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***Karuk Tribe of California v. United States Forest Service*, 681 F.3d 1006 (9th Cir. 2012)**

Justin Harkins

ABSTRACT

In *Karuk Tribe v. USFS*, the Ninth Circuit overturned its own panel’s prior ruling that the Forest Service was not required to consult with biological agencies pursuant to ESA standards when reviewing an NOI filed by a recreational miner. The Court held, instead, that the Forest Service’s decision to approve an NOI constitutes “agency action” sufficient to trigger an ESA biological assessment. The ruling provides an exception to the earlier rule that inaction cannot be considered action.

I. INTRODUCTION

In *Karuk Tribe of California v. United States Forest Service*,¹ the Ninth Circuit Court of Appeals (Ninth Circuit), sitting en banc, reheard an appeal filed by the Karuk Tribe that sought to require the United States Forest Service (Forest Service) to conduct an Endangered Species Act (ESA) assessment when a recreational miner files a Notice of Intent (NOI) to mine.² Overturning its own panel’s prior ruling, the Court held that authorization on an NOI did constitute agency action sufficient to trigger an ESA assessment.³ In reaching that conclusion, the Court also held (1) that a challenge to an agency decision will not be considered moot merely because the time limit contemplated by that decision has lapsed⁴ and (2) that the NOIs in question were sufficiently likely to affect an endangered species as to require further action.⁵ This holding expands the category of Forest Service decisions that are properly considered “agency action.”

¹ *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, (9th Cir. 2012).

² *Id.* at 1011.

³ *Id.* at 1017.

⁴ *Id.* at 1018.

⁵ *Id.* at 1027-1028.

II. FACTS

The Karuk Tribe (Tribe) is a long-time inhabitant of the Klamath River region in northern California and considers the Coho salmon, a species listed as “threatened” under the ESA, a historical neighbor.⁶ The Klamath River system (including the river, its tributaries, and streamside riparian zones) is designated critical habitat for the salmon.⁷ The Tribe depends on the salmon “for cultural, religious, and subsistence uses.”⁸ Large scale placer mining for gold has caused environmental harm to the Klamath river in the past and is no longer lawful in California rivers and streams. However, small-scale recreational mining remains authorized under the General Mining Law of 1872.⁹ Such recreational miners utilize several methods of varying magnitude in their quest for treasure; the method most pertinent to the instant case is known as “suction dredging,” whereby a gasoline-powered engine sucks up streambed material and filters it through a sluice to separate heavier materials like gold from the lighter riverbed soils.¹⁰ The Tribe maintained that the activities of the recreational miners were detrimental to the resident fish, including the Coho salmon. The Tribe brought the instant suit to challenge the Forest Service’s approval of four specific NOIs authorizing mining activities in the Klamath River system.¹¹

Mining proposals on National Forest land are subject to a three-tiered level of review, based on whether the proposed activities “will not cause,” “might cause,” or “will likely cause” a “significant disturbance of surface resources.”¹² Mining activities that “will not cause” a

⁶ *Id.* at 1011.

⁷ *Id.*

⁸ *Id.*

⁹ *Karuk Tribe*, 681 F.3d at 1011-1012.

¹⁰ *Id.* at 1012.

¹¹ *Id.* at 1012.

¹² *Id.* at 1012.

significant disturbance do not require authorization.¹³ Activities that “might cause” a disturbance require the miner to submit an NOI notifying the Forest Service of the basic details of the miner’s proposed operation. The NOI must be approved by the District Ranger before mining may commence.¹⁴ Activities that “will likely cause” a disturbance require the miner to submit a Plan of Operations (Plan), which is also subject to agency approval.¹⁵ If a miner, in the belief that her proposed operation “might cause” significant disturbance, submits an NOI and the reviewing Ranger determines instead that the operation “will likely cause” significant disturbance, the Ranger can order the miner to submit a Plan, which is more detailed and is subject to a higher level of scrutiny than an NOI.¹⁶ All of the NOIs at issue in this case were approved under the “might cause” standard during the 2004 mining season.¹⁷

In response to concerns expressed by the Tribe about the impact of suction dredge mining, the District Ranger calculated a sustainable threshold of ten dredges per mile on the Klamath River and three dredges per mile on the River’s tributaries.¹⁸ The first pertinent NOI was filed by a recreational mining company called the New 49’ers.¹⁹ The New 49’ers spoke to Vandiver prior to filing their NOI, and Vandiver instructed them that their NOI would only be approved if three conditions were met: (1) the company had to maintain cold water habitats (“refugia”) within 500 feet of certain River/tributary confluences; (2) the company had to refill its dredge holes in certain fish spawning areas; and (3) the company had to abide by Vandiver’s dredge threshold calculation.²⁰ The New 49’ers submitted an NOI in compliance with the three

¹³ *Id.*

¹⁴ *Id.* at 1013.

¹⁵ *Karuk Tribe*, 681 F.3d at 1012-1013.

¹⁶ *Id.* at 1013.

¹⁷ *Id.*

¹⁸ *Id.* at 1014.

¹⁹ *Id.*

²⁰ *Id.*

conditions, and it was approved on May 25, 2004.²¹ The three other pertinent NOIs were filed and approved later that season, and each proactively assented to the conditions Vandiver had placed on the New 49'ers. Vandiver did not require a Plan for any of the four, and he did not consult with any wildlife agencies regarding any of the NOIs.²² Significant to the Court's eventual analysis is that a miner who filed one of the four NOIs "totally disagree[d]" with the dredging distance requirements but agreed to follow them in order to continue mining.²³

III. PROCEDURAL HISTORY

The Tribe filed its original suit in federal district court and alleged that the Forest Service's approval of the four NOIs had violated the ESA, the National Environmental Policy Act, and the National Forest Management Act.²⁴ The district court ruled against the Tribe on all counts.²⁵ The Tribe appealed only as to the ESA claim, "arguing that the Forest Service violated its duty to consult with the expert wildlife agencies before approving the four NOIs."²⁶ The Ninth Circuit affirmed the district court, holding that the Forest Service's decision to approve the NOIs was not sufficient to constitute "agency action" under the ESA.²⁷ The Ninth Circuit later agreed to rehear the case en banc.²⁸

IV. ANALYSIS

The Ninth Circuit Court addressed three aspects of the case in its rehearing. The first, mootness, and third, whether the four NOIs "may affect" a listed species, were largely fact-dependent. The primary case for mootness rested on the fact that the term contemplated by the Forest Service's decisions (namely, a one-year limit for an NOI approval) had lapsed by the time

²¹ *Karuk Tribe*, 681 F.3d at 1014.

²² *Id.* at 1015.

²³ *Id.*

²⁴ *Id.* at 1016.

²⁵ *Id.* See *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 379 F.Supp.2d 1071 (N.D. Cal. 2005).

²⁶ *Karuk Tribe*, 681 F.3d at 1017.

²⁷ *Id.* See *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 640 F.3d 979 (9th Cir. 2011).

²⁸ *Karuk Tribe*, 681 F.3d at 1017.

the case reached the Court. The Court held that the lapse did not moot the challenge because the one-year term did not provide sufficient time for a challenge to make it through litigation; therefore, because the challenged circumstances were likely to reappear, the limited duration could not be grounds for mootness without depriving the plaintiff of any possibility for recourse.²⁹ The Miners and the Forest Service also argued that the challenge was moot because California had, at the time of the rehearing, declared a statewide moratorium on suction dredge mining.³⁰ The Court ruled against that challenge because there were other mining activities at issue in the case and because the moratorium was temporary.³¹

The third question the Court addressed was whether the miners' actions "may affect" the Coho salmon.³² The Court explained that a plaintiff (in this case, the Tribe) need not prove that a listed species has been injured in fact in order to carry its burden; rather, the plaintiff need only prove that the challenged activity may affect the species, a standard the Ninth Circuit previously held to be "relatively low."³³ After consulting the facts regarding the miners' potential contact with the fish, the Court ruled that the Tribe had carried its burden such that their activities "may affect" a threatened species.³⁴

The second of the three aspects the Court addressed (and the primary focus of the case's dissent³⁵) was whether the Forest Service should have consulted with any wildlife agencies prior to approving the NOIs. Federal agencies, such as the Forest Service, have a duty under § 7 of the ESA to consult with either the Fish and Wildlife Service or the National Oceanic and Atmospheric Administration Fisheries Service if "any action authorized, funded, or carried out

²⁹ *Id.* at 1018.

³⁰ *Id.* at 1018.

³¹ *Id.* at 1019.

³² *Id.* at 1027.

³³ *Id.* at 1027-1028.

³⁴ *Id.* at 1029.

³⁵ *Id.* at 1031.

by [such] agency” may affect a listed species or critical habitat.³⁶ The district court previously held (and the Ninth Circuit previously affirmed) that the decision to approve an NOI did not constitute “agency action” on the part of the Forest Service because the NOI is properly considered a notification of a miner’s intended activity.³⁷ If the Forest Service decides to approve an NOI, it is, in effect, making the decision to allow the miner to proceed without any further investigation. Heretofore, that had been interpreted as a decision *not* to take any agency action.³⁸ As the Ninth Circuit has previously held, “inaction is not action for section 7(a)(2) purposes,” and advice to private parties does not constitute agency action where no federal authorization is required.³⁹

In this case, however, the Ninth Circuit ruled that the decision to approve an NOI was not a decision to take no action but rather an implicit authorization of the miner’s proposed action.⁴⁰ As the Court wrote, “when a miner proposes to conduct mining operations under an NOI, the Forest Service either affirmatively authorizes the mining under the NOI or rejects the NOI and requires a Plan instead.”⁴¹ The Court placed great emphasis on the way both the Ranger and the miners seemed to understand the NOI process, remarking on both Vandiver’s expressed “authorization” of the NOIs and Johnson’s decision to seek agency approval even though she disagreed with its requirements.⁴² The Court ultimately held that the decision to approve an NOI did constitute agency action sufficient to trigger an ESA assessment, so the Forest Service erred when it did not consult with wildlife experts prior to approving the NOIs.⁴³

V. CONCLUSION

³⁶ *Id.* at 1020.

³⁷ *Id.* at 1017.

³⁸ *Id.* at 1021.

³⁹ *Id.*

⁴⁰ *Karuk Tribe*, 681 F.3d at 1021-1024.

⁴¹ *Id.* at 1022.

⁴² *Id.* at 1025-1026.

⁴³ *Id.* at 1030.

When it ruled that the approval of an NOI constituted agency action, the Ninth Circuit broadened considerably the scope of agency decisions that may constitute agency action under the ESA. Prior to *Karuk Tribe*, miners merely were required to notify the Forest Service of activities that may affect a listed species. The Ninth Circuit's decision in this case transforms the way the miner's NOI is viewed. No longer is an NOI viewed merely as a notification action; now it is viewed as seeking authorization, a change that carries with it certain additional consequences (including the required consultation with wildlife agencies). The environmental law practitioner should note that an agency's decision not to take further action may itself constitute action if the agency's decision operates as an implicit authorization of activity over which it exercises control.