



## **Ninth Circuit Finds ESA 60-Day Notice "Adequate" & Resurrects Challenge to Suction Dredge Mining Suit**

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On August 10, 2015, the U.S. Court of Appeals for the Ninth Circuit reversed a district court order dismissing an Endangered Species Act ("ESA") lawsuit on the grounds plaintiffs provided inadequate notice. *Klamath-Siskiyou Wildlands Center v. MacWhorter*, No. 13-35453, D.C. No. 1:12-cv-01900-PA, \_\_\_ F.3d \_\_\_ (Aug. 10, 2015). The Ninth Circuit's decision is a reminder that while notice is a prerequisite to certain actions under the ESA, the notice does not need to be exacting. As a consequence of the Ninth Circuit's decision, the action challenging the U.S. Forest Service's ("Service") tacit approval of applications to conduct recreational suction dredge mining in the Rogue River-Siskiyou National Forest will continue.

Under existing regulations, all plans to conduct suction dredge mining activities within the boundaries of National Forests must be submitted to the Service for review if they "might cause significant disturbance of surface resources." 36 C.F.R. § 228.4(a). The Service may either tacitly accept the project as described, or it may notify the applicant that the planned operation will "likely cause significant disturbance of surface resources," which triggers a requirement that the miner submit a detailed plan of operations. *Id.*

Parts of the designated critical habitat for the threatened Coho salmon occur within the Rogue Rivers-Siskiyou National Forest in areas where recreational suction dredge mining activities occur. Because of this overlapping habitat, many of the recreational suction dredge mining activities within this forest could be subject to the section 7 consultation requirement in the ESA.

Before a plaintiff may bring a failure to consult claim under the ESA against a government agency, it must serve the government agency with a notice of its intent to sue at least 60 days prior to filing suit. 16 U.S.C. § 1540(g)(2). The notice must state the alleged violations with sufficient specificity so as to allow the agency to correct any violations and obviate the need to file suit. *San Francisco BayKeeper, Inc. v. Tosco Corp.*, 309

F.3d 1153, 1155 (9th Cir. 2002).

In 2012, the Klamath-Siskiyou Wildlands Center and Cascadia Wildlands Project served a letter on the Service alleging that the Service "authorized, approved, or otherwise acquiesced" to suction dredge mining operations in waters included in coho salmon critical habitat, and specified a number of dates on which the Service received notices of intent to conduct mining activities from various miners. Moreover, the letter alleged that the Service failed to consult with NMFS on any of these notices. After this initial letter, the Klamath-Siskiyou Wildlands Center requested that Rogue Riverkeeper be added as a party to its notice (plaintiffs are collectively referred to as "Klamath-Siskiyou Wildlands Center"). The Service subsequently responded to Klamath-Siskiyou Wildlands Center's letter stating that it was examining the need to commence consultation with NMFS with regard to various notices of intent to conduct mining activities that had the potential to impact coho salmon. Klamath-Siskiyou Wildlands Center subsequently sent another letter, providing specific dates and locations for notices of intent to conduct mining activities that it asserts violated the ESA's consultation requirement. Klamath-Siskiyou Wildlands Center was relying on the first letter it sent in 2012 in order to fulfill the ESA's 60-day notice requirement.

In the U.S. District Court for the District of Oregon, the Service moved to dismiss Klamath-Siskiyou Wildlands Center's complaint for failure to fulfill the ESA's notice requirement, asserting that the first letter was insufficient to put the Service on notice of the specific allegations against the Service. The district court agreed with the Service and dismissed the complaint.

The Ninth Circuit reversed the district court's decision, finding that the first letter from Klamath-Siskiyou Wildlands Center provided sufficient notice of the claims against the Service. In support of the reversal, the court noted that in three recent cases proceeding under citizen suit provisions, the Ninth Circuit allowed plaintiffs to proceed although they did not specifically detail their claims in a notice of intent. The court explained that in each of the three cases, the Ninth Circuit found that the notices of intent provided sufficiently specific details for the defendant to identify, based on the defendant's own knowledge, the extent of the claims made. The court then found that the Klamath-Siskiyou Wildlands Center's description of its claims as described in the first letter, in combination with the Service's own knowledge of the suction dredge mining operations proposed or ongoing within the Rogue River-Siskiyou National Forest, gave the Service sufficient knowledge to determine the Klamath-Siskiyou Wildlands Center's specific claims. Accordingly, the Ninth Circuit reversed the district court's dismissal and remanded the matter back to the district court so it could address the merits of the failure to consult claim.