sold certain timber pursuant to a pre-existing agreement; the Bureau even issued a letter to the timber company "'approving' its proposal". *Id.* at 1511. But the agency review process was "for the limited purpose of determining whether [the timber company's] proposal implicated one of the three factors allowing for disapproval". *Id.*

Here the Forest Service's review of the notices of intent was for the limited purpose of screening to see if there are environmental impacts sufficient to afford the agency authority to invoke its regulatory authority to require a plan of operations, potentially halting the mining activity pending plan approval. In each case, the Forest Service concluded that the impacts were too slight to invoke any regulatory authority. *The Tribe offers no challenge to the accuracy of these determinations.*

The District Ranger's determinations may also be analogized to the EPA's review of criteria set forth in § 402(b) of the Clean Water Act, 33 U.S.C. § 1342(b), governing the transfer of permitting authority to states reviewed in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). In that case, the Supreme Court reversed this Court's determination that the transfer of authority from EPA to the State of Arizona constituted "agency action" within the meaning of § 7(a)(2), even though

EPA's transfer decision "involves some exercise of judgment as to whether a State has met the criteria set forth in § 402(b)". *Id.* at 671.

As the Court explained, "§ 7(a)(2)'s no-jeopardy duty covers only discretionary agency actions and does not attach to actions (like the NPDES permitting transfer authorization) that any agency is required by statute to undertake once certain specified triggering events have occurred". *Id.* at 669. The *Home Builders* case stands for the proposition that, as in *Sierra Club v. Babbitt*, the mere existence of agency determinations is not alone "agency action". Rather, the agency must, *after giving legal effect to such determinations*, have the discretionary authority to regulate for the asserted benefit of listed species.

The District Ranger's specific determinations of insignificance constitute a predicate finding removing the Forest Service's authority to regulate the mining activities set forth in the notice of intent. Again, the Tribe does not even suggest that any of the specific determinations were arbitrary, capricious or contrary to law; rather, the Tribe seeks to invoke § 7(a)(2) procedures without regard to the merit of the District Ranger decisions.

The Tribe's claim that "'initiation or continuation'" of mining that disturbs Forest Service lands is *generally* subject to the agency's approval

(Karuk Br. 26 (citing *United States v. Weiss*, 642 F.2d 296, 297 (9th Cir. 1981)) is simply wrong. The *Weiss* case apparently discussed certain now-superceded regulations which, as explained above, were changed at the direction of Congress to avoid interference with mining rights. The present regulations do not, as a general matter, make the "initiation or continuation" of mining conditional on Forest Service approval; rather, only a determination of significance triggers agency authority.[15]

As this Court has emphasized several times in this context, the absence of an agency duty to consult does not leave the Tribe without a remedy under the ESA. If the mining activity were actually injuring

[15] The Tribe also cites *dictum* from *Granite Rock Co. v. California Coastal Comm'n*, 768 F.2d 1077, 1983 (9th Cir. 1985), *overruled*, 480 U.S 572 (1987). A number of cases (cited in Karuk Br. At 26) have erroneously assumed, in *dictum*, that mining regulation falls within the planning authority provided under the National Forest Management Act. This Court recently refused to consider whether that assumption is correct. *Siskiyou Regional Education Project v. U.S. Forest Service*, 565 F.3d 545, 549 n.1, 558 (9th Cir. 2009). In fact, as demonstrated in the briefing in that case, in enacting the NFMA, 16 U.S.C. §§ 1600-1614, Congress expressly excluded mining from its purview, consistent with long-standing and extraordinary statutory protections of mining activity from restrictive regulations. The very concept of land use planning, involving the consideration of particular uses for particular parcels, is utterly incompatible with the future development of mineral resources whose locations are generally unknown at the time of any particular planning process. Consistent with this obvious problem, the present planning regulations make no attempt to plan mineral development, and indeed the regulations contain no reference to minerals. *See* 36 C.F.R. § 219.12 (2009). For this reason, the Forest Service's reference to mining-related planning materials (Forest Service Br. 13), apparently prepared in error, should be disregarded.

endangered fish (rather than constituting habitat improvement while the fish are absent), the Tribe could seek relief under § 9 of the ESA. *See Matejo,* 468 F.3d 1110 n.9; *Babbitt*, 65 F.3d at 1512.

IV. WHERE LOCAL RANGERS DETERMINE THAT SUCTION DREDGE MINING IS CONDUCTED IN A MANNER THAT CANNOT BE SAID "MAY AFFECT" AN ESA-LISTED SPECIES, NO ESA CONSULATION IS REQUIRED.

Even if this Court were to determine that mere review of a notice of intent constitutes "agency action" within the meaning of the ESA, the consultation requirements under the Act only arise where a federal action "may affect an ESA listed species". *National Wildlife Federation v. National Marine Fisheries Service*, 422 F.3d 782 (9th Cir. 2005). The Tribe's case is devoid of any evidence whatsoever that the four challenged suction dredge mining activities "may affect" the coho salmon "species" listed in Northern California. Notwithstanding assertions as to various potential effects, the record is devoid of evidence that even a single member of any listed species would be "taken" by reason of the specific, limited, small-scale mining operations at issue on this appeal.

Indeed, as set forth above, the extensive negotiation process between the Tribe, the miners and the Forest Service produced voluntary decisions by the miners to avoid any area where they might even encounter the listed

species. For example, local biologists developed a concern that certain areas of cold water constituted important "refugia" for juvenile salmon; apparently they imagined that any miner presence in this water would harass the fish. In fact, "[a]ll observers would agree that fish do congregate near the effluent of suction dredges to prey upon the invertebrates pulled from the substrate" (MER: FEIR at 5); the suction dredge miners may be said to feed fish, not injure them. Nevertheless, the local District Ranger warned that he might find significance if miners operated in these areas (*see* MER6, SER14-21), so the Miners did not (*see* MER5).[16]

In substance, the highly-localized consultation process between and among all of the local stakeholders, including the Tribe, produced a series of guidelines, which when voluntarily incorporated by miners into their notices of intent, assured no impact whatsoever on listed species. The District Ranger's decisions not to require plans of operation in such circumstances constituted "an initial determination that the [activity] would have no effect on [the fish]. That finding obviates the need for formal consultation under the ESA." *Southwest Center for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1447 (9th Cir. 1996).

[16] The Tribe complains that the Miners submitted only "generalized maps" concerning the mining activity (Karuk Br. 13), but what was important to the fish advocates (at the time) was that activity be limited where the fish might be, not everywhere in the river.

What the Tribe actually challenges in this appeal is the notion that any activity, anywhere in the National Forests might be deemed by the responsible local officials to be sufficiently *de minimus* to avoid time-consuming and expensive paperwork. It is important for this Court to understand that "every activity requires formal ESA consultation" approach advocated by the Tribe has, in a broader context, virtually paralyzed forest management and frustrated conservation goals. The Forest Service's June 2002 Report "The Process Predicament: How Statutory, Regulatory and Administrative Factors Affect National Forest Management"[17] confirms that, the Forest Service faces a crisis from "excessive analysis" and procedures which frequently

> "place line officers in a costly procedural quagmire, where a single project can take years to move forward and where planning costs alone can exceed $1 million. Even noncontroversial projects often proceed at a snail's pace.
>
> "Forest Service officials have estimated that planning and assessment consume 40% of total direct work at the national forest level. . . . Although some planning is obviously necessary, Forest Service officials have estimated that improving administrative procedures could shift up to $100 million a year from unnecessary planning to actual project work to restore ecosystems and deliver services on the ground." (Report at 5.)

[17] Available at http://www.fs.fed.us/projects/documents/Process-Predicament.pdf (accessed 11/11/09). The District Court deemed this report "entirely irrelevant to the Court's review". *Karuk*, 379 F. Supp.2d at 1091.

Specifically, the Report notes that "project-level decisions", *the very formalized process the Tribe seeks here to impose*, "involve as many as 800 individual activities and more than 100 process interaction points", are "fragile and prone to failure", and involve "extensive" "time and costs". (*Id.* at 14.)

The Report warns that these problems have caused "a land health crisis of tremendous proportions". (*Id.* at 7.) While the Report is not technically part of the Administrative Record, the Court ought to understand the risks and costs, including significant overall declines in Forest health, which may arise from a failure to defer to agency administration that permits careful use of scarce resources to address projects of genuine environmental significance, and fosters an informal, collaborative approach to addressing highly-localized concerns with minimal significance.

V. THERE CANNOT BE AN UNLAWFUL FAILURE TO CONSULT PURSUANT TO SECTION 7 OF THE ENDANGERED SPECIES ACT IF THERE IS NO LAWFULLY-LISTED SPECIES ABOUT WHICH TO CONSULT.

A final problem with the Tribe's claim is that the only relevant listed species is the Southern Oregon/Northern California coho salmon ("SONC coho"). At the time the District Court made its decision, however, the decision listing had been been held invalid as exceeding the substantive authority of the listing agency. Specifically, Congress empowered the

National Fisheries Service to list species, including "distinct population segments", 16 U.S.C. § 1532(16), but "expressly limited the Secretary's ability to make listing distinctions among species below that of a subspecies or DPS of a species". *Alsea Valley Alliance v. Evans*, 161 F. Supp.2d 1154, 1163 (D. Or. 2001), *appeal dismissed*, 358 F.3d 1181 (9th Cir 2001). With respect to Oregon coastal coho, the *Alsea* court held the listing invalid for making such a listing distinctions. *Id.*

A subsequent case declared the SONC coho listing invalid "for the reasons stated in the Alsea Valley case" (*California State Grange v. U.S. Department of Commerce*, No. 02-CV-6044-HO (D. Or. Jan. 11, 2005) (MER71-92). The Court then held that "the threat to the plaintiffs in this record is somewhat speculative", and did not set aside the listing while the decision was remanded, but did declare that if "during this [remand] period, there were specific items of relief that weren't so speculative, then the plaintiffs could approach the court about those". (MER90.) In short, the Court recognized that an unlawful listing decision could not be employed by federal agencies to injure citizens, but the Court was not required to act on the record then before it to prevent such injury.

The District Court declined to give any weight to the absence of any predicate lawful listing because "Defendants have conceded that the coho

listing is currently in effect and still valid". *Karuk*, 379 F. Supp.2d at 1101 n. 21. But an Executive Branch agency cannot by concession overturn a federal district court decision. While the District Court's unusual regard for the separation of powers was *dictum*, in light of the District Court's subsequent advisory opinion that the District Ranger's review of "notices of intent" did not constitute agency action within the meaning of § 7(a)(2), the Tribe continues to insist that the review constitutes agency action, a claim that cannot be evaluated in a context where there is no lawfully-listed species to invoke the ESA at all.

It is fundamentally unjust for the Executive Branch, having lost its defense to uphold the validity of the listing in a federal case, to continue to give effect to that listing by conceding its validity in a second action. And it was clear error for the District Court to proceed to resolve the ESA claim in the absence of a lawful listing. In substance, the District Court rendered an improper advisory opinion on the application of the ESA without a factual *or* legal predicate for applying it, and the Tribe asks this Court to do the same. These circumstances constitute yet another reason that dismissal for want of federal jurisdiction is the appropriate outcome for this appeal.

VI. THIS COURT SHOULD CONSIDER CERTAIN SUPPLEMENTAL MATERIALS REJECTED BY THE DISTRICT COURT.

This Court reviews the District Court's decision *de novo*, and may make its own judgments as to what materials beyond the record assembled by agency officials may assist judicial review. *But cf. Inland Empire Public Lands Council v. Glickman*, 88 F.3d 697, 703 (9th Cir. 1996) (District Court rulings as to scope of administrative record reviewed under abuse of discretion standard). As explained above, the District Court refused to consider a variety of supplemental materials presented by the Miners plainly pertinent to judicial review of the challenged decisions.

As explained above, many materials were disregarded by the District Court notwithstanding direct statements in the administrative record indicating agency reliance upon such documents, including extensive environmental analyses of the asserted environmental impacts of suction dredge mining. (*See supra* at 10-11 (1994 FEIR), 8 n.6 (Bayley and other scientific studies)). In these cases, the supplemental materials were obviously omitted from the administrative record by the agency's plain error, and agency counsel's representations contrary to that record should not have been credited by the District Court.

Other materials (*see supra* at 6 n.4 (McCracken Declaration), 17 n.8 (Kitchar Declaration), 19 n.9 (1974 Forest Service mineral regulation EIS); 38 n.17 (Process Predicament report)) provide the court with background information putting the dispute in its proper context. *Cf. Asarco, Inc. v. U.S. Environmental Protection Agency*, 616 F.2d 1153, 1159-60 (9th Cir. 1980) (appropriate to provide "background materials" "to aid the court in its understanding"), or explaining complex technical matter (*see supra* at 8 n.6 (Greene & Maria Declarations). While the District Court may not have abused its discretion by declining to consider such materials, true *de novo* review by this Court would require that the Court make its own assessment of the usefulness of these materials for its own review.

Conclusion

For the foregoing reasons, the appeal should be dismissed, or the District Court's judgment affirmed.

Dated: November 17, 2009

s/James L. Buchal
Attorney for the Miners

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Defendant/Intervenors/Appellees' The New 49ers and Raymond W. Koons state that there are no related cases pending in this Court.

CERTIFICATE OF COMPLIANCE WITH RULE 32

Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and 9th Cir. R. 32-1 for Case No. 05-16801.

1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and 9th Cir. R. 32-1, the attached opening brief was prepared using Microsoft Word 2003 is proportionality spaced, has a typeface of 14 points and contains 9,867 words.

Dated: November 17, 2009.

Respectfully submitted,

s/ James L. Buchal
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CERTIFICATE OF ELECTRONIC FILING OF BRIEF

I hereby certify that on November 17, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the ninth Circuit by using the appellate CM/ECF System.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

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s/ *James L. Buchal*

CERTIFICATE OF SERVICE

I certify that the following parties were served with a copy of the Defendant/Intervenors/Appellees' The New 49ers and Raymond W. Koons Excerpts of Record by placing it for delivery via First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days this 17th of November, 2009 to the following parties:

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s/ *James L. Buchal*

STATUTORY ADDENDUM

Senate Bill No. 670

CHAPTER 62

An act to add Section 5653.1 to the Fish and Game Code, relating to dredging, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor August 5, 2009. Filed with Secretary of State August 6, 2009.]

LEGISLATIVE COUNSEL'S DIGEST

SB 670, Wiggins. Vacuum or suction dredge equipment.

Existing law prohibits the use of any vacuum or suction dredge equipment by any person in any river, stream, or lake of this state without a permit issued by the Department of Fish and Game. Under existing law, it is unlawful to possess a vacuum or suction dredge in areas, or in or within 100 yards of waters, that are closed to the use of vacuum or suction dredges. A violation of the permit requirement is a misdemeanor. The department is authorized to close areas otherwise open for dredging and for which permits have been issued if there is an unanticipated water level change and the department determines that closure is necessary to protect fish and wildlife resources. Existing law requires the department to adopt regulations to implement certain of the vacuum or suction dredge equipment requirements and authorizes the department to issue regulations with respect to other requirements. Existing law requires that the regulations be adopted in accordance with the requirements of the California Environmental Quality Act (CEQA).

CEQA requires a lead agency, as defined, to prepare, or cause to be prepared by contract, and certify the completion of, an environmental impact report on a project, as defined, that it proposes to carry out or approve that may have a significant effect on the environment, or to adopt a negative declaration if it finds that the project will not have that effect. The act exempts from its provisions, among other things, certain types of ministerial projects proposed to be carried out or approved by public agencies, and emergency repairs to public service facilities necessary to maintain service.

This bill would designate the issuance of permits to operate vacuum or suction dredge equipment to be a project under CEQA, and would suspend the issuance of permits, and mining pursuant to a permit, until the department has completed an environmental impact report for the project as ordered by the court in a specified court action. The bill would prohibit the use of any vacuum or suction dredge equipment in any river, stream, or lake, for instream mining purposes, until the director of the department certifies to the Secretary of State that (1) the department has completed the environmental review of its existing vacuum or suction dredge equipment regulations as ordered by the court, (2) the department has transmitted for

filing with the Secretary of State a certified copy of new regulations, as necessary, and (3) the new regulations are operative.

This bill would declare that it is to take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. Section 5653.1 is added to the Fish and Game Code, to read:

5653.1. (a) The issuance of permits to operate vacuum or suction dredge equipment is a project pursuant to the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code) and permits may only be issued, and vacuum or suction dredge mining may only occur as authorized by any existing permit, if the department has caused to be prepared, and certified the completion of, an environmental impact report for the project pursuant to the court order and consent judgment entered in the case of Karuk Tribe of California et al. v. California Department of Fish and Game et al., Alameda County Superior Court Case No. RG 05211597.

(b) Notwithstanding Section 5653, the use of any vacuum or suction dredge equipment in any river, stream, or lake of this state is prohibited until the director certifies to the Secretary of State that all of the following have occurred:

(1) The department has completed the environmental review of its existing suction dredge mining regulations, as ordered by the court in the case of Karuk Tribe of California et al. v. California Department of Fish and Game et al., Alameda County Superior Court Case No. RG 05211597.

(2) The department has transmitted for filing with the Secretary of State pursuant to Section 11343 of the Government Code, a certified copy of new regulations adopted, as necessary, pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(3) The new regulations described in paragraph (2) are operative.

(c) The Legislature finds and declares that this section, as added during the 2009–10 Regular Session, applies solely to vacuum and suction dredging activities conducted for instream mining purposes. This section does not expand or provide new authority for the department to close or regulate suction dredging conducted for regular maintenance of energy or water supply management infrastructure, flood control, or navigational purposes governed by other state or federal law.

(d) This section does not prohibit or restrict nonmotorized recreational mining activities, including panning for gold.

SEC. 2. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

The Legislature finds that suction or vacuum dredge mining results in various adverse environmental impacts to protected fish species, the water quality of this state, and the health of the people of this state, and, in order to protect the environment and the people of California pending the completion of a court-ordered environmental review by the Department of Fish and Game and the operation of new regulations, as necessary, it is necessary that this act take effect immediately.