IF A TREE FALLS IN THE WOODS AND THE GOVERNMENT DID NOTHING TO CAUSE IT, DOES IT STILL INVOKE THE ENDANGERED SPECIES ACT? EVALUATING *KARUK TRIBE V. U.S. FOREST SERVICE* AND ITS IMPACT ON AGENCY ACTION UNDER THE ESA

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There is no reality except in action.[1]

I. Introduction

If one reflects on environmental law, existential philosophy is probably not the first thought that comes to mind. Yet, with the Endangered Species Act (ESA) as a backdrop, the 9th Circuit's 2012 *Karuk Tribe of California v. U.S. Forest Service (Karuk III)*[2] decision raises exactly that subject. Similar to existentialism, where one's acts define the extent of their existence,[3] the extent of federal agency obligation under Section 7 of the ESA is determined by the level of activity conducted by that agency.[4] This is known as agency action, and, when present, it requires the federal government to follow special procedures, (including regulatory consultation), to ensure the protection

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[1] JEAN-PAUL SARTRE, EXISTENTIALISM IS A HUMANISM 37 (2007).

[2] Karuk Tribe of California v. U.S. Forest Serv. (*Karuk III*), 681 F.3d 1006 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 1579 (2013).

[3] *See generally* SARTRE, *supra* note 1.

[4] *See Karuk III*, 681 F.3d at 1021–22.

of certain species.[5] *Karuk III* troublingly lowered the threshold of federal activity required to trigger this ESA consultation requirement in the 9th Circuit. The *Karuk III* decision begs the question: What *won't* trigger ESA consultation?

This article explores *Karuk III*'s impact on the meaning of "agency action" under the ESA. The majority opinion, which declared that the use of the U.S. Forest Service's mining Notice of Intent (NOI)[6] system was agency action, was overbroad and therefore incorrect. The majority opinion gave the wrong interpretation to the specific interactions between the U.S. Forest Service (Forest Service) and miners, treating these interactions as evidence of agency action. It failed to properly interpret the mining regulations involved. Finally, it failed to reconcile its decision with contrary case law, both in and beyond the 9th Circuit, that supports a finding in favor of the Forest Service. As a result, it created an unwarranted expansion of ESA applicability by requiring ESA consultation during the use of this NOI process.[7] The decision will lead to regulatory confusion, not only in the mining realm, but also with respect to what other agency actions might trigger ESA consultation, and it could facilitate unwarranted court challenges to other federal activity.[8] This, in turn, will increase burdens on public activity via unnecessary entanglement in the over-application of the ESA.[9] The government should look for opportunities to challenge this precedent in the future and look to other avenues, such as regulatory clarifications, to minimize the effects of the decision.

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[5] 16 U.S.C. § 1536(a)(2) (LexisNexis 2014).

[6] As explained in detail below, the Notice of Intent (NOI) regulations require miners to provide notice to the Forest Service prior to commencing certain types of mining. *See* 36 C.F.R. § 228 (LexisNexis 2014).

[7] *See Karuk III*, 681 F.3d at 1030 (Smith, J., dissenting).

[8] *See Ninth Circuit Expands "Agency Action" for Endangered Species Act Consultation*, PERKINS COIE (July 12, 2012), http://www.perkinscoie.com/ninth-circuit-expands-agency-action-for-endangered-species-act-consultation-07-12-2012/. As discussed further infra, these issues are not conjecture. The legal community has already recognized the case will create distinct problems. *See id.*

[9] *See id.*

II. ESA Background and Statutory and Regulatory Scheme

A. Brief Background

1. Legislative History

To fully recognize the flaws in the *Karuk III* decision and how it led to misapplication of the ESA, one must first understand the scope of the act and how it is triggered. As with many environmental statutes, the ESA is relatively new.[10] The modern ESA passed in 1973; Congress intended a broad scope for the law, which was enacted during a period of great environmental regulatory expansion in the 1960s and 1970s.[11] It repealed the majority of prior endangered species laws and implemented much more substantive protections in their place.[12] The ESA is now recognized as one of the most robust and important environmental laws in the United States.[13]

2. Statutory Provisions

The ESA mandated the federal government to identify threatened and endangered species and designate their critical habitats (Section 4), authorized land acquisition for habitat protection (Section 5), called for state and international cooperation in species protection (Sections 6 and 8), and prohibited the taking of endangered or threatened species by public and private parties (Section 9), among other directives.[14] Section 7 (the section at issue in *Karuk III*) created the requirement for agencies

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[10] *See* BRIAN CZECH & PAUL R. KRAUSMAN, THE ENDANGERED SPECIES ACT: HISTORY, CONSERVATION BIOLOGY, AND PUBLIC POLICY 1, 24 (2001).

[11] *See id.* at 23–24 (noting that between 1970 and 1972 alone the Federal Water Pollution Control Act, Clean Air Act, Marine Mammal Protection Act, and Coastal Zone Management Act were enacted); Tennessee Valley Auth. v. Hill, 437 U.S. 153, 188 (1978).

[12] *See* CZECH & KRAUSMAN, *supra* note 10, at 21–26.

[13] *See* SHANNON PETERSEN, ACTING FOR ENDANGERED SPECIES: THE STATUTORY ARK, at ix, 119 (2002). Data shows the Endangered Species Act (ESA) has had a positive impact on species protection. For example, the U.S. Fish and Wildlife Service (USFWS) has delisted eleven species due to their recoveries. However, there is debate over the exact reach of its benefits. *Id*.

[14] *See* CZECH & KRAUSMAN, *supra* note 10, at 25; *U.S. Fish and Wildlife Service Endangered Species Program*, FWS.GOV, http://www.fws.gov/endangered/law-policies/section-4.html (last visited Apr. 22, 2014). Taking has a broad meaning. Take means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (LexisNexis 2014).

to consult with federal fish and wildlife agencies when a federal action (defined below) may affect protected species.[15]

3. ESA Agency Action and Implementation of the Requirement

The agency action concept at the heart of *Karuk III* is derived from 16 U.S.C. § 1536(a)(2) (Section 7).[16] Under implementing regulations, Section 7 agency action is defined very broadly to include permits, contracts, licenses, or other activities authorized or funded by a federal agency (hence, *agency* action).[17] Other conditions must be present to invoke ESA consultation. For example, the action must be discretionary,[18] and it must have the potential to affect species covered

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[15] DALE D. GOBLE & ERIC T. FREYFOGLE, WILDLIFE LAW: CASES AND MATERIALS 1164–65 (Robert C. Clark et al. 2002). *See Section 7 Consultation: A Brief Explanation*, FWS.GOV (Mar. 29, 2011), http://www.fws.gov/midWest/endangered/section7/section7.html (finding that action "may affect" a listed species is a requirement to finding agency action with respect to invoking consultation; without it, consultation is not required). Although discussed in the *Karuk* decisions, this article focuses on the agency action requirement, as that is the heart of the controversy in the case. *See* Karuk Tribe of California v. U.S. Forest Serv. (*Karuk III*), 681 F.3d 1006, 1011 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 1579 (2013).

[16] *See* 16 U.S.C. § 1536(a)(2) (LexisNexis 2014). Section 7 states that

> 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 . . . .

Id.

[17] 50 C.F.R. § 402.02 (LexisNexis 2014). Agency action includes

> 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.

Id.

[18] 50 C.F.R. § 402 notes that "Section 7 and the requirements of this part apply to all actions in which there is *discretionary* Federal involvement or control." *Id.* § 402.03 (emphasis added). Thus, even if the agency conducts an action under the ESA, if it was

by the ESA (the "may affect" requirement).[19] Although discussed by the majority in *Karuk III*, both the discretionary aspect and "may affect" standards are not at issue,[20] and the essential debate is whether the actual activity of the Forest Service amounted to agency action under the law.

The ESA is implemented and enforced by the U.S. Fish and Wildlife Service (USFWS), which falls under the Department of the Interior, and the National Marine Fisheries Service (NMFS), which falls under the National Oceanic and Atmospheric Administration in the Department of Commerce).[21] Once federal agency action by definition under the statute and Code of Federal Regulations (CFR) is involved, the law requires, at a minimum, informal consultation with either the USFWS, NMFS, or both, depending on the location of the action.[22] The agency seeking to take the action at issue must request informal consultation in the early stages of planning with USFWS/NMFS. After these discussions, if the agency determines that the proposed action is not likely to adversely affect any listed species in the project area, and if the USFWS/NMFS concur, informal consultation is complete and the proposed project can proceed. If, after informal consultation, it still appears the agency's action may

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compelled to do so by law, ESA consultation is not required. *See generally* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007).

[19] 50 C.F.R. § 402.14(a). *See Section 7 Consultation: A Brief Explanation*, FWS.GOV, http://www.fws.gov/midWest/endangered/section7/section7.html (Mar. 29, 2011) (finding that the action "may affect" a listed species is an equal requirement to finding agency action with respect to invoking consultation; without this finding, consultation is not required). Note that implementing agencies have determined that any possible affect, whether beneficial, benign, adverse, or of an undetermined nature, triggers the requirement for formal consultation; unless through informal consultation agencies determine it is not needed. Interagency Cooperation—Endangered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. 19926, 19949 (June 3, 1986) (codified at 50 C.F.R. § 402).

[20] *See Karuk III*, 681 F.3d at 1031–39 (Smith, J., dissenting). Neither discretion nor the "may affect" requirement are contested in Judge Smith's dissent. *Id*. The issue of agency action was the only substantive issue put to the Supreme Court. *See* Petition for Writ of Certiorari at 2, The New 49'ers, Inc., et al., v. Karuk Tribe of California (9th Cir. 2012) (No. 12-289).

[21] *Endangered Species Act (ESA)*, NOAA FISHERIES, http://www.nmfs.noaa.gov/pr/laws/esa/ (last visited Apr. 22, 2014). Generally, USFWS manages land and freshwater species and the National Marine Fisheries Service (NMFS) manages marine species. *Id*.

[22] *See Consulting with Federal Agencies (ESA Section 7)*, NOAA.GOV (Sept. 24, 2012), http://www.nmfs.noaa.gov/pr/consultation; *Section 7 Consultation: A Brief Explanation*, FWS.GOV (last updated Apr. 1, 2014), http://www.fws.gov/midWest/endangered/section7/section7.html (informal consultation can be as simple as discussions with USFWS or NMFS to determine if a project is likely to affect any listed species in the project area).

affect a listed species, formal consultation must take place.[23] Formal consultation could lead to project modification, a halt to the project, or continuance without further issue.[24]

B. Supreme Court Interpretation of Agency Action

Only one Supreme Court case has directly evaluated the extent of Section 7 and what constitutes agency action under the ESA. *Tennessee Valley Authority v. Hill*[25] involved a project found to threaten the survival of a small species of fish known as the snail darter. The agency action at issue was the construction of the Tellico Dam, to be carried out by the Tennessee Valley Authority, a U.S. public corporation. Despite the fact that dam construction began before the passage of the ESA, and the fact that the dam was 75% complete by the time the snail darter was listed as an endangered species, the Court noted that under Section 7 it was required to permanently enjoin the operation of any federal project that threatened endangered species or their habitat. In describing the broad intent of Section 7, the Court noted that the ESA's language affirmatively commands all federal agencies "'to *insure* that actions *authorized, funded,* or *carried out* by them do not *jeopardize* the continued existence' of an endangered species or '*result* in the destruction or modification of habitat of such species . . . .'"[26] The Court further noted that "[t]his language admits of no exception."[27] Although *Tennessee Valley Authority* gave Section 7 a very broad scope,[28] the 9th

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[23] 50 C.F.R. §§ 402.13, 402.14(a) (Lexis Nexis 2014).

[24] *Id.* (formal consultation may last up to 90 days, after which NMFS or USFWS will prepare a biological opinion stating whether the proposed action will jeopardize the continued existence of a listed species). The federal approval and construction of a dam on a river that is home to endangered fish is a good example of agency action that would require formal consultation prior to execution. *See generally* Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978) (discussed below).

[25] Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978).

[26] *Id.* at 173 (quoting 15 U.S.C. § 1536 (2014)).

[27] *Id.*

[28] *Id.* at 153–57, 173, 194, 196–204. Another Supreme Court case, *National Association of Home Builders v. Defenders of Wildlife* (2007), addressed agency action in the context of discretion. The Court found the Clean Water Act required the EPA to transfer pollution discharge permitting power to the State of Arizona, which was a non-discretionary action that by regulation and definition did not qualify as agency action. *See generally* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007). Again, although discussed in *Karuk III*, discretion is not at issue in that case. *See generally* Karuk Tribe of California v. U.S. Forest Serv. (*Karuk III*), 681 F.3d 1006 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 1579 (2013).

Circuit expanded this scope and the apparent applicability of the ESA further than precedent and the facts warranted in *Karuk III*.[29]

III. Analysis of the *Karuk III* Controversy

A. Basic Background

The case involves public citizens mining on federal lands overseen by the Forest Service.[30] An overview of the mining laws, regulations, and the specific facts involved is critical to understanding how the 9th Circuit went awry in finding agency action present and stating the Forest Service should have completed ESA consultation when using the NOI process.

1. The Mining Laws and Regulations at Issue in Karuk III

The mining regulations involved in *Karuk III* fall under the Organic Administration Act of 1897 and the General Mining Law of 1872.[31] Forest Service implementing regulations for these laws create a three-level approach to mining in federal forests based on the potential for environmental disturbance.[32] First, certain *de minimus* mining acts (panning for gold, for example) require no notice to or interaction with the Forest Service.[33] Second, miners who might cause a significant disturbance of surface resources must give notice to the Forest Service District Ranger overseeing the area of mining in the form of an NOI.[34]

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[29] *See generally Karuk III*, 681 F.3d at 1031–39.

[30] *See id.* at 1012.

[31] *See id.* Under the General Mining Law of 1872, minerals on U.S. lands are open to exploration by the public. The Organic Act states that federal forests are governed by U.S. mining laws, and that those entering national forests for "proper and lawful purposes" (such as those allowed by the General Mining Law of 1872) must comply with regulations governing such forests. *Id.*

[32] *See* 36 C.F.R. § 228.1, § 228.4 (West 2013); *Karuk III*, 681 F.3d at 1012.

[33] *Karuk III*, 681 F.3d at 1012 (noting that 36 C.F.R. § 228.4(a)(1) lists the specific activities that do not require advance notice to the Forest Service).

[34] *See* 36 C.F.R. § 228.4(a) (LexisNexis 2014), which states,

> A notice of intent to operate is required from any person proposing to conduct operations which might cause significant disturbance of surface resources. Such notice of intent to operate shall be submitted to the District Ranger having jurisdiction over the area in which the operations will be conducted. Each notice of intent to operate shall

Finally, if the mining activity will likely cause a significant disturbance of surface resources, an approved Operations Plan (Ops Plan) is required prior to the start of mining.[35] An Ops Plan could result from the miners identifying the need themselves, or because it is directed by the Forest Service after review of an NOI.[36]

The Forest Service does not review the first level of activity, so agency action is not involved with that type of mining.[37] On the other end of the spectrum, review and approval of an Ops Plan is agency action.[38] The second tier is what is at issue in *Karuk III*. Since NOIs involve some interaction with the Forest Service, they may appear to constitute an authorization (or agency action). However, to label them as such (as the *Karuk III* decision did) reached too far in light of prior case law, ignored the agency's clear intent for the NOI regulations, and set a dangerous precedent that could impact how a court interprets other federal notice processes.[39]

2. The Karuk III *Facts*

The *Karuk* dispute concerns four NOIs submitted to the Forest Service for mining in and along the Klamath River, in the Happy Camp District of the Klamath National Forest in Northern California.[40] The plaintiff, Karuk Tribe of California (the Tribe), is a federally recognized Indian Tribe located in Happy Camp, California, that depends on native fish for cultural uses. Coho Salmon in the Klamath River were listed as threatened under the ESA in 1997, and the Klamath River system was

> 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.

Id.

[35] *See id.* § 228.4(a), which states, "An operator shall submit a proposed plan of operations to the District Ranger having jurisdiction over the area in which operations will be conducted in lieu of a notice of intent to operate if the proposed operations will likely cause a significant disturbance of surface resources." *Id.* § 228.4(a).

[36] *Karuk III*, 681 F.3d 1006, 1021 (noting that when an NOI is filed, under 36 C.F.R. § 228(a)(2)(iii), the Forest Service will notify a sender within fifteen days as to whether an Ops Plan is required for the proposed activity).

[37] *See id.* at 1021.

[38] Baker v. U.S. Dept. of Agric., 928 F. Supp. 1513, 1518 (D. Idaho 1996).

[39] *See* Petition for Writ of Certiorari at 31–32, The New 49'ers, Inc., et al., v. Karuk Tribe of California (2012) (No. 12-289).

[40] *Karuk III*, 681 F.3d at 1011–16.

listed as critical habitat in 1999. The four NOIs involve mining by suction dredging and were submitted by: (1) The New 49'ers (a mining corporation), (2) Nida Johnson, (3) Robert Hamilton, and (4) Ralph Easley.[41]

All four NOI filers were eventually notified their activities would not require Ops Plans.[42] However, there were various degrees of interaction between the filers and Forest Service before and during the NOI filing process. After the Tribe expressed concerns about the environmental effects of suction dredge mining, the Happy Camp District Ranger (Ranger Vandiver) organized meetings between the Tribe, Forest Service, and unspecified miners to discuss the issue. Ranger Vandiver then developed criteria for the Klamath River and its tributaries that he considered important to the review of mining operations. On May 17, 2004, Ranger Vandiver then met with the New 49'ers and advised them of these criteria, which included areas to avoid, methods for tailings pile disposal, and the maximum number of dredges per mile he felt were appropriate. On May 24, 2004, the New 49'ers submitted an NOI for suction dredge mining in the Happy Camp District, which conformed to the criteria outlined by Ranger Vandiver. In a Forest Service response, the New 49'ers were told they could mine after obtaining all relevant state and federal permits and that the "authorization expires December 31, 2004."[43]

Johnson submitted her NOI on May 29, 2004, and noted it was the result of a meeting with the Forest Service on May 25, 2004.[44] Her NOI also conformed to criteria regarding tailings piles and locations to avoid, and was approved on June 14, 2004. Hamilton submitted his NOI on June 2, 2004. The record does not discuss a meeting between him and the Forest Service, but his NOI conformed to dredge spacing criteria the District Ranger gave to the New 49'ers. It was approved by the District Ranger on June 15, 2004. Lastly, Easley submitted his NOI to mine one claim on June 14, 2004. The record does not discuss a meeting between him and the Forest Service either, but his NOI also conformed with tailings pile disposal criteria given to the New 49'ers and was approved

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[41] *Id.* Suction dredge mining uses an apparatus that sucks up stream bed material and directs it to a floating sluice box. Excess material is deposited into a "tailings pile" in the stream or on the stream bank. *Id.*

[42] *Id.* at 1013–15.

[43] *Id.*

[44] *Id.*

on June 15, 2004.[45]

B. Case History

1. District Court and 9th Circuit Panel Decisions

The Karuk Tribe brought suit against the miners and the Forest Service in the Northern District of California in 2005 to challenge the four NOIs under the ESA.[46] The Tribe specifically alleged the Forest Service violated Section 7 of the ESA by failing to consult with USFWS during the NOI review process. It argued that the Forest Service NOI reviews were a federal authorization of mining operations, and thus were agency action that triggered Section 7 of the ESA. The district court found the NOI reviews did not constitute agency action.[47] On appeal (in *Karuk II*) a three-judge 9th Circuit panel upheld the decision.[48]

2. Analysis of the Karuk III *Decision*

a. Judge Fletcher's Majority Opinion

In June 2012 the 9th Circuit published its *en banc* rehearing on the Tribe's challenge to the NOIs under the ESA.[49] Judge William A. Fletcher wrote for a seven-judge majority, and Judge Milan D. Smith wrote for a four-judge dissent.[50] Judge Fletcher's opinion was based on his interpretation of the regulations and the conduct of the Forest Service, both evaluated in light of general case law statements regarding the

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[45] *See id*.

[46] *See id*. at 1016. The Tribe also alleged failures to follow the National Environmental Policy Act (NEPA) and the National Forest Management Act. Both allegations were unsuccessful and not discussed in *Karuk III*. *Id*.

[47] *See id*. at 1011, 1016.

[48] *See* Karuk Tribe of California v. U.S. Forest Serv. (*Karuk II*), 640 F.3d 979, 993 (9th Cir. 2011) *reh'g en banc granted*, 658 F.3d 953 (9th Cir. 2011) and *on reh'g en banc*, 681 F.3d 1006 (9th Cir. 2012). The *Karuk II* majority opinion finding the NOI process did not invoke agency action was the basis for Judge Smith's dissent in *Karuk III*; he authored both opinions. *See generally Karuk II*, 640 F.3d 979; and *Karuk III*, 681 F.3d 1006.

[49] *Karuk III*, 681 F.3d at 1006.

[50] *Id*. at 1007. Two judges did not join with Judge Smith's final commentary on the state of 9th Circuit environmental case law and the impact of the *Karuk III* decision on mining. *Id*.

overarching principles of Section 7.[51]

He started his analysis by setting forth a two-part test for agency action: whether a federal agency affirmatively[52] authorized, funded, or carried out an activity; and whether the agency had some discretion to influence the activity to benefit protected species.[53] He declared the issue must be analyzed in the context of the broad scope of Section 7.[54] He felt the facts describing meetings and criteria set by the Forest Service favored finding agency action, and he found it highly persuasive that both sides appeared to use language indicating they were in an approval process.[55] Judge Fletcher believed that the miners had to meet the criteria set by Vandiver prior to proceeding, and that this was further evidence that the Forest Service affirmatively approved their mining.[56] He noted that under the regulations the Forest Service had to notify miners whether they could proceed or if an Ops Plan would be required, and found this also supported finding an affirmative authorization.[57] In arriving at the overbroad conclusion that the NOI process amounted to agency action, he ignored the Forest Service's intent for its own regulations,[58] misapplied precedents to support his expanded view of Section 7, and failed to refute key case law that cut against his holding.[59]

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[51] *Id*. at 1021–24.

[52] *See id*. The word affirmative appears often in 9th Circuit analysis of agency action. The 9th Circuit has stated that Congress's intent was that agencies must refrain from jeopardizing listed species when acting affirmatively. *See* Defenders of Wildlife v. U.S. Envtl. Prot. Agency, 420 F.3d 946, 967 (9th Cir. 2005), *rev'd* and *remanded sub nom*. Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007).

[53] *Karuk III*, 681 F.3d at 1024–27. Judge Fletcher discussed discretion at length and why it was present. However, discretion is not truly at issue, and the dissent conceded this. *Id.* at 1036 (Smith, J., dissenting).

[54] *Id.* at 1020.

[55] *Id*. at 1021–25. For example, the District Ranger told the New 49'ers, "This authorization expires December 31, 2004." On another occasion the Ranger told the New 49'ers, "I am unable to allow your proposed mining operations" regarding separate mining not challenged in the case. *Id*. at 1022.

[56] *Id.* at 1013–16, 1022–23. The facts (1) that the record does not show all of the four NOI submitters met with the Forest Service and (2) that it indicates at least one (Hamilton) may not have been able to meet the specific criteria set by Vandiver, but was still able to mine, are not addressed by the majority. *Id*.

[57] *Id*. at 1021.

[58] *See infra* Part III.C.1.b. *See infra* notes 83–86 and accompanying text.

[59] *Karuk III*, 681 F.3d at 1020–24. The majority also makes a comparison to the Administrative Procedure Act (APA) based on *Siskiyou Reg'l Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545 (9th Cir. 2009), where an NOI review was labeled final agency action for the purposes of the APA and cited as an act from which legal consequences flow. This raises the specter that the entire controversy is already decided.

b. An Overbroad Holding

There are two issues that should have been addressed in *Karuk III*: (1) Did the review of the specific NOIs at issue constitute agency action and invoke the ESA; and (2) Do the NOI regulations on their face invoke the consultation requirement in all cases? It is possible that use of the NOI process in every circumstance is not agency action, but under these facts, the manner in which it was executed did amount to agency action (the conduct and communications at issue make this argument possible, as shown by Judge Fletcher's opinion).[60] Along this line, the court could have specifically limited its holding to the NOIs at issue. This is not to say this would have been the correct holding, but it would be more supportable than the one given. It would have recognized the intent of the regulations and not ignored appropriate precedent. Regardless of the decision on the specific NOIs at issue, it would have correctly decided the more important issue of the NOI regulations overall, and avoided exposing a host of other activities to baseless challenge.

Judge Fletcher did indicate an attempt to limit his opinion solely to the four NOIs at issue.[61] However, he used unclear language throughout the opinion that left plenty of room to argue the NOI regulations require ESA consultation *every time* they are applied.[62] The parties themselves

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One might argue if NOI review is final agency action under the APA, it must be agency action under the ESA. Judge Fletcher implied as much. However, the reasoning that declares ESA agency action is not the equivalent of major federal action under NEPA applies. *See infra* note 92 and accompanying text (directly equating APA final agency action with ESA agency action raises problems). For example, it is possible that what is declared agency inaction by the court could still be considered final agency action under the APA, thus making the APA applicable, but not the ESA. *Karuk III*, 681 F.3d at 1023.

[60] *See Karuk III*, 681 F.3d at 1021–24. Judge Fletcher supported his opinion heavily with facts surrounding the Forest Service and miner meetings. *Id.* It would be interesting to see how he would have decided had there been little to no interaction between the Forest Service and miners, aside from the required responses under the Code of Federal Regulations.

[61] *See id.* at 1021–30. For example, Judge Fletcher uses the phrase "in approving the NOIs challenged" in his conclusion, possibly implying an attempt to limit the decision to the four NOIs challenged. *Id.*

[62] *See id.* at 1021, 1024, 1030. Judge Fletcher uses phrases such as "[b]y regulation, the Forest Service must authorize mining activities before they may proceed under a NOI" and "the Forest Service controls mining activities through the NOI process. . . ." *Id.* These statements clearly indicate he believes the NOI process itself is at issue. In their briefs surrounding the petition for certiorari discussed below, the parties believed the same. *See also Endangered Species Act to Trump Mining Claims: Supreme Court Lets Stand Ninth Circuit Ruling in* Karuk Tribe of California v. U.S. Forest Serv., CALIFORNIA LAND USE BLOG (Mar. 22, 2013) (averring that low-level mining that could have

agree *Karuk III* determined the NOI process itself, and not just the four NOIs, invoke Section 7 consultation.[63] Because of the failure to limit the decision, its impact might be felt outside the context of the Forest Service mining NOI regulations. Although the holding does not discuss impacts on other regulatory schemes, the arguments used in the decision provide a glimpse into how parties could challenge similar notice processes used by other agencies.[64] As discussed below, such challenges could have a huge negative impact on agency regulation and business endeavors.[65]

c. Judge Smith's Correct Dissenting Opinion

Judge Smith began with an assessment of 36 C.F.R. § 228.[66] He emphasized the Forest Service's interpretation of those regulations; specifically, that they were intended to be a simple notification procedure to assist in identifying whether an Ops Plan is needed. He refuted the notion that the rangers turned the NOI reviews into approvals due to the meetings, criteria established, and approval language used during the process. In his view the meetings and criteria merely involved advice regarding how the miners could avoid regulation by the Forest Service,

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proceeded under an NOI must now undergo ESA consultation in the 9th Circuit). At least one National Forest has issued guidance discussing the effects of *Karuk III* on mining. *See Frontliner Questions and Answers, Minerals and Geology*, NEZ PERCE NAT'L FOREST, *available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5426179.pdf (last visited Apr. 23, 2014). Conflicting with this is the fact that in October 2012 the Forest Service was recently sued by groups alleging the Forest Service, based on *Karuk III*, had to complete Section 7 consultation when it approved suction dredge mining in Oregon under NOIs (demonstrating that the Forest Service continued to utilize the same regulatory process after *Karuk III*). *See* Brian Hennes, *Ninth Circuit Endorses Functional Approach to Determining Agency Action Under Section 7(a)(2) of the Endangered Species Act:* Karuk Tribe of California v. United States Forest Service, 28 J. ENVTL. L. & LITIG. 545, 591 (2013). At a minimum, the decision has generated regulatory confusion in the short-term.

[63] *See* Petition for Writ of Certiorari at 21, The New 49'ers, Inc., et al., v. Karuk Tribe of California (9th Cir. 2012) (No. 12-289).

[64] *See id.* at 32. The New 49'ers briefly recognized this possibility, averring that the 9th Circuit in *Karuk III* effectively held that each time a federal agency requires information from a citizen about activity in areas where listed species may be present, that activity is subject to approval by the federal agency and triggers consultation under the ESA. *Id*.

[65] *See Karuk III*, 681 F.3d at 1039 (Smith, J., dissenting) (noting in the mining realm alone in 2008, California issued about 3,500 permits to low-impact miners such as those involved in *Karuk III*, and 18 percent of those miners earned a significant portion of their income from dredge mining).

[66] *Id*. at 1034.

and it was well established that such activities did not equal agency action.[67] He noted precedent similar to *Karuk III* establishing that inaction is not agency action. Most significantly, he showed Judge Fletcher did not identify any case where activity similar to that engaged in by the Forest Service was found to equal agency action.[68]

C. Why Judge Fletcher and the *Karuk III* Majority Are Incorrect

Judge Smith held the correct position in declaring the Forest Service NOI process should not be considered agency action for three main reasons. First, the majority overstated the significance of the interactions between the Forest Service and miners. Second, the NOI regulatory structure and intent, largely ignored by Judge Fletcher, weigh in favor of finding the NOI process is a simple notice procedure.[69] Third, a finding of no agency action under these facts is well supported by analogous case law that was not adequately addressed by Judge Fletcher.[70]

1. Interpreting the Forest Service Actions and Their Regulations

a. The Forest Service and Miners' Interactions

Judge Fletcher neglected to adequately consider precedent in holding the meetings between the miners and Forest Service, and the criteria developed by Vandiver, were proof of an approval process. The case of *Marbled Murrelet v. Babbitt*[71] offers a close analogy supporting Judge Smith's dissenting argument that this type of conduct is not proof of an approval process or agency action. In *Babbitt*, the USFWS, during a voluntary consultation, wrote a letter to a lumber company describing specific conditions to follow to avoid a taking (in violation of ESA Section 9) of protected species during operations.[72] The plaintiffs argued the letter showed control over the lumber operations amounting to

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[67] *Id*. at 1038–39.
[68] *Id*. at 1034–39.
[69] *See id*. at 1034–35.
[70] *See id*. at 1036.
[71] Marbled Murrelet v. Babbitt, 83 F.3d 1068 (9th Cir. 1996).
[72] *Id*. at 1074 (noting the letter required lumber companies to provide a description of procedures to be followed, and required a "no-take" determination by the USFWS in order to avoid a taking of northern spotted owls; and directing that site consultation with USFWS was required prior to timber harvest operations).

agency action.[73] Despite mandatory-type language in the letter, the 9th Circuit held the USFWS did nothing more than provide advice on how to avoid Section 9 enforcement by the USFWS.[74] The court noted holding otherwise would discourage necessary dialogue between the agency and public that assists in ensuring environmental compliance.[75] Likewise, the Forest Service interactions and criteria detailed in *Karuk III* were only forms of advice regarding how miners could avoid triggering the need for an Ops Plan.[76] By holding otherwise in *Karuk III*, the 9th Circuit produced the exact opposite result of what the Forest Service intended for the NOI process, and put a considerable chilling effect on vital public-agency interaction.[77]

Additionally, although the Forest Service used language in their interactions and correspondence that presented a tone of approval, these words should not decide the issue.[78] Use of a term like "approve" with the public does not convert a communication or interaction into an approval amounting to agency action if the activity cannot otherwise legally be called an approval or agency action under the ESA.[79] Agency representatives can call activity what they want, but if a legal analysis does not bear that label out, then such words should not matter as much as they did to Judge Fletcher in *Karuk III*.[80]

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[73] *Id*.
[74] *Id.* at 1074–75.
[75] *Id*.
[76] *See* Karuk Tribe of California v. U.S. Forest Serv. (*Karuk II)*, 640 F.3d 979, 993 (9th Cir. 2011), *reh'g en banc granted*, 658 F.3d 953 (9th Cir. 2011) and *on reh'g en banc*, 681 F.3d 1006 (9th Cir. 2012) (explaining that the NOI process merely facilitates whether an Ops Plan is needed, it is not a regulatory action itself, and communications between miners and the Forest Service at the NOI stage occur for the limited purpose of categorizing the private activity, not for the purpose of obtaining the agency's affirmative permission to act).
[77] *See* Karuk Tribe of California v. U.S. Forest Serv. (*Karuk III*), 681 F.3d 1006, 1038–39 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 1579 (2013).
[78] *Id*. at 1037–38 (Smith, J., dissenting).
[79] *See id*. at 1038 (noting in Sierra Club v. Babbitt, 65 F.3d 1502, 1511 (9th Cir.1995), the court held that an agency's letter purporting to approve a construction project could not be construed as an authorization for ESA purposes because the letter did not otherwise satisfy the statutory criteria of an ESA authorization).
[80] *See id*.

b. The Interpretation of the Forest Service Regulations

Judge Fletcher's interpretation of the regulations reveals two flaws. First, he failed to adequately consider key regulatory interpretations provided.[81] Second, he failed to give deference in general to the Forest Service's interpretation of its own regulations.[82]

There are several items that show Judge Fletcher glossed over or ignored key matters. He did not adequately address the Forest Service Federal Register clarification indicating the NOI process was only meant to gather information.[83] He assumed the mere fact that miners had to provide information to the Forest Service prior to starting work was strong evidence of an approval.[84] He misinterpreted the meaning of the regulatory requirement for a response to NOI filers.[85] Judge Fletcher failed to address the difference in regulatory treatment between mining under an Ops Plan and an NOI, a difference which favored Judge Smith's position.[86] Lastly, he used a generally conclusory tone that

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[81] *See id.* at 1034–35.

[82] *See* Auer v. Robbins, 519 U.S. 452, 461–62 (1997) (deference to an agency's interpretation of its own regulation is warranted unless that interpretation is clearly erroneous, inconsistent with the regulation, or does not reflect the agency's fair and considered judgment on the issue).

[83] *See Karuk III*, 681 F.3d at 1023. Judge Fletcher does not give full context to a statement in the Federal Register clarifying NOI regulatory intent. He quotes "a notice of intent to operate was not intended to be a regulatory instrument" and then criticizes the Forest Service by stating the question of agency action is not answered by whether something is intended to be a regulatory instrument or not. While technically correct, his statement misses the point of the Forest Service clarification. Judge Smith gives the full context by quoting, "[A] notice of intent to operate was not intended to be a regulatory instrument; it was simply meant to be a notice given to the Forest Service . . . facilitating resolution of the question, 'Is submission and approval of a plan of operations required . . . ?'" *See id.* at 1034 (Smith, J. dissenting). Judge Fletcher never adequately addresses these Forest Service interpretations. *See id.* at 1021–24.

[84] *See id.* at 1021–22. Here, the extent of Judge Fletcher's argument is, because the miners have to submit NOIs before mining, NOI reviews are approvals. He repeats the NOI regulations with this assertion as if they obviously support this contention, but offers little to no analysis as to why this is so.

[85] *See id.* at 1034 (Smith, J., dissenting). It is an overgeneralization to equate a response to the public as an approval. Judge Smith accurately characterizes the fifteen-day response requirement in the NOI regulations by analogizing it to the NOI itself, stating that it merely provides notice of the agency's review. *Id.*

[86] *See id.* at 1021–24 (majority opinion). The Forest Service specifically states that if mining will likely cause a significant disturbance to surface resources, an approved Ops Plan is required prior to the start of work. No such requirement is listed for mining under the NOI provision. *See* 36 C.F.R. § 228 (LexisNexis 2014). One would think the Forest Service would use similar language if the NOI process was meant to be an approval.

presupposed the decision he reached.[87]

Regarding deference in general, Judge Fletcher noted it was not warranted because the ESA regulations were not administered by the Forest Service.[88] It is true that because the Forest Service does not oversee the ESA regulations (i.e., 50 C.F.R. § 402), it is not entitled to deference in any interpretation of what is considered agency action under those regulations.[89] However, the majority should have distinguished this rule from deference owed to the Forest Service regarding the interpretation of its *own* regulations at 36 C.F.R. § 228.[90] This could raise a conflict; granting deference to the Forest Service for its regulations is difficult without appearing to grant deference to it regarding the ESA regulations. However, the conflict can be resolved. Judge Fletcher should have applied deference to the Forest Service interpretations of its NOI regulations, appropriately finding that on their face, their use did not amount to agency action. Then, in a separate interpretation, he could have analyzed the Forest Service activity in *Karuk III* to see if the execution of the NOI process under the facts of the case amounted to agency action under the ESA (which, again, may have led to a more appropriate limited holding regarding only the four NOIs and not the whole NOI process).[91]

This is further evidence of intent to use the NOI process only as an information-gathering tool, not an approval process.

[87] *See Karuk III*, 681 F.3d at 1011. The language Judge Fletcher uses shows he appears to have the case decided before conducting any analysis. He frames the question as "whether the Forest Service's *approval* of four NOIs . . . ." is agency action (emphasis added). Prior to attempting an analysis of the NOI regulations, he states, "By regulation, the Forest Service *must authorize* mining activities before they may proceed under a NOI." *Id*. at 1011, 1021 (emphasis added).

[88] *Id*. at 1017.

[89] *See id*.

[90] *See* Auer v. Robbins, 519 U.S. 452, 461–62 (1997). There are several reasons for not giving deference to an agency's interpretation of its own regulations. They include: (1) the agency's interpretation conflicts with a prior interpretation; (2) the agency interpretation is merely a convenient litigating position; and (3) accepting the interpretation would impose new regulatory requirements without fair notice. *See* Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2166 (2012); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988); Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 159 (2007). None of these concerns are present in *Karuk III*. The Forest Service maintained a consistent position, treating the NOI system as a notice process and maintaining an interpretation not asserted merely to win the *Karuk* case. *See Karuk III*, 681 F.3d, at 1031–34 (Smith, J., dissenting).

[91] *See infra* Part III.B.2.b.

Thus, Judge Fletcher not only should have given more consideration to key facts and interpretations surrounding the Forest Service regulations, he should have granted some deference to Forest Service explanations regarding the NOI process. His failure to do so significantly contributed to his overly broad interpretation of agency action.

2. Agency Action Case Law Supports Judge Smith

The NOI regulations and their application are also more analogous to previous situations where agency action was not found.[92] There are clear examples of agency action involving permits, contracts, and similar actions that can easily be labeled affirmative approvals—yet Judge Fletcher fails to analogize any of them to the facts in *Karuk III*.[93] Judge Smith, however, compares the *Karuk III* facts to prior cases holding that agency inaction does not equal action, and in the process provides a much more compelling and legally sound argument.[94]

The key case raised by Judge Smith is *Western Watersheds Project v. Matejko*, a 2006 9th Circuit opinion.[95] It involved Bureau of Land

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[92] *See Karuk III*, 681 F.3d at 1035–37 (Smith, J., dissenting). One case used by Judge Smith, *Sierra Club v. Penfold*, 857 F.2d 1307 (9th Cir. 1988), warrants mention for an incorrect analogy. In that case, the 9th Circuit held Forest Service NOIs were not major federal action triggering NEPA requirements, and Judge Smith felt this supported finding the NOI process did not amount to ESA agency action in *Karuk III*. Judge Fletcher correctly points out NEPA and the ESA have two different standards for action, and thus the analogy does not work. *Id*. at 1024 (majority opinion). This is of no moment—for the reasons stated in this article, Judge Smith's opinion should have carried the day without any mention of *Penfold*.

[93] *Karuk III*, 681 F.3d at 1036 (Smith, J., dissenting); Baker v. U.S. Dept. of Agric., 928 F. Supp. 1513, 1515 (D. Idaho 1996) (approval of mining plan of operations under 36 C.F.R. § 228 is agency action); Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv., 340 F.3d 969, 970 (9th Cir. 2003) (NMFS had a duty to consult under Section 7 with respect to high seas fishing permits it issued); Sierra Club v. United States, 255 F. Supp. 2d 1177, 1179 (D. Colo. 2002) (road easement granted by the Federal Regulatory Energy Commission to gravel miners was agency action); Washington Toxics Coal. v. Envtl. Prot. Agency, 413 F.3d 1024, 1030 (9th Cir. 2005) (EPA's registration of fifty-four pesticide active ingredients, allowing them for public use, was an agency action).

[94] *See Karuk III*, 681 F.3d at 1035–36 (Smith, J., dissenting) (discussing W. Watersheds Project v. Matejko, 468 F.3d 1099 (9th Cir. 2006); California Sportfishing v. F.E.R.C., 472 F.3d 593 (9th Cir. 2006)).

[95] *See id. at* 1021–24 (majority opinion). It is notable that Judge Fletcher does not refute the analogy to *Western Watersheds* anywhere in his opinion. He does not even mention

Management (BLM) oversight of private water diversions.[96] The BLM determined it would not regulate water diversions established under certain historical grants unless there were substantial deviations from those original grants.[97] Citizens' groups alleged the BLM's continued adherence to its decision not to apply its regulatory authority to these water diversions was affirmative agency action.[98] The court disagreed, noting the BLM watercourse policy was agency inaction that did not trigger ESA consultation; BLM had simply decided not to regulate.[99] The BLM adherence to its policy was not a mere failure to regulate, it was a deliberate decision not to act after a review of the facts.[100] This is analogous and very similar to the NOI process in *Karuk III*, where the Forest Service reviewed information and decided not to require an Ops Plan.[101] Just as the BLM's refusal to require permits for the water diversions was not an affirmative approval of their use, a Forest Service refusal to require an Ops Plan for a miner filing an NOI is not an affirmative approval of that mining.[102]

A case from the D.C. Circuit (not discussed in *Karuk III*) offers another direct comparison to the activity in *Karuk III*.[103] In *International Center for Technology Assessment v. Thompson*,[104] the plaintiffs challenged the Food and Drug Administration's (FDA) decision not to regulate a company's genetically engineered pet fish, stating the FDA should have conducted ESA Section 7 consultation prior to deciding not to regulate. As with the Forest Service NOI process, information was reviewed by the FDA, and it decided no further action was needed. The court held that the FDA's decision was appropriately characterized as an election not to engage in enforcement, and it was not agency action.[105]

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the case, other than to use it for general statements about ESA Section 7. *See Karuk III*, 681 F.3d at 1035–36 (Smith, J. dissenting).

[96] *See generally* Western Watersheds Project v. Matejko, 468 F.3d 1099 (9th Cir. 2006).

[97] *See id*. at 1105–08.

[98] *Id*. at 1109. The Bureau of Land Management (BLM) previously issued policy and relevant regulations, 43 C.F.R. § 2803, well before this case that promulgated the decision to exclude the referenced water diversions from further regulation. *Id*. at 1105–06.

[99] *Id*.

[100] *See id*.

[101] Karuk Tribe of California v. U.S. Forest Service (*Karuk III*), 681 F.3d 1006, 1035–37 (9th Cir. 2012) (Smith, J., dissenting), *cert. denied*, 133 S. Ct. 1579 (2013).

[102] *See id*.

[103] *See generally id.* at 1006.

[104] Int'l Ctr. for Tech. Assessment v. Thompson, 421 F. Supp. 2d 1, 5, 11 (D.D.C. 2006).

[105] *Id*. at 11. The court also concluded that even if the company had submitted a New Animal Drug Application (NADA) to the FDA, and even if it approved the NADA, the

A 7th Circuit case, *Texas Independent Producers & Royalty Owners Association v. EPA*,[106] presents another excellent analogy to the facts of *Karuk III*. In that case, the EPA granted a national general permit to allow certain wastewater discharges under the Clean Water Act.[107] Facility operators that wanted to use the permit provisions filed NOIs with the EPA, and, absent a negative ruling from the agency, could proceed with their wastewater discharges. The court specifically held these reviews were not agency action, and that the EPA did not have to complete ESA consultation for NOIs filed under the general permit.[108] Advocates for the *Karuk III* majority note that *Texas Independent Producers & Royalty Owners Association v. EPA* may not be on point because the EPA did in fact conduct ESA consultation when it issued the general permit.[109] The case remains persuasive nonetheless because the court focused on action and who was taking action, if any—the court clearly held that the filing of an NOI was a private action, and there was no federal action involved.[110]

Western Watersheds provides specific 9th Circuit precedent that Judge Fletcher fails to contend with, and *International Center for Technology Assessment* and *Texas Independent Producers* offer diverse support for Judge Smith's position.[111] Judge Smith gives appropriate

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court would still consider this a decision not to enforce. *Id.* at 8. Again, this is similar to the review of a Forest Service NOI with no objections. *See generally Karuk III*, 681 F.3d 1006.

[106] Texas Indep. Producers & Royalty Owners Ass'n v. E.P.A., 410 F.3d 964 (7th Cir. 2005). The case is not used as a direct analogy by Judge Smith, and only briefly mentioned in *Karuk III* in a footnote. *See Karuk III* at 1041 (Smith, J., dissenting).

[107] *Texas Indep. Producers & Royalty Owners Ass'n*, 410 F.3d at 968. The EPA met ESA consultation requirements at the time it promulgated the general permit requirements. *Id.* at 979.

[108] *See id.* Although the EPA is not required to respond to each NOI filer under this process, and the Forest Service is required to respond under its NOI process, that issue should not matter. By regulation the EPA states a timely NOI filer meeting their requirements can proceed automatically. The Forest Service's fifteen-day response requirement (where a miner would learn the Forest Service has no objections) has the same effect, the Forest Service just chose to respond individually, whereas the EPA chose to give blanket notice via the C.F.R. to filers regarding how they would know if there were objections to their NOI. *See* 40 C.F.R. 122.28(b)(2)(i) (LexisNexis 2014). If the EPA's method of communicating with NOI filers did not transform their process into an approval, the Forest Service's method should not either.

[109] Respondent Karuk Tribe of California's Brief in Opposition at 20–21, The New 49'ers, Inc., et al., v. Karuk Tribe of California, *et. al.* (9th Cir. 2012) (No. 12-289) (Feb. 2013).

[110] *See Texas Indep. Producers & Royalty Owners Ass'n*, 410 F.3d at 979.

[111] *See Karuk III*, 681 F.3d at 1020–24.

recognition to the agency's intent under the regulations and has precedent and direct analogy for support—all of which are weakly addressed or missing in the majority opinion.[112] Unfortunately, Judge Fletcher's overbroad analysis can potentially be applied to impede other government notice activities that should not invoke the ESA.

D. What Happened to *Karuk III*

The New 49'ers filed a petition for writ of *certiorari* in August 2012, and the federal government filed a brief in opposition in November 2012.[113] In its response, the government stated that the 9th Circuit incorrectly found the Forest Service review of the NOIs required ESA consultation.[114] However, the government felt *certiorari* was unwarranted because the decision did not conflict with any U.S. Supreme Court or Court of Appeals decisions,[115] and the practical effect of the decision on future mining operations would be limited because California recently enacted a permanent moratorium on suction dredging.[116] The U.S. position seemed to ignore the fact that the *Karuk III* decision creates a confusing state of the law and potentially opens the door to unwarranted ESA challenges to a wide range of low-level government activity similar to the Forest Service NOI process.[117] *Certiorari* was denied on March 18, 2013.[118]

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[112] *See id*. at 1035–39 (Smith, J., dissenting).

[113] *See* SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/the-new-49ers-inc-v-karuk-tribe-of-california/ (last visited Apr. 22, 2014).

[114] Brief for the United States in Opposition to Petition for Certiorari at 11, The New 49'ers, Inc., et al., v. Karuk Tribe of California (9th Cir. 2012) (No. 12-289).

[115] *See id*. at 14. With a narrow view toward *Karuk III* and the NOI process, the statement about a lack of a split in the circuits may be true. With a broader view of notice activities in general there is a split, demonstrated by juxtaposing *International Center for Technology* and *Texas Independent Producers* with the *Karuk III* decision. *See id*.

[116] *Id*. at 11, 14. The government's brief did not discuss any possible impact (or perceived lack thereof) of the 9th Circuit's decision on mining in the other states within the circuit. *Id*. at 11–16.

[117] *See* PERKINS COIE, *supra* note 8.

[118] *See* SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/the-new-49ers-inc-v-karuk-tribe-of-california/ (last visited Apr. 22, 2014).

IV. The Potential For Broader Negative Impacts

A. Why We Should Care

As mentioned above, the ESA has an incredibly expansive reach.[119] If its scope is improperly pushed too far, the ESA will stymie government and private efforts that should not be covered by the statute.[120] An immediate concern is the decision will lead to inconsistent application of Forest Service regulations from circuit to circuit.[121] On a larger scale, *Karuk III* created uncertainty as to whether consultation might be required by other agencies conducting similar activities, which could lead to confusion and inconsistent regulation application in other areas of U.S. governmental regulation.

Most significantly, the *Karuk III* decision provided an unseemly conduit for further baseless opposition to minor government activity (i.e., similar notice procedures) that should not fall under Section 7.[122] Federal agencies conduct many other low-level activities that might carry some appearance of an authorization on the surface, but in reality are nothing more than notice and information-collecting activities that can be analogized to cases discussed above that found inaction for the purposes of the ESA. As stated by Judge Smith, such activities are "at most a preliminary step prior to agency action being taken."[123] This is likely not the type of activity that Congress contemplated invoking ESA Section 7. The arguments that successfully challenged the NOI process could be applied to other notice activities, causing drastic economic impacts and seriously hampering the government's ability to carry out its missions.[124] Enterprising Non-Governmental Organizations have always sought to expand ESA applicability through suits, and the *Karuk III* case now provides them a potential new template to utilize in challenging government activity.[125] Below is an example of how the *Karuk III*

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[119] *See generally* Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978).
[120] *See* PERKINS COIE, *supra* note 8.
[121] *See* Karuk Tribe of California v. U.S. Forest Serv. (*Karuk III*), 681 F.3d 1006, 1038 (Smith, J., dissenting) (9th Cir. 2012), *cert. denied*, 133 S. Ct. 1579 (2013).
[122] *See* PERKINS COIE, *supra* note 8.
[123] *Karuk III*, 681 F.3d at 1035 (Smith, J., dissenting).
[124] *See* PERKINS COIE, *supra* note 8.
[125] *See* PETERSEN, *supra* note 13, at ix, 119 (commenting on the ESA citizen suit provision serving as a powerful tool for environmental groups to expand the powers of the law, and that litigation has played a significant role in broadening the scope of the act).

arguments could be applied to challenge other important government activity.[126]

B. How Could Unwarranted Challenges Happen?

U.S. Coast Guard advance notice of transfer (ANOT) regulations provide one example for examination of the problem. Oil and chemical transfers involving vessels, tanker trucks, and bulk liquid facilities occur in marine port areas throughout the United States on a daily basis and are regulated by numerous provisions throughout 33 C.F.R. Notice provisions for these transfers fall under 33 C.F.R. § 156.118.[127] The regulations indicate that an ANOT must be provided to the Coast Guard if required by the Captain of the Port (COTP) prior to commencing a

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[126] This is but one example. There are likely dozens more, spanning multiple federal agencies; the government uses NOIs and similar processes across the board to lessen regulatory burdens on the public in numerous spheres. The EPA NOI process at issue in *Texas Independent Producers & Royalty Owners Association v. EPA* is another example. Another is the U.S. Customs NOI process for drawbacks (refunds) involving unused merchandise. Regulations provide that individuals seeking to use this process must submit an NOI to the Customs Service, which will make a determination as to whether or not the merchandise must be inspected, or inspection will be waived. *See* 19 C.F.R. § 191.35 (LexisNexis 2014). The feasibility of challenges to these NOI processes is debatable (especially since the "may affect" standard must still be met), these examples and the one discussed in detail herein are merely provided to show that there are numerous "notice" activities utilized by the federal government.

[127] The regulation states,

> (a) The COTP may require a facility operator to notify the COTP of the time and place of each transfer operation at least 4 hours before it begins for facilities that: (1) Are mobile; (2) Are in a remote location; (3) Have a prior history of oil or hazardous material spills; or (4) Conduct infrequent transfer operations. (b) In the case of a vessel to vessel transfer, the COTP may require a vessel operator of a lightering or fueling vessel to notify the COTP of the time and place of each transfer operation, as specified by the COTP, at least 4 hours before it begins. (c) No person may conduct such transfer operations until advance notice has been given as specified by the COTP.

See 33 C.F.R. § 156.118 (LexisNexis 2014). The COTP refers to the Coast Guard Captain of the Port, and "means the U.S. Coast Guard officer commanding a Captain of the Port Zone described in part 3 of this chapter, or that person's authorized representative." *Id.* § 154.105. The COTP administers marine safety, security, and environmental protection programs throughout his or her area of responsibility. *See* U.S. COAST GUARD, MARINE SAFETY MANUAL VOL. VI, PORTS AND WATERWAYS ACTIVITIES para. 1.A.2 (11 Oct. 1996) [hereinafter USCG MARINE SAFETY MANUAL].

liquid transfer.[128] Descriptions of the intent behind this requirement at 33 C.F.R. § 156.118 are not as extensive as those for the NOI process published by the Forest Service, but the purpose is nonetheless clear—the process is designed to provide the Coast Guard with awareness of oil and chemical transfers.[129] The Coast Guard does not describe the process as an authorization of oil or chemical transfer operations.[130] Once received, ANOTs are reviewed (similar to the Forest Service NOIs) and used as one of many sources of information to determine whether any further monitoring or enforcement action is needed.[131] One difference in the process is, the Coast Guard does not respond to the ANOT unless some form of enforcement is needed.[132]

Other Coast Guard regulations add to the scenario. 33 C.F.R. § 154 contains dozens of requirements (or criteria) governing the actual transfer process.[133] Additionally, 33 C.F.R. Section 160.109 gives the Captain of the Port the authority to halt bulk liquid transfers if they pose a risk to navigable waters.[134] One can see how an entity could apply Judge Fletcher's two-part test and the same arguments made in *Karuk III* and use them to raise a possible challenge to an ANOT, claiming it involves agency action.[135]

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[128] *See* 33 C.F.R. § 156.118.

[129] *See* Pollution Prevention: Vessel and Oil Transfer Facilities, 42 Fed. Reg. 32,670, 32673 (June 1977) (codified at 33 C.F.R. § 154) (explaining the requirement to notify the Coast Guard of oil transfers was implemented simply because the Coast Guard was unaware of numerous transfers that occur).

[130] *See, e.g.*, *Advance Notice of Transfer*, MARINE SAFETY UNIT CHI., http://www.uscg.mil/d9/msuchicago/AdvanceNoticeForm.asp (last visited Apr. 22, 2014) (showing the form simply asks for the particulars surrounding when and where the transfer will occur).

[131] This statement is based upon the author's experience as a Division Officer in charge of bulk oil and chemical facility compliance and pollution response.

[132] *Id*. The lack of an actual response to each ANOT would not stop a challenge to this notice activity. Challengers could argue an implied approval was created when the regulations governing bulk liquid transfers were promulgated. More importantly, key arguments used in the *Karuk III* case are still available. Namely, the facts that an ANOT must be filed prior to commencing a transfer, the Coast Guard has established criteria governing bulk liquid transfers, and the Coast Guard has the ability to monitor or stop the transfers. *Cf.* Karuk Tribe of California v. U.S. Forest Service (*Karuk III*), 681 F.3d 1006, 1021–24 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 1579 (2013).

[133] 33 C.F.R. § 154.530 (LexisNexis 2014). For example, 33 C.F.R. §154.530 requires small discharge containment equipment in the event a spill occurs during transfer. *Id*.

[134] 33 C.F.R. § 160.109 (LexisNexis 2014).

[135] *See Karuk III*, 681 F.3d at 1021. Again, this test asks whether a federal agency affirmatively authorized, funded, or carried out an activity; and whether the agency had discretion to influence the activity to benefit protected species. *Id*. One can easily show the discretion portion is met, as with the NOIs in *Karuk III*, discretion is present in the

In applying the arguments used by Judge Fletcher to the Coast Guard ANOT process, the strongest potential argument a party could use for finding agency action would be the fact that, as stated in 33 CFR § 156.118, the ANOT must be filed prior to commencing a transfer. A reviewing court could equate this to a condition precedent to operating that in reality meant agency approval was required.[136] Judge Fletcher considered the fact that miners who might disturb surface resources had to submit an NOI prior to commencing operations as strong evidence in support of finding agency action, and a challenger could argue the review of required ANOTs is an analogous action.[137] One could also argue the facility transfer requirements at 33 C.F.R. § 154 (such as small discharge containment) are similar to the dredge distance and tailings pile replacement criteria set by the Forest Service in *Karuk III*, and assert the filing of an ANOT is effectively a member of the public stating to the Coast Guard that they have met pre-established criteria.[138] Additionally, the Coast Guard has the authority to (and often does) monitor transfers for compliance; one could argue this is similar to when Judge Fletcher found the Forest Service monitoring of mining was evidence of an approval process.[139] Lastly, the fact that the filer knows the purpose of an ANOT is to make the Coast Guard aware of the transfer and allow it the opportunity to intervene for safety reasons (if needed) gives an additional ground for a challenger to argue that the submitter seeks approval through an ANOT.

Thus, one could make an argument that the Coast Guard ANOT process is actually agency action requiring ESA consultation. This is not to say the argument would have much chance of success in this particular example; however even unsuccessful, misguided challenges such as this place significant unnecessary logistical burdens on the government. It is but one example of how *Karuk III* could be used, and there are countless other government notice activities it could be applied against. Some federal government activities may have more of a tenor of agency action than the example discussed above, and thus may be more at risk in a

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case of the ANOT review. The Coast Guard, like the Forest Service, has discretion in deciding to act on information. Such actions could include increased safety measures or a halt to the oil or chemical transfer altogether, so it has discretion to influence the liquid transfer to benefit protected species.

[136] *Id.* at 1021–22 (Smith, J., dissenting).

[137] *See id.*

[138] *See id*. at 1013–16, 1022–23 (noting Forest Service criteria for mining were evidence of agency action).

[139] *Id*. at 1023.

challenge. The ultimate problem is that a successful court challenge to what should clearly be considered a notice activity (such as the ANOT process) may then require that Section 7 consultation occur for that activity. Consultation takes time and funds, and should only be used when truly necessary; during consultation, agencies must gather information from the public, hold interagency discussions, and possibly produce formal biological opinions before proceeding.[140] In the meantime, if the activity involves construction or business operations, a negative economic impact due to delays will occur.[141]

C. What Can Be Done?

There are three avenues to combat this problem. First, the USFWS and NMFS could issue a clarification in the form of a rulemaking regarding the definition of agency action.[142] Such a clarification could set guidelines excluding low-level notice activities that meet certain criteria from the definition of agency action. The USFWS and NMFS could even list specific exempted activities. This would significantly assist federal agencies whose notice activities may be challenged in the future. There is risk in this method—such a regulation could be challenged as an unacceptable interpretation of the ESA.[143] However, this may prove to be the most economical approach. From a practical standpoint, it is better to have an overarching solution instead of leaving federal agencies to defend their notice activities one by one.

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[140] *See id*. at 1039 (Smith, J. dissenting) (noting that ESA consultations can sometimes take years, and private entities often have to hire their own experts to assist in the process due to agency shortfalls).

[141] *See Comparison of U.S. and Foreign-Flag Operating Costs*, U.S. MARITIME ADMINISTRATION (Sept. 2011) http://www.marad.dot.gov/ documents/Comparison_of_ US_and_Foreign_Flag_Operating_Costs.pdf. It notes in 2010 the average daily operating cost of a U.S.-flagged vessel was about $20,053. In the Coast Guard example, this would be the cost to a vessel operator for every day a fuel transfer was delayed due to an ANOT challenge. *See id*.

[142] *See* Interagency Cooperation—Endangered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. 19926, 19930 (June 3, 1986) (codified at 50 C.F.R. § 402). This was the last time the USFWS and NMFS clarified the definition of action under the ESA regulations. *See id*.

[143] *Cf.* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (where citizens challenged EPA regulations implementing the Clean Air Act as an unreasonable interpretation of the law).

Second, agencies should be aware of the increased potential for challenge to their notice activities after *Karuk III*, and may want to promulgate clarifications for their own notice processes they feel may be vulnerable to challenge. The Forest Service created a significant amount of fodder for the *Karuk III* majority through its interactions with the miners that required explanation; some agency guidance may help avoid this issue. Otherwise, agency counsel should simply be aware that their regulators in the field can conduct notice-related activities that might give rise to ESA challenges, and they should be prepared to defend these notice processes and regulations.

Lastly, the government should challenge the decision at its next opportunity. It is unclear why the government did not desire to fight the case in the Supreme Court. One can only surmise it feared that the Court would find against the government, which would fully cement the expansion of agency action put forth in *Karuk III*. However, until overturned, the decision remains a significant issue, and not just for the Forest Service NOI process.[144] It increases the potential for overbroad application of the agency action concept across the circuits, leaving similar activities exposed to court challenges.[145] It also has created the potential for increased confusion over the state of ESA Section 7.[146] The federal government would be better served by challenging the decision at the next opportunity to ensure it does not become an unreasonable impediment to agency notice activities.

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[144] *See* PERKINS COIE, *supra* note 8.

[145] *See id.*

[146] The case has already generated disagreement in the 9th Circuit over the status of a previous 9th Circuit ESA case, *Pac. Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994), which addressed ESA consultation in the context of ongoing (continuous) agency action. A Northern Distict of California case found *Karuk III* overruled the *Pacific Rivers* stance on ongoing agency action. *See* Ctr. for Biological Diversity v. E.P.A., 2013 WL 1729573, at 10 (N.D. Cal. Apr. 22, 2013). A District of Montana case decided less than a month later held *Pacific Rivers* remained good law in the 9th Circuit. *See* Salix v. U.S. Forest Serv., 944 F. Supp. 2d 984, 986 (D. Mont. 2013). *See also* Brian Hennes, *Ninth Circuit Endorses Functional Approach to Determining Agency Action Under Section 7(a)(2) of the Endangered Species Act:* Karuk Tribe of California v. United States Forest Service, 28 J. ENVTL. L. & LITIG. 545, 591–92 (2013) (discussing the conflict between the Montana and Northern District of California cases).

V. Conclusion

It is evident from *Karuk III* that this area of the law can turn on the finest distinctions in federal regulations and actions. Nonetheless, on balance precedent, regulations, and the law are on the side of Judge Smith and the *Karuk III* dissent. Judge Fletcher was overly focused on the activity and language used by the Forest Service, he ignored precedent, and he could not identify case law specifically analogous to his position. The focus on activity and labeling is understandable, but not at the exclusion of precedent and valid regulatory interpretation.

There is no doubt Section 7 is meant to be broad. However, *Karuk III* pushed the law's reach too far. One could take the *Karuk III* result to its furthest extent and argue any time an agency does anything, it acts affirmatively, and apply that concept across the board to invoke the ESA for virtually any federal activity. Given the amount of notice activity in the federal realm, *Karuk III* creates a huge potential for frivolous suits, and will ultimately cause great confusion and inconsistency in regulatory efforts.[147] The federal government should investigate issuing clarifying regulations to lessen the chance that similar notice activities will be interpreted as agency action in future court challenges. It should also look for future opportunities to aid in overruling *Karuk III* to ensure it cannot be used to further confuse the regulatory landscape and burden the public.

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[147] *See* Petition for Writ of Certiorari at 31–32, The New 49'ers, Inc., et al., v. Karuk Tribe of California (9th Cir. 2012) (No. 12-289).