12-289

No. 12-

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

KARUK TRIBE OF CALIFORNIA,
Respondent.

On Petition for Writ of *Certiorari* to The United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF *CERTIORARI*

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Questions Presented for Review

The Endangered Species Act requires consultation to ensure that federal "agency action" does not exterminate listed species. 16 U.S.C. § 1536(a)(2). The questions presented by this petition are:

1. Whether a federal official's receipt and review of notice of private action, his exercise of discretion as to whether to invoke agency regulatory powers over such private action, and his decision *not* to invoke such powers, constitute "agency action" for purposes of § 7(a)(2) of the Endangered Species Act.

2. Whether the federal courts lack jurisdiction over the action in light of changed circumstances.

Parties to the Proceeding and Rule 29.6 Statement

The parties to the proceeding are Karuk Tribe of California, appellant below and respondent here; United States Forest Service and Margaret Boland, Forest Supervisor, Klamath National Forest, appellees below and respondents here; and The New 49'ers, Inc. and Raymond M. Koons, intervenor-appellees below and petitioners here. There are no parent or publicly-held corporations involved in this proceeding.

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Opinions Below

The June 1, 2012 *en banc* opinion of the Ninth Circuit that is the subject of this petition is reported at 681 F.3d 1006 (9th Cir. 2012), and reproduced in the Appendix hereto ("App.") at pages 1-76. The Ninth Circuit's initial panel opinion was published at 640 F.3d 979 (9th Cir. 2011), and is reproduced in the Appendix at pages 77-150. The Ninth Circuit's order granting the Karuk Tribe of California's (hereafter the "Tribe") petition for rehearing *en banc* is reported at 658 F.3d 953 (9th Cir. 2011), and is reproduced in the Appendix at page 151; a further unpublished order requesting supplemental briefing on mootness was issued December 20, 2011 and is reproduced in the Appendix at pages 152-153.

The district court's order denying the Tribe's motion for summary judgment is reported at 379 F. Supp.2d 1071 (N.D. Cal. 2005) and is reproduced in the Appendix at pages 154-222. The district entered final judgment in favor of the Federal defendants on July 11, 2005, reproduced in the Appendix at page 223, and a later unreported opinion concerning fees was issued January 30, 2006 and is reproduced in the Appendix at pages 224-231.

Basis for Jurisdiction in this Court

The Ninth Circuit initially filed the opinion and judgment that is the subject of this petition on June 1, 2012. 28 U.S.C. § 1241(1) confers jurisdiction on this Court to review that opinion and judgment of the Ninth Circuit.

Statutory and Regulatory Provisions at Issue

The particular "action" here involved is small-scale mining conducted on mining claims created under the 1872 Mining Act as amended, 30 U.S.C. § 22, and the primary question arising in this petition relates to certain Forest Service regulations concerning such mining created under the authority of the Organic Act of 1897, 16 U.S.C. § 551, and set forth at 36 C.F.R. § 228.4:

> (a) Except as provided in paragraph (a)(2) of this section, a notice of intention to operate is required from any person proposing to conduct operations which might cause disturbance of surface resources.[1] Such notice of intention shall be submitted to the District Ranger having jurisdiction over the area in which the operations will be conducted. If the District Ranger determines that such operations will likely cause significant disturbance of surface resources, the operator shall submit a proposed plan of operations to the District Ranger.

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[1] We quote the 2004 regulations which apply to the challenged conduct (*see* App. 7); this particular sentence was subsequently amended to state that a notice is required for operations which might cause *significant* disturbance of surface resources, but the "parties agree that the 2005 revisions do not materially affect the issues on appeal" (*id.*).

(1) The requirements to submit a plan of operations shall not apply:

(i) To operations which will be limited to the use of vehicles on existing public roads or roads used and maintained for National Forest purposes,

(ii) To individuals desiring to search for and occasionally remove small mineral samples or specimens,

(iii) To prospecting and sampling which will not cause significant surface resource disturbance and will not involve removal of more than a reasonable amount of mineral deposit for analysis and study,

(iv) To marking and monumenting a mining claim and

(v) To subsurface operations which will not cause significant surface resource disturbance.

(2) A notice of intent need not be filed:

(i) Where a plan of operations is submitted for approval in lieu thereof,

> (ii) For operations excepted in paragraph (a)(1) of this section from the requirement to file a plan of operations,
>
> (iii) 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.
>
> Each notice of intent to operate shall provide information sufficient to identify the area involved, the nature of the proposed operations, the route of access to the area of operations and the method of transport. If a notice of intent is filed, the District Ranger will, within 15 days of receipt thereof, notify the operator whether a plan of operations is required.

The underlying action was brought by the Tribe to enforce the interagency consultation provisions of the Endangered Species Act (ESA), 16 U.S.C. § 1536(a)(2)-(3), which provide:

> "(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered

> species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical . . ."
>
> "(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species."

The issues raised in this petition and addressed by the Ninth Circuit concern provisions of 50 C.F.R. § 402.02, including the definition of "action":

> *Action* means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to:
>
> (a) actions intended to conserve listed species or their habitat;

(b) the promulgation of regulations;

(c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or

(d) actions directly or indirectly causing modifications to the land, water, or air.

Statement of the Case

The District Court proceeded to review Forest Service conduct pursuant to jurisdiction arising under the citizen suit provision of the Endangered Species Act, 16 U.S.C. § 1540(g). The case concerns the relationship between the exercise of private rights created under federal mining law, review and regulation of such activity by the U.S. Forest Service, and the potential application of the Endangered Species Act in connection with the Forest Service's review. The specific facts concerning the nature of the mining are not particularly pertinent to the question presented.

A. Private Rights under Federal Mining Law and the Regulation of Mining Thereunder

The 1872 Mining Act declares:

. . . all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, *shall be free and open* to exploration and purchase, and the lands in which they

> are found to occupation and purchase, by citizens of the United States . . .

30 U.S.C. § 22 (emphasis added). Until 1955, Congress even granted miners such as petitioners the exclusive right of possession of their mining claims:

> The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain . . . so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations.

30 U.S.C. § 26; *see also* 30 U.S.C. § 35 (same rules for placer claims).

Congress determined to promote the mineral development of the United States by granting mining claims on federal land, including national forest lands, which this Court has described as private "property in the fullest sense of the word". *Bradford v. Morrison*, 212 U.S. 389, 395 (1909). Use of private property is necessary to fulfill the "continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in . . . the development of economically sound and stable

domestic mining, minerals, metal and mineral reclamation industries". 30 U.S.C. § 21a.

In 1955, Congress passed the Multiple Use Act, which provides, in pertinent part, that

> Rights under any mining claim hereafter located under the mining laws of the United States 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 (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: *Provided, however, That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto . . .*

30 U.S.C. § 612(b) (emphasis added). As the legislative history of Multiple Use Act makes clear,

the statute was intended to assure that "[d]ominant and primary use of the locations hereafter made, as in the past, would be vested first in the locator". *See generally United States v. Curtis-Nevada Mines, Inc.,* 611 F.2d 1277, 1281 (9th Cir. 1980) (quoting legislative history). Consistent with this Act, the regulations provide that mining operations should be conducted "so as, *where feasible,* to minimize adverse environmental impacts . . .". 36 C.F.R. § 228.8 (emphasis added).

These statutes establish that, unlike all other activities conducted in the National Forests, mining activity proceeds by statutory authorization as the exercise of federally-created property rights, and that the Forest Service's regulations concerning the exercise of such property rights cannot "endanger or materially interfere" with mining.

This substantive restriction on Forest Service authority is also deeply embedded in the structure of the Organic Administration Act of 1897, from which the Service's regulatory authority derives. *See generally* 16 U.S.C. §§ 551 (limited authority to prevent "depredations upon the public forests") & 478 (explaining that § 551 shall not prohibit development of mineral resources); *see also id.* §§ 472 (limiting Service authority over laws affecting mining), 475 (purpose to exclude mineral lands from forest purview) & 482 (same).

Pursuant to the Organic Act authority, the Service has enacted regulations which categorize mining activities three ways:

First, there are small-scale activities, such as activities that do not "involve the use of mechanized earth moving equipment such as bulldozers or backhoes". 36 C.F.R. § 228.4(a)(1)(vi). These activities may proceed without any notice to the Forest Service. *Id.* § 228.4(a)(1). The suction dredge equipment here is not of bulldozer scale, but the miners involved voluntarily determined to provide notice given that the mining claims were already located and filed. However, in other circumstances, suction dredges are used to prospect for valuable mineral deposits, and it is not consistent with fostering mineral exploration or good business practices to require prospectors to make their prospecting plans a matter of public record before a valuable discovery is located.

Second, where a miner reasonably determines that his activities may cause a significant adverse impact on surface resources, he must provide a "notice of intent" to the Service, and the local district ranger is to make a determination within fifteen days as to whether the activities described in the notice are "likely to cause significant disturbance of surface resources" or not. 36 C.F.R. § 228.4(a). Miners have never understood the regulations to make the initiation or continuation of such mining conditional on Forest Service approval. The regulation merely states that "[i]f a notice of intent is filed, the District Ranger will, within 15 days of receipt thereof, notify the operator whether a plan of operations is required". 36 C.F.R. § 228.4(a)(2).

Third, where the ranger makes a determination of significant impact to surface resources, a "plan of operations" is required. *Id.* § 228.4(a)(4). This is the highest level of scrutiny, which requires full environmental analysis. *Id.* § 228.4(f).

Congress directly intervened in the development of the Forest Service's mining regulations to prevent any requirement that small-scale mining activities be approved in advance, properly recognizing that such restrictions would seriously interfere with mineral development.

The Service had 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). The initial rules provoked a Congressional oversight hearing during which members of Congress made clear their opposition to Service mining regulations which would entangle small-scale miners in environmental regulation. *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 environmental 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 Service initially defended the position that each and every mineral operation would require an approved plan of operations. *See id.* at 10 (Testimony of 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 Service conformed to Congressional intent and amended the proposed regulations to add a "notice of intent provision" which would suffice for less 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).[2]

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[2] The Forest Service conducted an EIS in connection with the adoption of these regulations in which the Forest Service specifically rejected the alternative of requiring a plan of operation for all mining activities not only because of "undue hardships on the operator", but also because it would "require additional qualified personnel in the Forest Service to implement and administer these regulations", and result in "a reduced rate of exploration and discovery of mineral deposits with attendant shortages of some minerals and increased costs to society". (Miners' Excerpts of Record (MER), filed November 17, 2009, at 11) The District Court rejected the Miners' attempt to supplement the administrative record with this EIS based on Defendants' representation that the EIS was not considered in connection with the decisions at issue (App. 192), a holding upheld *sub silentio* by the Ninth Circuit, but the document remains important as historical evidence, akin to legislative history, demonstrating the importance of the notice of intent procedure in implementing federal mining policy.

Before the District Court, petitioners sought to introduce *The Process Predicament*, a Forest Service report noting that actions such as developing a plan of operations would "involve as many as 800 individual activities and more than 100 process interaction points", be "fragile and prone to failure", and require "extensive" "time and costs".[3] (*Process Predicament* at 14.) Excessive procedure has, in fact, caused "a land health crisis of tremendous proportions". (*Id.* at 7.) The district court struck the report from the record as "entirely irrelevant" (App. 192), though its conclusions are generally shared by Chief Judge Kozinski and Judge Smith (App. 70-76), the Ninth Circuit did not address petitioners' attempts to include the document in the record.

B. The Suction Dredge Mining Challenged by the Tribe

Until the State of California outlawed the practice of suction dredge mining, this case was all about suction dredge mining. (*See* App. 170-175 (District Court reviews specific 2004 notices of intent in detail).). The practice involves floating a small gasoline-powered engine with a suction pump, while the miner works underwater digging *by hand* and vacuuming up gold-bearing stream gravels. The dredged material is run over a simple sluice, the gold

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[3] The Process Predicament: how Statutory, Regulatory and Administrative Factors Affect National Forest Management (U.S. Forest Service June 2002) (available at http://www.fs.fed.us/projects/documents/Process-Predicament.pdf).

falls out, and the balance of the dredged material falls back into the stream.

Until recently, the activity proceeded under a state permitting regime forbidding dredging when salmon eggs were in the gravel. As the responsible Forest Service Officials observed, "[t]here are at least 3 S[t]ate of California, Department of Fish and Game Environmental Impact Reports (EIRs) that tie to the dredge permit and indicate that there is no significant disturbance if permit regulations are followed". (Miners' Excerpts of Record (MER), filed November 17, 2009, at 11.)

It should be noted that during the great California gold rush, and for decades thereafter, gold miners washed entire hillsides into California rivers and streams (*see* App. 3-4), while salmon runs continued at record levels. It was not until fishermen developed the technology to catch each and every fish everywhere that anadromous species were ever threatened. A single fisherman pulling in a single fish manifestly "affects the listed species" more than all of the suction dredge mining ever conducted in the Klamath River.[4]

By the time the Ninth Circuit heard this case *en banc*, the suction dredging was under a

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[4] The Ninth Circuit refuses, in substance, effectively to apply the ESA to salmon fishing. *Pacific Northwest Generating Cooperative v. Brown*, 38 F.3d 1058, 1068 (9th Cir. 1994) ("Impossibility in our view is sufficient answer. It was not the intention of the statute to ban all salmon fishing . . .").

"temporary moratorium" that was scheduled to end in 2016 (*see* App. 22). The Ninth Circuit then characterized the case as concerning "other mining operations occurring in and along the Klamath River and its tributaries", which "could impact the Tribe's ability to enjoy the spiritual, religious, sustenance, recreational, wildlife, and aesthetic qualities of the areas affected by the mining operations". (*Id.* App. 22 (quoting District Court; emphasis deleted).) These activities disturb riparian areas *out of the water* with hand tools or hand-operated equipment. There was, in substance, no record before the Ninth Circuit concerning the environmental impacts of these other mining practices on listed species.[5]

Shortly after the Ninth Circuit's June 1, 2012 opinion, on July 27, 2012, the California Legislative Assembly made the temporary moratorium permanent. California Fish and Game Code § 5653.1 (App. 232-234). The opinion below could not address this subsequent change in law.

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[5] The District Court struck the Tribe's own testimony concerning such activities as having "no relevance to this litigation" (App.186); the Ninth Circuit did not review this decision, and premised its holding that mining activities "may affect" listed fish by reference to the now-banned practice of suction dredge mining. (App. 45-47).

C. The Endangered Species Act's Restrictions upon Federal Agency Action

The Endangered Species Act is involved in this case because the National Marine Fisheries Service determined to list the southernmost populations, out of thousands of non-endangered populations of coho salmon, under the Act. *See* 62 Fed. Reg. 24,588 (May 6, 1997). Following the coho listing, the Forest Service completed an ESA biological assessment on May 20, 1997, concluding that the Forest Service's "issuance of Plans of Operation associated with suction dredging may affect but is not likely to adversely affect anadromous fish species or their habitat". (MER16.)

Thereafter, on July 31, 1997, the National Marine Fisheries Service issued an opinion that "the effects of permitting suction dredging within the KNF [Klamath National Forest], taken together with cumulative effects and the effects of the environmental baseline, are not likely to jeopardize the continued existence of [SONC coho salmon]. (MER17.) Thus, on a programmatic basis, the practice of suction dredging in the Klamath National Forest, whether proceeding in association with "plans of operation" or "notices of intent" (*see* MER13), was determined in formal consultations to have no discernible adverse impact on endangered salmon, consistent with all available scientific information. However, so-called critical habitat for coho salmon was designated in 1999,

64 Fed. Reg. 24,049 (May 5, 1999),[6] and no further consultations were conducted; until recently, the practice of small-scale suction dredging was widely recognized to have no significant adverse impacts whatsoever.

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

D. Procedural History

The controversy arose primarily because local district rangers in the Klamath National Forest exercised initiative to attempt to mollify the Karuk Tribe's objections to mining though a negotiated resolution among user groups, which culminated in a

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[6] Critical habitat included "the adjacent riparian area . . . defined as the area adjacent to a stream that provides the following functions: shade, sediment, nutrient or chemical regulation, streambank stability, and input of large woody debris or organic matter". *Id.* at 24,055. The District Court did not permit any record to be developed on small-scale mining activities in such areas, given the focus on suction dredge mining in the water (*see* App.186).

solution on which all parties shook hands.[7] Thereafter the Tribe faithlessly breached its agreement and lent its name to multiple environmental activists purportedly suing on its behalf, an effort they have publicly asserted is being conducted at their own expense.

This particular case was initiated on October 4, 2004. The District Court easily resolved the ESA claim in the case by noting that the Tribe's position was contrary to and "would essentially eviscerate any meaningful distinction between the [notice of intent] and [plan of operation] processes whatsoever." (App. 221.)

Before the Ninth Circuit, the case was stayed for some time because other issues, not arising under the Endangered Species Act, were being resolved in an unrelated case, *Siskiyou Regional Education Project, v. U.S. Forest Service*, 565 F.3d 545 (9th Cir. 2009). The Ninth Circuit's initial opinion, issued April 7, 2011, concluded that the Forest Service's "limited and internal review of an NOI for the purpose of confirming that the miner does not need to submit a Plan for approval (because the activities are unlikely to cause any significant disturbance of

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[7] The saga of these negotiations was presented to the District Court in a twenty-page Declaration from the President of Petitioner The New 49ers, Inc. Petitioners asked the District Court to supplement the record with this Declaration, but the District Court refused (App. 190-191; *cf. id.* at 170-174 (incomplete and abbreviated version of events)), and the Ninth Circuit upheld the refusal *sub silentio*.

the forest or river) is an agency decision not to regulate legal private conduct". App. 111.

By order issued September 12, 2011, the Ninth Circuit granted the Tribe's petition for rehearing *en banc*. Following further briefing on the question of mootness and a flurry of motions, the *en banc* decision issued on June 1, 2012. App. 1-75. Four judges dissented, stating that the majority "now flouts crystal-clear and common sense precedent, and for the first time holds that an agency's decision *not to act* forces it into a bureaucratic morass". App. 50.

Reasons Why Certiorari Is Warranted

I. REVIEW IS WARRANTED BECAUSE THE SCOPE OF FEDERAL OBLIGATIONS TO ENGAGE IN INTERAGENCY CONSULTATIONS UNDER THE ENDANGERED SPECIES ACT CONCERNING PRIVATE ACTIVITY SHOULD BE SETTLED BY THIS COURT.

Very substantial, and sometimes majority, portions of the Western states are held by the federal government, and the Region's prosperity depends upon the ability of private enterprise to operate on such lands. At the same time, federal agencies demand to know what private operators are doing on federal land, and exercise potential regulatory authority over such operators.

Forty years of implementation of the Endangered Species Act by the United States Court of Appeals for the Ninth Circuit has destroyed the

clear distinction between actions by private enterprise and public agency action Congress built into the Act, and entangled private operators in cumbersome interagency consultation procedures not related, as a practical matter, to preventing any appreciable risk to listed species. While this Court finally intervened in 1997 to at least give private entities standing to sue concerning the application of such procedures,[8] this Court has never addressed the questions whether and to what extent private action may be treated as "agency action" for purposes of the Act, and the opinion below threatens to turn each and every private action over which a federal agency may potentially exercise regulatory jurisdiction into "agency action".

The Ninth Circuit's decision is contrary to a long line of this Court's cases, and those of other circuits, concerning (i) proper interpretation of § 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2); (ii) deference to agency interpretations of law; and (iii) the reviewability of decisions not to take enforcement action.

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[8] *Bennett v. Spear*, 520 U.S. 154 (1997).

A. The Ninth Circuit's Conclusion that Ranger Review of Notices of Private Activity Constitutes "Agency Action" "Authorizing" Mining is Contrary to the Endangered Species Act and the Relevant Regulations.

The question of what constitutes "agency action" for purposes of § 7, as opposed to the private actions taken by "any person subject to the jurisdiction of the United States" for purposes of the prohibitions of § 9 (and permitting under § 10) is of vital importance to the proper implementation and enforcement of the ESA. Congress spelled out with painstaking care that "agency action," in the context of activities actually conducted by private individuals, only occurs where the agency exercises administrative discretion to grant or deny a license or permit for such activities.

As a general matter, § 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), is to be invoked only for action "authorized, funded, or carried out" by the agency involved. Under the mining laws and regulatory structure, the Forest Service simply does not "authorize" the mining at all, much less fund it or carry it out. At most, for claims located after 1955, the Service may impose reasonable restrictions upon the exercise of private property rights that do not materially interfere with mining, for the purpose of protecting "surface resources," generally understood to include endangered species. The Service simply does not engage in the granting of "licenses, contracts, leases,

easements, rights-of-way, permits, or grants-in-aid" (50 C.F.R. § 402.02) with respect to suction dredge mining that are the hallmarks of the sort of "agency action" intended to fall within the purview of § 7(a)(2).

Congress intended that private activity be governed by § 9, a general prohibition against "taking" listed species, 16 U.S.C. § 1539, and where such take was necessary, through permits under § 10, 16 U.S.C. § 1540. There is no evidence that suction dredge mining has ever "taken" so much as a single fish or fish egg.

The careful design of the Act is further confirmed by review of § 7(a)(3), 16 U.S.C. § 1536(a)(3). Congress provided that the consultation process triggered with respect to private action only if the miners were a "prospective permit or license applicant," and then only if the private action "will likely affect such species". Specifically, § 7(a)(3) provides that

> ". . . a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species."

16 U.S.C. § 1536(a)(3).[9]

The Service told the lower courts that if it required a "plan of operations," *i.e.*, made a decision to exercise its regulatory authority, it would comply with § 7(a)(2) with respect to its involvement in the miner's plan. This concession was neither necessary nor appropriate under the Act. Agreements between the Service and the miner on "plans" are not the grant of any "licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid" (50 C.F.R. § 402.02). The word "plan" is of a different character, consistent with the unique status of the United States as a trustee holding legal title in trust for the miner,[10] which is seeking to negotiate reasonable protection for its interests in the other surface resources. Simply put, Congress did not provide for consultation for actions "authorized, funded, or carried out" *or regulated by* in § 7(a)(2); "regulation" is what an agency does with respect to conduct that is independently authorized, and subject to potential restriction.

The correct view is that mining is "authorized" as a matter of law, such that consultation is not formally required in connection with the Service's negotiations with miners concerning an agreed-upon

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[9]Because the State of California has outlawed suction dredge mining, (*see infra* at 35 & n. 15) the only relevant mining now proceeding is not even occurring in the water, and the notion that it "will likely affect" endangered fish is unsupported (and unsupportable) by any evidence of record or otherwise.

[10] *See Wyoming v. United States*, 255 U.S. 489, 497-98 (1921).

plan of operations. Rather, pursuant to § 7(a)(1) of the Act, 16 U.S.C. § 1536(a)(1), the Service is required to exercise its regulatory and planning authority in furtherance of the purposes of the Act.

It is true that when the Service determines to exercise its regulatory authority, the Service's regulatory decisions have the potential to affect private conduct. But, properly understood, the exercises of such regulatory authority are not the "actions directly or indirectly causing modifications to the land, water, or air" (50 C.F.R. § 402.02) that fall within the purview of § 7(a)(2); it is the miners who are engaging in such actions and *cause* the modifications. Congress never intended to ensnare agencies in burdensome interagency consultation procedures merely because they had jurisdiction over some aspect of private conduct, a burden that quickly becomes transfinite as federal jurisdiction expands.

But this case does not require the Court to second-guess the Service's unfortunate concession concerning plans of operations. This case involves a far more pernicious misinterpretation of the law in the context where the Service has received and reviewed notices of private operations and determined *not* to exercise its regulatory authority to demand a "plan of operations". The Ninth Circuit held that the agency's knowledge of private activity, and consideration whether or not to exercise regulatory authority, makes the decision *not* to exercise authority "agency action" for purposes of § 7(a)(2). According to the Ninth Circuit, "agency action" is if because the Service merely advises the

miners in writing that the Service has declined to require a plan of operations.

As set forth above, the Forest Service is simply not granting permission to proceed by virtue of its review of a notice of intent. The authorization for the activity does not come from the Forest Service at all; the Forest Service is not, under its regulations, in a position to exercise any regulatory authority unless and until the pertinent ranger makes the finding, required under the regulations, that the mining "will likely cause significant disturbance of surface resources". 36 C.F.R. § 228.4(a).

The Ninth Circuit relied significantly upon the fact that the district rangers involved departed from the regulatory design by providing advice and feedback to the miners on how to structure their activities to achieve regulatory insignificance. The district rangers even purported, on occasion, to "approve" the notices of intent or "authorize" the mining involved. It is contrary to federal law in all circuits, and indeed to the rule of law itself, to treat erroneous assertions of authority by federal officials as creating authorizing power.[11] It is also contrary to this Court's holding in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644

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[11] The Ninth Circuit opinion is also flatly contrary with environmental precedent throughout the Circuit Courts concerning interpretation of "major Federal action" in the National Environmental Policy Act, 42 U.S.C. § 4332. *See, e.g., Aircraft Owners & Pilots Ass'n v. Hinson*, 102 F.3d 1421, 1426-27 (7th Cir. 1996).

(2007), which emphasized the "harmless error" rule in 5 U.S.C. § 706 to conclude that EPA's invocation of § 7(a)(2) compliance in its Federal Register notice, though erroneous, did not compel the conclusion that § 7(a)(2) consultations were required. *Home Builders*, 551 U.S. at 659-60.

This Court's *Home Builders* decision explained at some length the meaning and application of § 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536, in the context of other statutes. Specifically, the Court reviewed the application of § 7(a)(2) to the EPA's transfer of the Clean Water Act National Pollutant Discharge Elimination System program to the State of Arizona. Because § 402(b) of the Clean Water Act, 33 U.S.C. § 1342(b), provided certain criteria for a transfer of permitting powers, this Court held that § 7(a)(2) could not be invoked to add additional criteria, somehow amending § 402(b). Similarly, § 7(a)(2) did not amend the mining laws to make the exercise of private mining rights into "agency action".

B. The Ninth Circuit's Destruction of Deference Principles Merits Review.

The Ninth Circuit gave no deference whatsoever to the Forest Service's interpretation of its own § 228.4 regulations, characterizing the issue as one of ESA interpretation, and stating that "an agency's interpretation of a statute outside its administration is reviewed *de novo*". App. 18. But the cornerstone of the Ninth Circuit's decision was its conclusion, flatly contrary to the position of the

Service concerning interpretation of *its own regulation*, that "[b]y regulation, the Forest Service must authorize mining activities before they may proceed under a NOI". App. 28.

The Forest Service's position as to the meaning of the § 228.4 regulations, as set forth in its opening brief below, was that

> The regulations do not affirmatively require a mining operator to receive "authorization" for any mining activity that is not likely to cause "significant disturbance of surface resources." *See* 36 C.F.R. § 228.4(a). For certain specific mining operations with the least impacts, including those that will not involve the use of mechanized earthmoving equipment or the cutting of trees, *id.* § 228.4(a)(2)(iii), a miner need not even submit a notice of intent. For those operations that "might" cause disturbance of surface resources, the only requirement imposed by the regulations is that a miner submit a notice of intent before proceeding. *Id.* § 228.4(a). If the District Ranger informs a miner that a plan of operations is not required, the regulations require nothing else on the part of the mining operator before proceeding.

(Brief of the Federal Appellees, Nov. 13, 2009, at 26-27.) In substance, the Forest Service has concluded that notices of intent do not constitute a "permit" or "license", and that determination is entitled to substantial deference.

As this Court has long emphasized in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) and the many cases following *Chevron*, federal courts are to defer to agency constructions of their own regulations. As this Court more recently emphasized, "broad deference is all the more warranted when, as here, the regulation concerns 'a complex and highly technical regulatory program' . . .". *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994).

The statutes and regulatory history discussed above provide support of a high degree of deference to the Service's interpretation in this case, but the Ninth Circuit refused, in substance, to grant any deference whatsoever. *See* App. 27-41. By contrast, the Seventh Circuit in reviewing the analogous issues arising under the Clean Water Act gave appropriate deference. *Texas Independent Producers and Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 978 (7th Cir. 2005) ("EPA's interpretation of the terms 'permit application' and 'permit' as not including NOIs and SWPPPs [Storm Water Pollution Prevention Plan] is a permissible construction").

C. The Ninth Circuit's Disregard of Other Fundamental Principles of Administrative Law Merits Review.

As a general matter, this Court has emphasized the elementary principle that relief under the Administrative Procedure Act is only available where action is "legally *required*". *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004). The Service was not legally obligated to take any action in response to receipt of a notice of intent other than to "notify the operator whether a plan of operations is required". 36 C.F.R. § 228.4(a)(2). The federal judiciary might, therefore, compel the Service to respond to a notice of intent, but it cannot require the particular discretionary choice of asserting the right to demand a plan of operations.

Decisions, in substance, not to take enforcement action against self-reported mining activities are the sort of decisions that have long been "presumed immune from judicial review under § 701(a)(2)". *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). The decision of the Forest Service not to exercise jurisdiction over private mining activities is, under *Heckler* and its progeny, committed to agency discretion by law. *Cf. Salmon Spawning & Recovery Alliance v. U.S. Customs and Border Protection*, 550 F.3d 1121, 1127-28 (Fed. Cir. 2008); *see also id.* at 1132 n. 11 ("reasoning of *Heckler* may be relevant "to § 7 claims).

The Ninth Circuit's conclusion that agency decisions *not* to exercise regulatory authority trigger

interagency consultation obligations threatens to create a vast new set of obligations upon agencies already struggling to meet their responsibilities in other contexts where threats to listed species are genuine. The federal judiciary is ill-suited to second guess all these exercises of discretion, and Congress never intended that decisions *not* to act trigger such burdensome procedures.

D. The Ninth Circuit's Unprecedented Expansion of "Agency Action" Has Ramifications Far Beyond Suction Dredge Mining.

In the modern regulatory state, nothing is more natural than for citizens to seek to structure their conduct to fall within classifications associated with a lower regulatory burden. Here, as a practical matter, the miners understood that they were being given an opportunity to structure their operations to avoid regulation, and in many cases, would prefer to acquiesce in restrictions they regarded as irrational and unfounded. *See, e.g.,* App. 30 (quoting miner letter: "I totally disagree with these distances and believe that dredging is actually beneficial to fish survival, but am willing to follow these recommendations in order to continue with my mining operations").

If citizens are to hazard a conclusion that their private activities are "authorized" by federal officials on any occasion when they seek advice concerning compliance with increasing far-ranging and intrusive regulatory regimes under the Endangered Species

Act and other statutes, the chilling effects will be very significant. In another case, the Ninth Circuit itself determined that "[p]rotection of endangered species would not be enhanced by a rule which would require a federal agency to perform the burdensome procedural tasks mandated by section 7 simply because it advised or consulted with a private party." *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1074 75 (9th Cir. 1996). A contrary rule, said the Court, would discourage "desirable communication" and "protection of threatened and endangered species would suffer". *Id.*

The problem extends far beyond mining to many other contexts. For example, the United States Environmental Protection Agency issues general permits under the Clean Water Act, 33 U.S.C. § 1342, pursuant to which citizens involved in projects discharging stormwater give notice of intent to EPA concerning the procedures under which they will operate. The Seventh Circuit has confirmed that EPA's receipt and review of such notices do not give rise to obligations under § 7(a)(2), *Texas Independent Producers and Royalty Owners Ass'n v. EPA,* 410 F.3d 964, 979 (7th Cir. 2005).

American businesses are withering away under a relentlessly increasing regulatory state. To strike down efficient and informal means of permitting them to adjust their conduct to avoid regulatory burdens not only makes that problem worse, but undermines the goals for which the regulation was intended. The Ninth Circuit has held, in substance, that each and every time a

federal agency demands information from a citizen about the citizen's activity in areas where listed species may be present, that activity is now one that proceeds only by permission of the federal agency, thereby triggering the application of the ESA, and many other statutes as well. This threatens the cooperation of private enterprise with regulatory programs, and the overall goals of the Endangered Species Act.

II. REVIEW IS WARRANTED AS AN EXERCISE OF THE COURT'S SUPERVISORY JURISDICTION ON ACCOUNT OF THE NINTH CIRCUIT'S REPEATED AND SUBSTANTIAL DEPARTURES FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

A final consideration in favor of granting the writ is that the Ninth Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power" (Rule 10(a)). Chief Judge Kozinsky and Judge Smith, in § VII of the dissent, invoked Dante's Inferno to analogize the particular hell though which petitioners and others have suffered under the rule of the Ninth Circuit, characterizing it as an extraordinary decision to "flout our precedents and undermine the rule of law". App. 69 ("Abandon all hope, ye who enter here"). What is particularly outrageous about this decision is that Congress specifically intervened in the creation of the Forest Service regulations to ensure

that the notice of intent procedure would not trigger environmental reviews interfering with the powerful federal policies favoring mineral development.

After reviewing a number of other recent Ninth Circuit cases, the extreme nature of which should invoke this Court's supervisory power, Chief Judge Kozinsky and Judge Smith concluded:

> "No legislature or regulatory agency would enact sweeping rules that create such economic chaos, shutter entire industries, and cause thousands of people to lose their jobs. That is because the legislative and executive branches are directly accountable to the people through elections, and its members know they would be removed swiftly from office were they to enact such rules. In contrast, in order to preserve the vitally important principle of judicial independence, we are not politically accountable. However, because of our lack of public accountability, our job is constitutionally confined to *interpreting* laws, not *creating* them out of whole cloth. Unfortunately, I believe the record is clear that our court has strayed with lamentable frequency from its constitutionally limited role (as illustrated *supra*) when it comes to construing environmental law. When we do so, I fear that we undermine public

> support for the independence of the judiciary, and cause many to despair of the promise of the rule of law."

App. 75-76. The pattern of usurpation of legislative authority outlined by Chief Judge Kozinski and Judge Smith merits this Court's most urgent attention to vindicate the rule of law.

To make matters worse, the Ninth Circuit stretched to frame its extraordinary legal conclusions in such unusual circumstances that the mere consideration of the case was an extreme departure "from the accepted and usual course of judicial proceedings". To reach the merits in this case, the Ninth Circuit had to (i) ignore the fact that the ESA listing on which the holding was premised had been declared unlawful;[12] (ii) ignore the fact that the agencies had in fact engaged in a § 7 consultation concerning suction dredging generally;[13] (iii) exclude

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[12] Because the mining is conducted underwater, the primary species of concern has been coho salmon. Petitioners explained to the District Court that the coho salmon listing had been declared unlawful in *California State Grange v. Department of Commerce*, No. 02-CV-6044-HO, oral opinion at 21 (D. Or. Jan. 11, 2005), but the District Court gave effect to the Service's refusal to acquiesce in the *Grange* ruling (App. 193-194), an action upheld, *sub silentio*, by the Ninth Circuit. In short, the Tribe's ESA claim sought to compel consultation on a species that was not lawfully listed.

[13] Petitioners do not know why, given the existence of the general and programmatic consultations on suction dredging discussed above, the Service stipulated that it was required to engage in § 7(a)(2) consultations with respect to all plans of operation.

all the evidence demonstrating that suction dredging had no potential to cause any appreciable adverse effect on listed species;[14] and (iv) give inadequate weight to the fact that California legislature had banned suction dredge mining.[15] For these additional reasons, the Ninth Circuit's decision to entertain the Tribe's ESA claim in all these circumstances constitutes an unprincipled assault upon not merely the mining laws, but the rule of law itself.

With the July 27, 2012 passage of California Senate Bill 1018, amending § 5653.1 of the California Fish and Game Code to prohibit suction dredging indefinitely (App. 232), this Court has the opportunity to grant certiorari, vacate the judgment

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[14] The Ninth Circuit opinion cited opinions of one Forest Service biologist that lacked any relationship to the mining at issue (App. 46), and upheld, *sub silentio*, the District Court's refusal to allow petitioners to supplement the administrative record with scientific studies and explanatory testimony demonstrating that his opinions were contrary to all available evidence, *even though the record reflected that the underlying studies were in fact relied upon by very rangers involved. Compare* App. 189-193 *and* MER11.

[15] At the time of the Ninth Circuit's opinion, there was a moratorium on suction dredging in place until 2016; the Court's opinion relies, in part, upon its temporary nature as militating against dismissal for mootness. (App. 22.) The opinion also suggests that the Tribe had standing to challenge other mining activities which are not forbidden (*id.*), but there is no evidence demonstrating that small-scale mining by hand in the vicinity of the rivers has any ESA implications.

below, and remand the case (GVR) so that the Ninth Circuit may reconsider the appropriateness of even reaching the merits of this action. *See generally Lawrence v. Chater*, 516 U.S. 163 (1996) (per curiam) (discussing availability of GVR).

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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August 29, 2012.

App. 1

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-16801

KARUK TRIBE OF CALIFORNIA,
Plaintiff-Appellant,
v.
UNITED STATES FOREST SERVICE; MARGARET BOLAND,
Defendants-Appellees,

THE NEW 49'ERS, INC.; RAYMOND W. KOONS,
Defendants-intervenors-Appellees.

December 13, 2011, Argued and Submitted, San Francisco, California
June 1, 2012, Filed

Before: Alex Kozinski, Chief Judge, Barry G. Silverman, Susan P. Graber, Kim McLane Wardlaw, William A. Fletcher, Ronald M. Gould, Richard A. Paez, Marsha S. Berzon, Milan D. Smith, Jr., Sandra S. Ikuta, and Mary H. Murguia, Circuit Judges. Opinion by Judge William A. Fletcher; Dissent by Judge M. Smith.

W. FLETCHER, Circuit Judge:

We consider whether the U.S. Forest Service must consult with appropriate federal wildlife agencies under *Section 7* of the Endangered Species Act ("ESA") before allowing mining activities to proceed under a Notice of Intent ("NOI") in critical

habitat of a listed species. The ESA requires consultation with the Fish and Wildlife Service or the NOAA Fisheries Service for any "agency action" that "may affect" a listed species or its critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). There are two substantive questions before us.

The first is whether the Forest Service's approval of four NOIs to conduct mining in the Klamath National Forest is "agency action" within the meaning of Section 7. Under our established case law, there is "agency action" whenever an agency makes an affirmative, discretionary decision about whether, or under what conditions, to allow private activity to proceed. The record in this case shows that Forest Service District Rangers made affirmative, discretionary decisions about whether, and under what conditions, to allow mining to proceed under the NOIs.

The second is whether the approved mining activities "may affect" a listed species or its critical habitat. Forest Service regulations require a NOI for all proposed mining activities that "might cause" disturbance of surface resources, which include fisheries and wildlife habitat. 36 C.F.R. §§ 228.4(a), 228.8(e). In this case, the Forest Service approved mining activities in and along the Klamath River, which is critical habitat for threatened coho salmon. The record shows that the mining activities approved under NOIs satisfy the "may affect" standard.

We therefore hold that the Forest Service violated the ESA by not consulting with the

appropriate wildlife agencies[1] before approving NOIs to conduct mining activities in coho salmon critical habitat within the Klamath National Forest.

I. Background

The Karuk Tribe has inhabited what is now northern California since time immemorial. The Klamath River originates in southeastern Oregon, runs through northern California, and empties into the Pacific Ocean about forty miles south of the California-Oregon border. In northern California, the Klamath River passes through the Six Rivers and Klamath National Forests. The Klamath River system is home to several species of fish, including coho salmon. Coho salmon in the Klamath River system were listed as "threatened" under the ESA in 1997. 62 Fed. Reg. 24,588 (May 6, 1997). The Klamath River system and adjacent streamside riparian zones were designated as critical habitat for coho salmon in 1999. 64 Fed. Reg. 24,049 (May 5, 1999). The Karuk Tribe depends on coho salmon in the Klamath River system for cultural, religious, and subsistence uses.

The rivers and streams of the Klamath River system also contain gold. Commercial gold mining in and around the rivers and streams of California was halted long ago due, in part, to extreme environmental harm caused by large-scale placer mining. *See generally People v. Gold Run Ditch &*

[1] The parties appear to assume that if consultation is required under Section 7, it is required with both agencies. Without deciding the question, we also will so assume.

Mining Co., 66 Cal. 138, 4 P. 1152 (Cal. 1884) (affirming injunction against hydraulic gold mining because of impacts on downstream rivers); Green Versus Gold: Sources in California's Environmental History 101-40 (Carolyn Merchant ed., 1998) (describing environmental impacts of the California Gold Rush). However, small-scale recreational mining has continued. Some recreational miners "pan" for gold by hand, examining one pan of sand and gravel at a time. Some conduct "motorized sluicing" by pumping water onto streambanks to process excavated rocks, gravel, and sand in a sluice box. As the material flows through the box, a small amount of the heavier material, including gold, is slowed by "riffles" and is then captured in the bottom of the box. The remaining material runs through the box and is deposited in a tailings pile. Finally, some recreational miners conduct mechanical "suction dredging" within the streams themselves. These miners use gasoline-powered engines to suck streambed material up through flexible intake hoses that are typically four or five inches in diameter. The streambed material is deposited into a floating sluice box, and the excess is discharged in a tailings pile in or beside the stream. Dredging depths are usually about five feet, but can be as great as twelve feet.

The Karuk Tribe contends that these mining activities adversely affect fish, including coho salmon, in the Klamath River system. The Tribe challenges the Forest Service's approval of four NOIs to conduct mining activities in coho salmon critical habitat in the Klamath National Forest, without first

consulting with federal wildlife agencies pursuant to Section 7 of the ESA.

A. Mining Regulations

Under the General Mining Law of 1872, a private citizen may enter public lands for the purpose of prospecting and mining. 30 U.S.C. § 22. The Organic Administration Act of 1897 extended the Mining Law to the National Forest system but authorized the Secretary of Agriculture to regulate mining activities in the National Forests to protect the forest lands from destruction and depredation. 16 U.S.C. §§ 482, 551. The Act specified that prospectors and miners entering federal forest lands "must comply with the rules and regulations covering such national forests." *Id.* § 478. We have repeatedly upheld the Forest Service's authority to impose reasonable environmental regulations on mining activities in National Forests, so long as they do not prohibit or impermissibly encroach on legitimate mining uses. *See, e.g., United States v. Shumway,* 199 F.3d 1093, 1106-07 (9th Cir. 1999); *Clouser v. Espy,* 42 F.3d 1522, 1529-30 (9th Cir. 1994); *United States v. Weiss,* 642 F.2d 296, 298-99 (9th Cir. 1981).

In 1974, the Forest Service promulgated regulations to minimize the adverse environmental impacts of mining activities in *National Forests.* 39 Fed. Reg. 31,317 (Aug. 28, 1974); 36 C.F.R. § 228.1 (2004). The regulations establish three different categories of mining, based on whether the proposed activities "will not cause," "might cause," or "will likely cause" significant disturbance of surface

resources, which include fisheries and wildlife habitat. 36 C.F.R. §§ 228.4(a), 228.8(e). The first category, *de minimis* mining activities that "will not cause" significant disturbance of surface resources, may proceed without notifying the Forest Service or obtaining the agency's approval or authorization. *Id.* § 228.4(a)(1), (2)(ii). The third category, mining activities that "will likely cause" significant disturbance of surface resources, may not proceed until the Forest Service approves a Plan of Operations ("Plan") submitted by the miner. *Id.* § 228.4(a). A Plan requires relatively detailed information, including "the approximate location and size of areas where surface resources will be disturbed" and "measures to be taken to meet the requirements for environmental protection." *Id.* § 228.4(c). Within 30 days of receiving a Plan, or 90 days if necessary, the Forest Service must approve the proposed Plan or notify the miner of any additional environmental conditions necessary to meet the purpose of the regulations. *Id.* § 228.5(a).

At issue in this appeal is the middle category of mining activities: those that "might cause" disturbance of surface resources. *Id.* § 228.4(a). Forest Service mining regulations require that any person proposing such activities must submit a Notice of Intent to operate, or NOI, to the appropriate District Ranger. *Id.* A NOI is less detailed than a Plan. It need only contain information "sufficient to identify the area involved, the nature of the proposed operations, the route of access to the area of operations and the method of transport." *Id.* § 228.4(a)(2)(iii). Within 15 days of

receiving a NOI, the District Ranger must notify the miner whether a Plan is required. *Id.* The Ranger will require a Plan if, in his discretion, he determines that the operation "will likely cause" significant disturbance of surface resources. *Id.* § 228.4(a).

The Forest Service revised its regulations in 2005 to clarify when a NOI or Plan is required. *See* 70 Fed. Reg. 32,713 (June 6, 2005). The revised regulations provide examples of *de minimis* mining activities -- such as gold panning, metal detecting, and mineral sampling -- that "will not cause" significant disturbance of surface resources and thus require neither a NOI or Plan. 36 C.F.R. § 228.4(a)(1)(ii) (2011). The revised regulations also clarify that a NOI is required only for proposed mining activities that might cause "significant" disturbance of surface resources. *Id.* § 228.4(a) (2011). The parties agree that the 2005 revisions do not materially affect the issues on appeal. However, because the Karuk Tribe challenges the Forest Service's approval of NOIs during the 2004 mining season, our citations to subsections of 36 C.F.R. § 228 are to the 2004 version of the Forest Service regulations, unless otherwise noted.

B. 2004 Mining Season

Before the start of the 2004 mining season, representatives of the Karuk Tribe expressed concern to the Forest Service about the effects of suction dredge mining on fisheries in the Klamath River system. The District Ranger for the Happy Camp District of the Klamath National Forest, Alan

Vandiver, responded by organizing meetings that included Tribal leaders, miners, and district officials. Vandiver also consulted with Forest Service biologists Bill Bemis and Jon Grunbaum. Vandiver wrote the following memorandum on May 24, 2004:

> On April 20th a meeting was held in Orleans to discuss possible fisheries issues relating to dredging. A number of opinions were shared on the possible effects. . . .
>
> Following the Orleans meeting I asked our District Fisheries biologists, Bill Bemis and Jon Grunbaum, to develop recommendations, for my consideration, for the upcoming dredging season. They were not able to come to agreement on a list of fisheries recommendations. Their opinions varied widely on the effect of dredge operations on fisheries. I identified three key fisheries issues specific to the Happy Camp District[:] cold water refugia areas in the Klamath River, the intensity of dredge activities and the stability of spawning gravels in some portions of Elk Creek. These issues I used to help develop a threshold for determining a significant level of surface disturbance. I felt it was important from a cumulative effects standpoint to determine a threshold of dredge density on the streams, as well

> as identify the critical cold water refugia areas. . . .
>
> . . . I discussed at length with Bill [Bemis] and Jon [Grunbaum] the effect on fisheries if the dredge activity was concentrated or dispersed over the length of the river. Concentrated use would result in longer river stretches without dredge activity and therefore less possible impacts to fisheries in the longer stretches. Distributed use would result in dispersed possible effects over the entire length of the river. . . . Considering the limited dredge operations in cold water refugia areas and the limited dredge access, I developed a threshold of 10 dredges per mile on the Klamath River and 3 dredges per mile on the Klamath tributaries. My thinking was the larger Klamath River, excluding the cold water refugia, could accommodate more dredge density with less impact than the smaller tributaries.

The first of the four NOIs challenged in this appeal was submitted by the New 49'ers, a recreational mining company. The New 49'ers own and lease numerous mining claims in and around the Klamath and Six Rivers National Forests. On May 17, 2004, District Ranger Vandiver met with two representatives of the New 49'ers and other interested parties. Based on his earlier consultation

with Bemis and Grunbaum, Vandiver instructed the New 49'ers on "three primary issues."

First, Vandiver instructed the New 49'ers that areas of cold water habitat, or "cold water refugia," must be maintained within 500 feet of the mouths of twenty-two named creeks that feed into the Klamath River. Second, he instructed them that tailings piles must be raked back into the "dredge holes in critical spawning areas" of Elk Creek "in a timely manner as operations proceed, but no later than the end of the season." Third, he instructed them that there could be no more than ten dredges per mile on the Klamath River, and no more than three dredges per mile on Klamath tributaries.

On May 24, 2004, a week after their meeting with Vandiver, the New 49'ers submitted an eight-page, single-spaced NOI for mining activities in the Happy Camp District during the 2004 season. The NOI proposed suction dredge mining in approximately 35 miles of the Klamath River and its tributaries. The NOI also proposed motorized sluicing within the mean high water mark adjacent to the streams. In accordance with Vandiver's instructions, the NOI specified that no dredging would occur in specified cold water refugia in the summer and early fall, that dredging holes would be filled in coho salmon spawning grounds on Elk Creek, and that dredge density would not exceed ten dredges per mile on the Klamath River and three dredges per mile on its tributaries.

On May 25, Vandiver sent the New 49'ers a letter approving their NOI. He wrote: "You may begin your mining operations when you obtain all applicable State and Federal permits. This authorization expires December 31, 2004." On May 26, Bemis sent a "Note to the File" stating:

> The Notice of Intent (NOI) for the new 49'ers this year has an intensity of approximately 40 dredges over the 35 miles of the Klamath covered by their claims. They have agreed to a density of no more than 10 dredges in any one-mile at anytime. The new 49'ers have agreed to avoid the area around tributaries to the Klamath Rivers. The club has agreed to pull back dredging tailings in a critical reach within Elk Creek. These agreements and others explained in the NOI should reduce the impacts to anadromous fisheries on the Happy Camp Ranger District.

The second challenged NOI was submitted by Nida Johnson, an individual miner who planned to mine thirteen claims. She submitted the NOI on May 29, 2004, noting that it was the "result of a meeting at the Happy Camp U.S.F.S. May 25, 2004." The NOI stated that she planned to use a four-or five-inch suction dredge. In an attachment, she wrote that "[d]redge tailings piles in Independence Cr[eek] will be leveled." In a second attachment signed June 4, 2004, she wrote:

> As recommended by the Forest Service, no dredging will be conducted on the Klamath River within 500 feet above and below the mouth of Independence Creek between June 15th and October 15th.
> I totally disagree with these distances and believe that dredging is actually beneficial to fish survival, but I am willing to follow these recommendations in order to continue with my mining operations.

Vandiver approved the NOI on June 14.

The third NOI was submitted by Robert Hamilton, an individual miner who planned to mine four claims. He submitted his NOI on June 2, 2004. The NOI stated that he planned to use a four-inch suction dredge for about two weeks during July. Under the heading "Precautions," he wrote that he would limit dredge density to three per mile, and that "[t]ailings will be returned to dredge hole if possible in shallow areas or spread over [a] large area in deep areas." Vandiver approved the NOI on June 15.

The fourth NOI was submitted by Ralph Easley, an individual miner who planned to mine a single claim. He submitted his NOI on June 14. The NOI stated that he planned to use a four-inch suction dredge from the beginning of July to the end of September. He wrote that the "[d]redge tailings

will be raked back into dredge holes." Vandiver approved the NOI on June 15.

The Forest Service never consulted with the Fish and Wildlife Service or NOAA Fisheries Service before approving the four NOIs.

In addition to the four NOIs specifically challenged in this appeal, the record includes other NOIs for mining activities during the 2004 season in the Six Rivers and Klamath National Forests. These NOIs provide important information about the Forest Service's practices with respect to mining pursuant to NOIs.

First, on April 26, 2004, the New 49'ers submitted another eight-page, single-spaced NOI that proposed suction dredging and motorized sluicing in and along the Salmon River in the Orleans District of the Six Rivers National Forest. On May 13, Acting Forest Supervisor William Metz refused to approve the NOI. Metz wrote:

> There is an important cold water refugia at the mouth of Wooley Creek that was discussed on the April 23, 2004 field trip as needing protection. This was not mentioned in your NOI. Protection of this refugia is critical to the survival of migrating anadromous fish.

Metz wrote further:

> Due to the anadromous fisheries in the lower Salmon River the stability of spawning gravels for fish redds [spawning nests] is a major concern. Redds can be lost if loose tailing piles erode away by stream course action while eggs are still present. . . . Any resubmitted NOI or Plan of Operation needs to address the need to flatten tailings piles and rolling large dislodged rocks on the edge of the dredged holes back into the holes.

On May 24, the New 49'ers submitted a revised NOI for mining in the Orleans District. Dave McCracken, General Manager of the New 49'ers, wrote in a cover letter to the NOI, "If this Notice does not adequately address your concerns [then] I would suggest that we arrange an on-the-ground meeting at the earliest possible time." On May 29, anticipating that Metz would not approve the revised NOI, the New 49'ers withdrew it. McCracken wrote to Metz:

> From the substantial amount of dialog we have had with your office, other District offices, the Supervisor's office, Karuk Tribal leaders, active members of the Salmon River Restoration Council and others within local communities over the past several months, it has become increasingly clear that there are

> too many sensitive issues for us to try and manage a group mining activity along the Salmon River at this time.

Second, on April 28, 2004, the New 49'ers submitted a seven-page, single-spaced NOI to conduct suction dredging and motorized sluicing in the Scott River District of the Klamath National Forest. The NOI proposed an estimated fifteen dredges along fifteen miles of streams, with "[d]ensities of above five dredges per 100 yards . . . not anticipated." The NOI made a general commitment concerning mining in cold water refugia at the mouths of tributaries, stating that the New 49'ers would work with the Forest Service to identify these areas and "to adjust their operation to prevent disturbance and stress to these fish during critical time periods." Unlike the NOIs for mining in the Happy Camp and Orleans Districts, the NOI for the Scott River District made no provision for raking tailings piles back into dredge holes. On May 10, District Ranger Ray Haupt refused to approve the NOI, but for reasons unrelated to protection of fisheries. Haupt wrote:

> I am unable to allow your proposed mining operations for the [Scott River District] under a NOI because of your bonded campsite which allows your club members to camp (occupancy) longer than the 14 day camping limit. Your current Plan of Operations allows for extended camping (longer than 14 days) for your members, while they are actively engaged in mining. I am

> approving your mining operations for 2004 under a Plan of Operations with the following conditions . . . .

None of the conditions in the approved Plan related to specific cold water refugia or tailings piles.

C. Procedural Background

The Tribe brought suit in federal district court alleging that the Forest Service violated the ESA, the National Environmental Policy Act ("NEPA"), and the National Forest Management Act ("NFMA") when it approved the four NOIs to conduct mining in and along the Klamath River in the Happy Camp District. *Karuk Tribe of Cal. v. U.S. Forest Serv. ("Karuk I"),* 379 F. Supp. 2d 1071, 1085 (N.D. Cal. 2005). The Tribe sought declaratory and injunctive relief. The New 49'ers and Raymond Koons, an individual who leases several mining claims to the New 49'ers on the Klamath River, intervened as defendants in the suit (collectively "the Miners"). *Id.* at 1077. Initially, the Tribe also challenged five Plans of Operations approved by the Forest Service during the 2004 mining season, but the Tribe dropped those claims in April 2005 after the agency agreed in a stipulated settlement that it violated the ESA and NEPA when it approved the Plans. In other words, the Forest Service agreed that it had a duty under the ESA to consult with the appropriate wildlife agencies, and under NEPA to prepare additional environmental review documents, before approving the Plans.

In July 2005, the district court denied the Tribe's motion for summary judgment and ruled against the Tribe on all remaining claims. *Id.* at 1103. Briefing on appeal was stayed by agreement of the parties until we decided a case involving suction dredge mining in the Siskiyou National Forest in Oregon. *Siskiyou Reg'l Educ. Project v. U.S. Forest Serv.,* 565 F.3d 545 (9th Cir. 2009). When briefing resumed, the Tribe pursued only the ESA claim, arguing that the Forest Service violated its duty to consult with the expert wildlife agencies before approving the four NOIs.

In April 2011, a divided panel of this court affirmed the district court's denial of summary judgment, holding that the Forest Service's decision to allow proposed mining activities to proceed pursuant to a NOI did not constitute "agency action" under the ESA. *Karuk Tribe v. U.S. Forest Serv. ("Karuk II"),* 640 F.3d 979 (9th Cir. 2011). We agreed to rehear the case en banc. 658 F.3d 953 (9th Cir. 2011).

II. Standard of Review

We review *de novo* a district court's denial of summary judgment. *Russell Country Sportsmen v. U.S. Forest Serv.,* 668 F.3d 1037, 1041 (9th Cir. 2011). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Sierra Club v. Bosworth,* 510 F.3d 1016, 1022 (9th Cir. 2007). Because this is a record review case, we may direct that summary judgment be granted to either party based upon our review of the

administrative record. *Lands Council v. Powell,* 395 F.3d 1019, 1026 (9th Cir. 2005).

An agency's compliance with the ESA is reviewed under the Administrative Procedure Act ("APA"). *Westlands Water Dist. v. U.S. Dep't of Interior,* 376 F.3d 853, 865 (9th Cir. 2004). Under the APA, a court may set aside an agency action if the court determines that the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Although we defer to an agency's interpretation of its own regulations and the statutes it is charged with administering, *Cal. Dep't of Water Res. v. Fed. Energy Regulatory Comm'n,* 489 F.3d 1029, 1035-36 (9th Cir. 2007), an agency's interpretation of a statute outside its administration is reviewed *de novo, Am. Fed'n of Gov't Emps. v. Fed. Labor Relations Auth.,* 204 F.3d 1272, 1274-75 (9th Cir. 2000).

III. Discussion

A. Mootness

As a preliminary matter, we must decide whether intervening events have rendered the Karuk Tribe's claims for declaratory and injunctive relief moot. "The Supreme Court has emphasized that the doctrine of mootness is more flexible than other strands of justiciability doctrine." *Jacobus v. Alaska,* 338 F.3d 1095, 1103 (9th Cir. 2003). The Court has instructed that "harmful conduct may be too

speculative to support standing, but not too speculative to overcome mootness." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 190, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). In Laidlaw, the Court cautioned that dismissing a case as moot in the late stages of appeal could be "more wasteful than frugal." *Id.* at 191-92. Doing so is justified only when it is "absolutely clear" that the litigant no longer has "any need of the judicial protection that it sought." *Adarand Constructors, Inc. v. Slater,* 528 U.S. 216, 224, 120 S. Ct. 722, 145 L. Ed. 2d 650 (2000) (per curiam). The party asserting mootness bears a "heavy" burden; a case is not moot if *any* effective relief may be granted. *Forest Guardians v. Johanns,* 450 F.3d 455, 461 (9th Cir. 2006) (citing *Nw. Envtl. Def. Ctr. v. Gordon,* 849 F.2d 1241, 1244 (9th Cir. 1988)).

In this appeal, the Tribe challenges the Forest Service's approval of four NOIs allowing mining activities in and along the Klamath River during the 2004 mining season. Pursuant to the Forest Service letters approving the four NOIs, they all expired on December 31, 2004. However, we conclude that the Tribe's claims are justiciable under the "capable of repetition, yet evading review" exception to the mootness doctrine. The exception applies when (1) the duration of the challenged action is too short to allow full litigation before it ceases or expires, and (2) there is a reasonable expectation that the plaintiffs will be subjected to the challenged action again. *Feldman v. Bomar,* 518 F.3d 637, 644 (9th Cir. 2008).

We have repeatedly held that similar actions lasting only one or two years evade review. *See, e.g., Natural Res. Def. Council, Inc. v. Evans,* 316 F.3d 904, 910 (9th Cir. 2003); *Alaska Ctr. for the Env't v. U.S. Forest Serv.,* 189 F.3d 851, 856 (9th Cir. 1999); *Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle,* 829 F.2d 933, 939 (9th Cir. 1987). Although the Forest Service mining regulations do not specify that NOIs must expire after a certain period, the record in this case reveals that the agency allows seasonal mining activities pursuant to NOIs for only one year at a time. Accordingly, the challenged NOI approvals evade review because they are too short in duration for a plaintiff to complete litigation before the mining activities end.

The controversy is capable of repetition because the Tribe has shown "a reasonable expectation that the Forest Service will engage in the challenged conduct again." *Alaska Ctr. for the Envt.,* 189 F.3d at 857. During the pendency of this appeal, and as recently as December 2011, the Forest Service has continued to approve NOIs allowing mining activities in coho salmon critical habitat along the Klamath River without consultation under *Section 7 of the ESA.* The Tribe has demonstrated a commitment to challenging these approvals. *See Biodiversity Legal Found. v. Badgley,* 309 F.3d 1166, 1174 (9th Cir. 2002) (finding a controversy capable of repetition where there is "a reasonable expectation that [the parties] will again litigate the issue").

The Forest Service and Miners argue that the controversy is moot because the California

legislature has imposed a statewide moratorium on suction dredge mining. *Cal. Fish & Game Code* § 5653.1 (2011). No suction dredge mining may occur in the Six Rivers or Klamath National Forests until the temporary state ban expires. The moratorium is a result of a state court lawsuit filed by the Karuk Tribe against the California Department of Fish and Game ("CDFG") in 2005. By its terms, the moratorium will expire on June 30, 2016, or when the CDFG certifies that five specified conditions have been satisfied, whichever is earlier. *Id.* § 5653.1(b). Among other conditions, CDFG must promulgate new state suction dredge mining regulations that "fully mitigate all identified significant environmental impacts." *Id.* § 5653.1(b)(4).

The moratorium does not moot this appeal for two reasons. First, the suction dredge moratorium does not prohibit other mining activities at issue in this case. Throughout this litigation, the Tribe has challenged the Forest Service's approval of NOIs to conduct not only suction dredge mining in the Klamath River, but also mining activities outside the stream channel, such as motorized sluicing. *See, e.g., Karuk I,* 379 F. Supp. 2d at 1085 ("Plaintiff's Second Amended Complaint seeks declaratory and injunctive relief arising from Defendants' allegedly improper management of suction dredge *and other mining operations* in waterways *and riparian areas* within the Klamath National Forest." (emphasis added)). District Rangers in the Klamath National Forest have continued to approve NOIs allowing these other mining activities in coho salmon critical habitat along the shores of the Klamath River. The

Forest Service argues that the Tribe has not established a cognizable injury resulting from these activities. However, the district court specifically held that the Tribe had standing based on "suction dredge mining *and other mining operations* occurring in *and along* the Klamath River and its tributaries." *Id.* at 1092 (emphasis added). Because the court found that these operations "could impact the Tribe's ability to enjoy the spiritual, religious, subsistence, recreational, wildlife, and aesthetic qualities of the areas affected by the mining operations," it concluded that "any alleged failure of the Forest Service to properly regulate mining operations could directly and adversely harm the Tribe and its members." *Id.* We agree.

Second, even if these other mining activities were not at issue, the state's moratorium on suction dredge mining is only temporary. *See City of Los Angeles v. Lyons,* 461 U.S. 95, 100-01, 103 S. Ct. 1660, 75 L. Ed. 2d 675 & n.4 (1983) (openended, temporary moratorium did not moot a claim for injunctive relief because "the moratorium by its terms is not permanent"); *W. Oil & Gas Ass'n v. Sonoma Cnty.,* 905 F.2d 1287, 1290-91 (9th Cir. 1990) (federal moratorium on oil drilling off the California coast did not moot a challenge to local land use ordinances that regulated related onshore facilities). The Forest Service and Miners argue that, once the moratorium expires, any future suction dredging in the Klamath River will occur under a revised state permitting regime. But changes to the state regulations are immaterial to the legal controversy at issue in this appeal. In *California*

Coastal Commission v. Granite Rock Co., 480 U.S. 572, 577-78, 107 S. Ct. 1419, 94 L. Ed. 2d 577 (1987), the plaintiff mining company's five-year Plan of Operations had expired during the course of litigation, and the Supreme Court recognized that the federal and state regulatory landscape might change before the company submitted a new Plan to the Forest Service. But the Court held that the controversy was capable of repetition yet evading review, and thus not moot, because "dispute would continue" over whether the state could enforce future permit conditions. *Id.* at 578. Similarly, here, despite any changes to the state suction dredge regulations, "dispute would continue" over whether the Forest Service can approve NOIs allowing mining activities in critical habitat of a listed species without consultation under the ESA. Declaratory judgment in the Tribe's favor would "ensure that the Forest Service . . . fulfills its duty under the ESA to consult." *Forest Guardians,* 450 F.3d at 462.

A case becomes moot on appeal if "'events have completely and irrevocably eradicated the effects of the alleged violation,'" and there is "'no reasonable . . . expectation that the alleged violation will recur.'" *Am. Cargo Transp., Inc. v. United States,* 625 F.3d 1176, 1179 (9th Cir. 2010) (quoting *Los Angeles Cnty. v. Davis,* 440 U.S. 625, 631, 99 S. Ct. 1379, 59 L. Ed. 2d 642 (1979)). Here, the state moratorium neither completely (because it does not prohibit other mining activities) nor irrevocably (because it is only temporary) eradicated the effects of the Forest Service's alleged ESA violations. The agency's continued approval of NOIs allowing mining

activities in coho salmon critical habitat along the Klamath River, without consultation under the ESA, makes clear that the alleged violations will recur.

Because we conclude that this appeal is not moot, we proceed to the merits.

B. Consultation Under the Endangered Species Act

We have described Section 7 as the "heart of the ESA." *W. Watersheds Project v. Kraayenbrink,* 632 F.3d 472, 495 (9th Cir. 2011). Section 7 requires federal agencies to ensure that none of their activities, including the granting of licenses and permits, will jeopardize the continued existence of listed species or adversely modify a species' critical habitat. *Babbitt v. Sweet Home Chapter,* 515 U.S. 687, 692, 115 S. Ct. 2407, 132 L. Ed. 2d 597 (1995) (citing 16 U.S.C. § 1536(a)(2)).

Section 7 imposes on all agencies a duty to consult with either the Fish and Wildlife Service or the NOAA Fisheries Service before engaging in any discretionary action that may affect a listed species or critical habitat. *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.,* 340 F.3d 969, 974 (9th Cir. 2003). The purpose of consultation is to obtain the expert opinion of wildlife agencies to determine whether the action is likely to jeopardize a listed species or adversely modify its critical habitat and, if so, to identify reasonable and prudent alternatives that will avoid the action's unfavorable impacts. *Id.* The consultation requirement reflects "a conscious decision by Congress to give endangered

species priority over the 'primary missions' of federal agencies." *Tenn. Valley Auth. v. Hill,* 437 U.S. 153, 185, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978).

Section 7(a)(2) of the ESA provides:

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

16 U.S.C. § 1536(a)(2) (emphasis added).

Regulations implementing *Section 7* provide:

> Each Federal agency shall review its actions at the earliest possible time to determine whether any action *may affect* listed species or critical habitat. If such a determination is made, formal consultation is required . . . .

50 C.F.R. § 402.14(a) (emphasis added).

We discuss the "agency action" and "may affect" requirements in turn.

1. Agency Action

Section 7 of the ESA defines agency action as "any action authorized, funded, or carried out by [a federal] agency." 16 U.S.C. § 1536(a)(2). The ESA implementing regulations provide:

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

50 C.F.R. § 402.02. There is "little doubt" that Congress intended agency action to have a broad definition in the ESA, and we have followed the Supreme Court's lead by interpreting its plain meaning "in conformance with Congress's clear intent." *Pac. Rivers Council v. Thomas,* 30 F.3d 1050, 1054-55 (9th Cir. 1994) (citing *Tenn. Valley Auth.,* 437 U.S. at 173).

The ESA implementing regulations limit Section 7's application to "'actions in which there is discretionary Federal involvement or control.'" *Nat'l*

Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 666, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007) (quoting 50 C.F.R. § 402.03). The Supreme Court explained that this limitation harmonizes the ESA consultation requirement with other statutory mandates that leave an agency no discretion to consider the protection of listed species. *Home Builders,* 551 U.S. at 665-66.

Our "agency action" inquiry is two-fold. First, we ask whether a federal agency affirmatively authorized, funded, or carried out the underlying activity. Second, we determine whether the agency had some discretion to influence or change the activity for the benefit of a protected species.

a. Affirmative Authorization

We have repeatedly held that the ESA's use of the term "agency action" is to be construed broadly. *W Watersheds Project v. Matejko,* 468 F.3d 1099, 1108 (9th Cir. 2006); *Turtle Island,* 340 F.3d at 974; Pac. Rivers, 30 F.3d at 1055. Examples of agency actions triggering Section 7 consultation include the renewal of existing water contracts, *Natural Res. Def. Council v. Houston,* 146 F.3d 1118, 1125 (9th Cir. 1998), the creation of interim management strategies, *Lane Cnty. Audubon Soc'y v. Jamison,* 958 F.2d 290, 293-94 (9th Cir. 1992), and the ongoing construction and operation of a federal dam, *Tenn. Valley Auth.,* 437 U.S. at 173-74. We have also required consultation for federal agencies' authorization of private activities, such as the approval and registration of pesticides, *Wash. Toxics*

Coal. v. Envtl. Prot. Agency, 413 F.3d 1024, 1031-33 (9th Cir. 2005), and the issuance of permits allowing fishing on the high seas, *Turtle Island,* 340 F.3d at 974.

An agency must consult under *Section 7* only when it makes an "affirmative" act or authorization. *Cal. Sportfishing Prot. Alliance v. Fed. Energy Regulatory Comm'n, 472* F.3d 593, 595, 598 (9th Cir. 2006); *Matejko,* 468 F.3d at 1108. Where private activity is proceeding pursuant to a vested right or to a previously issued license, an agency has no duty to consult under Section 7 if it takes no further affirmative action regarding the activity. *Cal. Sportfishing,* 472 F.3d at 595, 598-99; *Matejko,* 468 F.3d at 1107-08 ("'inaction' is not 'action' for section 7(a)(2) purposes"). Similarly, where no federal authorization is required for private-party activities, an agency's informal proffer of advice to the private party is not "agency action" requiring consultation. *Marbled Murrelet v. Babbitt,* 83 F.3d 1068, 1074-75 (9th Cir. 1996); *see also Sierra Club v. Babbitt,* 65 F.3d 1502, 1512 (9th Cir. 1995) (Section 7 applies to private activity "only to the extent the activity is dependent on federal authorization").

Here, the Forest Service's mining regulations and actions demonstrate that the agency affirmatively authorized private mining activities when it approved the four challenged NOIs. By regulation, the Forest Service must authorize mining activities before they may proceed under a NOI. The regulations require that a miner submit a NOI for *proposed* mining activities. 36 C.F.R. § 228.4(a) ("[A]

notice of intention to operate is required from any person proposing to conduct operations which might cause disturbance of surface resources."); *see also* 70 Fed. Reg. at 32728 (describing the requirement for "submission of a notice of intent to operate *before an operator conducts proposed operations*" (emphasis added)). By contrast, a miner conducting *de minimis* mining activities, such as gold panning or mineral sampling, may proceed without submitting anything to, or receiving anything from, the Forest Service. 36 C.F.R. § 228.4(a)(1), (2)(ii). When a miner submits a NOI, the regulations also require that the Forest Service inform the miner within 15 days whether the mining may proceed under the NOI or whether he must prepare a Plan of Operations instead. *Id.* § 228.4(a)(2)(iii). In other words, when a miner proposes to conduct mining operations under a NOI, the Forest Service either affirmatively authorizes the mining under the NOI or rejects the NOI and requires a Plan instead.

The actions of both the Forest Service and the miners in this case accord with the understanding that the agency affirmatively authorizes mining activities when it approves a NOI. The District Ranger's letter approving the New 49'ers NOI for the 2004 mining season stated, "You may begin your mining operations when you obtain all applicable State and Federal permits. This authorization expires December 31, 2004." The District Ranger's letters approving six NOIs for the 2010, 2011, and 2012 mining seasons stated, "I am allowing your proposed mining activities . . . under a NOI with the following conditions." Another District Ranger stated

in a letter rejecting a NOI for the 2004 season that he was "unable to allow your proposed mining operations . . . under a NOI." The miners also understood that they were seeking authorization. In one instance, the New 49'ers sent a letter stating: "We would like to make a correction to our Notice of Intent which was recently approved on May 25, 2004." In another instance, a miner amended her NOI to accommodate Forest Service protective criteria about cold water refugia. She wrote, "I totally disagree with these distances and believe that dredging is actually beneficial to fish survival, but I am willing to follow these recommendations in order to continue with my mining operations."

Cal. Sportfishing, *Matejko*, and *Marbled Murrelet* involved private-party activities that required no affirmative act or authorization by the agency. The private parties in those cases were not required to submit proposals to the agency, and the agency was not required to respond affirmatively to the private parties. Here, by contrast, a person proposing to conduct mining activities that might cause disturbance of surface resources must submit a NOI for approval, and the District Ranger must respond within 15 days. 36 C.F.R. § 228.4(a)(2)(iii) ("[T]he District Ranger will, within 15 days of [receiving a NOI], notify the operator whether a plan of operations is required."). The 2005 amendments to the mining regulations changed the wording slightly, stating that the District Ranger will notify the operator within 15 days "*if* approval of a plan of operations is required." *Id.* § 228.4(a)(2) (2011) (emphasis added). The Forest Service explained in its

commentary to the amendments that it intended no substantive change when it reworded the requirement. *See* 70 Fed. Reg. at 32,721. In its commentary, the Forest Service also quoted its earlier explanation that the District Ranger will notify the prospective miner within 15 days "as to *whether or not* an operating plan will be necessary." 70 Fed. Reg. at 32,728 (emphasis added); *see also id.* at 32,729-30 (describing the miner's possible remedies if a District Ranger does not "comply with the requirement to respond [to a NOI] within 15 days"). In other words, the Forest Service must decide whether or not to authorize mining pursuant to the NOI and affirmatively notify the miner of its decision either way.

The District Rangers affirmatively responded to all six non-withdrawn NOIs in the record for the 2004 mining season. The Forest Service approved four of them and denied two. The District Ranger for the Happy Camp District also affirmatively approved all six NOIs for the 2010, 2011, and 2012 mining seasons. There is no NOI in the record, other than the one that was withdrawn, that the Forest Service did not affirmatively act to approve or deny. Thus, the Forest Service's mandatory, affirmative response to a NOI clearly distinguishes this case from *Cal. Sportfishing,* 472 F.3d at 597-98, and *Matejko,* 468 F.3d at 1108-10, where we held that there is no "agency action" or duty to consult under the ESA if the agency takes no affirmative act. *Marbled Murrelet* is also inapposite because the Forest Service does not "merely provide[ ] advice" to a

prospective miner when the agency approves a NOI for proposed mining activities. 83 F.3d at 1074.

In *Siskiyou,* 565 F.3d at 554, we held that the Forest Service's approval of a NOI to conduct suction dredge mining constitutes "final agency action" under the APA. This holding confirms that a NOI approval is not merely advisory. Rather, it "'mark[s] the consummation of the agency's decision making process'" and is an action "'from which legal consequences will flow.'" *Hells Canyon Pres. Council v. U.S. Forest Serv.,* 593 F.3d 923, 930 (9th Cir. 2010) (quoting *Bennett v. Spear,* 520 U.S. 154, 177-78, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997)). Further evidence that the Forest Service authorizes, rather than advises, proposed mining activities when it approves a NOI is provided by the Forest Service's rejection of two NOIs in the record in this case. In one instance, the District Ranger wrote that he was "unable to allow your proposed mining operations . . . under a NOI." In the other, the District Ranger rejected the NOI because it did not comply with criteria for the protection of critical fisheries habitat. Finally, the Forest Service periodically inspects mining operations to determine if they are complying with the regulations. 36 C.F.R. § 228.7. During the 2004 mining season, the Forest Service monitored miners' compliance with the protective criteria set forth in the approved NOIs, something the agency would not do if the approval merely constituted unenforceable, nonbinding advice. Thus, unlike in *Marbled Murrelet,* 83 F.3d at 1074, where there was "no evidence" that the agency had the power to enforce the advice that it gave, here the record

indicates that the Forest Service can enforce the NOI conditions.

The Forest Service and the Miners contend that the underlying mining activities are authorized by the General Mining Law, rather than by the agency's approval of the NOIs. But private activities can and do have more than one source of authority, and more than one source of restrictions on that authority. *See* 50 C.F.R. § 402.02 (agency "action" under the ESA includes all private activities authorized "in part" by a federal agency). The Mining Law and the Organic Act give miners "a statutory right, not mere privilege," to enter the National Forests for mining purposes, 39 Fed. Reg. at 31,317, but Congress has subjected that right to environmental regulation. *See* 16 U.S.C. § 478 (miners entering federal forest lands "must comply with the rules and regulations covering such national forests"); *see also United States v. Locke,* 471 U.S. 84, 104-05, 105 S. Ct. 1785, 85 L. Ed. 2d 64 (1985) (the right to mine on public lands is a "unique form of property" over which the federal government "retains substantial regulatory power" (internal quotation marks omitted)). The Forest Service concedes that its approval of a Plan of Operations "authorizes" mining activities and constitutes an "agency action" under the ESA, even though the Mining Law presumably "authorized" those activities as well. The same logic extends to the agency's approval of a NOI.

The Forest Service contends that approval of a NOI is merely a decision not to regulate the proposed

mining activities. *See 70 Fed. Reg. at 32,720; id. at 32,728* ("a notice of intent to operate was not intended to be a regulatory instrument"). But the test under the ESA is whether the agency *authorizes*, funds, or carries out the activity, at least in part. 50 C.F.R. § 402.02 (emphasis added). As shown above, the Forest Service authorizes mining activities when it approves a NOI and affirmatively decides to allow the mining to proceed. Moreover, the record in this case demonstrates that the Forest Service controls mining activities through the NOI process, whether or not such control qualifies a NOI as a "regulatory instrument." As discussed below, the Forest Service formulated precise criteria for the protection of coho salmon, communicated those criteria to prospective miners, and approved the miners' activities under a NOI only if they strictly conformed their mining to the specified criteria. The Forest Service also monitored the miners' compliance with those criteria.

Finally, the Forest Service and the Miners point to our holding in *Sierra Club v. Penfold,* 857 F.2d 1307 (9th Cir. 1988), which involved Bureau of Land Management ("BLM") mining regulations similar to the Forest Service regulations at issue in this appeal. In *Penfold*, we held that BLM's review of "notice" mining operations did not constitute a "major federal action" triggering the need for an environmental assessment under NEPA. *Id.* at 1313-14. Although the "major federal action" standard under NEPA is similar to the more liberal "agency action" standard under the ESA, *Marbled Murrelet,* 83 F.3d at 1075, the terms are not interchangeable. In *Penfold,* 857 F.2d at 1313-14, we held that BLM's

review of notice mines *was* a "federal action" -- albeit, a "marginal" instead of a "major" action. Under Section 7 of the ESA, a federal agency action need not be "major" to trigger the duty to consult. It need only be an "agency action." Thus, *Penfold* cuts against rather than in favor of the Forest Service and the Miners.

In sum, the Forest Service's approval of the four challenged NOIs constituted agency action under Section 7 of the ESA.

b. Discretionary Involvement or Control

The ESA implementing regulations provide that *Section 7* applies only to actions "in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. There is no duty to consult for actions "that an agency is *required* by statute to undertake once certain specified triggering events have occurred." *Home Builders,* 551 U.S. at 669 (emphasis in original); *id.* at 672-73 (no duty to consult where Clean Water Act required Environmental Protection Agency ("EPA") to transfer regulatory authority to a state upon satisfaction of nine specified criteria). However, to avoid the consultation obligation, an agency's competing statutory mandate must require that it perform specific nondiscretionary acts rather than achieve broad goals. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.,* 524 F.3d 917, 928-29 (9th Cir. 2008). An agency "cannot escape its obligation to comply with the ESA merely because it is bound to comply with another statute that has consistent,

complementary objectives." *Wash. Toxics,* 413 F.3d at 1032. The competing statutory objective need only leave the agency "some discretion." *Houston,* 146 F.3d at 1126.

To trigger the ESA consultation requirement, the discretionary control retained by the federal agency also must have the capacity to inure to the benefit of a protected species. *Turtle Island,* 340 F.3d at 974-75; *Ground Zero Ctr. for Nonviolent Action v. U.S. Dep't of the Navy,* 383 F.3d 1082, 1092 (9th Cir. 2004) (no duty to consult where Navy lacked discretion to cease missile operations for the protection of listed species). If an agency cannot influence a private activity to benefit a listed species, there is no duty to consult because "consultation would be a meaningless exercise." *Sierra Club,* 65 F.3d at 1508-09 (no duty to consult for approval of logging roads where, pursuant to a prior right-of-way agreement, BLM retained discretion over only three specified criteria, none of which related to protecting listed species); *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.,* 255 F.3d 1073, 1081-82 (9th Cir. 2001) (no duty to reinitiate consultation for previously issued permits where Fish and Wildlife Service lacked discretion to add protections for newly listed species). The relevant question is whether the agency *could* influence a private activity to benefit a listed species, not whether it *must* do so. *Turtle Island,* 340 F.3d at 977.

Here, the Forest Service's mining regulations and actions demonstrate that the decision whether to approve a NOI is a discretionary determination

through which the agency can influence private mining activities to benefit listed species. In *Siskiyou,* 565 F.3d at 548, we held that the applicable mining regulation "confers discretionary authority on district rangers" to determine whether mining activities may proceed under a NOI. We noted that the Forest Service's commentary to the 2005 amendments "emphasize[d] the discretionary elements of the regulation." *Id.* at 557 n.11. In that commentary, the Forest Service acknowledged that it has "'broad discretion to regulate the manner in which mining activities are conducted on the national forest lands.'" 70 Fed. Reg. at 32,720 (quoting *Freese v. United States,* 6 Cl. Ct. 1, 14 (1984), aff'd mem., 770 F.2d 177 (Fed. Cir. 1985)).

The agency's exercise of discretion under the mining regulations also may influence the mining activities to protect a listed species. The overriding purpose of the regulations is "to minimize [the] adverse environmental impacts" of mining activities on federal forest lands. 36 C.F.R. § 228.1. The touchstone of the agency's discretionary determination is the likelihood that mining activities will cause significant disturbance of surface resources, which include fisheries and wildlife habitat. *Id.* §§ 228.4(a), 228.8(e); *see also Siskiyou,* 565 F.3d at 551 ("[T]his regulation . . . vests discretion in the district ranger to determine if the mining operation 'will likely cause significant disturbance of surface resources.'"). Thus, the Forest Service can exercise its discretion to benefit a listed species by approving or disapproving NOIs based on whether the proposed mining activities satisfy

particular habitat protection criteria. The agency can reject a NOI and require that the prospective miner instead submit a Plan of Operations, under which the Forest Service can impose additional habitat protection conditions. 36 C.F.R. §§ 228.4(e), 228.5(a)(3).

The record in this case reveals at least three ways in which the Forest Service exercised discretion when deciding whether, and under what conditions, to approve NOIs for mining activities in the Klamath and Six Rivers National Forests.

First, the Forest Service exercised discretion by formulating criteria for the protection of coho salmon habitat. Those criteria governed the approval or denial of NOIs. As described in detail above, District Ranger Vandiver of the Happy Camp District prepared for the 2004 mining season by meeting with Forest Service biologists Bemis and Grunbaum. After consulting with them, Vandiver formulated criteria for protecting coho salmon habitat from the effects of suction dredge mining conducted pursuant to NOIs. He specified by name each of the tributaries to the Klamath River that provided cold water refugia that should be protected, he specified the maximum number of dredges per mile on the river and on its tributaries, and he required that tailings be raked back into dredge holes.

Once Vandiver had exercised his discretion to formulate these specific criteria, they became conditions with which any prospective miner

submitting a NOI in the Happy Camp District had to comply. For example, Nida Johnson amended her NOI to refrain from dredging in a cold water refugia near the mouth of Independence Creek. But she made clear that she did so only because, absent compliance with the condition imposed by Vandiver, she would not be allowed to engage in mining under a NOI. Similarly, a week after Vandiver had communicated the criteria to the New 49'ers, that group submitted an eight-page, single-spaced NOI for mining in the Happy Camp District that complied with the three criteria. Vandiver approved the NOI the next day. All four NOIs approved in the Happy Camp District complied with Van-diver's specified criteria.

Second, the Forest Service exercised discretion by refusing to approve a detailed NOI submitted by the New 49'ers for mining activities in the Orleans District of the Six Rivers National Forest. Acting Forest Supervisor Metz refused to approve the NOI because, in his view, it provided insufficient protection of fisheries habitat: a cold water refugia at the mouth of a particular creek was not mentioned in the NOI, and there was insufficient mitigation of the dangers posed by loose tailings piles left by the dredges. The New 49'ers submitted a new NOI, but then withdrew it five days later. The New 49'ers' representative wrote that despite "substantial . . . dialog," the Forest Service's protective conditions meant that "there are too many sensitive issues for us to try and manage a group mining activity along the Salmon River at this time."

Third, the Forest Service exercised discretion when it applied different criteria for the protection of fisheries habitat in different districts of the Klamath National Forest. District Ranger Vandiver developed and applied very specific protective criteria for granting or denying NOIs in the Happy Camp District. Different protective criteria for NOIs were developed and applied in the Scott River District. There is nothing in the record to tell us how the criteria were developed in the Scott River District. But it is clear that those criteria were different, at least in their application, from those in the Happy Camp District. The New 49'ers submitted a NOI to District Ranger Haupt in the Scott River District that complied in full with one of the criteria applied in the Happy Camp District by specifying the maximum number of dredges per mile. The NOI complied, to some degree, with a second Happy Camp criterion by committing to work with the Forest Service to identify cold water refugia. But the NOI did not promise to observe any particular cold water refugia and did not promise to stay a specified distance from any creek mouth. Finally, the NOI did not comply at all with the third Happy Camp criterion, for it did not mention raking tailings piles back into dredge holes. Scott River District Ranger Haupt denied the NOI for reasons unrelated to these three criteria, and he did not include these criteria in the approved Plan of Operations. Discretion is defined as "'the power or right to decide or act according to one's own judgment; freedom of

judgment or choice.'" *Home Builders,* 551 U.S. at 668 (quoting Random House Dictionary of the English Language 411 (unabridged ed. 1967)). District Rangers Vandiver and Haupt each exercised their own judgment by formulating and applying different criteria when deciding whether to approve or deny NOIs in their districts. This is the very definition of discretion.

Under our established case law, there is "agency action" sufficient to trigger the ESA consultation duty whenever an agency makes an affirmative, discretionary decision about whether, or under what conditions, to allow private activity to proceed. As to all four NOIs challenged in this appeal, the Forest Service made an affirmative, discretionary decision whether to allow private mining activities to proceed under specified habitat protection criteria. Accordingly, we hold that the Forest Service's approval of the NOIs constituted discretionary agency action within the meaning of Section 7 of the ESA.

2. May Affect Listed Species or Critical habitat

An agency has a duty to consult under Section 7 of the ESA for any discretionary agency action that "may affect" a listed species or designated critical habitat. *Turtle Island,* 340 F.3d at 974 (citing 50 C.F.R. § 402.14(a)). An agency may avoid the consultation requirement only if it determines that

its action will have "no effect" on a listed species or critical habitat. *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.,* 100 F.3d 1443, 1447-48 (9th Cir. 1996). Once an agency has determined that its action "may affect" a listed species or critical habitat, the agency must consult, either formally or informally, with the appropriate expert wildlife agency. If the wildlife agency determines during informal consultation that the proposed action is "not likely to adversely affect any listed species or critical habitat," formal consultation is not required and the process ends. 50 C.F.R. § 402.14(b)(1). Thus, actions that have any chance of affecting listed species or critical habitat -- even if it is later determined that the actions are "not likely" to do so -- require at least some consultation under the ESA.

We have previously explained that "may affect" is a "relatively low" threshold for triggering consultation. *Cal. ex rel. Lockyer v. U.S. Dep't of Agric.,* 575 F.3d 999, 1018 (9th Cir. 2009). "'*Any possible effect*, whether beneficial, benign, adverse or of an undetermined character,'" triggers the requirement. *Id.* at 1018-19 (quoting 51 Fed. Reg. 19,926, 19,949 (June 3, 1986)) (emphasis in *Lockyer*). The Secretaries of Commerce and the Interior have explained that "[t]he threshold for formal consultation must be set sufficiently low to allow Federal agencies to satisfy their duty to 'insure'" that

their actions do not jeopardize listed species or adversely modify critical habitat. 51 Fed. Reg. at 19,949.

Whether the mining activities approved by the Forest Service in this case "may affect" critical habitat of a listed species can almost be resolved as a textual matter. By definition, mining activities that require a NOI "might cause" disturbance of surface resources. 36 C.F.R. § 228.4(a). "Surface resources" include underwater fisheries habitat. *Id.* at § 228.8(e); 70 Fed. Reg. at 32,718 ("Fisheries habitat, of course, can consist of nothing other than water, streambeds, or other submerged lands."). The Forest Service approved NOIs to conduct mining activities in and along the Klamath River system, which is designated critical habitat for listed coho salmon. 64 Fed. Reg. at 24,049. If the phrase "might cause" disturbance of fisheries habitat is given an ordinary meaning, it follows almost automatically that mining pursuant to the approved NOIs "may affect" critical habitat of the coho salmon. Indeed, the Forest Service does not dispute that the mining activities in the Klamath River system "may affect" the listed coho salmon and its critical habitat.

The Miners, however, contend that the record is "devoid of any evidence" that the mining activities may affect coho salmon. The Miners make two arguments in support of their contention. Neither argument withstands scrutiny.

First, the Miners argue that there is no evidence "that even a single member of any listed species would be 'taken' by reason" of the mining activities approved in the NOIs. "Take" has a particular definition under the ESA. 16 U.S.C. § 1532(19) ("The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."); *see also* 50 C.F.R. § 17.3 (further defining "harm" and "harass"). Whether mining activities effectuate a "taking" under *Section 9 of the ESA* is a distinct inquiry from whether they "may affect" a species or its critical habitat under Section 7. *See Sweet Home Chapter,* 515 U.S. at 703 ("Section 7 imposes a broad, affirmative duty to avoid adverse habitat modifications that *§ 9* does not replicate . . . ."). The Miners also fault the Tribe for failing to identify "so much as a single endangered fish or fish egg ever injured by this [mining] activity." But where, as here, a plaintiff alleges a procedural violation under Section 7 of the ESA, as opposed to a substantive violation under Section 9, the plaintiff need not prove that a listed species has in fact been injured. *See Thomas v. Peterson,* 753 F.2d 754, 765 (9th Cir. 1985) ("It is not the responsibility of the plaintiffs to prove, nor the function of the courts to judge, the effect of a proposed action on an endangered species when proper procedures have not been followed."). The plaintiff need only show, as the Tribe has done here, that the challenged action "may affect" a listed species or its critical habitat.

Second, the Miners argue that Vandiver's consultation with Forest Service biologists, and the resulting habitat protection criteria, "assured" that there would be "no impact whatsoever on listed species." This argument cuts against, rather than in favor of, the Miners. The fact that District Ranger Vandiver formulated criteria to mitigate effects of suction dredging on coho salmon habitat does not mean that the "may affect" standard was not met. Indeed, that Vandiver consulted with Forest Service biologists in an attempt to reduce a possible adverse impact on coho salmon and their habitat suggests exactly the opposite. After Vandiver approved a NOI to conduct mining activities in and along the Klamath River for the 2004 mining season, Forest Service biologist Bemis sent a "Note to the File" stating that the miners' compliance with Vandiver's specified criteria should "reduce" -- not eliminate -- "the impacts to anadromous fisheries on the Happy Camp Ranger District." The agency has never suggested that the approved mining activities would have "no effect" on coho salmon or their critical habitat. *See Sw. Ctr. for Biological Diversity,* 100 F.3d at 1447.

Moreover, the record in this appeal includes ample evidence that the mining activities approved under the NOIs in the Happy Camp District "may affect" coho salmon and their critical habitat. Coho salmon in the Klamath River system were listed as threatened in 1997, and the river and adjacent riparian zones were designated as critical habitat two years later. In listing the coho salmon, the Fisheries Service noted that the salmon population

was "very depressed." 62 Fed. Reg. at 24,588. The Fisheries Service concluded that "human-induced impacts," such as over-harvesting, hatchery practices, and habitat modification including mining, had played a significant role in the decline and had "reduced the coho salmon populations' resiliency" in the face of natural challenges. *Id.* at 24,591. The Fisheries Service also concluded that "existing regulatory mechanisms are either inadequate or not implemented well enough to conserve" the salmon. *Id.* at 24,588.

The record also includes information about the effects of suction dredge mining that Forest Service biologist Grunbaum provided at an April 2004 meeting. Grunbaum wrote that relatively few studies of suction dredging had been performed, but "the majority . . . showed that suction dredging can adversely affect aquatic habitats and biota." The effects varied across ecosystems; in some, "dredging may harm the population viability of threatened species." Grunbaum summarized specific potential adverse effects. First, "[e]ntrainment by suction dredge can directly kill and indirectly increase mortality of fish -- particularly un-eyed salmonid eggs and early developmental stages." Second, disturbance from suction dredging can kill the small invertebrates that larger fish feed on, or alter the invertebrates' environment so that they become scarce. Third, destabilized streambeds can "induc[e] fish to spawn on unstable material," and fish eggs and larvae can be "smothered or buried." Fourth, because the streams the salmon occupy are already at "near lethal temperatures," even "minor"

disturbances in the summer can harm the salmon. Fifth, juvenile salmon could be "displaced to a less optimal location where overall fitness and survival odds are also less." Finally, a long list of other factors -- disturbance, turbidity, pollution, decrease in food base, and loss of cover associated with suction dredging -- could combine to harm the salmon.

We conclude that the mining activities approved by the Forest Service in this case "may affect" the listed coho salmon and its critical habitat. Indeed, as a textual matter, mining activities in designated critical habitat that require approval under a NOI likely satisfy the low threshold triggering the duty to consult under the ESA. *See* 64 Fed. Reg. at 24,050 "designation of critical habitat provides Federal agencies with a clear indication as to when consultation under section 7 of the ESA is required").

3. Burden on the Forest Service

The burden imposed by the consultation requirement need not be great. Consultation under the ESA may be formal or informal. 50 C.F.R. §§ 402.13, 402.14. Formal consultation requires preparation of a biological opinion detailing how the agency action affects listed species or their critical habitat, but informal consultation need be nothing more than discussions and correspondence with the appropriate wildlife agency. *Id.* § 402.02. If the wildlife agency agrees during informal consultation that the agency action "is not likely to adversely affect listed species or critical habitat," formal

consultation is not required and the process ends. *Id.* § 402.13(a). Thus, whereas approval of a Plan of Operations -- for mining activities that "will likely cause significant disturbance of surface resources" -- may often require formal consultation and preparation of a biological opinion, informal consultation may often suffice for approval of a NOI.

In fact, District Ranger Vandiver voluntarily initiated a type of informal consultation in this case. He consulted with Forest Service biologists Bemis and Grunbaum in formulating detailed protective criteria that would avoid the likelihood of significant habitat disturbance caused by suction dredge mining in the Happy Camp District. The problem is that Vandiver consulted with employees of the Forest Service, rather than the Fish and Wildlife Service or NOAA Fisheries Service. Congress made a conscious decision in the ESA to require that federal agencies consult with the expert wildlife agencies, not merely with biologists within their own agencies, about the adverse effects that their actions might have on listed species. If Vandiver had consulted with employees of the federal wildlife agencies, and those agencies agreed that the specified protective criteria would avoid the likelihood of adverse effects on coho salmon habitat, that consultation would have sufficed under the ESA. *See* 50 C.F.R. § 402.13. Any NOIs approved under such protective criteria likely would have required no further consultation. *Cf. Tex. Indep. Producers & Royalty Owners Ass'n v. Envtl. Prot. Agency,* 410 F.3d 964, 979 (7th Cir. 2005) (because EPA informally consulted before issuing a "general permit" authorizing private operators to

discharge stormwater according to specified criteria, the agency had no duty to consult when operators submitted individual NOIs indicating their compliance with the general permit).

Conclusion

There is "agency action" under Section 7 of the ESA whenever an agency makes an affirmative, discretionary decision about whether, or under what conditions, to allow private activity to proceed. In approving the NOIs challenged in this case, the Forest Service made affirmative, discretionary decisions to authorize mining activities under specified protective criteria. By definition, mining activities requiring a NOI are those that "might cause" disturbance of surface resources, including underwater fisheries habitat. The Forest Service does not dispute that the mining activities it approved in this case "may affect" critical habitat of coho salmon in the Klamath River system. The Forest Service therefore had a duty under Section 7 of the ESA to consult with the relevant wildlife agencies before approving the NOIs.

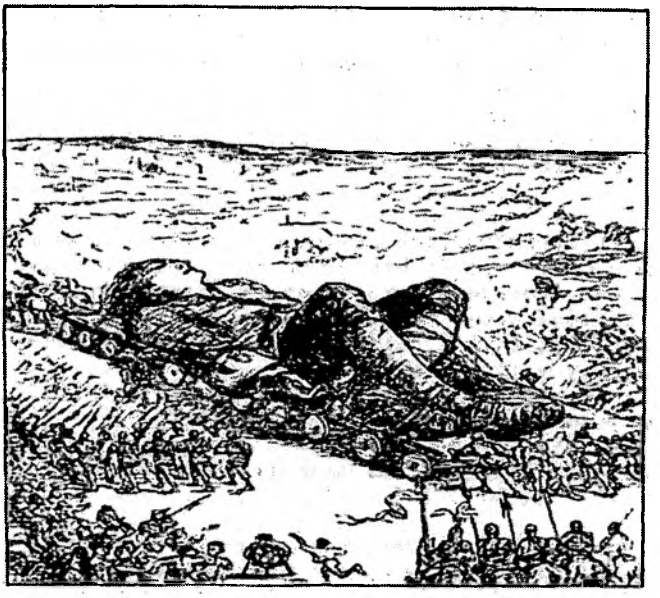
We reverse the district court's denial of summary judgment on the Karuk Tribe's ESA claim and remand for entry of judgment in favor of the Tribe.

REVERSED and REMANDED.

DISSENT BY: Milan D. Smith, Jr.

DISSENT

M. SMITH, Circuit Judge, with whom KOZINSKI, Chief Judge, joins, and with whom IKUTA and MURGUIA, Circuit Judges, join as to Parts I through VI, dissenting:



I attempted to rise, but was not able to stir: for, as I happened to lie on my back, I found my arms and legs were strongly fastened on each side to the ground; and my hair, which was long and thick, tied down in the same manner. I likewise felt several slender ligatures across my body, from my armpits to my thighs. I could only look

> *upwards; the sun began to grow hot, and the light offended my eyes.*

--Jonathan Swift, Gulliver's Travels, Chapter 1.

Here we go again.

Until today, it was well-established that a regulatory agency's "'inaction' is not 'action'" that triggers the Endangered Species Act's (ESA) arduous interagency consultation process. *W. Watersheds Project v. Matejko,* 468 F.3d 1099, 1108 (9th Cir. 2006). Yet the majority now flouts this crystal-clear and common sense precedent, and for the first time holds that an agency's decision *not to act* forces it into a bureaucratic morass.

In my view, decisions such as this one, and some other environmental cases recently handed down by our court (*see* Part VII, *infra*), undermine the rule of law, and make poor Gulliver's situation seem fortunate when compared to the plight of those entangled in the ligatures of new rules created out of thin air by such decisions.

I. Mining in national forests

The right to mine on national lands is established by the Mining Act of 1872, 30 U.S.C. § 21 et seq.:

> 'Under the provisions of the Mining Act, an individual may enter and explore land in the public domain in search of

> valuable mineral deposits. After minerals are discovered, the claimant may file a "mining claim" with the Bureau of Land Management (BLM), which if approved, entitles the claimant to the right of exclusive possession of that claim, as long as the requirements of the Mining Act are met. Although ownership of a mining claim does not confer fee title to the claimant, the claimant does have the right to extract all minerals from the claim without paying royalties to the United States.

Swanson v. Babbitt, 3 F.3d 1348, 1350 (9th Cir. 1993).

The Mining Act's permissive regime extends to national forests as well. The 1897 act that created the national forests and provided rules governing those forests' use, *see* Organic Administration Act, 16 U.S.C. §§ 473-78, emphasized that its provisions do not "prohibit 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.

When the U.S. Forest Service issued the mining regulations at issue in this case, the Service emphasized "that prospectors and miners have *a statutory right, not mere privilege*, under the 1872 mining law and the Act of June 4, 1897, to go upon

and use the open public domain lands of the National Forest System for the purposes of mineral exploration, development and production." *National Forests Surface Use Under U.S. Mining Laws,* 39 Fed. Reg. 31,317, at 31,317 (Aug. 28, 1974) (emphasis added).

II. The regulatory scheme

This case turns on whether a Forest Service District Ranger's receipt of, consideration of, and response to a miner's notice of intention to operate--a Notice of Intent--is an *agency action* that authorizes mining activities on national forests. This distinction is critical because the ESA requires federal agencies to consult with the Fish and Wildlife Service or NOAA Fisheries Service before taking "any action authorized, funded, or carried out by such agency" that might harm a listed species. 16 U.S.C. § 1536(a)(2).

The ESA's implementing regulations (promulgated by the Secretaries of Commerce and the Interior) offer a list of examples of agency action, including (in relevant part) "the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid." 50 C.F.R. § 402.02 (2004).

In this appeal, Plaintiff-Appellant asserts a single claim challenging the District Ranger's failure to consult with the Fish and Wildlife Service or NOAA Fisheries Service when deciding to allow certain suction dredge mining to proceed under a Notice of Intent rather than a Plan of Operations.

The dispute here is narrow: specifically, does the Forest lK Service's handling of Notices of Intent constitute an "authorization" of private mining activity under the ESA?

To answer this question, one must have a clear understanding of the operative regulations. In recognition of the "statutory right, not mere privilege" to mine in national forests, the Forest Service has carefully tailored its regulations to balance environmental goals with miners' unique pre-existing rights of access to national forests. *See* National Forests Surface Use, 39 Fed. Reg. 31,317 (Aug. 28, 1974). These regulations apply only to mining activities on Forest Service lands. 36 C.F.R. § 228.2 (2004).[1]

All mining "operations" must "be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest surface resources." *Id.* § 228.8(e); *see also id.* § 228.3(a) (defining "operations" broadly for purposes of these regulations). This environmental-impact provision requires compliance with federal air and water quality standards, as well as (among other things) the use of "all practicable measures to maintain and protect fisheries and wildlife habitat which may be affected by the operations." *Id.* § 228.8. Forest Service officials must "periodically inspect operations to determine if the operator is complying with the[se]

[1] Because the challenged Notice of Intent decisions were made in 2004, I rely upon the 2004 version of the regulation.

regulations," and inform non-compliant miners how to bring their activities into compliance. *Id.* § 228.7.

In addition to these generally applicable limitations on mining in the national forests, the Forest Service imposes additional requirements depending on the mining activities' potential environmental impact. For purposes of these additional requirements, mining activities are divided into three categories: activities that "will not," "might," and "will likely" lead to "significant disturbance of surface resources." *Id.* § 228.4(a), (a)(1)(v).

For activities that "will not" significantly disturb surface resources--including "occasionally remov[ing] small mineral samples or specimens," and "remov[ing] . . . a reasonable amount of mineral deposit for analysis and study"--persons may freely enter the national forest to conduct those activities. *Id.* § 228.4(a)(1), (a)(2)(ii), (a)(2)(iii).

For more substantial mining activities that "might" or "will likely" cause resource disturbance, miners must file a "notice of intention to operate"--a Notice of Intent, which is the focus of this appeal. *Id.* § 228.4(a).[2] The Notice of Intent is a straightforward document, requiring miners to list: (1) the name, address, and telephone number of the operator; (2) the area involved; (3) the nature of the proposed operations; (4) the route of access to the area; and (5) the method of transport to be used. U.S. Forest Serv., Notice of Intent Instructions: 36 CFR 228.4(a) - Locatable Minerals, http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsm9_020952.pdf (last visited May 4, 2012); *see also* 36 C.F.R. § 228.4(a)(2)(iii) (2004).

Once "a notice of intent is filed, the District Ranger will, within 15 days of receipt thereof, notify the operator whether a plan of operations is required." 36 C.F.R. § 228.4(a)(2)(iii) (2004). A Plan of Operations is required if the proposed mining

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[2] For purposes of this dissent, it is unnecessary to resolve whether suction dredge mining "may affect" Coho salmon. My primary disagreement with the majority stems from its finding of an agency "action."

activities "will likely" cause significant surface resource disturbance. *Id.* § 228.4(a). In contrast, if "significant disturbance is *not* likely," then a Plan of Operations "is *not required*." *Siskiyou Reg'l Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545, 557 (9th Cir. 2009) (emphasis in original). "[M]ining activity that *might* cause disturbance of surface resources, yet [is] not *likely to do so* . . . require[s] only a notice of intent under 36 C.F.R. § 228.4(a)." *Id.* (emphasis in original).

If the District Ranger requests a Plan of Operations, the Plan must contain "[i]nformation sufficient to describe or identify the type of operations proposed and how they would be conducted, the type and standard of existing and proposed roads or access routes, the means of transportation used . . ., the period during which the proposed activity will take place, and measures to be taken to meet the requirements for environmental protection in § 228.8." 36 C.F.R. § 228.4(c)(3) (2004). The District Ranger must "complet[e] . . . an environmental analysis in connection with each proposed operating plan," *id.* § 228.4(f), and within thirty days of submission (or ninety days if necessary), either "approve[ ] the plan" or "[n]otify the operator of any changes in, or additions to, the plan of operations deemed necessary to meet the

purpose of the regulations in this part." *Id.* § 228.5(a)(1), (3).[3]

III. Forest Service's interpretation of its regulations

The majority asserts that the Forest Service's *decision* not to require a Plan of Action for the mining activities described in a Notice of Intent constitutes an *implicit authorization* of those mining activities, therefore equating the Forest Service's "decision" with an agency "authorization" under the ESA.

The Forest Service never contemplated such a result. The Forest Service's explanation of its mining regulations establishes that a Notice of Intent is used as an information-gathering tool, not an application for a mining permit. Consistent with the Forest Service's interpretations, the Ranger's response to a Notice of Intent is analogous to the Notice of Intent itself, and provides merely notice of the agency's review decision. It is not a permit, and does not impose regulations on private conduct as does a Plan of Operations. The Forest Service interprets the Notice of Intent as an information-gathering tool used to decide whether a miner should file a Plan of Operations:

> "[T]he requirement for prior submission of a notice of intent to operate *alerts* the

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[3] In some cases, the District Ranger will inform the miner that a Plan of Operations is unnecessary, *id.* § 228.5(a)(2), or require the filing of an environmental statement with the Council on Environmental Quality, *id.* § 228.5(a)(5).

> Forest Service that an operator proposes to conduct mining operations on [National Forest Service] lands which the operator believes might, but are not likely to, cause significant disturbance of [National Forest Service] surface resources and *gives the Forest Service the opportunity to determine* whether the agency agrees with that assessment such *that the Forest Service will not exercise its discretion to regulate those operations.*

Clarification as to When a Notice of Intent To Operate and/or Plan of Operation Is Needed for Locatable Mineral Operations on National Forest System Lands, 70 Fed. Reg. 32,713, at 32,720 (June 6, 2005) (emphasis added).[4]

The Forest Service adds that the Notice of Intent process was designed to be "a *simple notification procedure*" that would

> "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

[4] I rely on the Forest Service's 2005 clarification of its mining rules because this document contains the clearest and most thorough explanation of the history and application of these regulations. The 2005 clarification did not materially change the operative provisions. 70 Fed. Reg. at 32,727-28.

> avoided thereby . . . . [The 1974 notice-and-comment rulemaking] record makes it clear that *a notice of intent to operate was not intended to be a regulatory instrument; it simply was meant to be a notice* given to the Forest Service by an operator which describes the operator's plan to conduct operations on [National Forest Service] lands. Further, this record demonstrates that the intended trigger for a notice of intent to operate is reasonable uncertainty on the part of the operator as to the significance of the potential effects of the proposed operations. In such a circumstance, *the early alert provided by a notice of intent to operate* would advance the interests of both the Forest Service and the operator by *facilitating resolution of the question*, "Is submission and approval of a plan of operations required before the operator can commence proposed operations?"

Id. at 32,728 (emphasis added).

Under the Forest Service's regulations, a Notice of Intent is exactly what its name implies: a *notice* from the miner, not a *permit* or *license* issued by the agency. It is merely a precautionary agency notification procedure, which is at most a preliminary step prior to agency action being taken.

IV. Precedent distinguishing "action" from "inaction"

Our precedent establishes that there is a significant difference between a *decision not to act* and an *affirmative authorization.* These cases distinguish between "agency action" and "agency inaction," and illustrate the meaning of the operative regulation's reference to "licenses," "permits," and the like. 50 C.F.R. § 402.02 (2004). In the pertinent cases involving "agency action," the agency takes an *affirmative step* that allows private conduct to take place; without the agency's affirmative action (such as issuing a permit, license, or contract), the private conduct could not occur.[5] In the pertinent cases involving agency *inaction*, private conduct may take place until the agency takes affirmative steps to intervene. The relevant case law requires us to identify the default position: if the agency does nothing, can the private activity take place? If the activity can proceed regardless of whether the agency takes any actions, then the activity does not involve the agency's "granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid" as required for "agency action" under the regulations. *Id.*

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[5] For example, *Turtle Island Restoration Network v. National Marine Fisheries Service,* 340 F.3d 969 (9th Cir. 2003), involved an agency's issuance of permits to fishing vessels. The operative statutory regime "*re-quire[d]* United States vessels to obtain permits to engage in fishing operations on the high seas . . . ." *Id. at 973* (emphasis added). In other words, absent an agency permit, the vessels could not undertake their fishing operations.

Western Watersheds Project involved the BLM's regulation (or, more accurately, non-regulation) of private parties' diversions of water that were done pursuant to those parties' pre-existing rights-of-way. 468 F.3d at 1103. Similar to this case, nineteenth-century federal laws recognized those rights-of-way, *id. at 1103-04*, but the BLM retained the power to regulate diversions that were more than "'substantial devia-tion[s]'" from prior uses, *id.* at 1109 (quoting 43 C.F.R. § 2803.2(b) (2004) (promulgated in 1986)). We assumed that the BLM had the power to regulate the diversions in dispute, and held that the BLM's failure to exercise this power was not an "agency action" triggering ESA consultation obligations. *Id.* at 1108-09. We explained that agency "'inaction' is not 'action' for *section 7(a)(2)* purposes." *Id.* at 1108. "[T]he BLM did not *fund* the diversions, it did not *issue* permits, it did not *grant* contracts, it did not *build* dams, nor did it *divert* streams." *Id.* at 1109 (emphasis in original). Rather, the BLM made a decision not to regulate, which was not "agency action" under the ESA. We explained that "the duty to consult is triggered by affirmative actions." *Id.* at 1102; *see also Marbled Murrelet v. Babbitt,* 83 F.3d 1068, 1070 (9th Cir. 1996) ("Protection of endangered species would not be enhanced by a rule which would require a federal agency to perform the burdensome procedural tasks mandated by *section 7* simply because it advised or consulted with a private party."); *Cal. Sportfishing Protection Alliance v. FERC,* 472 F.3d 593, 595, 598 (9th Cir. 2006) (holding that "the agency[ ] ha[d] proposed no affirmative act that would trigger the consultation requirement" for operations of a

hydroelectric plant that were authorized by an earlier and ongoing permit, even though the agency was empowered to "unilaterally institute proceedings to amend the license if it so chose"). Predictably, the majority relegates discussion of this precedent to a brief citation and entirely fails to distinguish it from this case. Moreover, the majority does not point to a *single* opinion in which any court has held that such inaction triggers the ESA's consultation requirements.

Granted, *Western Watersheds Project* addressed both prongs of the ESA's "agency action" requirement: first, whether there is agency action as defined in 50 C.F.R. § 402.02, and second, whether that agency action is "discretionary," 50 C.F.R. § 402.03. Here, I address only the "action" requirement, because the agency has discretion when deciding whether or not to act. But the regulations and case law show that these two requirements--action and discretion--are conjunctive, not disjunctive. If the agency has discretion to act but decides not to act, then there is no agency action under the ESA.

An almost identical regulatory scheme was at issue in *Sierra Club v. Penfold,* 857 F.2d 1307 (9th Cir. 1988). Under 43 C.F.R. § 3809 (1986), the BLM uses a three-tiered approach to regulating placer mining on federal lands within its jurisdiction. First are "casual" use mines, for which no notice or approval is required. 857 F.2d at 1309. Second are "notice" mines, for which no BLM approval is required but for which the miner must submit basic

information to the BLM about the proposed operations at least fifteen days prior to commencing them. *Id.* BLM monitors "casual" and "notice" mining operations for compliance. *Id.* at 1310. Third are "plan" mines, which must be approved by the BLM and subjected to environmental assessment before the operation may proceed. *Id.* at 1309.

The BLM's approach to "casual," "notice," and "plan" mining operations follows the same structure as the Forest Service's approach to mining activities that "are not likely to," "might," and "are likely to" cause significant surface resource disturbance. *See* 36 C.F.R. § 228.4. This similarity was intentional. 45 Fed. Reg. 78,906 (Nov. 26, 1980) (explaining that the regulations were designed "to be as consistent as possible with the Forest Service regulations").

At issue in *Penfold* was whether the BLM's approval of Notice mines is a "major Federal action." Such a finding would trigger the National Environmental Policy Act's (NEPA) requirement that the BLM file an environmental impact statement. We held that the approval was not a major Federal action. 857 F.2d at 1314. *Penfold* can be read to say that the BLM's review of a notice is a "marginal" agency action, just not a "major" one. *See id.* at 1313-14. But just as actions must be "major" to trigger NEPA obligations, actions carried out entirely by private parties must involve "affirmative" federal agency authorization to trigger section 7's consultation requirement. The mere fact that the agency is involved in some way is not enough. Thus, even assuming the Tribe is correct that the threshold

for triggering environmental compliance under the ESA is lower than for NEPA, I nonetheless find our previous determination that a similar notice scheme was not the sort of agency action that requires environmental compliance to be additional persuasive authority in support of the district court's holding.

I emphasize the narrowness of the question before us; I do not argue that every Forest Service "decision" is exempted from ESA consultation. The Forest Service's mining regulations are clearly distinguishable from the Forest Service's other regulatory activities. For example, the Forest Service must consult under the ESA when it creates and implements Land and Resource Management Plans, which govern "every individual project" in each national forest. *Pac. Rivers Council v. Thomas,* 30 F.3d 1050, 1053 (9th Cir. 1994). In addition, the Forest Service's negotiation and execution of timber-sale contracts, 16 U.S.C. § 472a(a); 36 C.F.R. § 223.1 (2011), is undoubtedly an agency "authoriz[ation]" that requires ESA consultation. See 50 C.F.R. § 402.02 (2004) (agency actions include "granting of . . . contracts"); *see also Nw. Forest Res. Council v. Pilchuck Audubon Soc'y, 97 F.3d 1161, 1167 (9th Cir. 1996)* (noting that Forest Service consulted with Fish and Wildlife Service regarding timber sales' effect on marbled murrelets). The same is true for the Forest Service's construction of roads in the national forest. *Thomas v. Peterson,* 753 F.2d 754, 763-64 (9th Cir. 1985). Likewise, "all grazing and livestock use on National Forest System lands and on other lands under Forest Service control must be authorized by a

grazing or livestock use permit." 36 C.F.R. § 222.3 (2011). The Forest Service's grant and oversight of such permits is undeniably "agency action" subject to the ESA consultation requirement. *See Forest Guardians v. Johanns,* 450 F.3d 455, 457-58, 463 (9th Cir. 2006).

But here, Notices of Intent are not permits, contracts, or plans issued by the Forest Service. They are mere *notifications* about miners' activities. Certainly, the Forest Service retains discretion to require miners to submit a Plan of Operations under appropriate circumstances. That was the conclusion reached in a recent Administrative Procedures Act decision, *Siskiyou Regional Education Project v. U.S. Forest Service*: "determining which operations are likely to cause significant disturbance of surface resources--and therefore require a plan of operations--requires a discretionary determination by a district ranger." 565 F.3d at 557 (emphasis omitted). But the Forest Service's decision not to require a Plan of Operations is simply not an "authorization" as defined by the statute and regulations. The majority's proposed new category of agency conduct--*implicit agency action*--finds little support in the statutes, regulations, and case law.

The district court's opinion in this case follows naturally from *Western Watersheds Project.* Although the majority characterizes the Forest Service's response to a Notice of Intent as an "approval," an "authorization," and a "rejection," the relevant regulations show that the Forest Service is not approving, authorizing, or rejecting anything. It

is receiving and analyzing information, and deciding not to take further action.

V. Subjective views of the parties

The majority relies heavily on the fact that the District Ranger and the miners *in this case* understood the Notice of Intent to be an "authorization."

At first glance, this case-specific reasoning may be enticing: after all, the miners sought the Ranger's "approv[al]" and the Ranger "authoriz[ed]" their activities. But this path of reasoning is full of legal obstacles, any one of which should be dispositive of the ultimate legal question under the ESA.

First, a similar argument was considered and rejected in *Sierra Club v. Babbitt,* 65 F.3d 1502 (9th Cir. 1995), where we held that the BLM's letter purporting to "approv[e]" a construction project could not "be construed as an authorization within the meaning of *[ESA] section 7(a)(2)*" because the BLM's letter did not otherwise satisfy the statutory criteria of an ESA authorization. *Id.* at 1511.

Second, we are not bound by litigants' concessions of law (even assuming that the miners' and Ranger's letters can be deemed "concessions"). *E.g., United States v. Ogles,* 440 F.3d 1095, 1099 (9th Cir. 2006) (en banc).

Third, the District Ranger has no authority to interpret the ESA or its implementing regulations, so his use of the term "authorization" cannot reasonably be read as an interpretation of the ESA regulations, 50 C.F.R. §§ 402.02-03 (2004).[6] *See generally Robertson,* 490 U.S. at 359 (discussing deference owed to agency's interpretation of its regulations); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843-45, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

Finally, to understand why the parties' conduct in this case cannot control our application of the ESA and its regulations, consider the implications of such a holding. A single District Ranger would be subjected to the ESA consultation process because he used the word "authorize" when responding to a Notice of Intent. However, no other District Ranger in the country would be subjected to the ESA under similar circumstances, even though those District Rangers operate under the same Forest Service regulations governing Notices of Intent. It goes without saying that this result makes little, if any, sense as an application of our national environmental protection laws.

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[6] Regulatory authority under the ESA is delegated to the Departments of Interior and Commerce, *see Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 651, 664-65, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007), whereas the Forest Service is a part of the Department of Agriculture, *see* U.S. Forest Service, "U.S. Forest Service History: Agency Organization," http://www.foresthistory.org/ASPNET/Policy/Agency_Organization/index.aspx (last visited May 4, 2012).

VI. Discussions between miners and district rangers

The majority also relies on the fact that informal discussions take place between miners and district rangers regarding how the miners can modify their proposed activities to avoid triggering the obligation to prepare a Plan of Operations. For instance, a ranger may advise miners how to change their plans in a way that will avoid causing significant surface resource disturbances. If the miners do so, and describe their appropriately modified activities in Notices of Intent, the regulations do not require anything further; the miners are authorized to proceed with their mining activities under the General Mining Law.

The majority mistakenly attempts to characterize such informal discussions as the Forest Service's exercise of discretion to approve or deny an NOI. But we have long held that these sorts of informal, voluntary discussions do not constitute an agency action. *Marbled Murrelet v. Babbitt,* 83 F.3d 1068 (9th Cir. 1996). *Marbled Murrelet* is directly on point. In that case, we held that a joint letter from U.S. Forest Service and the California Department of Fish and Game to a timber company describing "specific conditions that must be followed to . . . avoid 'take' of the identified species under the ESA" was "merely provid[ing] advice" that did not trigger section 7 consultation under the ESA. *Id.* at 1074. As we explained, "[p]rotection of endangered species would not be enhanced by a rule which would require a federal agency to perform the burdensome

procedural tasks mandated by section 7 simply because it advised or consulted with a private party. Such a rule would be a disincentive for the agency to give such advice or consultation." *Id.*

The majority takes exactly that step here. In holding that a miner's submission of an NOI triggers section 7 consultation under the ESA, the majority discourages miners from discussing their proposed activities with the Forest Service to voluntarily reduce their impact on the environment, and rather encourages miners to make their own determination that their activities are not likely to "cause significant disturbance of surface resources," 36 C.F.R. § 228.4(a), and thus no NOI need be filed.

VII. Brave New World

Abandon all hope, ye who enter here.

-- Dante Alighieri, THE DIVINE COMEDY, Inferno Canto III

I cannot conclude my dissent without considering the impact of the majority's decision in this case, and others like it, which, in my view, flout our precedents and undermine the rule of law. In doing so, I intend no personal disrespect or offense to any of my colleagues. My intent is solely to illuminate the downside of our actions in such environmental cases.

By rendering the Forest Service impotent to meaningfully address low impact mining, the

majority effectively shuts down the entire suction dredge mining industry in the states within our jurisdiction. The informal Notice of Intent process allows projects to proceed within a few weeks. In contrast, ESA interagency consultation requires a formal biological assessment and conferences, and can delay projects for months or years. Although the ESA generally requires agencies to complete consultations within ninety days, 16 U.S.C. § 1536(b), the agencies frequently miss their deadlines due to personnel shortages. One study found that nearly 40 percent of U.S. Fish and Wildlife Service ESA consultations were untimely, with some taking two or three years. Government Accountability Office, *More Federal Management Attention is Needed to Improve the Consultation Process*, March 2004. Moreover, formal consultation comes at great costs to the private applicants, often requiring them to hire outside experts because the agency is backlogged. *Id.* Most miners affected by this decision will have neither the resources nor the patience to pursue a consultation with the EPA; they will simply give up, and curse the Ninth Circuit.

As a result, a number of people will lose their jobs and the businesses that have invested in the equipment used in the relevant mining activities will lose much of their value. In 2008, California issued about 3,500 permits for such mining, and 18 percent of those miners received "a significant portion of income" from the dredging. *See* Justin Scheck, *California Sifts Gold Claims*, The Wall Street Journal, April 29, 2012. The gold mining operation in this case, the New 49ers, organizes recreational

weekend gold-mining excursions. The majority's opinion effectively forces these people to await the lengthy and costly ESA consultation process if they wish to pursue their mining activities, or simply ignore the process, at their peril.

Unfortunately, this is not the first time our court has broken from decades of precedent and created burdensome, entangling environmental regulations out of the vapors. In one of the most extreme recent examples, our court held that timber companies must obtain Environmental Protection Agency permits for stormwater runoff that flows from primary logging roads into systems of ditches, culverts, and channels. *Nw. Envtl. Def. Ctr. v. Brown,* 640 F.3d 1063 (9th Cir. 2011). In the nearly four decades since the Clean Water Act was enacted, no court or government agency had ever imposed such a requirement. Indeed, the EPA promulgated regulations that explicitly exempted logging from this arduous permitting requirement. *Id.* at 1073. Yet our court decided to disregard the regulation and require the permits.

The result? The imminent decimation of what remains of the Northwest timber industry. The American Loggers Council estimates that the decision, if implemented, will result in up to three million more permit applications nationwide. The timber industry is not the only group criticizing *Brown.* Three of Oregon's leading politicians quickly attacked the ruling. Oregon U.S. Senator Ron Wyden predicted that this opinion "would shut down forestry on private, state and tribal lands by subjecting it to

the same, endless cycle of litigation." Oregon Congressman Kurt Schrader called the opinion a "bad decision" that would create "another layer of unnecessary bureaucracy." Oregon Governor John Kitzhaber branded the opinion as "legally flawed."

Oregon political leaders have good reason to be concerned about the impact of our rulings on logging. Decades of court injunctions already have battered the state's timber industry, once a dominant employer that paid excellent wages. In the 1970s and 1980s, the wood product industry employed more than 70,000 Oregonians and paid 30 percent more than the state average wage. Now, the industry employs 25,000 people and pays the state average wage. Josh Lehner, *Historical Look at Oregon's Wood Product Industry*, Oregon Office of Economic Analysis, Jan. 23, 2012, *available at* http://oregoneconomicanalysis.wordpress.com/2012/01/23/ historical-look-at-oregons-wood-product-industry/ (last visited May 4, 2012). Requiring millions of burdensome new permits will only accelerate the decline.

Brown also profoundly harms rural local governments. Because counties receive twenty-five percent of the revenues from timber harvests on federal land, the decrease in logging has caused shorter school days, smaller police forces, and closures of public libraries. Moreover, *Brown* subjects rural counties to the burdensome permitting requirement if their roads are used for logging. The Association of Oregon Counties estimates that the

decision will increase planning costs to Oregon counties by $56 million.

More recently, a panel majority of our court handed down *Pacific Rivers Council v. United States Forest Service,* 668 F.3d 609 (9th Cir. 2012). The Forest Service spent years developing a forest management plan for 11.5 million acres of national forest land in the Sierra Nevada. We overturned that plan, holding that the Forest Service's programmatic environmental impact statement must "analyze environmental consequences of a proposed plan as soon as it is 'reasonably possible' to do so." *Id.* at 623. This conflicts with our longstanding rule that "NEPA requires a full evaluation of site-specific impacts *only* when a 'critical decision' has been made to act on site development--*i.e.*, when 'the agency proposes to make an irreversible and irretrievable commitment of the availability of resources to [a] project at a particular site.'" *Friends of Yosemite Valley v. Norton,* 348 F.3d 789, 801 (9th Cir. 2003) (quoting *California v. Block,* 690 F.2d 753, 761 (9th Cir. 1982)). *Pacific Rivers Council's* de facto reversal of well-established precedent will dramatically impede any future logging in the West. Because environmental agencies will never be certain whether the unclear "reasonably possible" standard applies, it will take even longer for the agencies to approve forest plans.

Farmers, too, have suffered, and will continue to suffer, from the impact of similarly extreme environmental decisions. The Central Valley Project Improvement Act, Pub. L. No. 102-575, 106 Stat. 4600 (1992), requires that 800,000 acre feet of water

in California's Central Valley Project be designated for "the primary purpose of implementing the fish, wildlife, and habitat restoration purposes and measures[.]" In *San Luis & Delta-Mendota Water Authority v. United States,* 672 F.3d 676 (9th Cir. 2012), the majority inexplicably read this requirement to mean that water counts toward that yield only if it "predominantly contributes to one of the primary purpose programs." *Id.* at 697. This interpretation has absolutely no basis in the statutory text. The practical impact of this decision is that there will be less, perhaps far less, water for irrigation in the San Joaquin Valley's $20 billion crop industry. *Id.* at 715-16 (M. Smith, J., dissenting). The region's farms and communities, and the thousands of people employed there, already have suffered because of the lack of water, with approximately 250,000 acres of farmland now lying fallow, and unemployment ranging between 20 percent and 40 percent. *Id.*

No legislature or regulatory agency would enact sweeping rules that create such economic chaos, shutter entire industries, and cause thousands of people to lose their jobs. That is because the legislative and executive branches are directly accountable to the people through elections, and its members know they would be removed swiftly from office were they to enact such rules. In contrast, in order to preserve the vitally important principle of judicial independence, we are not politically accountable. However, because of our lack of public accountability, our job is constitutionally confined to *interpreting* laws, not *creating* them out of whole

cloth. Unfortunately, I believe the record is clear that our court has strayed with lamentable frequency from its constitutionally limited role (as illustrated *supra*) when it comes to construing environmental law. When we do so, I fear that we undermine public support for the independence of the judiciary, and cause many to despair of the promise of the rule of law.[7]

I respectfully dissent.

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[7] "[R]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches." *United States v. Richardson,* 418 U.S. 166, 188, 94 S. Ct. 2940, 41 L. Ed. 2d 678 (1974) (Powell, J., concurring).

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KARUK TRIBE OF CALIFORNIA,
Plaintiff-Appellant,
v.
UNITED STATES FOREST SERVICE; MARGARET BOLAND,
Defendants-Appellees,

THE NEW 49'ERS, INC.; RAYMOND W. KOONS,
Defendants-Intervenors-Appellees.

July 13, 2010, Argued and Submitted, San Francisco, California
April 7, 2011, Filed

Before: William A. Fletcher and Milan D. Smith, Jr., Circuit Judges, and James D. Todd, Senior District Judge. Opinion by Judge Milan D. Smith, Jr.; Dissent by Judge William A. Fletcher.

M. SMITH, Circuit Judge:

Section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536(a)(2), requires interagency consultation for any federal agency action that may affect a listed species. In this opinion, we determine whether a United States Forest Service (USFS) District Ranger's (Ranger) decision that a proposed mining operation may proceed according to the miner's Notice of Intent (NOI) and will not require a Plan of Operations (Plan) is an "agency action" for

purposes of triggering the ESA's interagency consulting obligations.

We hold that the NOI process does not constitute an "agency action," as that term is defined under the ESA. The Ranger's receipt of an NOI and resulting decision not to require a Plan is most accurately described as an agency decision *not* to act. Because "'inaction' is not 'action' for *section 7(a)(2)* purposes," *W. Watersheds Project v. Matejko,* 468 F.3d 1099, 1108 (9th Cir. 2006), we affirm the district court's denial of summary judgment on the Tribe's ESA challenge to the NOI process.

FACTUAL AND PROCEDURAL BACKGROUND

I. Gold and Silver Salmon

The Klamath River (River) runs from Oregon, through California, to the Pacific Ocean. As it winds through Northern California, it crosses through the lands that have been home to the Plaintiff-Appellant Karuk Tribe of California (the Tribe) since time immemorial. The River is a designated critical

habitat of the Coho, or silver, salmon[1] and various other fish species, and is a source of cultural and religious significance to the Tribe, who depend upon it for the fish and other subsistence uses.

The River also contains gold deposits. As erosion and other natural processes loosen gold from hard rock in and around the River, the gold travels downstream and settles at the bottom, underneath the lighter sediments but above the bedrock. One method of retrieving this gold is by using a suction dredger, a machine that vacuums a small area of the riverbed and extracts the gold from the other sediments. Because the precise mechanics of suction dredging are not relevant to our disposition and are ably described in *Siskiyou Regional Education Project v. Rose,* 87 F. Supp. 2d 1074, 1081-82 (D. Or. 1999), and other decisions cited herein, we do not repeat them here. Suffice it to say that suction

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[1] The Coho salmon was listed as "threatened" in 1997, 62 Fed. Reg. 24,588 (May 6, 1997), and the River was designated as critical habitat for the Coho salmon in 1999, 64 Fed. Reg. 24,049 (May 5, 1999). The New 49'ers assert that the district court improperly ignored the fact that the listing was invalid. The New 49'ers base this argument on the transcript of proceedings taken in *California States Grange v. Department of Commerce*, No. 02-CV-6044-HO (D. Or. Jan. 11, 2005), in which a district court declared the Coho salmon listing unlawfully promulgated under the Administrative Procedure Act (APA), in light of another district court decision, *Alsea Valley Alliance v. Evans,* 161 F. Supp. 2d 1154, 1163 (D. Or. 2001). However, despite its concerns, the district court left the listing in place because doing so was consistent with the purpose of the ESA. There is nothing in *section 7* requiring that a listing be unassailable in order for consultation to be required as to a listed species.

dredgers are mechanical equipment, and accordingly, may not be used on federal forest lands without formally notifying the USFS, *see* 36 C.F.R. § 228.4(a) (2004).[2] The suction dredge mining activity conducted by the individual gold miners represented in this suit by the Defendants-Intervenors The New 49'ers is best described as small-scale suction dredge gold mining (a few cubic inches at a time) performed for recreational purposes.

The Tribe contends that even small-scale suction dredge mining, especially when conducted by sufficient numbers of people with sufficient frequency, significantly disturbs surface resources and destroys aquatic habitat. In particular, the Tribe offers expert evidence that suction dredging kills salmonid and other fish eggs, kills fish food sources, destabilizes riverbed areas used for spawning, and otherwise disturbs the fish and their reproductive activities. The New 49'ers disagree, and contend that there is no evidence that the very small-scale suction dredging at issue in this case causes any

[2] Because the challenged NOI decisions were made in 2004, we rely upon the 2004 version of the regulation.

harm to the Coho salmon.[3] Because the standard for ESA consultation is only whether the conduct "may affect" a listed species, *see Pac. Rivers Council v. Thomas, 30 F.3d 1050, 1055 (9th Cir. 1994)*, the district court did not resolve this factual dispute, and neither must we. We assume the Tribe has established that suction dredge mining may affect the Coho salmon. *See Siskiyou Reg'l Educ. Project v. U.S. Forest Serv., 565 F.3d 545, 550 & n.2 (9th Cir. 2009)*. In fact, the Tribe, the USFS, and

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[3] The New 49'ers argue that the district court improperly excluded certain extra-record evidence that shows that small-scale suction dredge mining is not harmful to fish. "This circuit has only allowed extra-record materials: (1) if necessary to determine 'whether the agency has considered all relevant factors and has explained its decision,' (2) 'when the agency has relied on documents not in the record,' or (3) 'when supplementing the record is necessary to explain technical terms or complex subject matter.'" *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443,1450 (9th Cir. 1996) (quoting *Inland Empire Pub. Lands Council v. Glickman*, 88 F.3d 697, 703-04 (9th Cir. 1996)). It is usually inappropriate for a district court to consider extra-record evidence offered merely to rebut the merits of an agency's findings. *See Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980) ("Consideration of the evidence to determine the correctness or wisdom of the agency's decision is not permitted[.] . . . If the court determines that the agency's course of inquiry was insufficient or inadequate, it should remand the matter to the agency for further consideration and not compensate for the agency's dereliction by undertaking its own inquiry into the merits."). Here, not only were the disputed documents offered merely to rebut the merits of the USFS's decision concerning the risks to species from suction dredging, the merits of that decision are not even relevant to the purely legal question at issue here. Accordingly, the district court did not abuse its discretion in striking The New 49'ers' proffered materials.

The New 49'ers met for the purpose of discussing what criteria the USFS should consider when deciding whether a Plan will be required for a proposed suction dredge operation. Most of the discussion at that meeting centered on what those miners who do not want to have to submit a Plan should do to avoid disturbing fish and aquatic habitat, suggesting that the USFS would admit that at least some suction dredging activities "may affect" the Coho salmon.

II. Statutory and Regulatory Background

The Organic Administration Act, 16 U.S.C. §§ 473-78 (1897) (the Organic Act), provides that federal forest lands are subject to the United States mining laws, including the General Mining Law of 1872, 30 U.S.C. § 22, *as amended by* 30 U.S.C. § 612. Under the mining laws, citizens are entitled to enter public lands for the purpose of prospecting and removing mineral deposits. The Organic Act further provides that prospectors and miners entering federal forest lands "must comply with the rules and regulations covering such national forests." 16 U.S.C. § 478. The government's regulatory authority (vested in the Secretary of Agriculture and, derivatively, the USFS), however, does not go so far as to permit it to "*prohibit* 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." *Id.* (emphasis added). Indeed, "[e]xercise of th[e] right [to enter federal lands for prospecting] *may not be unreasonably restricted*." *National Forests Surface*

Use Under U.S. Mining Laws, 39 Fed. Reg. 31,317 (Aug. 28, 1974) (hereinafter Forests Use Under Mining Laws) (emphasis added).

The Organic Act thus creates a regulatory scheme whereby the USFS may regulate mining activity on federal forest lands "to preserve the forests thereon from destruction," 16 U.S.C. § 551, but may not otherwise interfere with or prohibit the activities permitted under the mining laws. *See Siskiyou,* 565 F.3d at 557-58. To achieve an appropriate balance between mining rights and environmental preservation, the USFS promulgated regulations, which are the source of the present controversy.

The relevant regulations, set forth as 36 C.F.R. § 228.4(a), outline a three-tiered approach to regulating mining in the national forests. The regulatory scheme is based on the touchstone "disturbance of surface resources." 36 C.F.R. § 228.4(a).[4] The regulations first describe certain de minimis activities, such as gold panning, that citizens may conduct without involving the USFS. *See id.* § 228.4(a)(1) (listing activities that require no notice to the USFS, including use of existing roads, mineral sampling, marking out a mining claim, and

[4] The current version is slightly different in that it adds that the disturbance must be "significant" in order to require an NOI to be filed. *See* 36 C.F.R. § 228.4(a) (2010). This difference is immaterial for our purposes. *See Siskiyou,* 565 F.3d at 550 n.3 ("The revised regulations retain the basic requirements of the earlier version, and do not materially affect suction-dredge mining.").

other activities that "will not cause significant surface resource disturbance"). Second are activities that "might cause disturbance of surface resources." *Id.* § 228.4(a). The person intending to engage in such an activity must submit a "notice of intent to operate" to the Ranger--an NOI. Third are activities that are "likely [to] cause significant disturbance of surface resources." *Id.* These activities require a Plan, which may include, among other things, specific conditions requiring the proposed operator to ensure environmental preservation. Operations requiring a Plan cannot be conducted until the Ranger approves the Plan. *See id.* § 228.5.

Upon receipt of an NOI, the Ranger decides, within his discretion, whether the activities described in the NOI are likely to significantly disturb surface resources and will consequently require a Plan to be submitted for the USFS's approval. 36 C.F.R. § 228.4(a); *Siskiyou,* 565 F.3d at 551. When the USFS clarified its regulations in 2005, it explained that:

> The requirement for prior submission of a notice of intent to operate alerts the Forest Service that an operator proposes to conduct mining operations on [National Forest Service (NFS)] lands which the operator believes might, but are not likely to, cause significant disturbance of NFS surface resources and gives the Forest Service the opportunity to determine whether the agency agrees with that

> assessment such that the Forest Service will not exercise its discretion to regulate those operations.

Clarification as to When a Notice of Intent To Operate and/or Plan of Operation Is Needed for Locatable Mineral Operations on National Forest System Lands, 70 Fed. Reg. 32,713, 32,720 (June 6, 2005) (hereinafter NOI Clarification). In other words, the purpose of submitting an NOI is "to provide the Forest Service District Ranger with sufficient information to determine if the level of disturbance will require a Plan and a detailed environmental analysis." U.S. Forest Serv., *Notice of Intent Instructions:* 36 CFR 228.4(a) -- *Locatable Minerals*, http://www.fs.fed.us/geology/noi_instructions.doc (last visited Mar. 31, 2011). The NOI need include only (1) the name, address, and telephone number of the operator; (2) the area involved; (3) the nature of the proposed operations; (4) the route of access to the area; and (5) the method of transport to be used. *Id.; see also* 36 C.F.R. § 228.4(a)(2). There is no requirement that an NOI include any statement of planned environmental protection measures. [5]

If the Ranger concludes that the NOI describes an activity likely to cause significant disturbance of

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[5] Given that the Ranger considers the environmental impact of the proposed mining operation in deciding if significant surface resource disturbance is likely, however, some of the longer NOIs do include details about certain environmental factors (such as location and season) that the operator plans to account for in order to avoid significantly disturbing surface resources.

surface resources, the Ranger must "notify the operator if approval of a plan of operations is required before the operations may begin." 36 C.F.R. § 228.4(a)(2). The Ranger's notice must be given within fifteen days of receiving the NOI. *Id.* If the Ranger does not request a Plan, then the mining operations may proceed. *See id.*

III. The NOIs at Issue in this Appeal

In this appeal, the Tribe challenges the USFS's decision to "accept" four NOIs without consulting with other agencies about the biological effects of the miners' conduct. Importantly, the Tribe does *not* argue that the Ranger abused his discretion in deciding that the activities described in these NOIs did not require a Plan, or that the USFS breached its ESA consultation obligations by adopting the regulatory scheme described *supra*. [6]

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[6] The Dissent concludes in part that the USFS's "actions" included "formulating criteria" that "governed the approval or denial of NOIs for suction dredge mining." Dissent at 4693. However, the Tribe does not contend on appeal that the Ranger's creation of an informal (albeit detailed) document constitutes a challenged "action" during which the USFS should have engaged in ESA consultations. The Dissent's analysis therefore violates the well-established tenet that "[w]e review only issues which are argued specifically and distinctly in a party's opening brief. . . We will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim, particularly when, as here, a host of other issues are presented for review." *Birdsong v. Apple, Inc.*, 590 F.3d 955, 959 (9th Cir. 2009) (internal quotation marks omitted).

The first NOI at issue is a May 24, 2004 NOI submitted by Dave McCracken, General Manager for The New 49'ers. This NOI notified the USFS of multiple small-scale suction dredge mining operations members of The New 49'ers planned to conduct over a 35-mile river and stream area. Each dredge was estimated to affect about one quarter of a cubic yard of the river, limited to no more than ten dredges per mile in the River proper and three dredges per mile in its tributaries. The NOI specifically mentioned that the miners would avoid a handful of places along the River to guard against disturbing certain cold water refugia used by fish in the warmer summer months. After receiving and reviewing McCracken's NOI, on May 25, 2004, the Ranger sent a letter to McCracken explaining that he had "determined that [McCracken and The New 49'ers'] proposed operations would not require a Plan of Operations." The "authorization" was set to expire on December 31, 2004.

The second challenged NOI was submitted to the USFS on May 29, 2004 by Nida Jo Lawson Johnson. Johnson's NOI described her activities as using a six-to-eight inch dredger to make four-to-five inch dredges. She also indicated that she would not conduct dredging activities near the mouths of certain tributaries. The Ranger responded that the described mining operations "would not require a Plan of Operations." The Ranger stated that the NOI would "expire" on December 21, 2004.

Third, the Tribe challenges Robert Hamilton's June 2, 2004 NOI. Hamilton sought to use a four-

inch suction dredger, restricted to a two-and-a-half inch opening, to mine for gold in up to twenty cubic yards of riverbed, between July 12 and July 23, 2004. The Ranger's June 15 response was nearly identical to his response to Johnson's NOI.

Finally, the last challenged NOI was submitted on June 14, 2004 by Ralph Easley. Easley proposed to use a four-inch dredge for recreational purposes between July 1, 2004 and September 30, 2004. The Ranger responded with the same form letter sent to Johnson and Hamilton, explaining that no Plan was required for Easley's planned operations, and that the NOI would expire on December 31, 2004.

IV. The Summary Judgment Motion

The Tribe filed suit against the USFS for various claims alleging violations of the National Forest Management Act, the National Environmental Policy Act (NEPA), and the ESA. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 379 F. Supp. 2d 1071 (N.D. Cal. 2005). The district court denied summary judgment on all grounds. The Tribe appeals only the ESA claim.

The district court rejected the Tribe's argument that the USFS's review of an NOI constitutes an "authorization" of mining activity. *Id.* at 1101. Given that the miners, not the USFS, conduct the mining activities, that the NOI process is more like a review than an authorization, and that the mining laws confer a statutory right on the

miners to prospect, subject only to limited agency interference, the district court found that the Tribe failed to meet its burden to show that the NOI process is equivalent to the sort of affirmative agency action required to trigger ESA consulting obligations. *Id.* The district court subsequently entered its final judgment in favor of the USFS.

JURISDICTION AND STANDARD OF REVIEW

Summary judgment is appropriate when there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a); Sierra Club v. Bosworth, 510 F.3d 1016, 1022 (9th Cir. 2007).*

Although denial of summary judgment is ordinarily not appealable, we have jurisdiction under 28 U.S.C. § 1291, as the district court's order denying summary judgment fully resolved all of the legal issues in the case and resulted in the district court's entry of final judgment in favor of the USFS. *See Regula v. Delta Family-Care Disability Survivorship Plan,* 266 F.3d 1130, 1138 (9th Cir. 2001), *cert. granted and opinion vacated on other grounds*, 539 U.S. 901, 123 S. Ct. 2267, 156 L. Ed. 2d 109 (2003). We review the district court's denial of summary judgment de novo. *Id.* at 1136-37. We also review questions of statutory interpretation de novo. *Idaho Farm Bureau Fed'n v. Babbitt,* 58 F.3d 1392, 1399 (9th Cir. 1995).

DISCUSSION

Section 7 of the ESA provides, in pertinent part:

> Each Federal agency shall, in consultation with and with the assistance of [U.S. Fish and Wildlife Service (USFWS) or other relevant agency], insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . .

16 U.S.C. § 1536(a)(2). Consultation is designed "to allow [USFWS, in this case,] to determine whether [a] federal action is likely to jeopardize the survival of a protected species or result in the destruction of its critical habitat, and if so, to identify reasonable and prudent alternatives that will avoid the action's unfavorable impacts." *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003) (citing 16 U.S.C. § 1536(b)(3)(A)). When consultation is required, the agency begins by preparing a "biological assessment" or engaging in an "informal consultation." 50 C.F.R.

§ 402.14(b)(1).[7] The agency uses the biological assessment or materials gathered during informal consultation to determine whether its action is "likely to adversely affect" a listed species. *Turtle Island,* 340 F.3d at 974 n.9 (citing 50 C.F.R. § 402.12(a)). The likelihood of adverse effects, as determined by the biological assessment, dictates whether further consultation with USFWS must occur. *Id.* (citing 50 C.F.R. § 402.13(a)).

To trigger the consultation duty, there must be a qualifying federal agency action. "Agency action" for ESA purposes is defined by regulations promulgated by the Secretaries of Commerce and the Interior:

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

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[7] The New 49'ers contend that interagency consultation *did* occur. However, "[b]ecause these arguments were not raised before the district court, they are waived." *O'Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1063 n.3 (9th Cir. 2007).

50 C.F.R. § 402.02 (emphases added).[8] Although "agency action" is construed broadly, it does not encompass everything an agency does related to planned *private* activity. As we explained in *Sierra Club v. Babbitt,* 65 F.3d 1502, 1510 (9th Cir. 1995), "Congress specifically limited the application of section 7(a)(2) to cases where the federal agency retained some measure of control over the private activity." Congress intended that the "discrete burdens [of the ESA] properly fall on a private entity *only to the extent the activity is dependent on federal*

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[8] Further, interagency consultation is required only for "actions in which there is *discretionary* Federal involvement or control." 50 C.F.R. § 402.03 (emphasis added); *see also Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 664-65, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007). Our case law may not be a model of clarity when it comes to separating our inquiries into whether an action is a qualifying "agency action," 50 C.F.R. § 402.02, as well as one in which the agency has "discretionary Federal involvement or control," 50 C.F.R. § 402.03. Often, when an agency is empowered to authorize an activity, it will have discretion over that decision, making the inquiries necessarily overlap and showing that the *section 7* duty obviously applies. *See, e.g., Turtle Island,* 340 F.3d 969.

In this case, we agree with the Dissent that the USFS exercises "discretion" in deciding whether to request a Plan on a case-by-case basis. *See* Dissent at 4675-77, 4695 (citing *NOI Clarification,* 70 Fed. Reg. at 32,728); *see also Siskiyou,* 565 F.3d at 551. However, 50 C.F.R. § 402.03 makes clear that the ESA consultation obligation is only triggered if a discretionary "action" is involved. 50 C.F.R. § 402.03 (emphasis added). As described in greater detail infra, absent an "agency action" as defined by 50 C.F.R. § 402.02, the consultation obligation is not triggered.

authorization." *Id.* at 1512 (emphasis added).[9]

Here, the activities described in an NOI are neither funded by the USFS nor carried out by the USFS. They are carried out by private parties, such as the individual members of The New 49'ers. The Tribe thus bears the burden of showing that the activities described in an NOI are "authorized" by the USFS.

The Tribe contends that filing an NOI is a legal prerequisite to conducting the mining activities described therein, and that accordingly, the Ranger's decision to allow the suction dredging activities described in the NOI is an agency authorization of the activities. *See Turtle Island,* 340 F.3d at 977 (finding agency action under ESA where NMFS issued permits pursuant to the High Seas Fishing Compliance Act and had "substantial discretion to condition permits to inure to the benefit of listed species"); *see also Mayaguezanos por la Salud y el Ambiente v. United States,* 198 F.3d 297, 302 (1st Cir. 1999) (collecting cases in which various circuits

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[9] At oral argument, it was suggested that the USFS's decision with respect to an NOI is an "agency action" for purposes of the ESA because in *Siskiyou,* 565 F.3d at 554, we concluded that such a decision is a "final agency action" for purposes of the APA, 5 U.S.C. § 704. However, the standard for "agency action" under the ESA (articulated *supra*) is distinct from the standard under the APA; under the APA, "[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Or. Natural Desert Ass'n v. U.S. Forest Serv.,* 465 F.3d 977, 982 (9th Cir. 2006) (internal quotation marks omitted).

have held that there is an agency action for NEPA purposes when the private activity cannot go forward without federal approval and the federal agency has some discretionary authority over the outcome). The Tribe also points to the USFS's response to McCracken's NOI, in which the USFS notified McCracken of its "authorization" of his NOI. In addition, the Tribe relies on evidence showing that the Ranger can monitor suction dredge mining conducted pursuant to an NOI much the same as he monitors activities conducted pursuant to a Plan. This, the Tribe contends, shows that the Ranger has discretionary involvement or control over the mining operations. The Tribe also emphasizes that the Ranger is able to influence proposed activities for the benefit of species even under an NOI by demanding changes to an NOI to ensure there is no significant disturbance of surface resources.

The USFS responds that it has no power to "authorize" mining activities described in an NOI because the miners already possess the right to mine under the mining laws, and that the permits to engage in such mining are granted by other state

and federal bodies.[10] While the USFS has some power to require miners to seek its approval and submit to reasonable USFS regulation, such power only materializes once the USFS determines that the activity is likely to cause significant disturbance of surface resources. The USFS concedes that ESA consultation is required before it can approve a Plan, but argues that the Ranger's decision *not* to require a Plan for the proposed activities is essentially a

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[10] The New 49'ers direct our attention to California Senate Bill No. 670 (Aug. 5, 2009), which amends *California Fish and Game Code* § 5653. The new section, *Cal. Fish & Game Code § 5653.1*, requires an environmental impact report to be prepared prior to issuance of any suction dredging permits. This statutory section was added pursuant to a court order and consent judgment entered in a state court action brought by the Tribe against the California Department of Fish and Game. The New 49'ers contend that, because the state statutory amendment effectively prohibits suction dredge mining in California without completion of an environmental impact report, the Tribe's concerns about the USFS failing to conduct environmental consultation about such mining activities are moot. We disagree. "The basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted." *Nw. Envtl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1244 (9th Cir. 1988). Although the particular suction dredge mining operations the Tribe objects to are temporarily suspended under California law pending environmental assessment, the Tribe and the USFS nonetheless have a live controversy over whether the NOI process is being conducted in violation of ESA consulting requirements. Whether or not California issues permits is an entirely distinct legal issue from whether the USFS is obliged to consult with USFWS about the activity authorized by the state permit, so a final declaration of the legal status of the NOI review process under the ESA would give the parties the primary relief they are seeking. Thus, the New 49'ers have not shown that the case is moot.

decision *not* to act and a recognition of its lack of discretionary authority over the proposed activities. The USFS further argues that its decision not to require a Plan leaves it with no remaining discretionary involvement with or control over the mining operations that it could exercise for the benefit of listed species.

Our resolution of these competing positions depends on the proper characterization of what the USFS does with respect to an NOI and the activities described therein. If the Tribe's description was accurate--that the NOI is a decision to authorize the operations described in the NOI--a holding in the Tribe's favor would necessarily follow. However, we conclude that the Tribe does not accurately describe the NOI process. Rather, the NOI process was designed to be "a simple notification procedure" that would

> 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. . . . Th[e notice-and-comment rulemaking] record makes it clear that *a notice of intent to operate was not intended to be a regulatory instrument; it simply was meant to be a notice* given to the Forest Service by an operator which describes the operator's plan to conduct operations on [National

> Forest Service] lands. Further, this record demonstrates that the intended trigger for a notice of intent to operate is reasonable uncertainty on the part of the operator as to the significance of the potential effects of the proposed operations. In such a circumstance, the early alert provided by a notice of intent to operate would advance the interests of both the Forest Service and the operator by *facilitating resolution of the question*, "Is submission and approval of a plan of operations required before the operator can commence proposed operations?"

NOI Clarification, 70 Fed. Reg. at 32,728 (emphases added). Following the tenor of our precedents discussed below, including *Western Watersheds,* 468 F.3d 1099, *Sierra Club v. Babbitt,* 65 F.3d 1502, *California Sportfishing Protection Alliance v. FERC,* 472 F.3d 593 (9th Cir. 2006), *Marbled Murrelet v. Babbitt,* 83 F.3d 1068 (9th Cir. 1996), and *Sierra Club v. Penfold,* 857 F.2d 1307 (9th Cir. 1988), we hold that the NOI process is not "authorization" of private activities when those activities are already authorized by other law. Rather, it is merely a precautionary agency notification procedure, which is at most a preliminary step prior to agency action being taken. The USFS acts in the sense claimed by the Tribe only in approving a Plan. The Tribe's statement that the "Ranger determines whether mining should be regulated under a[n] NOI or [Plan]," is inaccurate. Mining is not "regulated"

under an NOI because an NOI is not a regulatory document. The Ranger's response to an NOI--which is not even required by statute or regulation--is analogous to the NOI itself, a notice of the agency's review decision. It is not a permit, and does not impose regulations on the private conduct as does a Plan.

In *Western Watersheds*, we explained that "the duty to consult is triggered by affirmative actions." 468 F.3d at 1102. In other words, "authorization" under the ESA and its implementing regulations means affirmative authorization of the activity, in the manner of granting a license or permit, as opposed to merely acquiescing in the private activity. Thus, in that case we held that the Bureau of Land Management's (BLM) "acquiescence" in private parties' diversions of water was not an agency action under the ESA. *Id.* at 1103, 1108.

In addition and of particular interest here, in *Western Watersheds*, the BLM asserted authority to regulate diversions of vested rights-of-way (which were protected by nineteenth century statutes) only after deciding that a given diversion was a "substantial deviation" from the original use. The BLM's failure to regulate diversions of vested rights-of-way that fell below that threshold was merely an agency decision not to exercise discretionary involvement with or control over the activities, and accordingly did not require ESA consultation. This was true *even if* the BLM *could* have asserted regulatory authority over the diversions, but simply chose, as a matter of internal agency discretion, not

to do so. *See id.* at 1108 ("[E]ven assuming the BLM could have had some type of discretion here to regulate the diversions (beyond a 'substantial deviation'), the existence of such discretion without more is not an 'action' triggering a consultation duty.").

Just as the BLM's internal decision not to regulate diversions less than "substantial" could not be construed as "authorizing" the diversions permitted under prior law, here, the USFS's internal decision not to require a Plan for a mining operation unlikely to cause significant disturbance of surface resources does not "authorize" the mining already permitted under the mining laws. *See also Cal. Sportfishing,* 472 F.3d at 595, 598 (holding that "the agency[ ] ha[d] proposed no affirmative act that would trigger the consultation requirement" for operations of a hydroelectric plant that were authorized by an earlier and ongoing permit, even though the agency was empowered to "unilaterally institute proceedings to amend the license if it so chose"). It is merely an internal decision not to regulate miners' exercise of their pre-existing rights to prospect in national forests. Importantly, the USFS is not compelled to respond to NOIs; rather the USFS need only respond "*if* approval of a plan of operations is required before the operations may begin." 36 C.F.R. § 228.4(a)(2) (emphasis added). Absent the USFS's request for a Plan, miners may simply proceed with their operations. In other words, to allow mining to take place under an NOI, the USFS does nothing. *See W. Watersheds,* 468 F.3d at

1108 ("'inaction' is not 'action' for *section 7(a)(2)* purposes").[11]

Sierra Club v. Babbitt is also instructive. In that case, we held that the BLM's issuance of an "approval" letter to a private party concerning the private party's planned construction of a right-of-way was not an agency authorization of private activity triggering the ESA consultation duty. 65 F.3d at 1511. Although the agency might have been acting in some way by issuing the letter, such was not an agency action for section 7 purposes because the private party had a contractual right to develop the

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[11] The USFS's use of the word "authorization" in one of its NOI response letters does not resolve the matter. The USFS is not empowered to make any authoritative interpretation of whether its decision constitutes an "authorization" under the regulations implementing the ESA, *see Home Builders,* 551 U.S. at 651-52, nor is there any suggestion that the Ranger intended to do so by means of his letter to McCracken. In any event, as the Tribe recognizes in its reply brief, "the permitting agency's position regarding whether its action was an 'agency action' under the ESA is a 'legal question,' and 'not a factual question.'" (Quoting *Nat'l Wildlife Fed'n v. Brownlee,* 402 F. Supp. 2d 1, 11 (D.D.C. 2005)).

The Dissent also relies on the USFS's statement to the miners that "[they] may begin [their] mining operations when [they] obtain all applicable state and federal permits." Dissent at 4677. But rather than providing "authorization" or "approval" for the mining activities to begin, the USFS's statements simply pointed out the obvious: miners must obtain relevant permits before they begin mining.

In short, the record does not support the Dissent's view that the USFS's correspondence with miners affirmatively "approved" the NOIs.

right-of-way. *Id.* In other words, the private action was already authorized in the relevant sense. We explained:

> the right-of-way was granted prior to the enactment of the ESA *and* there is no further action relevant to the threatened [species] that the BLM c[ould] take prior to [the private party's] exercise of [its] contractual rights. In light of the [ESA's] plain language, the agency's regulations, and the case law construing the scope of "agency action," we conclude that where, as here, the federal agency lacks the discretion to influence the private action, consultation would be a meaningless exercise; the agency simply does not possess the ability to implement measures that inure to the benefit of the protected species.

Id. at 1509. We have reiterated this reasoning many times. *See Envtl. Prot. Info. Ctr. v. Simpson Timber Co.,* 255 F.3d 1073, 1080 (9th Cir. 2001); *Natural Res. Def. Council v. Houston,* 146 F.3d 1118, 1125-26 (9th Cir. 1998); *Turtle Island,* 340 F.3d at 975.

Here, just as the contract in *Sierra Club v. Babbitt* gave the private party a right to construct the right-of-way, and the BLM was constrained from imposing conditions for the benefit of species, the relevant regulations provide USFS no authority to "approve" NOI activities related to the exercise of

pre-existing mining rights unless the activities are likely to significantly disturb surface resources. Indeed, for those mining activities authorized under the mining laws and not subject to the Plan requirement, the USFS can impose no conditions whatsoever. [12]

In short, we find *Western Watersheds* and *Sierra Club v. Babbitt* particularly applicable because, in both those cases as well as this one, prior law (or contract) endowed the private parties with the "right, not mere privilege," *Forests Use Under Mining Laws,* 39 Fed. Reg. at 31,317, to engage in the activities at issue. Where the agency is not the authority that empowers or enables the activity, because a preexisting law or contract grants the *right* to engage in the activity subject *only to regulation*, the agency's decision *not* to regulate (be it based on a discretionary decision not to regulate or a

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[12] While the Ranger may be able to alter the way he applies the standard "likely to cause significant disturbance of surface resources" to the benefit of species (resulting in more NOIs requiring a Plan, in connection with which the Ranger *can* demand changes in the intended private conduct), his adoption and carrying out of the standard is not at issue here. *Cf.* 50 C.F.R. § 402.02 (listing as "agency action" the promulgation of regulations and the carrying out of programs "intended to conserve listed species or their habitat"). If it were, the holding in this case might be very different. Rather, the Tribe seeks to force interagency consultation for NOIs that, we must assume, are properly deemed not Plan-worthy under the governing standard. *Cf. Tex. Indep. Producers & Royalty Owners Ass'n v. EPA,* 410 F.3d 964, 979 (7th Cir. 2005) (holding *section 7* consultation not required for ministerial acceptance of NOIs filed to take advantage of a previously-authorized general permit).

legal bar to regulation) is not an agency action for ESA purposes. This case, like *Western Watersheds* and *Sierra Club v. Babbitt*, is thus distinct from *Turtle Island Restoration Network,* 340 F.3d at 976, in which permission to engage in the activity (fishing in that case) depends upon the federal agency's own discretionary authority to grant permits, which it has the power to condition for the benefit of listed species.

In a slightly modified argument, the Tribe argues that the Ranger's discretionary authority over the NOI/Plan decision enables the USFS to tell miners how to alter their activities in order to avoid significantly disturbing surface resources, and such power to direct activities could be employed for the benefit of species. *See Turtle Island,* 340 F.3d at 977 (holding that USFWS had discretion over permits because it "*could* condition permits to benefit listed species"). When the Ranger responds to an NOI by expressing concerns that the NOI is unclear or that a Plan would probably be required, however, we again do not see how the Ranger "authorizes" anything at that stage. Rather, the Ranger is merely providing advice about what additional information is needed for him to evaluate the NOI, and how the proposed miner can alter his operations to avoid filing a Plan.

Marbled Murrelet provides insight on this point. In *Marbled Murrelet*, we considered whether *section 7* consultation was required when USFWS "consulted with [a private timber company] and provided them with information as to what they would have to do to avoid a 'take' of endangered species under the [ESA]."

83 F.3d at 1070. Environmental groups challenged this informal, voluntary consultation between the timber company and USFWS under *section 7*, claiming that the consultation was an agency action. We rejected the environmental groups' argument. The environmental groups' best evidence of discretionary federal agency action was a joint letter from USFWS and the California Department of Fish and Game describing "specific conditions that must be followed to . . . avoid 'take' of the identified species under the ESA." *Id.* at 1074. We characterized this as "merely provid[ing] advice" because "there [was] no evidence that the USFWS had any power to enforce those conditions other than its authority under *section 9* of the ESA, and this is not enough to trigger 'federal action' under *section 7*." *Id.* We explained,

> Protection of endangered species would not be enhanced by a rule which would require a federal agency to perform the burdensome procedural tasks mandated by *section 7* simply because it advised or consulted with a private party. Such a rule would be a disincentive for the agency to give such advice or consultation. Moreover, private parties who wanted advice on how to comply with the ESA would be loath to contact the USFWS for fear of triggering burdensome bureaucratic procedures.

Id.

Although *Marbled Murrelet* involved a private party's voluntary decision to consult (whereas the Ranger in this case appears to have adopted a blanket, informal policy of using the NOI process to consult with miners), its facts are analogous and its reasoning is compelling. There is nothing the USFS can do to enforce the conditions it sets forth in an NOI response, short of its authority to require a Plan. The NOI process is a "simple notification procedure" that facilitates determination of whether a Plan, and its attendant regulatory oversight, is required; it is not a regulatory action in and of itself.[13] The communications between the private party and the agency at the NOI stage occur for the limited purpose of categorizing the private activity, not for the purpose of obtaining the agency's affirmative permission to act or setting forth an enforceable regulatory regime.

As we explained in *Marbled Murrelet*, environmental compliance is enhanced by encouraging private party-agency communications about the environmental impact of the intended private activities. Importantly, as described *supra*, the Organic Act and Mining Law combine to give the

[13] We particularly note that the USFS will "notify the operator if approval of a plan of operations is required" within fifteen days of receiving an NOI. 36 C.F.R. § 228.4(a)(2). In contrast, the Ranger is entitled to spend 30 days, plus another 60 when necessary, considering the terms of a proposed Plan. 36 C.F.R. § 228.5(a). Preparation of a biological assessment and consultation would take considerably longer than the short time the Ranger has to review and acknowledge an NOI, strongly evidencing that the NOI process, unlike the process for submission and approval of a Plan, is merely ministerial.

USFS only limited regulatory authority over mining. The USFS has interpreted its authority to materialize only when mining is likely to cause significant disturbance of surface resources. Without the NOI process, then, either the miners would be the ones making the decision about whether their activities meet the regulatory threshold, or all mining activities would require a Plan. We have already disapproved of the latter option in light of legislative intent. *See Siskiyou,* 565 F.3d at 557-58. Specifically, the USFS adopted the NOI process in response to a suggestion from the House Committee on Interior and Insular Affairs, Subcommittee on Public Lands, which recommended that the USFS use a notice procedure in order to avoid the unreasonable restrictions on small-scale mining rights, and the unnecessary burdens on federal agencies, that are associated with the costs of preparing and submitting detailed Plans for operations that do not need them. *See Forests Use Under Mining Laws,* 39 Fed. Reg. at 31,317; *see also supra* at 4660-61. On the other hand, the former option would result in too little deserved regulation. Here, giving the USFS the final say over whether an activity is likely to significantly disturb surface resources results in greater environmental protection than would result from leaving that decision up to the miners themselves, who have little incentive to voluntarily subject themselves to perhaps costly regulation. *See Marbled Murrelet,* 83 F.3d at 1074.

In sum, the NOI process was not intended necessarily to trigger *more* environmental compliance; it was designed to make environmental

compliance better and more efficient. It would undermine the goals of the entire scheme to require consultation for an NOI, the procedural device designed to avoid burdensome compliance obligations and focus the USFS's energies on those activities that are likely to cause significant disturbance. The NOI process is a careful balancing act, designed to facilitate resolution of the question of whether a Plan should be filed. Given such considerations, we conclude that the NOI process is analogous to the adviceseeking process at issue in *Marbled Murrelet* for which section 7 consultation is not required.

An almost identical regulatory scheme was at issue in *Sierra Club v. Penfold,* 857 F.2d 1307. Under 43 C.F.R. § 3809 (1986), the BLM uses a three-tiered approach to regulating placer mining on federal lands within its jurisdiction. First are "casual" use mines, for which no notice or approval is required. *Id.* at 1309. The BLM nonetheless monitors casual uses to ensure no "undue degradation" of the lands occurs. *Id.* Second are "notice" mines, for which no BLM approval is required but for which the miner must submit basic information to the BLM about the proposed operations at least fifteen days prior to commencing them. *Id.* The notice must include a statement that "reclamation of disturbed areas will be completed and that reasonable measures will be taken to prevent unnecessary or undue degradation of the lands during operations." *Id.* BLM monitors "notice" mining operations for compliance, as well. *Id.* at 1310. Third are "plan" mines, which must be approved by the BLM and subjected to

environmental assessment before the operation may proceed. *Id.* at 1309.

It is clear that the BLM's approach to "casual," "notice," and "plan" mining operations follows the same structure as the USFS's approach to mining activities that "are not likely to," "might," and "are likely to" cause significant surface resource disturbance, *see* 36 C.F.R. § 228.4. This similarity was intentional. 45 Fed. Reg. 78,906 *(Nov. 26, 1980)* (explaining that the regulations were designed "to be as consistent as possible with the Forest Service regulations").

In *Penfold*, we determined that the "BLM's approval of Notice mines without an [environmental assessment] does not constitute *major* federal action within the scope of NEPA." 857 F.2d at 1314 (emphasis added). *Penfold* can be read to say that the BLM's review of a notice is a "marginal" agency action, just not a "major" one. *See id.* at 1313-14. But, just as actions must be "major" to trigger NEPA obligations, actions carried out entirely by private parties must involve "affirmative" federal agency authorization to trigger *section 7.* The mere fact that the agency is involved in some way is not enough. Thus, even assuming the Tribe is correct that the threshold for triggering environmental compliance

under the ESA is lower than for NEPA,[14] we nonetheless find our previous determination that a similar notice scheme was not the sort of agency action that requires environmental compliance to be additional persuasive authority in support of our holding.[15]

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[14] We have previously explained that "[t]he standards for 'major federal action' under NEPA and 'agency action' under the ESA are much the same[,]" although the ESA standard is arguably more liberal because it does not contain the "major" requirement. *Marbled Murrelet,* 83 F.3d at 1075. We note, however, that agency action under the ESA is specifically defined as those actions "authorized, funded, or carried out" by a federal agency. 50 C.F.R. § 402.02. Under NEPA, agency action is defined as an activity "entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies." 40 C.F.R. § 1508.18(a). Thus, although the ESA may be more liberal in the sense of the size of the federal undertaking that triggers the statute, NEPA may be broader in a different sense because it covers a broader array of activities than the ESA. The distinctions may thus cut both ways, further convincing us that while the NEPA and ESA analysis is certainly not interchangeable, in determining whether the federal activity is a qualifying "agency action," our analysis in *Penfold* of the BLM's equivalent of the NOI process under NEPA is highly persuasive as to the ESA question.

[15] We are additionally persuaded by analogy to *Penfold* that the NOI process is hardly an agency "action" (let alone an "authorization" of the mining activities) because the notice review process in *Penfold* was significantly more substantive than the review the USFS does here. If the detailed regulatory review of a notice in *Penfold* was merely a "marginal" agency action, the much less rigorous and involved review of an NOI by the USFS under 36 C.F.R. § 228.4 is not the sort of affirmative authorization we require for ESA consultation.

In sum, our conclusion is amply supported by the reasoning and holdings of our prior case law. Importantly, our conclusion is consistent with common sense as well. The operative words in the ESA and implementing regulations are "action" and "authorize," which inherently require affirmative conduct: "action" is "[t]he process of doing something; conduct or behavior," and to "authorize" is "[t]o give legal authority[,] to empower[,]. . . [t]o formally approve[, or] to sanction." Black's Law Dictionary 32, 153 (9th ed. 2009). Our conclusion is also eminently logical. Nothing in the ESA or the relevant rule-making history suggests that the ESA imposes a duty on federal agencies to *affirmatively engage* in regulatory actions to protect the environment. As the Supreme Court noted in *National Association of Home Builders*, the ESA requires agencies to "insure"--that is, "'to make certain, to secure, to guarantee'"--that "listed species or their habitats" are not "jeopardize[d]." 551 U.S. at 666-67 (alterations omitted) (quoting *Defenders of Wildlife v. EPA,* 420 F.3d 946, 963 (9th Cir. 2005)). If agencies were forced to conform their *inaction* to the ESA's requirements, then the ESA would operate as a blanket mandate requiring federal agencies to take *affirmative* steps to *guarantee* that listed species are not harmed. That is, of course, not the law.

CONCLUSION

The mining laws provide miners like The New 49'ers with the "right, not the mere privilege" to prospect for gold in the Klamath River and its tributaries. We therefore find it is most accurate to

say that the mining laws, not the USFS, authorize the mining activities at issue here. The USFS has adopted a simple review process to sort between those mining activities it will regulate in order to conserve forest resources, and those activities it will not regulate because such regulation would be unnecessary and unduly interfere with mining rights. The USFS's limited and internal review of an NOI for the purpose of confirming that the miner does not need to submit a Plan for approval (because the activities are unlikely to cause any significant disturbance of the forest or river) is an agency decision not to regulate legal private conduct. In other words, the USFS's decision at issue results in agency inaction, not agency action.

The decision of the district court is

AFFIRMED.

DISSENT BY: William A. Fletcher

DISSENT

W. FLETCHER, Circuit Judge, dissenting:

I respectfully but emphatically dissent.

The issue in this case is whether the Endangered Species Act ("ESA") requires the U.S. Forest Service to consult with appropriate agencies of the federal government before approving a Notice of Intent ("NOI") to conduct suction dredge mining in the Klamath National Forest. Section 7(a)(2) of the ESA requires that a federal agency consult with one or both of the Fish and Wildlife Service and the National Marine Fisheries Service to ensure that any "agency action" is "not likely to jeopardize the continued existence" of any endangered or threatened species or "to result in the destruction or adverse modification of habitat of such species." *16* U.S.C. § 1536(a)(2). Consultation is required under Section 7(a)(2) whenever agency action "may affect listed species or critical habitat." 50 C.F.R. § 402.14(a).

An NOI is required when suction dredge mining "might cause significant disturbance of surface resources." 36 C.F.R. § 228.4(a). Mining is not allowed unless the NOI is approved by the Forest Service. "Surface resources" include underwater fisheries habitat. *Id.* at § 228.8(e). The Klamath

River system is "critical habitat" for coho salmon, a listed species.

There are two questions before us.

The first is whether Forest Service approval of NOIs to conduct suction dredge mining in the Klamath National Forest is "agency action" within the meaning of Section 7(a)(2). Under our established case law, there is "agency action" whenever an agency makes a discretionary decision about whether, or under what conditions, to allow private activity to proceed. The record in this case shows that District Rangers in the Klamath National Forest made discretionary decisions about whether, and under what conditions, to allow suction dredge mining to proceed under NOIs.

The second is whether suction dredge mining under NOIs (which, by definition, is mining that "might cause significant disturbance" to fisheries habitat) "may affect" critical habitat of the listed coho salmon. The record in this case shows such mining satisfies the "may affect" standard. I would therefore hold that the Forest Service must consult with the Fish and Wildlife Service and the National Marine Fisheries Service[1] before allowing suction dredge mining to proceed under NOIs in the Klamath National Forest.

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[1] The parties appear to assume that if consultation is required under Section 7(a)(2), it is required with both agencies. Without deciding the question, I will also so assume.

I. Background

The Karuk Tribe has inhabited what is now northern California since time immemorial. The Klamath River originates in southeastern Oregon, runs through northern California, and empties into the Pacific Ocean about forty miles south of the California-Oregon border. As it runs through northern California, the Klamath River passes though the Klamath National Forest. The Klamath River system is home to several species of fish, including coho salmon. Coho salmon in the Klamath River system were listed as "threatened" under the ESA in 1997. 62 Fed. Reg. 24588 (May 6, 1997). The Klamath River system was designated a "critical habitat" for coho salmon in 1999. 64 Fed. Reg. 24049 (May 5, 1999).

The rivers and streams of the Klamath River system contain gold. Commercial gold mining in and around the rivers and streams of California was halted long ago due to the extreme harm to the environment caused by large-scale placer mining. *See generally* Charles N. Alpers et al., *Mercury Contamination from Historical Gold Mining in California*, U.S. GEOLOGICAL SURVEY FACT SHEET 2005-3014 (Oct. 2005); GREEN VERSUS GOLD: SOURCES IN CALIFORNIA'S ENVIRONMENTAL HISTORY (Carolyn Merchant ed., 1998); Scott Fields, *Tarnishing the Earth*, ENVIRONMENTAL HEALTH PERSPECTIVES 109:10 (Oct. 2001). However, small-scale recreational mining has continued. Some recreational miners "pan" for gold by hand,

examining one pan of sand and gravel at a time. Others use mechanical suction dredging devices.

Suction dredge miners use gasoline-powered engines and hoses to suck rock, gravel and sand from streambeds. The material sucked from the streambed is discharged into a sluice box. As the material flows through the box, a small amount of the heavier material, including gold, is slowed by "riffles" and is then captured in the bottom of the box. The remaining material runs through the box and is deposited in a tailings pile in or beside the stream. The suction dredges at issue typically have intake hoses four or five inches in diameter. Dredging depths are usually about five feet, but can be as great as twelve feet.

The majority attempts to minimize the impact of suction dredge mining, stating it is "best described" as moving "a few cubic inches at a time" and "affect[ing] about one quarter of a cubic yard of the river." Maj. Op. at 4648, 4653. A typical suction dredge picks up from the bottom of the stream and deposits in a tailings pile about one-quarter of a cubic yard of material per day. A cubic yard contains 11,664 cubic inches. Many square yards of stream bottom are scoured in order to obtain one-quarter of a cubic yard of movable material per day, but the record does not tell us how many.

The Karuk Tribe contends that suction dredge mining adversely affects fish, including coho salmon, in the Klamath River system. The Tribe brought suit in federal district court in 2004 seeking to limit

suction dredge mining in the Klamath National Forest under the National Forest Management Act ("NFMA"), the National Environmental Policy Act ("NEPA"), and the ESA. The Tribe alleged that the Forest Service defendants violated these statutes when they allowed suction dredge mining under Notices of Intent ("NOIs") and Plans of Operation ("PoOs"). The district court granted judgment in 2005, but briefing on appeal was stayed by agreement of the parties until we decided a case involving suction dredge mining in the Siskyou National Forest in Oregon. *Siskiyou Regional Educ. Project v. U.S. Forest Service,* 565 F.3d 545 (9th Cir. 2009).

The Tribe prevailed in the district court in this case in its challenge to the Forest Service's approval of large-scale suction dredge mining under PoOs. By stipulation filed in the district court in April 2005, the Forest Service defendants agreed that "each of the challenged PoOs were approved without compliance with the ESA, NEPA, and their implementing regulations." That is, the Forest Service agreed that it had to prepare appropriate documents under NEPA and to consult with the appropriate federal agencies under the ESA before approving any PoO.

However, the district court agreed with the Forest Service that compliance with NEPA and the ESA was not required for suction dredge mining allowed under approved NOIs. On appeal, the Tribe does not contend that the Forest Service must comply with NEPA before approving an NOI. But it

does contend that the Forest Service must consult with appropriate federal agencies under Section 7(a)(2) of the ESA before approving an NOI. For the reasons that follow, I strongly agree with the Tribe.

II. Regulation of Suction Dredge Mining

An approved NOI is required for any suction dredge mining that "*might cause* significant disturbance of surface resources." 36 C.F.R. § 228.4(a) (emphasis added). An approved PoO is required for suction dredge mining that "*will likely cause* significant disturbance of surface resources." *Id.* § 228.4(a)(3) (emphasis added). That is, an approved NOI is required for all suction dredge mining for which the likelihood of a "significant disturbance of surface resources" falls between "might cause" and "will likely cause."

The Department of Agriculture defines "surface resources" as including underwater "fisheries . . . habitat." *Id.* § 228.8(e). See 70 Fed. Reg. at 32718 ("Section 228.8 characterizes fisheries habitat as a 'National Forest surface resource[.]' . . . Fisheries habitat, of course, can consist of nothing other than water, streambeds, or other submerged lands.").

The Department recognizes that the effects of suction dredge mining vary substantially from one site to another. It wrote in a 2005 commentary:

> The environmental impacts of operating suction dredges, even small

> ones, are highly site-specific depending on the circumstances and resource conditions . . . . Given this variability, the Department believes that, insofar as suction dredge operations are concerned, the need for the prior submission of a notice of intent to operate or for the prior submission and approval of a proposed plan of operations must be evaluated on a site-specific basis.

70 Fed. Reg. at 32720.

The Department has made clear, in a response to a comment directed to 36 C.F.R. § 228.4(a), that an NOI for suction dredge mining is not a "regulatory instrument," but rather "simply . . . a notice given to the Forest Service by an operator which describes the operator's plan to conduct operations on NFS lands." *Id.* at 32728; 36 C.F.R. § 228.4(a)(2) ("The District Ranger will, within 15 days of a notice of intent to operate, notify the operator if approval of a plan of operations is required before the operations may begin."). However, in that same response, the Department also made clear that requirements for NOIs vary substantially depending on the site:

> [T]here can be no definitive answer to the question of what level of activity requires the submission of a notice of intent to conduct operations. As previously mentioned . . ., given the variability of the lands within the NFS

> subject to the United States mining laws, identical operations could have vastly different effects depending upon the conditions of the lands and other surface resources which would be affected by those mining operations. . . . *[I]n many cases the need for the submission of a notice of intent to operate must be determined based upon a case-by-case evaluation of the proposed operations and the kinds of lands and other surface resources involved.*

70 Fed. Reg. at 32728 (emphasis added).

The majority writes that the Forest Service decision to allow mining to proceed under an NOI is "most accurately described as a decision *not* to act." This is a critical point, and the majority is wrong. The Forest Service makes an actual decision whether to allow suction dredging to proceed pursuant to an NOI. As I will describe in detail below, there are seven NOIs in the record in this case. One was withdrawn. Of the remaining six, the Forest Service acted affirmatively to approve four and to deny two. There is no non-withdrawn NOI in the record that the Forest Service did not act affirmatively to approve or deny. The miners whose NOIs were approved each received a letter from the Forest Service District Ranger stating that "You *may begin* your mining operations when you obtain all applicable state and federal permits" (emphasis added). No miner was allowed to engage in suction

dredge mining under an NOI unless that NOI had been explicitly approved by the Forest Service.

III. Notices of Intent

The term "Notice of Intent" is not specific to mining laws. It is a generic term used in a number of different statutory regimes. The discretion available to an agency in approving or denying an NOI varies depending on the statute and the implementing regulations under which the NOI is submitted. We described one such regime in *Environmental Defense Center, Inc. v. Environmental Protection Agency,* 344 F.3d 832, 853-54 (9th Cir. 2003). We explained in our opinion that the EPA regulated stormwater discharges under the Clean Water Act. Some types of discharges were governed by a "general permit" that allowed applicants to submit short NOIs certifying that they would comply with the terms of the general permit. *Id.; see also Tex. Indep. Producers & Royalty Owners Ass'n v. EPA,* 410 F.3d 964, 979 (7th Cir. 2005). The EPA provided applicants with a simple form NOI for that purpose.[2] *Envtl. Def. Ctr.,* 344 F.3d at 853. We wrote that "because th[is] NOI represents no more than a formal acceptance of terms elaborated elsewhere," the operator could begin discharges after submitting an NOI without waiting for a response from the EPA. *Id.*

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[2] The current general permit and form NOI are available at http://www.epa.gov/npdes/pubs/cgp2008_finalpermit.pdf. The NOI form and instructions are found at Appendix E.

But not all NOIs for stormwater discharges are ministerial and non-discretionary. Plaintiffs in *Environmental Defense Center* challenged a different sort of NOI from the one just described. The challenged NOI allowed discharges from small municipal storm systems. Each operator of these small systems was required to submit an NOI that included an "individualized pollution control program" addressing six criteria. Because the information required in this NOI was quite detailed, we held that this NOI was functionally identical to a permit application. *Id.* This NOI "crosse[d] the threshold from being an item of procedural correspondence to being a substantive component of a regulatory regime." *Id.* at 855.

As is evident from *Environmental Defense Center*, the mere label "Notice of Intent" does not allow us to determine how much agency discretion is involved in allowing an operator to proceed under an NOI. To make that determination, we must examine the actual practice of the agency with respect to the particular NOI at issue.

IV. Consultation under the Endangered Species Act

Section 7(a)(2) of the ESA requires consultation prior to any "agency action" that "may affect" a listed species or its habitat:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or

> carried out by such agency (hereinafter in this section referred to as an "*agency action*") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical[.]

16 U.S.C. § 1536(a)(2) (emphasis added).

Regulations implementing Section 7 provide:

> Each Federal agency shall review its actions at the earliest possible time to determine whether any action *may affect* listed species or critical habitat. If such a determination is made, formal consultation is required[.]

50 C.F.R. § 402.14(a) (emphasis added).

I discuss the "agency action" and "may affect" requirements in turn.

A. "Agency Action"

Congress intended the term "agency action" to have a broad definition. "[T]here is little doubt that Congress intended to enact a broad definition of agency action in the ESA[.] . . . Following the Supreme Court's lead in [*Tennessee Valley Authority v. Hill,* 437 U.S. 153, 98 S. Ct. 2279, 57 L. Ed. 2d 117

(1978)], we have also construed 'agency action' broadly." *Pacific Rivers Council v. Thomas,* 30 F.3d 1050, 1054, 1055 (9th Cir. 1994) (statutory citations omitted); *see also Western Watersheds Project v. Matejko,* 468 F.3d 1099, 1108 (9th Cir. 2006) ("[T]he term 'agency action' is to be construed broadly[.]"); *Natural Res. Def. Council v. Houston,* 146 F.3d 1118, 1125 (9th Cir. 1998).

The regulations defining "agency action" make clear the breadth of the term:

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

50 C.F.R. § 402.02 (emphases added). "Section 7 and the requirements of this part apply to all actions in which there is *discretionary* Federal involvement or

control." *Id.* at § 402.03 (emphasis added). The question before us is whether Forest Service approval of the NOIs at issue was an "action[ ] in which there is discretionary Federal involvement or control," such that the Forest Service's approval was "agency action" within the meaning of *Section 7.*

This circuit has a well-established body of law on discretion and agency action under *Section 7* of the ESA. In *Turtle Island v. National Marine Fisheries Service,* 340 F.3d 969 (9th Cir. 2003), we held that *Section 7* required the Fisheries Service to consult within its own agency when issuing fishing permits under the High Seas Fishing Compliance Act ("the Compliance Act"). Because the Fisheries Service had discretion whether to issue the permits, the issuance of the permits was agency action. The Service was therefore required to consult under *Section 7.* We wrote, "Whether the Fisheries Service *must* condition permits to benefit listed species is not the question before this court, rather, the question before us is whether the statutory language of the Compliance Act confers sufficient discretion to the Fisheries Service so that the agency *could* condition permits to benefit listed species. We hold that the statute confers such discretion." Id. at *977* (emphasis in original).

In *National Wildlife Federation v. National Marine Fisheries Service,* 524 F.3d 917 (9th Cir. 2008), we reviewed a biological opinion prepared as part of the consultation process under Section 7. We wrote, "When an agency, acting in furtherance of a broad Congressional mandate, chooses a course of

action which is not specifically mandated by Congress and which is not specifically necessitated by the broad mandate, that action is, by definition, discretionary and is thus subject to *Section 7* consultation." *Id.* at 929. In *Washington Toxics Coalition v. Environmental Protection Agency,* 413 F.3d 1024 (9th Cir. 2005), we held that the EPA had to consult with the National Marine Fisheries Service under *Section 7* before approving pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). We wrote, "EPA retains discretion to alter the registration of pesticides for reasons that include environmental concerns. Therefore, EPA's regulatory discretion is not limited by FIFRA in any way that would bar an injunction to enforce the ESA." *Id.* at 1033 (statutory citation omitted).

In *Natural Resources Defense Council v. Houston,* 146 F.3d 1118 (9th Cir. 1998), we held that the Bureau of Reclamation had to consult with the National Marine Fisheries Service under *Section 7* before renewing contracts with farmers for water from the federal Central Valley Project because "there was some discretion available to the Bureau during the negotiation process" leading up to the renewals. *Id.* at 1126. Finally, in *Pacific Rivers Council v. Thomas,* 30 F.3d 1050 (9th Cir. 1994), we held that the Forest Service was required to consult under *Section 7* before allowing projects under the Land and Resource Management Plans for particular national forests.

If an agency performs an act that does not involve the exercise of discretion, that act is not "agency action" within the meaning of Section 7. For example, in *National Association of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007), the Supreme Court held that the EPA was required only to find that nine statutory criteria specified in the Clean Water Act ("CWA") had been satisfied before transferring regulatory authority to a state. Under the CWA, the EPA had no discretion, once these criteria were satisfied, to take any action that would benefit or protect any listed species under the ESA. The Court wrote, "[T]he ESA's requirements would come into play only when an action results from the exercise of agency discretion. This interpretation [of the CWA and the ESA] harmonizes the statutes by giving effect to the ESA's no-jeopardy mandate whenever an agency has discretion to do so, but not when the agency is forbidden from considering such extrastatutory factors." *Id.* at 665.

If an agency only has discretion that is unrelated to protecting a listed species, an act by that agency is not "agency action" within the meaning of *Section 7.* For example, in *Sierra Club v. Babbitt,* 65 F.3d 1502 (9th Cir. 1995), the Bureau of Land Management ("BLM") had entered into an agreement granting a logging company the right to build new logging roads on BLM land subject to BLM approval under specified criteria. None of the criteria was relevant to the protection of protected species under the ESA. Therefore, there was no "agency action" under Section 7: "[W]e conclude that where,

as here, the federal agency lacks the discretion to influence the private action, consultation would be a meaningless exercise; the agency simply does not possess the ability to implement measures that inure to the benefit of the protected species." *Id.* at 1509; *see also Envtl. Prot. Info. Ctr. v. Simpson Timber Co.,* 255 F.3d 1073, 1081 (9th Cir. 2001) ("[N]owhere in the various permit documents did the FWS retain discretionary control to make new requirements to protect species that subsequently might be listed as endangered or threatened.").

Sometimes an earlier act dictates later agency actions such that a later act involves no discretion and therefore does not require consultation. For example, in *Western Watersheds Projects v. Matejko,* 468 F.3d 1099 (9th Cir. 2006), private parties had been granted vested rights to divert water for irrigation long before the passage of the ESA. The Bureau of Land Management ("BLM") announced that it would not interfere with those previously vested rights. We held that so long as the private parties limited their activities to those consistent with their vested rights they did not have to notify the BLM of their activities, and the BLM did not have the ability to regulate their activities. Under these circumstances, we concluded that the BLM had not undertaken any discretionary "agency action" that would have required it to consult under Section 7. *Id.* at 1107-08.

An out-of-circuit example is *Texas Independent Producers and Royalty Owners Ass'n v. EPA,* 410 F.3d 964 (7th Cir. 2005), in which the EPA

consulted under the ESA before exercising its discretion to grant a "general permit" authorizing private operators to discharge stormwater under the Clean Water Act. *Id.* at 979. The operators then filed individual NOIs to discharge in accordance with the conditions of the general permit. *Id.* at 968. The Seventh Circuit held that the EPA did not have to consult on the individual NOIs because it had already consulted under the ESA before granting the general permit. The terms of the general permit dictated the manner in which stormwater would be discharged, thereby eliminating any discretion by the EPA in approving or denying an individual NOI.

B. "May Affect"

An agency is required to consult when its action "may affect" listed species or designated critical habitat. 50 C.F.R. § 402.14(a). An agency can avoid the obligation to consult only if it determines that its action will have "no effect" on listed species or designated critical habitat. *Thomas,* 30 F.3d at 1054 n.8. Once an agency has determined that its action "may affect" listed species or critical habitat, the agency may proceed with formal consultation or may choose instead to consult informally with the appropriate agency. If the consulting agency determines during informal consultation that the proposed action is "not likely to adversely affect any listed species or critical habitat," formal consultation is not required and the process ends. 50 C.F.R. § 402.14(b)(1). Thus, actions that have any chance of affecting listed species or critical habitat -- even if it is later determined that the actions are "not likely" to

do so -- require an agency at least to consult informally.

We have previously explained that "may affect" is a "relatively low . . . threshold" for triggering consultation. *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1018 (9th Cir. 2009). "'*Any possible effect*, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation[.]'" *Id.* at 1019 (quoting 51 Fed. Reg. 19926, 19949 (June 3, 1986)) (emphasis in Lockyer). The Secretaries of Interior and Commerce have explained that "the threshold for formal consultation must be set sufficiently low to allow Federal agencies to satisfy their duty to 'insure'" that their actions do not jeopardize listed species or critical habitat under section 7(a)(2). 51 Fed. Reg. at 19949.

In response to concerns that the "may affect" standard is too burdensome, the Secretaries explained that the availability of informal consultations mitigates any burden on the affected agencies. *Id.* at 19950. The Secretaries therefore rejected the suggestion that the consultation requirement should be triggered on a higher showing than the low "may affect" threshold. *Id.* at 19949.

V. Discussion

A. Challenged Notices of Intent

Four NOIs are challenged in this appeal. All four are for suction dredge mining in the Happy

Camp District of the Klamath National Forest. As noted above, an approved NOI is required for all suction dredge mining for which the likelihood of a "significant disturbance of surface resources" falls between "might cause" and "will likely cause." 36 C.F.R. § 228.4(a). "Surface resources" includes "fisheries habitat." *Id.* § 228.8(e). The Klamath River system is critical habitat for the listed coho salmon. Before the 2004 dredging season, the Forest Service had issued a two-page generic handout requiring information from operators who sought to engage in suction dredge mining pursuant to an NOI:

> Describe what you plan to do. Include when and how you will be operating, the proposed start-up date, and the expected duration of the activities. List other details such as the number of people involved in the operation, equipment you intend to use (sizes, capacity, frequency of use), depth of proposed suction dredging or excavation, how waste material will be handled, what vegetation will be removed, the size of area to be disturbed, quantity of material to be removed, housing or camping facilities to be used, and the method for sewage and waste disposal.

In preparation for the 2004 season, Happy Camp District Ranger Alan Vandiver decided that he needed more information than required by the handout. He was particularly concerned with the

effect of suction dredge mining on the critical habitat of listed coho salmon. Vandiver consulted with biologists Bill Bemis and Jon Grunbaum, who are employees of the Forest Service, not the Fish and Wildlife Service or the National Marine Fisheries Service.

Vandiver wrote the following memorandum on May 24, 2004:

> On April 20th a meeting was held in Orleans to discuss possible fisheries issues relating to dredging.

A number of opinions were shared on the possible effects. . . .

Following the Orleans meeting I asked our District Fisheries biologists, Bill Bemis and Jon Grunbaum, to develop recommendations, for my consideration, for the upcoming dredging season. They were not able to come to agreement on a list of fisheries recommendations. Their opinions varied widely on the effect of dredge operations on fisheries. I identified three key fisheries issues specific to the Happy Camp District[:] cold water refugia areas in the Klamath River, the intensity of dredge activities and the stability of spawning gravels in some portions of Elk Creek. These issues I used to help develop a threshold for determining a significant level of surface disturbance. I felt it was important from a cumulative effects standpoint to determine a threshold of dredge density on the streams, as well as identify the critical cold water refugia areas. . . .

. . . I discussed at length with Bill [Bemis] and Jon [Grunbaum] the effect on fisheries if the dredge activity was concentrated or dispersed over the length of the river. Concentrated use would result in longer river stretches without dredge activity and therefore less possible impacts to fisheries in the longer stretches. Distributed use would result in dispersed possible effects over the entire length of the river. . . . Considering the limited dredge operations in cold water refugia areas and the limited dredge access, I developed a threshold of 10 dredges per mile on the Klamath River and 3 dredges per mile on the Klamath tributaries. My thinking was the larger Klamath River, excluding the cold water refugia, could accommodate more dredge density with less impact than the smaller tributaries.

. . .

> On May 17, 2004 I met with members of the New 49'ers, the Karuk Tribe and our District fisheries biologists to discuss the upcoming dredge season. We discussed the key issues with respect to fisheries including cold water refugia areas in the Klamath River, the intensity of dredge activities and the stability of spawning gravels in the portion of Elk Creek from the East Fork of Elk Creek to Cougar Creek. See notes for May 17th for more detail.

The first of the NOIs challenged in this appeal was submitted by a recreational mining group called

the "New 49'ers." The New 49'ers own numerous mining claims in the Happy Camp District. On May 17, 2004, District Ranger Vandiver met with two representatives of the New 49'ers. Based on his earlier consultation with Bemis and Grunbaum, Vandiver instructed the New 49'ers on "three primary issues."

First, Vandiver instructed the New 49'ers that cold water refugias must be maintained within 500 feet of the mouths of twenty-two named creeks that fed into the Klamath River. Second, he instructed them that tailings piles must be raked back into the "dredge holes in critical spawning areas" of Elk Creek "in a timely manner as operations proceed, but no later than the end of the season." Third, he instructed them that there could be no more than ten dredges per mile on the Klamath River, and no more than three dredges per miles on Klamath tributaries.

On May 24, 2004, a week after their meeting with Vandiver, the New 49'ers submitted a detailed eight-page singlespaced NOI for suction dredge mining in the Happy Camp District during the 2004 season. The NOI proposed mining on approximately 35 miles of the Klamath River and its tributaries. The NOI estimated that each dredge would move an average of one quarter of a cubic yard of material per day. In accordance with Vandiver's instructions, the NOI specified that no dredging would occur in specified cold water refugia in the summer and early fall, that dredging holes would be filled in coho salmon spawning grounds on Elk Creek, and that dredge density would not exceed ten dredges per mile

on the Klamath River and three dredges per mile on its tributaries.

On May 25, Vandiver sent the New 49'ers a letter approving their NOI. On May 26, Bemis sent a "Note to the File" stating:

> The Notice of Intent (NOI) for the new 49'ers this year has an intensity of approximately 40 dredges over the 35 miles of the Klamath covered by their claims. They have agreed to a density of no more than 10 dredges in any one-mile at anytime. The new 49'ers have agreed to avoid the area around tributaries to the Klamath Rivers. The club has agreed to pull back dredging tailings in a critical reach within Elk Creek. These agreements and others explained in the NOI should reduce the impacts to anadromous fisheries on the Happy Camp Ranger District.

The second NOI was submitted by Nida Johnson, an individual miner who planned to mine thirteen claims. She submitted the NOI on May 29, 2004, noting that it was the "result of a meeting at the Happy Camp U.S.F.S. May 25, 2004." She explained that she was processing ore with dredges with four and five inch intake pipes. She wrote that "[d]redge tailings piles in Independence Cr[eek] will be leveled." In an attachment, she wrote:

> As recommended by the Forest Service, no dredging will be conducted on the Klamath River within 500 feet above and below the mouth of Independence Creek between June 15th and October 15th. I totally disagree with these distances and believe that dredging is actually beneficial to fish survival, but I am willing to follow these recommendations in order to continue with my mining operations.

Vandiver approved the NOI on June 14.

The third NOI was submitted by Robert Hamilton, an individual miner who planned to mine on four claims. He submitted his NOI on May 11, 2004. He stated that he planned to use a four-inch suction dredge for about two weeks during July. Under the heading "precautions," he wrote that he would limit dredge density to three per mile, and that "[t]ailings will be returned to dredge hole if possible in shallow areas or spread over large area in deep areas." Vandiver approved the NOI on June 15.

The fourth NOI was submitted by Ralph Easley, an individual miner who planned to mine on a single claim. He submitted his NOI on June 14. He stated that he planned to use a four inch suction dredge from the beginning of July to the end of September. He stated that the "[d]redge tailings will be raked back into dredge holes." Vandiver approved the NOI on June 15.

In addition to the four NOIs specifically at issue in this appeal, the record contains information about NOIs for suction dredging in two other districts of the Klamath National Forest--the Orleans and the Scott River Districts. Examination of these two NOIs provides important information about the Forest Service's practices with respect to section dredge mining pursuant to NOIs.

First, on April 26, 2004, the New 49'ers submitted a detailed eight-page single-spaced NOI for suction dredge mining in the Orleans District. On May 13, Acting Forest Supervisor William Metz refused to approve the NOI. Metz wrote:

> There is an important cold water refugia at the mouth of Wooley Creek that was discussed on the April 23, 2004 field trip as needing protection. This was not mentioned in your NOI. Protection of this refugia is critical to the survival of migrating anadromous fish.

Metz wrote further:

> Due to the anadromous fisheries in the lower Salmon River the stability of spawning gravels for fish redds [spawning nests] is a major concern. Redds can be lost if loose tailings piles erode away by stream course action while eggs are still present. Your NOI and the California Fish and Game

> Suction Dredge regulations fall short of addressing mitigations for this issue.

On May 24, the New 49'ers submitted a revised NOI for mining in the Orleans District. Dave McCracken, General Manager of the New 49'ers, wrote in a cover letter to the NOI, "If this Notice does not adequately address your concerns than [sic] I would suggest that we arrange an on-the-ground meeting at the earliest possible time." Then, anticipating that Metz would still not approve the NOI, the New 49'ers withdrew the revised NOI on May 29. McCracken wrote to Metz:

> From the substantial amount of dialog we have had with your office, other District offices, the Supervisor's office, Karuk Tribal leaders, active members of the Salmon River Restoration Council and others within local communities over the past several months, it has become increasingly clear that there are too many sensitive issues for us to try and man-age a group mining activity along the Salmon River at this time.

Second, on April 28, 2004, the New 49'ers submitted a detailed seven-page single-spaced NOI for suction dredge mining in the Scott River District. The NOI proposed an estimated fifteen dredges along fifteen miles of "stream course," with "[d]ensities of above five dredges per 100 yards . . . not anticipated." The NOI for the Scott River District made a general commitment concerning mining in cold water

refugias at the mouths of tributaries. After giving an example of a refugia, the NOI stated, "The 49'ers are committed to working with the Forest Service and [Department of Fish and Game] to identify these areas . . . and to adjust their operation to prevent disturbance and stress to these fish during critical time periods." Unlike the NOIs for mining in the Happy Camp and Orleans Districts, the NOI for the Scott River District made no provision for raking tailings piles back into dredge holes. On May 10, District Ranger Ray Haupt refused to approve the NOI, but for reasons unrelated to protection of fisheries. Haupt wrote,

> I am unable to allow your proposed mining operations for the SRRD [Scott River Ranger District] under a NOI because of your bonded campsite which allows your club members to camp (occupancy) longer than the 14 day camping limit. Your current Plan of Operations allows for extended camping (longer than 14 days) for your members, while they are actively engaged in mining. I am approving your mining operations for 2004 under a Plan of Operations with the following conditions . . . .

None of the conditions in the Plan of Operations related to specific cold water refugia or tailings piles.

In total, there are seven NOIs in the record. Four of them are for suction dredge mining in the

Happy Camp District. All four of these NOIs were approved by the Forest Service because they complied with the criteria formulated by District Ranger Vandiver for the protection of the critical habitat of the listed coho salmon. A fifth NOI was submitted for suction dredge mining in the Orleans District. That NOI was denied by the Forest Service because it did not comply with criteria for the protection of critical fisheries habitat. A revised NOI was then submitted, but it was withdrawn in anticipation of its being denied. Finally, a seventh NOI was submitted for suction dredge mining in the Scott River District. That NOI was denied by the Forest Service for reasons unrelated to fisheries habitat.

The Forest Service took affirmative action on all of the six NOIs that were not withdrawn. The Forest Service approved four of them and denied two of them. In no case did the Forest Service take "no action," as the majority opinion erroneously contends.

B. Consultation under Section 7(a)(2)

As noted above, two criteria must be met before consultation is required under Section 7(a)(2) of the ESA. Those criteria are: (1) there must be a proposed "agency action," and (2) the proposed agency action "may affect" a listed species or its habitat. I conclude that each of these criteria have been satisfied.

1. Agency Action

The Forest Service takes "agency action" under Section 7(a)(2) of the ESA in deciding whether to approve or deny NOIs for suction dredge mining if it exercises discretion in making that decision. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.03 (Section 7 "appl[ies] to all actions in which there is discretionary Federal involvement or control").

I conclude that the Forest Service exercised discretion in three ways in approving or denying NOIs for suction dredge mining in the Klamath National Forest. Because the Forest Service exercised discretion in approving or denying these NOIs, it took "agency action" within the meaning of Section 7(a)(2).

First, the Forest Service exercised discretion in formulating criteria for the protection of critical habitat of listed coho salmon. Those criteria governed the approval or denial of NOIs for suction dredge mining. As described in detail above, District Ranger Vandiver of the Happy Camp District prepared for the 2004 mining season by meeting with Forest Service biologists Bemis and Grunbaum. After consulting with them, Vandiver formulated criteria for protecting critical habitat from the effects of suction dredge mining conducted pursuant to NOIs. He specified by name each of the tributaries to the Klamath River that provided cold-water refugias that should be protected; he specified the maximum number of dredges per mile on the river and on its

tributaries; and he required that tailings be raked back into dredge holes.

Once Vandiver had exercised his discretion to formulate these specific criteria, they became conditions with which any would-be miner submitting an NOI in the Happy Camp District had to comply. For example, Nida Johnson's NOI indicated that she would respect a cold-water refugia by refraining from dredging within 500 feet of the mouth of Independence Creek. But she made clear that she was doing so only because of the condition imposed by Vandiver, and that, absent compliance with that condition, she would not be allowed to engage in mining:

> I totally disagree with these distances and believe that dredging is actually beneficial to fish survival, but I am willing to follow these recommendations in order to continue with my mining operations.

Similarly, a week after Vandiver had communicated the criteria to the New 49'ers, that group submitted an eight-page single-spaced NOI for suction dredge mining in the Happy Camp District that complied with the criteria. Vandiver approved the NOI the next day.

In one sense, Vandiver is to be commended. He recognized the danger that suction dredge mining posed to the critical habitat of coho salmon, and he consulted with Forest Service biologists Bemis and

Grunbaum in formulating protective criteria for approving mining under NOIs. The problem is that Vandiver failed to consult with employees of the required agencies. The ESA requires Vandiver consult with the Fish and Wildlife Service and the National Marine Fisheries Service, not merely within his own agency. Therefore, Vandiver's consultation with Forest Service biologists Bemis and Grunbaum did nothing to comply with Section 7.

Second, the Forest Service exercised discretion in refusing to approve a detailed NOI submitted by the New 49'ers for suction dredge mining in the Orleans District. Acting Forest Supervisor Metz refused to approve the NOI because, in his view, it provided insufficient protection of fisheries habitat: first, a cold-water refugia at the mouth of a particular creek was not mentioned in the NOI; second, there was insufficient mitigation of the dangers posed by loose tailings piles left by the dredges. The New 49'ers submitted a new NOI, but then withdrew it five days later. The New 49'ers' representative wrote that despite a "substantial . . . dialog," the Forest Service's protective conditions meant that "there are too many sensitive issues for us to try and manage a group mining activity along the Salmon River at this time."

Third, the Forest Service exercised discretion when its employees applied different criteria for the protection of fisheries habitat in different districts of the Klamath National Forest. District Ranger Vandiver developed and applied very specific protective criteria for granting or denying NOIs in

the Happy Camp District. Different protective criteria for NOIs were developed and applied in the Scott River District. There is nothing in the record to tell us how the criteria were developed in the Scott River District. But it is clear from the record that those criteria were different, at least in their application, from those in the Happy Camp District. The New 49'ers submitted an NOI to District Ranger Haupt in the Scott River District that complied in full with one of the criteria applied in the Happy Camp District by specifying the maximum number of dredges per mile. The NOI complied, to some degree, with a second Happy Camp criterion by committing to "work[ing] with" the Forest Service to identify cold-water refugia. But the NOI did not promise to observe any particular coldwater refugia and did not promise to stay a specified distance from any creek mouth. Finally, the NOI did not comply at all with the third Happy Camp criterion, for it did not mention raking tailings piles back into dredge holes. Scott River District Ranger Haupt denied the NOI for reasons unrelated to these three criteria, and he did not include these criteria in the Plan of Operations.

A discretionary decision is one that is not dictated or controlled by precise rules or regulations. District Rangers Vandiver and Haupt each formulated and applied their own, differing criteria in deciding whether to grant or deny NOIs for suction dredge mining in their districts. In neither district were those criteria dictated or controlled by precise rules or regulations. *See* 70 Fed. Reg. at 32720, 32724 (explaining that NOIs must be

evaluated on a site-specific basis, and that there is no "universal definition" of "significant disturbance"). This difference in formulating and applying criteria is the very definition of the exercise of discretion.

In every instance in the record before us, except one in which the NOI was withdrawn, the Forest Service affirmatively acted. In each of those instances, it either approved or denied the NOI in which suction dredge mining was proposed. In each instance, the Forest Service took some kind of discretionary action. Those actions were "agency actions" within the meaning of Section 7 of the ESA.

2. "May Affect" Listed Species or Habitat

Section 7 and an implementing regulation require consultation whenever an agency action "may affect . . . critical habitat" of a listed species. 50 C.F.R. § 402.14(a). An NOI is required whenever proposed suction dredge mining "might cause significant disturbance of surface resources." 36 C.F.R. § 228.4(a). "Surface resources" include fisheries habitat. *Id.* at § 228.8(e). The Klamath River system is a "critical habitat" for listed coho salmon.

Whether suction dredge mining under NOIs "may affect" "critical habitat" can almost be resolved as a textual matter, without the necessity to consult the factual record. That is, by definition, suction dredge mining under an NOI "might cause significant disturbance" of fisheries habitat in the Klamath River system. If the phrase "might cause

significant disturbance" of "fisheries habitat" is given an ordinary meaning, it follows almost automatically that suction dredge mining pursuant to an NOI "may affect" critical habitat of the coho salmon. Indeed, the Forest Service does not dispute that suction dredge mining in the Klamath River system pursuant to NOIs "may affect" the listed coho salmon and its critical habitat.

However, the New 49'ers contend that the record "is devoid of any evidence whatsoever that the four challenged suction dredge mining activities 'may affect' the coho salmon 'species' listed in Northern California." The New 49'ers make two arguments in support of their contention. Neither argument withstands scrutiny.

First, the New 49'ers argue that there is no evidence "that even a single member of any listed species would be 'taken' by reason" of the suction dredge mining at issue. "Take" has a particular definition under the ESA. 16 U.S.C. § 1532(19) ("The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.,* 515 U.S. 687, 691, 115 S. Ct. 2407, 132 L. Ed. 2d 597 (1995). Even if it is true (which I will assume *arguendo*) that suction dredge mining does not effectuate a "taking" of coho salmon under the ESA, this has no bearing on whether such mining "may affect" the salmon or its critical habitat under 50 C.F.R. § 402.14(a).

Second, the New 49'ers argue that Vandiver's consultation process within the Forest Service, and its resulting guidelines, "assured" that there would be "no impact whatsoever on listed species." This argument cuts against rather than in favor of the New 49'ers. The fact that District Ranger Vandiver formulated his own criteria to mitigate effects of suction dredging on the coho salmon and their critical habitat does not mean that the "may affect" standard was not met. Indeed, the fact that Vandiver consulted with Forest Service biologists in an attempt to reduce any adverse impact on coho salmon and their habitat suggests exactly the opposite.

A review of the record reveals abundant evidence that suction dredging under NOIs in the Happy Camp District "may affect" coho salmon and their critical habitat. Coho salmon in the Klamath River system were listed as "threatened" in 1997, and the river was listed as "critical habitat" two years later. 62 Fed. Reg. 24588, 24588 (May 6, 1997); 64 Fed. Reg. 24049 (May 5, 1999). In listing the salmon, the National Marine Fisheries Service noted that its population was "very depressed." 62 Fed. Reg. at 24588. The Fisheries Service concluded that "human-induced impacts," including overharvesting, hatchery practices, and habitat modification including mining had played a significant role in the decline, and had "reduced the coho salmon populations' resiliency" in the face of natural challenges. *Id.* at 24591-92. The Fisheries Service also concluded that "existing regulatory mechanisms

are either inadequate or not implemented well enough to con-serve" the salmon. *Id.* at 24588.

The record also includes information that Forest Service biologist Grunbaum provided on the effects of suction dredge mining at a meeting of Forest Service personnel on April 20, 2004. Grunbaum wrote that relatively few studies of suction dredging had been performed, but "the majority . . . showed that suction dredging can adversely affect aquatic habitats and biota." The effects varied across ecosystems; in some, "dredging may harm the population viability of threatened species." Grunbaum summarized specific potential adverse effects. First, "[e]ntrainment by suction dredge can directly kill and indirectly increase mortality of fish -- particularly un-eyed salmonid eggs and early developmental stages." Second, disturbance from suction dredging can kill the small invertebrates that larger fish feed on, or alter the invertebrates' environment so that they become scarce. Third, destabilized streambeds can "induc[e] fish to spawn on unstable material," and fish eggs and larvae can be "smothered or buried." Fourth, because the streams the salmon occupy are already at "near lethal temperatures," even "minor" disturbances in the summer can harm the salmon. Fifth, juvenile salmon could be "displaced to a less optimal location where overall fitness and survival odds are also less." Finally, a long list of other factors -- disturbance, turbidity, pollution, decrease in food base, and loss of cover associated with suction dredging -- could combine to harm the salmon.

I therefore conclude that the suction dredge mining challenged in this case "may affect" the listed coho salmon and its critical habitat.

C. Burden on the Forest Service

The burden imposed upon the Forest Service by the obligation to consult under Section 7 of the ESA is not great. Indeed, District Ranger Vandiver has already consulted with Forest Service biologists Bemis and Grunbaum in formulating the detailed criteria for suction dredge mining NOIs in the Happy Camp District of the Klamath National Forest. That consultation could not satisfy Section 7 because Bemis and Grunbaum work for the Forest Service rather than the Fish and Wildlife Service or the National Marine Fisheries Service. But if Vandiver had consulted with employees of those agencies, that consultation could have satisfied Section 7. If, after engaging in that consultation, Vandiver had formulated sufficiently detailed coho-protective criteria based on the views of the Fish and Wildlife Service and the National Marine Fisheries Service, any NOIs approved using those criteria would not have required the exercise of further discretion and therefore would not have required further consultation. *See Texas Indep. Producers, 410 F.3d at 979; Envtl. Def. Ctr.,* 344 F.3d at 853. Of course, Vandiver formulated his criteria for NOIs only for the Happy Camp District. But there is no reason why the Forest Service could not consult with the Fish and Wildlife Service and the National Marine Fisheries Service to formulate comparable criteria for all of the districts in the Klamath National

Forest, with the result that any individual NOI approved under those criteria would not require further consultation.

Conclusion

By definition, suction dredge mining pursuant to an NOI is mining that "might cause" "significant disturbance of surface resources," including the surface resource of "fisheries habitat." The Forest Service does not dispute that such mining "may affect" critical habitat of coho salmon in the Klamath River system within the meaning of Section 7 of the ESA. The Forest Service therefore has an obligation under Section 7 to consult with the relevant agencies at some point in the process of allowing such mining.

The Forest Service had several available choices. It could have consulted under Section 7 when it promulgated the regulation for dredge mining under NOIs. That is, it could have consulted when it set the threshold criterion for an NOI as mining that "might cause significant disturbance of surface resources" including fisheries habitat. Or it could have consulted under Section 7 when it formulated habitat-protective criteria for approving NOIs. That is, it could have consulted when District Ranger Vandiver formulated his criteria for approving the NOIs for the Happy Camp District. Or, finally, in the absence of criteria such as those formulated for the Happy Camp District, it could have consulted under Section 7 with respect to each individual NOI.

The one choice that was not available to the Forest Service was *never* to consult. Yet that is the choice the Forest Service made. In making that choice, the Forest Service violated Section 7 of the ESA.

I respectfully but emphatically dissent from the conclusion of the majority to the contrary.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KARUK TRIBE OF CALIFORNIA,
Plaintiff - Appellant,
v.
UNITED STATES FOREST SERVICE; MARGARET BOLAND,
Defendants - Appellees,

THE NEW 49'ERS, INC.; RAYMOND W. KOONS,
Defendants - Intervenors - Appellees.

September 12, 2011, Filed

JUDGES: KOZINSKI, Chief Judge.

OPINION BY: KOZINSKI

OPINION

ORDER

KOZINSKI, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.

Judge Rawlinson did not participate in the deliberations or vote in this case.

[Docket No. 92]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 05-16801

D.C. No. CV-04-04275-SBA

KARUK TRIBE OF CALIFORNIA,
Plaintiff-Appellant,
v.
UNITED STATES FOREST SERVICE; MARGARET BOLAND,
Defendants-Appellees,

THE NEW 49'ERS, INC.; RAYMOND W. KOONS,
Defendants-Intervenors-Appellees.

December 20, 2011, Filed

Before: KOSINSKI, Chief Judge, SILVERMAN, GRABER, WARDLAW, W. FLETCHER, GOULD, PAEZ, BERZON, M. SMITH, IKUTA, and MURGUIA, Circuit Judges.

ORDER

Any party wishing to argue that this case is moot may file a brief doing so by January 11, 2012. Any party wishing to respond may file a brief by

February 1, 2012. Optional replies are due by February 15, 2012. The principal briefs may not exceed 7000 words, and any reply filed may not exceed 3500 words.

The parties are invited to discuss, inter alia, Cal. Fish & Game Code § 5653.1; progress, if any, toward the issuance of final regulations pursuant to § 5653.1 and the lifting of California's moratorium on suction dredge mining; California Coastal Commission v. Granite Rock Co., 480 U.S. 572 (1987); and the "capable of repletion yet evading review" doctrine with respect to the four NOIs challenged in this case.

Each party must submit 20 paper copies of its brief on the day that it files the brief electronically. See 9th Cir. R. 31-1. The paper copies must be accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. A sample certificate is available at http://www.ca9.uscourts.gov/datastore/uplads/cmecf/Certificate-for-Brif-in-Paper-Format.pdf.

Submission is vacated, pending further order of the court.

KARUK TRIBE OF CALIFORNIA, Plaintiff,
v.
UNITED STATES FOREST SERVICE, et al.,
Defendants.

No. C 04-4275 SBA

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

July 1, 2005, Decided

JUDGES: SAUNDRA BROWN ARMSTRONG, United States District Judge.

OPINION BY: SAUNDRA BROWN ARMSTRONG

OPINION

ORDER

[Docket Nos. 54, 59, 65]

This matter comes before the Court on Plaintiff's Motion for Summary Judgment [Docket No. 54], Defendants' Motion to Strike Portions of Plaintiff's Declaration of Toz Soto [Docket No. 59], and the Miners' Motion for Miscellaneous Relief Concerning the Record [Docket No. 65]. Having read and considered the arguments presented by the parties in the papers submitted to the Court, the Court finds this matter appropriate for resolution without a hearing. The Court hereby GRANTS Defendants' Motion to Strike Portions of Plaintiffs

Declaration of Toz Soto, GRANTS IN PART and DENIES IN PART the Miners' Motion for Miscellaneous Relief Concerning the Record, and DENIES Plaintiff's Motion for Summary Judgment.

BACKGROUND

I. Factual and Regulatory Background.

A. The Parties.

B.

Plaintiff Karuk Tribe of California ("Plaintiff" or the "Tribe") is a federally-recognized Indian Tribe located in Happy Camp, California. Second Amended Complaint ("SAC") P 11. The Tribe has lived in northern California since time immemorial. Declaration of Leaf Hillman ("Hillman Decl.") at P 3. The Tribe works to protect certain fish species and the water quality of the streams and rivers in the Klamath National Forest. *Id.* P 12. A primary concern of the Tribe is the protection and restoration of native fish and wildlife species that the Tribe has depended upon for traditional, cultural, religious, and subsistence uses. Hillman Decl. P 3. The center of the Karuk world is Katimin, where the Salmon River meets the Klamath River. *Id.*

Defendant United States Forest Service ("Forest Service") is an agency of the United States Department of Agriculture. *Id.* P 16. Defendant Margaret Boland is the Supervisor for the Klamath National Forest. *Id.* The Forest Service is responsible for implementing all laws and regulations relating to

the management of the Klamath National Forest. *Id.* P 16.

Intervenor the New 49'ers, Inc. (the "New 49'ers") is a California corporation with a principal place of business in Happy Camp, California. Miners' Answer to Second Amended Complaint ("Miners' Answer") P 3. The New 49'ers own or control numerous mining claims in a 60-mile area surrounding the Salmon, Klamath, and Scott Rivers. SAC PP 36-37. The New 49'ers also leases many of its mining claims located along these rivers to its members. Miners' Answer P 3. Intervenor Raymond W. Koons ("Koons") is an individual who resides in Happy Camp. *Id.* He is also the owner of several unpatented mining claims located around the Klamath River. *Id.* Koons leases his mining claims to the 49'ers (the New 49'ers and Koons are collectively referred to herein as the "Miners"). *Id.*

B. The Applicable Mining Regulations.

Mining in national forests is governed by the General Mining Law of 1872 ("General Mining Law"), which confers a statutory right upon citizens to enter certain public lands for the purpose of prospecting. *See* 30 U.S.C. § 22, as amended by 30 U.S.C. § 612 (the "Surface Resources Act of 1955"). Pursuant to the General Mining Law, "Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase." *Id.*

The application of the General Mining Law to national forests was specifically affirmed by Congress in the Organic Act, 16 U.S.C. §§ 478 *et seq.*, which makes the national forests "subject to entry under the existing mining law of the United States and the rules and regulations applying thereto." *See* 16 U.S.C. § 482; *see Wilderness Society v. Dombeck,* 168 F.3d 367, 374 (9th Cir. 1999). The Organic Act allows the Secretary of Agriculture to make rules regulating the "occupancy and use [of national forest land] and to preserve the forests thereon from destruction." 16 U.S.C. § 551. However, the Organic Act also expressly states that it "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." 16 U.S.C. § 478.

In 1974, pursuant to the Organic Act, the Forest Service promulgated regulations governing the use of surface resources in connection with the mining activities on national forests. *See* 39 Fed. Reg. 31317 (Aug. 28, 1974) (presently codified as amended at 36 C.F.R. Part 228, subpart A (referred to herein as the "Part 228 regulations")). Before the Forest Service issued the final regulations, the House Committee on Interior and Insular Affairs, Subcommittee on Public Lands (the "Subcommittee") held oversight hearings and heard testimony from the Chief of the Forest Service and representatives from both the mining and environmental communities. *Id.* Following these hearings, the Subcommittee chairman wrote the Chief of the

Forest Service and stated that "the 1897 [Organic] Act clearly cannot be used as authority to prohibit prospecting, mining, and mineral processing" in national forests. *See* Letter from Rep. John Melcher to John McGuire, Forest Service Chief (June 20, 1974), reproduced in S. Dempsey, *Forest Service Regulations Concerning the Effect of Mining Operations on Surface Resources*, 8 Nat. Res. Law 481, 497-504 (1975). He further urged that the final regulations be reasonable and not "extend further than to require those things which preserve and protect the National Forests from needless damage by prospectors and miners." *Id.* The Subcommittee chairman also specifically expressed concerns regarding "the possibility of unreasonable enforcement of the regulations, with resulting cost increases that could make otherwise viable mineral operations prohibitively expensive." 39 Fed. Reg. 31317.

Due to the Subcommittee's concerns, the chairman ultimately recommended the adoption of a "simple notification procedure" that would enable the Forest Service to determine whether the miner would be required to submit a more comprehensive plan of operation ("PoO") before proceeding with mining operations. 8 Nat. Res. Law at 500. As the chairman explained:

An effort [should] be made to define more precisely what sort of prospecting would be excepted from the requirement to file operating plans. The National Wildlife Federal, the American Mining Congress, and the Idaho Mining Association[] all

seem to agree that prior notification of proposed 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. *Id.*

In response, the Forest Service stated that it "recognize[d] that prospectors and miners have a statutory right, not mere privilege, under the 1872 mining law and the Act of June 4, 1897, to go upon and use the open public domain lands of the National Forest System for the purposes of mineral exploration, development and production." 39 Fed. Reg. 31317. The Forest Service also acknowledged that "[e]xercise of that right may not be unreasonably restricted." *Id.* To address the Subcommittee's concerns, the Forest Service adopted a final rule that included a provision for notices of intent ("NOIs"). The Forest Service also noted that a "specific provision [was] made in the operating plan approval section of the regulations [that] charg[ed] Forest Service administrators with the responsibility to consider the economics of operations, along with the other factors, in determining the reasonableness of the requirements for surface resource protection." *Id.* In accordance with the *National Environmental Policy Act*, a Final Environmental Impact Statement

was prepared and filed that discussed the environmental impact of the regulations. *Id.*

The regulations, as originally promulgated, provided that, with certain exceptions, "a notice of intention to operate [would be] required from any person proposing to conduct operations which might cause disturbance of surface resources." 39 Fed. Reg. 31317. They further provided that, "[i]f the District Ranger determines that such operations will likely cause significant disturbance of surface resources, the operator [would be required to] submit a proposed plan of operations to the District Ranger." *Id.* Additionally, the regulations provided that the "requirements to submit a plan of operations [would] not apply . . . to individuals desiring to search for and occasionally remove small mineral samples or specimens [or] to prospecting and sampling which will not cause significant surface resource disturbance" and that a "notice of intent need not be filed . . . for operations which will not involve the use of mechanized earthmoving equipment such as bulldozers or backhoes and will not involve cutting of trees." *Id.* at 36 C.F.R. § 252.4(a)(2).[1] All persons entering national forests for mining purposes were required to comply with the regulations after their promulgation. *See* 16 U.S.C. § 482.

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[1] The current regulations are now set forth at 28 C.F.R. Part 228, subpart A.

C. The Northwest Forest Plan.

In 1994, the Secretaries of the Interior and Agriculture issued the Record of Decision for Amendments to Forest Service and Bureau of Land Management ("BLM") Planning Documents Within the Range of the Northern Spotted Owl, commonly known as the Northwest Forest Plan. The Northwest Forest Plan (or "NFP") amended the forest plans for numerous national forests, including the Klamath National Forest. In July 1995, the Klamath Forest issued a new forest plan, referred to as the Klamath Forest Plan, which incorporated elements of the NFP.[2]

The Northwest Forest Plan is a common approach to managing about 24 million acres of federal land within the range of the northern spotted owl across the Pacific Northwest. *See* Record of Decision for Northwest Forest Plan at 1-2. It consists of an extensive system of standards and guidelines[3] and land use allocations designed to balance extractive uses, such as mining, with considerations for wildlife species. *Id.* at 7, 12. One land use

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[2] Although the Northwest Forest Plan was technically superseded by the new forest plan, the term "NFP" is still used to refer to the conservation strategy incorporated into the Klamath National Forest Plan.

[3] Standards and guidelines are the "rules and limits governing actions, and the principles specifying the environmental conditions or levels to be achieved and maintained in managing specific lands." *See* Attachment A to the Record of Decision. In essence, they are conditions which apply either forest wide or to specific land use allocations within a national forest. *Id.*

allocation in the Northwest Forest Plan is known as the "Riparian Reserves" (or "RRs"). *Id.* at 7. Riparian Reserves include "areas along all streams, wetlands, ponds, lakes, and unstable or potentially unstable areas where the conservation of aquatic and riparian-dependent terrestrial resources receives primary emphasis." *Id.* Riparian Reserves are intended to "protect the health of the aquatic system and its dependent species" by maintaining and restoring riparian structure and function. *Id.*

It is explicitly stated in the Northwest Forest Plan that the standards and guidelines "do not apply where they would be contrary to existing law or regulation, or where they would require the agencies to take actions for which they do not have authority." *See* Attachment A to the Record of Decision. One of the Northwest Forest Plan standards and guidelines governing mineral management is MM-1, which requires, among other things, an approved Plan of Operation("PoO") for all minerals operations that include areas designated as RRs. *Id.* This guideline is incorporated into the forest plan for the Klamath National Forest as standard MA 10-34.

D. The Forest Service's Interpretation of the Northwest Forest Plan.

In 1995, the Regional Foresters issued a memorandum clarifying how the Part 228 mining regulations should be applied to the standard and guidelines addressing mining within RRs. AR 212-

213.[4] In that memorandum, the Regional Foresters noted that there were "numerous, small placer operations using suction dredges[5] and similar equipment occurring in RR's and [late successional reserves] throughout Regions 5[6] and 6," the majority of which would not require PoOs due to the "insignificant nature of their operation." AR 212. The memorandum further stated that, since mining was lawfully conducted under NOIs, the stricter standards and guidelines applicable to mining in RRs would not apply, since "there is no regulatory provision for including [the standards and guidelines] in an NOI." AR 213.

In February 2002, the Forest Service issued another memorandum again clarifying the regulation of mining within RRs. AR 216. It explained that requiring a PoO for mining that does not cause a significant disturbance of surface resources would be

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[4] The administrative record is referred to herein as "AR."

[5] Suction dredge mining is a "popular, relatively low cost mining method." AR 418. In suction dredge mining, the "gravel within the active stream channel is suctioned from the bottom of the stream and processed over a sluice on a floating platform." *Id.* A "gasoline powered motor and pump are mounted on the floating platform for powering the suction apparatus and for driving the air pump which supplies air to the persons working underwater." *Id.* The size of dredges used in California "ranges from 2-inches [to] up to 10-inches or more." *Id.*

[6] Region 5 encompasses California. *See 36 C.F.R. § 200.2(e).*

inappropriate and "contrary to law and regulation." AR 216. The memorandum further explained that:

> If no significant surface disturbance is occurring, we have no reason to require a reclamation bond, nor would we be able to determine that bond amount.
>
> In areas covered by the Northwest [Forest] Plan . . . or covered by other general management guidance or strategies, forest users can conduct non-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 228.3(a)(2).*

Id. The Forest Service thus concluded that, to be consistent with 36 C.F.R. § 228.4(a), PoOs would only be required in RRs where proposed mining would likely cause significant surface resource disturbances. AR 216-217.

In a 2004 memorandum, the Regional Forester for Region 5 reiterated that the requirement to submit a PoO in RRs would apply "only when the proposed activity is likely to cause significant surface resource disturbance." AR 219. The 2004 memorandum further stated that if the District Ranger concludes that a PoO is not required, then

"there is no decision and, hence, no federal action" to trigger the National Environmental Protection Act ("NEPA") or the *Endangered Species Act* ("ESA") for the Forest Service." AR 219. The memorandum also acknowledged that PoOs would be subject to the requirements of NEPA and the ESA. *Id.*

E. Amendments to the Mining Regulations.

On July 9, 2004, in response to a decision of the United States District Court of the Eastern District of California in *United States v.* Lex, 300 F.Supp.2d 951 (E.D. Cal. 2003), the Forest Service decided to amend the mining regulations in order to further clarify the Forest Service's position with respect to how 36 C.F.R. § 228.4(a) should be interpreted. *See* 70 Fed. Reg. 32713. The interim rule, which was published in the Federal Register, took effect on August 9, 2004. *See id.* at 32714. The interim rule stated that it was specifically intended to clarify that "the requirement to file a notice of intent to operate with the District Ranger is mandatory in any situation in which a mining operation might cause disturbance of surface resources, regardless of whether that operation would involve the use of mechanized earth moving equipment, such as bulldozer or backhoe, or the cutting of trees." *Id.* "The interim rule also sought to eliminate possible confusion by more specifically addressing the issue of what level of operation requires prior submission of a notice of intent to operate and what level of operation requires prior submission and approval of a plan of operations." *Id.* Although it was not required to, the Forest Service

provided the public with a 60-day comment period and stated that comments received on the interim rule would be considered in adopting a final rule. *Id.*

During the comment period, the Forest Service received a request that the new regulation include a provision exempting mining activities using only "small portable suction dredges, such as those with an intake of four inches or less" from the requirement to submit an NOI or PoO. *Id.* at 32720. The respondent who submitted the request indicated that "various studies, including those by the United States Environmental Protection Agency, the Department of Interior, United States Geological Survey, and the State of Alaska Department of Natural Resources, have shown that these dredges do not cause significant disturbance of streams or rivers." *Id.* The respondent further stated that"such a provision would [also] be consistent with the recommendations of the National Academy of Sciences, National Research Council's 1999 report entitled, Hardrock Mining on Federal Lands.'" The Forest Service declined to add such a provision to the final rule, but noted that:

> The environmental impacts of operating suction dredges, even small ones, are highly site-specific depending on the circumstances and resource conditions involved. The environmental impacts of using a suction dredge on two bodies of water which are otherwise similar can vary greatly if a threatened or endangered specie inhabits one body

> of water but not the other. Even with respect to a particular body of water, the environmental impacts of suction dredge operations can vary by season due to climatic conditions or the life cycles of aquatic species. Given this variability, the Department believes that, insofar as suction dredge operations are concerned, the need for the prior submission of a notice of intent to operate or for the prior submission and approval of a proposed plan of operations must be evaluated on a site-specific basis. While the operation of suction dredges with intakes smaller than four inches may not require either a notice of intent to operate or an approved plan of operations in many cases, the prior submission of a notice of intent to operate will be required in some cases, and the prior submission and approval of a proposed plan of operations will be required in fewer cases.

Id. at 32720.

The final rule was adopted by the Forest Service and published in the Federal Register on

June 6, 2005. As amended, 36 C.F.R. 228.4 now reads in pertinent part:

> *§ 228.4* Notice of intent -- plan of operations -- requirements.
>
> (a) Except as provided in paragraph (a)(1) of this section, a notice of intent to operate is required from any person proposing to conduct operations which might cause significant disturbance of surface resources . . . .Each notice of intent to operate shall provide information sufficient to identify the area involved, the nature of the proposed operations, the route of access to the area of operations, and the method of transport.
>
> (1) A notice of intent to operate is not required for:
>
> (i) Operations which will be limited to the use of vehicles on existing public roads or roads used and maintained for National Forest System purposes;
>
> (ii) Prospecting and sampling which will not cause significant surface resource disturbance and will not involve removal of more than a reasonable amount of mineral deposit for analysis and study which generally might include searching for and

occasionally removing small mineral samples or specimens, gold panning, metal detecting, non-motorized hand sluicing, using battery operated dry washers, and collecting of mineral specimens using hand tools;

(iii) Marking and monumenting a mining claim;

(iv) Underground operations which will not cause significant surface resource disturbance;

(v) Operations, which in their totality, will not cause surface resource disturbance which is substantially different than that caused by other users of the National Forest System who are not required to obtain a Forest Service special use authorization, contract, or other written authorization;

(vi) Operations which will not involve the use of mechanized earthmoving equipment, such as bulldozers or backhoes, or the cutting of trees, unless those operations otherwise might cause a significant disturbance of surface resources; or

(vii) Operations for which a proposed plan of operations is submitted for approval;

> (2) The District Ranger will, within 15 days of receipt of a notice of intent to operate, notify the operator if approval of a plan of operations is required before the operations may begin.
>
> . . .
>
> (4) If the District Ranger determines that any operation is causing or will likely cause significant disturbance of surface resources, the District Ranger shall notify the operator that the operator must submit a proposed plan of operations for approval and that the operations can not be conducted until a plan of operations is approved.

36 C.F.R. § 228.4 (June 6, 2005).

F. The 2004 Mining Season.

On or about February 1, 2004, Rangers and staff from the Klamath, Six Rivers, and Shasta Trinity National Forests met to discuss issues relevant to the upcoming mining season. AR 110. One of the issues discussed was suction dredging and whether the Rangers should develop a template to be used in the evaluation of NOIs. *Id.* On February 4, 2004, the Rangers conducted a meeting with representatives from the New 49'ers in order to evaluate issues surrounding the New 49'ers mining operations. AR 112.

On March 22, 2004, members of the Forest Service met with the Karuk Tribe and the New 49'ers to discuss potential issues for the upcoming dredging season. AR 109. A representative from the Karuk Tribe indicated that the Tribe was concerned about the effects of suction dredge operations on the Salmon River. *Id.* The Karuk Tribe representative also expressed concern regarding the New 49'ers potential interference with certain areas of ceremonial import to the Tribe. AR 109[7]. The attendees of the meeting agreed to reconvene on April 20, 2004 or April 21, 2004 to further discuss potential impacts of suction dredging on fisheries. *Id.*

During this time, the Happy Camp Ranger, Alan Vindiver ("Vindiver"), was working with two Forest Service biologists, Jon Grunbaum ("Grunbaum") and Bill Bemis ("Bemis"), to develop standards for determining when proposed operations in the Klamath Forest were likely to cause significant surface disturbances, thereby requiring a PoO. AR 095. As part of this process, Vindiver reviewed an April 20, 2004 report prepared by Grunbaum, a United States Forest Service Fisheries Biologist for the mid-Klamath and Salmon River regions. AR 095. Grunbaum's report noted that "[r]elatively few studies have examined the effects of suction dredging and related activities on riparian and aquatic habitats, and on fish and other aquatic organisms," and that "[t]he majority of the studies

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[7] As a result of this meeting with the Karuk Tribe, and due to the Karuk Tribe's concerns, the New 49'ers eventually withdrew their Notice of Intent to mine for gold on the lower Salmon River. AR 041.

show[] that suction dredging can adversely affect aquatic habitats and biota." AR 294. Grunbaum's report also noted that a United States Forest Service technical team had reviewed information on potential suction dredging effects on fisheries in 1998 and concluded that, "[i]n some situations, the effects of a dredging may be local and minor, particularly when compared to the effects of other human activities . . [while, in] other [situations], dredging may harm the population viability of threatened species." *Id.*

Vindiver also received input from Bemis, another District Fisheries biologist. AR 095. Vindiver observed that Bemis' opinions "varied widely [from Grunbaum's] on the effect of dredge operations on fisheries." *Id.* After considering the opinions of both Grunbaum and Bemis, Vindiver identified three key issues regarding fisheries, which he set forth in an internal Forest Service memorandum. AR 095. First, he identified twenty-two cold water refugia on the Klamath River used by fish when river temperatures are high, in which dredging might impact fish. AR 097-105. Second, Vindiver developed threshold dredging levels *(e.g.* ten dredges per mile on the Klamath River and three dredges per mile on tributary streams) which he felt would not lead to a significant disturbance of surface resources. AR 095, AR 108. Finally, he concluded that tailing piles should be raked back into dredge holes to protect spawning gravel on Elk Creek. *Id.* These recommendations were discussed in an open forum with potential miners. AR 091, AR 096. Vindiver's findings were also summarized in a comprehensive

set of internal guidelines. AR 097-105. A shorter summary of Vindiver's findings was circulated to potential miners. AR 091.

On May 17, 2004, members of the Forest Service met with members of the Karuk Tribe and the New 49'ers to further discuss potential fisheries issues associated with the upcoming dredge season. AR 106. At the meeting, Vindiver identified the three key issues that needed to be addressed in all NOIs: (1) cold water refugia areas on the Klamath River; (2) stability of coho spawning gravels in a portion of Elk Creek, and (3) the number of dredges per mile of stream. AR 106. With respect to the first issue, Vindiver identified twenty discrete areas of cold water refugia where dredging would not be permitted between June 15, 2004 and October 15, 2004. AR 106. Vindiver also stated that all dredge trailings would have to be raked back into dredge holes by the end of the season. AR 107. Finally, Vindiver set up a threshold dredge intensity level of "10 dredges per mile on the Klamath River" and "no more than three dredges per mile on Klamath tributaries." AR 108. Vindiver concluded that "this level of intensity would not lead to a significant disturbance of the surface resource." *Id.*

1. The New 49'ers Notice of Intent.

On May 24, 2004, the New 49'ers submitted an NOI to conduct operations within the Happy Camp Ranger District. AR 031-040. The NOI indicated that the level of dredging activity would involve "a daily average of 10 active suction dredges out of

approximately 40 dredges disbursed throughout 35 miles of stream course between the months of May through mid-September." AR 033. The NOI also indicated that the average amount of material moved per dredge was estimated to be around 1/4 yard, that no operations would occur within 500 feet of numerous cool water refugia, and that dredge holes would be back-filled to replicate the original contour of the streambed. AR 033-34. The NOI further stated that large mechanized equipment, such as backhoes and bulldozers, would not be used, and instead proposed a very limited use of hand tools outside the stream but with the mean high water channel. AR 035. On May 25, 2005, the Ranger notified the 49'ers that they would not need to submit a PoO. AR 029.

2. Nida Johnson's Notice of Intent.

On May 29, 2004, Nida Johnson submitted an NOI to conduct suction dredging on several claims in the Happy Camp Ranger District. AR 069. The NOI indicated that no mechanized earthmoving equipment would be used, that no trees would be cut, that all dredge tailings would be leveled, and that no dredging would be conducted within 500 feet above or below the mouth of Independence Creek. AR 069-070. On June 14, 2004, the Forest Service informed Johnson that he would not need to submit a PoO. AR 067.

3. Robert Hamilton's Notice of Intent.

On June 2, 2004, Robert Hamilton submitted an NOI indicating that he would be performing

suction dredge mining for twelve days, from July 12, 2004 to July 23, 2004, between the hours of 9:30 a.m. and 3:30 p.m. AR 075. The NOI also indicated that Hamilton would be using a pan, shovel, and a 4-inch suction hose with a 2.5-inch nozzle. AR 075. It further stated that "[u]p to 20 cu[bic] y[ar]ds of material could be moved down to a depth of approx[imately] 6 f[ee]t or bedrock, whichever comes first" and that all "tailings will be returned to a dredge hole if possible in shallow areas or spread over large area in deep areas." AR 076. On June 15, 2004, the Ranger informed Hamilton that he would not need to submit a PoO. AR 074.

4. Ralph Easley's Notice of Intent.

On June 14, 2004, Ralph Easley submitted an NOI indicating that he intended to perform suction dredging at his one mining claim from July 1, 2004 to September 30, 2004. AR 082. The NOI further indicated that two people would be using a 4-inch dredge hose and other assorted hand tools, but that mechanized earth-moving equipment would not be used. *Id.* It also stated that all dredge tailings would be raked back into dredge holes. *Id.* On June 15, 2004, the Forest Service informed Easley that he would not need to submit a PoO. AR081.

5. The Forest Service's Subsequent Monitoring of Suction Dredge Activities.

Throughout the summer of 2004, the Forest Service -- often in conjunction with a representative of the Karuk Tribe -- monitored the activities taking

place within the Forest to evaluate compliance with the NOIs. AR 087. For example, on June 8, 2004, Vandiver floated the Klamath River with the River Ranger and the Deputy Forest Supervisor to monitor compliance with the NOIs. AR 090. On June 15, 2004, Vandiver also consulted with a member of the Karuk Tribe to discuss a monitoring strategy for the dredge season. AR 088. Further, on June 23, 2004, a member of the Forest Service monitored a number of mining operations with a member of the Karuk Tribe. AR 087. The Tribe continued to participate in the Forest Service's monitoring trips in September. AR 085.

II. Procedural Background.

On October 8, 2004, Plaintiff filed a Complaint for Declaratory and Injunctive Relief against the United States Forest Service, Jeff Walters,[8] and Margaret Boland (collectively, "Defendants"). On October 15, 2004, Plaintiff filed an Amended Complaint for Declaratory and Injunctive Relief ("Amended Complaint"). Pursuant to a stipulation between the parties, Plaintiff's Amended Complaint was dismissed without prejudice on January 24, 2005.

On January 31, 2005, Plaintiff filed a Second Amended Complaint. Plaintiffs Second Amended Complaint seeks declaratory and injunctive relief arising from Defendants' allegedly improper

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[8] Jeff Walters is the Forest Supervisor for the Six Rivers National Forest.

management of suction dredge and other mining operations in waterways and riparian areas within the Klamath National Forest. *Id.* P 1. The Second Amended Complaint challenges four Forest Service decisions allowing suction dredge and other mining operations to occur pursuant to a Notice of Intent instead of a Plan of Operation: (1) the New 49'ers NOI; (2) the Johnson NOI; (3) the Hamilton NOI; and (4) the Easley NOI. *Id.* P 2. [9]

The Second Amended Complaint alleges violations of the following statutes: (1) the *National Forest Management Act* ("NFMA"); (2) the National Environmental Policy Act ("NEPA"); and (3) the

[9] Initially, the Second Amended Complaint also challenged five instances in which the Forest Service required a miner to submit a PoO, but allegedly failed to comply with the additional requirements triggered by the PoO approval process. *Id.* P 3. These allegations, and Defendant Jeff Walters, were dismissed from the lawsuit pursuant to a stipulation between the parties.

Endangered Species Act ("ESA").[10] *Id.* PP 94-127. Plaintiff asserts jurisdiction under the Administrative Procedure Act ("APA") and the citizen suit provision of the ESA. *Id.* P 8.

On March 1, 2005, the New 49'ers and Koons (hereinafter the "Miners") filed a Motion to Intervene. On April 26, 2005, the Court granted the Miners' Motion to Intervene. On April 29, 2005, Plaintiff filed the instant Motion for Summary Judgment.

LEGAL STANDARD

I. Summary Judgment.

The Federal Rules of Civil Procedure provide for summary adjudication when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,

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[10] The Second Amended Complaint also asserts causes of action for (1) violations of the Organic Act and the Forest Service's mining regulations; (2) violations of the *Clean Water Act*; and (3) violations of the Organic Act's special use regulations. However, in Plaintiff's Motion for Summary Judgment, Plaintiff states that it is not moving for summary judgment on these causes of action and requests that the causes of action be "excised from the case." The Court construes this request as a motion to amend the Second Amended Complaint such that the fifth, sixth, and eighth causes of action are dismissed from the case without prejudice. *See Hells Canyon Preservation Council v. United States Forest Service,* 403 F.3d 683, 689-90 (9th Cir. 2005). Accordingly, Plaintiff's request is GRANTED and Plaintiff's fifth, sixth, and eighth causes of action are hereby DISMISSED WITHOUT PREJUDICE.

show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

In considering a motion for summary judgment, the court must examine all of the evidence in the light most favorable to the non-moving party. *United States v. Diebold, Inc.,* 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962). If the moving party does not bear the burden of proof at trial, he or she may discharge his burden of showing that no genuine issue of material fact remains by demonstrating that "there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Once the moving party meets the requirements of *Rule 56* by showing there is an absence of evidence to support the non-moving party's case, the burden shifts to the party resisting the motion, who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

Where, as here, the Court's review is limited to the administrative record, stipulated to by the parties, there are no triable issues of fact, and summary judgment is appropriate. *See Northwest Motorcycle Ass'n v. United States Dep't of Agric.,* 18 F.3d 1468, 1472 (9th Cir.1994).

II. Administrative Procedure Act.

The Administrative Procedure Act ("APA") provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

The APA limits the scope of judicial review of agency actions. Generally, a court may not set aside an agency action unless that action was "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). "To make this finding, the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens To Preserve Overton Park v. Volpe,* 401 U.S. 402, 416, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971). "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Id.* "This is especially appropriate where, as here, the challenged decision implicates substantial agency expertise." Mt. *Graham Red Squirrel v. Espy,* 986 F.2d 1568, 1571 (9th Cir. 1993) ("Deference to an agency's technical expertise and experience is particularly warranted with respect to questions involving . . . scientific matters").

In determining whether an agency's actions were arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with the law, "the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706. "The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Florida Power & Light Co. v. Lorion,* 470 U.S. 729, 743, 84 L. Ed. 2d 643, 105 S. Ct. 1598 (1985). "The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." *Id.* at 743-44. A court may not consider information "that was not available at the time the [agency] made its decision." *Airport Cmtys. Coalition v. Graves,* 280 F. Supp. 2d 1207, 1213 (W.D.Wash.2003). "If the court were to consider this new information in an arbitrary and capricious analysis, the court would effectively transform that analysis into de novo review, a level of review for which the court is not authorized." *Id.*

ANALYSIS

I. The Administrative Record.

As a preliminary matter, the parties seek to include, and exclude, certain materials that are not part of the stipulated administrative record. Specifically, Plaintiff seeks to include the following documents: (1) excerpts from the Klamath National Forest Land and Resource Management Plan; (2) a December 2001 Draft Environmental Impact Statement for the Siskiyou National Forest; and (3)

an April 24, 2000 letter from the Acting Forest Supervisor for the Siskiyou National Forest.[11] Additionally, Plaintiff has submitted the Declaration of Toz Soto ("Soto Declaration") and the Declaration of Leaf Hillman ("Hillman"). In support of their Opposition brief, Defendants seek to include the following documents: (1) 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 ("Record of Decision"); (2) Attachment A to the Record of Decision; (3) excerpts from the Final Environmental Impact Statement and Land and Resource Management Plan for Six Rivers National Forest; (4) excerpts from Chapter 4 of the Klamath National Forest Land and Resource Management Plan; (5) a copy of Volume 8 *of Natural Resources Lawyer*; and (6) a copy of the originally promulgated Part 228 mining regulations, as published in the Federal Register.[12] In support of their Opposition brief, the Miners have submitted the Declaration of Joseph C. Greene ("Greene Declaration"), the Declaration of Dennis Maria ("Maria Declaration"), and the Declaration of David McCracken ("McCracken Declaration"). The Miners also seek to supplement the record with the following documents, which are attached to the Declaration of James L. Buchal ("Buchal Declaration"): (1) a copy of the

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[11] These documents were submitted to the Court as exhibits to Plaintiff's Motion for Summary Judgment.

[12] These documents were submitted to the Court as exhibits to Defendants' Opposition to Plaintiffs Motion for Summary Judgment.

Forest Service Manual; (2) a copy of the Forest Service Handbook; (3) a Forest Service report entitled "The Process Predicament"; (4) a copy of the Declaration of Thomas Kitchar, President of the Waldo Mining District; (5) the transcript of the proceedings in *California State Grange v. Dept. of Commerce,* 2005 U.S. Dist. LEXIS 28578, 02-6044-HO (May 25, 2005); and (6) a copy of the 1974 Environmental Impact Statement prepared in connection with the promulgation of the Part 228 mining regulations.

The Ninth Circuit allows a reviewing court to consider extra-record materials in an APA case only under four narrow exceptions: (1) when it needs to determine whether the agency has considered all relevant factors and has explained its decision; (2) when the agency has relied upon documents or materials not included in the record; (3) when it is necessary to explain technical terms or complex matters; and (4) when a plaintiff makes a showing of agency bad faith. *Southwest Center for Biological Diversity v. United States Forest Service,* 100 F.3d 1443, 1450 (9th Cir. 1996). For extra-record material to be considered, a plaintiff must first make a showing that the record is inadequate. *Animal Defense Council v. Hodel,* 840 F.2d 1432, 1437 (9th Cir. 1988) ("The [plaintiff] makes no showing that the district court needed to go outside the administrative record to determine whether the [agency] ignored information"). At the same time, "[a] satisfactory explanation of agency action is essential for adequate judicial review, because the focus of judicial review is not on the wisdom of the

agency's decision, but on whether the process employed by the agency to reach its decision took into consideration all the relevant facts." *Asarco, Inc. v. U.S. Environmental Protection Agency,* 616 F.2d 1153, 1160 (9th Cir. 1980).

A. Defendants' Motion to Strike the Soto Declaration.

1. Paragraph 9 and Exhibit 1 of the Soto Declaration.

In their Motion to Strike, Defendants move to strike paragraph 9 and Exhibit 1 of the Soto Declaration on the grounds that such materials do not fall within any of the recognized exceptions to the general rule that the Court may not consider extra-record declarations in an APA review. Defendants also argue that paragraph 9 and Exhibit 1 contain inadmissible opinion testimony. In response, Plaintiff argues that the Soto Declaration is admissible and necessary to establish the Karuk Tribe's standing.

Plaintiff is correct that extra-record declarations may be used and, indeed, are required at the summary judgment stage to establish standing. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992) (noting that, at the summary judgment stage, a plaintiff "must set forth by affidavit or other evidence specific facts" to demonstrate standing). Although neither Defendants nor the Miners have contested Plaintiff's standing, to the extent that the Soto Declaration serves to establish standing, it is

permissible. *Id.* However, as Defendants correctly note, paragraph 9 of the Soto Declaration contains several purportedly factual statements that go beyond Plaintiff's need to establish standing. Specifically, in paragraph 9 of the Soto Declaration, Mr. Soto makes certain statements regarding the effects of suction dredging operations. *See* Soto Decl. P 9. Similarly, Exhibit 1 to the Soto Declaration is a four-page white paper prepared by Mr. Soto that summarizes Mr. Soto's personal observations and opinions regarding "the negative impacts from section dredging." *See* Soto Decl. at Ex. 1. There is no evidence before the Court that Mr. Soto's opinions were considered by the Forest Service before making the decisions challenged in this action and Plaintiff has not shown that such information should be part of the administrative record.

Moreover, the Court agrees with Defendants that Plaintiff has not established that Mr. Soto is an expert qualified to offer testimony concerning scientific, technical, or other specialized matters of expertise. *See* Fed. R. Evid. 701, 702. Specifically, Plaintiff has not provided the Court with Mr. Soto's curriculum vitae or a list of his qualifications, education, training, experience, or publications. Accordingly, even if the Court could consider such extra-record materials, there is no basis for this Court to defer to Mr. Soto on technical issues relating to suction dredging. Since paragraph 9 and Exhibit 1 of the Soto Declaration are not necessary to establish standing, and are not appropriately part of the administrative record, the Court hereby

GRANTS Defendants' request to STRIKE Paragraph 9 and Exhibit 1 of the Soto Declaration.

2. Paragraph 10 and Exhibit 2 of the Soto Declaration.

Defendants also argue that paragraph 10 and Exhibit 2 of the Soto Declaration should be stricken on the grounds that they contain, and depict, information that is outside of the administrative record. Defendants further argue that the information described in paragraph 10 and depicted in Exhibit 2 is not relevant to the instant litigation. In response, Plaintiff asserts that paragraph 10 and Exhibit 2 are relevant and admissible because they relate to Plaintiff's standing.

Plaintiff does not dispute, however, that Exhibit 2 contains four photographs of suction dredge mining that occurred on the Salmon River in August and September 2003 and that these activities are not challenged in the Second Amended Complaint. Similarly, Plaintiff does not dispute that paragraph 10 of the Soto Declaration contains a description of certain mining activities, such as "high banking," that have no relevance to this litigation. Accordingly, the Court finds that paragraph 10 and Exhibit 2 are not necessary to establish Plaintiffs standing and may not be considered part of the administrative record. Paragraph 10 and Exhibit 2 to the Soto Declaration are therefore STRICKEN from the record.

B. The Miners' Motion for Miscellaneous Relief Concerning the Record.

1. Exhibit 2 to Plaintiff's Motion for Summary Judgment.

In their separately filed Motion for Miscellaneous Relief Concerning the Record, the Miners first request that the Court strike Exhibit 2 to Plaintiff's Motion for Summary Judgment on the grounds that it is not properly part of the administrative record. However, as the Miners concede, the exhibit, which is a December 2001 Draft Environmental Impact Statement relating to the Siskiyou National Forest (the "2001 Siskiyou Draft EIS"), is cited in a document entitled "Suction Dredge Literature Review as of December 6, 2004" that is currently part of the administrative record. *See* AR 303. Moreover, Defendants do not object to the inclusion of the 2001 Siskiyou Draft EIS in the administrative record and have stated that the document was omitted from the record only due to oversight. Accordingly, the Court concludes that the document is properly part of the administrative record and the Miners' request to strike Exhibit 2 to Plaintiff's Motion for Summary Judgment is DENIED.

2. Exhibit 3 to Plaintiff's Motion for Summary Judgment.

Second, the Miners request that the Court strike Exhibit 3 to Plaintiff's Motion for Summary Judgment, which is an April 24, 2000 letter from an

Acting Forest Supervisor for the Rogue River and Siskiyou National Forests. Since Plaintiff has conceded that Exhibit 3 should be withdrawn, the Court GRANTS Plaintiff's request to withdraw the document and Exhibit 3 to Plaintiff's Motion for Summary Judgment is hereby STRICKEN from the record.

3. References to *Siskiyou Regional Education Project v. Rose.*

Third, the Miners request that the Court ignore all of Plaintiffs references to the factual findings in *Siskiyou Regional Educ. Project v. Rose,* 87 F. Supp. 2d 1074 (D. Or. 1999). Specifically, the Miners argue that the factual findings in *Rose* must be ignored because that case was allowed to proceed without any "input whatsoever from the Miners under circumstances the Miners regard as collusive." The Court finds the Miners' wholly speculative and unsupported assertions regarding the legitimacy of the Court's ultimate findings in *Rose* inappropriate and unpersuasive. However, the Court also recognizes that its review in the instant action is limited to the administrative record that is properly before it, and may not include the factual findings of a different district court in a separate proceeding that occurred outside of this jurisdiction. Accordingly, the Court sustains the Miners' objection on this basis, and has disregarded Plaintiff's references to the factual findings set forth in the *Siskiyou* opinion.

4. Declarations of Soto and Hillman.

Fourth, the Miners request that the Court "reject the Declarations of Soto and Hillman in their entirety because no party to this litigation contests Plaintiff's standing." However, as noted above, Plaintiff is permitted -- indeed *required* -- to submit such declarations regardless of whether any party contests standing. Moreover, pursuant to Defendants' request, the Court has already stricken the portions of the Soto Declaration that exceed Plaintiffs need to establish standing. The Miners' request that the Court strike both declarations in their entirety is therefore improper and unnecessary. As such, the Court DENIES the Miners' request to strike the Declarations of Soto and Hillman in their entirety.

5. Exhibits 1 and 2 to the Buchal Declaration.

Fifth, the Miners seek to have the Court take judicial notice of the Forest Service Manual, which is attached as Exhibit 1 to the Buchal Declaration, and the Forest Service Handbook, which is attached as Exhibit 2 to the Buchal Declaration. The Miners argue that these documents should be considered by the Court because the administrative record refers to the documents but does not include them. The Miners further contend that the parties do not object to the Court taking judicial notice of the documents. Accordingly, the Court hereby takes judicial notice of the Forest Service Manual and the Forest Service Handbook and has considered them only to the extent that they are necessary to understand the

Forest Service's actions. *See Southwest Center for Biological Diversity,* 100 F.3d at 1450 (allowing a court to consider extra-record materials when it has been shown that the agency relied upon certain documents or materials not included in the record).

6. Declarations of McCracken, Maria, and Greene.

Sixth, the Miners seek to supplement the administrative record with the Declarations of David McCracken,[13] Dennis Maria,[14] and Joseph Greene[15]. The Miners argue that the Declarations of McCracken, Maria, and Greene are necessary to: (1) further illuminate highly technical issues for the Court; (2) demonstrate the adequacy of the Forest Service's consultations with Plaintiff; and (3) show "relevant" factors not documented in the record. The Miners also argue that the materials are necessary to "rebut" the Hillman and Soto Declarations. Defendants and Plaintiff object to the inclusion of these declarations in the record.

The Miners' attempt to supplement the administrative record with "rebuttal" declarations is inappropriate. Courts may not consider technical

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[13] David McCracken is the President and General Manager of the New 49er's, Inc. McCracken Decl. at P 1.

[14] Dennis Maria is a biologist formerly employed by the California Department of Fish and Game. Maria Decl. at PP 2-3.

[15] Joseph Greene is a research biologist formerly employed by the United States Environmental Protection Agency. Greene Decl. at P 1.

testimony elicited for the sole purpose of determining the scientific merit of the agency's decision. *Asarco, Inc.,* 616 F.2d at 1161. The Court also may not consider information created during the litigation "that was not available at the time the [agency] made its decision." *See, e.g., Airport Cmtys. Coalition,* 280 F.Supp.2d at 1213. Accordingly, the Court STRIKES the Declarations of McCracken, Maria, and Greene from the record.

7. California Department of Fish and Game Environmental Impact Reports and Federal Environmental Impact Statement.

Seventh, the Miners seek to supplement the administrative record with Exhibit 1 to the Maria Declaration, which is a 1994 California Environmental Impact Report, and Exhibit 6 to the Buchal Declaration, which is a federal Environmental Impact Statement that was prepared in connection with the initial promulgation of the Part 228 mining regulations. The Miners further argue that the Court should compel Defendants to "complete" the administrative record by locating additional California Environmental Impact Reports and "such other and further documents." Plaintiff and Defendants object to the inclusion of these documents on the grounds that the documents were not considered by the agency in reaching the decisions challenged in the instant lawsuit. Plaintiff and Defendants also contend that the administrative record is complete and does not need to be further supplemented.

The Court finds that the California Environmental Impact Report and the Environmental Impact Statement for the Part 228 mining regulations are not necessary to determine whether the Forest Service considered all relevant factors relating to its decision or to explain any technical terms or complex matters. Further, the Court finds it highly relevant that the Defendants have expressly stated that the documents the Miners seek to include were not considered by Forest Service. Accordingly, the Court STRIKES Exhibit 1 to the Maria Declaration and Exhibit 6 to the Buchal Declaration from the record.

8. Process Predicament Report.

Eighth, the Miners seek to supplement the record with a United Forest Service report called "The Process Predicament," which is attached as Exhibit 3 to the Buchal Declaration. The Miners, however, do not even make a minimal attempt to show that this document is relevant to the instant analysis or that it should be properly considered part of the administrative record under *Southwest Center for Biological Diversity. Id.* at 1450. The Court therefore concludes that this document is entirely irrelevant to the Court's review and STRIKES Exhibit 3 to the Buchal Declaration from the record.

9. Declaration of Thomas Kitchar.

Ninth, the Miners request that the Court consider the Declaration of Thomas Kitchar, which is attached as Exhibit 4 to the Declaration of James

Buchal, as a "rebuttal" to Exhibit 2 to Plaintiff Motion for Summary Judgment. According to the Miners, the Kitchar Declaration "explains how the notice of intent' regulatory scheme operated successfully for decades until local environmentalists and forest service officials joined improperly forces in an extraordinary, bad-faith campaign against suction dredge mining." Again, this document does not fall within any of the four exceptions identified by the Ninth Circuit in *Southwest Center for Biological Diversity. Id.* at 1450. Additionally, the Kitchar Declaration concerns a different case and matters that are entirely outside of the scope of this litigation. Accordingly, Exhibit 4 to the Buchal Declaration is STRICKEN from the record.

10. Transcript from *California State Grange v. Dept. of Commerce.*

Last, the Miners seek to include the transcript from the proceedings in *California State Grange v. Department of Commerce* in the administrative record. The Miners, however, do not provide any rationale for the Court as to why this document should be considered as part of the administrative record. It does not appear that any of the parties involved in the instant litigation were involved in the *California State Grange* case. Further, there is no evidence that the transcript, or the facts of the *California State Grange* case, were considered by the Forest Service before making the decisions challenged here. Therefore, the Court declines to consider this document as part of the administrative

record and, accordingly, the document is STRICKEN from the record.

II. Plaintiff's Motion for Summary Judgment.

A. Plaintiff's Standing.

In order to maintain this action, Plaintiff must first establish that it has standing. *See Lujan,* 504 U.S. at 561 (noting that, at the summary judgment stage, a plaintiff "must set forth by affidavit or other evidence specific facts" to demonstrate standing). "Article III of the Constitution limits the judicial power' of the United States to the resolution of cases' and controversies.'" *Valley Forge Christian College v. Americans United for Separation of Church & State,* 454 U.S. 464, 471, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982) (citations omitted). There are three requirements for Article III standing: (1) an injury in fact, which means an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjecturalor hypothetical; (2) a causal relationship between the injury and the challenged conduct, which means that the injury fairly can be traced to the challenged action of the defendants, and has not resulted from the independent action of some third party not before the court; and (3) a likelihood that the injury will be redressed by a favorable decision, which means that the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative. *Lujan,* 504 U.S. at 560-61. The party invoking federal jurisdiction bears the burden of establishing each of these elements. *Id.*

Here, neither Defendants nor the Miners contest Plaintiffs standing, and the Court concludes that Plaintiff has adequately satisfied the requirements set forth in *Lujan*. Specifically, Plaintiff has shown that it has a reasonable belief that suction dredge mining and other mining operations occurring in and along the Klamath River and its tributaries could impact the Tribe's ability to enjoy the spiritual, religious, subsistence, recreational, wildlife, and aesthetic qualities of the areas affected by the mining operations. Soto Decl. PP 6-7. Accordingly, any alleged failure of the Forest Service to properly regulate mining operations could directly and adversely harm the Tribe and its members. Hillman Decl. PP 6, 8.

B. Alleged Violations of the National Forest Management Act.

In its Motion for Summary Judgment, Plaintiff first alleges that the Forest Service violated the National Forest Management Act ("NFMA").

Pursuant to the NFMA, the Secretary of Agriculture has developed certain land and resource management plans ["LRMPs"] for units of the National Forest System. 16 U.S.C. § 1604(a). The LRMP provides the overall management direction and general guidelines for the forest units for a period of up to 15 years. 16 U.S.C. § 1604(b). The "plans . . . contain desired conditions, objectives, and guidance for project and activity decision making in the plan area." 36 C.F.R. § 219.3. However, the

"[p]lans do not grant, withhold, or modify any contract, permit, or other legal instrument, subject anyone to civil or criminal liability, or create any legal rights." *Id.* Any resource plans, permits, contracts, or other instruments for the use and occupancy of National Forest System lands must be consistent with the LRMPs. 16 U.S.C. § 1604(i). Here, the relevant LRMPs are the Klamath National Forest Land and Resource Management Plan("Klamath Forest Plan") and the Northwest Forest Plan.

Plaintiff alleges that the Forest Service violated the NFMA by: (1) failing to require a PoO for all mining operations occurring in RRs, regardless of whether those mining operations were likely to cause surface resource disturbances; (2) failing to survey for and protect two sensitive species, the spring chinook salmon and summer steelhead; and (3) failing to consult with the Karuk Tribe or to otherwise protect Tribal resources. -- Because the NFMA does not authorize judicial review or create a private cause of action to enforce its provisions, Plaintiff's claims are brought pursuant to the APA. *Neighbors of Cuddy Mt. v. United States Forest Serv.,* 137 F.3d 1372, 1377-78 (9th Cir. 1998). Accordingly, the Court may set aside the Forest Service's actions only if it finds that such actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Citizens to*

Preserve Overton Park, 401 U.S. at 416. The Court finds that Plaintiff has not made this showing.[16]

1. Notices of Intent.

With regard to the first issue, Plaintiff asserts that Defendants violated standard MM-1 of the Northwest Forest Plan, which is incorporated into the Klamath Forest Plan as standard MA 10-34. *See* AR017. MA 10-34 reads as follows:

> 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

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[16] In their Opposition to Plaintiffs Motion for Summary Judgment, the Miners raise many of the same arguments set forth in Defendants' Opposition brief. The arguments that are entirely duplicative of Defendants' arguments are not separately referred to herein. The Court notes that the Miners have also argued that the NFMA does not apply to mining operations and that federal regulation of suction dredge mining is preempted by California's extensive regulatory regime. However, since "[i]t is well settled that a court may not uphold an agency action on grounds not relied on by the agency," the Court declines to consider the Miners' additional arguments. *See National R.R. Passenger Corp. v. Boston & Me. Corp.,* 503 U.S. 407, 420, 118 L. Ed. 2d 52, 112 S. Ct. 1394 (1992).

> preparation and revegetation to meet Aquatic Conservation Strategy objectives.

AR017. Plaintiff argues that this provision is binding on the Forest Service and compels the Forest Service to require a PoO for every single mining operation occurring in the Klamath Forest, regardless of whether that mining operation is likely to involve a significant disturbance of surface resources. Plaintiff further argues that MA 10-34 must be followed by the Forest Service because it has the force and effect of binding law. Plaintiff's position, however, is wholly unsupported by the relevant factual and regulatory background.

As Defendants point out, MA 10-34 does not compel the Forest Service to require PoOs in RRs when the District Ranger has determined that a surface disturbance is not likely to occur. Indeed, as Defendants argue, Plaintiffs narrow reading of the Klamath Forest Plan is untenable in light of the numerous regulatory and statutory provisions that apply to mining in national forests and blatantly ignores the fact that, pursuant to the General Mining Law and 36 C.F.R. § 228, the Forest Service may not interfere with mining that is not likely to result in a significant disturbance of surface resources. See 39 Fed. Reg. 31317 ("[The] [e]xercise of [the] right [to mine] may not be unreasonably restricted.").

Further, Plaintiffs assertion that the standards and guidelines have the "force and effect of binding law" is flatly contradicted by the explicit

language in the Northwest Forest Plan. Specifically, the Northwest Forest Plan clearly provides that its standards and guidelines *"do not apply where they would be contrary to existing law or regulation*, or where they would require the agencies to take actions for which they do not have authority." See Record of Decision for Northwest Forest Plan, Attachment A at A-6 (emphasis added). Indeed, the portion of the Northwest Forest Plan that discusses the intended force and effect of the standard and guidelines reads in its entirety:

> Designated areas, matrix, and Key Watershed all have specific management direction regarding how those lands are to be managed, including actions that are prohibited and descriptions of the conditions that should occur there. This management direction is known as "standards and guidelines" -- the rules and limits governing actions, and the principles specifying the environmental conditions or levels to be achieved and maintained. Although the direction in all sections of this document constitutes standards and guidelines, standards and guidelines specific to particular land allocation categories [such as RRs], or relative to specific types of management activities, are included in Section C of these standards and guidelines.

> ***Additional direction to management agencies includes, but is not limited to directives, policy, handbooks, manuals, as wells as other plans, regulations, laws and treaties.*** The standards and guidelines presented here supersede other direction ***except treaties, laws, and regulations*** unless that direction is more restrictive or provides greater benefits to late-successional forest related species. ***These standards and guidelines do not apply where they would be contrary to existing law or regulation, or where they would require the agencies to take actions for which they do not have authority.***

See id. (emphasis added).[17]

Since MA 10-34 appears to require miners to submit a PoO in all instances, even when a significant disturbance of surface resources is not likely, and the Part 228 mining regulations permit a miner to proceed under an NOI when a significant disturbance of surface resources is not likely, MA 10-

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[17] Standard 19-1 of the Plan also states that the Forest Service must "[a]dminister all beatable, leasable, and saleable mineral resource activities according to the 36 CFR 228 Regulations and other applicable laws, regulations and orders." AR 012. Although Plaintiff argues that this standard applies only to those areas outside of RRs, the standard is found in the section entitled "Management Direction -- Forestwide" and thus "applies to all management areas, unless specifically excluded by the direction for that specific management area." *Id.*

34 and the mining regulations are in conflict. By the Plan's own terms, the mining regulations supersede the requirements of MA 10-34.[18]

Plaintiff's sole response to this overwhelming evidence is the bare assertion that Defendants' position does not deserve deference because the Forest Service has not consistently interpreted the Northwest Forest Plan. As a preliminary matter, even if this Court were to conclude that the Forest Service's interpretation of the Northwest Forest Plan has been inconsistent, this would not necessitate a finding that the Forest Service's actions were arbitrary or capricious. *See Seldovia Native Ass'n, Inc. v. Lujan,* 904 F.2d 1335, 1345 (9th Cir. 1990) (holding that consistency is only "one relevant factor in judging [an agency's] reasonableness."). While "the consistency of an agency's position is a factor in assessing the weight that position is due," *Good Samaritan Hospital v. Shalala,* 508 U.S. 402, 417, 124 L. Ed. 2d 368, 113 S. Ct. 2151 (1993), "[t]he fair measure of deference to an agency administering its

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[18] Plaintiff's argument that there is no "conflict" between MA 10-34 and the mining regulations because the requirement of a PoO is not an absolute "prohibition" on mining completely ignores the extensive regulatory history and discourse leading up to the promulgation of the Part 228 mining regulations. *See* 39 Fed. Reg. 31317 (noting that the Forest Service "recognize[d] that prospectors and miners have a statutory right, not mere privilege, under the 1872 mining law and the Act of June 4, 1897, to go upon and use the open public domain lands of the National Forest System for the purposes of mineral exploration, development and production" and that the "[e]xercise of that right may not be unreasonably restricted").

own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to [the] persuasiveness of the agency's position." *United States v. Mead,* 533 U.S. 218, 228, 150 L. Ed. 2d 292, 121 S. Ct. 2164 (2001); *see also Skidmore v. Swift,* 323 U.S. 134, 139-40, 89 L. Ed. 124, 65 S. Ct. 161 (1944) ("The weight accorded [to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

More importantly, however, the Court does not agree with Plaintiff that Defendants have been inconsistent or arbitrary. Plaintiff's sole "evidence" of inconsistency is its assertion that the Forest Service made an abrupt "about-face regarding the Plan of Operations . . . requirement in Riparian Reserves" following the District Court of Oregon's ruling in *Siskiyou Regional Educ. Project v. Rose,* 87 F. Supp. 2d 1074 (D. Or. 1999). This argument is flawed for several reasons. First and foremost, the *Siskiyou* opinion was issued approximately five years ago and involved discrete areas within the Siskiyou forest in Oregon, not the Klamath Forest in California. It thus goes without saying that the facts and administrative record considered by the *Siskiyou* court were different. Further, the persuasiveness of the *Siskiyou* opinion is diminished considerably in light of the fact that its analysis of the issues relevant to *this* litigation is extremely limited. For

example, although the Forest Service apparently argued in *Siskiyou*, as it does here, that the standards and guidelines of the Siskiyou National Forest Plan (the "Siskiyou Plan") were in conflict with the mining regulations, the *Siskiyou* court ultimately concluded that the Forest Service's interpretation of the Siskiyou National Forest Plan was "clearly erroneous and inconsistent with the plain language of the Standards and Guidelines." *Id.* 1087-1088. Inexplicably, however, the *Siskiyou* opinion has absolutely no analysis of the express provision in the Northwest Forest Plan that states that standards and guidelines may not conflict with existing regulations. Nor does the *Siskiyou* opinion have any meaningful discussion regarding the inherent conflict between MM-1 and 36 C.F.R. § 228, or the Forest Service's position with respect to how to resolve the conflict. In light of the fact that the *Siskiyou* opinion does not address these issues, *which are at the very heart of this lawsuit*, this Court declines to find the *Siskiyou* opinion persuasive or its holdings relevant.

Additionally, the *Siskiyou* opinion does not prove that the Forest Service has changed its position in an arbitrary or capricious manner. To the contrary, the fact that the Forest Service raised the same argument it is relying upon here -- that MM-1 cannot be followed due to its inherent conflict with the mining regulations -- proves just the opposite.

Further, the administrative record in this case demonstrates that Defendants have been anything but inconsistent. Significantly, Defendants first

noted the conflict between the standards and guidelines of the Klamath Forest Plan and 36 C.F.R. § 228 in 1995 -- almost four years prior to the *Siskiyou* litigation. Those conclusions were set forth in a February 21, 1995 memorandum almost immediately following the issuance of the Record of Decision for the Northwest Forest Plan. *See* AR 212-213. The memorandum, which was jointly issued by the Regional Foresters from the Pacific Northwest and Pacific Southwest Regions to all of the Forest Supervisors, including the Forest Supervisor for the Klamath Forest, specifically recognized the inherent conflict between the regulations governing the use of the surface of National Forest Lands in connection with operations authorized by the United States mining laws *(i.e.* 36 C.F.R. 228, subpart A) and the standards and guidelines applicable to Riparian Reserves. AR 212. The memorandum resolved the conflict by concluding that the Forest Service may require a miner to submit a PoO only when the proposed mining operation is likely to cause a significant disturbance of surface resources. *See* AR 212 (concluding that "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.").

On January 30, 2002, the Deputy Chief for the National Forest System issued a directive that reiterated the Forest Service's position with respect to the way the MM-1 is to be interpreted. In the letter, the Deputy Chief expressly stated that "[t]o apply . . . [the MM-1] standard and guideline to activities not meeting the likely to cause significant

surface disturbance' test is not appropriate and contrary to law and regulation. If no significant surface resource disturbance is occurring, [the Forest Service has] no reason to require a reclamation bond, nor would [the Forest Service] be able to determine the bond amount." AR 214. The letter concludes by stating that the "MM-1 standard and guideline applies only when the proposed activity is likely to cause significant surface disturbance. This policy is consistent with Bureau of Land Management policy for lands they manage, as well as the February 21, 1995, joint Regional Foresters' letter." AR 215. Significantly, the Deputy Chief's letter did not ignore the *Siskiyou* litigation, but specifically addressed the outcome of the litigation as follows:

> Small-scale mining activity on the Siskiyou Forest has been suspended pending completion of a cumulative effects analysis. The Forest Supervisor decided that numerous small scale ming activities occurring in the same area at the same time may likely cause significance [*sic*] surface disturbance, and that a forest-wide effects analysis should be completed to determine terms and condition[s] for conducting suction dredging. A Draft Environmental Impact Statement for Suction Dredging Activities was released January 2001. It is our expectation that, upon completion for this science based cumulative effects analysis, the Forest Supervisory may find that certain types and levels of

> activities may require a plan of operations ***and others may not.***

AR 215 (emphasis added).

On February 5, 2002, the Director of Minerals and Geology Management circulated a memorandum to all Regional Foresters that summarized the Deputy Chiefs findings and conclusions with respect to the MM-1 standard and guideline. The memorandum stated:

> In the areas covered by the Northwest [Forest] Plan . . . or covered by other general management guidance or strategies, forest users can conduct non-significant surface disturbing activities without filing a 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 if *36 CFR 228.4(a)(2).* The MM-1 standard and guideline applies only when the proposed activity is likely to cause significant surface disturbance. This policy is consistent with the Bureau of Land Management policy for lands they manage, and is consistent with both the February 21, 1995, joint Regional Foresters' letter, and a January 30,

> 2002 letter from Deputy Chief Tom Thompson[.]

AR217.

In May 26, 2004, the Regional Forester for the Pacific Southwest Region circulated a memorandum to all Forest Supervisors that again "clarif[ied] the roles and responsibilities of the Forest Service for the regulation of suction dredge mining activities that occur on national Forest System lands within Region 5." AR 218 -- AR 220. The memorandum provided Forest Rangers with the following guidance:

> The District Ranger must [first] evaluate the [mining] operation as described in the Notice of Intent, including the environmental protection measures that are required through the state dredging permit and any other state or federal permits, and determine if there is likely to be significant disturbance of surface resources, thus requiring a more-detailed Plan of Operations. Forests under the Northwest Forest Plan should be aware that the MM-1 standard and guideline (requiring a Plan of Operations for all mineral operations in riparian reserves) applies only when the proposed activity is likely to cause significant surface resource disturbance. . . .

The District Ranger's evaluation of suction dredging Notice of Intent must consider all activities, proposed and reasonably foreseeable, in the waters and on the banks, including cumulative effects. Suction dredging operations frequently involve incidental use and occupancy of the banks and shores for camping, fuel and equipment storage, campfires, and similar uses. In fact, the on-shore activities may often present more concern for causing significant surface disturbance than the suction dredging operations. The District Ranger cannot separate the on-shore from the in-water activities for the purpose of the evaluation of significant disturbance.

The District Ranger's evaluation should define the thresholds or parameters within which suction dredging can occur without becoming a significant disturbance of surface resources. By doing so, the District Ranger will be able to determine what type and level of operations can be conducted under a Notice of Intent, and which ones will require a Plan of Operations. A Notice of Intent may suffice if the operator proposes to limit the hours of operation and to confine camping and other incidental uses to existing campgrounds or to a level that

> would not be likely to cause significant disturbance of surface resources. District Rangers are therefore encouraged to discuss or communicate to operators the parameters for a Notice of Intent prior to submittal.

AR219.

Based on the foregoing evidence in the administrative record, the Court concludes that the Forest Service has consistently, and reasonably, interpreted the Northwest Forest Plan and Klamath Forest Plan to address the inherent conflict between the mining regulations and the Northwest Forest Plan. In fact, the weight of the evidence supports a finding that the Forest Service has exercised considerable care in achieving the correct balance between the guidelines of the Forest Plan, on one hand, and the mandates of the relevant mining statutes and regulations, on the other.

2. Threatened and Endangered Species and Tribal Consultation and Protection of Tribal Resources.

Plaintiff has also not shown that the Forest Service's acceptance of the four NOIs challenged in this litigation violated any other provisions within the Klamath Forest Plan, including: (1) standard 8-3, which requires the Forest Service to "[r]eview all Forest Service planned, funded, executed or permitted programs and activities for possible effects on TE&S [threatened and endangered] species"; (2) standard 6-8, which provides that "[p]roject areas

should be surveyed for the presence of Sensitive species before project implementation [and] . . . assessed for the presence and condition of Sensitive species habitat [if surveys cannot be conducted]"; (3) standard 8-18, which requires the Forest Service to "[a]void or minimize impacts to Sensitive species where possible"; (4) standard 24-24, which requires the Forest Service to provide for Native American needs for collection and/or use of traditional resources; or (5) standard 24-27, which requires the Forest Service to consult and coordinate with the Tribe on all projects that have the potential to affect Native American values. *See* AR 006, AR 009-010.

First, the Forest Service's duty, under the NFMA, to comply with these standards in the Klamath Forest Plan is not triggered by the NOI process because the Forest Service's receipt of an NOI is not a federal project or a "permit[], contract[], [or] other instrument for the use and occupancy of the National Forest System lands." *See* 16 U.S.C. § 1604(i) (providing that "[r]esource plans and permits, contract, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans."). Moreover, even if the NFMA did apply, the administrative record demonstrates that the Forest Service fulfilled its obligations under standards 8-3, 6-8, 8-18, 24-24, and 24-27. Specifically, the administrative record shows that the Happy Camp Ranger developed an extensive series of recommendations to provide better protection for fisheries, including sensitive species. *See* AR 097-100. The record also shows that Defendants

consulted with members of the Karuk Tribe, responded to the Tribe's concerns, conducted several meetings with Karuk Tribe members and others, and directly engaged the Tribe in suction dredge compliance monitoring activities. *See* AR 041, AR 106, AR 109, AR 381-83, and AR 384-91.

Accordingly, with respect to its NFMA allegations, Plaintiff has failed to establish that it is entitled to judgment as a matter of law, and therefore Plaintiffs motion for summary judgment on its NFMA claim is DENIED.

B. Alleged Violations of the National Environmental Policy Act.

Plaintiff has also not shown that Defendants violated the National Environmental Policy Act ("NEPA"). Plaintiff's specific assertion is that Defendants violated NEPA by failing to prepare an Environmental Assessment ("EA") or Environmental Impact Statement ("EIS") before allowing mining to proceed under the four NOIs challenged in this action.

NEPA, 42 U.S.C. §§ 4321-4370f, requires the preparation of a detailed EIS for all "major [f]ederal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2). Should the agency determine that there is a federal action, but that the federal action does not significantly affect the quality of the human environment, the agency's analysis may take the form of an EA. *See* 40 C.F.R. § 1501.4(c)-(e). Thus, the most important

threshold question is whether the action falls within NEPA in the first place. *Citizens Against Rails-to-Trails v. Surface Transp. Bd.,* 347 U.S. App. D.C. 382, 267 F.3d 1144, 1151 (D.C.Cir.2001); *Save Barton Creek Ass'n v. Fed. Highway Admin.,* 950 F.2d 1129, 1133 (5th Cir.1992). If there is no "major federal action," that is the end of the inquiry; the agency need not prepare an EIS or EA. *Citizens Against Rails-to-Trails,* 267 F.3d at 1151.

As Defendants correctly note, Plaintiffs belief that NEPA applies to the NOI process is in direct conflict with the Ninth Circuit's holding in *Sierra Club v. Penfold,* 857 F.2d 1307 (9th Cir. 1988). In *Penfold,* the Ninth Circuit analyzed the Bureau of Land Management's ("BLM") processing of "notice mines"[19] and concluded that the BLM's review of notice mining did not amount to a "major federal action" triggering NEPA compliance. *Id.* at 1313. Significantly, the Ninth Circuit reached this conclusion even after observing that: (1) the BLM's involvement in reviewing the notices was extensive; (2) the BLM was required to, and did, conduct compliance inspections of the notice mining; (3) the BLM was responsible for promulgating the regulations relating to notice mining; and (4) the BLM issued letters indicating that the notice mining was "approved." *Id.* at 1314. Specifically, the Ninth Circuit held that "[n]either BLM's approval process

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[19] According to the BLM's placer mining regulations, "notice" mine is a mining operation relating to alluvial or glacial deposits of gold that "causes a cumulative surface disturbance of five acres or less per year." 43 C.F.R. § 3809.1-3(a).

nor regulatory involvement is sufficient to trigger NEPA . . . application." *Id.*

Plaintiff nevertheless argues that the holding in *Penfold* is inapposite because the Ninth Circuit's holding in *Penfold* was premised entirely on the fact that the BLM was not vested with any "discretion" to deny notice mining due to the regulation's "categorical 5-acre cutoff rule."[20] Plaintiff's attempt to distinguish Penfold might be persuasive if this were actually the holding *of Penfold.* But it is not. *See Penfold,* 857 F.2d at 1314 (concluding only that notice mining is not a major federal action because "[n]otice mine operators [do not] receive federal funding . . . [and] BLM cannot require approval before an operation can commence developing the mine"); *see also Mineral Policy Ctr. v. Norton,* 292 F.Supp.2d 30 (D.D.C. 2003) (agreeing with the district court in *Sierra Club v. Penfold* that notice mining is merely "the basis for limited enforcement review . . to target the distribution of information" and that the notices are "ministerial reminder[s] . . . [that] encourage miners to comply with their legal responsibilities.").

Although the Court is cognizant of the fact that *Penfold* concerns placer mining, rather than the specific type of mining and mining regulations at issue here, the Court finds that *Penfold* is sufficiently analogous to the instant case such that

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[20] Tellingly, Plaintiff does not support this statement with any actual citations to *Penfold.* That is because this "holding" does not appear anywhere in the *Penfold* opinion.

the holding of *Penfold* is controlling. Thus, pursuant to *Penfold*, the Court finds that the Forest Service's acceptance of the four NOIs was not a "federal action" that triggered NEPA. Accordingly, Plaintiff's motion for summary judgment with respect to its NEPA cause of action is DENIED.

C. Alleged Violations of the Endangered Species Act.

Finally, the Court finds that Plaintiff has not demonstrated that Defendants violated the Endangered Species Act ("ESA") by failing to comply with ESA's Section 7 consultation requirements. Section 7(a)(2) of the ESA requires all federal agencies "to insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence" of any endangered or threatened species or result in the destruction of critical habitats. 16 U.S.C. § 1536(a)(2). Under the applicable regulations, a "federal action" includes activities or programs of any kind authorized, funded, or carried out, in whole or in part, by federal agencies, such as: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air. 50 C.F.R. § 402.02. If an agency determines that its proposed action "may affect" an endangered or threatened species, the agency must formally consult with the Fish and Wildlife Service and/or the National Marine Fisheries Service, depending on the species that are protected in the area of the proposed

action. *See Pacific Rivers Council v. Thomas,* 30 F.3d 1050, 1054 n. 8 (9th Cir. 1994). "Section 7 and [its] requirements . . . apply to all actions where there is discretionary [f]ederal involvement and control." 50 C.F.R. § 402.03. Judicial review of administrative decisions involving the ESA is governed by section 706 of the APA.

Plaintiff argues that the Forest Service's review of an NOI constitutes an "authorization" of that mining operation and thus is a "federal action" within the meaning of the ESA. In response, Defendants maintain that the only mining operations that are "authorized" by the Forest Service are those operations that are proceeding under a PoO. Consequently, Defendants contend that the ESA is not triggered by the NOI review process because the review process is not a "federal action." [21] Accordingly, with respect to Plaintiffs allegations under the ESA, the critical question is this: Is the

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[21] The Miners raise this same argument in their Opposition brief. Additionally, the Miners argue that the ESA does not apply to this case because the listing of the Southern Oregon/Northern California (SONC) coho salmon as a threatened species is invalid. However, Defendants have conceded that the coho listing is currently still in effect and still valid. Thus, the Court declines to consider this argument. The Court also finds unpersuasive the Miners' alternative argument that Plaintiff's ESA claim fails because Plaintiff "offers no evidence that any listed species were present during any mining operations conducted with the [four] challenged notices of intent." The correct standard under the ESA is whether a federal action "may affect" the listed species. *Pacific Coast Fed. v. Bureau of Reclamation,* 138 F.Supp.2d 1228, 1240-41 (N.D. Cal. 2001). Plaintiff does not need to prove actual harm to the species. *Id.*

Forest Service's determination that a mining operation is not likely to cause a significant disturbance of surface resources an "authorization" of the subsequent mining activities such that the entire NOI review process constitutes a "federal action" within the meaning of the ESA?

The Court finds that the answer to this question is "No" for several reasons. First, neither party disputes that the miners, who are all private entities, are the ones carrying out the mining operations described in the NOI. This factor, though not dispositive, weighs in favor of a finding that the activity is "private" and not "federal." Second, the Ninth Circuit's holding in *Penfold* makes clear that a federal agency's *review* of mining "notices" is not a "federal action" within the meaning of NEPA. Although this factor is also not necessarily dispositive with respect to an ESA claim, it weighs heavily in favor of a finding that the Forest Service's does not "authorize" an NOI merely by reviewing it and, thus, the NOI review process, in and of itself, is not a "federal action." *See Marbled Murrelet v. Babbitt,* 83 F.3d 1068, 1075 (9th Cir. 1996) (finding that the standards for "major federal action," under NEPA, and "agency action," under the ESA, are much the same, though acknowledging that the

NEPA standard may be more broad).[22] This is further strengthened by the fact that the Forest Service has only fifteen days within which it must review the NOI and inform the operator whether a PoO will be required. 36 C.F.R. § 228.4(a)(2)(iii).

Third, Plaintiff's argument utterly ignores the fact that mining operations take place pursuant to the General Mining Law and the Surface Resources Act, which confers a statutory right upon miners to enter certain public lands for the purpose of mining and prospecting. This distinction is significant, as it differentiates mining operations from "licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid," which are permissive in nature. Last, Plaintiff has not identified any sufficiently analogous case law that supports its argument that the Forest Service's "discretion" to determine what constitutes a "significant surface resource

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[22] Contrary to Plaintiffs assertion, *United States v. Weiss,* 642 F.2d 296 (9th Cir. 1981) does not support Plaintiffs position. *Weiss* states that "[u]nder the [Forest Service mining] regulations, the Forest Service must be notified of any mining-related operation that is likely to cause a disturbance of surface resources. The initiation or continuation of such operation is subject to the approval of the Forest Service." *Weiss,* 642 F.2d at 297. Since Defendants do not dispute that mining operations likely to cause a disturbance of surface resources must be approved by the Forest Service, *Weiss* is consistent with Defendants' position. Plaintiff, however, unjustifiably reads this second sentence as stating: "The initiation or continuation *of [any* mining operation, *even those that are not likely to cause a significant disturbance of surface resources]* is subject to the approval of the Forest Service." This is not what *Weiss* actually says, and the Court declines to adopt Plaintiffs contorted reading of the case.

disturbance" is the type of "discretionary control" over the NOI process that invokes the ESA.

In fact, although Plaintiff vigorously argues that any act requiring "discretion" invokes the ESA, it is well-established that not every agency action triggers the consultation requirement of Section 7(a)(2) of the ESA. As the Ninth Circuit has made clear:

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

Sierra Club v. Babbitt, 65 F.3d 1502, 1508 (9th Cir. 1995) (emphasis added).

Plaintiffs reliance on *Turtle Island Restoration Network v. National Marine Fisheries Service,* 340 F.3d 969 (9th Cir. 2003) does not compel a different conclusion. Although *Turtle Island does* stand for the general proposition that "*Section 7* and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control," *id.* at 975, the discretionary involvement and control in *Turtle Island* arose out of the agency's responsibilities under the Compliance Act to regulate

and authorize fishing operations.[23] *Id.* at 973. Thus, the discretion retained by the agency in *Turtle Island* is closely analogous to the discretion retained by the Forest Service when approving a PoO; however, the facts in *Turtle Island* are not analogous to the NOI review process.

For the same reasons, *Pacific Rivers Council v. Thomas,* 30 F.3d 1050 (9th Cir. 1994) is also inapposite. In *Pacific Rivers Council*, the Ninth Circuit concluded that a forest's land resource management plan ("LRMP") is an "continuing agency" action within the meaning of the ESA. *Id.* at 1056. The Pacific Rivers Council opinion squarely addresses projects that are "planned" and "implemented" by the Forest Service pursuant to the LRMP, such as timber sales, range activities, grazing permits, and road building projects. *Id.* at 1053. Arguably, a PoO would fall within this description, and indeed, Defendants do not dispute that it does. But Plaintiff has not demonstrated that the *Pacific Rivers Council* holding extends to the NOI process, which merely provides the Forest Service with notice of activities occurring pursuant to the General Mining Law. Indeed, in *Environmental Prot. Info. Ctr. v. Simpson Timber,* 255 F.3d 1073, 1081 (9th Cir. 2001), the Ninth Circuit declined to follow *Pacific Rivers Council*, even though the action challenged under the ESA involved the Forest Agency's continuing administration of a logging

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[23] The Compliance Act requires "United States vessels to obtain permits [from the National Marine Fisheries Service before they] engage in fishing operations on the high seas." 16 U.S.C. §§ 5504-5506.

permit issued to a private person. *Id.* at 1080 ("The Forest Service has plenary control [over its LRMPs] because it is the agency charged with promulgating, approving, and implementing LRMPs on Forest Service land. In contrast, Simpson's . . . permit, like the right-of-way agreement in. Sierra *Club*, involves agency authorization of a private action and a more limited role for the [Forest Service].").

Finally, pursuant to *Marbled Murrelet*, the Court finds that Plaintiffs generalized challenge to the "discretionary" nature of the Forest Service's implementation of the NOI review process is insufficient to invoke the ESA. Although, here, the Forest Service engaged in an interactive process with the miners prior to the start of the 2004 mining season, which process involved a discussion of the types of activities that would be considered a significant disturbance of surface resources, this process is most properly considered the type of "advisory" conduct that does not trigger the ESA. *Marbled Murrelet,* 83 F.3d. at 1074. Indeed, as the Ninth Circuit stated in *Marbled Murrelet:*

> Protection of endangered species would not be enhanced by a rule which would require a federal agency to perform the burdensome procedural tasks mandated by *section 7* [of the ESA] simply because it advised or consulted with a private party. Such a rule would be a disincentive for the agency to give such advice or consultation. Moreover, private parties

> who wanted advice on how to comply with the ESA would be loathe to contact the [agency] for fear of triggering burdensome bureaucratic procedures. As a result, desirable communication between private entities and federal agencies on how to comply with the ESA would be stifled, and protection of threatened and endangered species would suffer.

Id. at 1074-75.

Here, Plaintiff has not established that the NOIs are "permits" that are "authorized" by the Forest Service. Nor has Plaintiff established that the Forest Service's initial consultation process with the miners is a federal action that triggers the ESA. Thus, while the Court is sensitive to the fact that the ESA is broadly construed, Plaintiff has simply not demonstrated that the statute is so broad as to encompass activities -- such as the NOI review process-where the only federal involvement is (1) the agency's internal policy determinations with respect to the parameters of the review process; and (2) the review process itself. Significantly, were the Court to adopt Plaintiff's reading of the ESA, it would essentially eviscerate any meaningful distinction between the NOI and the PoO processes whatsoever. Thus, the Court does not find that Defendants' actions were arbitrary, capricious, or contrary to law, and therefore DENIES Plaintiff's motion for summary judgment on its ESA cause of action.

CONCLUSION

Based on the foregoing, IT IS HEREBY ORDERED AS FOLLOWS:

1. Plaintiffs fifth, sixth, and eighth causes of action are DISMISSED WITHOUT PREJUDICE;

2. Defendants' Motion to Strike Portions of Plaintiffs Declaration of Toz Soto [Docket No. 59] is GRANTED;

3. The Miners' Motion for Miscellaneous Relief Concerning the Record [Docket No. 65] is GRANTED IN PART AND DENIED IN PART; and

4. Plaintiff's Motion for Summary Judgment [Docket No. 54] is DENIED.

IT IS SO ORDERED.

Dated: July 1, 2005

SAUNDRA BROWN ARMSTRONG
United States District Judge

[Docket No. 105]

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. CV-04-04275-SBA

KARUK TRIBE OF CALIFORNIA,
Plaintiff,
v.
UNITED STATES FOREST SERVICE et al.,
Defendants,

JUDGMENT

In accordance with the Court's Order denying Plaintiff's Motion for Summary Judgment [Docket No. 104],

IT IS HEREBY ORDERED THAT final judgment is entered in favor of Defendants on all of Plaintiff's remaining claims for relief. All matters calendared in this action are VACATED. The Clerk shall close the file and terminate any pending matters.

IT IS SO ORDERED.

Dated: July 11, 2005

SAUNDRA BROWN ARMSTRONG
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

D.C. No. CV-04-04275-SBA

KARUK TRIBE OF CALIFORNIA,
Plaintiff,
v.
UNITED STATES FOREST SERVICE; MARGARET BOLAND,
Defendants,

THE NEW 49'ERS, INC.; RAYMOND W. KOONS,
Defendants-Intervenors.

July 30, 2006, Filed

[Docket Nos. 107, 117]

JUDGES: HONORABLE SAUNDRA BROWN ARMSTRONG, United States District Judge.

OPINION BY: SAUNDRA BROWN ARMSTRONG

OPINION

MODIFIED ORDER GRANTING FEDERAL DEFENDANTS' MOTION TO STAY PLAINTIFF'S PETITION FOR ATTORNEYS' FEES

The matter is before the Court upon Federal Defendants' motion to stay litigation of Plaintiff's petition for attorneys' fees and expenses until this case is resolved on appeal. Good cause exists for a stay: it will conserve judicial resources by preventing the consideration of multiple petitions; it will avoid the possibility that Plaintiff is overcompensated for this case; and it will assist the Court in its inquiry into whether the position of the United States was substantially justified. As set forth below, nothing in Plaintiff's opposition brief demonstrates that the requested stay should not be granted.

BACKGROUND

This action involved challenges under the National Environmental Policy Act ("NEPA"), National Forest Management Act ("NFMA"), Endangered Species Act ("ESA"), and other statutes and regulations, to suction dredge mining operations on the Klamath National Forest. On April 22, 2005, prior to briefing on the merits, the parties entered a stipulation resolving Plaintiff's claims against five plans of operation. [Docket No. 50]. The parties then briefed the merits of Plaintiff s remaining claims. On July 1, 2005, the Court denied Plaintiff's motion for summary judgment. [Docket No. 104] The Court entered final judgment in favor of Federal

Defendants on July 11, 2005, and the case was closed. [Docket No. 105].

Plaintiff filed a notice of appeal on September 9, 2005, indicating that it would be docketing an appeal in the Ninth Circuit Court of Appeals. On October 7, 2005, Plaintiff filed a petition seeking attorneys' fees and costs pursuant to the Equal Access to Justice Act ("EAJA"). Plaintiff seeks an award of $115,652.21 for claims that were subject to a stipulated motion to dismiss that was entered prior to the beginning of summary judgment briefing. [Docket No. 107].

On November 9, 2005, Federal Defendants filed a motion to stay Plaintiffs' fee petition until the conclusion of any appeal in the Ninth Circuit. [Docket No. 117]. Pursuant to a stipulated schedule entered by this Court, Plaintiffs filed an opposition to the motion to stay on December 5, 2005. [Docket No. 120]. Federal Defendants filed their reply memorandum on December 12, 2005. [Docket No. 121]. Pursuant to Civil L.R. 7-1(b), the Court finds that this motion is appropriate for resolution without oral argument.

ANALYSIS

The EAJA provides a limited waiver of sovereign immunity for attorneys' fees and costs against the United States in cases where Plaintiff is a prevailing party, unless the Court finds that the position of the United States was substantially justified or that special circumstances make an

award unjust. *See* 28 U.S.C. § 2412(a), 2412(d)(1)(A). Federal Defendants argue that the Court has power to stay Plaintiff's motion, and that such a stay is appropriate because it would promote judicial economy and avoid the risk of overcompensation should Plaintiff decide to file a second fee petition following its appeal. Federal Defendants also argue that Plaintiff has not demonstrated that it would be prejudiced by a stay. Each of these arguments is addressed below.

The Court "has broad discretion to stay proceedings as an incident to its power to control its own docket." *Clinton v. Jones,* 520 U.S. 681, 707-08, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997) (citing *Landis v. North American Co.,* 299 U.S. 248, 254, 57 S. Ct. 163, 81 L. Ed. 153 (1936)). This discretionary power extends to the timing of consideration for petitions for attorney's fees while the matter is under appeal. *See, e.g., Glaxo Group Limited v. Apotex, Inc.,* 272 F. Supp. 2d 772, 778 (N.D. Ill. 2003) (exercising discretion to stay fee petition until conclusion of appeal); *1st Westco Corp. v. School District of Phildelphia,* 1993 U.S. Dist. LEXIS 5025, 1993 WL 117539 (E.D. Pa. 1993) (same); *see also Oberdorfer v. Glickman,* 2001 U.S. Dist. LEXIS 14677, 2001 WL 34045732 (D. Or. Sept. 14, 2001) (noting defendants' motion to postpone consideration of petition for fees under EAJA until conclusion of appeal was granted). Plaintiff does not argue that this Court lacks the discretionary power to stay a fee petition pending resolution of an appeal. Indeed, such stays are not unusual and are within the

Court's discretion. *See Jones,* 520 U.S. at 707-08; Glaxo, 272 F. Supp. 2d at 778.[1]

A stay of Plaintiff's fee petition is appropriate because it would promote judicial economy and avoid the risk of overcompensation in the event that Plaintiff is successful on appeal. First, a stay is in the interest of judicial economy. As the Ninth Circuit has stated in another context, waiting until after all appeals have been exhausted to adjudicate a fee application "avoids the possibility that multiple fee applications will be necessary, a weighty consideration given that EAJA fees are intended specifically for individuals with limited resources." *Al-Harbi v. Immigration and Naturalization Serv.,* 284 F.3d 1080, 1084 (9th Cir. 2002). Given that it would save both the resources of the Court and the parties to consider a fee application by Plaintiff once at the conclusion of all appeals, rather than twice, a stay would promote the interest of judicial economy.

In its opposition, Plaintiff does not dispute that judicial resources would be saved by litigating one fee petition rather than two. Instead, Plaintiff urges the Court to depart from the Supreme Court's admonition that the substantial justification inquiry

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[1] Plaintiff seeks to distinguish *Glaxo Group* and *1st Westco Corp.* on grounds that the fee petitions involved in those cases were brought under fee shifting statutes other than EAJA. This distinction is irrelevant: Plaintiff points to nothing particular to the EAJA statute that would suggest that Congress intended to deprive the Court of its "broad discretion to stay proceedings as an incident to its power to control its own docket." *Jones,* 520 U.S. at 706-07.

should be conducted based on the case "as an inclusive whole," *Comm'r INS v. Jean,* 496 U.S. 154, 161-62, 110 S. Ct. 2316, 110 L. Ed. 2d 134 (1990), and instead urges that the disposition of the case on appeal is irrelevant because the claims it settled are "entirely separate" from the claims it litigated and lost. Pl.'s Resp. at 8. Plaintiff, however, points to no caselaw that would justify departing from the well-established principle that the substantial justification inquiry is based on the entire case. *United States v. Rubin,* 97 F.3d 373, 375 (9th Cir. 1996) (EAJA "favors treating a case as an inclusive whole, rather than as atomized line items") (quoting *Jean,* 496 U.S. at 161-62); *Bullfrog Films, Inc. v. Wick,* 959 F.2d 782, 784 (9th Cir. 1992) ("The district court is to take into account the totality of the circumstances in deciding whether the government's position is substantially justified.").

A stay would also avoid the risk that Plaintiff will be overcompensated for time spent on this case. Plaintiff's timesheets do not specify which claim particular hours were expended on, and as a consequence, Plaintiff is seeking an award of fees both for the claims it settled and the claims that it lost. *See, e.g., Oberdorfer,* 2001 U.S. Dist. LEXIS 14677, 2001 WL 34045732 (disallowing compensation for undifferentiated "block-billing" where the Court could not assess the time spent on specific tasks). If fees were awarded at this time and if the Plaintiff lost on appeal, then Plaintiff will have received compensation for claims for which it was not a prevailing party and will thus have been overcompensated. Similarly, if fees were awarded at

this time and Plaintiff prevailed on appeal, then the Court and parties would be forced to determine the hours for which Plaintiff had already been compensated. Both of these problems are easily avoided by staying Plaintiff's fee petition until its appeal has concluded.

Finally, Plaintiff argues that it may be a year or more before oral argument on its appeal is scheduled, and that a stay would therefore impose "undue hardship" on the Plaintiff. Pl.'s Resp. at 9. Plaintiff, however, has not proffered any actual evidence of hardship. When weighed against the benefits of a stay discussed above, Plaintiff's allegation of hardship fails to provide a sufficient basis for denying Defendants' motion to stay. *See Jones,* 520 U.S. at 707-08.

CONCLUSION

Based on the foregoing analysis, it is hereby ORDERED that Federal Defendants' Motion to Stay [Docket No. 117] is GRANTED.

IT IS FURTHER ORDERED THAT Plaintiffs' Motion for Attorney's Fees and Expenses [Docket No. 107] is hereby DENIED WITHOUT PREJUDICE. The February 28, 2006 hearing on Plaintiff's Motion for Attorney's Fees and Expenses is therefore VACATED. Plaintiff is hereby granted leave to re-file its Motion for Attorney's Fees and Expenses and supporting declarations no later than thirty (30) days following the expiration of the time required for filing

a certiorari petition after any decision by the Court of Appeals.

IT IS SO ORDERED.

Dated: January 30, 2006

HON. SAUNDRA BROWN ARMSTRONG
United States District Judge

Section 5653.1 of the California Fish and Game Code

5653.1.

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

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

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

(2) The department has transmitted for filing with the Secretary of State pursuant to Section

11343 of the Government Code, a certified copy of new regulations adopted, as necessary, pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.
(3) The new regulations described in paragraph (2) are operative.

(4) The new regulations described in paragraph (2) fully mitigate all identified significant environmental impacts.

(5) A fee structure is in place that will fully cover all costs to
the department related to the administration of the program.

(c)

(1) To facilitate its compliance with subdivision (b), the department shall consult with other agencies as it determines to be necessary, including, but not limited to, the State Water Resources Control Board, the State Department of Public Health, and the Native American Heritage Commission, and, on or before April 1, 2013, shall prepare and submit to the Legislature a report with recommendations on statutory changes or authorizations that, in the determination of the department, are necessary to develop the suction dredge regulations required by paragraph (2) of subdivision (b), including, but not limited to, recommendations relating to the mitigation of all identified significant environmental impacts and a fee structure that will fully cover all program costs.

(2) The requirement for submitting a report imposed under this subdivision is inoperative on January 1, 2017, pursuant to Section 10231.5 of the Government Code.

(3) The report submitted to the Legislature pursuant to this subdivision shall be submitted in accordance with Section 9795 of the Government Code.

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

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