12-289

No. 12-

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

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PETITION FOR WRIT OF *CERTIORARI*

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Questions Presented for Review

The Endangered Species Act requires consultation to ensure that federal "agency action" does not exterminate listed species. 16 U.S.C. § 1536(a)(2). The questions presented by this petition are:

1. Whether a federal official's receipt and review of notice of private action, his exercise of discretion as to whether to invoke agency regulatory powers over such private action, and his decision *not* to invoke such powers, constitute "agency action" for purposes of § 7(a)(2) of the Endangered Species Act.

2. Whether the federal courts lack jurisdiction over the action in light of changed circumstances.

Parties to the Proceeding and Rule 29.6 Statement

The parties to the proceeding are Karuk Tribe of California, appellant below and respondent here; United States Forest Service and Margaret Boland, Forest Supervisor, Klamath National Forest, appellees below and respondents here; and The New 49'ers, Inc. and Raymond M. Koons, intervenor-appellees below and petitioners here. There are no parent or publicly-held corporations involved in this proceeding.

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Opinions Below

The June 1, 2012 *en banc* opinion of the Ninth Circuit that is the subject of this petition is reported at 681 F.3d 1006 (9th Cir. 2012), and reproduced in the Appendix hereto ("App.") at pages 1-76. The Ninth Circuit's initial panel opinion was published at 640 F.3d 979 (9th Cir. 2011), and is reproduced in the Appendix at pages 77-150. The Ninth Circuit's order granting the Karuk Tribe of California's (hereafter the "Tribe") petition for rehearing *en banc* is reported at 658 F.3d 953 (9th Cir. 2011), and is reproduced in the Appendix at page 151; a further unpublished order requesting supplemental briefing on mootness was issued December 20, 2011 and is reproduced in the Appendix at pages 152-153.

The district court's order denying the Tribe's motion for summary judgment is reported at 379 F. Supp.2d 1071 (N.D. Cal. 2005) and is reproduced in the Appendix at pages 154-222. The district entered final judgment in favor of the Federal defendants on July 11, 2005, reproduced in the Appendix at page 223, and a later unreported opinion concerning fees was issued January 30, 2006 and is reproduced in the Appendix at pages 224-231.

Basis for Jurisdiction in this Court

The Ninth Circuit initially filed the opinion and judgment that is the subject of this petition on June 1, 2012. 28 U.S.C. § 1241(1) confers jurisdiction on this Court to review that opinion and judgment of the Ninth Circuit.

Statutory and Regulatory Provisions at Issue

The particular "action" here involved is small-scale mining conducted on mining claims created under the 1872 Mining Act as amended, 30 U.S.C. § 22, and the primary question arising in this petition relates to certain Forest Service regulations concerning such mining created under the authority of the Organic Act of 1897, 16 U.S.C. § 551, and set forth at 36 C.F.R. § 228.4:

> (a) Except as provided in paragraph (a)(2) of this section, a notice of intention to operate is required from any person proposing to conduct operations which might cause disturbance of surface resources.[1] Such notice of intention shall be submitted to the District Ranger having jurisdiction over the area in which the operations will be conducted. If the District Ranger determines that such operations will likely cause significant disturbance of surface resources, the operator shall submit a proposed plan of operations to the District Ranger.

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[1] We quote the 2004 regulations which apply to the challenged conduct (*see* App. 7); this particular sentence was subsequently amended to state that a notice is required for operations which might cause *significant* disturbance of surface resources, but the "parties agree that the 2005 revisions do not materially affect the issues on appeal" (*id.*).

(1) The requirements to submit a plan of operations shall not apply:

(i) To operations which will be limited to the use of vehicles on existing public roads or roads used and maintained for National Forest purposes,

(ii) To individuals desiring to search for and occasionally remove small mineral samples or specimens,

(iii) To prospecting and sampling which will not cause significant surface resource disturbance and will not involve removal of more than a reasonable amount of mineral deposit for analysis and study,

(iv) To marking and monumenting a mining claim and

(v) To subsurface operations which will not cause significant surface resource disturbance.

(2) A notice of intent need not be filed:

(i) Where a plan of operations is submitted for approval in lieu thereof,

> (ii) For operations excepted in paragraph (a)(1) of this section from the requirement to file a plan of operations,
>
> (iii) For operations which will not involve the use of mechanized earthmoving equipment such as bulldozers or backhoes and will not involve the cutting of trees.
>
> Each notice of intent to operate shall provide 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. If a notice of intent is filed, the District Ranger will, within 15 days of receipt thereof, notify the operator whether a plan of operations is required.

The underlying action was brought by the Tribe to enforce the interagency consultation provisions of the Endangered Species Act (ESA), 16 U.S.C. § 1536(a)(2)-(3), which provide:

> "(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") 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 which is determined by the Secretary, after consultation as appropriate with affected States, to be critical . . ."
>
> "(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species."

The issues raised in this petition and addressed by the Ninth Circuit concern provisions of 50 C.F.R. § 402.02, including the definition of "action":

> *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.

Statement of the Case

The District Court proceeded to review Forest Service conduct pursuant to jurisdiction arising under the citizen suit provision of the Endangered Species Act, 16 U.S.C. § 1540(g). The case concerns the relationship between the exercise of private rights created under federal mining law, review and regulation of such activity by the U.S. Forest Service, and the potential application of the Endangered Species Act in connection with the Forest Service's review. The specific facts concerning the nature of the mining are not particularly pertinent to the question presented.

A. Private Rights under Federal Mining Law and the Regulation of Mining Thereunder

The 1872 Mining Act declares:

. . . all 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, by citizens of the United States . . .

30 U.S.C. § 22 (emphasis added). Until 1955, Congress even granted miners such as petitioners the exclusive right of possession of their mining claims:

> The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain . . . so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations.

30 U.S.C. § 26; *see also* 30 U.S.C. § 35 (same rules for placer claims).

Congress determined to promote the mineral development of the United States by granting mining claims on federal land, including national forest lands, which this Court has described as private "property in the fullest sense of the word". *Bradford v. Morrison*, 212 U.S. 389, 395 (1909). Use of private property is necessary to fulfill the "continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in . . . the development of economically sound and stable

domestic mining, minerals, metal and mineral reclamation industries". 30 U.S.C. § 21a.

In 1955, Congress passed the Multiple Use Act, which provides, in pertinent part, that

> Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: *Provided, however, That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto . . .*

30 U.S.C. § 612(b) (emphasis added). As the legislative history of Multiple Use Act makes clear,

the statute was intended to assure that "[d]ominant and primary use of the locations hereafter made, as in the past, would be vested first in the locator". *See generally United States v. Curtis-Nevada Mines, Inc.,* 611 F.2d 1277, 1281 (9th Cir. 1980) (quoting legislative history). Consistent with this Act, the regulations provide that mining operations should be conducted "so as, *where feasible,* to minimize adverse environmental impacts . . .". 36 C.F.R. § 228.8 (emphasis added).

These statutes establish that, unlike all other activities conducted in the National Forests, mining activity proceeds by statutory authorization as the exercise of federally-created property rights, and that the Forest Service's regulations concerning the exercise of such property rights cannot "endanger or materially interfere" with mining.

This substantive restriction on Forest Service authority is also deeply embedded in the structure of the Organic Administration Act of 1897, from which the Service's regulatory authority derives. *See generally* 16 U.S.C. §§ 551 (limited authority to prevent "depredations upon the public forests") & 478 (explaining that § 551 shall not prohibit development of mineral resources); *see also id.* §§ 472 (limiting Service authority over laws affecting mining), 475 (purpose to exclude mineral lands from forest purview) & 482 (same).

Pursuant to the Organic Act authority, the Service has enacted regulations which categorize mining activities three ways:

First, there are small-scale activities, such as activities that do not "involve the use of mechanized earth moving equipment such as bulldozers or backhoes". 36 C.F.R. § 228.4(a)(1)(vi). These activities may proceed without any notice to the Forest Service. *Id.* § 228.4(a)(1). The suction dredge equipment here is not of bulldozer scale, but the miners involved voluntarily determined to provide notice given that the mining claims were already located and filed. However, in other circumstances, suction dredges are used to prospect for valuable mineral deposits, and it is not consistent with fostering mineral exploration or good business practices to require prospectors to make their prospecting plans a matter of public record before a valuable discovery is located.

Second, where a miner reasonably determines that his activities may cause a significant adverse impact on surface resources, he must provide a "notice of intent" to the Service, and the local district ranger is to make a determination within fifteen days as to whether the activities described in the notice are "likely to cause significant disturbance of surface resources" or not. 36 C.F.R. § 228.4(a). Miners have never understood the regulations to make the initiation or continuation of such mining conditional on Forest Service approval. The regulation merely states that "[i]f a notice of intent is filed, the District Ranger will, within 15 days of receipt thereof, notify the operator whether a plan of operations is required". 36 C.F.R. § 228.4(a)(2).

Third, where the ranger makes a determination of significant impact to surface resources, a "plan of operations" is required. *Id.* § 228.4(a)(4). This is the highest level of scrutiny, which requires full environmental analysis. *Id.* § 228.4(f).

Congress directly intervened in the development of the Forest Service's mining regulations to prevent any requirement that small-scale mining activities be approved in advance, properly recognizing that such restrictions would seriously interfere with mineral development.

The Service had initially promulgated the Part 228 (then Part 252) Organic Act regulations as a proposed rule in 1973. 38 Fed. Reg. 34,817 (Dec. 19, 1973). The initial rules provoked a Congressional oversight hearing during which members of Congress made clear their opposition to Service mining regulations which would entangle small-scale miners in environmental regulation. *See generally* Proposed Forest Service Mining Regulations: Hearings before the Subcommittee on Public Lands, House Committee on Interior and Insular Affairs, 93rd Cong., 2d Sess. 1-4 (Mar. 7-8, 1974). Testimony before the Subcommittee confirmed that even back in 1974, under a "plan of operation" approach, it would often be impossible to comply with environmental processes consistent with the "length of the field season" (*id.* at 37); the industry noted, however, "no objection to a notification procedure which would alert the Forest Service to the expected activities" (*id.* at 41).

During the hearings, the Service initially defended the position that each and every mineral operation would require an approved plan of operations. *See id.* at 10 (Testimony of Chief); *see also* proposed 36 C.F.R. § 252.7, 38 Fed. Reg. at 34,818 (with certain exceptions, "[n]o operations shall be conducted unless they are in accordance with an approved plan of operations . . ."). Thereafter, the Service conformed to Congressional intent and amended the proposed regulations to add a "notice of intent provision" which would suffice for less significant operations. 39 Fed. Reg. 26,038, 26,039 (July 16, 1974) (proposed 36 C.F.R. § 252.4). The final rule was adopted August 28, 1974. 39 Fed. Reg. 31,317 (Aug. 28, 1974).[2]

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[2] The Forest Service conducted an EIS in connection with the adoption of these regulations in which the Forest Service specifically rejected the alternative of requiring a plan of operation for all mining activities not only because of "undue hardships on the operator", but also because it would "require additional qualified personnel in the Forest Service to implement and administer these regulations", and result in "a reduced rate of exploration and discovery of mineral deposits with attendant shortages of some minerals and increased costs to society". (Miners' Excerpts of Record (MER), filed November 17, 2009, at 11) The District Court rejected the Miners' attempt to supplement the administrative record with this EIS based on Defendants' representation that the EIS was not considered in connection with the decisions at issue (App. 192), a holding upheld *sub silentio* by the Ninth Circuit, but the document remains important as historical evidence, akin to legislative history, demonstrating the importance of the notice of intent procedure in implementing federal mining policy.

Before the District Court, petitioners sought to introduce *The Process Predicament*, a Forest Service report noting that actions such as developing a plan of operations would "involve as many as 800 individual activities and more than 100 process interaction points", be "fragile and prone to failure", and require "extensive" "time and costs".[3] (*Process Predicament* at 14.) Excessive procedure has, in fact, caused "a land health crisis of tremendous proportions". (*Id.* at 7.) The district court struck the report from the record as "entirely irrelevant" (App. 192), though its conclusions are generally shared by Chief Judge Kozinski and Judge Smith (App. 70-76), the Ninth Circuit did not address petitioners' attempts to include the document in the record.

B. The Suction Dredge Mining Challenged by the Tribe

Until the State of California outlawed the practice of suction dredge mining, this case was all about suction dredge mining. (*See* App. 170-175 (District Court reviews specific 2004 notices of intent in detail).). The practice involves floating a small gasoline-powered engine with a suction pump, while the miner works underwater digging *by hand* and vacuuming up gold-bearing stream gravels. The dredged material is run over a simple sluice, the gold

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[3] The Process Predicament: how Statutory, Regulatory and Administrative Factors Affect National Forest Management (U.S. Forest Service June 2002) (available at http://www.fs.fed.us/projects/documents/Process-Predicament.pdf).

falls out, and the balance of the dredged material falls back into the stream.

Until recently, the activity proceeded under a state permitting regime forbidding dredging when salmon eggs were in the gravel. As the responsible Forest Service Officials observed, "[t]here are at least 3 S[t]ate of California, Department of Fish and Game Environmental Impact Reports (EIRs) that tie to the dredge permit and indicate that there is no significant disturbance if permit regulations are followed". (Miners' Excerpts of Record (MER), filed November 17, 2009, at 11.)

It should be noted that during the great California gold rush, and for decades thereafter, gold miners washed entire hillsides into California rivers and streams (*see* App. 3-4), while salmon runs continued at record levels. It was not until fishermen developed the technology to catch each and every fish everywhere that anadromous species were ever threatened. A single fisherman pulling in a single fish manifestly "affects the listed species" more than all of the suction dredge mining ever conducted in the Klamath River.[4]

By the time the Ninth Circuit heard this case *en banc*, the suction dredging was under a

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[4] The Ninth Circuit refuses, in substance, effectively to apply the ESA to salmon fishing. *Pacific Northwest Generating Cooperative v. Brown*, 38 F.3d 1058, 1068 (9th Cir. 1994) ("Impossibility in our view is sufficient answer. It was not the intention of the statute to ban all salmon fishing . . .").

"temporary moratorium" that was scheduled to end in 2016 (*see* App. 22). The Ninth Circuit then characterized the case as concerning "other mining operations occurring in and along the Klamath River and its tributaries", which "could impact the Tribe's ability to enjoy the spiritual, religious, sustenance, recreational, wildlife, and aesthetic qualities of the areas affected by the mining operations". (*Id.* App. 22 (quoting District Court; emphasis deleted).) These activities disturb riparian areas *out of the water* with hand tools or hand-operated equipment. There was, in substance, no record before the Ninth Circuit concerning the environmental impacts of these other mining practices on listed species.[5]

Shortly after the Ninth Circuit's June 1, 2012 opinion, on July 27, 2012, the California Legislative Assembly made the temporary moratorium permanent. California Fish and Game Code § 5653.1 (App. 232-234). The opinion below could not address this subsequent change in law.

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[5] The District Court struck the Tribe's own testimony concerning such activities as having "no relevance to this litigation" (App.186); the Ninth Circuit did not review this decision, and premised its holding that mining activities "may affect" listed fish by reference to the now-banned practice of suction dredge mining. (App. 45-47).

C. The Endangered Species Act's Restrictions upon Federal Agency Action

The Endangered Species Act is involved in this case because the National Marine Fisheries Service determined to list the southernmost populations, out of thousands of non-endangered populations of coho salmon, under the Act. *See* 62 Fed. Reg. 24,588 (May 6, 1997). Following the coho listing, the Forest Service completed an ESA biological assessment on May 20, 1997, concluding that the Forest Service's "issuance of Plans of Operation associated with suction dredging may affect but is not likely to adversely affect anadromous fish species or their habitat". (MER16.)

Thereafter, on July 31, 1997, the National Marine Fisheries Service issued an opinion that "the effects of permitting suction dredging within the KNF [Klamath National Forest], taken together with cumulative effects and the effects of the environmental baseline, are not likely to jeopardize the continued existence of [SONC coho salmon]. (MER17.) Thus, on a programmatic basis, the practice of suction dredging in the Klamath National Forest, whether proceeding in association with "plans of operation" or "notices of intent" (*see* MER13), was determined in formal consultations to have no discernible adverse impact on endangered salmon, consistent with all available scientific information. However, so-called critical habitat for coho salmon was designated in 1999,

64 Fed. Reg. 24,049 (May 5, 1999),[6] and no further consultations were conducted; until recently, the practice of small-scale suction dredging was widely recognized to have no significant adverse impacts whatsoever.

Congress also asked the National Research Council to reassess the adequacy of the regulatory framework for small-scale mining activities, and its Committee reported back that "BLM and the Forest Service are appropriately regulating these small suction dredge mining operations under current regulations as casual use or causing no significant impact, respectively". NRC, *Hardrock Mining on Federal Lands* 96 (Nat'l Academy Press 1999).

D. Procedural History

The controversy arose primarily because local district rangers in the Klamath National Forest exercised initiative to attempt to mollify the Karuk Tribe's objections to mining though a negotiated resolution among user groups, which culminated in a

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[6] Critical habitat included "the adjacent riparian area . . . defined as the area adjacent to a stream that provides the following functions: shade, sediment, nutrient or chemical regulation, streambank stability, and input of large woody debris or organic matter". *Id.* at 24,055. The District Court did not permit any record to be developed on small-scale mining activities in such areas, given the focus on suction dredge mining in the water (*see* App.186).

solution on which all parties shook hands.[7] Thereafter the Tribe faithlessly breached its agreement and lent its name to multiple environmental activists purportedly suing on its behalf, an effort they have publicly asserted is being conducted at their own expense.

This particular case was initiated on October 4, 2004. The District Court easily resolved the ESA claim in the case by noting that the Tribe's position was contrary to and "would essentially eviscerate any meaningful distinction between the [notice of intent] and [plan of operation] processes whatsoever." (App. 221.)

Before the Ninth Circuit, the case was stayed for some time because other issues, not arising under the Endangered Species Act, were being resolved in an unrelated case, *Siskiyou Regional Education Project, v. U.S. Forest Service*, 565 F.3d 545 (9th Cir. 2009). The Ninth Circuit's initial opinion, issued April 7, 2011, concluded that the Forest Service's "limited and internal review of an NOI for the purpose of confirming that the miner does not need to submit a Plan for approval (because the activities are unlikely to cause any significant disturbance of

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[7] The saga of these negotiations was presented to the District Court in a twenty-page Declaration from the President of Petitioner The New 49ers, Inc. Petitioners asked the District Court to supplement the record with this Declaration, but the District Court refused (App. 190-191; *cf. id.* at 170-174 (incomplete and abbreviated version of events)), and the Ninth Circuit upheld the refusal *sub silentio*.

the forest or river) is an agency decision not to regulate legal private conduct". App. 111.

By order issued September 12, 2011, the Ninth Circuit granted the Tribe's petition for rehearing *en banc*. Following further briefing on the question of mootness and a flurry of motions, the *en banc* decision issued on June 1, 2012. App. 1-75. Four judges dissented, stating that the majority "now flouts crystal-clear and common sense precedent, and for the first time holds that an agency's decision *not to act* forces it into a bureaucratic morass". App. 50.

Reasons Why Certiorari Is Warranted

I. REVIEW IS WARRANTED BECAUSE THE SCOPE OF FEDERAL OBLIGATIONS TO ENGAGE IN INTERAGENCY CONSULTATIONS UNDER THE ENDANGERED SPECIES ACT CONCERNING PRIVATE ACTIVITY SHOULD BE SETTLED BY THIS COURT.

Very substantial, and sometimes majority, portions of the Western states are held by the federal government, and the Region's prosperity depends upon the ability of private enterprise to operate on such lands. At the same time, federal agencies demand to know what private operators are doing on federal land, and exercise potential regulatory authority over such operators.

Forty years of implementation of the Endangered Species Act by the United States Court of Appeals for the Ninth Circuit has destroyed the

clear distinction between actions by private enterprise and public agency action Congress built into the Act, and entangled private operators in cumbersome interagency consultation procedures not related, as a practical matter, to preventing any appreciable risk to listed species. While this Court finally intervened in 1997 to at least give private entities standing to sue concerning the application of such procedures,[8] this Court has never addressed the questions whether and to what extent private action may be treated as "agency action" for purposes of the Act, and the opinion below threatens to turn each and every private action over which a federal agency may potentially exercise regulatory jurisdiction into "agency action".

The Ninth Circuit's decision is contrary to a long line of this Court's cases, and those of other circuits, concerning (i) proper interpretation of § 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2); (ii) deference to agency interpretations of law; and (iii) the reviewability of decisions not to take enforcement action.

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[8] *Bennett v. Spear*, 520 U.S. 154 (1997).

A. The Ninth Circuit's Conclusion that Ranger Review of Notices of Private Activity Constitutes "Agency Action" "Authorizing" Mining is Contrary to the Endangered Species Act and the Relevant Regulations.

The question of what constitutes "agency action" for purposes of § 7, as opposed to the private actions taken by "any person subject to the jurisdiction of the United States" for purposes of the prohibitions of § 9 (and permitting under § 10) is of vital importance to the proper implementation and enforcement of the ESA. Congress spelled out with painstaking care that "agency action," in the context of activities actually conducted by private individuals, only occurs where the agency exercises administrative discretion to grant or deny a license or permit for such activities.

As a general matter, § 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), is to be invoked only for action "authorized, funded, or carried out" by the agency involved. Under the mining laws and regulatory structure, the Forest Service simply does not "authorize" the mining at all, much less fund it or carry it out. At most, for claims located after 1955, the Service may impose reasonable restrictions upon the exercise of private property rights that do not materially interfere with mining, for the purpose of protecting "surface resources," generally understood to include endangered species. The Service simply does not engage in the granting of "licenses, contracts, leases,

easements, rights-of-way, permits, or grants-in-aid" (50 C.F.R. § 402.02) with respect to suction dredge mining that are the hallmarks of the sort of "agency action" intended to fall within the purview of § 7(a)(2).

Congress intended that private activity be governed by § 9, a general prohibition against "taking" listed species, 16 U.S.C. § 1539, and where such take was necessary, through permits under § 10, 16 U.S.C. § 1540. There is no evidence that suction dredge mining has ever "taken" so much as a single fish or fish egg.

The careful design of the Act is further confirmed by review of § 7(a)(3), 16 U.S.C. § 1536(a)(3). Congress provided that the consultation process triggered with respect to private action only if the miners were a "prospective permit or license applicant," and then only if the private action "will likely affect such species". Specifically, § 7(a)(3) provides that

> ". . . a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species."

16 U.S.C. § 1536(a)(3).[9]

The Service told the lower courts that if it required a "plan of operations," *i.e.*, made a decision to exercise its regulatory authority, it would comply with § 7(a)(2) with respect to its involvement in the miner's plan. This concession was neither necessary nor appropriate under the Act. Agreements between the Service and the miner on "plans" are not the grant of any "licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid" (50 C.F.R. § 402.02). The word "plan" is of a different character, consistent with the unique status of the United States as a trustee holding legal title in trust for the miner,[10] which is seeking to negotiate reasonable protection for its interests in the other surface resources. Simply put, Congress did not provide for consultation for actions "authorized, funded, or carried out" *or regulated by* in § 7(a)(2); "regulation" is what an agency does with respect to conduct that is independently authorized, and subject to potential restriction.

The correct view is that mining is "authorized" as a matter of law, such that consultation is not formally required in connection with the Service's negotiations with miners concerning an agreed-upon

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[9]Because the State of California has outlawed suction dredge mining, (*see infra* at 35 & n. 15) the only relevant mining now proceeding is not even occurring in the water, and the notion that it "will likely affect" endangered fish is unsupported (and unsupportable) by any evidence of record or otherwise.

[10] *See Wyoming v. United States*, 255 U.S. 489, 497-98 (1921).

plan of operations. Rather, pursuant to § 7(a)(1) of the Act, 16 U.S.C. § 1536(a)(1), the Service is required to exercise its regulatory and planning authority in furtherance of the purposes of the Act.

It is true that when the Service determines to exercise its regulatory authority, the Service's regulatory decisions have the potential to affect private conduct. But, properly understood, the exercises of such regulatory authority are not the "actions directly or indirectly causing modifications to the land, water, or air" (50 C.F.R. § 402.02) that fall within the purview of § 7(a)(2); it is the miners who are engaging in such actions and *cause* the modifications. Congress never intended to ensnare agencies in burdensome interagency consultation procedures merely because they had jurisdiction over some aspect of private conduct, a burden that quickly becomes transfinite as federal jurisdiction expands.

But this case does not require the Court to second-guess the Service's unfortunate concession concerning plans of operations. This case involves a far more pernicious misinterpretation of the law in the context where the Service has received and reviewed notices of private operations and determined *not* to exercise its regulatory authority to demand a "plan of operations". The Ninth Circuit held that the agency's knowledge of private activity, and consideration whether or not to exercise regulatory authority, makes the decision *not* to exercise authority "agency action" for purposes of § 7(a)(2). According to the Ninth Circuit, "agency action" is if because the Service merely advises the

miners in writing that the Service has declined to require a plan of operations.

As set forth above, the Forest Service is simply not granting permission to proceed by virtue of its review of a notice of intent. The authorization for the activity does not come from the Forest Service at all; the Forest Service is not, under its regulations, in a position to exercise any regulatory authority unless and until the pertinent ranger makes the finding, required under the regulations, that the mining "will likely cause significant disturbance of surface resources". 36 C.F.R. § 228.4(a).

The Ninth Circuit relied significantly upon the fact that the district rangers involved departed from the regulatory design by providing advice and feedback to the miners on how to structure their activities to achieve regulatory insignificance. The district rangers even purported, on occasion, to "approve" the notices of intent or "authorize" the mining involved. It is contrary to federal law in all circuits, and indeed to the rule of law itself, to treat erroneous assertions of authority by federal officials as creating authorizing power.[11] It is also contrary to this Court's holding in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644

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[11] The Ninth Circuit opinion is also flatly contrary with environmental precedent throughout the Circuit Courts concerning interpretation of "major Federal action" in the National Environmental Policy Act, 42 U.S.C. § 4332. *See, e.g., Aircraft Owners & Pilots Ass'n v. Hinson*, 102 F.3d 1421, 1426-27 (7th Cir. 1996).

(2007), which emphasized the "harmless error" rule in 5 U.S.C. § 706 to conclude that EPA's invocation of § 7(a)(2) compliance in its Federal Register notice, though erroneous, did not compel the conclusion that § 7(a)(2) consultations were required. *Home Builders*, 551 U.S. at 659-60.

This Court's *Home Builders* decision explained at some length the meaning and application of § 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536, in the context of other statutes. Specifically, the Court reviewed the application of § 7(a)(2) to the EPA's transfer of the Clean Water Act National Pollutant Discharge Elimination System program to the State of Arizona. Because § 402(b) of the Clean Water Act, 33 U.S.C. § 1342(b), provided certain criteria for a transfer of permitting powers, this Court held that § 7(a)(2) could not be invoked to add additional criteria, somehow amending § 402(b). Similarly, § 7(a)(2) did not amend the mining laws to make the exercise of private mining rights into "agency action".

B. The Ninth Circuit's Destruction of Deference Principles Merits Review.

The Ninth Circuit gave no deference whatsoever to the Forest Service's interpretation of its own § 228.4 regulations, characterizing the issue as one of ESA interpretation, and stating that "an agency's interpretation of a statute outside its administration is reviewed *de novo*". App. 18. But the cornerstone of the Ninth Circuit's decision was its conclusion, flatly contrary to the position of the

Service concerning interpretation of *its own regulation*, that "[b]y regulation, the Forest Service must authorize mining activities before they may proceed under a NOI". App. 28.

The Forest Service's position as to the meaning of the § 228.4 regulations, as set forth in its opening brief below, was that

> The regulations do not affirmatively require a mining operator to receive "authorization" for any mining activity that is not likely to cause "significant disturbance of surface resources." *See* 36 C.F.R. § 228.4(a). For certain specific mining operations with the least impacts, including those that will not involve the use of mechanized earthmoving equipment or the cutting of trees, *id.* § 228.4(a)(2)(iii), a miner need not even submit a notice of intent. For those operations that "might" cause disturbance of surface resources, the only requirement imposed by the regulations is that a miner submit a notice of intent before proceeding. *Id.* § 228.4(a). If the District Ranger informs a miner that a plan of operations is not required, the regulations require nothing else on the part of the mining operator before proceeding.

(Brief of the Federal Appellees, Nov. 13, 2009, at 26-27.) In substance, the Forest Service has concluded that notices of intent do not constitute a "permit" or "license", and that determination is entitled to substantial deference.

As this Court has long emphasized in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) and the many cases following *Chevron*, federal courts are to defer to agency constructions of their own regulations. As this Court more recently emphasized, "broad deference is all the more warranted when, as here, the regulation concerns 'a complex and highly technical regulatory program' . . .". *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994).

The statutes and regulatory history discussed above provide support of a high degree of deference to the Service's interpretation in this case, but the Ninth Circuit refused, in substance, to grant any deference whatsoever. *See* App. 27-41. By contrast, the Seventh Circuit in reviewing the analogous issues arising under the Clean Water Act gave appropriate deference. *Texas Independent Producers and Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 978 (7th Cir. 2005) ("EPA's interpretation of the terms 'permit application' and 'permit' as not including NOIs and SWPPPs [Storm Water Pollution Prevention Plan] is a permissible construction").

C. The Ninth Circuit's Disregard of Other Fundamental Principles of Administrative Law Merits Review.

As a general matter, this Court has emphasized the elementary principle that relief under the Administrative Procedure Act is only available where action is "legally *required*". *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004). The Service was not legally obligated to take any action in response to receipt of a notice of intent other than to "notify the operator whether a plan of operations is required". 36 C.F.R. § 228.4(a)(2). The federal judiciary might, therefore, compel the Service to respond to a notice of intent, but it cannot require the particular discretionary choice of asserting the right to demand a plan of operations.

Decisions, in substance, not to take enforcement action against self-reported mining activities are the sort of decisions that have long been "presumed immune from judicial review under § 701(a)(2)". *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). The decision of the Forest Service not to exercise jurisdiction over private mining activities is, under *Heckler* and its progeny, committed to agency discretion by law. *Cf. Salmon Spawning & Recovery Alliance v. U.S. Customs and Border Protection*, 550 F.3d 1121, 1127-28 (Fed. Cir. 2008); *see also id.* at 1132 n. 11 ("reasoning of *Heckler* may be relevant "to § 7 claims).

The Ninth Circuit's conclusion that agency decisions *not* to exercise regulatory authority trigger

interagency consultation obligations threatens to create a vast new set of obligations upon agencies already struggling to meet their responsibilities in other contexts where threats to listed species are genuine. The federal judiciary is ill-suited to second guess all these exercises of discretion, and Congress never intended that decisions *not* to act trigger such burdensome procedures.

D. The Ninth Circuit's Unprecedented Expansion of "Agency Action" Has Ramifications Far Beyond Suction Dredge Mining.

In the modern regulatory state, nothing is more natural than for citizens to seek to structure their conduct to fall within classifications associated with a lower regulatory burden. Here, as a practical matter, the miners understood that they were being given an opportunity to structure their operations to avoid regulation, and in many cases, would prefer to acquiesce in restrictions they regarded as irrational and unfounded. *See, e.g.,* App. 30 (quoting miner letter: "I totally disagree with these distances and believe that dredging is actually beneficial to fish survival, but am willing to follow these recommendations in order to continue with my mining operations").

If citizens are to hazard a conclusion that their private activities are "authorized" by federal officials on any occasion when they seek advice concerning compliance with increasing far-ranging and intrusive regulatory regimes under the Endangered Species

Act and other statutes, the chilling effects will be very significant. In another case, the Ninth Circuit itself determined 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 simply because it advised or consulted with a private party." *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1074 75 (9th Cir. 1996). A contrary rule, said the Court, would discourage "desirable communication" and "protection of threatened and endangered species would suffer". *Id.*

The problem extends far beyond mining to many other contexts. For example, the United States Environmental Protection Agency issues general permits under the Clean Water Act, 33 U.S.C. § 1342, pursuant to which citizens involved in projects discharging stormwater give notice of intent to EPA concerning the procedures under which they will operate. The Seventh Circuit has confirmed that EPA's receipt and review of such notices do not give rise to obligations under § 7(a)(2), *Texas Independent Producers and Royalty Owners Ass'n v. EPA,* 410 F.3d 964, 979 (7th Cir. 2005).

American businesses are withering away under a relentlessly increasing regulatory state. To strike down efficient and informal means of permitting them to adjust their conduct to avoid regulatory burdens not only makes that problem worse, but undermines the goals for which the regulation was intended. The Ninth Circuit has held, in substance, that each and every time a

federal agency demands information from a citizen about the citizen's activity in areas where listed species may be present, that activity is now one that proceeds only by permission of the federal agency, thereby triggering the application of the ESA, and many other statutes as well. This threatens the cooperation of private enterprise with regulatory programs, and the overall goals of the Endangered Species Act.

II. REVIEW IS WARRANTED AS AN EXERCISE OF THE COURT'S SUPERVISORY JURISDICTION ON ACCOUNT OF THE NINTH CIRCUIT'S REPEATED AND SUBSTANTIAL DEPARTURES FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

A final consideration in favor of granting the writ is that the Ninth Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power" (Rule 10(a)). Chief Judge Kozinsky and Judge Smith, in § VII of the dissent, invoked Dante's Inferno to analogize the particular hell though which petitioners and others have suffered under the rule of the Ninth Circuit, characterizing it as an extraordinary decision to "flout our precedents and undermine the rule of law". App. 69 ("Abandon all hope, ye who enter here"). What is particularly outrageous about this decision is that Congress specifically intervened in the creation of the Forest Service regulations to ensure

that the notice of intent procedure would not trigger environmental reviews interfering with the powerful federal policies favoring mineral development.

After reviewing a number of other recent Ninth Circuit cases, the extreme nature of which should invoke this Court's supervisory power, Chief Judge Kozinsky and Judge Smith concluded:

> "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 (as illustrated *supra*) 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."

App. 75-76. The pattern of usurpation of legislative authority outlined by Chief Judge Kozinski and Judge Smith merits this Court's most urgent attention to vindicate the rule of law.

To make matters worse, the Ninth Circuit stretched to frame its extraordinary legal conclusions in such unusual circumstances that the mere consideration of the case was an extreme departure "from the accepted and usual course of judicial proceedings". To reach the merits in this case, the Ninth Circuit had to (i) ignore the fact that the ESA listing on which the holding was premised had been declared unlawful;[12] (ii) ignore the fact that the agencies had in fact engaged in a § 7 consultation concerning suction dredging generally;[13] (iii) exclude

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[12] Because the mining is conducted underwater, the primary species of concern has been coho salmon. Petitioners explained to the District Court that the coho salmon listing had been declared unlawful in *California State Grange v. Department of Commerce*, No. 02-CV-6044-HO, oral opinion at 21 (D. Or. Jan. 11, 2005), but the District Court gave effect to the Service's refusal to acquiesce in the *Grange* ruling (App. 193-194), an action upheld, *sub silentio*, by the Ninth Circuit. In short, the Tribe's ESA claim sought to compel consultation on a species that was not lawfully listed.

[13] Petitioners do not know why, given the existence of the general and programmatic consultations on suction dredging discussed above, the Service stipulated that it was required to engage in § 7(a)(2) consultations with respect to all plans of operation.

all the evidence demonstrating that suction dredging had no potential to cause any appreciable adverse effect on listed species;[14] and (iv) give inadequate weight to the fact that California legislature had banned suction dredge mining.[15] For these additional reasons, the Ninth Circuit's decision to entertain the Tribe's ESA claim in all these circumstances constitutes an unprincipled assault upon not merely the mining laws, but the rule of law itself.

With the July 27, 2012 passage of California Senate Bill 1018, amending § 5653.1 of the California Fish and Game Code to prohibit suction dredging indefinitely (App. 232), this Court has the opportunity to grant certiorari, vacate the judgment

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[14] The Ninth Circuit opinion cited opinions of one Forest Service biologist that lacked any relationship to the mining at issue (App. 46), and upheld, *sub silentio*, the District Court's refusal to allow petitioners to supplement the administrative record with scientific studies and explanatory testimony demonstrating that his opinions were contrary to all available evidence, *even though the record reflected that the underlying studies were in fact relied upon by very rangers involved. Compare* App. 189-193 *and* MER11.

[15] At the time of the Ninth Circuit's opinion, there was a moratorium on suction dredging in place until 2016; the Court's opinion relies, in part, upon its temporary nature as militating against dismissal for mootness. (App. 22.) The opinion also suggests that the Tribe had standing to challenge other mining activities which are not forbidden (*id.*), but there is no evidence demonstrating that small-scale mining by hand in the vicinity of the rivers has any ESA implications.

below, and remand the case (GVR) so that the Ninth Circuit may reconsider the appropriateness of even reaching the merits of this action. *See generally Lawrence v. Chater*, 516 U.S. 163 (1996) (per curiam) (discussing availability of GVR).

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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