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

20 KARUK TRIBE OF CALIFORNIA,)
)
 21 Plaintiff,)
)
 22 v.)
)
 23 UNITED STATES FOREST SERVICE;)
 MARGARET BOLAND, Forest Supervisor,)
 24 Klamath National Forest,)
)
 25 Federal Defendants,)
)
 26 and)
)
 27 THE NEW 49ers, Inc. and RAYMOND KOONS,)
)
 28 Defendant-Intervenors.)

Civ. No. 04-4275 (SBA)
FEDERAL DEFENDANTS'
OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

Date: June 21, 2005
 Time: 1 p.m.
 Courtroom 3, 3rd Floor
 Hon. Sandra B. Armstrong

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- A. Excerpts from the Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl (April 13, 1994) (“NFP ROD”). Pages 1, 2, 7, 12.
- B. Excerpts from the Standards and Guidelines for Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl, Attachment A to the Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl (April 13, 1994) (“NFP Standards & Guidelines”). Pages A-6, C-1, C-34.
- C. Excerpts from the Record of Decision for the Final Environmental Impact Statement for the Klamath National Forest (July 5, 1995) (“Klamath Forest Plan ROD”). Page 1.
- D. Excerpts from the Klamath National Forest Land and Resources Management Plan (July 5, 1995), as amended through Nov. 21, 2001 (“KNF LRMP”). Pages 4-18, 4-17.
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1 **I. INTRODUCTION**

2 Plaintiff challenges four instances in which suction dredge mining occurred within the
3 Happy Camp Ranger District (“HCRD”) of the Klamath National Forest (“KNF”) under Notices
4 of Intent (“NOIs”), rather than under the more onerous terms of Plans of Operation (“PoOs”).
5 Plaintiff’s main claim is that guidelines from the Northwest Forest Plan now included in the
6 KNF Forest Plan compel the agency--regardless of the actual impacts of the proposed mining--to
7 require PoOs for all mining proposed in Riparian Reserves (“RRs”). Plaintiff also asserts that in
8 accepting the four NOIs, the KNF violated its duty under the National Forest Management Act
9 (“NFMA”) to consult with the Karuk Tribe and to protect sensitive species. Finally, Plaintiff
10 contends that the Forest Service’s acceptance of the four NOIs violated the National
11 Environmental Policy Act (“NEPA”) and the Endangered Species Act (“ESA”). Plaintiff’s
12 claims must fail.

13 The Forest Service has interpreted the KNF Forest Plan language regarding RRs so as to
14 reconcile that language with the mining regulations and the General Mining Law, consistent with
15 the intent of Congress. That interpretation is reasonable and deserves deference. The record
16 shows that the agency complied with all forest plan requirements for tribal consultation and
17 sensitive species. Finally, the acceptance of NOIs is not “an agency action authorized, funded or
18 carried out” by the Forest Service subject to the Endangered Species Act, or “major federal
19 action” triggering the National Environmental Policy Act. For these reasons, Plaintiff’s motion
20 must be denied.

21 **II. LEGAL BACKGROUND**

22 **A. Regulation of Mining on National Forest System Land**

23 Mining on National Forest System land is governed by the General Mining Law of 1872,
24 which confers a statutory right to enter certain public lands for the purpose of prospecting. See
25 30 U.S.C. § 22, as amended by the Surface Resources Act of 1955, 30 U.S.C. § 612 (“Except as
26 otherwise provided, all valuable mineral deposits in lands belonging to the United States . . .
27 shall be free and open to exploration and purchase . . .”). The application of the General Mining
28 Law to national forests was specifically affirmed by Congress in the Organic Act, which makes

1 the national forests “subject to entry under the existing mining law of the United States and the
2 rules and regulations applying thereto.” 16 U.S.C. § 482; see Wilderness Soc’y v. Dombeck,
3 168 F.3d 367, 374 (9th Cir. 1999). The Organic Act also allows the Secretary of Agriculture^{1/} to
4 make rules regulating the “occupancy and use [of National Forest land] and to preserve the
5 forests thereon from destruction.” 16 U.S.C. § 551. Nothing in the Organic Act, however, “shall
6 be construed as prohibiting . . . any person from entering upon such national forests for all proper
7 and lawful purposes, including that of prospecting, locating, and developing the mineral
8 resources thereof.” 16 U.S.C. § 478.

9 Pursuant to the Organic Act, the Forest Service has promulgated regulations governing
10 the use of surface resources in connection with mining activities on national forests. See
11 generally 36 C.F.R. Part 228, subpart A (“Part 228A”). Persons who enter national forests for
12 mining purposes must comply with these rules. See 16 U.S.C. § 482. Under the Part 228A
13 rules, an individual who commences mining operations “which might cause disturbance of
14 surface resources” must first submit to the appropriate District Ranger a notice of intent to
15 operate. See 69 Fed. Reg. 41,428, 41,430 (July 9, 2004) (interim rule amending 36 C.F.R. §
16 228.4(a)(2)).^{2/} If the District Ranger determines that the proposed activity “is causing or will
17 likely cause significant disturbance of surface resources, the operator shall submit a proposed
18 plan of operations.” Id.; accord, United States v. Brunskill, 792 F.2d 938, 940 (9th Cir.1986). A
19 PoO shall include the operator’s name and legal address, and a map sufficient to locate the
20 proposed operating area, existing or proposed access routes, and the approximate location and
21 _____

22 ^{1/} While the Secretary of Agriculture may reasonably regulate mining on National Forest
23 land to protect surface resources, the authority to manage the mineral estate on all federal land is
24 vested in the Secretary of the Interior. See 16 U.S.C. § 472 (transferring power from Secretary
25 of the Interior to make laws regarding National Forest reserves, but “excepting such laws as
26 affect” the prospecting and entering of such lands); see also Best v. Humboldt Placer Mining
27 Co., 371 U.S. 334, 336 (1963) (the “determination of the validity of [mining] claims against the
28 public lands was . . . transferred to the Department of the Interior on its creation in 1849”).

^{2/} Recently, the Forest Service adopted an interim rule amending Section 228.4(a), so as to
clarify that an NOI “is mandatory in any situation in which a mining operation causes a surface
disturbance, regardless of whether that disturbance is caused by mechanized earth moving
equipment or the removal of timber.” 69 Fed. Reg. 41,428, 41,429 (July 9, 2004). The interim
rule also clarifies that a PoO can be required at any time if the mining operation “*is* causing
. . . significant disturbance of surface resources.” Id. at 41,430 (emphasis added).

1 size of areas where surface resources will be disturbed. See 36 C.F.R. §§ 228.4(c)(1), (2). The
2 PoO shall also include other information showing the type of operations, time when they would
3 occur, and measures to be taken for environmental protection. See 36 C.F.R. § 228.4(c)(3). If a
4 PoO is submitted, the Forest Service completes an environmental analysis in connection with the
5 proposed plan to determine whether the preparation of an environmental statement is required.
6 36 C.F.R. § 228.4(f).

7 **B. The National Environmental Policy Act**

8 The purpose of NEPA, 42 U.S.C. §§ 4321 *et seq.*, is to focus the attention of federal
9 agencies and the public on a proposed action so that the environmental impacts of the action can
10 be studied before a decision is made. NEPA imposes procedural, not substantive requirements:
11 “NEPA does not work by mandating that agencies achieve particular substantive environmental
12 results.” Marsh v. ONRC, 490 U.S. 360, 371 (1989). “It is now well settled that NEPA itself
13 does not mandate particular results, but simply prescribes the necessary process.” Robertson v.
14 Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). NEPA requires agencies to analyze
15 environmental impacts of proposed major federal actions that may significantly affect the
16 environment. 42 U.S.C. § 4332; 40 C.F.R. § 1501.1. An agency’s analysis may take the form of
17 an Environmental Impact Statement (“EIS”) if the major federal action “significantly affect[s]
18 the quality of the human environment,” 42 U.S.C. § 4332(c); an Environmental Assessment
19 (“EA”) if it does not significantly affect the environment, 40 C.F.R. § 1501.4(c)-(e); or a
20 categorical exclusion (“CE”) if the action belongs to a predetermined class of actions which do
21 not individually or cumulatively have significant effects. 40 C.F.R. § 1508.4.

22 An agency’s duty to comply with NEPA is triggered only by a proposal to undertake a
23 “major federal action.” NEPA is not triggered by actions in which the agency is only marginally
24 involved, Sierra Club v. Penfold, 857 F.2d 1307, 1314(9th Cir. 1988), or where the agency lacks
25 discretion to control a non-federal actor, Mineral Policy Ctr. v. Norton, 292 F. Supp.2d 30, 55
26 (D. D.C. 2003).

27 **C. Endangered Species Act**

28

1 Section 7 of the ESA requires each federal agency to ensure that any action that agency
2 authorizes, funds, or carries out “is not likely to jeopardize the continued existence of any
3 endangered species or threatened species or result in the destruction or adverse modification” of
4 designated critical habitat. 16 U.S.C. § 1536(a)(2). To achieve this objective, the agency
5 proposing the action (“the action agency”) is required to consult with U.S. Fish and Wildlife
6 Service (“FWS”) or the National Marine Fisheries Service (“NMFS”) (the “consulting agency”)
7 whenever a federal action “may affect” a threatened or endangered species.^{3/} 50 C.F.R. §
8 402.14(a). Unless the action agency determines with the written concurrence of the consulting
9 agency that an action is “not likely to adversely affect” the listed species or critical habitat, it
10 must engage in “formal consultation.” 50 C.F.R. §§ 402.14(a), (b). The action agency must
11 prepare a biological assessment (“BA”) for use in consultation if the activity is a major
12 construction activity. 16 U.S.C. § 1536(c); 50 C.F.R. § 402.12(b). Formal consultation typically
13 concludes with the issuance of a biological opinion (“BiOp”) by the consulting agency. 50
14 C.F.R. § 402.14(l)(1). The BiOp assesses whether the proposed action is likely to jeopardize the
15 continued existence of the species or result in destruction or adverse modification of critical
16 habitat. 50 C.F.R. § 402.14(g)(4).

17 **III. STANDARD & SCOPE OF REVIEW**

18 Review of this action falls under the Administrative Procedure Act (“APA”), 5 U.S.C. §
19 706 et seq. Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 377 n.23 (1989) (no private
20 cause of action under NEPA); Ecology Ctr., Inc. v. U.S. Forest Serv., 192 F.3d 922, 924 (9th Cir.
21 1999) (same as to NFMA). Although the ESA includes a citizen suit provision creating an
22 independent cause of action, 16 U.S.C. § 1540(g)(1), courts reviewing claims under that
23 provision still apply the APA standard of review. See Southwest Ctr. for Biological Diversity v.
24 U.S. BOR, 143 F.3d 515, 522 (9th Cir. 1998). Under the APA, this Court may set aside final
25 agency action only if it finds that such action was “arbitrary, capricious, an abuse of discretion,
26

27 ^{3/} Whether the consulting agency is NMFS or FWS depends on the species involved. 50
28 C.F.R. § 402.01(b).

1 or otherwise not in accordance with law.” Citizens to Preserve Overton Park v. Volpe, 401 U.S.
2 402, 416 (1971).

3 Judicial review of agency decisionmaking is limited. A reviewing court “is not to
4 determine the *correctness*, in some ultimate sense, of an agency’s actions” but “is limited to
5 determining only the *legality* of the challenged action.” Di Vosta Rentals, Inc. v. Lee, 488 F.2d
6 674, 678 (5th Cir. 1973) (emphasis in original). In short, a court may not substitute its own
7 judgment for that of the agency. Vermont Yankee Nuclear Power Corp. v. Natural Res. Def.
8 Council, 435 U.S. 519, 555 (1978).

9 Under the APA, this Court’s review is to be based on the administrative record that
10 existed before the agency at the time the decision was made. “The focal point for judicial review
11 should be the administrative record already in existence, not some new record made initially in
12 the reviewing court.” Camp v. Pitts, 411 U.S. 138, 142 (1973).

13 The Ninth Circuit has endorsed the use of summary judgment motions under Rule 56 of
14 the Federal Rules of Civil Procedure for review of agency actions under the APA. See, e.g.,
15 Northwest Motorcycle Ass’n v. United States Dep’t of Agric., 18 F.3d 1468, 1471-72 (9th Cir.
16 1994).

17 **IV. FACTUAL BACKGROUND**

18 **A. Suction Dredge Mining on the Klamath National Forest**

19 In 1994 the Secretaries of the Interior and Agriculture issued the Record of Decision for
20 Amendments to Forest Service and Bureau of Land Management (“BLM”) Planning Documents
21 Within the Range of the Northern Spotted Owl, commonly known as the Northwest Forest Plan
22 (“NFP”). The NFP amended the forest plans for numerous National Forests, including the
23 KNF.^{4/} See Defs.’ Ex. A at 12.^{5/} The NFP is a common approach to managing about 24 million
24

25 ^{4/} The KNF subsequently issued a new forest plan in July 1995 which incorporates the
26 elements of the NFP. See KNF Forest Plan ROD (Defs.’ Ex. C) at 1 (adopting the preferred
27 alternative, which was modified to “incorporate direction” in the NFP). Even though the NFP
28 was technically superseded by the new forest plan, the term NFP is still used to refer to the
conservation strategy incorporated into the KNF Plan.

^{5/} The NFP and KNF documents are included in the AR at AR 001 on a CD Rom. They are
attached hereto for the Court’s convenience.

1 acres of federal land within the range of the northern spotted owl across the Pacific Northwest.
2 Id. at 1-2. It consists of an extensive system of standards and guidelines^{6/} and land use
3 allocations designed to balance extractive uses such as mining with considerations for wildlife
4 species. One of the land use allocations in the NFP is RRs, which include “areas along all
5 streams, wetlands, ponds, lakes, and unstable or potentially unstable areas where the
6 conservation of aquatic and riparian-dependent terrestrial resources receives primary emphasis.”
7 Id. at 7. RRs are intended to “protect the health of the aquatic system and its dependent species”
8 by maintaining and restoring riparian structure and function. Id.

9 The standards and guidelines in the NFP specifically “*do not apply where they would be*
10 *contrary to existing law or regulation*, or where they would require the agencies to take actions
11 for which they do not have authority.” NFP Standards & Guidelines (Def.’s Ex. B) at A-6, C-1
12 (emphasis added). One of the NFP standards and guidelines governing mineral management is
13 MM-1, which requires among other things, an approved PoO for “all minerals operations that
14 include” areas designated as RRs. Id. at C-34. This guideline is incorporated into the forest plan
15 for the KNF as guideline MA 10-34. See Defs.’ Ex. D at 4-111.

16 Because the Forest Service’s regulations allow some low impact mining operations to
17 occur without a PoO, see 36 C.F.R. § 228.4(a)(1), while the NFP Standards and Guidelines
18 appear to require a PoO in RRs, regardless of the operation’s impact, the mining regulations and
19 the forest plan guidelines are potentially in conflict. To address this potential conflict, in 1995
20 the Regional Foresters issued a memorandum clarifying the application of the Part 228A
21 regulations to mining within RRs. AR 212-13. In that memorandum, the Regional Foresters
22 noted that there were “numerous, small placer operations using suction dredges and similar
23 equipment occurring in RR’s and [late successional reserves] throughout Regions 5 and 6,”^{7/} the
24 majority of which did not require PoOs due to “the insignificant nature of their operation.” AR

25 _____
26 ^{6/} Standards and guidelines are “the rules and limits governing actions, and the principles
27 specifying the environmental conditions or levels to be achieved and maintained” in managing
28 specific lands. See Defs.’ Ex. B (NFP ROD Attach. A) at C-1. In essence, they are conditions
which apply either forestwide or to specific land use allocations within a national forest.

^{7/} Forest Service Region 5 encompasses California. See 36 C.F.R. § 200.2(e).

1 212. Accordingly, where such mining was lawfully conducted under NOIs, the stricter standards
2 and guidelines applicable to mining in RRs would not apply, since “there is no regulatory
3 provision for including [standards and guidelines] in an NOI.” AR 213.

4 More recently, the Forest Service issued several memoranda again clarifying the
5 regulation of mining within RRs. The first, issued in February 2002 explains that requiring a
6 PoO for mining which will not cause a significant surface disturbance would be inappropriate
7 and “contrary to law and regulation.” AR 216. The memorandum explained:

8 If no significant surface disturbance is occurring, we have no reason to require a
9 reclamation bond, nor would we be able to determine that bond amount.

10 In the areas covered by the Northwest [Forest] Plan . . . or covered by other
11 general management guidance or strategies, forest users can conduct non-
12 significant surface disturbing activities without filing plan of operations per the
intent of the Forest Service Mining Regulations. A Notice of Intent to Operate
(NOI) will still be required if the proposed activity might cause disturbance of
surface resources and it doesn’t meet the provisions of 36 CFR 228.4(a)(2).

13 Id. The agency thus concluded that consistent with 36 C.F.R. § 228.4(a), PoOs would only be
14 required in RRs where proposed mining would likely cause significant surface disturbance. AR
15 216-17.

16 Finally, in a 2004 memorandum, the Regional Forester for Region 5 reiterated the
17 interpretation in the 1995 and 2002 memoranda that the requirement to submit a PoO in RRs
18 “applies only when the proposed activity is likely to cause significant surface resource
19 disturbance.” AR 219 The 2004 memorandum further explained that if the District Ranger
20 concludes that a PoO is not required, then “there is no decision and, hence, no federal action” to
21 trigger NEPA or the ESA for the Forest Service.^{§/} Id.

22
23
24 ^{§/} In addition to MA10-34, the KNF Forest Plan adopts several other standards and
25 guidelines, MA10-33 to MA10-36, regarding minerals management in RRs. When read as a
26 whole, these standards and guidelines support the Forest Service’s interpretation of MM-1 as
27 required PoOs in RRs only where significant surface disturbance might occur. In particular,
28 MA10-33 to MA10-36 appear to be directed toward mineral operations that are at the
development and production stage, rather than the exploration and prospecting stage. For
example, MA10-34 indicates that PoOs are needed to address reclamation for recontouring
disturbed areas to pre-mining topography, revegetation, and removing toxic materials and
facilities. These requirements only makes sense if the operations referred to are production or
development operations rather than prospecting type activities like suction dredge mining.

1 By contrast, if the District Ranger concludes that mining operations would result in a
2 significant surface disturbance, then a PoO is required. Id. If a plan is subsequently submitted,
3 then the Forest Service must comply with the requirements of NEPA and the ESA. Id.

4 **B. The Challenged Suction Dredge Determinations**

5 Plaintiff challenges four instances during the summer of 2004 in which the District
6 Ranger for the HCRD accepted NOIs for suction dredge mining because the proposed operations
7 were not likely to cause a significant surface disturbance.

8 Prior the to start of the 2004 dredging season, and before any of the challenged NOIs
9 were filed, the HCRD Ranger worked carefully with Forest Service biologists to develop
10 standards for determining when proposed operations were likely to cause significant surface
11 disturbance, thereby requiring a PoO. The HCRD Ranger identified three key issues regarding
12 fisheries. AR 095. First, he identified 22 cold water refugia on the Klamath River used by fish
13 when river temperatures are high, in which dredging might impact fish. AR 097-105. Second,
14 the Ranger developed threshold levels (10 dredges per mile on the Klamath River and 3 per mile
15 on tributary streams) which he felt would not lead to a significant disturbance of surface
16 resources. AR 095; AR 108. Finally, he found that tailing piles should be raked back into
17 dredge holes to protect spawning gravel on Elk Creek. Id. These recommendations and others
18 were discussed with potential miners. AR 091; AR 096.

19 The HCRD Ranger also held a series of meetings with Plaintiff and the New 49'ers to
20 address dredging issues prior to the 2004 season. AR 109 (March 22, 2004); AR 111 (April 20,
21 2004); AR 106 (May 17, 2004). Through the course of these meetings the New 49'ers agreed to
22 develop NOIs responsive to the standards developed by the HCRD Ranger, and the Forest
23 Service agreed to conduct cooperative monitoring of dredging activities with Plaintiff. AR 096.

24 **New 49'ers NOI.** On May 24, 2004, the New 49'ers submitted an NOI to conduct
25 operations within the HCRD. AR 031 The NOI noticed operations along 35 miles of streams
26 with an average daily level of 10 suction dredges dispersed over the entire area. Id. The average
27 amount of material moved per dredge was estimated to be around 1/4 yard. AR 033. The NOI
28 indicated no operations would occur within 500 feet of numerous cool water refugia, and that

1 dredge holes would be back-filled to replicate the original contour of the streambed. AR 033-34.
2 The NOI did not include the use of large mechanized equipment such as backhoes or bulldozers,
3 AR 032 , instead proposing only very limited use of hand tools outside the stream but within the
4 mean high water channel. Such operations would affect a total of less than 25 square yards
5 within the entire 35-mile stream-side area. AR 035. On May 25, the HCRD Ranger accepted
6 the NOI, finding a PoO was not required. **Johnson NOI.** On May 29, 2004, Nida Jo Lawson
7 Johnson submitted an NOI to conduct suction dredging on several claims in the HCRD. AR 069.
8 Under this NOI, no mechanized earthmoving equipment would be used, no trees would be cut,
9 all dredge tailings will be leveled, and no dredging would be conducted within 500 feet above
10 and below the mouth of Independence Creek, which is a cold water refuge area. AR 069-70. On
11 June 14, the HCRD Ranger accepted this NOI, finding the proposed operations were not likely to
12 cause significant disturbance of surface resources, and therefore a PoO was not required. AR
13 067.

14 **Hamilton NOI.** On June 2, 2004, Robert Hamilton submitted an NOI to conduct suction
15 dredging from July 12 to July 23 in Elk Creek. AR 075. Mr. Hamilton's operations would not
16 use any earthmoving equipment and all tailings would be returned to the dredge hole. AR 076.
17 On June 15, the HCRD Ranger accepted Mr. Hamilton's NOI. AR 074.

18 **Easley NOI.** On June 14, 2004, Ralph Easley submitted an NOI to conduct suction
19 dredging on one claim in the HCRD. The operations would not involve cutting trees, no
20 mechanized earth moving equipment would be used, and all dredge tailing would be raked back
21 into the dredge hole. AR 082. On June 15, 2004 the HCRD Ranger accepted Mr. Easley's NOI.
22 AR 081.

23 Finally, the record demonstrates that throughout the summer of 2004, the Forest Service
24 –often in cooperation with a representative of the Karuk Tribe – monitored suction dredging
25 operations to insure miners conformed to their NOIs. See AR 090 (6/8/04 compliance check on
26 Klamath River); AR 089 (6/14/04 compliance check - operators without NOI found and
27 removed); AR 087 (6/23/04 compliance check with Plaintiff); AR 086 (7/20/04 compliance
28 check - New 49'ers dredge found to be operating within terms of NOI); AR 085 (9/9/04

1 compliance check with Plaintiff - one violation found); AR 084 (9/17/04 compliance check -
2 found dredge holes being filled).

3 **V. ARGUMENT**

4 **A. The Forest Service Does Not Violate NFMA by Accepting NOIs For Mining
5 Within Riparian Reserves.**

6 **1. The Forest Service is Not Compelled to Require PoOs for all Suction
7 Dredging Operations in Riparian Reserves.**

8 Plaintiff first asserts that the KNF is compelled, pursuant to its forest plan, to require that
9 all suction dredge mining operations in RRs, regardless of their impact, be conducted under a
10 PoO. Pl. Br. at 8. This claim fails, as it conflicts with the Forest Service mining regulations and
11 the General Mining Law of 1872.

12 Since 1974, the Forest Service has implemented rules regarding the use of surface
13 resources by miners on National Forest System lands. These regulations, which have
14 consistently been upheld by the courts,^{2/} strike a delicate balance between the Forest Service's
15 duty under the Organic Act to protect surface resources, and the statutory right of miners to enter
16 the national forests for prospecting under the Mining Law. The regulations achieve this balance
17 by establishing a regulatory scheme whereby miners submit NOIs to district rangers, informing
18 them of the location and time of proposed mineral operations. If, after reviewing the NOI, the
19 ranger concludes that the proposed mining would cause significant disturbance to surface
20 resources, then the miner must submit a more detailed PoO, which must be approved by the
21 Forest Service. If no significant disturbance would result, however, the miner may simply
22 proceed with his operation without approval or authorization from the Forest Service. See AR
23 212 (explaining regulatory scheme).

24 Because mining that occurs at levels which does not result in significant surface
25 disturbance is conducted pursuant to the miner's statutory right under the General Mining Law,
26 the Forest Service takes the position that it may not reasonably interfere with such mining by

27 ^{2/} See Clouser v. Espy, 42 F.3d 1522, 1530 (9th Cir. 1994); United States v. Doremus, 888
28 F.2d 630, 632 (9th Cir.1989); United States v. Goldfield Deep Mines Co., 644 F.2d 1307,
1309 (9th Cir. 1981); United States v. Weiss, 642 F.2d 296, 298 (9th Cir.1981).

1 requiring PoOs. See AR 212-213; 216-217; 218-219. This position was expressed shortly after
2 the promulgation of the NFP, in a February 1995 memorandum which explains as follows:

3 There are numerous, small placer operations using suction dredges and similar
4 equipment occurring in RR's and [late successional reserves ("LSRs")]
5 throughout Regions 5 and 6. The majority of these operations are carried out
6 under an NOI because of the insignificant nature of their operation. The mining
[standards and guidelines ("S&Gs")] within the President's [Northwest Forest]
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.

7 AR 212-213.

8 This interpretation was reiterated more recently in a January 2003 letter from the Chief of
9 the Forest Service, which explains that applying MM-1 to "activities not meeting the 'likely to
10 cause significant surface disturbance' test, is not appropriate and contrary to law and regulation .
11 . . The MM-1 standard and guideline applies only when the proposed activity is likely to cause
12 significant surface disturbance." AR 215. The letter finds that this position is "consistent with
13 Bureau of Land Management policy for lands" managed by that agency, as well as the 1995
14 Memorandum. Id. This same policy was reiterated in a February 2002 Memorandum from the
15 Director of Minerals and Geology Management in the Forest Service's Washington Office to
16 Regional Foresters. See AR 216-217. Finally, the Regional Forester further emphasized this
17 policy in a May 2004 memorandum to Forest Supervisors. See AR 219 ("Forests under the
18 [NFP] should be aware that the MM-1 standard and guideline applies only when the proposed
19 activity is likely to cause significant surface resource disturbance.").

20 Because the Forest Service has attempted to harmonize the language of the MM-1 forest
21 plan standard with the regulatory scheme already established by the Part 228A regulations, as
22 well as the miner's statutory right to enter the public lands for prospecting, the agency's
23 interpretation of the forest plan is reasonable and should be upheld. See Forest Guardians v.
24 U.S. Forest Serv., 329 F.3d 10809, 1098 (9th Cir. 2003); Hells Canyon Alliance v. U.S. Forest
25 Serv., 227 F.3d 1170, 1180 (9th Cir. 2000) (deferring to the agency's interpretation even where
26 "the plan language is susceptible to more than one reasonable interpretation"); see also Native
27 Ecosystems Council v. Dombeck, 304 F.3d 886, 900 (9th Cir. 2002) (deferring to Forest
28

1 Service's "particular expertise in interpreting its own Forest Plan"); Lamb v. Thompson, 265
 2 F.3d 1038,1047 (10th Cir. 2001) (deferring to agency's interpretation of its forest plan).^{10/}

3 In contrast, Plaintiff asks the Court to adopt an interpretation of the forest plan that would
 4 directly and unnecessary conflict with the mining regulations. Plaintiff asserts that MM-1 (as
 5 incorporated through MA 10-34 in the KNF Forest Plan) should be read as compelling the
 6 Forest Service to require PoOs in RRs even where the District Ranger has determined that a
 7 significant surface disturbance would *not* likely occur. See Pl. Br. at 12. Where there is not a
 8 significant surface disturbance, however, section 228.4(a)(1) expressly provides that some types
 9 of operations would not require PoOs. See 69 Fed. Reg. at 41430 (to be codified at
 10 228.4(a)(1)(iii)) ("Unless the District Ranger determines that an operation is causing or will
 11 likely cause a significant disturbance of surface resources, the requirements to submit a plan of
 12 operations shall not apply" to five enumerated categories of activities).^{11/} Plaintiff's
 13 interpretation runs afoul of the well-established canon that language from separate statutes

14
 15 ^{10/} Plaintiff attempts to distract from the issue by asserting that the memoranda "do not have
 16 the force of law." Pl. Br. at 13 n.10. Of course, the Forest Service has not asserted that they do;
 17 the memoranda simply explain how the agency has reconciled the potential conflict between the
 18 KNF Forest Plan and the mining regulations and Mining Law. That interpretation deserves
 19 deference because it is reasonable; the agency is not relying on the legal force of the memoranda.
 20 Moreover, assuming Plaintiff's assertion is true, then no legal consequences flow from the
 21 issuance of the memoranda, and they do not constitute final agency actions subject to judicial
 22 review. See Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (challengeable final agency action
 23 must be one by which rights or obligations have been determined, or from which "legal
 consequences will flow.") (citations omitted). Plaintiff's challenge to the memoranda as final
 agency actions, see 2nd Am. Compl. at ¶ 2, must therefore be rejected. Additionally, the fact
 that the memoranda "do not have the force of law" compels the court to reject Plaintiff's
 argument that they require notice and public participation. Pl. Br. at 16. Simply put, only
 decisions which *do* have the force of law require such procedures. See Western Radio Servs. Co.
v. Espy, 79 F.3d 896, 901 (9th Cir. 1996) (Forest Service manual did not have binding effect
 because it was not promulgated in accordance with procedural requirements of the APA).

24 ^{11/} Plaintiff asserts that the KNF Forest Plan acknowledges that there are different regulatory
 structures inside and outside RRs, and points to forest plan standard 19-1, which Plaintiff claims
 25 applies to all areas outside RRs, and which requires mineral activities to be administered
 "according to the 36 CFR 228 Regulations." Pl. Br. at 12. Plaintiff's argument is contradicted
 26 by the page heading where standard 19-1 appears, which is entitled "Management Direction -
 Forestwide." See Defs.' Ex. D at 4-18. Indeed, standard 19-1 is part of a set of forestwide
 27 standards and guidelines beginning on page 4-18 of the plan. See Id. at 4-18, 4-41. These
 forestwide standards and guidelines "apply to all management areas, unless specifically excluded
 28 by the direction for that specific management area." Id. at 4-17. Thus, Plaintiff's argument
 supports the Forest Service's position that the plan must be reconciled with the regulations.

1 should not be construed to create an unnecessary conflict, and it therefore should be rejected.
2 See Nealon v. California Stevedore & Ballast Co., 996 F.2d 966, 972 (9th Cir. 1993) (“To read
3 the Longshore regulation in a way antithetical to the Black Lung regulation would be to construe
4 it in an arbitrary fashion--to create a conflict between two statutes where none exists.”); see also
5 In re Co Petro Mktg. Group, Inc., 680 F.2d 566, 569-70 (9th Cir. 1982) (“Statutes should
6 generally not be construed to render any provision surplusage.”); Citizens to Save Spencer
7 County v. EPA, 600 F.2d 844, 871 (D.C. Cir. 1979) (where statutory provisions are
8 irreconcilable, it is the agency’s duty to pursue a middle course that harmonizes the two
9 provisions).

10 In support of its argument that the terms of the forest plan should be interpreted to
11 conflict with and override both the Mining Regulations and the Mining Law, Plaintiff cites to the
12 district court’s opinion in Siskiyou Reg’l Educ. Project v. Rose, Pl. Br. at 15-16, and the
13 Eleventh Circuit’s opinion in Sierra Club v. Martin. Both citations are inapposite.

14 In Siskiyou, an environmental group challenged the Siskiyou National Forest’s decision
15 to amend the Siskiyou Forest Plan to be consistent with the mining regulations. 87 F. Supp.2d at
16 1080-81. The Siskiyou plan contained language identical to the MM-1 standard at issue here. In
17 addition to MM-1, however, the Siskiyou plan also contained a standard not found in the KNF
18 plan. See id. at 1079. That standard, MA7-10, applied not to RRs, but to parts of the Siskiyou
19 National Forest designated as Special Resource Areas (“SRAs”). Within SRAs, MA7-10
20 provided that “Mining activity is permitted in accordance with mining regulations and an
21 approved operating plan.” Id. The Siskiyou National Forest amended MM-1 but did not
22 expressly amend MA7-10. Id. at 1087.

23 Contrary to Plaintiff’s assertion, the Siskiyou court did not decide whether MM-1
24 compelled the Forest Service to require PoOs in RRs, or whether MM-1 conflicted with the
25 mining regulations. Instead, the court relied on the fact that even if MM-1 had been amended
26 properly, MA 7-10 remained in effect for SRAs. Id. at 1088. The court found that because the
27 stricter MA7-10 standard had not been expressly amended, the agency was compelled to require
28 PoOs in SRAs. See id. Because the Siskiyou court relied upon a land use allocation specific to

1 the national forest involved in that case and not the direction for RRs upon which Plaintiff here
2 relies, its holding is inapposite.^{12/}

3 Plaintiff similarly misconstrues Sierra Club v. Martin, 168 F.3d 1 (11th Cir. 1999), which
4 it cites for the proposition that other courts have “held that the requirements of a Forest Plan are
5 not nullified by general agency regulations.” Pl. Br. at 16. In Martin the court considered an
6 argument that both the NFMA planning regulations *and* the applicable forest plan required the
7 Forest Service to gather data for species which it had designated as “sensitive” prior to
8 approving timber sale projects. The court found that although the planning regulations did not
9 impose such a duty, the applicable forest plan did, and the agency was bound to follow it.
10 Critically, unlike this case, the regulations and forest plan at issue in Martin were not in *conflict*
11 with one another. In addition, the statute at issue in Martin, NFMA, differs from the statute at
12 issue in this case, the Mining Law, in an important respect: while the General Mining law
13 confers a statutory right upon a private third party for use of national forest resources, the NFMA
14 does not. Instead of giving third parties a statutory right to harvest timber, the NFMA simply
15 sets forth a planning regime for agency-initiated projects which involve timber harvest. By
16 contrast, the Mining Law gives third parties a statutory right to enter the national forests for
17 prospecting. Thus, the Mining Law involves an important statutory right of third parties that was
18 not implicated in Martin.

19 In sum, because Plaintiffs’ argument would create an unnecessary conflict between the
20 mining regulations and the forest plan, the Court should uphold the Forest Service’s
21 interpretation of its own forest plan and regulatory scheme.

22 **2. The Regulatory History of 36 C.F.R. Part 228A Supports the Forest**
23 **Service’s Position that PoOs should not be Required as a Per Se Rule**

24 Not only is the Forest Service’s interpretation of its forest plan a reasonable
25 harmonization of the obligation to protect surface resources with the statutory right of miners,

26 ^{12/} Plaintiff is undeterred by this fact, and simply alters the Siskiyou holding to suit its needs
27 by substituting “Riparian Reserve” for “SRA” in the block quote at page 15 of its brief.
28 Compare Pl. Br. at 15 with Siskiyou, 87 F. Supp.2d at 1088 (“The court finds that defendants’
decision to allow mining operations to proceed *within a SRA* without approved plans of
operation was arbitrary and capricious”) (emphasis added).

1 but it is also supported by the regulatory history of the Part 228A regulations, which were first
2 promulgated in 1974. See 39 Fed. Reg. 31317 (Aug. 28, 1974) (presently codified as amended at
3 36 C.F.R. part 228) (attached as Defs.' Ex. F). Before the Forest Service issued the final
4 regulation, the House Committee on Interior and Insular Affairs, Subcommittee on Public Lands,
5 held oversight hearings at which they heard testimony from the Chief of the Forest Service and
6 representatives from both the mining and environmental communities. Following these hearings,
7 the subcommittee chairman wrote the Chief of the Forest Service expressing concern that "that
8 the 1897 [Organic] Act clearly cannot be used as authority to prohibit prospecting, mining, and
9 mineral processing" in national forests, and that any regulations must satisfy a test of
10 reasonableness--that is, they "cannot extend further than to require those things which preserve
11 and protect the National Forests from needless damage by prospectors and miners." See Letter
12 from Rep. John Melcher to John McGuire, Forest Service Chief (June 20, 1974), reproduced in
13 S. Dempsey, *Forest Service Regulations Concerning the Effect of Mining Operations on Surface*
14 *Resources*, 8 Nat. Res. Law. 481, 497-504 (1975) (attached as Defs.' Ex. E). The chairman
15 further noted that:

16 . . . Forest Service administrators must keep constantly in mind that the miner has
17 a statutory right, not a privilege, under the 1897 Act to go upon the open public
18 domain lands in National Forests for mineral exploration and development
19 purposes. Administrators may not unreasonably restrict the exercise of that right.

20 Id. at 499.

21 The subcommittee examined the proposed regulations and recommended the adoption of
22 a "simple notification procedure" to determine whether a PoO is required. As the chairman
23 explained:

24 [T]he Subcommittee urges that an effort be made to define more precisely what
25 sort of prospecting would be excepted from the requirement to file operating
26 plans. The National Wildlife Federation, the American Mining Congress, and the
27 Idaho Mining Association, all seem to agree that prior notification of proposed
28 operations is a reasonable requirement. The Subcommittee therefore recommends
that the Forest Service provide a simple notification procedure in any regulations
it may issue. The objective in so doing would be to assist prospectors in
determining whether their operations would or would not require the filing of an
operating plan. Needless uncertainties and expense in time and money in filing
unnecessary operating plans could be avoided thereby.

1 Id. at 500 (internal page citations omitted). The Forest Service responded to these concerns by
2 adopting a final rule that included a provision for NOIs. See 39 Fed. Reg. 31317 (Aug. 28,
3 1974) (“A number of comments noted the lack of a provision for a ‘notice of intent to operate.’
4 Such a provision has been included in the regulations.”).

5 The requirement of a PoO was adopted even though many commenters objected to it.
6 See id. The Forest Service saw the requirement as reflecting “both the necessities for
7 environmental protection and for the use of surface resources in connection with mineral
8 operations.” Id. As part of balancing the protection of surface resources with the concern that
9 the costs of requirements imposed in PoOs could make mining prohibitively expensive, the
10 Forest Service also included provisions to consider economics in determining whether the
11 requirements were reasonable. See id. In striking this balance, the Forest Service

12 recognize[d] that prospectors and miners have a statutory right, not mere
13 privilege, under the 1872 mining law and the Act of June 4, 1897, to go upon and
14 use the open public domain lands of the National Forest System for the purposes
of mineral exploration, development and production. Exercise of that right may
not be unreasonably restricted.

15 Id.

16 The balance between the right of miners to enter the national forests for prospecting and
17 the need to safeguard against substantial disturbances to surface resources was recently
18 reaffirmed when the Forest Service promulgated an interim regulation amending 36 C.F.R. §
19 228.4(a).^{13/} The amended regulation reaffirms the two-step process set forth in the Part 228A
20 regulations. As the Forest Service explained in its preamble, the interim regulation does this:

21 by more specifically addressing the issue of what level of operation requires a
22 notice of intent and what level of operation requires a plan of operations by
23 directing a mining operator to submit a notice of intent to operate when the
24 proposed operation *might cause* a disturbance to surface resources. After a notice
of intent is submitted, the District Ranger determines whether the proposed
operations will likely cause a significant disturbance of surface resources.

25 ^{13/} The amendments were undertaken in response to a district court decision, United States
26 v. Lex, 300 F. Supp. 2d 951 (E.D. Cal. 2003), which reversed a criminal conviction of a miner
27 who had failed to submit a NOI. The district judge remanded the conviction to the magistrate
28 after determining that because the defendant’s mining operations did not involve earthmoving
equipment, the miner was exempt from the requirement to submit a NOI. The court found that
because the regulations exempted the miner from this requirement, there would never be an
opportunity for the District Ranger to determine that a PoO was required. Id. at 962.

1 69 Fed. Reg. at 41,429. The agency has thus recently reaffirmed the detailed, two-step
 2 regulatory scheme by which it seeks to balance the rights of miners with the need to protect
 3 surface resources. Because the promulgation of the interim regulation occurs well after the
 4 adoption of the NFP and the KNF Forest Plan, it further supports the Forest Service's
 5 interpretation of its own forest plan standards. Plaintiffs' argument should therefore be rejected.

6 **B. The Forest Service Has Considered Impacts to Sensitive Species in**
 7 **Accordance with NFMA.**

8 Plaintiff argues that the Forest Service has violated NFMA by failing to consider the
 9 impact of suction dredging on two sensitive species,^{14/} spring chinook salmon and summer
 10 steelhead. See Pl. Br. at 17-18. Plaintiff's argument relies upon requirements for sensitive
 11 species found in the KNF Forest Plan. The NFMA provides that "[r]esource plans and permits,
 12 contracts, and other instruments for the use and occupancy of National Forest System lands shall
 13 be consistent with the land management plans." 16 U.S.C. § 1604(i). As a preliminary matter,
 14 this requirement does not apply to the agency's acceptance of NOIs from miners, because such
 15 acceptance does not involve the issuance of permit, contract, or other land use instrument.
 16 Instead, the Forest Service simply accepts the NOIs from miners in recognition of the fact that,
 17 except where mining activity would result in significant surface resource disturbance, the Forest
 18 Service does not have discretion to prevent miners from exercising their statutory right to enter
 19 the public lands for prospecting. Because the forest plan requirements regarding sensitive
 20 species are not triggered for mining under a NOI, Plaintiff's argument should be rejected.

21 Even if the duties in the forest plan apply to mining under NOIs, the record demonstrates
 22 that the Forest Service has given adequate consideration to sensitive species. As set forth in
 23 section IV.B. above, the HCRD Ranger developed an extensive series of recommendations to
 24

25 ^{14/} The category of sensitive species is created not by NFMA, but rather the agency's Forest
 26 Service Manual, which defines sensitive species as those plant and animal species "for which
 27 population viability is a concern, as evidenced by" either "[s]ignificant current or predicted
 28 downward trends in population numbers or density" or "[s]ignificant current or predicted
 downward trends in habitat capability that would reduce a species' existing distribution." Forest
 Serv. Manual § 2670.5(19). Available at www.fs.fed.us/im/directives/fsm/2600/2670-2671.txt

1 provide better protection for fisheries, including sensitive species.^{15/} Indeed, the record
2 demonstrates that the challenged mining operations employ the mitigation measures
3 recommended by the Forest Service to reduce impacts to sensitive species. For example, the
4 Nida Johnson NOI states that “no dredging will be conducted on the Klamath River within 500
5 feet above and below the mouth of Independence Creek between June 15th and October 15th”
6 for the operations in her NOI. AR 071. The New 49'ers amended their 2004 NOI for HCRD to
7 make clear that on Ukonom Creek, there would be “[n]o dredging within 500 feet upstream and
8 2000 feet downstream of the mouth.” AR 028. Robert Hamilton’s NOI notes that his operations
9 will be limited to three dredges per mile, banks would not be undercut, vegetation would not be
10 removed, and tailings would be returned to the dredge hole where possible in shallow areas or
11 spread over large area in deep areas. AR 076; cf. AR 104-105 (general recommendations 1, 5, 8,
12 10 for tributaries supporting anadromous fish). Similar recommendations are followed in Ralph
13 Easley’s NOI. See AR 082 (single dredge would be used, no vegetation or trees will be cut or
14 material removed, and dredge tailings will be raked back into dredge holes). Thus, assuming the
15 Forest Service’s acceptance of an NOI triggers any NFMA requirement to consider the impact of
16 suction dredging on sensitive species, it is clear the Forest Service both considered and worked
17 to avoid any negative impacts.

18 **C. The Forest Service Has Not Violated Any Tribal Consultation Duty.**

19 Plaintiff argues that the Forest Service has not complied with its duties to engage in
20 consultation with Plaintiff regarding effects of suction dredge mining on tribal cultural areas.
21 Pl. Br. at 18. Plaintiff relies primarily upon forestwide standard and guideline 24-27, which
22 provides that the Forest Service should “[c]onsult and coordinate on all *projects* that have the
23 potential to affect Native American values.” AR 013 (emphasis added). Unlike activities such
24

25 ^{15/} See, e.g., AR 097 (recommending no dredging within 500 feet upstream and downstream
26 of current mouth of Dillon Creek and no dredging in the floodplain pool); AR 098
27 (recommending no dredging 500 feet upstream or 2000 feet downstream of mouth of Ukonom
28 Creek); AR 099 (noting that Clear Creek is closed to suction dredging by state regulation); AR
0100 (recommending no dredging occur within 500 feet above to 1500 feet below the confluence
of Indian Creek with Klamath River); id. (recommending no dredging within 500 feet upstream
or downstream from confluence of Little Grider Creek with Klamath River).

1 as timber sales, however, suction dredge mining is not initiated by the Forest Service. Rather,
2 mining is conducted pursuant to an independent third-party's statutory rights under the General
3 Mining Law, as discussed supra at 5-7. It is therefore not a "project" that requires tribal
4 coordination under the forest plan. See, e.g., AR 110 (noting "operations under a NOI [were]
5 just acknowledging activities were occurring [and] it is not a Federal decision that commits
6 Federal dollars"); see also Mineral Policy Ctr., 292 F. Supp. 2d at 55-56.

7 Even if the Forest Service is required to coordinate with Plaintiff on suction dredging by
8 third parties under NOIs, it has satisfied that obligation by conducting numerous meetings with
9 Plaintiff to assure that miners do not exceed the scope of activities in their NOIs, and to develop
10 mitigation measures and compliance monitoring.^{16/} See, e.g., AR 0381-83 (documenting field
11 trips with Plaintiff to monitor dredging compliance, discuss monitoring and specific mitigation
12 measures); AR 384-91 (notes from April 20, 2004 meeting involving Plaintiff). For example, on
13 September 9, 2004, the HCRD Minerals and Recreation Officer "met with Sandy Tripp and Earl
14 Crosby from the Karuk Tribe . . . for the purpose of conducting compliance checks on dredging
15 operations on the Klamath river." AR 085. On that trip, the agency officer discovered a
16 potential violation and "called [the Karuk Tribe members] down to discuss the situation and we
17 all agreed that this looked like a violation since the river bank and [its] vegetation should not
18 have been disturbed." Id. The Forest Service informed the state fish and game warden so that a
19 citation could be issued.^{17/} Id.

20 Plaintiff's members were also invited to participate in a July 20, 2004 compliance
21 inspection on the HCRD but chose not to attend. See AR 086 (noting that "Sandy Tripp was
22 scheduled to go but Sandy and Earl Crosby were attending a meeting in Scotland at this time").
23 Other compliance inspection field trips involving Plaintiff's members are also documented in the
24

25 ^{16/} Other conversations with Tribal members have involved discussions of sites that are
26 important to them for ceremonial reasons. See AR 0109 (noting that "Hippo Rock is off limits to
New 49'ers because it is a swimming hole").

27 ^{17/} The Forest Service has conducted compliance monitoring in Tribal cultural areas as well.
28 See AR 0090 (noting that the Forest Service floated from Indian Creek to Independence Creek
and that "[n]o dredges were in operation for the entire 14 miles").

1 record. See AR 0087 (describing trip with “Earl Crosby from the Karuk Tribe” where they
2 discovered suction dredgers mining without current PoOs or NOIs); AR 088 (documenting
3 conversation between HCRD Ranger and Sandy Tripp of the Karuk Tribe “to discuss a
4 monitoring strategy for this year[’]s dredge season”); AR 381-83.

5 Discussions with the Tribe have also resulted in the development of mitigation and
6 avoidance measures that are recommended to miners in order to keep surface disturbance below
7 the level that requires a PoO. For example, in their NOI on the HCRD for the 2004 Mining
8 Season, the New 49’ers included measures that “were discussed in the course of a meeting
9 between the HCRD, The Karuk Tribe of California, and The New 49’ers on May 17, 2004.” AR
10 0034; see also AR 0030 (referencing May 17, 2004 meeting); AR 0096 (same); AR 0106-0108
11 (meeting notes). At that meeting, the Forest Service discussed a variety of key issues with
12 Plaintiff regarding fisheries, including “cold water refugia areas in the Klamath River, the
13 intensity of dredge activities and the stability of spawning gravels” in certain stream reaches.
14 AR 0096. The Forest Service also obtained agreement with Plaintiff’s members to develop a
15 cooperative monitoring strategy. Id. (“It was agreed with members of the Karuk Tribe that a
16 cooperative monitoring strategy would be determined based on planned operations”).

17 Discussions among the Forest Service, the Karuk Tribe, and the New 49’ers also led to
18 the mining club’s decision to withdraw its NOI on the Ukonom Ranger District^{18/} for 2004. See
19 AR 0041. In their letter withdrawing the NOI, the New 49’ers noted that a “*substantial amount*
20 *of dialog*” involving a number of groups, including the Forest Service and “Karuk Tribal
21 leaders” made it “increasingly clear that there are too many sensitive issues for us to try and
22 manage a group mining activity along the Salmon River at this time.” AR 0041 (emphasis
23 added). The NOI that the New 49’ers had submitted listed a variety of mitigation measures that
24 were developed on a field trip that involved several groups, including the Forest Service and the
25 Karuk Tribe. See AR 0046; see also AR 0055 (referring to April 23, 2004 field trip). The
26 development of such measures satisfies the Forest Service’s duties under the forest plan. See

27 ^{18/} The Ukonom Ranger District is part of the KNF but is administered by the Six Rivers
28 National Forest. AR 0052.

1 KNF AR 0015 (standard MA8-10, providing that surface disturbances from mineral exploration
2 that adversely impact Native American values “shall be mitigated wherever possible”).

3 In light of the numerous meetings and discussions that the Forest Service has conducted
4 with Plaintiff regarding suction dredging, it cannot be said that the agency failed to satisfy any
5 coordination duties under the forest plan.

6 **D. The Forest Service Did Not Violate the Endangered Species Act.**

7 Plaintiff alleges that the Forest Service should have consulted with FWS or NMFS
8 pursuant to Section 7 of the ESA before “authorizing” operations under the four challenged
9 NOIs. Pl. Br. at 19. This claim must be rejected, as the conduct of mining under an NOI is not
10 agency action under Section 7.

11 While the “plain intent of Congress in enacting the ESA was to halt and reverse the trend
12 toward species extinction,” Pacific Coast Fed’n of Fisherman’s Ass’n. v. BOR, 138 F.Supp.2d
13 1228, 1240 (N.D. Cal. 2001), it is well-established that not every agency action triggers
14 consultation under Section 7(a)(2) of the ESA. As the Ninth Circuit has made clear:

15 Within the limitations prescribed by the Constitution, Congress undoubtedly has
16 the power to regulate all conduct capable of harming protected species. However,
17 Congress chose to apply section 7(a)(2) to federal relationships with private
18 entities *only when the federal agency acts to authorize, fund, or carry out the
19 relevant activity.*

18 Sierra Club v. Babbitt, 65 F.3d 1502, 1508 (9th Cir. 1995) (emphasis added); Marbled Murrelet
19 v. Babbitt, 83 F.3d 1068, 1074-75 (9th Cir. 1996) (holding that advising a private actor on how
20 to avoid “take” of an endangered species does not constitute an “agency action” under the ESA).

21 As noted above, the Forest Service does not authorize mining under an NOI. Through
22 the 36 C.F.R. Part 228A mining regulations, the Forest Service has balanced the right of citizens
23 to develop mineral resources on federal lands, with its obligation to regulate the “occupancy and
24 use [of National Forest land] and to preserve the forest thereon from destruction,” 16 U.S.C. §
25 551. Under those regulations, the Forest Service has the authority to impose terms and
26 conditions on a miner’s use of the land through a PoO if that use is likely to cause a significant
27 disturbance of surface resources. 36 C.F.R. § 228.4(a). In contrast to the federal control over
28 terms of a PoO, where there is not likely to be a significant disturbance of surface resources, the

1 Forest Service simply accepts the NOI and the miner may operate under the terms of the NOI
2 without any action from the Forest Service. The regulations do not require approval of a NOI
3 before operations pursuant to the NOI can proceed, they provide simply that if an NOI is filed,
4 “the District Ranger will, within 15 days of receipt thereof, notify the operator whether a plan
5 operations is required.” 36 C.F.R. § 228.4(a)(2)(iii).

6 The Forest Service interprets acceptance of an NOI under the mining regulations as
7 insufficient federal action to trigger section 7 consultation obligations. AR 0219 (2004 Regional
8 Forester Memo noting that “[i]f the District Ranger’s conclusion is that a Plan of Operations is
9 not required, there is no decision and, hence no federal action. Under these circumstances,
10 NEPA and the ESA are not triggered for the Forest Service.”). The Forest Service’s
11 interpretation of its own mining regulations is entitled to “substantial deference” from this Court.
12 Thomas Jefferson v. Shalala, 512 U.S. 504, 512 (1994).

13 The caselaw supports the Forest Service’s position. In Sierra Club v. Babbitt, 65 F.3d
14 1502, 1513 (9th Cir. 1995) the Ninth Circuit held that the BLM’s issuance of an approval letter
15 for construction of a road on a private-right-of way across BLM land did not constitute federal
16 action triggering ESA because the BLM lacked discretion to modify or halt the road
17 construction. Similarly, under the Mining Regulations, if the ranger determines the NOI is not
18 likely to significantly impact surface resources, he is without discretion to alter the terms of the
19 NOI. Nor is the fact that the District Ranger retains the discretion to require a PoO if he finds
20 the mining operation is likely to cause a significant disturbance of surface resources sufficient to
21 trigger section 7 consultation obligations. Environmental Prot. Info. Ctr. v. Simpson Timber,
22 255 F.3d 1073, 1081 (9th Cir. 2001) (rejecting the argument that an agency’s generalized
23 discretion to “amend any permit for just cause at any time during its term, upon written finding
24 of necessity” requires a permitting agency to reopen a permit when new species have been listed)
25 (quoting 50 C.F.R. §13.23).

26 Despite the clear language of the mining regulations, the Forest Service’s interpretation
27 of those regulations, and the weight of the caselaw, Plaintiff asserts that the Forest Service’s
28 acceptance of an NOI is an “authorization” of the mining described therein. However, Plaintiff’s

1 only support for this proposition is the fact that the district ranger used the term “authorization”
2 in a letter accepting a NOI. Pl. Br. at 21. Although the cited letter may have been inartfully
3 worded, that fact cannot convert the acceptance of an NOI into a federal action under the ESA.
4 Sierra Club v. Babbitt, 65 F.3d at 1511 (“[T]he issuance of an ‘approval’ letter cannot be
5 construed as an authorization within the meaning of section 7(a)(2).”).

6 Plaintiff’s claim under the ESA must be rejected, the acceptance of an NOI under 28
7 C.F.R. § 228 is not a “federal action” triggering any obligation under that act.

8 **E. The Forest Service Did Not Violate NEPA**

9 Plaintiff asserts that the Forest Service violated NEPA by not preparing an EA or EIS for
10 the mining operations proposed under the four challenged Notices of Intent. Pl. Br. at 22. This
11 claim fails, as the acceptance of an NOI does not constitute a “major federal action” under
12 NEPA, and because Plaintiffs have failed to demonstrate that the Forest Service erred in
13 accepting the four challenged NOIs rather than requiring a PoO.

14 As set forth above, NEPA requires federal agencies to evaluate the environmental
15 impacts of “major federal actions.” 42 U.S.C. § 4332(C). If the proposed action is not a major
16 federal action, an agency has no duty under NEPA. Penfold, 857 F.2d at 1313 (“NEPA
17 compliance is required only when there is a ‘major Federal action’ which significantly affects the
18 environment”). To determine whether an action is a major federal action, courts consider three
19 factors: “(1) whether the project is federal or non-federal; (2) whether the project receives
20 significant federal funding; and (3) when the project is undertaken by a non-federal actor,
21 whether the federal agency must undertake ‘affirmative conduct’ before the non-federal actor
22 may act.” Mineral Policy Ctr., 292 F. Supp.2d at 54-55 (internal citations omitted); see also
23 Maryland Conservation Council v. Gilchrist, 808 F.2d 1039, 1042 (4th Cir. 1986) (“A non-
24 federal project is considered a ‘federal action’ if it cannot begin or continue without prior
25 approval of a federal agency.”).

26 Applying these criteria to this case, it is clear that the Forest Service’s acceptance of the
27 four NOIs does not constitute a major federal action. First, all four of the mining operations
28 were run by private individuals, not a federal agency. Second, there is no suggestion in the

1 record that the operations received any federal funding. Third, the Forest Service need take no
2 action before mining can proceed under an NOI.

3 As noted above, under the Forest Service mining regulations, the Forest Service has the
4 authority to impose terms and conditions on a miner's use of the land through a PoO if the
5 responsible District Ranger determines that the operations are likely to cause a significant
6 disturbance of surface resources. 36 C.F.R. § 228.4(a). However, where the District Ranger
7 finds there is not likely to be a surface disturbance, operations under the terms of the NOI may
8 take place without any action from the Forest Service.

9 The Forest Service's determination that acceptance of a NOI under Section 228A is not a
10 major federal action is supported by the caselaw. In Penfold, 857 F.2d at 1312-13, the Ninth
11 Circuit considered whether BLM was required to prepare an EA or EIS under NEPA for "notice"
12 mining under the BLM's regulations. Like the Forest Service's mining regulations, the BLM
13 regulations at issue provided that certain small mining operations could proceed without BLM
14 approval after the miner gave notice to the agency. Id. at 1313. Although BLM reviewed
15 notices, and had regulatory power to monitor compliance with the notices, the Ninth Circuit
16 found the federal action to be "marginal" rather than major, and held "BLM's approval of Notice
17 mines without an EA does not constitute major federal action with the scope of NEPA." Id. at
18 1314. In Mineral Policy Ctr., 292 F. Supp.2d 30, the district court in D.C., reviewing a later
19 version of the BLM regulations, also concluded that notice mining projects "are undertaken by
20 private actors without federal funds or approval[, and] [c]onsequently, the court concludes that
21 Notice exploration projects are not 'major federal actions' within the bounds of NEPA." Id. at
22 56.^{19/}

23
24 ^{19/} Plaintiff cites Siskiyou, 87 F. Supp.2d 1074 for the proposition that the Forest Service
25 must prepare NEPA analysis for mining under an NOI. To the contrary, the court in Siskiyou,
26 following Penfold noted "the Forest Service's review and regulation of individual Notices of
27 Intent to mine is considered only 'marginal federal action rather than a major action,' and
28 therefore, NEPA's requirements are not triggered." Id. at 1103. The Siskiyou court did rule on
the particular facts of that case, that while acceptance of an NOI is not a major federal action, the
plaintiffs had presented evidence that the NOIs challenged there, when considered together,
warranted evaluation in a single EA. Id. at 1102 ("three of the projects involved the use of five
or six inch suction dredges to move 40-50 cubic yards of streambed material in eight different
claims."). Here, in contrast, Plaintiff has not presented the Court with any specific evidence of

1 As acceptance of an NOI clearly is itself not a major federal action, Plaintiff can prevail
 2 on its NEPA claim only if it can demonstrate that the district ranger erred in his determination
 3 that the four proposed operations would not require a PoO and the NEPA analysis that would
 4 accompany a PoO. However, Plaintiff makes no serious effort to prove that the District Ranger's
 5 determination that the four NOIs would not cause a surface disturbance was arbitrary or
 6 capricious. In fact, Plaintiff entirely ignores the terms of the Johnson, Hamilton and Easley
 7 NOIs and apparently seeks to have the Court hold all four determinations were arbitrary or
 8 capricious based on the fact the New 49'ers NOI covers 35 miles of river, Pl. Br. at 23, and based
 9 on a laundry-list of potential impacts of dredging in general, Pl. Br. at 4-5.

10 Plaintiff's list of potential impacts of dredging in general does not meet its burden of
 11 proving that the District Ranger erred in concluding that these four particular NOIs were not like
 12 to cause a significant surface disturbance.^{20/} As the Grunbaum Report, from which Plaintiff's
 13 list of impacts is derived, acknowledges, the impacts of dredging need to be considered on a
 14 case-by-case basis: "[i]n some situations, the effects of dredging may be local and minor . . . [i]n
 15 others, dredging may harm the population viability of threatened species." AR 92 at 0294.
 16 Here, the HCRD District Ranger considered each NOI and made a determination that those
 17 operations would not cause a significant surface disturbance. Plaintiff's listing of possible
 18 impacts, without any linkage to the challenged NOIs, fails to prove the HCRD Ranger was
 19 arbitrary or capricious.

20 In fact, the record demonstrates that the District Ranger's determinations were anything
 21 but arbitrary or capricious. For example, the New 49'ers NOI, although it cover 35 miles of
 22 river, only proposed an average daily level of operations of 10 suction dredges dispersed over the
 23

24 the actual impacts of the four challenged NOIs, instead relying on generic assertions about the
 25 impacts of suction dredge mining generally. Without such project specific evidence, Plaintiff
 here cannot make the showing needed to fall within the narrow holding in Siskiyou.

26 ^{20/} Throughout its brief Plaintiff relies on a report by Forest Service fishery biologist
 Grunbaum in support of its contention that suction dredge mining has significant environmental
 27 impacts. See, e.g., Pl. Br. at 4-5. While the Grunbaum Report discusses potential effects in a
 general manner, it does not prove that every operation will cause a significant surface
 28 disturbance. For example, the list a harms on pages 4 and 5 of Plaintiff's brief is taken from
 Grunbaum's "*potential* adverse effects to aquatic habitats." AR 295.

1 entire 35 miles of stream course, and estimated the average amount of material moved per
2 dredge to be around $\frac{1}{4}$ of a yard. AR 033. The proposed operations would avoid mining in
3 specified fish refugia, and dredge holes would be back-filled to replicate the original contour of
4 the streambed. Id. at 033-34. Finding that the terms of the NOI were consistent with the
5 measures he established (in coordination with the tribe) prior to the mining season (AR 029), the
6 HCRD Ranger reached the reasonable conclusion that the operations described in the NOI were
7 not likely to cause significant disturbance of surface resources, and that a PoO was not required.

8 Plaintiffs NEPA claim must be rejected. It is well-established that acceptance of an NOI
9 is not a major federal action triggering NEPA, and there is no basis for a conclusion that the
10 Forest Service erred in accepting the four NOIs rather than requiring a PoO.

11 **VI. CONCLUSION**

12 For the reasons set forth herein, Plaintiffs' motion for summary judgment must be denied.

13
14 Respectfully submitted this 17th day of May 2005,

15
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CERTIFICATE OF SERVICE

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

| | |
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