IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. : 05-16801

KARUK TRIBE OF CALIFORNIA,

Appellant,

v.

UNITED STATES FOREST SERVICE, ET AL.,

Appellees,

AND

THE NEW 49'ERS, INC., ET AL.,

Intervenor-Appellees,

APPELLANT'S OPENING BRIEF

On Appeal of the Order and Final Judgment of the U.S. District Court for the Northern District of California, Honorable Sandra B. Armstrong, Presiding
(Case No: 04-cv-04275-SBA)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1, Appellant Karuk Tribe of California states that it has no parent companies, subsidiaries or affiliates that have issued shares to the public.

STATEMENT OF JURISDICTION

Jurisdiction of the District Court

Appellant, Karuk Tribe of California (the "Tribe") challenges the actions of the United States Forest Service ("USFS") authorizing mining operations on streams and rivers in northern California, within the traditional homelands of the Tribe, in violation of the federal Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq*. The Tribe appeals the district court's decision denying the Tribe's Motion for Summary Judgment. The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because the action arose under the laws of the United States including the ESA and its implementing regulations.[1] The court also had jurisdiction under the citizen-suit provision of the ESA. 16 U.S.C. §1540(g).

Jurisdiction of the Court of Appeals

This appeal is taken from the district court's Order, dated July 1, 2005, and Judgment, dated July 11, 2005, denying the Tribe's Summary Judgment Motion. Excerpt of Record ("ER") 1-40. The Order was reported

[1] The Tribe's Complaint and Motion for Summary Judgment also included claims arising under other federal laws, such as the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, and the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600 *et seq.* In order to reduce the issues before this Court in this Appeal, the Tribe does not raise these other claims.

as Karuk Tribe of California v. U.S. Forest Service, 379 F.Supp.2d 1071 (N.D. Cal. 2005). This Court has jurisdiction to review the district court's Order and Judgment under 28 U.S.C. § 1291.

Finality of Judgment and Timeliness of Appeal

The district court issued its written Order denying the Tribe's Motion for Summary Judgment on July 1, 2005 ("Order"). ER 1-37. The court's final Judgment was issued on July 11, 2005. ER 38-40. The Tribe's Notice of Appeal was filed on September 9, 2005. ER 41-44. Pursuant to Fed. R. App. P. 4(a)(1)(B), this Appeal is timely.

STATEMENT OF ISSUES

1. Whether the Forest Service's authorization of mining operations, particularly in-stream "suction dredge" mining in the streams and rivers of the Klamath River system in northern California, without any consultation regarding federally-listed threatened species of salmon that will be adversely affected by these mining operations, violates the ESA.

2. Whether the district court erred in denying the Tribe's Summary Judgment Motion.

STATEMENT OF THE CASE

This case involves the Forest Service's regulation (or lack thereof) of mining operations in and along numerous streams and rivers in northern California within the designated critical habitat of the Southern Oregon/Northern California Coastal Coho Salmon (*Oncorhynchus kisutch*), ("SONCC Salmon"). The primary issue is whether the Forest Service violated the ESA in allowing mining operations to proceed without undertaking any of the required consultation with federal wildlife agencies as required by the Endangered Species Act.[2] The Forest Service admits that it did not conduct any consultation under the ESA, but maintains that the agency's authorization of mining to proceed under a Notice of Intent ("NOI") filed by the mining applicants is not an "agency action" triggering the ESA's consultation and species-protection requirements.

Regarding this litigation, in 2003 and 2004, the Forest Service authorized numerous mining operations in and along the Klamath River and its tributaries under either a Plan of Operation ("PoO") or a NOI submitted

[2] The Forest Service also failed to conduct any of the required consultation under the ESA for other listed species in the area, such as the bald eagle and the northern spotted owl. However, due to the direct effects of suction dredge and other in-stream mining on the SONCC Salmon, this appeal will focus on the agency's failures related to that species.

by the various mining applicants. The agency approved five PoOs without conducting any environmental reviews under NEPA or any consultation as required by the ESA. These individual Forest Service decisions were made in the documents found at ER 45-55, 56-62, 63, 78-87, and 88-97.

In addition, the agency authorized mining in and along these waters pursuant to a series of NOIs, also without any NEPA or ESA compliance. These individual Forest Service decisions were made in the following documents: (1) May 25, 2004 letter from Alan Vandiver, District Ranger, Happy Camp Ranger District, to Mr. Dave McCracken (along with the approved NOI), ER 108-119; (2) June 14, 2004 letter from Alan Vandiver to Nida Johnson (along with approved NOI), ER 123-129; (3) June 15, 2004 letter from Alan Vandiver to Robert A. Hamilton (along with approved NOI), ER 130-136; and (4) June 15, 2004 letter from Alan Vandiver to Ralph R. Easley (along with approved NOI), ER 137-139.

For each of these operations, the Forest Service allowed motorized suction dredge, motorized sluicing, and other mining in and along these waterways via the submittal of a NOI, without conducting the required consultation with federal wildlife agencies such as NOAA Fisheries and the Fish and Wildlife Service ("FWS").

On June 15, 2004, the Tribe submitted a 60-day notice letter to the USFS notifying the agency that the Tribe intended to sue the agency for violations of the ESA and other laws regarding the agency's continued authorizations of mining in these waters.

Having received no assurances by the USFS that they would comply with the ESA and other laws, the Tribe filed its Complaint for Declaratory and Injunctive Relief on October 8, 2004. The Tribe filed its first Amended Complaint on October 15, 2004. On January 31, 2005, the Tribe filed its Second Amended Complaint, which focused the litigation on the Klamath National Forest – the Forest in which the challenged mining authorizations had occurred. ER 145-184. In that Complaint, the Tribe challenged the Forest Service's approval of the five mining PoOs without compliance with the ESA and NEPA. Secondly, the Tribe challenged the agency's authorization of mining operations pursuant to NOIs for the other mining operations in these waters.

On March 1, 2005, the New 49ers, Inc., and Raymond Koons (collectively, the "New 49ers") filed a motion to intervene. The district court granted that motion on April 26, 2005. The New 49ers, Inc. is a California corporation which obtains its primary revenues from its "members" that are authorized to mine on leased mining claims in these

waters. In 2003, the agency approved a PoO for the New 49'ers that authorized their members to conduct suction dredge and/or motorized sluicing in and along the Klamath River. However, in 2004, the Klamath National Forest authorized similar mining via only a NOI for the New 49'ers. ER 108-119.

On April 22, 2005, the Tribe and the Forest Service submitted a Joint Stipulation for Partial Settlement in which the agency agreed that it violated both the ESA and NEPA in its approval of the five PoOs. *See* Joint Stipulation for Partial Settlement and Proposed Order, signed by the district court on April 26, 2005 ("Joint Stipulation and Order"). ER 207-210. In that Stipulation, the Forest Service stated that: "Defendants agree that each of the challenged PoOs were approved without compliance with the ESA, NEPA, and their implementing regulations." Joint Stipulation and Order, at 2 (¶ 1). ER 208. In exchange for the agency's admission of noncompliance and pledge for future compliance, the Tribe agreed to dismiss its claims regarding the five PoOs.

The parties, however, could not agree on the legality of the agency's authorization of mining pursuant to the NOIs. Subsequently, in April of 2005, the Tribe submitted its motion for summary judgment to the district court. The district court, without holding any oral argument on the motion,

issued its Order on July 1, 2005, denying the Tribe's summary judgment motion. On September 9, 2005, the Tribe filed its appeal of that Order and Judgment (which had issued on July 11, 2005).

On information and belief, the Klamath National Forest's authorization of mining operations under the NOI process, without any ESA compliance, has continued from 2004 until the present. Thus, although the specific agency actions that initiated this lawsuit occurred in 2004, the agency's violations of the ESA have continued unabated since that time.

Although this appeal was filed in 2005, briefing before this Court was stayed, by mutual agreement of the parties, until a case before the Ninth Circuit arising out of the Forest Service's approval of suction dredge mining in Oregon, raising issues under the National Forest Management Act, was resolved. This Court issued its decision in that case, Siskiyou Regional Education Project v. U.S. Forest Service, 565 F.3d 545 (9th Cir. 2009), on May 7, 2009. That decision did not involve any issues related to the ESA. Upon that decision, the parties agreed to a briefing schedule for this case. As noted above, the Tribe has limited this appeal to only those issues involving the Forest Service's violations of the ESA.

STATEMENT OF FACTS

This case focuses on the Forest Service's failure to comply with the substantive and procedural requirements of the ESA in its authorization of mining operations in the streams and rivers flowing through the ancestral homelands of the Karuk Tribe of California. These rivers and streams support and provide habitat for wild salmon and other important species. ER 64-69. These waters are also popular areas for suction dredge and other mining. For example, in just one of the challenged NOIs, the Forest Service authorized suction dredge and other mining across a 35-mile stretch of the Klamath River. ER 112 (2004 NOI for the New 49ers).

The Karuk Tribe is a federally-recognized Indian Tribe. The Tribe's headquarters is located in Happy Camp, California. The Tribe has lived in northern California since time immemorial. The Tribe works to protect and restore the native fish and wildlife species that the Tribe depends upon for traditional cultural, religious, and subsistence uses. The center of the Karuk world is *Katimin*, where *Masuhsava* (the Salmon River) meets *Ishkeesh* (the Klamath River). ER 211-214 (Declaration of Tribal Vice-Chair Leaf Hillman, submitted to the district court). The Tribe also works to protect the water quality of the streams and rivers in these areas, as well to protect, promote, and preserve the cultural and natural resources and ecological

processes upon which the Karuk People depend. Id.

Suction dredge gold mining was described by the court in Siskiyou Regional Educ. Project v. Rose, 87 F. Supp.2d 1074, 1081-82 (D. Or. 1999*)*:

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

A more detailed description of suction dredging prepared by the Forest Service is at ER 140-144.

According to the Forest Service Fisheries Biologist who has studied the adverse affects of suction dredging in the Klamath River Basin, suction dredge operations can cause significant disturbance of surface resources, direct injury to SONCC Salmon and other fish species, degrade salmon habitat, and cause or contribute to degradation of water quality. Grunbaum, Summary of Fisheries Issues Concerning Suction Dredge Mining, April 2004 (hereinafter "Grunbaum Report"). ER 64-69. The Grunbaum Report stated:

> **From the studies that have been conducted, and from reviews by top fishery researchers, stream ecologists, and fluvial geomorphologists – potential adverse impacts to aquatic habitats, fish, and other aquatic organisms from suction dredging include**:

A. Entrainment by suction dredging can kill and indirectly increase mortality of fish, particularly un-eyed salmonid eggs and early developmental stages.

B. Entrainment and disturbance by suction dredges can kill benthic invertebrates that are the food source for salmonids and other fishes, thereby reducing available fish food supply in the dredged stream area(s) for a period of weeks to months until the area is re-colonized. Re-colonization may be much slower if dredged area is extensive. Populations of invertebrates with limited distributions could be eliminated.

C. Streambed destabilization can increase the mortality of incubating salmonid embryos and benthic fish species such as sturgeon and lamprey. Destabilization of the stream channel may occur because of channel excavations made by the suction dredge and the piling of cobbles too large to pass through the dredge. Such direct disturbance of the stream channel tends to destabilize natural processes that mold stream channels. The resulting destabilization may increase local scour and fill in parts of the streambed that were not directly disturbed.

D. Deposition of dredge tailings can decrease fish reproductive success by inducing fish to spawn on unstable material.

E. Dredging can change surface substrate composition – which can affect in turn fish and benthic invertebrate populations. Fish eggs and larvae could be smothered or buried, and fish could lose the interstitial spaces between cobbles or boulder.

F. Dredging could frighten adult summer steelhead or spring Chinook and inhibit migrations of these fish.

G. Disturbances during the summer may harm adult salmon and steelhead because their energy supply is limited, and the streams they occupy can be near lethal temperatures. Suction dredging may be synergistic with high stream temperatures and other cumulative watershed effects that are being manifested – so that adverse effects of dredging are increased.

H. Deposition of fine sediment can reduce availability of microhabitats used by benthic fish such as sturgeon larvae and young sturgeon. Extensive deposition of fine sediment can reduce invertebrate populations important for the food supply of anadromous salmonids.

ER 65 (emphasis in original). The Grunbaum Report further detailed adverse impacts to coho salmon (SONCC Salmon) from suction dredging:

> Adults fish may be induced to spawning on dredge tailings which are not stable on subsequent seasonal high flows, resulting in the loss of eggs or embryos. Synergistic effects of high water temperatures, and the disturbance and/or turbidity and/or pollution and/or decrease in food base and/or loss of cover associated with suction dredging has the potential to reduce the juvenile fish carrying capacity in the vicinity of the recently dredged area. Displaced juvenile salmon and trout are likely to be displaced to a less optimum location where overall fitness and survival odds are also less.

ER 66. The court in Rose also discussed the adverse impacts from suction dredge mining:

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

87 F. Supp.2d at 1102-03 (quoting a Forest Service Report on suction dredge mining known as the "Harvey Report"). The court noted that the Forest Service's "Harvey report also warns of potential cumulative impacts from multiple suction dredge operations." Id. at 1103. "This [Forest Service] report points out that suction dredging can negatively affect aquatic resources, can greatly alter stream channels, and mobilize fine sediments."

Id. at 1108.

Many streams and rivers in the Six Rivers and Klamath National Forests support populations of, and provide habitat for, wild salmon species. These species include Southern Oregon/Northern California coho salmon (*Oncorhynchus kisutch*). Def. Answer ¶17, ER 188 (admitting this allegation contained in the Tribe's Second Amended Complaint, ER 151). The SONCC Salmon was listed as "threatened" under the ESA in 1997. 62 Fed. Reg. 24588 (May 6, 1997). The Klamath River and its tributaries that are subject to the mining operations at issue in this case were designated as "critical habitat" for the SONCC Salmon under the ESA in 1999. 64 Fed. Reg. 24049 (May 5, 1999).

Despite the acknowledged adverse effects of suction dredge mining, the Forest Service has allowed motorized suction dredge and motorized sluicing operations in and along these waterways without conducting the required consultation with federal wildlife agencies such as NOAA Fisheries and the Fish and Wildlife Service.

In 2003 (via a PoO) and in 2004 (via a NOI), the Forest Service authorized the New 49ers to conduct mining on numerous mining claims leased or controlled by the New 49'ers, Inc. This corporation obtains its primary revenues from its "members" that are authorized to mine on leased

mining claims in these waters. ER 111 (New 49ers NOI for 2004). The Club's webpage is www.goldgold.com which details the Club's and its members' activities. In 2003, the Forest Service authorized the Club's members to conduct suction dredge and/or motorized sluicing on the Klamath River and its tributaries via a PoO. Def. Answer ¶37, ER 192-93 (admitting this allegation in the Tribe's Second Amended Complaint, fifth sentence of ¶37, ER 156). However, in 2004, the Klamath National Forest authorized essentially the same mining via a NOI for the New 49'ers. *See* May 25, 2004 letter from District Ranger Alan Vandiver to New 49'ers. ER 108.

In the 2004 New 49'ers NOI, the Forest Service authorized, along the Klamath River, "an estimated 35 miles of stream course where dredging could be conducted." ER 112. Up to 10 dredges per river mile on the Klamath River were authorized in this one NOI alone. ER 113. In addition, the miners are allowed to conduct "motorized sluicing" which involves, in part, pumping water out of the river to scour streamside gravel and soil deposits outside of the stream. ER 114. The Forest Service does not know any of the specific locations within the 35 stream miles where "members" of the New 49'ers will be operating. The only location descriptions in the NOI are two generalized maps submitted by the New 49'ers covering almost the

entire middle Klamath River Basin. ER 118-19. In addition to the NOI for the New 49'ers, the Forest Service also authorized mining operations pursuant to NOIs for numerous other mining operations in the Klamath River Basin. ER 123-139.

In none of these NOI reviews and approvals did the Forest Service prepare any biological assessments or conduct any consultation under the ESA for the challenged operations.

SUMMARY OF ARGUMENT

The Forest Service's refusal to conduct consultation with federal wildlife agencies regarding its authorization of suction dredge and other forms of mining in critical habitat of the federally-listed SONCC Salmon, and other listed species in the area, violates Section 7 of the ESA.

Section 7 of the ESA requires that all federal agencies "insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence" of any endangered or threatened species or result in the "destruction or adverse modification" of critical habitats for those species. 16 U.S.C. § 1536(a)(2).

Under the applicable regulations, an "agency action" which triggers these ESA duties includes activities or programs of any kind authorized, funded, or carried out, in whole or in part, by federal agencies. Examples

include: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air. 50 CFR § 402.02. "Section 7 and [its] requirements . . . apply to all actions where there is discretionary [f]ederal involvement or control." 50 CFR § 402.03.

The primary question in this case is whether the Forest Service's review and authorization of mining under the NOI process has the requisite "discretionary federal involvement or control" to constitute an "agency action" under the ESA, thus triggering the mandatory consultation and species-protection duties upon the Forest Service.

The answer is yes. Under federal public land and mining law, and the agency's implementing regulations, mining cannot occur on National Forest lands or waters unless allowed by the Forest Service. Here, although the agency had previously authorized the New 49ers' mining operations as part of the Plan of Operations process, the agency changed positions in 2004 and began to approve suction dredge and related mining under its NOI process.

Under either process, the mining applicant desiring to conduct operations first submits a proposal to the appropriate District Ranger (whether in the form of a PoO or NOI). The agency then reviews the

submittal to determine the appropriate level of agency review and what, if any, additional environmental mitigation measures would be required as a condition of mining. For PoOs, the agency usually conducts additional environmental reviews prior to allowing mining to proceed.

Under the NOI process, the agency reviews the NOI and makes a site-specific analysis and determination whether to allow the proposed operation to proceed as described in the NOI, or whether to require the operator to submit a revised NOI or a PoO, prior to allowing operations to proceed. Either way, the Forest Service's review of the proposal, including the determination regarding impacts and agency-mandated requirements for additional environmental protections and eventual authorization to proceed, is the type of "discretionary federal involvement or control" that constitutes an "agency action" under the ESA.

Under Ninth Circuit caselaw, such "discretionary federal involvement and control" occurs when the agency decision has the "ability to inure to the benefit of a protected species." That is the case here. The District Ranger's decision whether to allow mining to proceed under the proposed NOI, or whether to require a revised NOI or PoO with additional environmental protections, has direct ramifications and benefits to the SONCC Salmon.

According to the agency's litigation position, however, only the Ranger's decision to require a PoO triggers the ESA's species protection and consultation requirements. If the Ranger determines to allow mining to proceed under a proposed NOI, that is the end of the matter and the ESA is not applicable.

The agency argues that the District Ranger's discretionary determination as to how to regulate mining (i.e., under the NOI or PoO process) is not an "agency action" under the ESA. Under the agency's truncated view of its authority, it believes that the Ranger's decision to allow mining to proceed under the NOI does not involve any "discretionary federal involvement or control" under the ESA. The agency believes that only its eventual decision to allowing mining pursuant to a PoO is an "authorization" triggering the ESA.

This is contradicted by the administrative record in this case, in which the agency, in allowing mining to proceed under the NOI submitted by the New 49ers for the Klamath River, specifically described its determination as an "authorization" with a specific timeframe for approval (and expiration date). Further, in another instance, the agency rejected a similar New 49ers' NOI (covering mining on a different river) and stated that it was not allowing operations to proceed under the group's NOI because of concerns

over the impacts of mining on protected salmon species. The agency specifically prohibited mining until a revised NOI or PoO was submitted which insured greater protections for salmon habitat.

Thus, the agency's determination of whether to regulate mining under the NOI or PoO process, which includes the decision whether to require additional environmental controls, and the subsequent authorization to allow mining, has direct ramifications for listed species. Accordingly, the agency's decision is the type of "agency action" that invokes the ESA.

STANDARD OF REVIEW

"We review the summary judgment de novo. As this is a record review case, we may direct that summary judgment be granted to either party based upon our de novo review of the administrative record." Great Basin Mine Watch v. Hankins, 456 F.3d 955, 961 (9th Cir. 2006)(citations omitted). A court will overturn the agency's decisions if they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1211 (9th Cir. 1998) (quoting the APA, 5 U.S.C. § 706(2)(A)). Under this standard, the court should reverse the agency's decision "if the agency has relied on factors Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation

for its decision that runs counter to the evidence before the agency." Great Basin Mine Watch, 456 F.3d at 962 (citations omitted).

The agency's decisions must be "fully informed and well-considered." Save the Yaak Committee v. Block, 840 F.2d 714, 717 (9th Cir.1988). The court "need not forgive a 'clear error of judgment.'" Blue Mountains, 161 F.3d at 1208, *quoting* Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989). "[A]n order may not stand if the agency has misconceived the law." Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80, 94 (1943). "An agency's action is arbitrary and capricious … if the agency's decision is contrary to the governing law. 5 U.S.C. § 706(2)." Lands Council v. Powell, 395 F.3d 1019, 1026 (9th Cir. 2005).

ARGUMENT

THE FOREST SERVICE'S DECISIONS TO ALLOW MINING TO PROCEED WITHOUT ANY CONSULATION VIOLATES THE ENDANGERED SPECIES ACT

A. The Consultation and Species-Protection Requirements of the ESA

In authorizing the challenged mining operations, the Forest Service failed to comply with the strict requirements of the ESA. The ESA is the nation's pre-eminent wildlife conservation statute. *See* Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978); Thomas v. Peterson, 753 F.2d 754, 765

(9th Cir. 1985). "The ESA is the 'most comprehensive legislation for the preservation of endangered species ever enacted by any nation.'" Turtle Island Restoration Network v. National Marine Fisheries Service, 340 F.3d 969, 973 (9th Cir. 2003) *quoting* TVA v. Hill, 437 U.S. at 180. The Supreme Court held that the ESA requires federal courts to strike a balance in favor species facing potential extinction.

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

TVA, 437 U.S. at 194. As the Supreme Court continued:

> One would be hard pressed to find a statutory provision whose terms were any plainer than those in §7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence" of an endangered species or "result in the destruction or modification of habitat of such species…." This language admits no exception.

Id. at 173, *quoted in* Natural Resources Defense Council ("NRDC") v. Houston, 146 F.3d 1118, 1125 (9th Cir. 1998). "The plain intent of Congress in enacting the ESA was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute." TVA, 437 U.S. at 184. Congress "inten[ded] to give the benefit of the doubt to the species." Conner v. Burford, 848 F.2d 1441, 1454 (9th Cir. 1986).

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

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

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

Section 7(a)(2) of the ESA requires that:

> Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species.

16 U.S.C. § 1536(a)(2). In complying with this mandate, the Forest Service must consult with NOAA Fisheries, the delegated agent of the Secretary of Commerce, or the FWS, as the delegated agent of the Secretary of the Interior, whenever its actions "may affect" a listed species. NRDC v. Houston, 146 F.3d at 1126. "If an agency determines that an action 'may

affect' critical species or habitats, formal consultation is mandated." Id. Formal consultation results in a biological opinion from NOAA or FWS that determines if the action is likely to jeopardize the species; if so, the opinion may specify reasonable and prudent alternatives that will avoid jeopardy and allow the agency to proceed with the action. 16 U.S.C. § 1536(b)(3)(A). *See also* Thomas, 753 F.2d at 763; Turtle Island, 340 F.3d at 974.

NOAA or FWS may also "suggest modifications" to the action during the course of consultation to "avoid the likelihood of adverse effects" to the species even when not necessary to avoid jeopardy. 50 CFR § 402.13. *See also* Turtle Island, 340 F.3d at 974.

Section 7(a)(2) of the ESA also requires federal agencies to insure that their actions are not likely to "result in the destruction or adverse modification of habitat … determined by the Secretary … to be critical." 16 U.S.C. § 1536(a)(2). *See* Gifford Pinchot Task Force v. FWS, 378 F.3d 1059, 1075-76 (9th Cir. 2004)("The purpose of designating "critical habitat" is to set aside certain areas as 'essential' for the survival and recovery of the threatened species. 16 U.S.C. § 1532(5). … Once designated, critical habitat receives its legal protection because it is subject to the exact Section 7 consultations at issue in this case.").

For the purposes of Section 7, the triggering "agency action" is defined as:

> all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to:
> (a) actions intended to conserve listed species or their habitat;
> (b) the promulgation of regulations;
> (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or
> (d) actions directly or indirectly causing modifications to the land, water, or air.

50 CFR §402.02. *See also* 50 CFR §402.03 ("Section 7 … [applies] to all actions in which there is discretionary Federal involvement or control"). "The term 'agency action' has been broadly defined encompassing 'all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies….'" Turtle Island, 340 F.3d at 974, *quoting* NRDC v. Houston, 146 F.3d at 1125.

Here, the Forest Service violated Section 7 of the ESA by allowing mining operations that may affect the threatened SONCC Salmon, among other listed species, without conducting the required consultation with NOAA Fisheries and/or FWS.[3]

[3] The agency has already admitted that its approval of the PoOs in 2004 violated the ESA, based on the Tribe's allegations that the agency failed to consult with NOAA Fisheries and the FWS, as well as the failure to protect critical habitat for Coho (SONCC) salmon. *See* April 22, 2005 Stipulation

B. The Forest Service's Authority Over Mining Operations

The agency's regulation of mining operations on the National Forests is governed by the Organic Act of 1897 (among other statutes) and its implementing regulations. The Organic Act authorizes the Forest Service to promulgate regulations for the national forests "to regulate their occupancy and use and to preserve the forests thereon from destruction." 16 U.S.C. § 551. The Organic Act "specifies that persons entering the national forests for the purpose of exploiting mineral resources must comply with the rules and regulations covering such national forests." Clouser v. Espy, 42 F.3d 1522, 1529 (9th Cir. 1994). Access to and use of mining claims on the National Forests is also governed by the 1872 Mining Law, 30 U.S.C. §§ 21, *et seq*.

Mining claims under the 1872 Mining Law are held subject to the federal government's paramount regulatory authority. In recognizing mining claims as a "unique form of property," the Supreme Court stated:

> The United States, as owner of the underlying fee title to the public domain, maintains broad powers over the terms and conditions upon which the public lands can be used, leased, and acquired. … [Mining] Claimants thus must take their mineral interests with the knowledge

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for Partial Settlement, approved by district court on April 26, 2004. ER 207-08.

> that the Government retains substantial regulatory power over those interests.

U.S. v. Locke, 471 U.S. 84, 104-105 (1985).

The Forest Service's mining regulations are found at 36 CFR Part 228, which states that "all [mining] operations shall be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest resources." 36 CFR § 228.8.[4] These regulations govern mining operations proposed for Forest Service lands and waters under the 1872 Mining Law. *See* 36 CFR § 228.2 (USFS mining regulations apply to operations conducted on mining claims filed pursuant to the Mining Law).

Although under the Organic Act the agency cannot categorically prohibit mining as a matter of course, *see* 16 U.S.C. §478, the agency has the authority to deny or condition proposed mining that would not be in compliance with its regulations or other federal wildlife and environmental laws. One of these overriding statutes is the ESA. "Based on the established authority of the Forest Service over mining activities within national forests, … and the substantive law reviewed by the court, the court

[4] "Operations" are defined as: "All functions, work, and activities in connection with prospecting, exploration, development, mining or processing of mineral resources and all uses reasonably incident thereto, including roads and other means of access on lands subject to the regulations of this part." 36 CFR § 228.3(a).

concludes that mining activities in the six national forests shall also be enjoined pending completion of formal consultation on the LRMPs under § 7(a)(2) of the ESA." Pacific Rivers Council v. Thomas, 873 F.Supp. 365, 374 (D. Idaho 1995). *See also* Baker v. U.S. Dept. of Agriculture, 928 F.Supp. 1513, 1517-18 (D. Idaho 1996).

"Forest Service regulations mandate that the power to prohibit the initiation or continuation of mining in national forests for failure to abide by applicable environmental requirements lies with the Forest Service." Granite Rock Co. v. California Coastal Comm'n., 768 F.2d 1077, 1083 (9th Cir. 1985) *overruled on other grounds* 480 U.S. 572 (1987).

> Under the regulations, the Forest Service must be notified of any mining-related operation that is likely to cause a disturbance of surface resources. The initiation or continuation of such an operation is subject to the approval of the Forest Service.

U.S. v. Weiss, 642 F.2d 296, 297 (9th Cir. 1981). "The Forest Service may require the locator of an unpatented mining claim on national forest lands to use nondestructive methods of prospecting." United States v. Richardson, 599 F.2d 290, 291 (9th Cir. 1979). *See also* Clouser, 42 F.3d at 1529-30.

As noted above, the regulation of mining operations on National Forest lands under the 36 CFR Part 228 regulations occurs in either one of

two primary ways: via the submittal of a Notice of Intent ("NOI"), or by the submittal of a Plan of Operations ("PoO").[5]

> Except as provided in paragraph (a)(2) of this section, a notice of intention to operate is required from any person proposing to conduct operations which might cause disturbance of surface resources. Such notice of intention shall be submitted to the District Ranger having jurisdiction over the area in which the operations will be conducted. If the District Ranger determines that such operations will likely cause significant disturbance of surface resources, the operator shall submit a proposed plan of operations to the District Ranger.

36 CFR §228.4(a), *quoted in* Siskiyou Regional Education Project, 565 F.3d at 550.[6]

Under the regulations, when mining operations are proposed on National Forest lands or waters, the Forest Service District Ranger determines whether mining should be regulated under a NOI or PoO.

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[5] There is a third, *de-minimus*, level of mining-related activity, which would not have the potential to cause any surface disturbance, and which does not require either a NOI or a PoO. These types of activities include, for example, mineral sampling and hand gold panning. *See* 36 CFR §228.4(a)(1) and (2). This type of activity is not at issue in this appeal.

[6] Recent revisions to the agency's Part 228 regulations do not materially affect this appeal. "[T]he Forest Service has promulgated revised regulations related to mining within the national forests. *See* 69 Fed. Reg. 41428 (July 9, 2004); 70 Fed. Reg. 32731 (June 6, 2005). The revised regulations retain the basic requirements of the earlier version, and do not materially affect suctiondredge mining." Siskiyou, 565 F.3d at 550, n. 3. Thus, for the purposes of this appeal, the regulations in force in May of 2004, when the agency approved the New 49ers NOI, will be applied (and are included at the end of this brief).

> Although this regulation requires a notice of intent in certain circumstances, it vests discretion in the district ranger to determine if the mining operation "will likely cause significant disturbance of surface resources." Id. [36 CFR §228.4(a)]. In the event of such a determination, the mining operator must submit a proposed plan of operations.

Siskiyou, 565 F.3d at 551. The District Ranger's discretionary decision as to whether to regulate mining under a NOI or PoO is based on the unique circumstances of each mining proposal. *See* Id. at 556 ("§228.4(a) contemplates that a district ranger will undertake a case-by-case determination of whether a plan of operations is needed.").

If the District Ranger determines that a NOI is sufficient and adequately safeguards the environment, then the operation is allowed to proceed as proposed by the mining applicant. §228.4(a). If the Ranger determines that a revised NOI or PoO is needed, then the operator must submit a revised NOI or PoO that complies with the regulations before operations may proceed. §§228.4 and 228.5.

If a PoO is required by the District Ranger, the mining applicant may have to provide additional information regarding the environmental impacts of the proposed operation, including measures to protect threatened and

endangered species. *See* §228.5.[7] Pursuant to the Forest Service's legal position in this case, only the submission of a PoO triggers the consultation and other requirements of the ESA. According to the agency, the District Ranger's review of the NOI, and the Ranger's discretionary decision to allow mining to begin under the NOI, rather than requiring submittal of a revised NOI or PoO, is not the type of "agency action" that triggers the ESA's procedural or substantive requirements.

It is this latter position that is at the heart of this appeal.

C. The Forest Service's Authorization of Mining Pursuant to a NOI Is An "Agency Action" Under the ESA

As detailed above, the level of Forest Service regulatory authority and scrutiny over proposed mining is dependent on the District Ranger's determination as to whether to allow mining to proceed under a NOI or under a PoO. That agency decision (or "determination") directly affects how mining will proceed, and most importantly for this case, directly affects listed species and their habitat.

Section 7 of the ESA requires all federal agencies "to insure that any action authorized, funded, or carried out by such agency is not likely to

[7] The submittal requirements for a NOI are discussed in a Forest Service policy document, "Notice of Intent Requirements" (undated). ER 215.

jeopardize the continued existence" of any endangered or threatened species or result in the destruction of critical habitats. 16 U.S.C. § 1536(a)(2). Under the applicable regulations, an "agency action" includes all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by federal agencies, such as: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air. 50 CFR § 402.02. "Section 7 and [its] requirements . . . apply to all actions where there is discretionary [f]ederal involvement or control." 50 CFR § 402.03.

These Section 7 requirements include, among other mandates, the duty to consult with federal wildlife agencies regarding the impacts from the proposed mining prior to allowing mining to proceed. "If an agency determines that an action 'may affect' critical species or habitats, formal consultation is mandated." NRDC v. Houston, 146 F.3d at 1126.

The primary issue in this case is whether the Forest Service's authorization of mining under the NOI process has the requisite "discretionary federal involvement or control" to constitute an "agency

action" under the ESA, thus triggering the mandatory consultation and species-protection duties upon the Forest Service.

The agency argues that its NOI/PoO determination is not an "agency action" under the ESA because it does not "authorize" any mining when it determines to allow mining to proceed under a NOI, rather than under a PoO. However, this ignores the basic fact that the agency's determination is part of the mine approval process and that operations may not proceed until the agency has made this decision. The fact that the agency's NOI decision allows mining to proceed with somewhat reduced federal oversight (compared to a PoO) does not mean that there is no federal involvement or discretion over the mining proposed under a NOI.

Indeed, the record shows that the Forest Service specifically "authorized" the various suction dredge and other mining operations described in the NOIs. For example, in the decision letter sent in response to the New 49'ers NOI in 2004, the District Ranger stated that:

> I have determined that your proposed operations would not require a Plan of Operations. **You may begin** your mining operations when you obtain all applicable State and Federal permits.
>
> This **authorization** expires December 31, 2004."

Letter from Alan Vandiver, District Ranger of the Happy Camp Ranger District, to Dave McCracken (New 49ers General Manager) dated May 25,

2004 (emphasis added). ER 108. The New 49ers NOI for that Ranger District is at ER 110-119.[8]

Further, in a letter from the New 49ers to the Forest Service shortly thereafter, the New 49ers specifically recognized that its NOI was "approved" by the agency. "We would like to make a correction to our Notice of Intent which was recently **approved** on May 25, 2004." Letter from Maria McCracken (New 49ers) to Alan Vandiver, Happy Camp Ranger District dated June 3, 2004. ER 122.

Notably, after reviewing a similar NOI submitted by the New 49ers to the Orleans Ranger District along the Salmon River (a major tributary to the Klamath River), the agency decided **not** to allow mining to proceed under a NOI, and required the submission of a revised NOI or PoO. Letter from William Metz, Acting Forest Supervisor, Six Rivers National Forest, to Dave McCracken of the New 49ers, dated May 13, 2004. ER 98-99. The

[8] In 2003, the Forest Service approved a PoO for the New 49ers Club that authorized the Club's members to conduct suction dredge and/or mechanical sluicing on the Klamath River and its tributaries. Def. Answer ¶37, ER 192-93 (admitting this allegation in the Tribe's Second Amended Complaint, fifth sentence of ¶37, ER 156). Nevertheless, in 2004, the Forest Service authorized the New 49ers to conduct essentially the same type of mining via a NOI, instead of a PoO. *See* May 25, 2004 letter from District Ranger Alan Vandiver to New 49'ers (with proposed NOI). ER 108-119.

New 49ers proposed NOI for mining in the Salmon River reviewed by Acting Supervisor Metz is contained at ER 70-77 ("Salmon River NOI").

The agency's decision to block mining until a revised NOI or PoO was submitted specifically highlighted the need to protect salmon – and that the proposed NOI "fell short" of meeting that standard:

> Due to the anadromous fisheries in the lower Salmon River the stability of spawning gravels for fish redds is a major concern. Redds can be lost if loose tailings piles erode away by stream course action while eggs are still present. Your NOI and the California Fish and Game Suction Dredge regulations fall short of addressing mitigations for this issue. Any resubmitted NOI or Plan of Operations needs to address the need to flatten tailings piles and rolling large dislodged rocks on the edge of dredged holes back into the holes.

Letter from Acting Forest Supervisor Metz to New 49ers, at 2. ER 99.[9] Based upon this letter, the New 49ers resubmitted its NOI for approval on May 24, 2004. ER 100-107. However, five days later, and prior to the agency's decision, the New 49ers withdrew their NOI for the Salmon River. Letter from New 49ers to Orleans District Ranger dated May 29, 2004. ER 120-21.

Thus, contrary to their litigation position, the agency and the mining applicants recognize that the agency's NOI process and its determination whether to allow mining to proceed under a NOI, instead of a PoO, is an

[9] The salmon "redds" discussed in the letter refers to the spawning nests that are an integral part of the species' reproduction and survival.

integral part of the determination whether, and under what conditions, mining may proceed on the National Forests. Further, this process shows how the agency's review of a NOI, and its discretionary determination whether to allow mining to proceed without submittal of a PoO, directly affects the environment and listed species. In this case, the Forest Service's actions/determinations made upon receipt of a NOI have substantial ramifications for the SONCC Salmon.

The district court based its ruling on its belief that the Forest Service's NOI review and approval process was simply "advisory" and thus lacked any discretion or potential for the agency to modify the proposed mining to protect listed species or their habitat. "This [NOI] process is most properly considered the type of 'advisory' conduct that does not trigger the ESA." Order at 35, ER 35. Karuk Tribe, 379 F.Supp. 2d at 1102.

However, as shown by the agency's rejection of the Salmon River NOI, and prohibition of mining until a revised NOI or PoO was submitted which contained specific protections for the salmon, the agency's role is not merely "advisory." Rather, the agency reviews each NOI on its merits and determines whether mining may go forward as proposed, or whether to preclude mining until a revised NOI or PoO is submitted which contain additional environmental protections.

Under Ninth Circuit precedent, the fact that the agency's decision may affect listed species is critical – and satisfies the requisite "discretionary [f]ederal involvement or control" that triggers the requirements of the ESA. 50 CFR § 402.03. "This court has held that the discretionary control retained by the agency must have the ability to inure to the benefit of a protected species." Turtle Island, 340 F.3d at 974. Turtle Island distinguished cases which found that there was no requisite "agency action" when the agency "could not influence construction of the [project] for the benefit of the newly listed [species]." Id. at 976, *distinguishing* Sierra Club v. Babbitt, 65 F.3d 1502 (9th Cir. 1995).

In another case, the Ninth Circuit reiterated that the key issue was whether the agency had the discretion to condition or modify a proposed operation to the benefit of the species. Washington Toxics Coalition v. EPA, 413 F.3d 1024, 1033 (9th Cir. 2005)(emphasis in original)(finding "agency action" under the ESA "because the [agency] *could* condition permits to benefit listed species.").

The Supreme Court recently reviewed what constitutes an "agency action" under the ESA. National Association of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007). "ESA's no-jeopardy mandate applies to every *discretionary* agency action – regardless of the expense or burden its

application might impose." 551 U.S. at 671 (emphasis in original). However, in that case, the Court found that a nondiscretionary agency action mandated by Congress was not the type of "agency action" under the ESA. It held that when Congress specifically directs an agency to take a certain action (in that case, EPA's approval of Arizona's application to assume the permitting program under the Clean Water Act) once specified criteria were met, the agency had no discretion to deny the application and thus no authority to modify the proposal to protect listed species. "The regulation's focus on 'discretionary' actions accords with the commonsense conclusion that, when an agency is *required* to do something by statute, it simply lacks the power to 'insure' that such action will not jeopardize endangered species." 551 U.S. at 667 (emphasis in original).

The Ninth Circuit recently reviewed Home Builders in National Wildlife Federation v. National Marine Fisheries Service, 524 F.3d 917 (9th Cir. 2008)("NWF v. NMFS"). In NWF v. NMFS, the court correctly noted that Home Builders was limited to those situations where the agency was required by Congress to take a certain action (i.e., when Congress removed all discretion over the action by the agency):

> We do not face this problem here, however, because in the present case Congress has imposed broad mandates, rather than directing the agency to take specific actions, and the agencies are perfectly capable of simultaneously obeying Section 7 and those mandates.

NWF v. NMFS, 524 F.3d at 928.

In this case, as detailed above, the Forest Service is not categorically required to approve all mining proposals. Rather, mining is subject to Forest Service regulations, including the requirement to protect the environment and listed species. These "broad mandates" of the Organic Act, and the agency's own 36 CFR Part 228 regulations, provide the Forest Service with the discretion to regulate mining (whether proposed under a NOI or a PoO) and to modify or limit operations such as "to inure to the benefit of a protected species." Turtle Island, 340 F.3d at 974.

Here, as evidenced by the agency's own actions in reviewing and responding to proposed mining under NOIs, the Forest Service has substantial authority to require modifications of proposed mining to protect the SONCC Salmon. Indeed, as described above, that was the primary reason why the agency rejected the New 49ers' NOI for the Salmon River. ER 98-99.

For all of the mining conducted under the agency's NOI determinations in this case, the Forest Service never prepared any biological assessments or conducted any consultation under the ESA. Without such consultation, the agency could not meet its duty to insure that the subject mining activities would not result in the destruction or adverse modification

of designated critical habitat for the SONCC Salmon, which includes the Klamath River and its tributaries. 64 Fed. Reg. 24049 (May 5, 1999)(critical habitat designation for the SONCC Salmon). *See* Gifford Pinchot Task Force v. FWS, 378 F.3d 1059, 1075-76 (9th Cir. 2004)("Once designated, critical habitat receives its legal protection because it is subject to the exact Section 7 consultations at issue in this case.").

In this case, suction dredge mining can result in "destruction or adverse modification" of "critical habitat" for the SONCC Salmon and cannot be allowed under the ESA absent consultation. 16 U.S.C. § 1536(a)(2). *See* Grunbaum Report, ER 64-69. The agency may not allow activities to proceed that may affect these species until it has completed a legally valid assessment and consultation that properly addresses, and protects against, these impacts.

CONCLUSION

The Tribe respectfully requests that this Court find the Forest Service in violation of the ESA and its implementing regulations and the other requirements detailed above. The district court's decision denying the Tribe's summary judgment motion should be vacated.

Respectfully submitted this 31st day of August, 2009.

/s/ Roger Flynn

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CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32 (a)(7)(C) AND CIRCUIT RULE 32-1

I certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is:

Proportionately spaced, has a typeface of 14 points or more and contains 8,560 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words).

/s/ Roger Flynn August 31, 2009

_____

Roger Flynn Date

CERTIFICATE OF SERVICE

I certify that the following parties were served with a copy of the Tribe's Excerpts of Record by placing it for delivery via overnight Federal Express this 31st day of August, 2009.

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CERTIFICATE OF SERVICE OF ELECTRONIC FILING OF BRIEF

I also certify that on August 31, 2009, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all of participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Roger Flynn

Roger Flynn

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellants state that there are no related cases pending in this Court.