James L. Buchal, Appearing *Pro Hac Vice*
MURPHY & BUCHAL LLP
2000 S.W. First Avenue, Suite 320
Portland, OR 97201
jbuchal@mbllp.com
Telephone: 503-227-1011
Facsimile: 503-227-1034

R. Dabney Eastham, Cal. Bar No. 115533
44713 Highway 96
Seiad Valley, CA 96086
dabneylaw@sisqtel.net
Telephone: 530-496-3677
Facsimile: 530-496-3319

Attorneys for The New 49'ers, Inc. and
Raymond W. Koons

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

KARUK TRIBE OF CALIFORNIA,

Plaintiff,

v.

UNITED STATES FOREST SERVICE, *et al.*,

Defendants.

Case No. 04-4275 (SBA)

THE MINERS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Date: June 21, 2005
Time: 1:00 p.m.
Ctrm: 3, 3d Floor

Judge: Hon. Saundra B. Armstrong

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Summary of Argument

Review of the Forest Service's decisions is under the "arbitrary, capricious, or contrary to law" standards of the Administrative Procedure Act, and review is limited to the Administrative Record unless the Tribe demonstrates grounds for adding additional materials to that Record. In particular, the Tribe is not permitted to prove the unlawfulness of Forest Service decisionmaking by reference to its own Declarations, statements concerning suction dredge mining in various documents not part of the Administrative Record—or even the Answer filed by the Federal defendants. Stripped of such material (the Miners are filing herewith a motion to strike), the Tribe offers almost no record support for its positions.

But the primary problem with the Tribe's case is legal, for the National Forest Management Act (NMFA), properly construed in the context of the complex web of statutory authorities governing to the Forest Service, does not afford the Service planning authority over mineral operations. Congress carefully protected the property rights of the Miners from any and all regulation that would "materially interfere with prospecting, mining or processing operations . . ." (30 U.S.C. § 612(b)), and expressly excluded mineral management from the purview of the general forest planning statutes, *see* 16 U.S.C. § 528.

Mineral operations within National Forests are thus managed under the 36 C.F.R. Part 228 regulations, which have a novel structure carefully crafted to recognize the unique property rights of the Miners and their substantive statutory protection against burdensome regulation by excluding non-"significant" mining from project-level planning requirements under NEPA and other statutes. While Forest planners did place language concerning mineral management in the Klamath Forest Plan, the general guidance in the Northwest Forest Plan and elsewhere confirms that the Part 228 regulations are controlling, and the Forest Service has repeatedly confirmed this interpretation in the National and Regional Directives challenged by the Tribe. The Part 228 regulations, recently re-promulgated, 69 Fed. Reg. 41,428 (July 9, 2004), stand as the most recent expression of the agency discretion, and merit considerable deference by the Court in light of the conflicting statutory and regulatory objectives and the agency's technical expertise in administering these statutes.

The Forest Service properly recognizes that federal law places substantive limits on its authority to regulate the Miners' use of their property; it would be patently unreasonable to restrict the use of that property without adverse effects on the "surface resources" under Forest Service jurisdiction. Accordingly, the Forest Service purports to require the Miners merely to give notice of their activities.[1] If and only if the local ranger concludes, upon review of such notice, that the Miner "will likely cause significant disturbance of surface resources" is the Miner required to file a Plan of Operations (36 C.F.R. § 228.4(a)(1)), which in turn triggers more formal environmental analysis pursuant to NEPA and other statutes (*id.* § 228.4(f)).

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, that activity is now one that proceeds only by permission of the federal agency, thereby triggering the application of the NFMA, Endangered Species Act (ESA), National Environmental Policy Act (NEPA), and perhaps other statutes as well. Under this theory, no activity would be sufficiently insignificant to avoid triggering costly and time-consuming formal NEPA review and ESA consultation, including 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. This is particularly the case given the rank speculation as to "possible" effects of the Miners' activities that litter the record; such speculation could be advanced against nearly any Forest activity.

The remaining claims of the Tribe may be quickly rejected. In light of Ninth Circuit authority confirming that the "notice of intent" procedure does not invoke NEPA procedures, *Sierra Club v. Penfold*, 857 F.2d 1307, 1312-14 (9th Cir. 1988), the Tribe's NEPA claim is wholly dependent upon its NFMA claim; only *significant* mining operations requiring a "plan of operations" trigger NEPA analysis. And the Tribe's Endangered Species Act (ESA) claim fails as a matter of law because there is no "agency action" triggering the Act or even a lawfully listed species present in the rivers of the Klamath National Forest. It fails as a matter of fact because the

[1] No notice is required at all for "operations which will not involve the use of mechanized earthmoving equipment such as bulldozers or backhoes and will not involve the cutting of trees, unless those operations might otherwise disturb surface resources". 36 C.F.R. § 228.4(a)(2)(iii).

Tribe fails to demonstrate, with site-specific evidence within the Administrative Record, that suction dredge mining *as conducted under the California regulatory regime* and under the voluntary restrictions adopted by the Miners would affect the fish. Those regulations already prohibit mining activity when and where fish would be adversely affected. One will search the Administrative Record in vain for a single reference to a single fish ever killed by a single suction dredge or other small-scale miner in the Klamath National Forest.

Argument

I. THIS COURT SHOULD DISMISS THE TRIBE'S NATIONAL FOREST MANAGEMENT ACT (NFMA) CLAIMS.

The Miners do not dispute that the Forest Service has authority to impose reasonable regulations governing mining in the National Forests. A close examination of the language, structure, and legislative history of the National Forest Management Act, 16 U.S.C. §§ 1600-14, upon which the Tribe relies, confirms that Forest Plans are to address renewable surface resources, not mining. Because Congress did not empower the Forest Service to promulgate "standards and guidelines" (S&Gs) concerning mining in forest plans, the Tribe may not lawfully enforce such standards and guidelines. Although the Forest Service has not disavowed the S&Gs, it has recognized that they are inconsistent with the 36 C.F.R. Part 228 mineral regulations issued that do lawfully empower the Service to regulate mining in the National Forests, and thus it issued directives stating that the Part 228 regulations control. At the least, the complex web of statutory authorities, and the technical nature of the ultimate determinations at issue? whether particular suction dredge and other small-scale mining operations conducted under certain "notices of intent" have any significant adverse effect on surface resources? counsels the Court to defer to the Forest Service's determinations in these matters.

A. Congress Expressly Required Forest Plans To Eschew Regulation Of Mineral Operations In Favor Of Pre-Existing Statutory Authority And Regulations.

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. As the Ninth Circuit has commented, "[n]o citation of authority is required to support the statement that the all-pervading purpose of the mining

laws is to further the speedy and orderly development of the mineral resources of our country". *United States v. Nogueira*, 403 F.2d 816, 823 (9th Cir. 1968).

Through the Organic Administration Act of 1897, Congress 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 provided 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. It is this statute that is most 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). Notably, the Forest Service is flatly barred from prohibiting entry for the purpose of developing mineral resources, an important and unique statutory limitation on its regulatory authority.[2]

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[2] The Organic Act also provided that "[a]ll waters within the boundaries of national forests may be used for domestic, mining, milling or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder". 16 U.S.C. § 481. This statutory provision may be construed, in light of the powerful policy favoring minerals development, as permitting suction dredge miners to comply with either the state regulatory scheme *or* the federal regulatory scheme insofar as use of "waters" is concerned, mooting the entire question of federal regulation for mining conducted under California suction dredging permits. *Cf. United States v. New Mexico*, 438 U.S. 696, 717 (1978) (reviewing legislative history of Organic Act; construing § 481 to require water allocation under state law).

At the least, the statute counsels this Court intent to give substantial weight to California's comprehensive regulatory scheme for suction dredge mining in reviewing the Forest Service's decisions herein. In substance, the Tribe is asking the Court to interpret portions of the Klamath Forest Plan to displace not merely the Part 228 mineral regulations, but the entire California regulatory program, in flat contradiction to the literal meaning of § 481. Simply put, the Tribe asks the Court to forbid what the State of California has determined to permit, in a context where the Klamath Forest Plan is silent on the question of pre-empting the California regulations. *Cf. California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 583 (1987) ("It is appropriate to expect an administrative regulation to declare any intention to pre-empt state law with some specificity").

In light of the already-complex record, limited time for research and briefing, and the page limit for this memorandum, the Miners wish to reserve further briefing of the question whether § 481 and other authorities forbid the Forest Service from insisting upon approved plans of operations *and* approved California permits, such that 36 C.F.R. § 228.8(h), which appears to contemplate coincident compliance with state and federal law, exceeds the Forest Service's Organic authority

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 therefor, 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) (emphasis added).

Consistent with this statutory direction, 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".[3]

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). As the *Shumway* court emphasized,

> "[t]he owner of a mining claim owns property, and is not a mere social guest of the Department of Interior to be shooed out the door when the Department chooses. Rather, pursuant to the Multiple Use Act, the Department must continue to coexist with a holder of a valid claim whose right to possession is vested." *Shumway*, 199 F.3d at 1103.

Unlike any other Forest use, the Miners have possessory property rights within the Forest and a special, protected status under Federal law. Under this statutory scheme, it is simply inconsistent with the Miners' rights for the Forest Service to impose regulatory burdens and delays in a context where the agency finds no substantial disturbance of the resources within its purview.

Congress' first significant foray into Forest planning came in the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-532 (MUSYA). In that Act, Congress expressly provided that *"[n]othing herein shall be construed so as to affect the use or administration of the mineral*

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pursuant to 16 U.S.C. § 481. That question need only be briefed should the Court set aside the notice of intent practice; for the Forest Service merely to require notice does not conflict with California's permission to mine.

resources of national forest lands". 16 U.S.C. § 528 (emphasis added). The statutory focus of Forest planning was (and is) on "the various renewable surface resources of the national forests". 16 U.S.C. § 531 (definition of "multiple use"). Mineral deposits, of course, are neither renewable resources, nor surface resources.

Next came the Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. § 1600-14, which was substantially amended in 1976, Pub. L. 94-588, 90 Stat. 2949, and is now commonly identified as the National Forest Management Act (NMFA). The Tribe focuses upon this Act, to the exclusion of all relevant authority concerning regulation of mining, but properly understood, the NMFA has nothing to do with mining.

The pertinent portion of the NMFA is set forth in 16 U.S.C. § 1604, which begins by declaring that the Secretary shall promulgate "land and resource management plans" "[a]s part of the Program provided for by section 1602 of this title". 16 U.S.C. § 1604(a). That section, in turn, declares that "[t]he Program shall be developed in accordance with the principles set forth in the Multiple-Use Sustained-Yield Act of June 12, 1960 . . .". 16 U.S.C. § 1602. Such principles necessarily include the statutory limitation that none of the resulting plans may "affect the use or administration of the mineral resources of national forest lands". 16 U.S.C. § 528.

Section 1604 then declares that "[t]he Secretary shall begin to incorporate the standards and guidelines required by this section in plans . . ." and contemplates that the surface resources of the Forests are "managed under plans". 16 U.S.C. § 1604(c). It is this language that gives rise to "standards and guidelines" (S&Gs) in National Forest plans. Section 1604(e), "Required Assurances", provides that

> "In developing, maintaining, and revising plans for units of the National Forest System pursuant to this section, the Secretary shall assure that such plans—
>
> "(1) provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960, and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness; and

[3] For the convenience of the Court, copies of the cited portions of the Forest Service Manual and Handbook are filed herewith as Exhibits 1-2 of the Declaration of James L. Buchal.

> "(2) determine forest management systems, harvesting levels, and procedures in the light of all of the uses set forth in subsection (c)(1) [should be (e)(1)] of this section, the definition of the terms "multiple use" and "sustained yield" as provided in the Multiple-Use Sustained-Yield Act of 1960, and the availability of lands and their suitability for resource management." 16 U.S.C. § 1604(e).

Consistent with the Congressional findings addressing renewable, surface resources, see 16 U.S.C. § 1600, mining is not to be found in the list of uses set forth in § 1604(e)(1). S*ee also id.* § 1604(g) (extensive planning guidelines with no reference to minerals). Plainly, the NMFA does not expand planning authority beyond the limitations of the MUSYA. *See also* 16 U.S.C. § 1604(g) (again carrying forward principles of MUSYA).

It is clear from the legislative history that Congress had no intention whatsoever to impose any form of minerals regulation through NFMA forest planning. The whole purpose of the NFMA was to overturn a series of federal court cases against clearcutting timber, the leading example of which was *Izaak Walton League of America v. Butz*, 522 F.2d 945 (4th Cir. 1975). The cases had held the Organic Act of 1897 to be the controlling source of substantive authority to sell timber (notwithstanding MUSYA), *e.g., Butz*, 522 F.2d at 952-53, and had construed that Act to permit only "sale of only dead, physiologically mature, or large trees which have been individually marked and will be entirely removed", *see generally* H. Rep. No. 94-1478, Pt. I, 94th Cong., 2d Sess. 12-17 (Sept. 8, 1976). Thus the Organic Act was amended, along with the Forest and Rangeland Renewable Resources Planning Act. *See id.* at 23.

The legislative history confirms that Congress intended the 1976 amendments to [e]mphasize that the land management planning process be conducted consistent with provisions of the Multiple-Use Sustained Yield Act". H. Rep. No. 94-1478, Pt. I, 94th Cong., 2d Sess. 8 (Sept. 8, 1976); *see also id.* at 10 ("It builds upon the direction provided in the Multiple-Use Sustained Yield Act and the Forest and Rangeland Renewable Resources Planning Act"); *see also* Cong. Rec. 27,606 (Aug. 12, 1976) ("The Forest and Rangeland Renewable Resources Planning Act and these amendments are intended to be fully compatible with the principles of the Multiple-Use Sustained Yield Act, and, in fact, provide further direction in the implementation of the Act"; remarks of Sen. Humphrey). There is no hint that Congress intended to afford the Forest Service any authority over minerals regulation in the NMFA.

And there is powerful evidence to the contrary. The prior Congress had just finished intervening in the Forest Service's promulgation of the Organic Act mineral regulations, making it clear that the Forest Service was to minimize regulatory burdens and delay, including NEPA compliance, for mineral operations. *See infra* pp. 12-13. And the very same Congress that passed NFMA was enacting the Federal Land Policy & Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-45, which provides, *inter alia*, that "public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 [30 U.S.C. § 21a]", *id.* § 1701(a)(12). Congress had enacted the FLPMA to limit environmental policies "effectively precluding the exploration of minerals on large areas of National Forest lands in order to preserve potential wilderness uses . . .". *Mountain States Legal Foundation v. Andrus*, 499 F. Supp. 383, 395 (D. Wy. 1980) (reviewing legislative history); *see generally* 43 U.S.C. § 1714. Members of Congress would be shocked to find the Forest Service purporting to use NFMA authority to promulgate the very sort of restrictions on mining that Congress had repeatedly opposed with oversight hearings and statutory amendments.

The *Mountain States* court, after reviewing the foregoing authority, declared:

> ". . . the National Forest Management Act continued in effect the priorities established by Congress in the earlier acts. In all respects, the programs were meant to conform to the requirements of existing law, S. Rep. No. 686, 93rd Cong. 2d Sess. 8 (1976), which would include the requirement of 16 U.S.C. § 528 that nothing be construed so as to affect the use or administration of mineral resources on national forest lands." *Id.* at 394 (Citations omitted.)

See also Rocky Mountain Oil & Gas Ass'n v. U.S. Forest Service, 157 F. Supp.2d 1142, 1145 (D. Mont. 2000) ("the NFMA and the MUSYA do not apply to oil and gas leasing"), *aff'd on other grounds*, 12 Fed. Appx. 498 (9th Cir. 2001), *cert. denied*, 534 U.S. 1018 (2001).

The Tribe places heavy reliance upon the case of *Siskiyou Regional Education Project v. Rose*, 87 F. Supp.2d 1074 (D. Or. 1999), which holds, without explanation, that "the Forest Service may also regulate mining through" Forest Plans. *Id.* at 1087 (citing *Pacific Rivers Council v. Thomas*, 873 F. Supp. 365, 372 (D. Idaho 1995)). The *Pacific Rivers Council* opinion in turn "acknowledges that case law and the statutes in question do not specifically state to what extent

mining activities in national forests are governed or controlled by [forest plans]. Nevertheless, the Court concludes that mining activities are covered . . .". *Pacific Rivers Council*, 873 F. Supp. at 372. As far as the Miners can tell, neither case addressed the Multiple Use Act of 1955 and, more importantly, neither case made no reference to the express exclusion of mining from the scope of forest planning through 16 U.S.C. § 528.

The *Pacific Rivers Council* case also articulated a policy-based rationale for extending the NFMA to cover minerals: to ensure a "comprehensive view of all activities". *Pacific Rivers Council*, 873 F. Supp. at 374. The Tribe makes the related policy argument that the Klamath Forest Plan "set[s] standards applicable to local conditions and resource needs that generalized national [mining] regulations do not cover". (Tribal Mem. 14.) The short answer is that the Tribe's policy concerns should be addressed to Congress, which manifestly excluded mining regulation from the Forest planning statutes. The long answer is that the Tribe has it backwards: the notice of intent procedure enables highly-localized determinations of insignificance, reserving complex and unwieldy planning processes for projects with significant adverse effects on surface resources.

B. The Klamath Forest Plan's Mineral S&Gs Cannot Override the Part 228 Regulations

The Tribe takes the position that the Klamath National Forest (KNF) "is governed by the KNF Forest Plan as well as by the [Northwest Forest Plan] NFP of 1994". (Tribal Mem. 10.) In its Record of Decision concerning the NFP of 1994, the Forest Service set forth the agency position concerning the general relationship between S&Gs and Forest Service regulations, under the heading "Existing Laws and Regulations"

> "Additional direction to the management agencies includes, but is not limited to directives, policy, handbooks, manuals, as well as other plans, regulations, laws and treaties. The standards and guidelines presented in this document supercede other direction except treaties, laws and regulations unless that direction is more restrictive or provides greater benefits to late-successional forest related species. *None of these standards and guidelines applies where they would be contrary to existing law or regulation*, or where they would require agencies to take actions for which they do not have authority." (Ex. B to Dfts' Motion to Dismiss, at C-1; emphasis added).)

The language reflects the simple reality that the NFMA, as a planning statute, does not generally expand the substantive authority of the Forest Service, or overcome limitations, in the fundamental authorizing statutes—just as the *Butz* case had held years before. Forest planning was supposed to

be developed in a fashion consistent with pre-existing limitations on the Forest Service's regulatory authority in the Organic Act, including the overriding requirement that the public lands be open for mineral development. Regrettably, that did not happen here.

Notwithstanding the statutory limitations and regulatory limitations on its authority, individuals opposed to mining within the Forest Service promulgated extensive S&Gs purporting to regulate mining. The centerpieces of the Tribe's NMFA claim are two S&Gs from the Klamath Forest Plan, initially promulgated in 1995 and most recently amended in 2001 (*see* AR0002), numbered MA10-33 and -34:

> "MA10-33 Mineral operations proposed within RRs shall require a written authorization before the start of development as part of the plan of operation, lease, sale contract or permit. Notices of intent for mineral operations under 36 CFR 228 shall not constitute authorization to operate within a RR.
>
> "MA10-34 Require a reclamation plan, approved Plan of Operations and reclamation bond for all minerals operations that include RRs. 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." (AR0017.[4])

The Tribe contends that these S&Gs override the provisions of the 36 C.F.R. Part 228 regulations, issued pursuant to the statutes that *do* empower the Forest Service to regulate mining (*see* 36 C.F.R. Part 228, Subpart A, Authority)). In particular, the Tribe contends that MA10-34 overrides 36 C.F.R. § 228.4(a), which permits forest rangers to review a notice of intent to determine whether mining operations "will likely cause significant disturbance of surface resources", and if so, require more formal review procedures.

As set forth above, Congress manifestly did not intend the S&Gs created pursuant to the NFMA (16 U.S.C. § 1604(c)) to include the "Minerals Management" standards and guidelines found in the Klamath Forest Plan (*e.g.*, A0017). The minerals S&Gs are simply *ultra vires*; for

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[4] Arguably, the Plan itself is internally inconsistent. S&G 19-1 of the Klamath Forest Plan declares that the Forest Service shall

> "[a]dminister all locatable, leasable, and saleable mineral resource activities according to the 36 C.F.R. 228 Regulations and other applicable laws, regulations and orders. Require submission of a notice of intent or plans of operation for all mineral-related activities where the potential for significant resource disturbance exists. Require surface resource protection and reclamation in all plans of operations." (AR0012.)

Congress required the Forest Service to manage potential conflicts between mining and other uses through *regulations* issued under the Organic Act, all subject to a substantive limitation on such regulation pursuant to the Multiple Use Act of 1955 and the general statutory imperative that the public lands remain open for mining.

Arguably, given the very specific legislative history and statutory language concerning the scope of the Forest Service's authority to protect bodies of water in Forest Plans pursuant to 16 U.S.C. § 1604(g)(3)(E)(iii), the "Riparian Reserves" themselves are contrary to law, for Congress made it clear that such "buffer zone" protection was to be provided "only where [timber] harvests are likely to seriously and adversely affect water conditions or fish habitat." H. Rep. No. 1735, 94th Cong., 2d Sess. 30 (Sept. 30, 1976). Insofar as many onerous requirements of the "Riparian Reserves" purport to apply without regard to any "serious and adverse effect" whatsoever, the Forest Service is frustrating entirely the overriding intent of Congress that Forest activities continue—indeed the very motive for the bill.[5] Indeed, the Forest Service is engaging in precisely the same conduct that motivated passage of the FLPMA: arbitrarily restricting mineral development in large portions of the National Forests. For reasons that require supplementation of the Administrative Record fully to explain, and are thus addressed in the accompanying motion, "Riparian Reserves" function, in substance, as a total withdrawal of the designated areas from mining. In the Klamath National Forest, these "Riparian Reserves" constitute essentially every body of water within the Forest. (*See* Maria Decl. ¶ 16 (explaining significance of Forest Service Map of Riparian Reserves).)

The Tribe may argue that the S&Gs might be sustained as an exercise of regulatory authority pursuant to the Organic Act, but the Forest Service did not purport to rely upon the Organic Act in issuing the Klamath Forest Plan (*see* AR1 (2-ROD-knf-lrmp-7-95.pdf, at 6)), just as it did not purport to rely upon the NFMA in issuing the Part 228 regulations. It is "simple but fundamental rule of administrative law" that this Court cannot sustain the S&Gs on a basis different from that relied upon by the agency. *See SEC v. Chenery*, 332 U.S. 194, 196 (1947). For the Court

[5] Even where Congress has expressly empowered agency officials to create "wilderness" areas, Congress has "grandfathered in" existing mining claims. *See* 16 U.S.C. § 1133(d)(3).

to assume that the Forest Service would exercise authority under the Organic Act to require full-blown planning efforts irrespective of the lack of significance of mining "would propel the court into the domain which Congress has set aside exclusively for the administrative agency". *Id.*

In fact, 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 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). In short, at roughly the same time Congress passed the Forest planning statutes, Congress was directly involved in creating the very "notice of intent" procedure the Tribe now says is superceded by a Forest Plan issued under the NMFA. Again, no member of Congress could possibly have imagined that renewable resource planning amendments designed to expedite timber harvest would be misconstrued to provide authority for onerous regulation of mining operations of the type Congress had just intervened to prevent.

Another problem with attempting to construe the S&Gs as regulations promulgated pursuant to Organic Act authority is that the Forest Service re-promulgated the pertinent portion of the Part 228 regulations, 36 C.F.R. Part 228.4(a), as an interim regulation several years after passage of the KFP. 69 Fed. Reg. 41,428 (July 9, 2004). Thus the most recent July 2004 expression of policy from the Forest Service is to allow insignificant mining activities to proceed without wasteful and unnecessary procedural paralysis.

The Tribe cites *Sierra Club v. Martin*, 168 F.3d 1 (11th Cir. 1999), in support of its position that "the requirements of a Forest Plan are not nullified by general agency regulations". (Tribal Mem. 16.) The Tribe misreads *Martin*, which construed the Forest Service's duty to collect biological data pursuant to the Forest Plan and the 36 C.F.R. Part 219 Forest planning regulations. The Forest Plan required the collection of data on "sensitive" species, and the regulations did not, *id.* at 5, but there was no conflict between the Plan and the regulations, for the regulations did not bar collection of the data. Here, by contrast, the Part 228 regulations affirmatively allow insignificant mining operations to proceed without further analysis, pursuant to direct statutory authority protecting mining operations, whilst the Tribe contends that no mineral operation of any size or type, without regard to significance, may proceed pending years and years of planning, appeals and litigation. Contrary to the Tribe's suggestion (Tribal Mem. 16), the *Rose* made no holding concerning this conflict at all, though there is a fleeting allusion to the issue. *Rose*, 87 F. Supp.2d at 1080. The Court's only holding concerning "conflicts" addressed conflicts amongst certain S&Gs themselves. *Id.* at 1087.

Even assuming that the NMFA may be construed to provide for regulation of mining by Forest Plan—and it should not—the NFMA does not, by its terms, require that insignificant mining activities conducted after giving "notice of intent" to be consistent with the Plan. The Tribe notes that the NMFA provides that

> "Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans. Those resource plans and permits, contracts, and other such instruments currently in existence shall be revised as soon as practicable to be made consistent with such plans. When land management plans are revised, resource plans and permits, contracts, and other instruments, when necessary, shall be revised as soon as practicable. Any revision in present or future

permits, contracts, and other instruments made pursuant to this section shall be subject to valid existing rights." 16 U.S.C. § 1604(i) (emphasis added).

It is this provision that the Tribe contends requires that "all Forest decisions comply with the Forest Plan". (Tribal Mem. 9.) But the statute does not require that every decision in the Forest comply with the Plan; it requires that "resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans".[6]

In substance, the Tribe appears to contend that in the NFMA, Congress intended to amend all existing mining claims for plan consistency. But that would be flatly inconsistent with § 1604(i)'s preservation of "valid existing rights" such as mining claims. (*See also* AR1, 3-acs-finalrod03_17_04, at 19-20 ("Valid existing rights may pertain to mining claims . . ."), 30 (same).) Alternatively, the Tribe may contend that the "notices of intent" filed by the Miners and others constitute "instruments for the use and occupancy of National Forest System lands" that must be "revised" into plans of operations. But this again stretches the statutory and regulatory scheme beyond recognition. The Miners already have federally-authorized mining claims, which constitute federal property rights of possession. They may, consistent with the Part 228 regulations, use Forest lands without even giving notice at all under some circumstances, and by giving notice where they might disturb surface resources. It makes no sense to revise a "notice" to be consistent with a Forest Plan. It might make sense to revise a Plan of Operations to be consistent with reasonable elements of a Forest Plan, but the Tribe has abandoned claims concerning Plans of Operations.

From this perspective, the Forest Service's memoranda explaining why continued insignificant mining may proceed notwithstanding the S&Gs make perfect sense. The issue first

[6] *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059 (9th Cir. 1998), *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372 (9th Cir. 1998), and *Pacific Coast Federation v. NMFS*, 265 F.3d 1028 (9th Cir. 2001), all hold that certain timber sales, which manifestly require a contract instrument authorizing use and occupancy of the Forest, cannot proceed as inconsistent with applicable Forest Plans. *See, e.g.*, *Friends*, 153 F.3d at 1068. None of these cases involved property rights within the forest, and mere notices concerning the owner's use of such property.

arose with respect to the Northwest Forest plan, triggering a February 21, 1995 memorandum from Regional Foresters to the Forest Supervisors, which explains:

> "The purpose of an NOI is to enable the District Ranger to determine if a plan of operations is required. An NOI is not approved by the Forest Service and requires no National Environmental Policy Act (NEPA) analysis. There are numerous, small placer operations using suction dredges and similar equipment occurring in RR's and LSR's throughout Regions 5 and 6. The majority of these operations are carried out under an NOI because of the insignificant nature of their operation. The mining S&G's within the President's Plan for RR's and LSR's would therefore not apply because there is no regulatory provision for including S&G's in an NOI." (AR0212-13.)

In saying that a notice of intent "is not approved by the Forest Service", the Service is confirming, in substance, that there is no relevant "instrument for the use and occupancy of National Forest System lands" that must be made "consistent" with the Plan. The statement that a notice of intent is not "approved" is also consistent with the language, if not the intent, of MA10-33's declaration that notices of intent shall not constitute authorization to operate within a RR". (AR17.[7]) Unless some sort of significant mining project is proposed under a plan of operation, no authorization is needed to commence mining activities. While this might not be the most natural way to construe MA10-33—to the extent it must be regarded as legally effective at all—it is the only construction that is faithful to the oft-reiterated Congressional intent to protect the rights of miners against Forest Service regulation.

A follow-up memorandum dated February 5, 2002, this time to the Regional Foresters from a national official, again addressed the MM-1 S&G found in the Northwest Forest Plan, which contains the same language as the MA10-34 S&G in the Klamath Forest Plan upon which the Tribe relies, and explains:

> "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.

[7] The Tribe notes that some rangers have, in letters responding to notices of intent, used the term "authorization" to refer to the effect of such letters. (*E.g.*, AR29.) The rangers are responsible for determinations of significance, not the legal subtleties of the regulatory scheme, and appear to have corrected that error (McCracken Decl. Ex. 2).

> "To apply this standard and guideline to activities not meeting the 'likely cause significant adverse disturbance' test is not appropriate and is contrary to law and regulation. If no significant surface disturbance is occurring, we have no reason to require a reclamation bond, nor would we be able to determine bond amount." (AR0216.)

In substance, this memorandum constitutes a further finding by the Forest Service that application of the Forest Plan S&Gs such as MA10-34 to insignificant operations would "materially interfere" with suction dredge mining and other small-scale mining or prospective activity, contrary to the substantive statutory limitations on Forest Service regulations required by 30 U.S.C. § 612(b).

C. The Tribe's Extra-Record Attempt To Demonstrate Environmental Harm Should Be Rejected.

As set forth in the accompanying motion and memorandum to strike certain factual submissions of the Tribe, the Tribe cites and quotes various materials concerning potential effects of suction dredge mining that are not found in the Administrative Record. The obvious purpose is to attempt to persuade the Court that the ranger-level notice of intent determinations at issue in this suit must be wrong. Stripped of generalities, which amount to little more than statements that biologists could imagine possible ways to employ a suction dredge to injure fish, *the Tribe does not demonstrate that any of the mining conducted after the five specific ranger-level determinations it challenged caused any environmental injury whatsoever.*

For example, the Tribe states that "[m]ining activities in Riparian Reserves are adversely affecting the threatened Coho salmon and other species, both directly and cumulatively. *See* Grunbaum Report AR294-99." (Tribal Mem. 21) But that document acknowledges that "in some situations, the effects of dredging may be local and minor, particularly when compared to the effects of other human activities". AR294. It repeatedly recites "potential adverse effects" (AR295), but never identifies any *actual* adverse effects, substituting a purely speculative presumption for data: "the latest word on suction dredging is that adverse effects should be expected unless proved otherwise". (AR296, 298.) Significantly, Mr. Grunbaum's extreme opinions were not shared by the other District biologist (AR95), and the Forest Service has stated that "the viewpoints expressed in Mr. Grunbaum's report are his own, and not those of the Forest Service" (Fed. Dfts. Answer

¶ 43.)[8] By separate motion, the Miners are attempting to supplement the record with material, including the Greene Declaration, to demonstrate the striking contrast between speculation about adverse effects, and scientific conclusions about suction dredge mining—that is, conclusions drawn from real-world, empirical observations and data.

In contrast to the speculation offered by the Tribe, the site-specific work of the Miners and the local rangers reflects constant communication and collaboration concerning surface resource concerns. (*E.g.*,AR106-08 (Tribe, Miners and Forest Service meet); AR30 (notice of intent reflects factors discussed at meeting); *see also* AR112-14 ("ongoing meetings").) The local forest service ranger, faced with disagreement amongst the biologists, fully considered highly-localized issues and developed local guidelines. (AR95-96 (ranger's memorandum describes process); AR94 (biologist notes the Miners' agreement to special fish protection measures); AR91 (local guidelines).) Through the motion to supplement, particularly the McCracken Declaration, the Miners also seek to demonstrate a striking, bad-faith contrast between the Tribe's positions during the site-specific work and the positions the Tribe now takes. (*E.g.*, McCracken Decl. ¶ 17 (statements of Soto).)

The Miners' notices of intent identify creek-specific areas particularly suitable to fish habitat to be avoided. (AR33-34.) They identify areas where specific reclamation techniques will be employed. (AR34.) The record reflects that the Miners carefully tailored their operations to avoid impact by modifying them in accordance with evolving micro-habitat concerns (AR28), action that would be impossible under more cumbersome regulatory schemes. The local ranger (and Mr. Grunbaum) carefully verified that miners were in fact operating consistent with their notices of intent. (AR84; *see also* AR86 (NOAA Fisheries involvement), AR90.) The Tribe was intimately involved in these efforts. (*See* AR86-87.) For the Tribe to tell the Court that the "record is devoid of evidence that the agency conducted any meaningful review of the impact of the challenged

[8] It is true that other Forest Service officials besides Mr. Grunbaum have sought restrictions on suction dredging (*e.g.*, AR300-01), but have apparently retreated in the face of the suggestion that they offer *data* "that demonstrate that the current regulations result in negative impacts to these [aquatic] species" (AR304). No such data exist, because the Miners are not hurting fish at all, and their activities even benefit them by removing toxic chemicals and improving spawning habitat. (*See* Maria Decl. ¶ 9 & Ex.1, at 5.)

suction dredge mining operations on sensitive species and their habitat" (Tribal Mem. at 17-18) is at best misleading.

The Forest Service has, consistent with Forest Manual Section 2817.1, documented "the basis for the determination that a plan is not required". The Manual (which was employed here (*see* AR113)) 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. As a 1997 Forest Service "Program Aid" document explains, [s]ince there is so much variation between rivers, many of the regulations, such as closures, must be determined on an individual basis". (AR410.) By contrast, the designation of "Riparian Reserves" arbitrarily lumps virtually the entire usable Forest in one designation, insofar as suction dredge mining is concerned. It is neither an appropriate nor lawful means of regulating mineral operations.

D. The Court Should Defer To The Forest Service's Reasonable Path Through A Dense Thicket Of Statutes And Regulatory Material.

Where, as here, a tangled web of statutes with flatly conflicting objectives entangles the Forest Service, the ultimate question is whether the agency has made a "reasonable accommodation among the conflicting policies that were committed to the agency's care by . . . statute". *Chevron, U.S.A, Inc. v. NRDC*, 467 U.S. 837, 845 (1984); *Wilderness Society v. U.S. Fish & Wildlife Service*, 316 F.3d 913, 929 (9th Cir. 2003). Here the situation is particularly difficult, as "the crazy quilt of apparently mutually inconsistent statutory directives are enough to drive any Secretary of Agriculture interested in discharging his lawful duties to drink".[9] As set forth above, one set of statutes requires the public lands to be open for mineral development, granting the Miners a statutory right to mine free of any "material interference" from Forest Service regulations, and other set of statutes provides comprehensive planning authority with respect to surface resources (but not mining). And the S&Gs of the Klamath Forest Plan appear to offer conflicting direction from the Part 228 mining regulations, prompting the Forest Service to resolve the conflict by directive and by re-promulgating the regulations.

[9] *United States v. Brunskill*, Civil No. 5-82-666 LKK (E.D. Cal. 1984), *aff'd*, 792 F.2d 938 (9th Cir. 1985) (quotation from Buchal Decl. Ex. 3, at 13 n.21).

It is under such circumstances that this Court's deference to the interpretations of the Forest Service ought to be at its zenith. As the Supreme Court explained in *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994), another case involving changing interpretations of arcane regulations,[10]

> "broad deference is all the more warranted when, as here, the regulation concerns 'a highly complex and highly technical regulatory program,' in which the identification and classification of appropriate 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'"

As set forth above, the question whether any particular suction dredge or other small-scale mining or prospecting operation will adversely affect other surface resources is a complex, highly-localized, site-specific determination reflecting the need for significant judgment and expertise. Ultimately, the Tribe offers nothing to suggest that the rangers' determinations with respect to the Miners' operations were arbitrary, capricious, or contrary to law. And while the Miners would prefer that the Court declare the S&Gs *ultra vires*, the Court may also simply defer to the Forest Service's harmonization of the Part 228 regulations and KFP S&Gs, for "it is axiomatic that the Secretary's interpretation need not be the best or most natural one by grammatical or other standards"; the interpretation need only be "reasonable". *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 702 (1991).

II. THE NATIONAL ENVIRONMENTAL POLICY ACT DOES NOT APPLY IN THESE CIRCUMSTANCES.

A. Without A Ranger's Determination Of Significance, Requiring A Plan Of Operation, There Can Be No Major Federal Action.

The National Environmental Policy Act (NEPA) applies to "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). As set forth above, only mining operations that have been determined by the local ranger to *not* to significantly affect the quality of the human environment are at issue here. Operations with actual significance are handled under plan of operation procedures that have been stipulated out of this lawsuit. Put another way, the actions at issue are minor, not major, and insofar as the Part 228 regulations do not purport to require any advance approval of "notice of intent" activity, not even federal.

[10] The Tribe argues that the Regional Directives

The Ninth Circuit has already determined that the "notice of intent" procedure for screening mining operations in this fashion does not trigger 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 did not comply with the notice requirement would 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 (no approval to commence operations specified where no plan of operations required).[11] 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)).[12] The Tribe's NEPA argument, then, is wholly

[11] 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 (AR218-20), "[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." (AR219.)

[12] Like the BLM regulations, which had been accompanied by a full EIS, *Penfold*, 857 F.2d at 1314 n.12, so too were the Part 228 regulations (initially numbered Part 252) covered by a Final EIS which was filed with the Council on Environmental Quality on July 16, 1974. *See* 39 Fed. Reg. at 26,038; *see also* 46 Fed. Reg. 36,142 (July 14, 1981) ("creating a new Part 228 [by] . . . transferring the verbatim text of Part 252 in its entirety"). The Miners move to supplement the Record with that EIS, *the adequacy of which is not challenged by the Tribe*. (Buchal Decl. Ex. 6.)

contingent upon its NFMA-based claim that each and every suction dredge or other small-scale mining or prospecting operation requires an approved plan of operations to proceed.

The Tribe, without reference to *Penfold*, advances the *Rose* case yet again to support its claim that the Forest Service violated NEPA. (Tribal Mem. 23) The *Rose* case did not even attempt to distinguish the holdings of *Penfold*, instead citing *Penfold* for the overly general proposition that "[t]he regulation of private mining operations by a federal agency is considered a 'federal action.'" *Rose*, 87 F. Supp.2d at 1102. Here, as elsewhere, *Rose* overlooked or misconstrued the law.

B. The Administrative Record Is Inadequate For Review Of The Tribe's NEPA Claim.

While the Court need not reach the NEPA claim for the reasons just discussed, the Administrative Record is manifestly incomplete for review of such a claim. The Record states that "[t]here are at least 3 S[t]ate of California, Department of Fish and Game EIRS that tie to the dredge permit *and indicate there is no significant disturbance if the permit regulations are followed*". (AR113; emphasis added.) Insofar as the Forest Service has apparently considered and relied upon these 3 EIRs, they ought to be part of the Administrative Record. (*See also* AR0223 (biological assessment is "tiered to" 1994 FEIR).) The Miners have been able to locate only one of these documents, and, as explained in the accompanying motion and memorandum, believe that the Federal defendants should be required to complete the Administrative Record with the other two.

The Record citations above raise serious questions as to whether the Record is adequate for the Court to determine whether the Forest Service has, consistent with Part 228 regulations, accepted the California regulatory scheme as a "[c]ertification or other approval issued by State agencies . . . of compliance with laws and regulations relating to mining operations" because the California statutes constitute "similar or parallel requirements of these regulations". 36 C.F.R. § 228.8(h). For reasons explained in the accompanying motion and memorandum, the Court ought to have no confidence that the Administrative Record is complete, insofar as the Certification offered in support of the Record reflects an extraordinarily limited approach to assembly of that Record.

In addition, there is another, Federal EIS that was prepared in connection with the initial promulgation of the Part 228 mineral regulations. *See* 39 Fed. Reg. at 26,038. That EIS, not

challenged by the Tribe, specifically analyzes the environmental impacts of proceeding under a notice of intent procedure rather than requiring plans of operation for each and every operation (Buchal Decl. Ex. 6, at 15). Insofar as the Forest Service opposes supplementation of the Record with this document, the Miners will defer further briefing concerning it.

C. Even If Agency Review Of Notices Of Insignificant Private Activity Constituted "Major Federal Action? And It Should Not? The Activity Would Be Categorically Excluded From NEPA Analysis.

Pursuant to the general NEPA regulations, 40 C.F.R. § 1508.4, the Forest Service has utilized "categorical exclusions" to identify categories of activities whose effect upon the environment is sufficiently trivial to make environmental analyses a waste of taxpayer dollars. The categorical exclusions are contained in the Forest Service Handbook 1909.15, Chapter 30 (Buchal Decl. Ex. 2), and include "[a]pproval, modification or continuation of minor, short-term (one-year or less) special uses of forest service lands" (FSH 1909.15, § 31.12(8)). The Handbook provides examples which "include but are not limited to" such things as "[a]pproving the gathering of forest products for personal use". (*Id.* § 31.12(8)(c).) The Administrative Record reflects the Forest Service's application of this categorical exclusion to mining activities with much more significant disturbance of surface resources than suction dredge mining or other small-scale mining and prospecting activity. AR0143 (FSH 1909.15, 31.2 category 8 exclusion for two 10x20 foot holes on dry land).

While the Miners' position is that exercise of their property rights is not technically a "special use", *see generally United States v. Lex*, 300 F. Supp.2d 951, 960 & n.7 (E.D. Ca. 2003), the NEPA exclusions demonstrate that even activities akin to mining that do not benefit from the statutory protection of mining would be deemed insignificant.

III. THE TRIBE'S ENDANGERED SPECIES ACT CLAIM SHOULD BE DISMISSED.

The Tribe's attempt to invoke the Endangered Species Act has three fatal flaws. There was no agency action on which to consult; there was no lawfully listed species present, and there was no effect on any listed species. The Miners note that dismissing the Tribe's claim leaves the ESA fully applicable to suction dredge mining, such that miners will remain strictly liable, and subject to

criminal prosecution and enormous penalties, when and if they ever "take" a listed fish. 16 U.S.C. § 1538(a)(1)(B) (anti-"take" prohibitions).[13]

A. There Is No Agency Action On Which To Consult.

Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), applies to "agency action", that is, "activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies . . . includ[ing] . . . the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid . . .". 50 C.F.R. § 402.02. The problem with the Tribe's case is that the grant occurred when the Miners obtained their claims, granting them possessory rights in Forest lands. At that point, the discretion of the Forest Service became sharply limited.

Specifically, the presence of mining claims and the associated property rights constrains the Forest Service's regulatory jurisdiction to reasonable regulations, forbidding them from barring entry for mineral development, and 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. Simply put, because the Forest Service has no discretion to shut down insignificant activities, the ESA cannot be invoked against such activities. *Cf., e.g, Ground Zero Center for Non-Violent Action v. U.S. Dep't of the Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004) (rejecting ESA challenge "because the Navy lacks discretion to cease Trident II operations"); *NRDC v. Houston*, 146 F.3d 1118, 1125-25 (9th Cir. 1998). As the local rangers have observed, "operations under a NOI was just acknowledging activities were occurring[;] it is not a Federal decision that commits Federal dollars". (AR110-11.)

B. There Cannot Be An Unlawful Failure To Consult Pursuant To Section 7 Of The Endangered Species Act Where There Is No Lawful Listing On Which To Consult.

The Tribe's claim is based upon the asserted presence of the Southern Oregon/Northern California coho salmon ("SONC coho"), which was listed under the ESA. However, the decision listing the species has been held invalid as exceeding the substantive authority of the listing agency.

[13] Even where not applicable, NEPA and the ESA are utilized by Forest Service officials to encourage individual forest users to limit their activities to levels that impose no significant impacts and do not trigger the statutes. (*E.g.*, AR0119 (warning individual miner to comply with pre-existing plan).)

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 distinction. *Id.*

In *California State Grange v. Department of Commerce*, No. 02-CV-6044-HO (Jan. 11, 2005), the Court declared the SONC coho listing invalid "for the reasons stated in the Alsea Valley case". Because there is no reported opinion in the case, we are filing herewith the summary judgment hearing transcript as Exhibit 5 to the Declaration of James L. Buchal; the quoted remark appears at p. 20. 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". (*Id.*) In short, the Court recognized that an unlawful listing decision could not be employed by federal agencies to injure citizens, but was not required to act to prevent such injury.

Here the Tribe seeks injunctive relief to give effect to the unlawful listing decision by summarily shutting down virtually all activities in the Forest involving mineral operations, but there can be no violation of the Endangered Species Act from any failure to consult concerning an unlawful listing. The rule of law requires that the courts not give effect to unlawful agency decisions to abridge the rights of citizens.

C. Even If The SONC Coho Were Lawfully Listed, And The ESA Applied To Notice Of Insignificant Mining Operations, The Tribe Fails To Prove Effects On Listed Species.

The Tribe offers no evidence that any listed species were present during any mining operations conducted with the five challenged notices of intent. The record reflects individualized determinations to avoid any and all locations even potentially utilized by SONC coho during mining operations. Moreover, the site-specific operations are screened by local rangers who consult with California Fish and Game biologists who, the Miners seek to demonstrate through supplementation

of the Administrative Record, are aware of where the unlawfully-listed fish spawn. (*See* Maria Decl. ¶ 12.) There is no factual case for the initiation of § 7 consultations.

Conclusion

For the foregoing reasons, the Court should deny the Tribe's motion for summary judgment.

Dated: May 17, 2005

MURPHY & BUCHAL LLP

By: /s/ James L. Buchal
James L. Buchal

Attorneys for The New 49'ers, Inc. and Raymond W. Koons

CERTIFICATE OF SERVICE

I certify that on May 17, 2005, I electronically filed the foregoing THE MINERS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, with the Clerk of the Court, using the CM/ECF system, which will send notification of such filing to the following:

Joshua Borger, *srmeredith@envirolaw.org*

James Russell Wheaton, *sarah-rose@thefirstamendment.org*

Roger Flynn, *wmap@igc.org*

Barclay Thomas Sanford, *Clay.Samford@usdoj.gov*

Brian C. Toth, *brian.toth@usdoj.gov*

s/_James L. Buchal_____
JAMES L. BUCHAL
Attorney for Potential Intervenors
The New 49'ers, Inc. and Raymond W. Koons