No. 12-289

In The
Supreme Court of the United States

THE NEW 49'ERS, INC., et al.,

Petitioners,

v.

KARUK TRIBE OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF NORTHWEST MINING ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the Forest Service's mere receipt and review of a hardrock miner's notice of intent ("NOI") to exercise rights granted to him by Congress in the Mining Law constitute "agency action," triggering the consultation requirements of Section 7(a)(2) of the Endangered Species Act?

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AMICUS CURIAE BRIEF OF NORTHWEST MINING ASSOCIATION

Pursuant to Supreme Court Rule 37.2, Northwest Mining Association ("NWMA") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioners.[1]

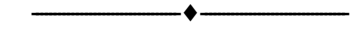
IDENTITY AND INTEREST OF AMICUS CURIAE

NWMA is a non-partisan, membership, trade association incorporated under the laws of the State of Washington, with its principal place of business in Spokane, Washington. NWMA is also an Internal Revenue Code Section 501(c)(6) non-profit organization. NWMA's purpose is to support and advance the mining-related interests of its approximately 2,300 members; to represent and inform its members on technical, legislative, and regulatory issues; to provide for the dissemination of educational material related to mining; and to foster and promote economic opportunity and environmentally responsible mining.

[1] The parties were notified ten days prior to the due date of this brief of NWMA's intention to file. NWMA has obtained the consent of the parties and has filed proof of their consent with this Court. *See* Supreme Court Rule 37.2(a). Pursuant to Supreme Court Rule 37.6, counsel for NWMA affirms that no counsel for a party authored this brief in whole or in part and that no party, person, or entity other than NWMA, its members, and counsel made a monetary contribution specifically for the preparation or submission of this brief.

Since its creation in 1895, NWMA has been actively involved in all issues that may affect mining operations in the United States. NWMA actively seeks to ensure that regulations affecting mining activities on federal lands are lawfully promulgated and implemented. Indeed, hundreds of NWMA members are actively engaged in programs designed to explore for, discover, and produce valuable mineral deposits on lands open to mineral location and entry. These members have invested millions of dollars to properly locate, maintain, and develop thousands of mining claims in the western United States. Accordingly, NWMA has a substantial interest in ensuring that, to the maximum extent possible, mineral prospecting, location, and development remain feasible on all federal lands. To this end, NWMA seeks to ensure that regulatory measures are not so burdensome or inconsistently interpreted by the courts as to prevent exploration and mine development.

The Ninth Circuit's decision in this case represents a departure from established law, and will for the first time subject miners to a level of regulatory scrutiny that will for all practical purposes halt their operations. Moreover, the decision represents such a vast departure from precedent that it is unclear what limit could exist that would safeguard private activities from being identified as agency actions and thus subject to federal regulation. Accordingly, NWMA respectfully submits this amicus curiae brief in support of Petitioners.



STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND.

A. The Mining Law.

The Mining Law, 30 U.S.C. § 22 *et seq*., provides: "[A]ll valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase. . . ." 30 U.S.C. § 22. Thus, the Mining Law is a unilateral offer that grants all persons a statutory right to enter upon federal lands for the purpose of exploring for and developing valuable mineral deposits. *Union Oil Co. of California v. Smith*, 249 U.S. 337, 346 (1919) ("[The Mining Law] extends an express invitation to all qualified persons to explore the lands of the United States for valuable mineral deposits. . . ."). In addition, a person who makes a "discovery" of a "valuable mineral deposit" and satisfies the procedures required for establishing the location of the claim becomes the owner of a constitutionally protected property interest. 30 U.S.C. §§ 22, 23, 26; *United States v. North Amer. Transp. & Trading Co*., 253 U.S. 330, 331-34 (1920) (the United States must pay just compensation when it occupies a mining claim).

The Organic Administration Act of 1897 ("Organic Act"), 16 U.S.C. § 473 *et seq*., opened National Forest lands to operation of the Mining Law. 16 U.S.C. § 478 ("Nor shall anything in [the Organic Act] 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."). Although prospectors and miners "must comply with the rules and regulations covering such national forests[,]" 16 U.S.C. § 478, the Forest Service lacks the authority to unreasonably restrict the rights granted under the Mining Law. *Shumway v. United States*, 199 F.3d 1093, 1106-07 (9th Cir. 1999); *Clouser v. Espy*, 42 F.3d 1522, 1529-30 (9th Cir. 1994); *United States v. Weiss*, 642 F.2d 296, 298-99 (9th Cir. 1981).

B. Forest Service Mining Regulations.

In 1974, the Forest Service first promulgated regulations concerning surface disturbances associated with mining on National Forest lands. These regulations strike a balance between environmental concerns and the statutory right to mine in National Forests. *See National Forests Surface Use Under U.S. Mining Laws*, 39 Fed. Reg. 31,317-21 (Aug. 28, 1974). Mining operations in National Forests must "be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest surface resources." 36 C.F.R. § 228.8 (2004).[2] Specifically,

[2] The relevant Forest Service regulations were amended in 2005; however, the challenged decisions in the instant case were made in 2004, therefore the courts and the parties have continued to rely on the 2004 version of the rules. Unless otherwise

(Continued on following page)

these regulations require that miners comply with applicable federal air and water quality standards and that miners implement "all practicable measures to maintain and protect fisheries and wildlife habitat which may be affected by the operations." 36 C.F.R. §§ 228.8(a), (b), (e).

The regulations also set forth a three-tier system under which mining operations are conducted. Under this system, mining operations are categorized as activities that "will not," "might," or "will likely" lead to "significant surface resource disturbance." 36 C.F.R. § 228.4(a). Miners may freely enter National Forests to conduct activities that "will not" significantly disturb surface resources, including "occasionally remov[ing] small mineral samples or specimens," and "remov[ing] . . . a reasonable amount of mineral deposit for analysis and study." *Id.* §§ 228.4(a)(1), (a)(2)(ii), (a)(2)(iii).

The Forest Service requires a NOI for mining activities that "might" or "will likely" cause "significant surface resource disturbance." *Id.* § 228.4(a). A NOI consists of the name, address, and telephone number of the operator; the area involved; the nature of the proposed operations; and the method of transport to be used. U.S. Forest Service, *Notice of Intent Instructions: 36 CFR 228.4(a) – Locatable Minerals,* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/

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indicated, all citations to the *Code of Federal Regulations* will be to the 2004 edition.

fsm9_020952.pdf (last visited September 26, 2012). The Forest Service has 15 days from receipt of a NOI to inform the operator whether a plan of operations is required. 36 C.F.R. § 228.4(a)(2)(iii). A plan of operations is required only if the proposed operations "will likely" result in significant surface resource disturbance. *Id.* § 228.4(a). If "significant disturbance is *not* likely," then a plan of operations is "*not required*." *Siskiyou Reg'l Educ. Project v. U.S. Forest Service*, 565 F.3d 545, 557 (9th Cir. 2009) (emphasis in original). When it requests a plan of operations, the Forest Service must conduct an environmental analysis and within 30 days either "approve the plan" or "[n]otify the operator of any changes in, or additions to, the plan of operations deemed necessary to meet the purpose of the" Forest Service's regulations. *Id.* §§ 228.4(f), 228.5(a)(1), (3).

C. The Endangered Species Act.

Section 7(a)(2) of the Endangered Species Act ("ESA") requires that federal agencies engage in consultation with the Fish and Wildlife Service and/or National Marine Fisheries Service to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species. . . ." 16 U.S.C.

§ 1536(a)(2). "Agency action" for ESA purposes is defined as:

> [A]ll 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.

50 C.F.R. § 402.02. Importantly, "agency action" includes only those "actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. Even if "agency action" is construed broadly, it does not encompass everything an agency does related to private activity. As the Ninth Circuit has recognized, "Congress specifically limited the application of Section 7(a)(2) to cases where the federal agency retained some measure of control over the private activity." *Sierra Club v. Babbitt*, 65 F.3d 1502, 1510 (9th Cir. 1995). Indeed, the "discrete burdens [of the ESA] properly fall on a private entity only to the extent the activity is dependent on federal authorization." *Id.* at 1512.

II. PROCEDURAL BACKGROUND.

On October 8, 2004, the Karuk Tribe of California ("Tribe") filed a complaint for declaratory and injunctive relief against the Forest Service. *Karuk Tribe of Cal. v. U.S. Forest Serv*. (*Karuk I*), 379 F.Supp.2d 1071, 1085 (N.D. Cal. 2005). The Tribe alleged, *inter alia*, that the Forest Service violated the ESA when it failed to consult with respect to four NOIs that were set to expire on December 31, 2004. *Id.* The miners who submitted the challenged NOIs intervened on the side of the Forest Service. *Id.*

In July 2005, the District Court rejected the Karuk's contention that the Forest Service's receipt and review of a NOI triggered the ESA's consultation requirement. *Id.* at 1100-03. On April 7, 2011, a divided panel of the Ninth Circuit affirmed the District Court's decision. *Karuk Tribe v. U.S. Forest Serv*. (*Karuk II*), 640 F.3d 979 (9th Cir. 2011). After granting the Tribe's petition for rehearing, a divided *en banc* panel held that the Forest Service's NOI process, even when it results in a determination that a plan of operations is not warranted, constitutes "agency action" under the ESA, and thus requires consultation under the ESA. *Karuk Tribe v. U.S. Forest Serv*. (*Karuk III*), 681 F.3d 1006, 1019-27 (2012). In so doing, the majority relied primarily on evidence in the record that Forest Service employees and the miners characterized the NOI process to be an "authorization" of mining operations. *Id.* at 1022.

Four judges of the *en banc* panel joined, in part, in a scathing dissent written by Milan D. Smith, Jr., who detailed the majority's departure from precedent in the instant case and then recounted the Ninth Circuit's broader pattern of disregarding the rule of law in environmental cases. *Id*. at 1031, 1035-41 (Smith, J., dissenting).

On August 28, 2012, the New 49'ers, Inc. and Raymond M. Koons, two of the mining claimants who intervened, filed a Petition for Writ of Certiorari in the U.S. Supreme Court.

SUMMARY OF ARGUMENT

The majority's decision in *Karuk III* represents a significant departure from what this Court has previously recognized as "discretionary agency action" sufficient to trigger consultation under the ESA. The majority failed to recognize the miners' statutory right to mine, and mistakenly relied on the subjective views of the parties in making its legal determination of whether the NOI process constitutes "agency action" for ESA purposes. To make matters worse, the majority's failure to follow this Court's precedent has the capacity to halt private activity on both federal and private lands if left unaddressed. Accordingly, this Court should grant the Petition in order to reinforce the legal boundary between private activity and "discretionary agency action."

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT THE PETITION BECAUSE THE MAJORITY FAILED TO RECOGNIZE THE MINERS' STATUTORY RIGHT TO MINE.

The majority in *Karuk III* presented only one aspect of the statutory and regulatory framework surrounding mining on National Forest Lands. The majority stated that the Organic Act "extended the Mining Law to the National Forest system but authorized the Secretary of Agriculture to regulate mining activities in the National Forests to protect the forest lands from destruction and depredation." *Karuk III*, 681 F.3d 1012 (citing 16 U.S.C. §§ 482, 551). Although the majority was correct in this recitation, it failed to take into consideration the miners' right, not privilege, to operate under the Mining Law.

This Court has previously held that a mining claim is "property in the fullest sense of the term":

> The rule is established by innumerable decisions of this Court, and of state and lower federal courts, that, when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner is taxable by the state; and is 'real property,' subject to the

> lien of a judgment recovered against the owner in a state or territorial court. The owner is not required to purchase the claim or secure patent from the United States; but, so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent.

Wilbur v. United States ex rel. Krushnic, 280 U.S. 306, 316-18 (1930) (internal citations omitted); *see also Forbes v. Gracey*, 94 U.S. 762, 767 (1876) (mining claims are subject to "bargain and sale, and constitute very largely the wealth of the Pacific coast States."). This Court has also recognized that the essential stick in the bundle of rights making up a mining claim is the right to mine. *Union Oil Co.*, 249 U.S. at 348-49 (An owner of a mining claim has "an exclusive right of possession to the extent of his claim as located, with the right to extract the minerals, even to exhaustion, without paying any royalty to the United States. . . ."); *Forbes*, 94 U.S. at 766-67 (the right to "develop and work the mines, is property in the miner, and property of great value."); *accord Shumway*, 199 F.3d at 1098-99 (The right of an owner of a mining claim to the "exclusive possession of the land for purposes of mining and to all the minerals he extracts, has been a powerful engine driving exploration and extraction of valuable minerals, and has been the law of the United States since 1866."). Similarly, Congress has repeatedly underscored the rights of miners under the Mining Law by ensuring that land management agencies, including the Forest

Service, protect the right to mine. 30 U.S.C. § 21a ("[I]t is the continuing policy of the Federal Government . . . to foster and encourage private enterprise in . . . the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries. . . .").

Most notably, although the Organic Act provides the basis for the Forest Service's regulatory authority, it limits that authority to ensure that the development of mineral resources is not curtailed. Specifically, the Organic Act:

> [M]akes clear that the Forest Service must act consistently with the federal policy of promoting mineral development. Section 1 of that Act precludes the Secretary of Agriculture from taking any action that would "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."

California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 598 (1987) (Powell, J., concurring in part and dissenting in part) (quoting 16 U.S.C. § 478). Moreover, as the District Court noted, "pursuant to the General Mining Law and 36 C.F.R. § 228, the Forest Service may not interfere with mining that is not likely to result in a significant disturbance of surface resources." *Karuk I,* 379 F.Supp.2d at 1093-94; *see also id.* at 1078 ("[The] [e]xercise of [the] right

[to mine] may not be unreasonably restricted.") (citing 39 Fed. Reg. at 31,317).

Here, the majority seemingly recognized the statutory right to mine, but paid it only lip-service by ruling the Forest Service's NOI process affirmatively authorizes mining. *Karuk III*, 681 F.3d at 1021-24. In so doing, the majority essentially rewrote the Mining Law by turning the statutory right to mine into a process where miners must ask for permission to mine. *See Karuk I*, 379 F. Supp. 2d at 1101 (The Mining Law "confers a statutory right upon miners to enter certain public lands for the purpose of mining and prospecting. This distinction is significant, as it differentiates mining operations from 'licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid,' which are permissive in nature."). As the dissent noted, miners, especially small miners, are not going to subject themselves to the "arduous interagency consultation process[.]" *Karuk III*, 681 F.3d at 1031 (Smith, J., dissenting). Thus, the majority has "effectively shut[ ] down the entire suction dredge mining industry in the states within [its] jurisdiction." *Id*. at 1039 (Smith, J., dissenting).

II. THIS COURT SHOULD GRANT THE PETITION BECAUSE THE MAJORITY RELIED ON THE SUBJECTIVE VIEWS OF THE PARTIES INSTEAD OF THE FOREST SERVICE'S INTERPRETATION OF ITS OWN REGULATIONS.

The majority characterized the Forest Service's decision not to require a plan of operations for the four NOIs at issue in this case as "approval" of the NOIs, and an "authorization" of the miners' operations. *Karuk III*, 681 F.3d at 1022. The Forest Service has never interpreted its own regulations in this manner, and the regulations themselves do not indicate that the NOI process constitutes approval or authorization to conduct mining operations. Under Forest Service regulations, a NOI is required only if the proposed operations "might cause disturbance of surface resources." 36 C.F.R. § 228.4(a). The Forest Service has fifteen days from the time a NOI is filed to notify an operator if "approval of a plan of operations is required before the operations may begin." *Id*. § 228.4(a)(2). The regulations do not speak to any Forest Service "approval" or "authorization" of operations under a NOI – in fact, the regulations do not require any further action by the Forest Service unless it determines a plan of operations is necessary. In contrast, plans of operations must be "approved" by the Forest Service. *Id*. § 228.4(a)(4).

In fact, the Forest Service views the NOI process as an information-gathering tool, used only to determine whether the Forest Service is compelled to

require a plan of operations.[3] This understanding of the NOI regulations was recently addressed by the Forest Service in response to comments during its 2005 rulemaking:

> [T]he requirement for prior submission of a notice of intent to operate alerts the Forest Service that an operator proposes to conduct mining operations on NFS lands which the operator believes might, but are not likely to, cause significant disturbance of NFS surface resources and gives the Forest Service the opportunity to determine whether the agency agrees with that assessment *such that the Forest Service will not exercise its discretion to regulate those operations*.

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) (emphasis added). Importantly, the Forest Service also recognized the overwhelming burden that would be placed on small-scale miners if the NOI process was

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[3] The Forest Service adopted the NOI process in response to a suggestion from the House Committee on Interior and Insular Affairs, Subcommittee on Public Lands, "which recommended that the [Forest Service] use a notice procedure in order to avoid the unreasonable restrictions on small-scale mining rights, and the unnecessary burdens on federal agencies, that are associated with the costs of preparing and submitting detailed Plans for operations that do not need them." *Karuk II*, 640 F.3d at 994 (citing 39 Fed. Reg. at 31,317).

considered a regulatory approval process and expressly stated that this was not its intent:

> This record makes it clear that a notice of intent to operate was not intended to be a regulatory instrument; it simply was meant to be a notice given to the Forest Service by an operator which describes the operator's plan to conduct operations on NFS lands.

Id. at 32,728.[4]

The Forest Service's interpretation of its own regulations are entitled to deference "unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotations marks omitted). Instead of relying on the Forest Service's official interpretation of its regulations, however, the majority focused on correspondence exchanged between Forest Service employees and the miners, which mentioned the words "authorization" and "approval." *Karuk III*, 681 F.3d at 1021-22. The words used by Forest Service employees and the

[4] Indeed, since the Forest Service first developed its regulations in 1974, it has never interpreted a NOI to be a regulatory instrument, as evidenced by the agency's inspection and noncompliance regulations. *See* 36 C.F.R. § 228.7 (requiring only general compliance with the regulations and any "approved plan of operations."). Similarly, the criminal regulations that the Forest Service relies upon to enforce its locatable mineral regulations prohibit and make punishable activities conducted "without a special use authorization, contract, or approved operating plan." 36 C.F.R. § 261.10(a), (b). Noticeably absent is mention of an "approved NOI" because no such instrument exists.

miners cannot rewrite the Forest Service regulations. As this Court has recognized, it is not bound to decide matters of law "based on a concession by the particular party before the Court as to the proper legal characterization of the facts." *Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n,* 518 U.S. 604, 622 (1996) (citing *United States Nat'l Bank of Oregon v. Indep. Ins. Agents of America, Inc.,* 508 U.S. 439, 447, (1993)); *Massachusetts v. United States,* 333 U.S. 611, 623-28 (1948). Moreover, the Ninth Circuit has specifically rejected the idea that the subjective views of the parties can control whether consultation under Section 7(a)(2) is required. *See Karuk III*, 681 F.3d at 1037-38 (Smith, J., dissenting) (citing *Sierra Club*, 65 F.3d at 1511). Indeed, if subjective views could control application of the ESA, an ill-informed Forest Service employee could *sua sponte* subject NOIs to consultation, while miners in another part of the same National Forest would not have to suffer through the consultation process. As the dissent noted, "[i]t goes without saying that this result makes little, if any, sense. . . ." *Karuk III*, 681 F.2d at 1038 (Smith, J., dissenting).

III. THIS COURT SHOULD GRANT THE PETITION BECAUSE THE MAJORITY'S DECISION CONFLICTS WITH THIS COURT'S INTERPRETATION OF "DISCRETIONARY AGENCY ACTION" AND EXPANDS THE DEFINITION OF "AGENCY ACTION" TO INCLUDE AGENCY INACTION.

Regulations concerning consultation were crafted to relieve the tension between an overbroad reading of the ESA and agencies' ability to carry out their statutory purposes and duties with some measure of efficiency. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661-62 (2007) ("*Home Builders*"). Accordingly, "agency action" is defined as action "authorized, funded, or carried out" by a federal agency. 50 C.F.R. § 402.02. Examples of agency action include: "(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." *Id.* The regulations further narrow the definition of "agency action" for consultation purposes to mean "all actions in which there is *discretionary* Federal involvement or control." 50 C.F.R. § 402.03 (emphasis added).

A. Under *Home Builders*, The Forest Service Does Not Have The Requisite Discretion During The NOI Process To Trigger Section 7 Consultation.

This Court has directly addressed the issue of what constitutes "discretionary agency action" for purposes of the ESA. In *Home Builders*, this Court held that federal agencies may exercise judgment without committing a "discretionary agency action." 551 U.S. at 668. In that case, plaintiffs challenged the Environmental Protection Agency's ("EPA") decision to transfer its permitting powers under the Clean Water Act ("CWA") to the State of Arizona. *Id*. at 653-657. Under the CWA, once a State meets a set of criteria, transfer of the permitting process to the State is mandatory. *Id*. at 661-62. Plaintiffs claimed that the process was "not entirely mechanical"; that it involves some exercise of judgment as to whether a State has met the criteria set forth in Section 402(b) of the CWA; and that these criteria incorporate references to wildlife conservation that brings consideration of Section 7(a)(2)'s no-jeopardy mandate properly within the agency's discretion. *Id*. at 671. This Court disagreed and held that the agency's use of judgment in applying the statute to the information provided by the State did not constitute discretionary agency action under 50 C.F.R. § 402.03. *Id*. at 671-73.

Similarly, this Court recognized that "an agency cannot be the legal 'cause' of an action that it has no statutory discretion *not* to take." *Id.* at 667 (emphasis

in original) (citing *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004)). Relying on its decision in *Public Citizen*, this Court discussed at length in *Home Builders* the essential link between an agency's "ability to prevent a certain effect" and its duty to address the cause of that effect under the ESA. *Id.* This Court noted that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Id.* Here, the majority disregarded the Forest Service's limited regulatory authority, and in doing so ran afoul of this Court's decision in *Home Builders*.

Even worse, the majority bypassed any consideration of what constitutes "discretionary agency action," and instead focused solely on the meaning of "agency action." The majority relied on the Ninth Circuit's recent decision in *Siskiyou* to hold that the NOI process constitutes agency action because: "[i]n *Siskiyou* . . . we held that the Forest Service's approval of a NOI to conduct suction dredge mining constitutes 'final agency action' under the APA." *Karuk III*, 681 F.3d at 1023. First, the majority misstated the holding in *Siskiyou*, which did not describe the Forest Service's decision not to require a plan of operations as "approval" of an NOI. *See Siskiyou*, 565 F.3d at 553-57. Second, the majority's reliance on *Siskiyou* is questionable given the lack of attention to the issue given by the panel in *Siskiyou*. *Id.* at 553-54. Finally, the majority failed to recognize that the standards for "final agency action" under the APA and

"discretionary agency action" under the ESA are entirely separate. *Compare Bennett v. Spear*, 520 U.S. 154, 177-78 (1999) *with Home Builders*, 551 U.S. at 667-70. In short, the majority was comparing apples to oranges.

B. The Majority Has Expanded The Definition Of Agency Action To Include Agency Inaction.

As the dissent noted, the majority's decision marks the first time the Ninth Circuit has held "that an agency's decision *not to act* forces it into a bureaucratic morass." *Karuk III*, 681 F.3d at 1031 (Smith, J., dissenting). Before *Karuk III*, the Ninth Circuit had taken the reasonable position that an agency must take affirmative steps to allow private conduct to take place before it can be said to have taken "agency action." *Id.* at 1035-36 (citing *Turtle Island Restoration Network v. National Marine Fisheries Service*, 340 F.3d 969 (9th Cir. 2003)); *Marbled Murrelet v. Babbitt,* 83 F.3d 1068, 1070 (9th Cir. 1996) ("Protection 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 simply because it advised or consulted with a private party.").

Perhaps most informative for purposes of the instant case is the Ninth Circuit's decision in *Western Watersheds Project v. Matejko,* 468 F.3d 1099 (9th Cir. 2006). The issue in that case was whether the Bureau

of Land Management's ("BLM") decision not to regulate the use of rights-of-ways acquired under Section 9 of the Lode Law of 1866 (14 Stat. 251-53) was "agency action" for ESA purposes.[5] *Id*. at 1107-10. Because the rights-of-ways and the use thereof were granted by Congress (much like the rights granted under the Mining Law) the Ninth Circuit held that the BLM had taken no "affirmative action" that could trigger ESA consultation:

> [T]he BLM did not *fund* the diversions, it did not *issue* permits, it did not *grant* contracts, it did not *build* dams, nor did it *divert* streams. Rather, private holders of the vested rights diverted the water, beginning a long time ago. The BLM did not affirmatively act and was "not an entity responsible for [the challenged] decisionmaking."

Id. at 1109 (emphasis in original) (quoting *Defenders of Wildlife*, 420 F.3d at 968 (citing *Washington Toxics Coal. v. Envtl. Prot. Agency*, 413 F.3d 1024, 1033 (9th Cir. 2005))). *A fortiori*, the exercise of rights granted under the Mining Law that are not likely to result in significant surface resource disturbance cannot trigger Section 7 consultation requirements.

The majority's decision was also a departure from Ninth Circuit precedent addressing notice-level

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[5] The Lode Law was one of the predecessors to the Mining Law. *High Country Citizens Alliance v. Clarke*, 454 F.3d 1177, 1183 (10th Cir. 2006).

mining on BLM lands. In *Sierra Club v. Penfold*, 857 F.2d 1307, 1313-14 (9th Cir. 1988), the plaintiffs argued that the notice-level mining operations governed by BLM regulations were major federal actions triggering NEPA compliance. The Ninth Circuit rejected this argument because BLM did not "approve" notice-level operations due to the statutory right to mine and BLM's regulations. *Id.* Thus, the Ninth Circuit held that notice-level mining operations were not major federal actions under NEPA. *Id.* Although the instant case turns on the definition of agency action under the ESA, not major Federal action under NEPA, the Ninth Circuit has held that the "standards for 'major federal action' under NEPA and 'agency action' under the ESA are much the same." *Marbled Murrelet*, 83 F.3d at 1075.

As the foregoing demonstrates, the majority's decision conflicts with this Court's decision in *Home Builders* and, for the first time, impermissibly expands the definition of agency action for purposes of the ESA's consultation requirement to include agency inaction. The Petition should be granted to correct the egregious error made by the majority.

IV. THE MAJORITY'S UNPRECEDENTED EXPANSION OF WHAT CONSTITUTES "AGENCY ACTION" WILL HAVE EXTREME REPERCUSSIONS IF LEFT UNADDRESSED.

The practical impact of the decision in *Karuk III* is difficult to overstate. Subjecting small miners on

National Forests in the Ninth Circuit to the bureaucratic labyrinth of ESA consultation will not further the protection of listed species, nor will it ensure the preservation of their habitat.[6] Instead, as the dissent aptly pointed out, "[m]ost miners affected by this decision will have neither the resources nor the patience to pursue a consultation with the EPA; they will simply give up, and curse the Ninth Circuit." *Karuk III*, 681 F.3d at 1039 (Smith, J., dissenting).

The greatest concern of course, is that the majority's decision will not only subject miners on National Forests in the Ninth Circuit to a level of government intervention that will stall their operations, but that the ruling could be applied to mining operations on all federal lands. It is only a matter of time until an attempt is made to apply the majority's decision to National Forests outside of the Ninth Circuit. After that, the next logical step would be to apply the majority's decision to BLM lands. *See* 45 Fed. Reg. 78,902, 78,906 (Nov. 26, 1980) (indicating the BLM surface mining regulations are patterned after the

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[6] Individuals subjected to Section 7 consultations generally face "a seemingly bottomless bureaucratic morass, taking up to a year to complete." J. Root, *Limiting the Scope of Reinitiation: Reforming Section 7 of the Endangered Species Act*, 10 Geo. Mason L. Rev. 1035, 1036 (2002); *see also*, *Karuk III*, 681 F.3d at 1039 (Smith, J., dissenting) (noting that "nearly 40 percent of U.S. Fish and Wildlife Service ESA consultations were untimely, with some taking two or three years." (citing Government Accountability Office, *More Federal Management Attention is Needed to Improve the Consultation Process* (March 2004))).

Forest Service's regulations); *see also* 43 C.F.R. Subpart 3809 (classifying mining operations into three categories: casual use, notice-level operations, and plan-level operations). In short, the majority's decision has the potential to wipe the Mining Law off the books.

The majority's decision also has the ability to threaten non-mining related activities, including private activities on private lands. For example, the Forest Service's NOI process is very similar to one used by the EPA to evaluate stormwater discharges from construction activities on both private and federal lands under the Clean Water Act. *See* 68 Fed. Reg. 39,087 (July 1, 2003); 33 U.S.C. § 1342 (requiring a permit for any discharge of pollutants into navigable waters of the United States). The EPA adopted specific procedures and measures to mitigate impacts on water quality from various categories of construction activity and then issued a General Permit, pursuant to which any individual project could proceed so long as the developer first submitted a NOI to the EPA. *See* 33 U.S.C. § 1342(p)(5).

The EPA's process was challenged in *Texas Indep. Producers and Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 968-69 (7th Cir. 2005), wherein an environmental group argued that EPA was required to consult each time it received a NOI for proposed construction activities. The Seventh Circuit held that no federal action occurred when a NOI is submitted to EPA. *Id.* at 979. Specifically, the Seventh Circuit ruled that the "action" in question was the creation and filing of a

NOI (and its attendant compliance plan), and private actors, not the federal agency, created and filed those documents. Therefore, no consultation was required. *Id*.

Now that the majority has deemed an agency's inaction to be "agency action" for ESA purposes, it is unclear whether any limit, such as that set by the Seventh Circuit, could exist that would safeguard private activities from being identified as agency actions. And, of course, the disturbing and broader trend in Ninth Circuit jurisprudence does little to assuage concerns that the majority's decision could prove to be a barrier to most private activity. As noted by the dissent,

> No legislature or regulatory agency would enact sweeping rules that create such economic chaos, shutter entire industries, and cause thousands of people to lose their jobs. That is because the legislative and executive branches are directly accountable to the people through elections, and its members know they would be removed swiftly from office were they to enact such rules. In contrast, in order to preserve the vitally important principle of judicial independence, we are not politically accountable. However, because of our lack of public accountability, our job is constitutionally confined to interpreting laws, not creating them out of whole cloth. Unfortunately, I believe the record is clear that our court has strayed with lamentable frequency from its constitutionally limited role

> . . . when it comes to construing environmental law. When we do so, I fear that we undermine public support for the independence of the judiciary, and cause many to despair of the promise of the rule of law.

Karuk III, 681 F.3d at 1041 (Smith, J., dissenting). This Court's review is necessary to avoid the kind of bureaucratic nightmare described by the dissent and to enforce the rule of law and impose some semblance of accountability on the Ninth Circuit.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

Respectfully submitted,

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