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Elise O'Dea

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A Salmon's Travels: The Forest Service's Struggle to Secure Proper Environmental Protection

INTRODUCTION

Unbeknownst to most Californians, a regulatory battle rages in Northern California between the Native American Karuk Tribe and recreational gold miners—the threatened coho salmon are caught in the middle. The Karuk Tribe has resided in the Klamath River Basin of Northern California for thousands of years.¹ The Tribe depends on coho salmon, a threatened fish species found in the Klamath River of the Klamath National Forest, for a variety of “cultural, religious, and subsistence” purposes.² Since 1997, the coho salmon has been listed as a threatened species, with the Klamath River listed as one of their critical habitats since 1999.³ Due to the Tribe's dependence on the coho salmon, the Tribe is concerned with potential impacts on the coho from suction dredge mining in the Klamath River.⁴

Suction dredge mining is popular among recreational miners searching for gold along the Klamath.⁵ Although some miners claim the practice is safe or even beneficial to the coho,⁶ science suggests otherwise. U.S. Forest Service biologists have determined that suction dredge mining subjects the already “very depressed” coho population to decreases in food supply, adverse temperature fluctuations, and destabilized streambeds, which can cause fish

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1. See ALVIS JOHNSON, OFFICE OF THE TRIBAL CHAIRMAN, KARUK TRIBE OF CALIFORNIA: TRIBAL GOVERNMENT PROFILE SUMMARY 3 (1995), available at <http://www.karuk.us/karuk/images/docs/hr-files/Tribal%20Government%20Profile%20and%20Summary.pdf> (explaining that the Tribe has “continuously occupied [their] ancestral village sites for at least 10,000 years”).

2. *Karuk Tribe of Cal. v. U.S. Forest Serv. (Karuk III)*, 681 F.3d 1006, 1011 (9th Cir. 2012) (en banc), cert. denied, 2013 WL 1091767 (Mar. 18, 2013).

3. See Endangered and Threatened Species; Threatened Status for Southern Oregon/Northern California Coast Evolutionarily Significant Unit (ESU) of Coho Salmon, 62 Fed. Reg. 24,588, 24,588 (May 6, 1997) (to be codified at 50 C.F.R. pt. 227); Designated Critical Habitat; Central California Coast and Southern Oregon/Northern California Coasts Coho Salmon, 64 Fed. Reg. 24,049, 24,049 (May 5, 1999) (to be codified at 50 C.F.R. pt. 226).

4. See *Karuk III*, 681 F.3d at 1012 (“The Karuk Tribe contends that these mining activities adversely affect fish, including coho salmon, in the Klamath River system.”).

5. See Klamathmedia, *Recreational Destruction: Suction Dredge Mining and the Decline of California's Fishery*, YOUTUBE (Apr. 27, 2009), <http://www.youtube.com/watch?v=11qwdzQ4fzI>.

6. See *Karuk III*, 681 F.3d at 1015 (quoting a recreational miner stating she believes “that dredging is actually beneficial to fish survival”).

eggs and larvae to be “smothered or buried.”⁷ Moreover, suction dredge mining itself has the potential to “directly kill and indirectly increase mortality of fish”⁸

The Forest Service has established a three-tiered regulatory system aimed at reducing mining’s impact on “surface resources” such as the coho salmon.⁹ However, after allegedly failing to secure proper environmental protection for the coho, the Forest Service sparked a controversy sharply dividing the Ninth Circuit. In *Karuk Tribe of California v. U.S. Forest Service (Karuk III)*, the Tribe alleged that the Forest Service failed to consult with the proper federal wildlife agencies per section 7 of the Endangered Species Act (ESA) before approving four Notices of Intent (NOIs) to allow suction dredge mining along the Klamath. The majority of the Ninth Circuit en banc hearing held that the Forest Service’s approval of the NOIs constituted “agency action” requiring consultation under section 7 of the ESA, thereby overturning the Ninth Circuit’s prior panel decision.¹⁰

Conversely, the dissent argued that the Forest Service’s review of the NOIs was more akin to agency “inaction” than action.¹¹ Invoking the classic image of Gulliver tied to the ground by the Lilliputians in *Gulliver’s Travels*, the dissent asserted that the majority’s holding “effectively shuts down the entire suction dredge mining industry” in the Ninth Circuit’s jurisdiction by causing costly delays of mining activities through increased regulatory requirements, thus making “poor Gulliver’s situation seem fortunate.”¹²

Although such drastic economic impacts may not be likely, as a majority of gold mining in the Klamath is recreational,¹³ the confusion resulting from the Forest Service’s failure to consult at the NOI stage could be avoided in the future if the Forest Service simplifies its three-tiered system into two distinct categories: mining activities that do require ESA consultation and those that do not.

7. *Id.* at 1028–29.

8. *Id.* at 1029.

9. 36 C.F.R. § 228.8 (2012) (establishing that “[a]ll operations shall be conducted so as . . . to minimize adverse environmental impacts on National Forest surface resources,” which includes “Fisheries and Wildlife Habitat”).

10. *Karuk III*, 681 F.3d at 1011.

11. *Id.* at 1031.

12. *Id.* at 1031, 1039.

13. See Holly Doremus, *Ninth Circuit Corrects Itself on Gold Mining and the ESA*, LEGAL PLANET (June 3, 2012), <http://legalplanet.wordpress.com/2012/06/03/ninth-circuit-corrects-itself-on-gold-mining-and-the-esa> (“The mining operations at issue in this case were entirely recreational. And although recreational miners do buy some equipment, they can hardly be said to support an entire industry or thousands of jobs.”).

I. LEGAL AND PROCEDURAL BACKGROUND

A. *The Forest Service and Mining*

Mining in National Forests such as the Klamath National Forest is permitted by the General Mining Law of 1872 in conjunction with the Organic Administration Act of 1897.¹⁴ Although these laws extend “a statutory right, not mere privilege” to mine in National Forests, miners are still subject to rules and regulations governing the forests.¹⁵

In order to “minimize adverse environmental impacts” in the National Forests,¹⁶ the Forest Service established a regulatory system dividing mining into three categories according to its potential impact on surface resources such as fisheries and wildlife habitat.¹⁷ The first category includes what is called “de minimis” mining activities—those that “will not cause” significant disturbance of surface resources.¹⁸ For mining activities in this category, which includes activities such as gold panning, the Forest Service has determined that miners need not notify them of their plans.¹⁹

The second category addresses mining that “might cause” significant disturbance of surface resources.²⁰ For this type of activity, miners must submit an NOI to the Forest Service providing basic information such as the location and “nature of the proposed operations.”²¹ If the proposed mining operation is not likely to cause significant disruption of surface resources, the Forest Service will allow the miners to proceed. But if the Forest Service believes that the mining activities proposed in an NOI “will likely” cause significant disruption of surface resources, the miners must submit a Plan of Operations (Plan) before proceeding.²²

Mining activities requiring a Plan make up the third category. Plans contain more information than NOIs, and may be subject to enforceable

14. 30 U.S.C. § 22 (2006) (“Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase . . .”); 16 U.S.C. § 482 (2006) (using the Organic Administration Act to extend the General Mining Law to all National Forest lands).

15. National Forests Surface Use Under U.S. Mining Laws, 39 Fed. Reg. 31,317, 31,317 (Aug. 28, 1974) (to be codified at 36 C.F.R. pts. 251–52, 293); 16 U.S.C. § 478 (requiring persons who enter national forests for lawful purposes like mining to “comply with the rules and regulations covering such national forests”).

16. 36 C.F.R. § 228.8 (2012).

17. See 36 C.F.R. § 228.4.

18. *Karuk III*, 681 F.3d 1006, 1012 (9th Cir. 2012) (en banc) (characterizing this first category of mining as “de minimis”); see 36 C.F.R. § 228.4(a)(1)(ii).

19. See 36 C.F.R. § 228.4(a)(1) (providing a list of activities the Forest Service has determined not to require an NOI).

20. *Id.* § 228.4(a).

21. *Id.*

22. *Id.* § 228.4(a)(3)–(4).

environmental regulations as a condition of their approval.²³ The Forest Service acknowledges that Plans are subject to consultation under section 7 of the ESA, though NOIs traditionally are not.²⁴ This difference lies at the heart of the *Karuk* controversy.

B. Endangered Species Act: “Agency Action”

The arguments laid out in *Karuk III* center most around what constitutes “agency action” as defined in section 7 of the ESA.²⁵ Under section 7, when a federal agency carries out a qualifying “agency action,” it must consult with the appropriate federal wildlife agencies to ensure that the action “is not likely to jeopardize the continued existence” of listed species or their critical habitat.²⁶ An agency action triggering the ESA consultation requirement is “any action authorized, funded, or carried out” by an agency that has the potential to significantly impact the existence of a listed species or their critical habitat.²⁷ As the majority argues, the Forest Service’s approval of the challenged NOIs qualifies as an agency action since it authorizes a private activity that has the potential to affect a listed species—in this case, the coho salmon.²⁸

C. Procedural History

In response to the Forest Service’s approval of four NOIs to conduct suction dredge mining activities along the Klamath, the Tribe brought suit against the Forest Service for alleged violations of the National Environmental Policy Act and the National Forest Management Act.²⁹ The Northern District of California ruled in favor of the Forest Service on all issues.³⁰

Upon appeal to the Ninth Circuit, the Tribe dropped all charges except the claim pertaining to the Forest Service’s alleged violation of section 7 of the ESA.³¹ Affirming the District Court’s judgment, Judge Smith, writing for the majority, held that the Forest Service’s review of the NOIs did not “authorize” mining activities in the sense required for agency action to trigger the ESA

23. *See id.* § 228.4(c); 36 C.F.R. § 228.5(a).

24. *See Karuk III*, 681 F.3d 1006, 1016 (9th Cir. 2012) (en banc) (“[T]he Forest Service agreed that it had a duty under the ESA to consult with the appropriate wildlife agencies . . . before approving the Plans.”).

25. *See* 16 U.S.C. § 1536 (2006).

26. *Id.* § 1536(a)(2).

27. *Id.* § 1536(a)(2), (4).

28. *See Karuk III*, 681 F.3d at 1020–27.

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

30. *See id.* at 1102.

31. *See Karuk III*, 681 F.3d at 1017 (“When briefing resumed, the Tribe pursued only the ESA claim, arguing that the Forest Service violated its duty to consult with the expert wildlife agencies before approving the four NOIs.”).

consultation requirement.³² In emphatic dissent, Judge William Fletcher argued that the Forest Service's approval of the NOIs did indeed constitute an agency action in need of ESA consultation.³³

The Tribe petitioned for and was granted an en banc hearing with the Ninth Circuit. This time, with the case decided in favor of the Tribe, Judge Fletcher penned the majority opinion, while Judge Smith spearheaded the dissent. As in *Karuk II*, the crux of the argument between the majority and dissent in *Karuk III* turned upon the meaning of "agency action."

II. THE NINTH CIRCUIT'S EN BANC DECISION

The majority held that the Forest Service's approval of the challenged NOIs constituted agency action requiring ESA consultation.³⁴ In evaluating agency action, the majority took a "two-fold" approach, considering first whether the agency took an affirmative act and second whether the agency had the ability to exercise discretion to benefit a listed species when carrying out the action.³⁵

A. *Affirmative Act*

The majority's analysis began by stating that both Congress and Supreme Court precedent have established that agency action is to have a "broad definition."³⁶ Looking to prior case law, the majority held that section 7 consultation is required when an agency takes an "affirmative act or authorization."³⁷ Since the Forest Service "must authorize" an NOI before proposed mining operations can proceed, the majority found that the Forest Service's review and approval of the NOIs in question demonstrated that the Forest Service "affirmatively authorized" the mining activities.³⁸

The majority highlighted language such as "authorization" and "allowing" in the Forest Service's letters to the applicant miners to further indicate that the Forest Service understood its action as constituting an affirmative authorization of the miners' NOIs.³⁹ In addition, the majority held that "[t]he miners also understood that they were seeking authorization" based on language contained in their responsive letters.⁴⁰ In sum, the majority found that the Forest Service "authorizes mining activities when it approves an NOI and affirmatively

32. *Karuk Tribe of Cal. v. U.S. Forest Serv. (Karuk II)*, 640 F.3d 979, 996 (9th Cir. 2011), *rev'd en banc*, 681 F.3d 1006 (9th Cir. 2012).

33. *See id.*

34. *See Karuk III*, 681 F.3d at 1011.

35. *Id.* at 1021.

36. *Id.* at 1020.

37. *Id.* at 1021.

38. *Id.*

39. *Id.* at 1022.

40. *Id.*

decides to allow the mining to proceed,” and that such an affirmative act qualifies as an agency action requiring ESA consultation.⁴¹

B. Discretionary Act

In conjunction with taking an affirmative act, an agency must be able to exercise some “discretionary Federal involvement or control” that could be used to influence or benefit the protection of a listed species in order for an action to qualify as an agency action.⁴² The majority pointed primarily to a Forest Service District Ranger’s use of conditional requirements in his approval of NOIs as evidence that the Forest Service exercised discretion in its approval of the NOIs.⁴³ Before approving the challenged NOIs, the District Ranger met with two Forest Service biologists to establish conditions aimed at limiting suction dredge mining’s impacts on coho salmon.⁴⁴ The Ranger then used the criteria to guide approval and denial of NOIs.⁴⁵ If an NOI contained the parameters the Ranger had spelled out, the NOI was approved.⁴⁶ If the NOI did not comply with the criteria, it was denied until it had been amended to meet the Ranger’s conditions.⁴⁷ All of the approved NOIs at issue in this case complied with the District Ranger’s criteria.⁴⁸

In this way, the majority argued that “by formulating and applying different criteria when deciding whether to approve or deny NOIs,” the Forest Service exercised discretion in its review of the challenged NOIs and thus committed an agency action requiring ESA consultation.⁴⁹

III. THE FOREST SERVICE SHOULD RESTRUCTURE THE MINING REGULATORY SYSTEM

The Forest Service itself interprets its use of NOIs as an “information gathering tool” or “simple notification procedure.”⁵⁰ However, the agency’s approach to the challenged NOIs suggests otherwise. The Forest Service, “by formulating criteria for the protection of coho salmon habitat” that “governed the approval or denial” of the challenged NOIs, essentially used the NOI

41. *Id.* at 1024.

42. 50 C.F.R. § 402.03 (2012); *see Karuk III*, 681 F.3d at 1024–25.

43. *See Karuk III*, 681 F.3d at 1025–26.

44. *See id.* at 1025.

45. *See id.* at 1026.

46. *See id.*

47. *See id.* (stating that one applicant miner “amended her NOI . . . only because, absent compliance with the condition imposed by [the Ranger], she would not be allowed to engage in mining under a NOF”).

48. *See id.*

49. *Id.* at 1026–27.

50. *Id.* at 1034 (Smith, J., dissenting) (“The Forest Service interprets the Notice of Intent as an information-gathering tool used to decide whether a miner should file a Plan of Operations . . .”).

process as a regulatory tool.⁵¹ In doing so, the Forest Service exercised discretion in its approval and denial of the NOIs at a level of its regulatory system that it normally “can impose no conditions [upon] whatsoever.”⁵² In actuality, the Forest Service’s exercise of such discretion in reviewing the challenged NOIs resembles the type of discretion normally exercised during its approval of Plans.⁵³ Indeed, the Forest Service has explicit authority to impose environmental protective conditions prior to approving Plans, but not NOIs.⁵⁴

As such, the Forest Service has created a regulatory scheme in which it has the ability to exercise discretion at two levels—the NOI stage and the Plan stage. This led the majority to hold that an NOI, being an affirmative and discretionary decision, requires ESA consultation. As a result, the majority’s holding blurs the distinction between an NOI and a Plan, since both now require ESA consultation.

To simplify and remedy this issue, the Forest Service should consider downsizing its three-tiered regulatory system into a system composed of two categories: mining activities that are categorically known not to cause significant disturbance of surface resources (such as those mining activities categorized as “de minimis” mining activities)⁵⁵; and mining activities that “might” cause significant disturbance of surface resources and are therefore subject to ESA consultation, at which point the Forest Service would determine whether a Plan is needed and, if so, what kind of environmental protections the Plan would require.

Although this would obviously increase the amount of mining activities subject to ESA consultation, the *Karuk III* majority pointed out that the process need not be formal and time consuming. In fact, ESA consultation begins with an “informal consultation,” during which time the appropriate wildlife agencies determine whether the proposed activity might adversely affect a listed species or critical habitat.⁵⁶ If not, no further consultation is required “and the process ends.”⁵⁷ As such, the informal consultation process would for all intents and purposes substitute in for the NOI process. Informal consultation would determine whether a Plan is needed through the ESA consultation process, rather than through the Forest Service’s potential abuse of discretion through the NOI process.

51. See *id.* at 1025 (majority opinion).

52. *Karuk II*, 640 F.3d 979, 992 (9th Cir. 2011).

53. See 36 C.F.R. § 228.4(c)–(f) (2012); see also 36 C.F.R. § 228.5(a).

54. See *Karuk III*, 681 F.3d at 1013 (“[T]he Forest Service must approve the proposed Plan or notify the miner of any additional environmental conditions necessary to meet the purpose of the regulations.”); see also 36 C.F.R. § 228.4 (c)–(f).

55. See 36 C.F.R. § 228.4(a)(1) (mining activities that will not cause significant disruption of surface resources).

56. *Karuk III*, 681 F.3d at 1027.

57. *Id.*

Other agencies that employ a three-tiered categorical approach to regulating private activities in their jurisdiction, such as the Bureau of Land Management, should take note of the implications of exercising discretion where it is not called for.⁵⁸ Perhaps these agencies, like the Forest Service, should consider simplifying their regulatory systems to attain proper environmental protections and compliance with the ESA.

CONCLUSION

As of now, the salmon's travels in this case may be over. A recreational mining organization, The New 49ers, who participated in *Karuk III* as an intervener, petitioned for writ of certiorari with the Supreme Court, but were denied in March 2013.⁵⁹

In the meantime, suction dredge mining is currently banned under a moratorium passed by the California Department of Fish and Game in response to a suit brought by the Tribe against the agency in 2005.⁶⁰ The moratorium is not set to expire until June 30, 2016 or until the agency "certifies that five specified conditions have been satisfied, whichever is earlier."⁶¹ Such a moratorium, however, does not moot the Tribe's claim against the Forest Service, for, as the majority discusses, the moratorium is "only temporary" and "the dispute [will] continue over whether the Forest Service can approve NOIs allowing mining activities in critical habitat of a listed species" without proper ESA consultation.⁶²

Looking to the future, the Forest Service should consider simplifying their regulatory structure in order to more easily attain both environmental protection and ESA compliance, thereby lessening the tensions between the Karuk Tribe and the miners of the north.

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58. See *id.* at 1036 (Smith, J., dissenting) (discussing the Bureau of Land Management's "three-tiered approach to regulating placer mining" in its jurisdiction).

59. *Karuk Tribe of Cal. v. U.S. Forest Serv. (Karuk III)*, 681 F.3d 1006, 1011 (9th Cir. 2012) (en banc), *cert. denied*, 2013 WL 1091767 (Mar. 18, 2013).

60. See *Karuk III*, 681 F.3d at 1018.

61. *Id.*; see CAL. FISH & GAME CODE § 5653.1 (2011).

62. *Karuk III*, 681 F.3d at 1019 (internal quotations omitted).