To Consult or Not to Consult, That is the Question:
Karuk Tribe of California vs. United States Forest Service

In a victory over unbridled expansion of the Endangered Species Act (ESA), a majority of the Ninth Circuit Court of Appeals refused to broaden the scope of federal agency ESA obligations as applied to mining activity in the Klamath National Forest. In *Karuk Tribe of California v. United States Forest Service*, 2011 WL 1312564, C.A.9 (Cal.), and over a vigorous dissent by Judge William A. Fletcher, a Ninth Circuit majority (Judges Milan D. Smith, Jr. and James D. Todd), held the process of receiving a Notice of Intent (NOI) by four small-scale dredging operators and acquiescence that the mining could proceed absent a Plan of Operations (Plan) is not federal "agency action" triggering formal ESA section 7(a)(2) consultation with the United States Fish and Wildlife Service and National Marine Fisheries Service (Services). In so holding, the Ninth Circuit reaffirmed its previous decision in *Western Watersheds Project v. Matejko*, 468 F.3d 1099, 1108 (9th Cir. 2006), that "'inacation is not 'action' for section 7(a)(2) purposes."

<u>The Ninth Circuit Decision in Karuk Tribe</u>

The Karuk Tribe, represented by the Western Mining Action Project, argued that review by the United States Forest Service of four NOIs qualified as "agency action" under the ESA regulations, 50 C.F.R. Section 402.02. Even though the mining proposed in the NOIs were not funded or carried out by the Forest Service, the Tribe asserted that the moment the Forest Service determined that a Plan of Operations (Plan) would not be required for suction dredging in the Klamath River, such moment constituted affirmative agency "authorization" of the mining activities.

In upholding the decision by the Forest Service *not* to consult with the Services, the majority relied heavily on Circuit precedent in *Western Watersheds*, which held that "the duty to consult is triggered by affirmative actions." *Western Watersheds*, 468 F.3rd at 1102. In fealty to *Western Watersheds*, the *Karuk Tribe* majority determined that the Forest Service's internal decision not to require a Plan for the specified mining operations in the NOI did not *affirmatively* "authorize" mining activity already permitted under a combination of federal organic law including the Mining Law of 1872 and Organic Act, among others. "Absent the USFS's request for a Plan, miners may simply proceed with their operations. In other words, to allow mining to take place under an NOI, the USFS does nothing." The majority also relied on *Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995), which held that BLM's issuance of an "approval" letter to a private party concerning its planned construction of a right-of-way was not an agency authorization of private activity triggering formal Section 7 consultation.

Importantly, the mining in *Karuk Tribe* was affirmed as not mere privilege. The Ninth Circuit clarified that "where the agency is not the authority that empowers or enables the activity, because a preexisting law or contract grants the *right* to engage in the activity subject *only to regulation*, the agency's decision *not* to regulate (be it based on a

discretionary decision not to regulate or a legal bar to regulation) is not an agency action for ESA purposes." (Emphasis in original.)

The Ninth Circuit majority concluded that while its decision was "amply supported by the reasoning and holdings of our prior case law," the decision was also "consistent with common sense as well." "If agencies were forced to conform their *inaction* to the ESA's requirements, then the ESA would operate as a blanket mandate requiring federal agencies to take *affirmative* steps to *guarantee* that listed species are not harmed. That is, of course, not the law." (Emphasis in original.)

The Dissent in Karuk Tribe

In a self-termed "emphatic" dissent, Judge Fletcher upbraided the majority by dissecting the mining activity itself and highlighting the discretion by the Forest Service in reviewing an NOI *prior* to mining activity commencing. Judge Fletcher described as "discretionary" (and thus properly-constituted "action") internal discussion by Klamath National Forest personnel about whether, and under what conditions, suction dredge mining would be allowed to proceed under the terms articulated in the NOIs. Also, in Judge Fletcher's view, suction dredge mining adversely affected critical habitat of ESA-listed Coho salmon and thus satisfied the ESA's "may affect" standard. Confronting the majority's determination that mining which proceeds under an NOI absent a Plan is federal agency "inaction," Judge Fletcher wrote "This is a critical point, and the majority is wrong."

Judge Fletcher characterized *Western Watersheds* as distinguished by different facts and law. In *Western Watersheds*, BLM notification was not required to exercise private water diversion rights that had vested before the ESA was enacted. Here, the Forest Service was required by law to be alerted to the mining activity through the NOI and thus, in the dissent's view, that launched broader "agency action" necessitating ESA section 7 consultation. Notably, the dissent failed to squarely address the impact of the federal Mining Law or Organic Act on the mining activity at issue in the Klamath National Forest.

The Karuk Tribe Decision is Consistent with Another Recent Case Outside of the Ninth Circuit

The Ninth Circuit's decision in *Karuk Tribe* is consistent with recent judicial review involving private oil and gas activity on Forest Service land absent additional federal statutory obligation. In late 2009, a federal district court in Pennsylvania declared that the Forest Service lacked the regulatory authority to impose a federal permitting approval regime – through the application of the National Environmental Policy Act (NEPA) - over private mineral estates in the Allegheny National Forest (ANF).

In *Minard Run Oil and Pennsylvania Independent Oil and Gas Association v. U.S. Forest Service, et al.* 2009 WL 4937785(No. 09-125 (W.D. Pa. Dec. 15, 2009)), United States District Judge Sean McLaughlin barred Forest Service approval of a process regulating private oil and gas exploration and production activity created by an April 9, 2009,

Settlement Agreement between the environmental organization plaintiffs and the federal government. The settlement agreement required full NEPA analyses of notices to proceed by private interests seeking to develop their oil and gas rights in the ANF. Judge McLaughlin held that the Forest Service involvement in the asserted approval process did not constitute a major federal action requiring NEPA compliance, and granted a preliminary injunction barring implementation of the settlement agreement.

Anticipating a theme later echoed by the Ninth Circuit in *Karuk Tribe*, the district court held that the federal Weeks Act and Pennsylvania state law had appropriately cabined the authority of the Forest Service to further regulate this type of private resources development on federal land. The case is currently on appeal in the United States Court of Appeals for the Third Circuit.