Legal Backgrounder

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DENIAL OF SUPREME COURT REVIEW LEAVES NINTH CIRCUIT ESA CASE INTACT

by
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At issue in the U.S. Court of Appeals for the Ninth Circuit in *Karuk Tribe of California v. United States Forest Service*, 681 F.3d 1006 (9th Cir. 2012) was whether the Forest Service's review of notices of intent ("NOI") submitted for small-scale mining activities in and along the Klamath River in the Klamath National Forest triggered the Forest Service's consultation requirements under Section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a). An en banc panel of the court, over a vigorous dissent, ruled that the Forest Service "approval" of the NOIs amounted to a discretionary agency action requiring consultation. In March of this year, the U.S. Supreme Court denied without comment the miners' petition for *certiorari* to review the issue, meaning that the Ninth Circuit's holding remains the law, at least within the nine states in the circuit's territory.

Under the General Mining Law of 1872, 30 U.S.C. § 22, private citizens may enter public lands for purposes of prospecting and mining, but that right is conditioned on compliance with rules and regulations concerning the public lands. *See* 16 U.S.C. § 478. This right extends to national forest lands. One such regulation, at issue in *Karuk Tribe*, divides the mining activities into three categories, each triggering a different set of requirements. 36 C.F.R. § 228.4. The first category includes mining activities that "will not cause" significant disturbance of surface resources, allowing a miner to proceed without notifying the Forest Service or seeking approval. The third category is for mining activities that "will likely cause" significant disturbance of surface resources, and in which case the mining activities may proceed only after the Forest Service approves of a detailed Plan of Operations.

The mid-level second category was at issue in this case. The second category applies to activities that "might cause" significant surface resource disturbance. This category requires a miner to submit a NOI that sets out specified information regarding the area to be mined, the access route to the area, the nature of the proposed mining activities, and the method of transport, but not to the extent of information that would need to be submitted for a Plan of Operations. Under this mid-level category, the National Forest's district ranger is required to make a determination whether the proposed activity "will likely cause" significant disturbance of surface resources. In either case, the

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district ranger must, within fifteen days of receiving the NOI, notify the prospective miner whether a Plan of Operations is required.

There were four NOIs, submitted in advance of the 2004 mining season, at issue in the *Karuk Tribe* case. Of concern to the Forest Service were impacts on coho salmon, which is listed as a threatened species under the ESA. In varying degrees with respect to each of the NOIs, Forest Service biologists evaluated potential impacts and recommended mitigation measures, met and corresponded with the miners, and ultimately "approved" the NOIs when the necessary mitigation measures were agreed to.

The Karuk Tribe sued the Forest Service in federal district court, seeking declaratory and injunctive relief, based on alleged violations of the ESA, the National Environmental Policy Act ("NEPA") and the National Forest Management Act ("NFMA"), resulting from the district ranger's approval of the NOIs. With regard to the ESA, the Karuk Tribe argued that the Forest Service was required to consult with the NOAA Fisheries Service as required under Section 7 of the ESA. Under Section 7, federal agencies are required to consult with either the NOAA Fisheries Service or U.S. Fish and Wildlife Service, depending on which agency has jurisdiction over the species at issue, to ensure that the agency action is not likely to jeopardize a listed species or adversely affect critical habitat. This requirement only applies to discretionary actions by the federal agency, which have the "capacity to inure to the benefit of a protected species," and is triggered only if the agency action "may affect" a listed or threatened species or its critical habitat. 50 C.F.R. § 402.14(a).

The primary issue was whether the Forest Service's approval of the NOIs constituted a federal agency action within the scope of Section 7, and if so, whether that action "may affect" the coho salmon. The court, after considering other procedural issues, answered both questions in the affirmative and held that the Forest Service was required to consult with the appropriate wildlife agency before approving the NOIs submitted by the recreational miners.

As to the "agency action" issue, the court undertook a two-part inquiry: (1) whether the Forest Service "affirmatively authorized, funded, or carried out the underlying activity; and (2) whether the agency had "discretion to influence or change the activity for the benefit of a protected species." The court found that the Forest Service had affirmatively authorized the miners' proposed activities by approving the four challenged NOIs. In support of its conclusion, the court noted that the actions of the Forest Service and the miners evinced an "understanding that the agency affirmatively authorizes mining activities when it approves a NOI." Specifically, the court pointed to communications between the district ranger and the miners before and after the NOIs were submitted discussing restrictions on and approval of the proposed mining activities.

The court acknowledged that an agency simply providing advice is not tantamount to an affirmative act, nor is there an affirmative agency action where a private party simply acts in accordance with a vested right or previously issued license to undertake an activity. The Forest Service argued that its "approval" of the NOIs was merely a decision *not* to regulate, and was therefore not an affirmative agency action. The court disagreed. It analogized this case to its opinion in *Siskiyou Regional Education Project v. U.S. Forest Service*, 565 F.3d 545, (9th Cir. 2009), in which it held that Forest Service approval of a NOI for suction dredge mining constituted "final agency action." The implication of *Siskiyou Regional Education Project*, according to the court,

was that approval of NOIs is "not merely advisory. Rather, it 'mark[s] the consummation of the agency's decision making process' and is an action from which legal consequences flow."

The court further distinguished the *Karuk Tribe* case from its 1988 opinion in *Sierra Club v. Penfold*, 857 F.2d 1307 (9th Cir. 1988), where it held that review of "notice" mining operations by the Bureau of Land Management was not "major federal action" triggering an environmental assessment requirement under NEPA. The court pointed out that the decision in *Sierra Club v. Penfold* was specifically based on NEPA's distinction between "major" and "marginal" federal agency action, each triggering different requirements, as opposed to the ESA, in which "agency action" applies to any discretionary act, even those that may benefit the species. The court added that courts have broadly construed the term "agency action" under the ESA. In addition, the court considered it significant that the Forest Service had a mandatory duty to respond to the NOIs, had conditioned approval of the NOIs on compliance with certain restrictions, and by its continued monitoring of the miners' compliance with the criteria for the protection of the critical fisheries habitat, demonstrated that it retained the power to enforce the NOI conditions.

With regard to whether approval of the NOIs was a discretionary act, the court found that the Forest Service did exercise discretion by formulating criteria for protection of coho salmon habitat, by applying different criteria for protecting fisheries habitat in different districts of the Klamath National Forest, and by refusing to approve a different NOI for mining activities in the Six Rivers National Forest. The court noted that the Forest Service can exercise its discretion to benefit the species by approving or disapproving a NOI, by requiring a prospective miner to submit of Plan of Operations, and thereby had the ability to influence the private mining activities.

As to the "may affect" issue, the court essentially resolved the question as a "textual matter." That is, the court compared the language of Section 7—requiring consultation for discretionary agency action that "may affect" a listed species or designated critical habitat—with the language of the mining regulations—requiring a NOI for activities that "might cause" disturbance of surface resources, including underwater fisheries habitat. According to the court, "[i]f the phrase 'might cause' disturbance of fisheries habitat is given an ordinary meaning, it follows almost automatically that mining pursuant to the approved NOIs 'may affect' critical habitat of the coho salmon." Having determined the issue largely based on its interpretation of statutory language, the court was not persuaded by the miners' argument that the record contained no evidence that the proposed mining activities "may affect" coho salmon. Rather, the court concluded its analysis of this issue by stating: "as a textual matter, mining activities in designated critical habitat that require approval under a NOI likely satisfy the low threshold triggering the duty to consult under the ESA."

In a scathing dissent, Judge Milan Smith criticized the majority for rejecting the Forest Service's interpretation of its own mining regulations, noting that the "Forest Service's explanation of its mining regulations establishes that a Notice of Intent is used as an information-gathering tool, not an application for a mining permit." The dissent also attacks the majority for relying on the subjective views of the district ranger and the miners as to whether they understood the NOIs to confer authorization for mining activities. According to Judge Smith, the rule articulated by the majority will discourage the Forest Service from engaging in informal advice or consultation with prospective miners, for fear that doing so may trigger Section 7's formal consultation requirement. In the final section of his dissent, Judge Smith relates a litany of Ninth Circuit decisions regarding

environmental regulations which he perceives as having wrought widespread economic damage within the jurisdiction, and which he views as evidence of the court's "straying" from its constitutionally limited role.

Notwithstanding the dissent's inclination to add the *Karuk Tribe* opinion to its "parade of horribles" of Ninth Circuit environmental decisions, this case seems unlikely to have wide-ranging economic consequences. Large scale mining operations—those that "will likely cause" significant disturbance of surface resources—will continue to require a detailed Plan of Operations, just as they did prior to this decision. It is unclear at this point, however, whether this decision will affect smaller-scale recreational mining within the Ninth Circuit. While it may discourage some prospective miners from subjecting themselves to a lengthier review of their proposed activities by multiple agencies under ESA Section 7, it may also drive other miners "underground," making it more difficult for the Forest Service to keep track of mining activities in the national forests.

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