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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

KARUK TRIBE OF CALIFORNIA, Plaintiff, v. **UNITED STATES FOREST SERVICE, et al.**, Defendants, and **THE NEW 49'ERS, INC. et al.** Defendants-Intervenors.	Case No. 04-4275 (SBA) **BRIEF OF SISKIYOU REGIONAL EDUCATION PROJECT AS [PROPOSED] AMICUS CURIAE**

Siskiyou Regional Education Project hereby respectfully files this brief as [proposed] Amicus Curiae.

A. Summary of Argument.

The Secretary of Agriculture and the Secretary of the Interior issued the Northwest Forest Plan in 1994 to comply with their duties under all federal laws, including the National Forest Management Act (NFMA) and the Endangered Species Act (ESA). The Klamath Forest Plan standard at issue in this case is a component of the Aquatic Conservation Strategy (ACS), which is the part of the Plan adopted to restore salmon, steelhead trout, and other fish species. The Ninth Circuit has held that the ACS standards are "binding." The Klamath Forest Plan standard is not "contrary" to Forest Service mining regulations. Indeed, the Forest Service has inconsistently interpreted the interplay between the standard and the regulations, including at one time stating that they are not contrary at all. The agency's inconsistency means its current interpretation is entitled to no deference. Further, under any interpretation of the Klamath Forest Plan standard, it is not contrary to the mining regulations, because the Forest Service can comply with both. The Karuk Tribe is entitled to a declaratory judgment as to its NFMA claim.

A. The President's Forest Plan.

In 1993, in part in response to the decline of salmonids in the Northwest, President Clinton directed the Secretaries of Agriculture and the Interior to reform management of lands and waters within the range of the northern spotted owl, which extends from the Canadian border south to Mendocino County. In 1994, the Secretaries issued a Final Supplemental Environmental Impact Statement (FSEIS) that evaluated alternatives for managing the region in part to determine how new land classifications and standards and guidelines would affect salmon and steelhead. Ex. A at 54 (filed herewith). The legal authorities the Secretaries acted under include NFMA, which requires the Forest Service to ensure a diversity of species on national forest lands, 16 U.S.C. § 1604(g)(3)(B), and the ESA, which requires the Forest Service and all other federal agencies to take such actions as may be necessary to prevent the listing of species

under the ESA. 16 U.S.C. § 1536(a)(1); Ex. A at 30, 31, 36 & 37 (noting legal authorities and duties underpinning the Northwest Forest Plan). The FSEIS states that the preferred alternative, "with the standards and guidelines incorporated since the Draft SEIS, would have at least an 80 percent or higher likelihood of attaining sufficient aquatic habitat to support well-distributed populations of anadromous and resident salmonids." Ex. A at 56. In April, 1994, the Secretaries issued a Record of Decision to adopt the Northwest Forest Plan. Ex. A at 29.

The Northwest Forest Plan includes the ACS, which was developed to "protect salmon and steelhead" and restore riparian and aquatic ecosystems and protect fish habitat. Ex. A at 9-10 & 38-41. The four components of the ACS include Riparian Reserves, Key Watersheds, Watershed Analysis, and Watershed Restoration. Ex. A at 41. The ACS also contains standards and guidelines, Ex. A at 44 & 46-50, which the Ninth Circuit has stated are "binding standards and guidelines that restrict certain activities within areas designated as riparian reserves or key watersheds." Pacific Coast Federation of Fishermen's Assn. v. National Marine Fisheries Service, 253 F.3d 1137, 1141, amended on denial of rehearing, 265 F.3d 1028 (9th Cir. 2001).

Riparian Reserves under the ACS are discrete areas that comprise the streambed and the riparian area on either side of certain streams, Ex. A at 32, and "portions of watersheds where riparian-dependent resources receive primary emphasis and where special standards and guidelines apply." Ex. A at 41 & 46-53. The streams where suction dredging placer mining administered by the Klamath National Forest occurs are designated as Riparian Reserves. Ex. A at 41-42 (defining Riparian Reserves).

The Northwest Forest Plan also established standard and guideline MM-1, which states:

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

Ex. A at 49. The FSEIS for the Northwest Forest Plan states that new standards would change

existing forest plan standards. Ex. A at 55.

In 1995, the Forest Service adopted the Klamath National Forest Plan. The Klamath Forest Plan codifies Northwest Forest Plan standard MM-1 as Klamath Forest Plan standard MA10-34. Fed. Ds' Ex. D at 4-111.

MA10-34 adds a heightened level of scrutiny to mining in Riparian Reserves. In contrast, mining operations outside Riparian Reserves may occur under the "notice" provisions of the Forest Service mining regulations. See 36 C.F.R. part 228. Under the regulations, a person who wishes to "conduct operations which might cause disturbance of surface resources" must submit a "notice of intent" to do so. 36 C.F.R. § 228.4(a)(2). If the Forest Service determines that any operation "is causing or will likely cause a significant disturbance of surface resources," then the miner must submit to the agency a "proposed plan of operations." 36 C.F.R. § 228.4(a)(1). A proposed plan of operations must contain information such as where mining may occur, access to the site, and measures to protect the environment. 36 C.F.R. § 228.4(c). Any mining under the proposed plan is subject to Forest Service approval. 36 C.F.R. § 228.5.

B. Prior Related Litigation and Administrative History.

In 1995, Siskiyou Project and other conservation groups filed suit against the Forest Service in the United States District Court for the District of Oregon, alleging that it violated NFMA when it allowed suction dredge mining in Silver Creek, a Riparian Reserve on the Siskiyou National Forest in Oregon, without a plan of operations, as required by MM-1. National Wildlife Federation v. Agpaoa, CV 95-3005-CO (D. Or. filed Jan. 23, 1995). In June, 1995, the district court dismissed the case after the parties stipulated that, among other things, the agency would propose new management direction for suction dredge mining within Riparian Reserves on the Siskiyou National Forest. Ex. A at 3.

In 1996, the Forest Service initiated a process to amend MM-1 to address consistency between the Siskiyou Forest Plan and the mining regulations. Ex. A at 6. In 1998, the Forest Service issued a decision amending the first sentence of MM-1 to make it apply to mining

activities in Riparian Reserves on the Siskiyou National Forest that the agency deemed "likely to significantly retard or prevent attainment of the Aquatic Conservation Strategy objectives." Ex. A at 5. Siskiyou Project filed suit to challenge that decision, alleging that the Forest Service violated NFMA by allowing mining in areas of the Siskiyou National Forest called Supplemental Resource Areas (SRAs) without plans of operation, as required by the Siskiyou National Forest Plan, and violated NEPA by preparing a deficient analysis of the impacts of amending MM-1. Siskiyou Regional Education Project v. Rose, 87 F.Supp.2d 1074 (D. Or. 1999). Magistrate Judge John P. Cooney of the United States District Court for the District of Oregon issued Findings and Recommendations that the Forest Service violated NFMA because it allowed mining in SRAs without a plan of operations as required by the Forest Plan standard. Id. at 1088. He also found that the Forest Service violated NEPA. Id. at 1103. His Findings and Recommendations were affirmed in their by Judge Michael R. Hogan. Id. at 1078.

After the district court's decision in Rose, the Forest Service acknowledged that "for the immediate term, the Siskiyou National Forest has no choice but to comply with MM-1. Until some action is taken to amend the Northwest Forest Plan or Siskiyou National Forest Land and Resource Management Plan relative to this standard and guideline, MM-1 applies." Ex. A at 7-8 & 4 (stating that MM-1 "remain[s] in effect" on the Siskiyou). The agency stated that the "requirement for Plans of Operation within riparian reserves is non-discretionary." Ex. A at 12. The agency also stated that "[r]ecognizing the controversy associated with amending the Siskiyou National Forest's Land and Resource Management Plan, and acknowledging the significance of the Coho listing and designation of critical habitat, the Forest decided to proceed with compliance with MM-1 rather than amending their [sic] plan." Ex. A at 16. In 2001, the agency told Siskiyou Project that it was "directing miners operating on claims using suction dredges to file a plan of operations" on the Siskiyou National Forest. Ex. A at 14.

In May, 2001, the Forest Service initiated a second public process to consider how it would address suction dredge placer mining on the Siskiyou National Forest. Ex. A at 10. In

December, 2001, the Forest Service released a draft environmental impact statement (DEIS) to analyze the environmental impacts of a proposal to approve plans of operation for suction dredging mining operations as long as those plans met certain criteria. Ex. A at 18. The preferred alternative in the DEIS was to retain MM-1 unchanged and provide an analysis of the impacts of suction dredge placer mining that the agency believed would allow it to efficiently review proposed plans of operations under 36 C.F.R. § 228.4(f), and, after conducting site-specific reviews, approve them. Ex. A at 17 & 19. However, the Forest Service never released a final EIS or a subsequent decision on any alternative it considered in the DEIS.

C. The Forest Service's Latest Directive Interpreting MM-1.

As recently as January, 2002, the Forest Service informed miners who submitted notices of intent to operate in Riparian Reserves on the Siskiyou National Forest that they were required to submit proposed plans of operation for consideration by the agency. See Ex. A at 26. However, in February, 2002, the agency's office in Washington, D.C., issued a directive to Regional Foresters stating that MM-1 "should not be read to include non-significant surface disturbing [mining] activity." Ex. A at 27. The directive states that "[i]n the areas covered by the Northwest Plan forest [sic] or covered by other general management guidance or strategies, forest users can conduct non-significant surface disturbing activities without filing plans of operation per the intent of the Forest Service Mining Regulations." Id. Based on the directive, since 2002, the Forest Service has not required plans of operation for certain suction dredge placer mining operations in Riparian Reserves at least on the Siskiyou National Forest.

Standard of Review.

This Court must give effect to the plain meaning of NFMA and the standards and guidelines in the Klamath Forest Plan. Lands Council v. Powell, 395 F.3d 1019, 1034 (9th Cir. 2005). If this Court determines that any provision of law is ambiguous, the Forest Service does not receive deference under Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984), because its decisions to not require plans of operation were not adopted in the

context of formal notice-and-comment rulemaking. United States v. Mead Corporation, 533 U.S. 218, 238-239 (2001) (stating standard). Instead, the Forest Service's interpretation of any ambiguous law[s] may "claim respect according to its persuasiveness," if it meets the indicia set forth in Skidmore v. Swift & Co., 323 U.S. 134 (1944). The Wilderness Society v. U.S. Fish and Wildlife Service, 353 F.3d 1051, 1059-61 (9th Cir. 2003). Under Skidmore, any respect is contingent on "the agency's expertise, care, consistency, and formality, as well as the logic of the agency's position." Pronsolino v. Nastri, 291 F.3d 1123, 1131 (9th Cir. 2002), citing United States v. Mead Corporation, 533 U.S. at 228.

Argument.

A. The Forest Service Violated NFMA by Violating MA10-34.

All resource plans, permits, contracts, or other decisions for the use of a national forest must be consistent with its Forest Plan. Lands Council v. Powell, 395 F.3d at 1033; 16 U.S.C. § 1604(i). In Rose, the court correctly applied that legal standard, finding that the Forest Service violated NFMA when it approved mining operations in SRAs in violation of a Siskiyou Forest Plan standard. 87 F.Supp.2d at 1087-88. The decision in Rose is precisely on point with the NFMA claim here. Similar to the plain language of the Forest Plan standard in Rose, the plain language of MA10-34 in the Klamath Forest Plan requires approved plans of operation for mining in Riparian Reserves. See Rose, 87 F.Supp.2d at 1087-88. Further, MA10-34 is "binding." Pacific Coast Federation of Fishermen's Associations, 253 F.3d at 1141.

Accordingly, MA10-34 would not apply to the suction dredge operations in this case only if it is "contrary to existing law or regulation," or would "require the agencies to take actions for which they do not have authority." Ex. A at 43. The Forest Service asserts that MA10-34 is contrary to its mining regulations for these reasons:

> Mineral operations are referred to in the Northwest Forest Plan by the following language: 'Such plans and bonds must address the cost for removal of facilities, equipment, and material; recontouring disturbed areas to near pre-mining topography, isolating and neutralizing or removing toxic or potentially toxic materials, salvage and replacement of topsoil, and seedbed preparation and revegetation to meet Aquatic

> Conservation Strategy objectives.' This language describes activities meeting the 'likely cause significant surface disturbance' test of the Forest Service Mining Regulation, for which an operating plan must be filed and a bond posted, and, conversely, should not be read to include non-significant surface disturbing activity.
>
> To apply this standard and guideline to activities not meeting the 'likely cause significant surface disturbance' test, is not appropriate and is contrary to law and regulation. If no significant disturbance is occurring, we have no reason to require a reclamation bond, nor would we be able to determine a bond amount.

Ex. A at 27.

1. The Agency's Inconsistent Legal Interpretations Deserve No Respect.

MA10-34 is unambiguous and this Court should interpret its plain meaning. See Lands Council, 395 F.3d at 1034 (stating standard of review). However, if this Court determines that the standard is ambiguous, it should not defer to the Forest Service's interpretation of it. The agency's directive was not issued after formal notice-and-comment rulemaking, which means that its interpretation may "claim respect according to its persuasiveness" only if, among other things, it is consistent with past interpretations. The Wilderness Society, 353 F.3d at 1059-61. Here, the agency's interpretation cannot claim any respect and is not persuasive, because it contradicts the agency's prior interpretations.

In 2001, the Forest Service stated that MM-1 (which is the same text as MA10-34) did not conflict with its mining regulations. The agency stated: "It is the Agency's view, however, that complying with Standard and Guideline MM1 is not only authorized, but is required by, the National Forest Management Act. It is allowed for by the discretion provided in 36 CFR 228.4(a), and it does not constitute a change to those regulations. Therefore, implementing MM-1 is not in direct conflict with 36 CFR 228 regulations." Ex. A at 9.

Second, the agency's new directive fails to address or distinguish the first sentence of MA10-34 at all. Instead, it focuses solely on the remaining provisions of the standard, and asserts that those provisions describe mining activities such as those meeting the regulatory threshold of likely to cause significant disturbances. But this reading completely disregards the existence and meaning of the first sentence, which the agency has interpreted to require a plan of

operations for all mining operations in Riparian Reserves. Ex. A at 12 & 14.

In the face of conflicting interpretations, the agency's latest directive related to all forests covered by the Northwest Forest Plan deserves no respect. Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1457 (9th Cir. 1992) (rejecting deference to agency when its position fluctuated); see Louisiana Public Service Corp. v. FERC, 184 F.3d 892, 897 (D.C. Cir. 1999) (stating that "[f]or the agency to reverse its position in the face of precedent it has not persuasively distinguished is quintessentially arbitrary and capricious."). Further, even if the agency did not vary its interpretations, its directive is nonetheless arbitrary and capricious.

2. MA10-34 Is Not Contrary to Any Other Existing Law.

Under the Mining Act of 1872, the Organic Act of 1897, and the Surface Resources Act of 1955, the Forest Service has the authority to issue rules and regulations to control mining on national forest lands. 30 U.S.C. § 226; 16 U.S.C. § 551; 30 U.S.C. § 612(b); California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 582, 107 S.Ct. 1419, 1426 (1987); United States v. Richardson, 599 F.2d 290, 294-295 (9th Cir. 1979), cert. denied, 444 U.S. 1014 (1980). The Forest Service issued mining regulations in 1974, 39 Fed. Reg. 31317 (Aug. 28, 1974), codified at 36 C.F.R. pt. 228, and amended them most recently in 2004. See 69 Fed. Reg. 41428 (July 9, 2004) (amending 36 C.F.R. § 228.4(a)). As noted, the regulations provide that a person who proposes to conduct a mineral operation on Forest Service lands that might cause a disturbance must file a notice of intent to mine, 36 C.F.R. § 228.4(a)(2), and if the Forest Service concludes that the operation "is causing or will likely cause significant disturbance of surface resources," a plan of operations is required. 36 C.F.R. § 228.4(a).

MA10-34 is not "contrary" to the mining regulations. The laws differ only in that MA10-34 requires a plan of operations for mining in Riparian Reserves. MA10-34 is limited to distinct areas of only certain forests within the national forest system. MA10-34 applied initially only to, at most, a 600-foot wide zone along certain creeks that comprise Riparian Reserves. On Forest Service lands, Riparian Reserves exist under the Northwest Forest Plan on all or parts of only 19

national forests. Ex. A, p. 35. The total interim acreage in Riparian Reserves within all national forests under the ROD is 2,627,500 acres. Ex. A at 45.

In contrast to this standard with limited geographic applicability, the mining regulations apply to all lands open to mining within roughly 191,000,000 acres on 155 national forests and 9 national grasslands in 42 states.[1] The regulations apply to every surface area of every national forest, including uplands, wetlands, and steppes. Further, even in national forests such as the Klamath to which MA10-34 applies, the mining regulations continue to dictate when a plan of operations is required on the majority of lands. It is only in Riparian Reserves that the suction dredge mining operations challenged in this case require such a plan.

MA10-34 is not "contrary" to the regulations simply because it is different.[2] MA10-34 establishes procedural requirements that in no way change certain substantive laws applicable to mining. The regulations continue to govern what a plan of operations must say. 36 C.F.R. § 228.4. The regulations govern the type of NEPA analysis that must be prepared. 36 C.F.R. § 228.4(f). The regulations establish how miners must demonstrate compliance with other certain state and federal laws. 36 C.F.R. § 228.8. The regulations also dictate matters such as where and how any roads may be built. 36 C.F.R. § 228.8(f). In contrast, MA10-34 provides that in Riparian Reserves, plans of operation are required. In effect, MA10-34 simply applies substantive requirements of the regulations to a potentially greater number of mining operations

The Forest Service's directive that MA10-34 is contrary to the regulations fails scrutiny. The theory that the provisions of MA10-34 other than the first sentence speak only to mining operations that meet the regulatory threshold of "likely to cause significant surface disturbance" test masks that all of the provisions directly apply to suction dredge mining operations that are

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[1] See http://www.fs.fed.us/aboutus/meetfs.shtml (noting statistics on national forest system).

[2] If the Forest Service's theory is that a Forest Plan standard that is different than the mining regulations is thereby contrary to them, then the agency's 1996 amendment of MM-1 as to the Siskiyou National Forest, which amended MM-1 to apply to mining operations that were "likely to significantly retard or prevent attainment of Aquatic Conservation Strategy objectives," was illegal too, because it differs from the regulations.

proceeding under notices of intent. For example, the provision in MA10-34 that requires plans and bonds to address "recontouring disturbed areas to near pre-mining topography" mimics the Forest Service's own considered alternative for suction dredge operations on the Siskiyou National Forest, which would have required miners to rake tailings piles at the end of the season (or daily) to prevent their use by salmon as sites for redds. Ex. A at 24. The provision also mimics the forest's recognition that local streambank failure could be obviated if plans required suction dredge miners to refill dredged holes with tailings. Ex. A at 21. Similarly, the provision in MA10-34 that requires plans and bonds to address "isolating and neutralizing . . . potentially toxic materials" directly relates to the problem the Forest Service identified on the Siskiyou National Forest of suction dredge miners who grease and refuel their machines in-stream, and currently are not required to have spill equipment on site to remediate gasoline or grease spills. Ex. A at 22 & 25 (noting potential significant cumulative impacts from individual spills). Indeed, the Forest Service considered requiring a 100-foot setback precisely to isolate these materials. Ex. A at 20. Similarly, the provision in MA10-34 that requires plans and bonds to address "revegetation to meet [ACS] objectives" relates to the problem the Forest Service acknowledges on the Siskiyou National Forest that some miners cut down "streamside trees they feel pose a hazard to their operation" or for firewood, Ex. A at 23, both of which could be addressed in a plan requiring replanting, or covered by a bond to cover the agency's costs if a miner failed to comply. The bottom line is that all of the provisions of MA10-34 directly apply to the suction dredge operations proceeding under notices of intent in forests such as the Klamath, and the Forest Service's theory to the contrary is baseless.

Indeed, when they adopted the Northwest Forest Plan, the Secretaries of Agriculture and the Interior specifically intended that the Plan would place more restrictions on mining:

> The effects of the alternatives on mineral and energy resources is directly related to the areas that would be withdrawn from mineral leasing or to the constrains placed on the development of those resources. . . .
>
> The development of mineral resources may be limited by the land allocations and

> the standards and guidelines proposed in the alternatives. However, the more likely effect of designating areas for habitat for the northern spotted owl and other late-successional and old-growth related species would be that additional measures to protect habitat would be required under mineral leases and in plans for locatable mineral development. This would tend to increase the costs of extracting minerals and result in less mining in these areas.

Ex. A at 57.

It makes sense that the Northwest Forest Plan, which was adopted in part to ensure compliance with NFMA and the ESA, would require a plan of operations where Forest Service regulations promulgated under the Mining Act of 1872 and the Organic Act of 1897 may not. NFMA did not even exist when the Forest Service first issued its mining regulations.[3] After Congress enacted NFMA, the Supreme Court stated that in part it is NFMA that requires the Forest Service to manage "the surface impacts of mining on federal forest lands." Granite Rock Co., 480 U.S. at 585, 107 S.Ct. at 1427; see also Pacific Rivers Council v. Thomas, 873 F.Supp. 365, 372 (D. Id. 1995) (rejecting miners' contention that the Forest Service cannot regulate mining pursuant to NFMA). Here, the Secretaries issued MM-1 to fulfill their duties under certain statutes, including the mandate in NFMA to provide for a diversity of species, 16 U.S.C. § 1604(g)(3)(B), and the mandate in the ESA to take such actions as may be necessary to prevent the listing of species. 16 U.S.C. § 1536(a)(1); see Baker v. United States, 928 F.Supp. 1513, 1520 (D. Id. 1996) (requiring Forest Service to consult under the ESA before approving a mining plan of operations). Indeed, after the Secretaries issued the Northwest Forest Plan, they defended it in the United States District Court for the Western District of Washington on the basis that it contained new standards that would meet the agencies' duties under those laws:

> [T]he Secretaries found that the aquatic and riparian subsystems in the planning area 'will receive significant protection' under the strategy. [Northwest Forest Plan ROD] at 46. That is so because the strategy provides for all riparian areas to be within reserves in which standards and guidelines apply that limit or prohibit degradative activities. In addition, FEMAT had already concluded that implementation of Alternative 9 'would work to reverse the trend of degradation and begin recovery of aquatic ecosystems on

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[3] The Forest Service issued the final regulations in August, 1974. 39 Fed. Reg. 31317 (Aug. 28, 1974). Congress enacted NFMA in October, 1976. Pub. L. 94-588, 90 Stat. 2949 (Oct. 22, 1976).

federal lands' in the planning area. Id. Alternative 9, as ultimately adopted provides even greater aquatic protection.

Federal Defendants' Memorandum in Support of Motion For Summary Judgment, Seattle Audubon Soc. v. Lyons, No. C94-820WD, at 90 (W.D. Wash. Sept. 28, 1994); Ex. A at 58-60.

For these reasons, this Court should grant the Karuk Tribe's request for a declaratory judgment on its claim under NFMA.

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Respectfully submitted,

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