

NOTE

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Ninth Circuit Endorses Functional Approach to Determining Agency Action Under Section 7(a)(2) of the Endangered Species Act: *Karuk Tribe of California v. United States Forest Service*

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“Never confuse movement with action.”¹

INTRODUCTION

The federal Endangered Species Act² (ESA) is the “most celebrated and controversial biodiversity protection measure in the United States.”³ The ESA’s stated purposes are, *inter alia*, to conserve the ecosystems upon which endangered and threatened species depend and to provide a program for conserving endangered and threatened species.⁴ The ESA gives effect to these purposes in a number of ways, including requiring the United States Fish and Wildlife Service (FWS) to maintain a list of species determined to be endangered or threatened; requiring federal agencies to ensure that actions they carry out, fund, or approve “are not likely to jeopardize the continued existence of any listed species or adversely modify or destroy its critical habitat”; and prohibiting all persons from taking animal species that are listed under the ESA.⁵

*Karuk Tribe of California v. United States Forest Service*⁶ is the latest chapter in an ongoing legal fight regarding state and federal regulation of suction dredge mining across the West. Suction dredge mining, defined broadly, uses a motorized pump to vacuum up streambed material and wash that streambed material over a sluice

¹ A.E. HOTCHNER, PAPA HEMINGWAY 26 (1966) (attributing quote to Ernest Hemingway).

² 16 U.S.C. §§ 1531–1544 (2012).

³ HOLLY DOREMUS ET AL., ENVIRONMENTAL POLICY LAW: PROBLEMS, CASES, AND READINGS 330 (6th ed. 2012).

⁴ 16 U.S.C. § 1531(b).

⁵ DOREMUS ET AL., *supra* note 3, at 330–31.

⁶ *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006 (9th Cir. 2012).

box to capture gold or other valuable minerals.⁷ Peer-reviewed scientific literature has shown that suction dredge mining has the potential to harm endangered species and their habitat.⁸ In *Karuk Tribe of California*, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit)—sitting en banc—addressed two questions under section 7(a)(2) of the ESA in a challenge against the United States Forest Service’s regulation of suction dredge mining in a national forest.⁹

This note proceeds as follows: Part I reviews the science on the harms of suction dredge mining to fish and other aquatic life. Part II explains the relevant background law and regulations. Part III discusses the facts and procedural history of the *Karuk* decision. Part IV summarizes the majority and dissenting opinions from the Ninth Circuit’s *en banc Karuk* decision. Part V critically analyzes both *Karuk en banc* opinions. Finally, Part VI describes the implications of the *en banc Karuk* decision.

I

SCIENCE ON THE HARMS OF SUCTION DREDGE MINING TO FISH

To suction dredge, a miner uses a gasoline-powered pump to vacuum material from the streambed through a flexible intake hose, which is commonly four or five inches in diameter.¹⁰ The diameter of this intake hose can be from two inches to ten inches or larger.¹¹ A larger intake size allows a greater amount of streambed material to be vacuumed up and processed through the dredge per hour of operation.¹² The suction dredge deposits water and streambed material into a floating sluice box.¹³ A sluice box is essentially a sloped channel with a textured bottom that catches and retains gold—which is especially dense—as water and streambed material move downslope along the sluice box.¹⁴ The suction dredge then discharges

⁷ See *id.* at 1012.

⁸ See *infra* Part I.

⁹ *Karuk Tribe of Cal.*, 681 F.3d at 1011.

¹⁰ *Id.* at 1012.

¹¹ *How Do Suction Gold Dredges Work*, GOLD FEVER PROSPECTING.COM, <http://www.goldfeverprospecting.com/howdosugodrw.html> (last visited Feb. 8, 2014).

¹² *Id.*

¹³ *Karuk Tribe of Cal.*, 681 F.3d at 1012.

¹⁴ *Sluicing for Gold—Getting Started*, GOLD FEVER PROSPECTING.COM, <http://www.goldfeverprospecting.com/slforogest.html> (last visited Feb. 8, 2014).

the resulting spoil back into the stream or onto its bank when it reaches the end of the sluice box.¹⁵

Suction dredge mining can have a number of harmful non-fishery effects, but this note focuses on the negative effects that the activity can have on coho salmon and other salmonids. If not properly regulated, suction dredge mining has the ability to jeopardize the continued existence of coho salmon and adversely modify its critical habitat. An overarching theme of the scientific literature on the effects of suction dredge mining is the need for additional studies on the environmental impacts of the activity.¹⁶ The effects of suction dredging “vary according to the size of stream, fish species present, season of dredging, and frequency and intensity of dredging.”¹⁷ This note first reviews the effects of suction dredging on spawning and early life stages of fishes, then the effects on juvenile and adult fishes, and finally the effects on stream benthic communities. This review of the potential harmful effects of suction dredging on fisheries and other aquatic life is primarily based off an expansive literature review completed by Horizon Water and Environment, LLC on behalf of the California Department of Fish and Wildlife in September 2009.¹⁸ The Oregon Chapter of the American Fisheries Society—which is “comprised of over 450 fisheries and aquatic science professionals”¹⁹—recently published a white paper that states the California Department of Fish and Wildlife literature review is, “[t]o date, the most complete literature review regarding impacts to fish and aquatic habitats from suction dredge mining” and largely supports the findings of that literature review.²⁰

¹⁵ *Karuk Tribe of Cal.*, 681 F.3d at 1012.

¹⁶ See Peter B. Moyle, *Suction Dredging is Bad for Fish*, CAL. WATERBLOG (June 17, 2011), <http://californiawaterblog.com/2011/06/17/suction-dredging-is-bad-for-fish/> [hereinafter Moyle, *Suction Dredging*].

¹⁷ *Id.*

¹⁸ *Draft Subsequent Environmental Impact Report, Appendix D. Literature Review*, CAL. DEPARTMENT OF FISH & WILDLIFE, 4.3-1 (Sept. 2009), <http://www.dfg.ca.gov/suctiondredge/>.

¹⁹ Letter from Jeffrey Yanke, President, Am. Fisheries Soc’y–Or. Chapter, to Oregon Legislature (Apr. 3, 2013), <http://orafs.org/wp-content/uploads/2013/04/2013-ORAFS-Suction-Dredge-Mining-Cover-Letter1.pdf>.

²⁰ *Effects of Suction Dredge Mining on Oregon Fishes and Aquatic Habitats*, OR.CHAPTER AM. FISHERIES SOC’Y (Apr. 2013), <http://orafs.org/wp-content/uploads/2013/04/2013-ORAFS-Suction-Dredge-Mining-Impacts-FINAL1.pdf>.

A. Fish Spawning and Early Life Stages

Suction dredging operations can occur in the spawning habitat of many California salmonid species:²¹ a group that includes coho salmon.²² Salmonids need specific environmental conditions to successfully complete the spawning and incubation process.²³ These conditions include proper depth, velocity, substrate, and complexity.²⁴ California salmonids spawn by digging a redd, also known as a nest, in stream or river substrate and depositing eggs into the redd; fertilization, incubation, hatching, and emergence take place in the redd.²⁵ The optimum substrate for salmonid embryos is a mix of gravel and cobble with a mean diameter of one-half to four inches containing less than five percent fine particles—particles less than three-tenths of an inch in diameter.²⁶

1. Destabilization of Spawning Substrate

Though a few studies have found that suction dredging increases the availability of spawning substrate by loosening compacted spawning gravels, most studies have found that the loose substrate frequently found in dredge tailings poses a threat to successful spawning.²⁷ This threat is due to the relative instability of dredge tailings, which increases the chances of scouring and reduced survival of embryos.²⁸ Further, salmonid embryo development frequently coincides with high-flow periods that cause scouring.²⁹ Regardless, “the extent to which fish populations depend on dredge tailings for spawning habitat likely depends on the availability of suitable unaltered substrate and the quality of the dredge tailings.”³⁰

2. Increased Fine Particles in Spawning Substrate

Salmonids require loose, uncompacted gravels with a high permeability and unclogged interstices for the removal of metabolic

²¹ CAL. DEPARTMENT OF FISH & WILDLIFE, *supra* note 18.

²² PETER B. MOYLE, INLAND FISHES OF CALIFORNIA 242–43, 245–46 (rev. & expanded ed. 2002).

²³ CAL. DEPARTMENT OF FISH & WILDLIFE, *supra* note 18, at 4.3-2.

²⁴ *Id.*

²⁵ *See id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 4.3-3.

wastes.³¹ The flow of water through the interstices of spawning substrate provides dissolved oxygen that is critical for the survival of developing salmonid eggs.³² Suction dredge mining can result in increased fine particles and organic matter in spawning gravels, which can reduce water flow and dissolved oxygen availability to salmonid eggs.³³ Such reduced flow and oxygen availability can result in a “reduced size of embryos at various developmental stages, increased development time of alevins, and higher pre- and post-hatching mortality.”³⁴ An increase of fine particles in redds can also delay the emergence of fry, which may result in “smaller fry that are less able to compete for resources.”³⁵

3. *Effects of Heavy Metals*

Suction dredge mining has the potential to introduce toxic, heavy metal contaminants into habitats that are critical to spawning and early life stages of salmonids.³⁶ A heavy metal of particular concern to fish is mercury, which is prevalent in the sediments of many California streams due to its historical use in gold mining.³⁷ Mercury is also prevalent in the sediments of other western streams that were mined for gold.³⁸ One study estimated that approximately half of the thirteen million pounds of mercury that was used to process gold in California ended up in the state’s waterways.³⁹ The primary form found in fish is methylmercury, an organic form of mercury that is a neurotoxin.⁴⁰ Inorganic mercury “can be methylated by microbes to form [methylmercury].”⁴¹ Methylmercury can then bioaccumulate up

³¹ *Id.*

³² *Id.* at 4.3-4.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 4.2-3.

³⁸ CHARLES N. ALPERS ET AL., U.S. GEOLOGICAL SURVEY, MERCURY CONTAMINATION FROM HISTORICAL GOLD MINING IN CALIFORNIA (Nov. 2005), available at http://pubs.usgs.gov/fs/2005/3014/fs2005_3014_v1.1.pdf; Jerome O. Nriagu, *Mercury Pollution from the Past Mining of Gold and Silver in the Americas*, 149 SCI. TOTAL ENV’T 167, 175–77 (1994).

³⁹ CAL. DEPARTMENT OF FISH & WILDLIFE, *supra* note 18, at 4.2-3.

⁴⁰ *Id.* at 4.3-4; *Methylmercury*, U.S. GEOLOGICAL SURVEY, <http://toxics.usgs.gov/definitions/methylmercury.html> (last modified Feb. 19, 2013).

⁴¹ CAL. DEPARTMENT OF FISH & WILDLIFE, *supra* note 18, at 4.3-4.

the food chain—very small aquatic plants and animals take up methylmercury, small fish eat these very small plants and animals, and larger fish subsequently eat these small fish, with the levels of mercury increasing exponentially up the food chain.⁴²

While studies on the biological effects of mercury on fish are limited, those that have been conducted showed that mercury contamination has “negative consequences for fish reproduction.”⁴³ Studies found that fish fed a mercury-contaminated diet show decreased spawning activity, a reduction in number of eggs laid, and impaired gonadal development, though the “mechanisms by which [methylmercury] influences the reproductive physiology of fish still remains unclear.”⁴⁴ Due to the lack of studies investigating the potential fitness consequences of methylmercury on fish in a natural setting, substantial uncertainty remains regarding how the physiological effects of mercury affect the long- and short-term fitness of fish.⁴⁵

Further, there is a significant data gap regarding the discharge of mercury during dredging and the proportion of mercury released from suction dredging relative to mercury released through natural mechanisms.⁴⁶ One study attempted to directly quantify the discharge of mercury from a suction dredge using a substrate sample from a stream known to be a mercury hotspot and found that a suction dredge captured ninety-eight percent of the sample substrate’s mercury.⁴⁷ However, the two percent of mercury that was released with the discharged spoil was at a concentration ten times greater than the threshold for hazardous waste designation.⁴⁸ Mercury hotspots like the one used in the study are known to widely exist but little effort has been made to map them.⁴⁹ Natural discharge of mercury from stream substrates is “generally episodic and correlates with sediment transport in high flow events” but little is known about the actual rate of mercury discharge from natural processes.⁵⁰

⁴² *Id.* at 4.2-3; *Human Exposure: Moving up the Food Chain*, EPA, <http://www.epa.gov/hg/exposure.htm#3> (last updated July 9, 2013).

⁴³ CAL. DEPARTMENT OF FISH & WILDLIFE, *supra* note 18, at 4.3-4.

⁴⁴ *Id.*

⁴⁵ *See id.*

⁴⁶ *Id.* at 4.2-4.

⁴⁷ *See id.* at 4.2-3.

⁴⁸ *See id.*

⁴⁹ *Id.* at 4.2-4.

⁵⁰ *Id.*

4. Egg and Larval Entrainment

Suction dredging can negatively affect the eggs and early life stages of salmonids through entrainment, which—in the context of suction dredge mining—refers to the process of an organism getting pulled into the suction dredge.⁵¹ Though publications are limited, one study found the following immediate effects on trout from entrainment: one-hundred percent mortality of uneyed eggs (the embryo's developing eyes are not yet visible), thirty percent mortality of eyed eggs (the embryo's developing eyes are visible as a black spot inside of the egg), and eighty-three percent mortality of sac-fry (newly hatched fish that continue to derive nourishment from the yolk sac of the egg from which they were born).⁵² Additionally, there are likely post-entrainment negative effects such as increased risk of predation and abrasions.⁵³

B. Juvenile and Adult Fishes

Suction dredging has the potential to negatively affect juvenile and adult salmonids through entrainment, pool formation and loss, sedimentation, loss of large woody debris and boulders, behavioral responses, suspended sediment, and cumulative impacts. These processes are briefly described below.

1. Entrainment

The negative impacts on juvenile and adult salmonids from suction dredge mining is likely minimal, as most juvenile and adult salmonids are likely to avoid or survive being pulled through a suction dredge.⁵⁴ For example, one study found that trout greater than four inches were able to avoid entrainment for dredge intake velocities less than one foot per second and were generally able to survive entrainment.⁵⁵ However, information is lacking for long-term impacts such as “disorientation, abrasions, and secondary infections.”⁵⁶

⁵¹ See *id.* at 4.3-5; see MOYLE, *supra* note 22, at 52 (discussing entrainment).

⁵² CAL. DEPARTMENT OF FISH & WILDLIFE, *supra* note 18, at 4.3-5.

⁵³ See *id.*

⁵⁴ *Id.* at 4.3-7.

⁵⁵ *Id.* at 4.3-5.

⁵⁶ *Id.* at 4.3-7.

2. Pool Formation and Loss

Suction dredging can both improve and worsen fish habitat.⁵⁷ Excavations from dredging operations can either temporarily form or deepen pools, which can have two positive effects.⁵⁸ First, these pools may intersect subsurface flow and create cool-water refugia for fish during the summer.⁵⁹ Second, increased water depth, especially when flows are low, can provide a refuge from non-fish predators.⁶⁰ However, suction dredging can also fill pool habitat through sedimentation, and whether pools that become filled with sediment can recover depends on whether the original hydrodynamic conditions that led to scour are still or will be present.⁶¹

3. Sedimentation.

The increase of fine sediment in habitat downstream from suction dredging “can negatively impact the microhabitats of bottom-oriented stream fish” such as juvenile salmonids because they “rely on cover that can become embedded during dredging operations.”⁶² One study “found that high densities of deposited sediment” below dredging sites significantly “reduced the amount of instream cover for juvenile salmonids because the fine sediment filled gravel interstices and decreased streambottom roughness.”⁶³ In another study on juvenile salmonids, increased fine-sediment was correlated with decreased growth, lower food availability, increased activity, increased intraspecific aggression, and an apparent increase in mortality.⁶⁴

4. Loss of Woody Debris and Boulders

The movement of large woody debris and boulders by suction dredge operators within stream channels can negatively affect juvenile and adult salmonids.⁶⁵ Suction dredge operators can directly move these structural elements or indirectly cause their movement by removing the substrate surrounding them.⁶⁶ The stability and

⁵⁷ *See id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *See id.*

⁶² *Id.* at 4.3-8.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

maintenance of large woody debris and boulders is important to the long-term maintenance of pool habitat, which is important for many species of fish.⁶⁷ More directly, woody debris provides cover for adult salmonids.⁶⁸ Woody debris is an important energy source for benthic macroinvertebrates, which are a major food source for juvenile salmonids.⁶⁹ Further, as woody debris is important as a refuge and source of macroinvertebrate recolonizers, loss of woody debris can decrease macroinvertebrate diversity and production in streams, thereby negatively affecting a food source of salmonids.⁷⁰

5. Behavioral Responses

The behavioral responses of fish to noise and vibrations generated by suction dredging have not been directly quantified, but studies have found a number of negative effects that suction dredging likely has on fish behavior.⁷¹ Research shows that suction dredging can increase salmon movement in pools and thereby increase adult stress, especially when numerous dredges are operating in close proximity to one another or water temperatures are high.⁷² Of particular concern to the Klamath River and its tributaries is that suction dredging creates a “chronic disturbance of fishes, which can change their behavior so they move to stream areas with less favorable conditions.”⁷³ The Klamath River system can experience water temperatures of seventy degrees Fahrenheit and higher; conditions that are stressful or even lethal for many salmonids.⁷⁴ As a response, salmonids, including juvenile coho salmon, concentrate in cooler areas where small tributaries flow into the Klamath River or where there is an upwelling of ground water.⁷⁵ Disturbing salmonids and causing them to leave these thermal refugia, even temporarily, reduces the “overall ability of the [Klamath River] to support fish.”⁷⁶

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 4.3-9.

⁷⁰ *Id.*

⁷¹ *Id.* at 4.3-10 to -11.

⁷² *Id.*

⁷³ Moyle, *Suction Dredging*, *supra* note 16.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

6. *Suspended Sediment*

Increases in suspended sediment due to suction dredging can have a variety of negative effects on juvenile and adult fishes.⁷⁷ Increased suspended sediment can lead to the occlusion of gravel interstices, which decreases the hiding places and food available to fish.⁷⁸ More direct effects on fish can include the abrasion or clogging of delicate membranes, such as gills; irritation of skin and facilitation of infections; and reduced growth rates as a result of limited vision in turbid waters.⁷⁹ However, fish may benefit by actively feeding on invertebrates that are entrained in suction dredges and discharged in the sediment plume and also by experiencing decreased risk of predation due to increased turbidity.⁸⁰ Further, juvenile and adult salmonids may simply avoid the local increases in turbidity that result from suction dredging.⁸¹

7. *Cumulative Impacts*

No research has focused on measuring the cumulative physical or biological impacts of numerous dredges working in close proximity or of a stream reach being dredged for many consecutive years.⁸² In many systems “dredging effects may be minor when considered in isolation, yet they may contribute to significant cumulative effects on important resources.”⁸³ Thus, more research on the cumulative physical or biological impacts of suction dredge mining is necessary in order for state and federal agencies to make informed decisions regarding the regulation of suction dredge mining.

C. *Stream Benthic Communities*

Disturbance caused by suction dredging can have deleterious effects on benthic communities (groups of organisms that live on or near the bottom of a water body), which subsequently affects higher trophic levels such as fish production.⁸⁴ Benthic communities are

⁷⁷ CAL. DEPARTMENT OF FISH & WILDLIFE, *supra* note 18, at 4.3-11 to -12.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 4.3-10 to -12.

⁸¹ *Id.*

⁸² *Id.* at 4.3-10 to -13.

⁸³ *Id.* at 4.3-13.

⁸⁴ *Id.*

among the “foundational components of the food web.”⁸⁵ One study found that the richness, diversity, and the absolute number of individuals of invertebrate species decreased as disturbance frequency increased.⁸⁶ A number of studies found that direct disturbances to benthic invertebrate populations caused by dredging could be extreme but that the disturbances were usually relatively temporary and limited to the area physically impacted by the dredging activity.⁸⁷ Overall, the effects of suction dredging on local benthic invertebrates are difficult to measure after just one year of dredging, but as dredging occurs over many years, it is more likely to significantly affect benthic communities upon which fish rely.⁸⁸

Ultimately, a review of the science on the effects of suction dredging shows that the activity has real potential to deleteriously affect fishes by, *inter alia*, destabilizing spawning substrate, increasing the amount of fine particles in spawning substrate, introducing heavy-metal contaminants into spawning habitats, entraining eggs and larvae, and creating chronic disturbance of fish. The review illuminates just how little is known about the effects of suction dredging on salmonids and other fish, as much of the research is anecdotal or in non-peer-reviewed reports.⁸⁹ Hence, Dr. Peter Moyle, a highly esteemed fisheries biologist,⁹⁰ advocates for a precautionary approach to allowing suction dredge mining on the Klamath River: “[I]n my professional opinion, suction dredging should only be allowed in areas where it can be demonstrated there will be no immediate or cumulative impact on the anadromous fishes.”⁹¹ Similarly, the Oregon Chapter of the American Fisheries Society “recommend[s] a precautionary approach to suction dredge

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 4.3-14.

⁸⁸ *Id.* at 4.3-16.

⁸⁹ Peter B. Moyle, *Expert Report of Professor Peter B. Moyle, Ph.D., KLAMATH RIVERKEEPER 4-7*, <http://www.klamathriver.org/Documents/Peter-Moyle-Expert-Report-on-Suction-Dredging-on-Klamath.pdf> (last visited Feb. 8, 2014) [hereinafter Moyle, *Expert Report*] (prepared on behalf of the plaintiffs in *Karuk Tribe v. California Department of Fish and Game*, in the Superior Court of California, Alameda County, RG0521197).

⁹⁰ *Id.* at 1-3.

⁹¹ *Id.* at 6.

mining in Oregon's waterways."⁹² Dr. Moyle also stated that suction dredging—as it was being conducted on the Klamath River system prior to the Ninth Circuit's recent *en banc* decision and California's statutory moratorium on suction dredging—would further contribute to the decline of all anadromous fishes in the Klamath basin.⁹³

III

BACKGROUND LAW AND REGULATIONS

A. Endangered Species Act

“The Endangered Species Act of 1973 [was] the most comprehensive legislation for the preservation of endangered species ever enacted by any nation” at the time it was passed by Congress.⁹⁴ In enacting the ESA, it was clear that Congress intended to “halt and reverse the trend toward species extinction, whatever the cost.”⁹⁵ The following portions of this note discuss sections 4, 7, 9 and 11 of the ESA.

1. Section 4

Section 4 of the ESA requires the Secretary of the Department of Interior to maintain a list of species determined by regulation to be endangered or threatened.⁹⁶ A species includes “any subspecies of fish or wildlife, or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.”⁹⁷ An endangered species is “any species which is in danger of extinction throughout all or a significant portion of its range,” with the exclusion of certain insect species.⁹⁸ A threatened species is “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”⁹⁹

The National Marine Fisheries Service (NMFS), an agency within the United States Department of Commerce, is responsible for anadromous fish and most marine species, and the FWS is responsible

⁹² OR.CHAPTER AM. FISHERIES SOC'Y, *supra* note 20.

⁹³ Moyle, *Expert Report*, *supra* note 89, at 4.

⁹⁴ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

⁹⁵ *Id.* at 184.

⁹⁶ 16 U.S.C. § 1533 (2012).

⁹⁷ *Id.* § 1532(16).

⁹⁸ *Id.* § 1532(6).

⁹⁹ *Id.* § 1532(20).

for all other species.¹⁰⁰ As a practical matter, the FWS—an agency within the United States Department of the Interior—maintains this list for all species and can only modify the listing status of species for which NMFS has responsibility upon direction from the Secretary of Commerce.¹⁰¹ The ESA requires the FWS and NMFS (the Services) to evaluate five categories of threats when deciding to list, reclassify, or delist a species: “(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.”¹⁰² The ESA further states that listing determinations shall be based “solely on the . . . best scientific and commercial data available.”¹⁰³ This language, strengthened and clarified by the legislative history behind it, is widely understood to prohibit the consideration of economic impacts by the Services in deciding whether to list a species.¹⁰⁴

The Services are generally required to designate critical habitat at the time of listing to the “maximum extent prudent and determinable” and can revise such designation at a later time as appropriate.¹⁰⁵ Critical habitat is defined as specific areas within or beyond the geographical areas currently occupied by a listed species that have those physical or biological characteristics essential to conservation of the species.¹⁰⁶ The ESA explicitly requires the Services to consider economic impacts when designating critical habitat.¹⁰⁷

¹⁰⁰ DOREMUS ET AL., *supra* note 3.

¹⁰¹ 16 U.S.C. § 1533.

¹⁰² *Id.* § 1533(a)(1)(A)–(E).

¹⁰³ *Id.* § 1533(b)(1)(A).

¹⁰⁴ *Listing Under the Endangered Species Act*, NOAA FISHERIES, <http://www.nmfs.noaa.gov/pr/listing/> (last updated Aug. 12, 2013); PAMELA BALDWIN, CONG. RESEARCH SERV., RL30792, THE ENDANGERED SPECIES ACT: CONSIDERATION OF ECONOMIC FACTORS (2003), available at http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL30792_04152003.pdf.

¹⁰⁵ 16 U.S.C. § 1533(a)(3). The other exceptions to critical habitat being designated concurrently with the listing of a species are if “it is essential to the conservation of the such species that the regulation implementing [the listing decision] be promptly published” or “critical habitat of such species is not then determinable.” *Id.* § 1533(b)(6)(C).

¹⁰⁶ *Id.* § 1532(5)(a).

¹⁰⁷ *Id.* § 1533(b)(2).

2. Section 7

Section 7 contains two primary mandates for all federal agencies.¹⁰⁸ First, section 7(a)(1) directs federal agencies to utilize their authority to further the purposes of the ESA by carrying out programs for the conservation of ESA-listed species.¹⁰⁹ Second, section 7(a)(2) (hereinafter Section 7(a)(2)) requires federal agencies to ensure that actions they carry out, authorize, or fund are not likely to jeopardize the continued existence of any listed species or adversely modify or destroy its critical habitat.¹¹⁰ The Ninth Circuit described Section 7(a)(2) as the “heart of the ESA.”¹¹¹ The Ninth Circuit and the Supreme Court have both described Section 7(a)(2)’s consultation requirement as a willful decision by Congress to give listed species priority over the “primary missions” of federal agencies.¹¹²

Agency action must be discretionary to trigger Section 7(a)(2) consultation.¹¹³ Examples of agency action “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.”¹¹⁴ In the Ninth Circuit, agency action is construed broadly but is limited to circumstances in which a federal agency makes an “affirmative” act or authorization.¹¹⁵

Federal agencies fulfill this Section 7(a)(2) duty through a process that usually begins with the federal agency contacting the Services and asking whether any listed species are present in the area where the proposed action will occur.¹¹⁶ After this step has been taken, the ESA prohibits the action agency and the permit or license applicant

¹⁰⁸ *Id.* § 1536(a)(1)–(2).

¹⁰⁹ *Id.* § 1536(a)(1).

¹¹⁰ *Id.* § 1536(a)(2); 50 C.F.R. § 402.02 (2012).

¹¹¹ *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011).

¹¹² *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978); *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1020 (9th Cir. 2012).

¹¹³ *Nat’l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666–67 (2007).

¹¹⁴ 50 C.F.R. § 402.02.

¹¹⁵ *Karuk Tribe of Cal.*, 681 F.3d at 1020 (citing *Cal. Sportfishing Prot. Alliance v. Fed. Energy Regulatory Comm’n*, 472 F.3d 593, 598 (9th Cir. 2006)).

¹¹⁶ *DOREMUS ET AL.*, *supra* note 3; *JAN G. LAITOS ET AL.*, *NATURAL RESOURCES LAW* 1107 (2d ed. 2012).

from making any “irreversible and irretrievable commitment of resources” that would limit the implementation of alternatives to the proposed action that would not violate Section 7(a)(2).¹¹⁷ Then, if a listed species is present, the action agency must conduct a biological assessment to determine if the proposed action is likely to adversely affect that listed species.¹¹⁸ If the action agency finds through its biological assessment that the proposed action is not likely to adversely affect the listed species or its critical habitat and gets written concurrence from the FWS or NMFS—which Service is dependent on which species is present—no further action is required.¹¹⁹

If the action agency issues a biological assessment that determines a proposed action would likely adversely affect a listed species, the action agency must proceed with formal consultation.¹²⁰ The formal consultation process results in the appropriate Service issuing a biological opinion regarding whether the proposed action “is likely to jeopardize the continued existence of the species or result in the destruction or adverse modification of its critical habitat.”¹²¹ If the proposed action “reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species,” then it fails the jeopardy test.¹²² If the proposed action would, directly or indirectly, result in an “alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species,” then it fails the critical habitat test.¹²³ The Ninth Circuit held that the Services must consider both survival *and* recovery when analyzing the impacts of proposed projects under Section 7(a)(2).¹²⁴

There are a number of possible outcomes of a biological opinion. If the Service finds that the proposed action will result in jeopardy or

¹¹⁷ 16 U.S.C. § 1536(d) (2012).

¹¹⁸ *Id.* § 1536(c)(1).

¹¹⁹ 50 C.F.R. § 402.13(a).

¹²⁰ *Forest Guardians v. Johanns*, 450 F.3d 455, 457–58 (9th Cir. 2006).

¹²¹ *LAITOS ET AL.*, *supra* note 116, at 1108 (internal quotations omitted).

¹²² 50 C.F.R. § 402.02.

¹²³ *Id.*

¹²⁴ *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1069 (9th Cir. 2004); *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 934 (9th Cir. 2007).

adverse modification of critical habitat, the Service must suggest reasonable and prudent alternatives (RPAs), if they exist, that would allow the project to proceed without causing jeopardy or adverse modification of critical habitat.¹²⁵ If the Service issues a “jeopardy” opinion, the action agency has three possible courses of action: it must abandon the proposed action, implement one of the RPAs, or seek an exemption from the Endangered Species Committee.¹²⁶ If the Service finds that the proposed action will not result in jeopardy or adverse modification of critical habitat—a “no jeopardy” opinion—then the action agency may proceed with the proposed action.¹²⁷ Biological opinions allowing the proposed actions to proceed, either under the RPAs or as originally envisioned, are accompanied by incidental take statements that protect the action agency from liability for violating section 9 of the ESA.¹²⁸

However, following an action agency biological assessment that determines a listed species is likely to be adversely affected, the action agency may voluntarily initiate a “less rigorous regulatory procedure called ‘informal consultation.’”¹²⁹ Informal consultation includes all communication between the Service and the action agency and is designed to help the action agency determine whether formal consultation will be required.¹³⁰ Through informal consultation, the Service may suggest modifications to the action agency’s proposed action that could be implemented to “avoid the likelihood of adverse effects to the listed species or critical habitat.”¹³¹ Further, if during informal consultation the action agency gets the Service to concur in writing that the proposed action “is not likely to adversely affect listed species or critical habitat, [then] the consultation process is terminated.”¹³²

¹²⁵ DOREMUS ET AL., *supra* note 3, at 331; 16 U.S.C. § 1536(b)(3)(A) (2012).

¹²⁶ Nat’l Assoc. of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 652 (2007).

¹²⁷ See 16 U.S.C. § 1535(b)(4)(A)–(C).

¹²⁸ DOREMUS ET AL., *supra* note 3, at 331; see *infra* notes 131–36 and accompanying text.

¹²⁹ Forest Guardians v. Johanns, 450 F.3d 455, 457 (9th Cir. 2006).

¹³⁰ 50 C.F.R. § 402.13(a) (2012).

¹³¹ *Id.* § 402.13(b).

¹³² *Id.* § 402.13(a).

3. *Sections 9 and 11*

Sections 9 and 11 of the ESA set out the Act's prohibitions on take and the mechanisms for enforcing those prohibitions.¹³³ Section 9 of the ESA prohibits any person from taking an endangered animal within the United States. Take means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."¹³⁴ A FWS regulation states that harm includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."¹³⁵ A NMFS regulation defining harm is phrased almost identically, except that it also lists spawning, rearing, and migration as essential behavioral patterns.¹³⁶ The ESA provides a different set of protections for plants, defined as "any member of the plant kingdom, including seeds, roots and other parts thereof."¹³⁷ Knowing violation of the ESA is punishable by civil penalty up to \$25,000 per violation and criminal penalty up to \$50,000 and one year of imprisonment per violation.¹³⁸ Moreover, the ESA contains a citizen-suit provision that provides for the injunction of ongoing violations and recovery of attorney's fees.¹³⁹

B. Mining Law of 1872 and Organic Administration Act of 1897

The General Mining Law of 1872 (Mining Law) provides that a private citizen may enter public lands, not otherwise withdrawn, to prospect and mine.¹⁴⁰ The Organic Administration Act of 1897 (Organic Act) extended the applicability of the Mining Law to the national forests but also gave the Secretary of Agriculture the power to regulate mining activities within the national forests for protective purposes.¹⁴¹ Specifically, the Organic Act requires that miners must "comply with the rules and regulations covering such national

¹³³ 16 U.S.C. §§ 1538, 1540 (2012).

¹³⁴ *Id.* § 1532(19).

¹³⁵ 50 C.F.R. § 17.3.

¹³⁶ *Id.* § 222.102.

¹³⁷ 16 U.S.C. §§ 1532(14), 1538(a)(2).

¹³⁸ *Id.* § 1540(a), (b).

¹³⁹ *DOREMUS ET AL.*, *supra* note 3, at 331.

¹⁴⁰ 30 U.S.C. § 22 (2012).

¹⁴¹ 16 U.S.C. §§ 482, 551.

forests.”¹⁴² Extraction of minerals on federal land is also subject to regulation by the state in which that federal land is located, as long as that state regulation does not contradict federal law.¹⁴³

C. USFS Mining Regulations

In 1974, the USFS promulgated regulations for mining activities in national forests in order to minimize the negative environmental impacts of such activities.¹⁴⁴ Those regulations require all operations to be conducted, to the extent feasible, “to minimize adverse environmental impacts on National Forest surface resources.”¹⁴⁵ In 2005 the USFS revised its regulations to improve clarity, but these changes did not materially affect the issues that were before the Ninth Circuit in *Karuk Tribe v. U.S. Forest Service*.¹⁴⁶ The regulations set out three different categories of mining, with each category dependent on the likelihood that the proposed activity would cause significant disturbance to surface resources, such as fisheries and wildlife habitat.¹⁴⁷ The first category is for de minimis mining activities that “will not cause” significant disturbance.¹⁴⁸ Such activities may proceed without notification of or approval from the USFS.¹⁴⁹

The second category of regulation is for mining activities that “might cause” significant disturbance.¹⁵⁰ A person proposing such activities must submit a notice of intent to operate (NOI) to the appropriate USFS district ranger.¹⁵¹ A NOI is only required to include 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.”¹⁵² The district ranger must notify the miner whether a Plan of Operation (Plan) for the proposed operation is

¹⁴² *Id.* § 478.

¹⁴³ LAITOS ET AL., *supra* note 116, at 749.

¹⁴⁴ *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1012 (9th Cir. 2012); National Forest Surface Use Under U.S. Mining Laws, 39 Fed. Reg. 31,317 (Aug. 28, 1974) (to be codified at 36 C.F.R. pts. 251, 252, and 293).

¹⁴⁵ 36 C.F.R. § 228.8 (2013).

¹⁴⁶ 681 F.3d at 1013; 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. 32,713-01 (June 6, 2005) (to be codified at 36 C.F.R. pt. 228).

¹⁴⁷ *Karuk Tribe of Cal.*, 681 F.3d at 1012; 36 C.F.R. §§ 228.4(a), 228.8(e).

¹⁴⁸ *Karuk Tribe of Cal.*, 681 F.3d at 1012; 36 C.F.R. § 228.

¹⁴⁹ *Karuk Tribe of Cal.*, 681 F.3d at 1012; 36 C.F.R. § 228.4(a)(1).

¹⁵⁰ *Karuk Tribe of Cal.*, 681 F.3d at 1013; 36 C.F.R. § 228.4(a).

¹⁵¹ *Karuk Tribe of Cal.*, 681 F.3d at 1013; 36 C.F.R. § 228.4(a).

¹⁵² *Karuk Tribe of Cal.*, 681 F.3d at 1013; 36 C.F.R. § 228.4(a).

required within fifteen days of receiving the NOI.¹⁵³ The district ranger will require a Plan if he or she determines that the proposed operation “will likely cause” significant disturbance, which determination bumps a miner’s proposed activity into the third category of regulation.¹⁵⁴ The regulations explicitly state that a NOI is not required for certain activities, including the following: operations that will be limited to the use of vehicles on existing roads, prospecting and sampling for minerals which “generally might include searching for and occasionally removing small mineral samples or specimens,” gold panning, metal detecting, nonmotorized hand sluicing, dry washing, and collection of mineral samples using hand tools.¹⁵⁵

Proposed activities that “will likely cause” significant disturbance require approval of a Plan submitted by the miner.¹⁵⁶ A Plan is significantly more detailed than a NOI, as it requires “the approximate location and size of areas where surface resources will be disturbed” and environmental protection measures.¹⁵⁷ Within thirty days of receiving a Plan, the district ranger must approve the Plan, notify the miner that an additional sixty days is required for Plan review, or notify the miner of any modifications necessary to meet the purposes of the regulations.¹⁵⁸

IV FACTS AND PROCEDURAL HISTORY

A. Facts

1. Karuk Tribe, Klamath River, and Coho Salmon

The Karuk Tribe of California has lived in the region that is now northern California “since time immemorial.”¹⁵⁹ The government of the federally-recognized Karuk Tribe is located in Happy Camp,

¹⁵³ *Karuk Tribe of Cal.*, 681 F.3d at 1013; 36 C.F.R. § 228.4(a)(2).

¹⁵⁴ *Karuk Tribe of Cal.*, 681 F.3d at 1013; 36 C.F.R. § 228.4(a).

¹⁵⁵ 36 C.F.R. § 228.4(a)(1)(ii).

¹⁵⁶ *Karuk Tribe of Cal.*, 681 F.3d at 1013; 36 C.F.R. § 228.4(a)(3).

¹⁵⁷ *Karuk Tribe of Cal.*, 681 F.3d at 1012, 1013; 36 C.F.R. § 228.4(c)(2).

¹⁵⁸ *Karuk Tribe of Cal.*, 681 F.3d at 1013; *see* 36 C.F.R. § 228.5(a).

¹⁵⁹ *Karuk Tribe of Cal.*, 681 F.3d at 1011.

California.¹⁶⁰ The center of the Karuk world, Katimin, is located at the confluence of the Salmon and Klamath Rivers.¹⁶¹ The Karuk Tribe relies on coho salmon for a variety of uses, including cultural, religious, and subsistence.¹⁶² The Tribe is greatly concerned with the protection of native fish and wildlife in the Klamath National Forest.¹⁶³

The headwaters of the Klamath River are in southeastern Oregon.¹⁶⁴ From there, the river flows through northern California and meets the Pacific Ocean about forty miles south of the California-Oregon border.¹⁶⁵ In northern California, the Klamath River flows through the Six Rivers and Klamath National Forests.¹⁶⁶ The Klamath River system supports the highest diversity of sea-run fishes of any California river, including coho salmon.¹⁶⁷ NMFS designated the Klamath River system and much of its riparian habitat as critical habitat for coho salmon in 1999.¹⁶⁸

Coho salmon—*Oncorhynchus kisutch*¹⁶⁹—are fairly large fish, with adults typically measuring between 55 and 70 centimeters at fork length and weighing between three and six kilograms.¹⁷⁰ The name coho is “derived from a Native American dialect name for the species.”¹⁷¹ Coho salmon are anadromous fish, with a fairly strict three-year life cycle, about half of which is spent in fresh water and half in salt water.¹⁷² The Southern Oregon and Northern California Coast Evolutionarily Significant Unit of coho salmon, which includes

¹⁶⁰ *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 379 F. Supp. 2d 1071, 1076 (N.D. Cal. 2005).

¹⁶¹ *Id.*

¹⁶² *Karuk Tribe of Cal.*, 681 F.3d at 1011.

¹⁶³ *Karuk Tribe of Cal.*, 379 F. Supp. 2d at 1076.

¹⁶⁴ *Karuk Tribe of Cal.*, 681 F.3d at 1011.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Moyle, *Suction Dredging*, *supra* note 16 (those other sea-run fishes are chum and Chinook salmon, coastal cutthroat trout, steelhead, eulachon, green sturgeon, white sturgeon, Pacific lamprey, and river lamprey).

¹⁶⁸ *Karuk Tribe of Cal.*, 681 F.3d at 1011; Designated Critical Habitat; Central California Coast and Southern Oregon/Northern California Coasts Coho Salmon, 64 Fed. Reg. 24,049-02 (May 5, 1999) (to be codified at 50 C.F.R pt. 226).

¹⁶⁹ MOYLE, *supra* note 22, at 245.

¹⁷⁰ *Id.* “[Fork length] is the distance from the tip of the snout or lower jaw to the middle of the fork of the caudal [tail] fin.” *Id.* at 79.

¹⁷¹ *Id.* at 246.

¹⁷² *Id.* at 249.

coho salmon that utilize the Klamath River, was listed as threatened under the ESA in 1997.¹⁷³

The Klamath River and its tributaries contain gold.¹⁷⁴ Commercial gold mining in the rivers and streams of California was suspended more than a century ago, due partly to the extreme environmental harm that it caused.¹⁷⁵ However, small-scale recreational mining has continued to the present day, with miners using a variety of methods including panning; motorized sluicing, also known as high banking; and suction dredging.¹⁷⁶ Panning for gold entails working through one pan of sand and gravel at a time.¹⁷⁷ Motorized sluicing involves pumping water into a sluice box located on a stream bank to process excavated substrate.¹⁷⁸ A sluice box works by trapping a small amount of the heavier material, including gold, in the bottom of the box as the substrate material is slowed by riffles on its way through the box.¹⁷⁹ Suction dredging is conducted within the water body itself and utilizes a floating unit that includes a gasoline-powered pump and sluice box.¹⁸⁰

2. 2004 Mining Season

Prior to the 2004 mining season, Karuk Tribe representatives expressed the Tribe's concerns regarding the effects of suction dredge mining on Klamath River fisheries to the USFS.¹⁸¹ In response, Alan Vandiver, district ranger for the Happy Camp District of the Klamath National Forest, organized meetings with tribal leaders, miners, district officials, and others.¹⁸² Additionally, Vandiver met with two USFS biologists, Bill Bemis and Jon Grunbaum. The three men discussed the issues raised by the Karuk Tribe, and Vandiver requested that Bemis and Grunbaum develop recommendations for

¹⁷³ Endangered and Threatened Species; Threatened Status for Southern Oregon/Northern California Coast Evolutionarily Significant Unit (ESU) of Coho Salmon, 62 Fed. Reg. 24,588 (May 6, 1997) (to be codified at 50 C.F.R. pt. 227).

¹⁷⁴ *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1011 (9th Cir. 2012).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 1012.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 1013.

¹⁸² *Id.*

the 2004 dredging season.¹⁸³ On May 24, 2004, Vandiver wrote a memorandum detailing the discussions that had taken place between Vandiver and biologists Bemis and Grunbaum.¹⁸⁴ The memorandum also explained that the maximum allowable density of operating suction dredges would be ten per mile on the Klamath River and three per mile on tributaries of the Klamath for the 2004 mining season.¹⁸⁵

At issue on appeal in the Ninth Circuit was the USFS's approval of the four NOIs to conduct mining in the Klamath National Forest over which the Karuk Tribe claimed the USFS failed to perform its consultation duties under Section 7(a)(2).¹⁸⁶

B. Procedural History

1. District Court

On October 8, 2004, the Karuk Tribe filed a Complaint for Declaratory and Injunctive Relief against the USFS in the United States District Court for the Northern District of California.¹⁸⁷ The Karuk Tribe later filed an amended complaint, which was dismissed without prejudice on January 24, 2005, pursuant to a stipulation between the parties.¹⁸⁸ In that stipulated settlement, the USFS agreed that it violated the ESA and the National Environmental Policy Act (NEPA) when it approved five Plans during the 2004 mining season; essentially, the USFS agreed that it had an ESA consultation duty and was required by NEPA to prepare additional environmental review documents before approving those Plans.¹⁸⁹

Subsequently, the Karuk Tribe filed a Second Amended Complaint on January 31, 2005, which alleged violation of the National Forest Management Act, NEPA, and the ESA for allowing mining operations to proceed under four specific NOIs.¹⁹⁰ On March 1, 2005, the New 49'ers and Raymond Koons filed a motion to intervene, which was granted on April 26, 2005.¹⁹¹ The New 49'ers is an

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 1013–14.

¹⁸⁶ *Id.* at 1011.

¹⁸⁷ *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 379 F. Supp. 2d 1071, 1085 (N.D. Cal. 2005).

¹⁸⁸ *Id.*

¹⁸⁹ *Karuk Tribe of Cal.*, 681 F.3d at 1016.

¹⁹⁰ *Karuk Tribe of Cal.*, 379 F. Supp. 2d at 1085.

¹⁹¹ *Id.*

organization that provides access to various mining claims in northern California and southern Oregon and technical support in exchange for paid membership.¹⁹² Raymond Koons is an individual who leased his unpatented mining claims located near the Klamath River to the New 49'ers.¹⁹³ On April 29, 2005, the Karuk Tribe filed a Motion for Summary Judgment.¹⁹⁴ On July 1, 2005, the district court denied the Karuk Tribe's Motion for Summary Judgment and issued a final judgment ruling against the Karuk Tribe on all of its claims.¹⁹⁵

Regarding the Karuk Tribe's claim that the USFS violated Section 7(a)(2) because review of a NOI is an authorization of a mining operation, the district court set out three reasons for its decision that NOI review is not a federal action under Section 7(a)(2).¹⁹⁶ First, the fact that private entities—the miners—are the ones carrying out the mining operations described in the NOI “weighs in favor of a finding that the activity is ‘private’ and not ‘federal.’”¹⁹⁷ Second, the district court explained that a Ninth Circuit case, *Sierra Club v. Penfold*,¹⁹⁸ in which the court held that a federal agency's review of similar mining notices is not a federal action under NEPA, weighed heavily in favor of finding that the USFS's review of NOIs is not a federal action under Section 7(a)(2).¹⁹⁹ Third, the court stated that the miners had a statutory right under the Mining Law of 1872 that differentiated their mining operations from government authorizations that are permissive in nature.²⁰⁰ Finally, the court stated that the Karuk Tribe failed to “identif[y] any sufficiently analogous case law that supports its argument”²⁰¹

¹⁹² *Master List of Gold Mining Properties*, NEW 49'ERS, <http://www.goldgold.com/master-list.html> (last visited Feb. 8, 2014); *Types of Property*, NEW 49'ERS, <http://www.goldgold.com/types-of-property.html> (last visited Feb. 8, 2014); *Join the New 49'ers*, NEW 49'ERS, <http://www.goldgold.com/join> (last visited Feb. 8, 2014).

¹⁹³ *Karuk Tribe of Cal.*, 379 F. Supp. 2d at 1077.

¹⁹⁴ *Id.* at 1085.

¹⁹⁵ *Id.* at 1103.

¹⁹⁶ *Id.* at 1100–01.

¹⁹⁷ *Id.* at 1101.

¹⁹⁸ *Sierra Club v. Penfold*, 857 F.2d 1307, 1322 (9th Cir. 1988).

¹⁹⁹ *Karuk Tribe of Cal.*, 379 F. Supp. 2d at 1099–1100.

²⁰⁰ *Id.* at 1101.

²⁰¹ *Id.*

2. *Ninth Circuit Panel*

The Karuk Tribe appealed to the Ninth Circuit, challenging only the USFS's decision to "accept" the four NOIs without engaging in Section 7(a)(2) consultation.²⁰² On April 7, 2011, the Ninth Circuit, in an opinion authored by Judge Milan Smith, ruled that the NOI process does not constitute agency action for purposes of Section 7(a)(2) consultation and affirmed the district court's denial of summary judgment.²⁰³ Judge William Fletcher "respectfully but emphatically" dissented from the majority's conclusion and would have granted the Karuk Tribe's Motion for Summary Judgment.²⁰⁴

3. *Ninth Circuit en Banc*

On September 12, 2011, the Ninth Circuit granted the Karuk Tribe an en banc hearing.²⁰⁵ On June 1, 2012, the court reversed and remanded the district court's denial of summary judgment to the Karuk Tribe.²⁰⁶ Judge Fletcher wrote the majority opinion, and Judge Smith wrote a dissenting opinion.²⁰⁷

4. *Supreme Court's Denial of Certiorari*

On March 18, 2013, the Supreme Court denied the New 49'ers petition for certiorari.²⁰⁸ The United States submitted a brief in opposition to the New 49'ers petition for certiorari, which stated that "[a]lthough the court of appeals' decision is incorrect, review by this court is not warranted because the decision does not conflict with any decision of this Court or of any other court of appeals and because the practical effect of the decision on future mining operations will be limited."²⁰⁹ The Eastern Oregon Mining Association and the

²⁰² Karuk Tribe of Cal. v. U.S. Forest Serv., 640 F.3d 979, 985 (9th Cir. 2011).

²⁰³ *Id.*

²⁰⁴ *Id.* at 996.

²⁰⁵ Karuk Tribe of Cal. v. U.S. Forest Serv., 658 F.3d 953, 953 (9th Cir. 2011).

²⁰⁶ Karuk Tribe of Cal. v. U.S. Forest Serv., 681 F.3d 1006, 1011, 1030 (9th Cir. 2012) (en banc).

²⁰⁷ *Id.* at 1011, 1030.

²⁰⁸ New 49'ers, Inc. v. Karuk Tribe of Cal., 133 S. Ct. 1579, (2013) (denying certiorari).

²⁰⁹ Brief for Respondent-United States at 11, New 49'ers, Inc. v. Karuk Tribe of Cal., 133 S. Ct. 1579, (2013) (No. 12-289) (denying certiorari), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/12/12-289-BIO.pdf>.

Northwest Mining Association filed amicus briefs in support of the New 49'ers.²¹⁰

The United States' assertion that the Ninth Circuit's decision does not conflict with any other court of appeals runs contrary to the assertions of the New 49'ers and the amicus briefs, which all argued that the Ninth Circuit's decision conflicted with a case from the United States Court of Appeals for the Seventh Circuit.²¹¹

V
MAJORITY AND DISSENT FROM NINTH CIRCUIT EN BANC
DECISION

In analyzing whether the USFS's approval of the four NOIs constituted agency action, the majority examined both the USFS's regulations that apply to suction dredge miners and the pattern of conduct between the USFS and NOI applicants and found that the USFS was affirmatively authorizing private mining activities.²¹² Accordingly, the majority held that the USFS "approved" the four NOIs and that this approval constituted discretionary agency action within the meaning of Section 7(a)(2).²¹³ Further, the majority found that the mining activities approved by the USFS may affect a listed species or its critical habitat.²¹⁴

In contrast, the dissent found that the USFS's decision to not require a Plan for the four NOIs did not constitute agency action.²¹⁵ The dissent determined that NOIs are merely information-gathering tools, that the miners have a statutory right to mine under the General Mining Act of 1872, and that if an agency has discretion to act but decides not to act, there is no agency action under the ESA.²¹⁶ Because the dissent determined that there was no agency action by the USFS, it did not examine the question of whether the mining

²¹⁰ *The New 49'ers, Inc. v. Karuk Tribe of California*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/the-new-49ers-inc-v-karuk-tribe-of-california/> (last visited Feb. 8, 2014).

²¹¹ *See id.* (referencing *Tex. Indep. Producers & Royalty Owners Ass'n*, 410 F.3d 964 (7th Cir. 2005)).

²¹² *Karuk Tribe of Cal.* 681 F.3d at 1021.

²¹³ *Id.* at 1023–26.

²¹⁴ *Id.* at 1029.

²¹⁵ *Id.* at 1037.

²¹⁶ *Id.*

activities approved by the NOIs may affect a listed species or its critical habitat.

A. Majority

1. Standard of Review

The court reviewed the USFS's compliance with the ESA under the Administrative Procedure Act (APA), which provides that the court may set aside the USFS's action if the court determines that the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²¹⁷ Because the case concerned the interpretation of a statute and regulations outside of the USFS's administration, the court employed *a de novo* standard in reviewing the USFS's interpretation of the ESA and the regulations promulgated by the FWS and NMFS pursuant to the ESA.²¹⁸

2. Agency Action

In addressing the question of whether the USFS's approval of four NOIs to mine in the Klamath National Forest is "agency action" as that phrase is used in Section 7(a)(2),²¹⁹ the court broke its inquiry into two distinct parts: first, whether "a federal agency affirmatively authorized, funded, or carried out the underlying activity," and second, whether "the agency had some discretion to influence or change the activity for the benefit of a protected species."²²⁰

a. Affirmative Authorization

The court ruled that the USFS's regulations require the USFS to either affirmatively authorize mining activities under a NOI or reject them and require the miner to submit a Plan.²²¹ The court highlighted that the NOI regulations require a miner to submit a NOI for *proposed* mining activities, a NOI must be submitted *before* mining operations begin, and the regulations give the USFS fifteen days to notify the miner whether the proposed activities may proceed under the NOI or whether the miner must submit a Plan.²²² The court contrasted the

²¹⁷ *Id.* at 1017 (quoting 5 U.S.C. § 706(2)(a) (2012)).

²¹⁸ *Id.*

²¹⁹ *Id.* at 1017–21.

²²⁰ *Id.* at 1021.

²²¹ *Id.* at 1021–22.

²²² *Id.* at 1021 (referencing Clarification as to When a Notice of Intent to Operate and/or Plan of Operation Is Needed for Locatable Mineral Operations on National Forest

NOI regulations with the regulations governing de minimis mining activities, which allow miners who wish to pan for gold to proceed without submitting anything to or receiving anything from the USFS.²²³

The court held that the actions of the USFS and the miners show the agency affirmatively authorizes mining activities when it approves a NOI and noted specific examples of such actions.²²⁴ The letter from the district ranger approving the New 49'ers NOI for the 2004 mining season stated that the miners may begin their mining operation after obtaining all necessary state and federal permits and also stated that “[t]his authorization expires December 31, 2004.”²²⁵ Letters from the district ranger approving six NOIs for the 2010, 2011, and 2012 mining seasons contained the phrase, “I am allowing your proposed mining activities . . . under a NOI with the following conditions.”²²⁶ In another letter in which a different district ranger rejected a NOI for the 2004 mining season, the ranger stated that he was “unable to allow [the] proposed mining operations”²²⁷ Additionally, the court was persuaded by the USFS’s monitoring efforts during the 2004 mining season to ensure the miners’ compliance with the protective criteria set out in the approved NOIs and the USFS’s regulation that allows for such inspections.²²⁸ The court also noted instances from correspondence between miners and the USFS which displayed the miners’ understanding that they were seeking authorization from the USFS.²²⁹

Next, the court distinguished the NOIs at issue on appeal from three significant Ninth Circuit cases involving “private-party activities that required no affirmative act or authorization by the agency” and therefore did not require Section 7(a)(2) consultation.²³⁰ In *California Sportfishing Protection Alliance v. FERC*, the court held

System Lands, 70 Fed. Reg. 32,718, 32,728 (June 6, 2005) (to be codified at 36 C.F.R. pt. 228)).

²²³ *Id.*

²²⁴ *Id.* at 1022.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 1023.

²²⁹ *See id.* at 1022.

²³⁰ *Id.*

that the Federal Energy Regulatory Commission (FERC) did not violate Section 7(a)(2) in deciding not to initiate formal consultation because FERC did not take any affirmative action concerning the hydropower facility owner's existing thirty-year license, even though FERC could have unilaterally amended the license according to its terms.²³¹ The *California Sportfishing* court stressed that "the agency action of granting a permit is complete" and "the ongoing activity is that of [the facility owner] operating pursuant to the permit."²³²

In *Western Watersheds Project v. Matejko*, the court held that the Bureau of Land Management (BLM) did not violate Section 7(a)(2) when it failed to regulate vested rights-of-way held by private landowners to divert water for irrigation because BLM did not take any affirmative action.²³³ The *Matejko* court noted that even if the BLM could have retained the power to regulate the water diversions to protect endangered species, the BLM enacted regulations clarifying that the only discretion it retained to regulate pre-1978 water diversions like those at issue in the case was if there was a "substantial deviation in use or location."²³⁴ There was not a substantial deviation in use or location of the water diversions challenged in the case.²³⁵

In *Marbled Murrelet v. Babbitt*, the court held that the FWS did not violate Section 7(a)(2) by failing to initiate consultation with itself when the FWS provided private lumber companies with information to help those companies avoid taking listed species.²³⁶ The court held that the FWS did not violate Section 7(a)(2) because the FWS did not have discretionary involvement or control over the lumber companies' proposed tree harvest operations.²³⁷

The *Karuk* court stated that "[t]he 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."²³⁸ This, the court held, distinguished those cases from the case before it in which the USFS's regulations and explanations of those regulations

²³¹ Cal. Sportfishing Protection Alliance v. FERC, 472 F.3d 593, 595 (9th Cir. 2006).

²³² *Id.* at 598.

²³³ W. Watersheds Project v. Matejko, 468 F.3d 1099, 1102 (9th Cir. 2006).

²³⁴ *Id.* at 1109–10.

²³⁵ *Id.*

²³⁶ Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1070–71 (9th Cir. 1996).

²³⁷ *Id.* at 1075.

²³⁸ Karuk Tribe of Cal. v. U.S. Forest Serv., 681 F.3d 1006, 1022 (9th Cir. 2012) (en banc).

established that the USFS must decide whether to authorize the mining activities in a NOI and “affirmatively notify the miner of its decision either way.”²³⁹

The court further supported its assertion that the USFS affirmatively authorizes mining activities through NOIs by examining *Siskiyou Regional Education Project v. USFS*.²⁴⁰ In that case, the Ninth Circuit held that the USFS’s approval of a NOI to conduct suction dredge mining was final agency action under the APA.²⁴¹ The *Karuk* court said this holding confirms the approval of a NOI is not merely advisory but instead “marks the consummation of the agency decision making process’ and is an action ‘from which legal consequences will flow.’”²⁴²

Next, the court addressed the contention put forth by the USFS and miners that the mining activities in question are authorized by the Mining Law, not by the agency’s approval of the NOIs.²⁴³ The court noted that private activities often have multiple sources of authority and multiple sources of restrictions on that authority.²⁴⁴ The court supported this assertion by citing to the FWS and NMFS joint regulations for the ESA, which specifically acknowledge that agency action under the ESA includes activities authorized “in part” by a federal agency.²⁴⁵ The court noted that the Mining Law and Organic Act provide “a statutory right, not mere privilege” to miners to enter national forests for mining purposes but explained that “Congress has subjected that right to environmental regulation.”²⁴⁶

The court then addressed the USFS’s contention that “approval of a NOI is merely a decision not to regulate the proposed mining activities.”²⁴⁷ The USFS had buttressed that claim with a 2005 Federal Register notice stating, “a [NOI] was not intended to be a regulatory

²³⁹ *Id.*

²⁴⁰ *Id.* at 1023.

²⁴¹ *Siskiyou Reg’l Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545, 554 (9th Cir. 2009).

²⁴² *Karuk Tribe of Cal.*, 681 F.3d at 1023 (quoting *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 930 (9th Cir. 2010)).

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* (internal quotations omitted).

²⁴⁷ *Id.*

instrument.”²⁴⁸ The court, however, pointed out that the relevant test under the ESA is whether the agency “authorizes, funds, or carries out the activity, at least in part.”²⁴⁹ The court reasserted its position that the record demonstrated the USFS authorizes mining activities through the NOI process whether or not the USFS considers a NOI a regulatory instrument.²⁵⁰

Finally, the court addressed the contention of the USFS and miners that the issue at appeal was controlled by *Sierra Club v. Penfold* in which the Ninth Circuit held that the BLM’s review of “notice” mining actions was not a “major federal action” under NEPA.²⁵¹ The court explained that the “major federal action” standard from NEPA and the “agency action” standard from the ESA are not interchangeable and that the holding in *Penfold* was that the BLM’s review of notice mines was a marginal federal action.²⁵² Thus, the court noted that *Penfold* actually works against the USFS and the miners in the present case because a federal action may be authorization under Section 7(a)(2) even if it is not a major federal action under NEPA.²⁵³

b. Agency Discretion

The court held that the USFS’s mining regulations and actions demonstrate that the decision whether to approve a NOI is a discretionary decision through which the USFS can affect the course of private mining activities for the benefit of a listed species because the USFS made affirmative, discretionary decisions when deciding whether to allow proposed mining activities to proceed under NOIs with certain protective criteria for fisheries.²⁵⁴ The court noted it had previously held that the mining regulation in question grants district rangers discretionary authority to decide whether to allow mining activities under a NOI.²⁵⁵ Further, the court highlighted that the

²⁴⁸ *Id.* (quoting 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, 32,728 (June 6, 2005) (to be codified at 36 C.F.R. pt. 228)).

²⁴⁹ *Id.* (quoting 50 C.F.R. § 402.02 (2004)).

²⁵⁰ *Id.* at 1024.

²⁵¹ *Id.* (citing *Sierra Club v. Penfold*, 857 F.2d 1307 (9th Cir. 1988)).

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* at 1025, 1027.

²⁵⁵ *Id.* at 1025 (referencing *Siskiyou Reg’l Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545, 548 (9th Cir. 2009)).

“overriding purpose of the mining regulations is ‘to minimize [the] adverse environmental impacts’ of mining activities on federal forest lands.”²⁵⁶

3. Mining Activities May Affect a Listed Species or Its Critical Habitat

The second substantive issue before the court was whether the mining activities approved by the USFS through the four NOIs may affect a listed species or its critical habitat.²⁵⁷ The court noted that Ninth Circuit precedent dictates an agency must consult with the appropriate Service unless it determines that its action will have *no* effect on a listed species or its critical habitat.²⁵⁸ Accordingly, the court stated that agency actions having “any chance” of affecting listed species or critical habitat require at least some consultation under Section 7(a)(2).²⁵⁹ Here, the USFS conceded that the mining activities in question may affect coho salmon or its critical habitat while the miners argued that the record did not support USFS’s concession.²⁶⁰ The court concluded that the mining activities approved by the USFS in this case “may affect” coho salmon and its critical habitat because both USFS’s regulatory scheme and the scientific evidence in the administrative record showed that this standard was met.²⁶¹

4. Burden on the USFS

Prior to its conclusion, the court examined the potential burden that its decision would place on the USFS,²⁶² seemingly to address the concerns raised in Judge Smith’s hyperbolic dissent. The court emphasized that the burden of Section 7(a)(2) consultation on the USFS does not have to be severe and could be dispatched with informal consultation if the appropriate Service agrees that the “agency . . . action is not likely to adversely affect listed species or

²⁵⁶ *Id.* (quoting 36 C.F.R. § 228.1 (2004)).

²⁵⁷ *Id.* at 1027–28.

²⁵⁸ *Id.* at 1027 (citing *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1447 (9th Cir. 1996)).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 1027–28.

²⁶² *Id.* at 1029.

critical habitat.”²⁶³ And, the court expanded, informal consultation can merely entail discussions and correspondence with the appropriate Service and does not require the preparation of a costly and time-consuming biological opinion.²⁶⁴ The court then compared the collaboration between Ranger Vandiver and USFS biologists Bemis and Grunbaum to the informal consultation process and noted that the process required by Section 7(a)(2) need not look much different: Ranger Vandiver would simply need to collaborate with biologists from the appropriate Service rather than USFS biologists.²⁶⁵

In conclusion, the majority held that the USFS was required to engage in Section 7(a)(2) consultation because the agency “approved” the four NOIs, this approval constituted discretionary agency action within the meaning of Section 7(a)(2), and the mining activities approved by the USFS may affect a listed species or its critical habitat.

B. Dissent

1. Poor Gulliver and the Statutory Right to Mine

Judge Smith’s dissenting opinion begins with a drawing and excerpt from the novel *Gulliver’s Travels*.²⁶⁶ In the drawing, Mr. Gulliver is bound by numerous small ropes and surrounded by his diminutive but armed captors.²⁶⁷ This drawing, which Judge Smith intended to be symbolic of what he thinks the majority opinion has done to the USFS, sets the scathing tone that Judge Smith employed throughout his opinion.²⁶⁸ The dissent went on to state that “[u]ntil today, it was well-established that a regulatory agency’s ‘inaction is not action’ that triggers the [ESA]’s arduous interagency consultation process,” and that the majority opinion “flouts” a “clear and common sense precedent.”²⁶⁹

After this introduction, the dissent addressed the Mining Law and the Organic Act.²⁷⁰ The dissent emphasized language from the

²⁶³ *Id.* at 1029 (internal quotation omitted).

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 1029–30.

²⁶⁶ *Id.* at 1030 (Smith, J., dissenting).

²⁶⁷ *Id.*

²⁶⁸ *See id.* at 1030–41.

²⁶⁹ *Id.* at 1031 (internal quotations omitted) (citing *W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1108 (9th Cir. 2006)).

²⁷⁰ *Id.* at 1032.

Organic Act: “[I]ts 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.’”²⁷¹ The dissent noted that upon issuing the mining regulations at issue in the present case, the USFS “emphasized ‘that prospectors and miners have a *statutory right, not mere privilege,*’” under the Mining Act and the Organic Act to mine in the National Forests.²⁷² Therefore, the USFS did not authorize the mining activity, and Section 7(a)(2) consultation was not required.

2. *No Agency Action*

The dissent framed the question at issue differently than the majority: “whether a [] District Ranger’s receipt of, consideration of, and response to a miner’s [NOI] is an *agency action* that authorizes mining activities on national forests.”²⁷³ The dissent conceded that the USFS has discretion to regulate the NOIs in question²⁷⁴ and did not address the question of whether suction dredge mining “may affect” coho salmon.²⁷⁵

In the dissent’s view, the USFS recognized the statutory right to mine in National Forests and tailored its regulations accordingly—to balance environmental concerns with the miners’ “unique pre-existing rights.”²⁷⁶ Then, the dissent explained how it interpreted the additional requirements imposed by the USFS in the mining regulations depending on whether the proposed activities “will not,” “might,” or “will likely” lead to significant disturbance of surface resources.²⁷⁷ The dissent describes the NOI, which is required for activities that “might” or “will likely” cause significant disturbance, as a “straightforward document” requiring miners to list various

²⁷¹ *Id.* (emphasis in original) (citing 16 U.S.C. § 478 (2012)).

²⁷² *Id.* (citing National Forests Surface Use Under U.S. Mining Laws, 39 Fed. Reg. 31,317 (Aug. 28, 1974) (to be codified at 36 C.F.R. pts. 251, 252 and 293)).

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 1033 n.2.

²⁷⁶ *Id.* at 1032.

²⁷⁷ *Id.* at 1033 (citing 36 C.F.R. § 228.4(a), (a)(1)(v) (2012)).

information about themselves and their proposed activities.²⁷⁸ Essentially, the dissent stated that the NOI is an information-gathering tool rather than a document used in conjunction with an affirmative authorization by the USFS of the miners' conduct.

Next, the dissent characterized the majority opinion as asserting that the USFS's "*decision* not to require a [Plan] for the mining activities described in a [NOI] constitutes an *implicit authorization* of those mining activities, therefore equating [USFS]'s 'decision' with an agency 'authorization' under the ESA."²⁷⁹ The dissent's problem with this is that the USFS's "explanation of its mining regulations establishes that a [NOI] is used as an information-gathering tool" to decide whether a miner should file a Plan, not as an "application for a mining permit."²⁸⁰ Accordingly, the ranger's response to a NOI is analogous to the NOI itself, "provid[ing] merely notice of the agency's review decision."²⁸¹ The dissent stated that a NOI is not a permit and that a NOI fails to impose regulations on private conduct the way that a Plan does.²⁸²

In support of its position, the dissent cited to language from a clarification published by the USFS in the Federal Register on June 6, 2005.²⁸³ That clarification states that the requirement of submitting a NOI before mining commences *alerts* the USFS of proposed activities that the operator believes might cause significant disturbance and "*gives the Forest Service the opportunity to determine* whether the agency agrees with that assessment such that [the USFS] *will not exercise its discretion to regulate those operations.*"²⁸⁴ Additionally, the clarification says that the NOI was designed to "assist prospectors in determining whether their operations would . . . require the filing of a [Plan]," and that the 1974 rulemaking record makes it clear that a NOI was "*not intended to be a regulatory instrument.*"²⁸⁵ The dissent concluded that the NOI is "merely a precautionary agency notification

²⁷⁸ *Id.* (citing 36 C.F.R. 228.4(a)).

²⁷⁹ *Id.* at 1034.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.* (citing Clarification as to What a Notice of Intent to Operate and/or Plan of Operation Is Needed for Locateable Mineral Operations on National Forest System Lands, 70 Fed. Reg. 32,713, 32,720 (June 6, 2005) (to be codified at 36 C.F.R. pt. 228)).

²⁸⁴ *Id.*

²⁸⁵ *Id.*

procedure, which is at most a preliminary step prior to agency action being taken.”²⁸⁶

The dissent explained that where the Ninth Circuit has found agency action, the agency took an affirmative step that allowed private conduct to proceed, and without such a step, the conduct could not have occurred.²⁸⁷ In relevant cases where the Ninth Circuit has found agency inaction, private conduct was allowed to proceed until the agency took an affirmative step to intervene.²⁸⁸

The dissent then analyzed how the present case compared to relevant Ninth Circuit cases, including those cited by the majority. The dissent stated that in the present case the conduct of the USFS was similar to the conduct of the BLM in *Matejko* because, like the BLM, the USFS made a decision not to regulate the activity in question, even though it had the power to do so.²⁸⁹ The dissent also compared the present case to *Marbled Murrelet*, in which the Ninth Circuit held that Section 7(a)(2) consultation is not required when an agency merely advises or consults with a private party.²⁹⁰ Further, the dissent cited *California Sportfishing*, in which FERC took no affirmative action and thus failed to trigger Section 7(a)(2) consultation, as another similar case.²⁹¹ The dissent claimed that the majority “entirely fail[ed] to distinguish [*Matejko*] from this case” and does not cite any opinion in which conduct such as the USFS’s was held to trigger Section 7(a)(2) consultation.²⁹²

Additionally, the dissent claimed that *Penfold*, a NEPA case, is additional persuasive authority that supports its opinion that the USFS did not take agency action that triggered the Section 7(a)(2) consultation requirement.²⁹³ The court articulated that the similar notice regulation schemes in *Penfold* and the current case are “not the sort of agency action that require[] environmental compliance.”²⁹⁴

²⁸⁶ *Id.* at 1035.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 1035–36.

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.* at 1037.

²⁹⁴ *Id.*

Next, the dissent criticized the majority's reliance on "case-specific reasoning" in determining that the district rangers and miners evidenced an understanding of the NOI as an "authorization."²⁹⁵ Similarly, the dissent criticized the majority's reliance on the informal discussions that miners and district rangers had with each other as a mistaken attempt to "characterize such informal discussions as [the USFS]'s exercise of discretion to approve or deny [a] NOI."²⁹⁶ The dissent cited *Marbled Murrelet* for the proposition that such informal and voluntary discussions are not examples of agency action.²⁹⁷ Further, the dissent stated a significant policy concern of the court in *Marbled Murrelet*—that requiring an agency to commence Section 7(a)(2) consultation for simply advising or consulting with a private party would not enhance protection of endangered species—is equally applicable in the present case; requiring the USFS to engage in Section 7(a)(2) consultation for NOI mining "discourages miners from discussing their proposed activities with [the USFS] 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'" and thus forego filing a NOI.²⁹⁸

Ultimately, the dissent concluded, the majority created a new category of agency conduct, "implicit agency action," that is purportedly sufficient to trigger Section 7(a)(2) consultation but is unsupported by statutes, regulations, and case law.²⁹⁹

3. *The Tirade*

Near its end, the dissent explores what it considers to be the massive impact of decisions like the *Karuk* majority in which the Ninth Circuit has misapplied the law.³⁰⁰ The dissent begins what may be considered a judicial tirade with a quote from *The Divine Comedy*, "Abandon all hope, ye who enter here."³⁰¹

The dissent claims that the majority has basically shut down the suction dredge mining industry in the Ninth Circuit.³⁰² The dissent

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 1038.

²⁹⁷ *Id.* at 1038–39.

²⁹⁸ *Id.* (quoting 36 C.F.R. § 228.4(a) (2012)).

²⁹⁹ *Id.* at 1037.

³⁰⁰ *Id.* at 1039.

³⁰¹ *Id.*

³⁰² *Id.*

compares the NOI process, which can allow projects to begin within weeks, to the Section 7(a)(2) process, which can delay projects for months or years because, due in part to personnel shortages, the Services often fail to meet their ninety-day consultation deadlines.³⁰³ Moreover, the dissent says, formal consultation can cost private parties large amounts of money because those private parties may have to hire outside experts.³⁰⁴

The dissent says that as a result of the majority's opinion, "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."³⁰⁵ Further, the dissent notes that eighteen percent of the roughly 3,500 miners that obtained suction dredge mining permits from California in 2008 received a "significant portion of their income" from dredging.³⁰⁶ Subsequently, the dissent explains that the majority's decision is one of many Ninth Circuit decisions in which the court breaks from long-standing precedent and creates "burdensome, entangling environmental regulations out of the vapors."³⁰⁷

VI

CRITICAL ANALYSIS OF MAJORITY AND DISSENT

A. *Standard of Review*

The dissent and majority arrive at such drastically different conclusions because they seem to be applying different standards of review to the USFS's interpretation of the Services' joint ESA regulations. The majority, relying on Ninth Circuit precedent, states that the court should defer to an agency's "interpretation of its own regulations and the statutes it is charged with administering [but that] an agency's interpretation of a statute outside of its administration is reviewed *de novo*."³⁰⁸ In contrast, the dissent does not explicitly

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.* (citing Justin Sheck, *California Sifts Gold Claims*, WALL ST. J., Apr. 29, 2012).

³⁰⁷ *Id.* at 1040.

³⁰⁸ *Id.* at 1017 (majority opinion) (citing *Cal. Dep't of Water Resources v. Fed. Energy Regulatory Comm'n*, 489 F.3d 1029, 1035–36 (9th Cir. 2007); *Am. Fed'n of Gov't Emps. v. Fed. Labor Relations Auth.*, 204 F.3d 1272, 1274–75 (9th Cir. 2000)).

explain what standard of review it is applying but places a heavy emphasis on the USFS's interpretation of a NOI as an information-gathering tool, not as a permit application.³⁰⁹ This deference to the USFS's interpretation of its own regulations is not inconsistent with the standard of review applied by the majority. However, contrary to the standard of review supported by Ninth Circuit precedent and applied by the majority, the dissent lends the USFS substantial deference in its interpretation of the Services' joint ESA regulations.

The dissent's reasoning relies on the fact that the USFS asserts the NOI is not a permit application but an information-gathering tool. This assertion is plausibly supported by the USFS's regulatory scheme for mining. An information-gathering tool or anything like it is not among the *examples* of agency action listed in the Services' joint regulations, such as "granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid."³¹⁰ Therefore, according to the dissent, the USFS's administration of its NOI scheme is not agency action.

This chain of logic is flawed in two ways. First, the majority's analysis of the USFS's NOI scheme correctly explains that the scheme is the functional equivalent of a license or permit process because the USFS affirmatively authorizes mining activities through NOIs. The USFS cannot escape its Section 7(a)(2) consultation duties by merely dressing up what is functionally a license or permit as an information-gathering tool. The dissent relies heavily on a USFS interpretive rule published in the Federal Register on June 6, 2005, titled "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."³¹¹ Based on fact that the USFS clarification was published approximately eight months after the Karuk Tribe filed its first complaint, this clarification likely represents the USFS's response to the Tribe's 2004 lawsuit with a *post hoc* recharacterization of the NOI scheme as an information-gathering tool without altering the functional parts of the NOI scheme. The Services' joint ESA regulations plainly define promulgation of regulations as agency action;³¹² therefore, had the USFS tried to

³⁰⁹ *Karuk Tribe of Cal.*, 681 F.3d at 1034 (Smith, J., dissenting).

³¹⁰ 50 C.F.R. § 402.02 (2004).

³¹¹ 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) (to be codified at 36 C.F.R. pt. 228).

³¹² 50 C.F.R. § 402.02.

change the functional parts of its NOI scheme, it would have been required to initiate Section 7(a)(2) consultation with the Services.

Second, the dissent errs in relying on an *illustrative and non-exhaustive* list of examples of agency action to conclude that the USFS's NOI scheme is not agency action. Read in larger context, the Services' joint ESA regulations establish that the Services' interpretation is *much* broader than the interpretation endorsed by the dissent:

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.³¹³

The joint regulations and the majority's functional analysis of the NOI process establish that the USFS's NOI scheme is agency action under Section 7(a)(2).

B. Miners Have a Statutory Right, Not Mere Privilege

The dissent mistakenly reasons that because the USFS recognizes "prospectors and miners have a *statutory right, not mere privilege*" to conduct mining operations in national forests and that its regulations for mining in national forests "balance environmental goals with miners' unique pre-existing rights," the NOI is merely an information-gathering tool and administration of the NOI scheme is not agency action.³¹⁴ The dissent explicitly acknowledges that the USFS has the authority to regulate mining in national forests, so whether it is a statutory right or mere privilege being regulated by the USFS is insignificant. As the majority correctly noted, even if the Mining Law and the Organic Act give miners a statutory right to conduct mining operations in national forests, "Congress has subjected that right to environmental regulation."³¹⁵

Further, the USFS *has* exercised its authority to regulate mining in national forests by promulgating the regulations at issue in the case.

³¹³ *Id.*

³¹⁴ *Karuk Tribe of Cal.*, 681 F.3d at 1032 (Smith, J., dissenting).

³¹⁵ *Id.* at 1023 (majority opinion).

The fact that the USFS's regulatory program includes a balancing of environmental goals and unique rights simply does not abrogate the mandate placed on the USFS by Section 7(a)(2). If it did, protections that Congress intended to afford to listed species would be seriously compromised. As explained in the background law section of this note, the Ninth Circuit and the United States Supreme Court have both described Section 7(a)(2)'s consultation requirement as a willful decision by Congress to give listed species priority over the "primary missions" of federal agencies.³¹⁶ Therefore, the relevant question for whether there is agency action is simply the two-part inquiry laid out by the majority: first, whether "a federal agency affirmatively authorized, funded, or carried out the underlying activity"; and second, whether "the agency had some discretion to influence or change the activity for the benefit of a protected species."³¹⁷ The dissent's support of a new test in which some categories of "discretion to influence or change the activity for the benefit of a protected species"³¹⁸ satisfy the test while other categories of discretion do not satisfy the test would severely undermine the protections afforded to imperiled species by the ESA.

C. Misconstructions of Relevant Ninth Circuit Cases

I. Matejko

The dissent incorrectly relied on *Matejko* as support for its opinion that the USFS did not affirmatively authorize mining activities through NOIs. In *Matejko*, the court held that the BLM's failure to regulate water diversion rights-of-way that had been granted decades earlier was not an agency action requiring Section 7(a)(2) consultation.³¹⁹ Even assuming that the BLM had discretion to regulate these rights-of-way—which the court held that the BLM did not—the court held that the BLM, in its continuing decision to not enforce its regulatory discretion for decades did not affirmatively act.³²⁰ The USFS's conduct in *Karuk* is distinguishable from the

³¹⁶ *Id.* at 1020; *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978).

³¹⁷ *Karuk Tribe of Cal.*, 681 F.3d at 1021; *Cal. Sportfishing Prot. Alliance v. Fed. Energy Regulatory Comm'n*, 472 F.3d 593, 595, 598 (9th Cir. 2006); *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d at 969, 974–75 (9th Cir. 2003).

³¹⁸ *Karuk Tribe of Cal.*, 681 F.3d at 1021.

³¹⁹ *W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1107 (9th Cir. 2006).

³²⁰ *Id.* at 1107–09.

BLM's conduct in *Matejko*: in *Matejko* there were no federal agency regulations requiring the right-of-way holders to submit any sort of annual notice to the federal agency prior to commencing activity like there were in *Karuk*; there were no federal agency regulations requiring the agency to respond to notices to inform parties whether further action would be required of them like there were in *Karuk*; nor was there a record of correspondence or interaction between the federal agency and a private actor like there was in *Karuk*.³²¹

Other than the legally insignificant similarity that the regulated parties in both cases had some type of access rights pursuant to nineteenth-century federal laws, the USFS's NOI scheme is fundamentally different than the regulatory scheme in *Matejko*. Accordingly, *Matejko* does not properly support the dissent's assertion that the USFS did not affirmatively authorize mining activities through NOIs.

2. Marbled Murrelet

The dissent erroneously relies on *Marbled Murrelet* in its assertion that the majority was wrong to characterize the discussions that took place between the USFS and the miners as an exercise of discretion to approve or deny a NOI. In *Marbled Murrelet*, the plaintiffs sued the FWS, arguing that providing advice to private logging companies on how to avoid taking listed species under section 9 of the ESA was a "federal action" under Section 7(a)(2).³²² The court held that the record showed no evidence of federal involvement or control of the lumber companies' proposed harvesting operations other than the FWS's authority under section 9 of the ESA to prosecute take violations, which is not enough to constitute federal action under Section 7(a)(2).³²³

The FWS's conduct in *Marbled Murrelet* is similar to the USFS's conduct in *Karuk* because in both cases the federal agency offered advice to private parties; however, that is where the similarity ends. *Marbled Murrelet* is not "directly on point" for *Karuk* as the dissent asserted.³²⁴ Rather, as the majority correctly noted, in *Karuk*—unlike

³²¹ *Id.* at 1110.

³²² *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1073–74 (9th Cir. 1996).

³²³ *Id.* at 1074.

³²⁴ *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1039 (9th Cir. 2012) (en banc) (Smith, J., dissenting).

in *Marbled Murrelet*—the agency had the regulatory power to enforce limitations on the private actors’ proposed activity regardless of whether an actual take of listed species under section 9 occurred.³²⁵ To simplify the majority’s explanation, in *Marbled Murrelet* the federal agency did not have any authority to regulate whether and under what conditions the private action could initially proceed, whereas in *Karuk* even the dissent conceded that the USFS had the regulatory authority to dictate whether and how private mining activity could initially proceed. The dissent fails to address this crucial difference.

The *Marbled Murrelet* court also stated 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(a)(2)] simply because it advised or consulted with a private party.”³²⁶ The dissent quoted this language and accused the majority of taking the type of action the *Marbled Murrelet* court cautioned against.³²⁷ Yet, this quoted language from *Marbled Murrelet* is inapposite to the *Karuk* case: discussions between a federal agency and a regulated entity are part of a broader pattern of agency conduct properly considered agency action when a federal agency has the authority to regulate whether and under what conditions a private action can initially proceed and does exercise that regulatory authority. The quoted language from *Marbled Murrelet*, when properly interpreted, is designed to warn against the dangers of requiring a federal agency to engage in Section 7(a)(2) consultation for advising or consulting with a private party when the agency has no authority to regulate whether and under what conditions private activity can initially proceed.

Further, the dissent’s claim that the majority’s holding encourages miners to make their own determination whether they need to file a NOI and forego discussing with the USFS how to voluntarily reduce the environmental impact of their proposed activities³²⁸ may be true but should not alter the court’s legal analysis. The record in the *Karuk* case and the USFS’s own regulations in effect in 2004 show that were a suction dredge miner to forego submitting a NOI, that miner would likely be in violation of USFS regulations and subject to enforcement

³²⁵ *Id.* at 1023 (majority opinion).

³²⁶ *Marbled Murrelet*, 83 F.3d at 1074.

³²⁷ *Karuk Tribe of Cal.*, 681 F.3d at 1039 (Smith, J., dissenting).

³²⁸ *Id.*

of those regulations.³²⁹ The USFS's regulations specifically state a number of mining activities that do not require a NOI and suction dredge mining is not one of those stated activities.³³⁰ The USFS's 2004 regulations state that miners intending to conduct mining activities that "might cause significant disturbance" of resources *must* submit a NOI to the USFS.³³¹ While lax enforcement of suction dredge mining by the USFS may be a genuine issue and the majority's clarification of the law and regulations would likely encourage some miners to break the law to avoid the burdens of USFS regulation, neither of these concerns should undermine the validity of the majority's ruling.

3. Penfold

The majority and dissent misconstrued *Penfold* by conflating the distinctly different purposes and standards of the ESA and NEPA in attempting to square a decision in *Karuk* with prior Ninth Circuit case law. In *Penfold*, the Ninth Circuit held that the BLM's review of notice mines was not a major federal action that required an environmental assessment under NEPA.³³² The dissent correctly noted the similarity—which the BLM intended³³³—between the BLM and the USFS's three-tiered mining regulations: the first tier of the BLM's regulations requires no notice or approval; the second tier, for notice mines, requires miners to submit basic information at least fifteen days prior to commencing mining and the BLM to respond to the notice; the highest tier, for Plan mines, requires the BLM to conduct an Environmental Assessment under NEPA.³³⁴

The majority incorrectly read *Penfold* to cut against the USFS and the miners. In *Penfold*, the court held that the BLM's review of notice mines was a "marginal federal action" and thus not a "major federal

³²⁹ LAITOS ET AL., *supra* note 116, at 781 (citing *United States v. Goldfield*, 644 F.2d 1307 (9th Cir. 1981)).

³³⁰ 36 C.F.R. § 228.4(a)(1) (2004).

³³¹ *Id.* § 228.4(a).

³³² *Sierra Club v. Penfold*, 857 F.2d 1307, 1322 (9th Cir. 1988).

³³³ *Karuk Tribe of Cal.*, 681 F.3d at 1036 (citing *Surface Management of Public Lands Under U.S. Mining Laws*, 45 Fed. Reg. 78,902, 78,906 (Nov. 26, 1980) (to be codified at 43 C.F.R. pt. 3800)) ("[R]egulations were designed to be as consistent as possible with the [USFS's] regulations.").

³³⁴ *Id.* at 1036–37; *Sierra Club*, 857 F.2d at 1309.

action” as is required to trigger NEPA analysis.³³⁵ Thus, the majority reasoned, under the “more liberal ‘agency action’ standard” of the ESA, a federal agency action “need not be ‘major’ to trigger the duty to consult. It need only be an ‘agency action.’”³³⁶

The dissent incorrectly read *Penfold* to support its opinion in stating it “find[s] our previous determination that a similar notice scheme was not the sort of agency action that requires environmental compliance to be additional persuasive authority.”³³⁷ Reducing NEPA’s major federal action requirement and the Section 7(a)(2) consultation requirement down to “environmental compliance” is flawed because it compares the two statutory schemes at too high a level of generality.

Even though the Ninth Circuit described NEPA’s major federal action standard and Section 7(a)(2)’s agency action standard as “much the same,”³³⁸ NEPA and the ESA are fundamentally different statutory schemes. NEPA is primarily an informational tool, which allows a federal agency to decide “that other values outweigh the environmental costs” of a proposed action,³³⁹ whereas Section 7(a)(2) requires that federal agencies “shall . . . insure that any action authorized, funded, or carried out . . . is not likely to jeopardize the continued existence” of a listed species or adversely modify the critical habitat of such species.³⁴⁰ Additionally, each statute has its own line of case law reaching back decades. Therefore, both the majority and dissent stretch *Penfold* a bit too far to support their opinions, which represent the court’s struggle to square a decision in the *Karuk* case with prior case law.

D. Case-Specific Reasoning

The dissent’s critique of the majority’s “heav[y]”³⁴¹ reliance on case-specific reasoning to establish that the USFS affirmatively authorizes private activity in allowing mining to proceed under a NOI is flawed. The majority only utilizes case-specific reasoning to buttress its primary finding that the regulatory scheme itself

³³⁵ *Sierra Club*, 857 F.2d at 1313–14.

³³⁶ *Karuk Tribe of Cal.*, 681 F.3d at 1024 (majority opinion).

³³⁷ *Id.* at 1036–37 (Smith, J., dissenting).

³³⁸ *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1073–74 (9th Cir. 1996).

³³⁹ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

³⁴⁰ 16 U.S.C. § 1536(a)(2) (2012).

³⁴¹ *Karuk Tribe of Cal.*, 681 F.3d at 1037 (Smith, J., dissenting).

demonstrates the USFS affirmatively authorizes private activity. Before discussing the actions of the USFS and the miners, the majority closely examines the USFS mining regulations and concludes that “[b]y regulation, [the USFS] must authorize mining activities before they may proceed under a NOI.”³⁴² Only after making that finding did the majority analyze the pattern of conduct between the USFS and the miners that was in the record, finding that the “actions of both [the USFS] and the miners in this case accord with the understanding that the agency affirmatively authorizes mining activities when it approves a NOI.”³⁴³ Therefore, what the dissent characterizes as a heavy reliance on case-specific reasoning is in fact just a thorough illustration of how the USFS’s and miners’ conduct supports the majority’s primary finding that the USFS’s regulations themselves require affirmative authorization before suction dredge mining can proceed under a NOI.

VII IMPLICATIONS OF THE *KARUK* DECISION

A. The USFS Will Have to Engage in Section 7(a)(2) Consultation for NOIs

The *Karuk* decision sets forth a clear mandate that, within the Ninth Circuit’s jurisdiction, the USFS must consult with the Services for all mining that requires a NOI under the USFS’s regulations, which includes all suction dredge mining in national forests.

If the USFS does not consult with the Services for NOI mining in national forests, it is likely to face lawsuits relying on the Ninth Circuit’s *Karuk* decision. Three environmental groups did in fact file such a suit. On October 22, 2012, the three groups, relying on the *Karuk* decision, alleged that the USFS violated Section 7(a)(2) by failing to consult with NMFS before approving suction dredge mining under NOIs in the Rogue River-Siskiyou National Forest.³⁴⁴ However, the case was dismissed on April 23, 2013, for lack of subject matter

³⁴² *Id.* at 1021 (majority opinion).

³⁴³ *Id.* at 1022.

³⁴⁴ Mark Freeman, *Coho Protection Focus of Suction Dredge Mining Suit*, WESTERN ENVTL. LAW CENTER (Oct. 25, 2012), <http://www.westernlaw.org/article/coho-protection-focus-suction-dredge-mining-suit>.

jurisdiction because the court held that the plaintiffs failed to comply with the ESA's notice requirements.³⁴⁵

Given the broad range of harms suction dredging can inflict on fish, the Ninth Circuit made the right decision to require the USFS to consult with the Services for NOI mining. Section 7(a)(2) puts the scientific judgment over whether activities may affect a listed species or its critical habitat in the hands of the Services, not in the hands of other agencies that may have serious conflicts of interest between protecting listed species and achieving their primary missions. While the Ninth Circuit's decision will certainly place a greater burden on the USFS, it is Congress that truly placed that burden on the USFS in passing Section 7(a)(2). Further, Congress can choose to ease that burden by either increasing funding to the USFS or amending the ESA. Also, as the *Karuk* majority noted, that burden does not have to be severe, as the USFS could utilize informal consultation and work with NMFS and miners to modify mining activities in a way that would allow NMFS to agree that they are not likely to adversely affect listed species or critical habitat.³⁴⁶

B. All Federal Agencies Will Be Subject to Broader Interpretation of Section 7(a)(2)

The *Karuk* decision significantly broadens the scope of all agency action under Section 7(a)(2) in the Ninth Circuit's jurisdiction, not just the USFS's approval of NOI mining. The Ninth Circuit's new functional approach to determining agency action, categorized by the *Karuk* dissent as implicit agency action, will force federal agencies to consult with the Services for agency functions that would not have been considered agency action under Section 7(a)(2) before the *Karuk* decision. The dissent from *Karuk* was correct in stating that the *Karuk* majority sets a new, more stringent standard for agency action under Section 7(a)(2) in Ninth Circuit case law, and if federal agencies do not comport with this new standard they are likely to face litigation in the Ninth Circuit.

However, a recent decision from the United States District Court for the Northern District of California reveals that the *Karuk* decision might also narrow the definition of agency action under Section

³⁴⁵ *Klamath Siskyou Wildlands Ctr. v. MacWhorter*, 2013 WL 1751287, at *1-3 (D. Or. Apr. 23, 2013).

³⁴⁶ *Karuk Tribe of Cal.*, 681 F.3d at 1029 (citing 50 C.F.R. § 402.13(a) (2013)).

7(a)(2).³⁴⁷ In that case, the court stated, “to the extent prior cases held that ongoing control over a previous agency action is sufficient to trigger Section 7’s consultation requirement without any further affirmative act, those holdings have been implicitly overruled in *Karuk Tribe*”.³⁴⁸ Then, less than one month later the United States District Court for the District of Montana considered that California case and “respectfully disagree[d]” that *Karuk* implicitly overruled *Pacific Rivers*.³⁴⁹ Thus, the true impact of the *Karuk* decision continues to develop.

C. Magnuson-Stevens Fishery Management and Conservation Act Consultation

The *Karuk* decision’s clarification that the USFS’s regulatory scheme for NOI mining constitutes affirmative authorization of mining activities means that the USFS must now engage in Magnuson-Stevens Fishery Management and Conservation Act³⁵⁰ (MSA) consultation with NMFS before authorizing NOI mining on the Klamath River. In 1996, Congress amended the MSA to require NMFS to establish new requirements for Essential Fish Habitat (EFH) designations in federal fishery-management plans³⁵¹ and to require federal agencies to consult with NMFS for “any action authorized, funded, or undertaken . . . by such agency that may adversely affect any [EFH]” identified by a federal fishery-management plan.³⁵² The MSA defines EFH as “those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity.”³⁵³ NMFS’s regulations define adversely affect as “any impact that reduces quality and/or quantity of EFH.”³⁵⁴ In 1999, the Pacific Fishery Management

³⁴⁷ Ctr. for Biological Diversity v. EPA, No. 11-cv-00293-JCS, 2013 WL 1729573, at *10 (N.D. Cal. Apr. 22, 2013).

³⁴⁸ *Id.* (referencing *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 2004) and *Washington Toxics Coal. v. EPA*, 413 F.3d 1024 (9th Cir. 2005), as well as other Ninth Circuit cases).

³⁴⁹ *Salix v. U.S. Forest Service*, No. CV-12-45-M-DLC, 2013 WL 2099811, at *13-14 (D. Mont. May 16, 2013).

³⁵⁰ 16 U.S.C. § 1801-1891 (2012).

³⁵¹ *Id.* § 1853(a)(7).

³⁵² *Id.* § 1855(b)(2).

³⁵³ *Id.* § 1802(10).

³⁵⁴ 50 C.F.R. § 600.810 (2012).

Council designated the Klamath River and various Klamath tributaries as EFH for the Pacific salmon fishery.³⁵⁵

Thus, given the *Karuk* court's holding that the USFS's administration of its NOI scheme constitutes an affirmative authorization of mining activities and that mining conducted under the USFS's NOI scheme may affect the Klamath River, the USFS's authorization of NOI mining on the Klamath River—which is designated as EFH—triggers the USFS's duty to consult under the MSA.

MSA consultation is much less burdensome than consultation under Section 7(a)(2). NMFS's EFH regulations require that for any federal action that may adversely affect EFH, the federal agency “must provide NMFS with a written assessment of the effects of that action on EFH.”³⁵⁶ The regulations further dictate that the “level of detail in an EFH Assessment should be commensurate with the complexity and magnitude of the potential adverse effects of the action.”³⁵⁷ NMFS's regulations allow the federal agency to integrate its EFH assessment into existing environmental review procedures, such as the consultation procedures required by Section 7(a)(2).³⁵⁸ NMFS's regulations also allow the federal agency to engage in programmatic consultation with NMFS when “sufficient information is available to address all reasonably foreseeable adverse effects on EFH.”³⁵⁹

After NMFS receives the federal agency's written assessment of the action's effects on EFH, NMFS must recommend measures that could be taken to conserve the EFH that will be affected by the action.³⁶⁰ Following receipt of NMFS's recommended measures, the action agency must respond to NMFS in writing within thirty days.³⁶¹ The action agency's response must include a description of measures it proposes for “avoiding, mitigating, or offsetting the impact of the activity on EFH,” and if such response is inconsistent with NMFS's recommendations, the federal agency must “explain its reasons for not

³⁵⁵ PAC. FISHERY MGMT. COUNCIL, SALMON FISHERY MANAGEMENT PLAN, AMENDMENT 14, APPENDIX A, A7–A8 (May 2000), available at <http://www.pcouncil.org/wp-content/uploads/99efh1.pdf>.

³⁵⁶ 50 C.F.R. § 600.920(e)(1).

³⁵⁷ *Id.* § 600.920(e)(2).

³⁵⁸ *Id.* § 600.920(f).

³⁵⁹ *Id.* § 600.920(j)(1).

³⁶⁰ 16 U.S.C. § 1855(b)(4)(A) (2012); 50 C.F.R. § 600.920(f)–(j).

³⁶¹ 50 C.F.R. § 600.920(k)(1).

following the recommendations, including the scientific justification for any disagreements with NMFS.”³⁶²

While consultation under the MSA for adverse effects to EFH is, like NEPA, merely procedural, it has the ability, like environmental impact statements, to provide better information to the public and political leaders about federal agencies’ management decisions. Providing better information about the effects that such decisions have on EFH has the potential to produce better substantive outcomes for Klamath River coho salmon.

D. Suction Dredge Mining as One of Many Causes of Coho Salmon Decline

Though suction dredge mining on the Klamath River has the potential to cause significant harm to coho salmon and their habitat and requiring the USFS to consult with the Services for NOI mining will help mitigate that potential to cause harm, the Ninth Circuit’s decision is unlikely to lead to any immediate recovery of coho salmon. NMFS’s 2010 biological opinion for the United States Bureau of Reclamation’s operation of the Klamath Project between 2010 and 2018 identified a myriad of causes of the coho salmon’s decline in Oregon and California—logging, road building, grazing, mining, urbanization, stream channelization, dams, wetland loss, beaver trapping, hatchery fish, overfishing, water withdrawals, unscreened diversions for irrigation, disease, and predation.³⁶³

The broad spectrum of harmful activities that negatively affect coho salmon on the Klamath River, and that negatively affect other fishes in river systems throughout the West, is likely a significant factor in the frustration felt by suction dredge miners over the regulations being imposed on them. While there is some merit to the miners’ frustration, the proper solution is taking the politically difficult steps to address all causes of fisheries declines, rather than allowing suction dredge mining to proceed unregulated just because it is one harm among many.

³⁶² *Id.*

³⁶³ NAT’L MARINE FISHERIES SERV., BIOLOGICAL OPINION: OPERATION OF THE KLAMATH PROJECT BETWEEN 2010 AND 2018, 36–37 (Mar. 15, 2010).

E. Increased Mining Pressure on Oregon State Lands Outside of National Forests

The Ninth Circuit's decision to subject suction dredge mining in national forests to Section 7(a)(2) consultation—combined with California's current statewide, statutory moratorium on suction dredging that has been in effect since 2009³⁶⁴ and the rising price of gold during the Great Recession³⁶⁵—has the potential to lead to increased suction dredge mining pressure on the beds and banks of Oregon waters outside of national forests.

For example, the Rogue River seems particularly susceptible. The New 49'ers' website stated that “within days” of California's suction dredging moratorium going into effect, the club was already planning to explore suction dredging opportunities on the Rogue River in Oregon.³⁶⁶ A more recent post touted the annual suction dredging permit that can be purchased from Oregon's Department of Environmental Quality (ODEQ) for only twenty-five dollars, regardless of Oregon residency, and the free permit that can be obtained from the Oregon Department of State Lands for dredging activities involving “less than 25 cubic yards of removal and fill annually in Essential Salmon Habitat streams” but excluding mining on state scenic waterways.³⁶⁷ The annual ODEQ permit for suction dredge mining is a National Pollutant Discharge Elimination System (NPDES) permit for general water quality discharge that is required for compliance with the federal Clean Water Act.³⁶⁸ The Oregon Department of State Lands Permit is required by Oregon statute,

³⁶⁴ *CEQA Findings of Fact*, CAL. DEPARTMENT OF FISH & WILDLIFE (Mar. 16, 2012), <http://www.dfg.ca.gov/suctiondredge/>.

³⁶⁵ Zach Urness, *Suction Dredge Reform Bill Passes Legislature*, CASCADIA WILDLANDS (July 8, 2013), <http://www.cascwild.org/suction-dredge-reform-bill-passes-legislature/> (originally published in the *Salem Statesman Journal*).

³⁶⁶ Dave McCracken, *New 49'ers Discover High-grade Gold Dredging on the Rogue River in Southern Oregon*, NEW 49'ERS, <http://www.goldgold.com/new-49a%C2%80%C2%99ers-discover-high-grade-gold-dredging-on-the-rogue-river-in-southern-oregon-2.html> (last visited Feb. 8, 2014).

³⁶⁷ Dave McCracken, *We Have Established High-grade Dredging on the Rogue River!*, NEW 49'ERS (July 2010), <http://www.goldgold.com/741.html>; *Application for 700-PM General Permit*, OR. DEPARTMENT OF ENVTL. QUALITY, <http://www.deq.state.or.us/wq/wqpermit/docs/general/npdes700pm/application.pdf> (last visited Feb. 9, 2014); *Recreational Placer Mining*, OREGON DEPARTMENT OF STATE LANDS, <http://statelandsonline.com/index.cfm?fuseaction=Placer.Apply> (last visited Feb. 9, 2014).

³⁶⁸ *Water Quality Permit Program—Metal Mining Activities*, OR. DEPARTMENT OF ENVTL. QUALITY, <http://www.deq.state.or.us/wq/wqpermit/mining.htm> (last visited Feb. 8, 2013).

which states that “a person may not remove any material from the bed or banks of any waters of this state or fill any waters of this state without a permit issued under the authority of the Director of the Department of State Lands” and “[r]emoval or filling activities customarily associated with mining require a permit” from the Department of State Lands.³⁶⁹ “Waters of this state in this context means all natural waterways, tidal and nontidal bays, intermittent streams, constantly flowing streams . . . [and] all other navigable and nonnavigable bodies of water in this state.”³⁷⁰

In 2010, the Oregon State Land Board, after completing a study that determined that the federal test for title navigability was satisfied, declared ownership of all lands below the ordinary high water mark for an eighty-nine mile stretch of the Rogue River: from river mile 68.5, Grave Creek, to river mile 157.5, Lost Creek Dam.³⁷¹ The consequences of such a determination are that these new lands owned by the Oregon State Land Board would potentially be open to suction dredge mining. As further evidence of this potential for increased pressure on the beds and banks of Oregon waterways outside of national forests, there was a two hundred percent increase in the number of suction dredge miners permitted by ODEQ from 2011 to 2012.³⁷²

In response to this increasing pressure, a number of Oregon Senate Bills were introduced to increase protections of Oregon’s rivers from suction dredge mining.³⁷³ On August 14, 2013, Governor Kitzhaber signed Oregon Senate Bill 838 into law.³⁷⁴ Senate Bill 838 acknowledges that “[b]etween 2007 and 2013, mining that uses motorized equipment in the beds and banks of the rivers of Oregon increased significantly, raising concerns about the cumulative

³⁶⁹ OR. REV. STAT. § 196.810(1)(a), (b) (2011).

³⁷⁰ *Id.* at 196.800(14) (internal quotation marks omitted).

³⁷¹ OR. DEP’T OF STATE LANDS, DECLARATION OF OWNERSHIP OF THE ROGUE RIVER BETWEEN RIVER MILES 68.5 AND 157.5 1–2 (2008), available at http://www.oregon.gov/dsl/NAV/docs/web_rogue_study/rogue_declaration.pdf.

³⁷² *Protect Oregon’s Rivers from Suction Dredging!*, ROGUE RIVERKEEPER, <http://rogueriverkeeper.org/get-involved/take-action/protect-oregons-rivers-from-suction-dredging> (last visited Feb. 9, 2014).

³⁷³ *Id.*

³⁷⁴ *Senate Bill 838: Measure Activity*, OREGONIAN, <http://gov.oregonlive.com/bill/2013/SB838/> (last visited Feb. 9, 2014).

environmental impacts”³⁷⁵ and sets out a number of other provisions: First, it requires the Department of State Lands to limit the individual suction dredge mining permits issued to “not more than 850 permits and authorizations for [motorized mining] at any time” during the period of January 1, 2014, to January 2, 2021. Second, it imposes certain conditions on the use of motorized mining from January 1, 2014, to January 2, 2016, including requiring a minimum distance of 500 feet between dredges unless otherwise allowed by the ODEQ, prohibiting unattended equipment, and limiting the allowable hours of operation to between 9:00 a.m. and 5:00 p.m.³⁷⁶ Third, it sets out a moratorium—subject to certain exceptions—from January 2, 2016, until January 2, 2021, on “mining that uses any form of motorized equipment for the purpose of extracting gold, silver or any other precious metal from placer deposits of the beds or banks of the waters of [Oregon]” within the “spawning habitat in any river and tributary thereof in [Oregon] containing essential indigenous anadromous salmonid habitat . . . or naturally reproducing populations of bull trout”³⁷⁷ This prohibition applies 100 yards perpendicular to the line of ordinary high water of rivers or tributaries thereof containing essential indigenous anadromous salmonid habitat or naturally reproducing populations of bull trout.³⁷⁸ Fourth, it allows ODEQ to increase the fees for the annual NPDES permit required for suction dredge mining to cover the costs of administration, compliance, monitoring, and enforcement related to the permit and imposes a surcharge of \$150 on every annual NPDES permit for suction dredge mining to fund data collection and reporting on suction dredge mining in Oregon by ODEQ.³⁷⁹ Finally, it directs the governor’s office and affected agencies—such as Department of State Lands and ODEQ—study and consider changes to the current system for regulating motorized mining and draft a legislative report with proposed regulatory framework along with necessary legislation and funding on or before November 1, 2014.³⁸⁰

³⁷⁵ S.B. 838, 77th Leg., Reg. Sess., 2013 Or. Laws 783, § 1(5) (2013).

³⁷⁶ *Id.* § 5.

³⁷⁷ *Id.* §§ 2-5.

³⁷⁸ *Id.*

³⁷⁹ *Id.* §§ 11-12.

³⁸⁰ *Id.* § 8.

CONCLUSION

The Ninth Circuit's *Karuk* decision may be a controversial and bold step forward in ESA case law, but it is legally supportable and provides necessary protection for endangered species. Congress passed Section 7(a)(2) to force federal agencies, which may be highly committed to their primary statutory missions, to consult with the Services for their actions. The body of peer-reviewed science, though riddled with significant gaps, overwhelmingly indicates that suction dredge mining is capable of causing harm to salmonids and specifically, coho salmon. The USFS's NOI mining regulations, and its administration of those regulations, exemplify the type of agency action that Congress intended to require Section 7(a)(2) consultation. The overarching purpose of the ESA is to recover species so that they may be delisted: requiring federal agencies to engage in Section 7(a)(2) consultation for their actions, even those that may only be considered functional or implicit agency actions, aligns with this purpose.

The Supreme Court's denial of the New 49'ers petition for certiorari was a massive step in solidifying the impacts that the Ninth Circuit's *Karuk* decision will have. Federal agencies operating in the Ninth Circuit—which may have been waiting for the Supreme Court's decision to decide whether to follow the *Karuk* court's more stringent mandate—will likely begin to follow that mandate and will face litigation from environmental interests if they do not.

Finally, the *Karuk* Tribe is almost certainly more interested in recovering coho salmon on the Klamath River than it is in winning lawsuits. The Ninth Circuit's *Karuk* decision, though significant, is a small part of broader efforts to recover coho salmon on the Klamath River. The Klamath Basin's history has shown that litigation alone is incapable of resolving the Basin's systemic conflicts.³⁸¹

In light of these intractable conflicts, in 2010 an incredibly diverse group of Klamath Basin stakeholders came together and agreed on a massive settlement package that seeks to restore Klamath Basin

³⁸¹ See generally E. Bayley Toft-Dupuy, Recent Development, *The Ovidian Water Drop: Negotiations in the Klamath Basin*, 28 J. ENVTL. L. & LITIG. (forthcoming Mar. 2014).

fisheries while providing for sustainable agriculture.³⁸² The Karuk Tribe's Natural Resources Director said that the settlement package is the "only approach that can restore salmon runs while benefitting Klamath Basin agriculture."³⁸³ A report conducted by the United States Geological Survey states that there is a high degree of certainty that removal of four Klamath River dams—as part of the settlement package—would benefit coho salmon.³⁸⁴ However, that settlement package is contingent upon funding from the United States Congress that has not yet materialized—estimates of the federal costs to implement the settlement package over the next fifteen years range from 536 to 798.5 million dollars.³⁸⁵ The original settlement package was set to expire if it failed to get congressional authorization by 2012 but that deadline has now been extended to 2014. Accordingly, though there have been dark days on the Klamath for the Karuk Tribe, coho salmon, and farmers, there is cause to believe in a bright future for all of the basin's stakeholders.

³⁸² See U.S. DEP'T OF INTERIOR ET. AL., KLAMATH DAM REMOVAL OVERVIEW REPORT FOR THE SECRETARY OF THE INTERIOR 5 (2012), available at <http://klamathrestoration.gov/sites/klamathrestoration.gov/files/2013%20Updates/Final%20OSDOR%20/0.Final%20Accessible%20SDOR%2011.8.2012.pdf>.

³⁸³ Damon Arthur, *Klamath Basin Restoration Pact Extended Two Years*, REDDING RECORD SEARCHLIGHT (Jan. 1, 2013), <http://www.redding.com/news/2013/jan/01/klamath-basin-pact-extended-two-years/?print=1>.

³⁸⁴ U.S. DEP'T OF INTERIOR ET. AL., *supra* note 382, at 17.

³⁸⁵ CHARLES V. STERN ET AL., CONG. RESEARCH SERV., R42158, KLAMATH BASIN SETTLEMENT AGREEMENTS: ISSUES IN BRIEF 7 (2013), available at <http://www.fas.org/sfp/crs/misc/R42158.pdf>.