**Public Land and Resources Law Review**

Volume 0 *Fall 2011 Case Summaries*

# Karuk Tribe of California v. United States Forest Service

Alexa Sample

***Karuk Tribe of California v. United States Forest Service*, 640 F.3d 979 (9th Cir. 2011).**

**Alexa Sample**

## I. INTRODUCTION

In *Karuk Tribe of California v. United States Forest Service*,[189] the question before the Ninth Circuit Court of Appeals was whether the United States Forest Service's (USFS) review of a Notice of Intent (NOI) for a prospector mining on federal forest land qualifies as an agency action.[190] An agency action is necessary to trigger the interagency consulting requirement of section 7 of the Endangered Species Act (ESA).[191] The court affirmed the district court's ruling, holding that "the NOI process is not 'authorization' of private activities when those activities are already authorized by other law."[192] Therefore, a decision approving an NOI is not an action but "at most a preliminary step prior to agency action being taken."[193]

## II. FACTUAL BACKGROUND

The Klamath River runs from Oregon to the Pacific Ocean, crossing Northern California, through lands belonging to the Karuk Tribe of California from time immemorial.[194] The Klamath is designated critical habitat for the endangered Coho salmon.[195]

Private citizens holding claims may prospect for gold in the Klamath pursuant to U.S. mining laws and USFS regulations.[196] A common method of mining is suction dredging, which involves vacuuming up material from the river bottom into a machine that can separate the gold from other minerals.[197] Although there is disagreement as to whether small scale mining

[189] *Karuk Tribe of Cal. v. U.S. Forest Service*, 640 F.3d 979 (9th Cir. 2011).
[190] *Id*. at 982.
[191] *Id*.
[192] *Id*. at 990.
[193] *Id*.
[194] *Id*. at 982.
[195] *Karuk Tribe*, 640 F.3d. at 982.
[196] *Id*. at 984.
[197] *Id*. at 983.

actually causes damage to fish, the court accepts as fact that the "suction dredge mining *may affect* the livelihood of Coho salmon."[198]

USFS regulates the mining activity on federal forest lands. No notice to the USFS is required if activities "will not cause significant surface resource disturbance."[199] Activities that "might cause" a disturbance require submission of a NOI to the District Ranger.[200] If the ranger determines that the activities are "likely to cause significant disturbance of surface resources," prospectors will be required to submit a more detailed Plan of Operations (Plan). A Plan would include specific conditions to ensure environmental protection and must be approved before commencing activities on forest lands.[201]

## IV. PROCEDURAL AND STATUTORY BACKGROUND

The Karuk Tribe of California originally brought multiple suits against the USFS under the National Forest Management Act, the National Environmental Policy Act, and the ESA. In 2005, the district court entered final judgment for the defendant on all claims. This claim under the ESA was the sole issue on appeal.[202]

Section 7 of the ESA, along with its relevant regulations, requires federal agencies to consult with U.S. Fish and Wildlife Service or other relevant agencies to "insure that any action authorized, funded, or carried out by such an agency" will not harm threatened or endangered species or damage the species' habitat.[203] This consultation requirement is triggered whenever an agency action "may affect" a listed species.[204]

## III. ANALYSIS

[198] *Id*. at 983–984 (emphasis added).
[199] *Id*. at 984 (citing 36 C.F.R. § 228.4(a)(1) (2010)).
[200] *Id*.
[201] *Karuk Tribe*, 640 F.3d. at 984–985 (citing 36 C.F.R. §§ 228.4(a), 228.5).
[202] *Id*. at 986-987.
[203] *Id*. at 987 (quoting 16 U.S.C. § 1536(a)(2).
[204] *Id*. at 982 (citing 16 U.S.C. § 1536(a)(2)).

Section 7 of the ESA[205] does not apply to private party activities unless the relevant federal agency retains some regulatory control over those activities.[206] In this case, in order for section 7 duties to apply to the USFS regarding suction dredge mining, the Tribe needed to show that the USFS's review and approval of the miner's NOIs acted as authorization of their activities.[207]

After evaluating its prior rulings on the subject of consultation obligations, the court determined that an agency decision cannot act as an authorization where the private party's activity is a right granted under a previous law.[208] Here, because the miners have the right to engage in mining activities on forest lands pursuant to U.S. mining laws, the NOI process cannot be an authorization.[209] The court cited a previous decision on an analogous process in *Western Watersheds Project v. Matejko*.[210] In that case, the court said that authorization requires affirmative actions, such as licensing or permitting, which are distinguished from "merely acquiescing in the private activity."[211] Even if the agency retains some authority to regulate activities that meet a certain threshold determined by the agency's discretion, simple failure to assign that threshold or to exercise that discretion cannot be called authorization.[212]

The Tribe argued that the USFS answered one of the defendant's NOI's by specifically giving its "authorization."[213] The court rejected this argument and pointed to another previous case, *Sierra Club v. Babbitt*.[214] In *Sierra Club*, the court held that an approval letter will still not act as authorization if the party already has a right to conduct the planned activities.[215] Here, the

---

[205] 16 U.S.C. § 1536(a)(2) (2006).
[206] *Karuk Tribe*, 640 F.3d. at 988.
[207] *Id*.
[208] *Id*. at 992.
[209] *Id*. at 990.
[210] *Western Watersheds Project v.Matejko*, 468 F.3d 1099 (9th Cir. 2006).
[211] *Karuk Tribe*, 640 F.3d at 990 (quoting *Western Watersheds*, 468 F.3d at 1103).
[212] *Id*. at 991.
[213] *Id*. at 989.
[214] *Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995).
[215] *Karuk Tribe*, 640 F.3d at 991 (citing *Sierra Club*, 65 F.3d at 1511).

USFS is not required to answer an NOI unless it feels the proposed operation necessitates the filing of a Plan.[216] Therefore, the USFS's answer to the NOI was simply to give notice of the USFS's decision.[217] Such notice is technically an action, but it is not an agency action by the definition provided in section 7.[218]

The Tribe also argued in the alternative that the USFS had the power to impose conditions on its approval of private activities in order to benefit listed species and habitat, and that such supervisory authority triggered the section 7 consultation duty.[219] The court disagreed, explaining that, while the USFS could require a Plan if the activities described in the NOI were not acceptable, it had no power to enforce conditions on an approved NOI.[220]

The court determined that rangers may tell miners what they can do to avoid being required to file a Plan by outlining certain limits on their own activities in their NOIs.[221] However, this sort of voluntary consultation between the USFS and the private parties would not be considered a "regulatory action in and of itself,"[222] nor would requiring formal consultations at this stage further the efforts of environmental protection, since it would only serve to discourage informal communication between federal agencies and the private parties.[223] The court noted that the original purpose for instituting the NOI process was not to guarantee environmental protection but to ensure that those protections could be instituted without sacrificing efficiency on the part of federal agencies or unduly restricting lawful mining operations.[224]

## IV. DISSENTING OPINION

[216] *Id*. at 991 (quoting 36 C.F.R. § 228.4(a)(2)).
[217] *Id*. at 990.
[218] *Id*. at 991 (citing *Sierra Club*, 65 F.3d at 1511).
[219] *Id*. at 992.
[220] *Id*. at 993.
[221] *Karuk Tribe*, 640 F.3d. at 993.
[222] *Id*.
[223] *Id*. (quoting *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1074 (9th Cir. 1996)).
[224] *Id*. at 994.

The dissenting opinion shifted the focus of the case's issue from whether there was an "authorization" to whether the USFS exercised discretion over the mining activities, emphasizing that section 7 applied whenever there was "discretionary Federal involvement or control."[225] Based on a 2003 case,[226] it argued that regardless of whether or not the NOI was meant to serve a regulatory function, the determining factor was USFS's actual practice.[227] In *Marbled Murrelet*, the USFS regularly rejected NOIs that did not meet conditions the rangers felt were necessary for protection of the salmon and compelled miners to agree to limitations they found unfavorable to avoid having to file a Plan.[228] Since the USFS was shown to be taking discretionary action to regulate the activities of the miners using the NOI process, these should have been considered "'agency actions' within the meaning of section 7 of the ESA."[229]

## IV. CONCLUSION

There is a specific standard for triggering the ESA's consultation requirements for federal agencies, and the Ninth Circuit has drawn a narrow view of that standard for activities conducted by private parties on federal public lands. Approval of activities that are already granted as a right under prior law will not meet that standard unless the activities are likely to affect listed species. However, this decision leaves the determination of whether activities are *likely to* affect or merely *may* affect listed species under the unilateral discretion of the USFS District Rangers wherever the status of such effects are in question.

[225] *Id*. at 1007 (quoting 50 C.F.R. § 402.03)).
[226] *Environmental Defense Center, Inc. v. Environmental Protection Agency*, 344 F.3d 832 (9th Cir. 2003).
[227] *Karuk Tribe*, 640 F.3d 979, 1000 (9th Cir. 2011).
[228] *Id*. at 1007–1008.
[229] *Id*. at 1009.