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**BY FIRST CLASS MAIL & E-MAIL**

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USDA Forester Service  
Objection Reviewing Officer  
Northern Region  
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Missoula, MT 59804

Dear Supervisor Probert and Objection Reviewing Officer:

These objections are submitted on behalf of the American Mining Rights Association, Shannon Poe, Jere Clements, David Erlanson, Gay Richardson, and Nicole Carson.<sup>1</sup> The lead objector is the American Mining Rights Association (AMRA). Objectors seek revision of the Service's decisions concerning the "Nez Perce-Clearwater National Forests North Fork Ranger District, Red River Ranger District, Salmon River Ranger District, [and] BLM Cottonwood Field Office Small-Scale Suction Dredging in Orogrande and French Creeks and South Fork of the Clearwater River" (hereafter, the "Small-Scale Suction Dredging Project" or the "Project"). The Responsible Official is Supervisor Cheryl Probert.

**Legal Defects with Respect to the Project**

**A. Failure to Abide by Administrative Procedure Act Requirements**

Through the Project, the Forest Service seeks to regulate small-scale suction dredge mining, an activity governed by existing Service regulations at 36 C.F.R. Part 228. These regulations of which provide that miners are not even required to give advance notice, much less obtain authorization, for activities such as:

- "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

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<sup>1</sup> The address of the Objectors appear at the end of this letter. Objectors Shannon Poe and Dave Erlanson own mining claims on the South Fork of the Clearwater River, as do other AMRA members.

detecting, non-motorized hand sluicing, using battery operated dry washers, and collecting of mineral specimens using hand tools”

- “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”
- “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”

36 C.F.R. § 228.4(a)(1)(ii), (v) & (vi). The Forest Service has specifically interpreted this rule with respect to the operation of suction dredges in National Forests, and determined that “the need for the prior submission of a notice of intent to operate . . . must be evaluated on a site-specific basis”. 70 Fed. Reg. 32,720 (June 6, 2005); *see also id.* at 32,713 (“The trigger for a notice of intent is the operator’s reasonable uncertainty as to the significance of the potential effects of the proposed operations”).

In short, under the existing regulations, suction dredge miners can and do determine *themselves*, based on conditions at their sites, whether notice to the Forest Service is required to operate on their claims. In general, miners and prospectors operating in the National Forests are not required to give advance notice or gain permission for their activities. Permission is inherent in 30 U.S.C. § 22’s guarantee that the public lands are free and open for mining.

The existing regulations provide a remedy in the event that the Forest Service disagrees with a miner’s assessment that no notice is required:

“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 cannot be conducted until a plan of operations is approved.”

36 C.F.R. § 228.4(a)(4). If the miner does not agree, the Service must then determine whether or not the noncompliance is “unnecessarily or unreasonably requiring injury, loss or damage to surface resources,” and if such a determination is made, serve a notice of noncompliance pursuant to 36 C.F.R. § 228.7(b), which the miner may then appeal administratively. Failure to respond to this notice can result in enforcement action. All of these procedural protections have been developed over the years to further the powerful Congressional purpose in facilitating mineral development.

In Alternative 2 to the Environmental Assessment, the adoption of which constitutes the Project, the Service proposes both to limit the number of suction dredgers and to require not merely notice of intent to operate, but also approval of a plan of operations. These demands are adopted in the Decision Notice and Finding of No Significant Impact (hereafter

“FONSI”), which makes it quite clear that the Service intends “to block or stop any suction dredging in the South Fork of the Clearwater River that is not consistent with an approved POO. (*Id.* at 16.)

The FONSI also adopts a detailed regulatory process of fantastic complexity out of all proportion to any impact to surface resources. In particular, miners are to be required to submit “operating conditions, design criteria, and mitigation measures” in a context where detailed rules operating through the Idaho Department of Fish and Game already address resource impacts. (FONSI at 13 (¶ 1).) Miners are to “demonstrate the actual or likely relevant permission/approval” of three other agencies, entangling the Service in totally unnecessary discretionary review concerning the status of other processes. (*Id.* (¶ 3).) Additional mandatory feedback loops are established between these processes and Service decisionmaking. (*Id.* (¶ 4).) Large amounts of additional internal Service paperwork are established through requirements to develop and publicize schedules, and internal checklists between Service units. (*Id.* (¶¶ 2, 5).)

Absurdly large amounts of additional resources are to be consumed in monitoring and reporting, posing a significant burden on miners. Miners whose operating time has already been grossly and unreasonably restricted to a short time interval each summer cannot reasonably be expected to maintain daily data such as the “surface areas and estimated volume of substrate dredged/disturbed, the number of days/hours per day operated, [and] length/breadth of maximum turbidity plume each day” (FONSI at 8). Miners cannot reasonably be expected to give up valuable dredging time scheduling meetings with Forest officials and waiting around for them.

The burden on the Service itself would also be unreasonable. The FONSI even contemplates mandatory photographic recording by fifteen-meter reach and the preparation of detailed cross-sectional drawings. (*Id.* at 14-15 (e.g., “Wollman pebble counts”).) Multiple site visits would also be required. (*Id.* at 15.) One cannot help but reason, particularly in light of the insignificant impact of suction dredging generally, that the limitations on the number of operations are really grounded in a desire to avoid even greater budgetary and staff impacts on the Service from the intensive regulation and monitoring of each tiny operations.

Such monitoring is entirely irrational in light of the well-known fact that nearly all traces of suction dredge mining are eliminated by high flows the following winter. The EA itself acknowledges that “[l]ong term effects on instream habitat should be minimal because high instream flows between the annual dredging operations should mobilize sediments so as to “reset” the channel morphology”. (EA at 3-51.) This feature of river bottoms also reclamation requirements (e.g., FONSI at 9 (¶ 7)) and the posting of reclamation bonds entirely irrational.

In a context where other Forest users cut down thousands of trees with no such fantastically-detailed documentation or pebble counting, a focus on documenting small holes dug underwater by hand by miners can only be explained by an unreasoning hostility toward mining itself. To the extent that the U.S. Fish and Wildlife Service or the National Marine Fisheries Service have included such monitoring in individual biological opinions (*see* EA at

A-6), the Service has ultimate decision authority, not these agencies, and may properly reject unreasonable conditions.

The Forest Service has previously recognized that excessive complexity in its review processes is inimical to both Forest health and resource protection. Specifically, in *The Process Predicament: How Statutory, Regulatory and Administrative Factors Affect National Forest System Management*, issued by the Service in June 2002,<sup>2</sup> confirmed that the Forest Service faces a crisis from excessive planning and process:

“Three problem areas stand out:

- “1. *Excessive analysis*—confusion, delays, costs and risk management associated with the required consultations and studies;
- “2. *Ineffective public involvement*—procedural requirements that create disincentives to collaboration in national forest management; and
- “3. *Management inefficiencies*—poor planning and decisionmaking, a deteriorating skills base, and inflexible funding rules, problems that are compounded by the sheer volume of required paperwork and the associated proliferation of opportunities to misinterpret or misapply required procedures

“These factors frequently place line officers in a costly procedural quagmire, where a single project can take years to move forward and where planning costs alone can exceed \$1 million. Even noncontroversial projects often proceed at a snail’s pace.

“Forest Service officials have estimated that planning and assessment consume 40% of total direct work at the national forest level. . . . Although some planning is obviously necessary, Forest Service officials have estimated that improving administrative procedures could shift up to \$100 million a year from unnecessary planning to actual project work to restore ecosystems and deliver services on the ground.” (Process Predicament at 5.)

The Report warns that these problems have caused “a land health crisis of tremendous proportions”. (*Id.* at 7.) The Project is a perfect example of the sort of problem *The Process Predicament* warns the Service to avoid, and is part and parcel of a general and regrettable tendency for the Service to destroy all productive endeavors within the Forest.

While the Objectors applaud the Service’s intent to streamline review for any suction dredge miners who may seek approval of a plan of operations, the Service may not lawfully adopt what is in substance a rule requiring advance approval of suction dredging operations in these areas without adherence to the rulemaking requirements of the Administrative Procedure Act (“APA”).

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<sup>2</sup> A copy of the Process Predicament is transmitted herewith.

Section 553 of Title 5, United States Code, dictates the formal rulemaking procedures by which an agency must abide when promulgating a rule. Under Section 553(b), "[g]eneral notice of proposed rule making shall be published in the Federal Register." 5 U.S.C. § 553(b). The required notice must include "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." *Id.* Upon providing the requisite notice, the agency must give interested parties the opportunity to participate and comment and the right to petition for or against the rule. *See id.* § 553(c)-(e).

The foregoing requirements on suction dredge miners operating within the areas specified in the EA constitute an unlawful agency rule, that is, "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency". 5 U.S.C. § 551(4). For example, a demand that each and every suction dredge miner in a particular area obtain an approved POO is, in substance, an amendment of 36 C.F.R. § 228.4 adopted without compliance with required lawmaking procedures.

The FONSI further adopts (at 8-13) extensive and detailed permit conditions which states are "required, as applicable, for the mining operations". To the extent that these conditions are mandatory, as they appear to be (see below), rather than issues to be considered in the course of individual plan of operation agreements, they too constitute unlawful rules.

The FONSI reports (at 6), that PACFISH "does require an approved POO, a reclamation plan, and a reclamation bond" for individual suction dredging operations. To the extent the Service would rely upon PACFISH, it too is unlawful as illegal rulemaking and as an unreasonable restriction on mineral development. More generally, the Forest Service's planning authority was never intended to extend to the regulation of mineral development, making any restriction of mineral operations taken pursuant to the NFMA *ultra vires*.

## **B. Failure To Give Effect to Federal Mining Law and Policy.**

As a federal agency implementing projects under multiple statutes, the Service must make "a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute[s]". *ALCOA v. BPA*, 903 F.2d 585, 598 (9th Cir. 1989), *cert. denied*, 498 U.S. 1024 (1991). In this particular context, Congress has given detailed instruction concerning how the Service is to balance its authorities under the Organic Act, 16 U.S.C. § 551, to protect Forests from "destruction by fire and depredations", and the Mining Act of 1872, as amended.<sup>3</sup>

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<sup>3</sup> The Organic Act was never intended to provide any authority to regulate mining. See 16 U.S.C. § 478 (nothing in the Organic Act is 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*"; emphasis added).

Specifically, Congress commanded that where, as here, Objectors generally operate on federally-registered mining claims,<sup>4</sup> Service restrictions 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). The Ninth Circuit has confirmed this substantive limitation on the Service’s regulatory authority, holding such authority “is cabined by Congress’ instruction that regulation not ‘endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto.’ 30 U.S.C. § 612(b)”. *United States v. Backlund*, 677 F.3d 930, 940 (9th Cir. 2012).

As noted above, the FONSI refers (at 8-13) extensive and detailed permit conditions which states are “required, as applicable, for the mining operations”. However, most of these items are then described in mandatory terms, and as such constitute material interference with suction dredge mining and Forest uses “reasonably incident thereto” within the meaning of 30 U.S.C. § 612(b). The Forest Service’s own Forest Service Manual (hereafter “FSM”) confirms that regulation “should be accomplished by the imposition of reasonable conditions which do not materially interfere with [mining or reasonably incident uses]”. FSM 2817.02; *see also* FSM 2813.14; FSM 2814.24.

In addition to the restrictions discussed above (and in previous objections by one or more of the Objectors), such restrictions as forbidding operation in “the highest quality pool” (FONSI at 11 (¶ 16)) constitute an unreasonable and material interference with mining such pools. The premise that fish are adversely affected by encounters with dredgers is absolutely false. Fish small and large share pools and space with dredgers without adverse effect, and as noted below, are often attracted to dredges. In a context where the operating period is already restricted to a tiny window of time when no vulnerable eggs or sac fry are present, such restrictions are irrational.

The Service has ignored comments that storage of fuel “at least 100 feet away from any stream channel” (*id.* (¶ 18)) is often not consistent with local geography, and in such circumstances materially interferes with mining. Dredgers should not be required to change in and out of wet suits just to refuel their dredges. This is another example of discrimination against mining, as the fuel-related requirements exceed those placed on other activities such as motorized boating and other recreational vehicle use.

Requirements to cease operations if mercury is encountered (*id.* ¶ 19) are also an unreasonable interference with mining. Any encounters with mercury wind up removing it from the natural environment, another net benefit from suction dredging. Similarly, requirements to cease operations if dead or injured fish are found near an operation are an unreasonable interference with mining. There is no plausible mechanism as to how a dredge might injure fish beyond the eggs or sac fry that are not present when dredging is allowed. Hatcheries releasing fish, including plants of threatened and endangered fish, commonly pump

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<sup>4</sup> As noted above, at least two Objectors and AMRA members own mining claims in the South Fork of the Clearwater River; others exercise rights of claimholders under license. Objectors are informed and believe that the Service is already aware of the significant number of mining claims—private property of the miners—in the NEPA study area.

them out of truck with equipment similar to suction dredges, and the EA acknowledges that “if entrained by a suction dredge, most larger salmonids are unlikely to be visibly harmed”. (EA at 3-50.)

Even reporting and monitoring activities during the short summer season constitute unreasonable and material interference with mining in violation of 30 U.S.C. § 612(b). As noted above, reclamation requirements are absurd in this context, but to the extent that miners might lawfully be conscripted to such work, it should be done after the dredging season.

Buried within the monitoring section is a mandatory and arbitrary limitation on the size operations may reach without triggering individualized NEPA analysis. (*Id.* at 14 (¶ 3).) Again, miners who are in the middle of working a valuable deposit cannot reasonably be expected to suspend operations to allow analysis. They have expended valuable effort to get to bedrock and work a deposit, and interruption through a winter high-flow season would require re-excavating to bedrock. Congress has previously forbidden the Forest Service from precisely such NEPA-based interference in prospecting and operations; that is why the Forest Service in 1974 rejected its own initial proposal to require advance approval before each and every mining operation.<sup>5</sup>

Finally, the power and size ratings (FONSI at 9 (¶ 4)) are, as explained in detail in the separate comments of Mr. Richardson, also a material interference with mining and are premised on totally erroneous estimates of the amount of material moved by larger dredges at higher altitudes. Such equipment limitations are further evidence of invidious discrimination against miners, insofar as we do not see the Forest Service limiting chainsaw power or size to slow down logging.

### **C. Permit Limitations and the TMDL**

The FONSI reports (at 7), that the limit of 15 suction dredge operations within the mainstem South Fork of the Clearwater River . . . is based on the limit imposed for EPA’s General Permit, which itself was derived from the sediment TMDL for the mainstem of the South Fork of the Clearwater River. Any such restriction is unlawful for many reasons beyond the scope of these Objections; an appropriate interpretation of the Clean Water Act could cover suction dredging, *if at all*, under § 404 as the discharge of dredged materials, not under § 402’s NPDES program, intended for toxic industrial polluters. The Service is not charged with implementation of the federal Clean Water Act, and should not impose any limitations based on its governing mineral regulations and NEPA review. The Service’s charge is to invoke regulatory authority only to the extent the Project involves unnecessary or unreasonable damage to surface resource with full recognition that some impacts are inevitably incurred in the process of extracting minerals where they may be found.

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<sup>5</sup> See generally *Proposed Forest Service Mining Regulations: Hearings before the Subcommittee on Public Lands, House Committee on Interior and Insular Affairs*, 93rd Cong., 2d Sess. 1-4 (Mar. 7-8, 1974). Testimony before the Subcommittee confirmed that even back in 1974, under a “plan of operation” approach, it would often be impossible to comply with NEPA processes consistent with the “length of the field season”. *Id.* at 37.

The record before the Service does not support the position that any sediment-based restrictions on the number of suction dredges is appropriate. First, the Service correctly notes that tests have shown no significant effects. (*E.g.*, EA at 3-5 (“minimal downstream increases in bedload” found when monitoring suction dredge mining in the Clearwater River).) Any water-quality limitations in the South Fork of the Clearwater River are especially irrational because, as acknowledged in the EA, “[f]ine sediment in the South Fork of the Clearwater River is typically sand and so the generation of directly harmful concentrations of suspended solids or high turbidity should not occur” (EA at 3-51). The Service is thus acting irrationally to the extent it conditions the number of operations on any imagined increase in sediment loading. At most, sediments are redistributed over short distances before falling back and have no appreciable adverse effect on any surface resource the Service is charged to protect.

Moreover, the EA shows the basis of the TMDL limitation on the number of dredges to be false. The TMDL document to which the EA refers indicates that the “sediment” loading was based on an assumption that dredges operate a full eight-hour day.<sup>6</sup> (The estimate itself is irrational insofar as the Clean Water Act was not intended to regard a rock displaced by miners, and subject to the tonnage limit in the TMDL calculation, as a “pollutant” to be controlled under the Act.) The EA reports (at 3-52), correctly, that “miners typically do not dredge more than five hours/day”. Hence the data before the Service shows that even under the defective TMDL tonnage limitations, 24 dredges could be allowed in the South Fork of the Clearwater.

The invocation of the TMDL-based restrictions also shows an invidious discrimination of mining activities. Most sources of sediment load regulated though, and allocated under, the TMDL, involve *additions* of sediment material to the rivers, such as increased erosion from forest roads. Yet the Service proposes “the prohibition of dredging, processing, or other disturbance of stream banks, which avoids the introduction of terrestrial-based sediments in the streams”. (EA at 3-53.) In short, the miners are limited to utterly insignificant and temporary changes in activities, mostly (by tonnage) consisting of rocks, while all other activities are permitted to introduce *additional* tonnage of terrestrial fine sediments that are the principal issue of asserted concern.

The mining community may challenge the 15-dredge limitation for the South Fork of the Clearwater River as based on substantial misconstructions of the federal Clean Water Act and factual errors, and the Service’s decisionmaking should not provide any independent basis for limitations of this nature. Rather, the Forest Service should simply indicate that suction dredging causes a less than significant impact for NEPA purposes, removing dredge number limitations in Project decisions.

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<sup>6</sup> We assume that Objectors need not re-submit the documents already in the record by reason of citation in the EA, and hereby incorporate the South Fork Clearwater River Subbasin Assessment and Total Maximum Daily Loads (IDEQ & EPA Oct. 2003) by reference. The Objectors further note their position that 36 C.F.R. § 218.8(b) is unlawful to the extent it attempts to limit any administrative record in further proceedings by arbitrarily excluding documents already relied upon by the Service, but not specifically referenced in objections.



## Factual Grounds for Objections

### A. Cultural Resources and Wildlife

The Objectors are pleased to see a recognition that the Service recognizes that no adverse effects to “cultural resources” are expected to arise by reason of the Project. (FONSI at 19.) Given that there no such resources have ever been documented to occur underwater where suction dredge miners are operating, the Service might reasonably rely upon existing regulations and refrain from complicating suction dredge regulation with such considerations. The Objectors are also pleased to see a recognition that effects on wildlife are “non-existent”. (FONSI at 19.)

### B. Fishery Resources

With respect to fish species and habitat, both the EA and the FONSI fail to acknowledge that effects are either entirely insignificant or mildly positive, particularly where suction dredging is restricted through in-water work times to times when fish eggs are not present in the streambed gravels that may be disturbed by suction dredgers. Even if dredging were allowed year-round, any simple analysis comparing the relatively small area disturbed by dredgers to the much larger area constituting all spawning habitat.

The likelihood of resource conflict is further reduced for two additional reasons. First, miners mine in different areas than fish like to spawn, and typically do not explore for gold in the smaller gravels that fish can move with their tails to build a redd. The EA itself acknowledges that “suction dredge operators prefer dredging in areas of larger substrate” (EA at 1-14), but fails to draw the obvious conclusion that this negates concerns about injury to fishery resources.

Second, miners can stop immediately in the extraordinarily-unlikely event that the dredge sees or even uncovers a redd, because the miners are underwater, with their heads just inches from the dredge nozzle, and visually and closely controlling what goes into the nozzle. (Failure to do so would lead to clogs, causing a loss of valuable mining time.) The Washington Department of Fish and Wildlife has recognized this ability of suction dredgers, and has successfully utilized volunteer suction dredgers to rescue hatching threatened Columbia River chum from spawning beds that had been covered with sediment.<sup>7</sup>

The above factors confirm that dredgers have an almost infinitesimal chance of encountering a redd. Competent analysis of the risk factors to fish from suction dredging have generally concluded that the risks are so vanishingly small as to not really be of regulatory significance.<sup>8</sup> The EA makes no quantitative attempt to assess risk in light of the foregoing

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<sup>7</sup> An electronically-downloaded copy of “Gold Dredgers Rescue Endangered Fish, ICMJ (May 2004) is filed herewith.

<sup>8</sup> A copy of testimony given by Dr. Robert Crittenden in a Washington case containing this conclusion is filed herewith.

factors, and other factors, and arbitrarily concludes that “[t]he requirements to IDWR and EPA permits, as well as the mitigating and monitoring measures described in the BA, have the potential to substantially reduce impacts on individual eggs, [fish], and [fish habitat]”. (EA at 3-50 (referring to steelhead).) Such statements do not inform any decision to be made by the Service, because the EA fails to provide any quantitative sense of the level of risk posed by unrestricted dredging (vanishingly small) or what a “substantial reduction” in impact means in this context.

In particular, a quantitative analysis not crippled by compounding so-called “conservative assumptions” in a way that results in gross overestimates of risk might conclude that there is a one in ten million risk of causing so much as the loss of a single fish. A reduction in risk to one in twenty million might then be regarded as substantial. None of the restrictions proposed in the FONSI are justified with reference to any quantifiable benefit to surface resources. Rather, they are simply the product of social pressure to restrict mining. The priorities set by Congress, however, do not permit the Forest Service to restrict miners on the basis of insignificant risks to surface resources, while permitting other groups to totally destroy other surface resources—as in the ongoing catching and killing of fish for human consumption.

While all the restrictions proposed might reasonably be regarded as more protective of Forest resources, without some quantitative assessment of their actual benefits, the Forest Service has no lawful basis for restricting mining, particularly where such restrictions cause material interference forbidden by 30 U.S.C. § 612(b). That being said, suction dredge miners have never objected to regulations that provide a reasonable summer season and put river beds off limits during times of peak redd density.

With such restrictions, the additional restrictions the Service proposes, such as “no dredging or other modification of substrate would be allowed in localized areas of suitable spawning substrate or within known spawning/early rearing habitat” (EA at 3-55 (referring to spring chinook)) are plainly unlawful. Under the legal authority discussed above, it is not permissible to dedicate particular areas that include federal mining claims to fish production, absent a specific finding that such a restriction is required to avoid jeopardizing the continued existence of an entire “species” subject to protection under the Endangered Species Act.<sup>9</sup> To the Objectors’ knowledge, no such findings have been made; with respect to the spring chinook, no such finding can be made in light of the long-recognized stability of this ESU.<sup>10</sup>

There has been only one study, commissioned by the Siskiyou National Forest, which utilized data concerning suction dredging intensity and fish populations in an attempt to assess impacts. The study found that “any effect that may exist could not be detected at the commonly used Type I error rate of 0.05”. The author concluded:

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<sup>9</sup> See, e.g., *In re Shoemaker*, 110 IBLA 39 (July 13, 1989) (requiring removal of stream improvement structures for fish because “federal management must yield to mining as the dominant and primary use”), copy submitted herewith.

<sup>10</sup> See, e.g., J. Emlen, Population Viability of Snake River chinook salmon (*Oncorhynchus tshawytscha*), copy transmitted herewith.

“Given that this analysis could not detect an effect averaged over good and bad miners [i.e., those not adhering to regulations] and that a more powerful study would be very expensive, it would seem that public money would be better spent on encouraging compliance with current guidelines than further study”.<sup>11</sup>

Such “current guidelines” have no resemblance to the extraordinarily-restrictive provisions discussed above.

While there is a great deal of narrative literature in which biologists propose possible effects of suction dredging, or test the endurance of fish eggs when transported through a suction dredge, there is no evidence that actual suction dredging has ever caused so much as the loss of a single actual fish. Multiple studies, less sophisticated than the SNF study, have found no cumulative impacts from suction dredging.<sup>12</sup> Instead of fairly balancing the available evidence, the EA falls into a regrettably-common pattern of reciting theoretical effects at length. (E.g., EA at 3-50 (“activities that could potentially effect”), even including speculation concerning “extreme cases” that have nothing to do with suction dredging (EA at 3-58).

A final problem with the EA is a failure to balance asserted potential adverse effects of suction dredging with known positive effects. The EA refers repeatedly to the embeddedness of streambeds in the area analyzed, without reference to the known benefits of loosening embedded spawning gravel. Indeed, the EA demands that “miners would be required to ensure that substrate affected by mining is in a condition similar to that of undisturbed adjacent substrate and so *should not be substantially more attractive*, less stable, or more subject to scour or movement during subsequent high flow events”. (EA at 3-64; *emphasis added*). Such requirements are irrational in a context where, even if suction dredges are unstable for a single season until re-distributed, the benefits of less compacted spawning substrate will persist for many years thereafter.

No account is taken of the benefits of increased oxygenation from pump activities. Nor is any account taken of the benefits of increased food availability, though the EA acknowledges that fish are attracted to suction dredges and feeding on dislodged invertebrates—an effect expressly acknowledged in the EA (at 3-59). Lacking any attempt to quantify and balance these factors, the EA simply accuses suction dredging of adverse effects on habitat without justification.

### C. Water Quality

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<sup>11</sup> The study, by Professor Peter Bayley, “Response of fish to cumulative effects of suction dredge and hydraulic mining in the Illinois subbasin, Siskiyou National Forest, Oregon” (April, 2003) is filed herewith.

<sup>12</sup> A succinct summary of the available scientific evidence concerning suction dredging and environmental impacts may be found in testimony of retired EPA scientist Joseph Greene, two sworn statements from whom are filed herewith.

The EA's discussion of water quality correctly and repeatedly notes the minimal effects of suction dredges, which add no pollutants to waters and operate within water quality standards. It confirms the absence of any justification for water-quality-related limitations on the number of dredgers.

The Service's treatment of turbidity as a potentially significant environmental concern should be contrasted with numerous projects, alleged to be associated with fisheries conservation or recovery, which have muddied Idaho rivers for up to fifty miles, as detailed in Gay Richardson's individual comments dated March 13, 2016, in which all Objectors join. It has at all times been obvious to responsible regulators that suction dredging does not cause significant and adverse environmental impacts.

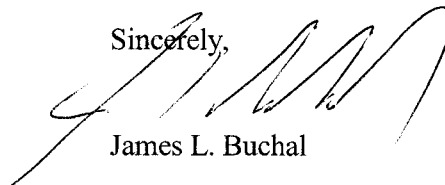
#### **D. Recreation Resources**

With respect to effects on "recreation resources," the Service should make clear that whatever a NEPA process may disclose concerning asserted interference with recreational experiences, no level of such interference in such experiences can form a lawful basis for restricting suction dredge mining. Miners have statutory rights to free and open access to federal lands for prospecting and mineral entry unless such lands are properly withdrawn from mineral entry. Recreationalists have no such statutory rights. It would be unreasonable to restrict statutory rights on the basis of any diminution in recreational privileges.

#### **Conclusion**

For the foregoing reasons, the Service should modify its decision documents to eliminate illegal restrictions on suction dredging, and expand the scope of environmental coverage in the EA by explicitly recognizing the utterly-insignificant impacts of even larger numbers of dredgers.

Sincerely,



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Copies without enclosures to Objectors:

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