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Expanding the Scope of ESA Section 7 Requirements

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The U.S. Court of Appeals for the Ninth Circuit issued an en banc decision on June 1, 2012, holding that the U.S. Forest Service must engage in Endangered Species Act (ESA) section 7 consultation upon receipt of a notice of intent to conduct small-scale recreational mining operations in areas containing critical habitat for listed species.

The decision, which is viewed by many as an expansion of activities subject to ESA section 7 consultation, reversed an earlier panel decision and was issued over a vigorous and colorful dissent. Its effects are likely to be felt beyond the Ninth Circuit.

In Karuk Tribe of California v. U.S. Forest Service, et al., No. 05-16801 (en banc), the Ninth Circuit held that the Forest Service violated the ESA by "approving" four notices of intent to conduct mining activities in areas designated critical habitat for the endangered coho salmon without first consulting with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service.

The Forest Service's regulations require any person proposing to conduct a mining activity that "might cause" disturbance of surface resources to submit a notice of intent to the appropriate district ranger. 36 C.F.R. § 228.4(a).

A notice of intent is a relatively simple document that describes planned mining operations in general terms by providing "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." Id. Within 15 days from the date of receipt of such a notice, the district ranger may require the submission of a more detailed "plan of operations," which must be submitted for approval by the Forest Service. Id. § 228.4(a)(2).

Section 7(a)(2) of the ESA provides that each federal agency shall ensure through consultation with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service 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).

ESA section 7 consultation procedures apply to federal agency action, which is defined as "activities or programs of any kind authorized, funded or carried out, in whole or in part, by federal agencies" such as the "granting of licenses, contracts, leases, easements, rights-of-way, permits or grants-in-aid." 50 C.F.R. § 402.02.

In Karuk Tribe, the Forest Service responded to the notices with letters stating the mining activities were "authorized" and could begin once all applicable state and federal permits were obtained. The district ranger did not require a plan of operations for any of the four notices at issue in Karuk Tribe. The Forest Service took the position that it had not engaged in federal

agency action triggering section 7 consultation because the miners had a statutory right to engage in mining and that its response letters constituted decisions not to regulate their mining activities.

Judge William A. Fletcher, writing for the majority, held that by not requiring a plan of operations, the Forest Service effectively authorized the mining activity and thereby engaged in agency action. See Slip op. at 6096 ("the Forest Service authorizes mining activities when it approves a [Notice of Intent] and affirmatively decides to allow the mining to proceed").

The dissenting judges stated, however, that this sort of decision by an agency not to exercise regulatory authority has not been understood by the courts as agency action. Slip op. at 6109. As Judge Milan D. Smith Jr. stated in his dissent, "[u]ntil today, it was well-established that a regulatory agency's inaction is not action that triggers the [ESA's] arduous interagency consultation process. Yet the majority flouts this 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." Slip op. at 6109 (internal quotations and citation omitted).

The Karuk Tribe decision may lead to an increase in determinations that section 7 consultation is required for activities that agencies choose not to regulate, particularly in the states included in the Ninth Circuit. The effects of this increase in consultations may be especially pronounced in light of the Fish and Wildlife Service's recent commitment to make listing decisions for 251 species, and to make listing determinations for hundreds of other species.

This potential for far-reaching effects, combined with the court's expansive interpretation of ESA section 7 consultation requirements, suggests that this case may be a good candidate for U.S. Supreme Court review. The Forest Service has 90 days from the entry of judgment — until Aug. 30, 2012 — to file a petition for a writ of certiorari with the Supreme Court.

A copy of the Ninth Circuit's en banc decision is available here and on the Ninth Circuit's website at www.ca9.uscourts.gov/opinions/.

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