No. 12-289

IN THE SUPREME COURT OF THE UNITED STATES

THE NEW 49'ERS, INC., *ET AL.*
Petitioners,

v.

KARUK TRIBE OF CALIFORNIA,
Respondent.

On Petition for Writ of *Certiorari* to The United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY TO RESPONDENT KARUK TRIBE'S BRIEF IN OPPOSITION

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Mindful of the Court's injunction to limit reply briefs, petitioners write briefly in response to the Brief in Opposition filed by the Karuk Tribe of California: (1) to highlight the national importance of the decision below; (2) to demonstrate the extreme departure from settled Endangered Species Act and other law represented by the decision; and (3) to respond to what petitioners regard as a somewhat misdirected presentation of the pertinent regulatory powers over mining.

Argument

I. THE NINTH CIRCUIT'S OPINION HAS AN IMPACT ON MINING OF NATIONAL IMPORTANCE.

The Tribe joins the Forest Service in asserting that the decision below will have "little practical effect," but such a generalization by the Tribe and the Service is not based on any facts of record. The miners are the only parties truly competent to testify about the practical effects, as they are the only parties that experience them. Neither the Tribe nor the Forest Service appears to have any understanding how all mineral development commences with small-scale prospecting activities that must be completed in limited summer seasons, with operations which move from location to location in an iterative process. The majority's willingness to put multi-year delays between each iteration of this process, a process that involves no appreciable

adverse environmental impact of any kind, materially interferes with national mineral development. (*See* Petition at 12 n.2 (years ago, Forest Service acknowledged the practical effects it now attempts to exclude from the record).) The various red herrings proffered by the Tribe to distract from this fundamental truth should be rejected.

A. The Tribe's Assertions Concerning BLM Regulation Are Wrong.

The Tribe's assertion that the U.S. Bureau of Land Management "has long engaged in ESA consultation before approving similar mining activity" (Karuk Br. 2) is simply wrong. The BLM regulations divide the use of public lands into three categories: "casual use," "notice level operations," and "plan-level operations". 43 C.F.R. § 3809.10. Only "plan-level operations" require BLM approval. *Id.* § 3809.10(c); *see also id.* § 3809.311 (no action taken on notices unless "we determine that you may not conduct operations because of your inability to prevent unnecessary or undue degradation").

Unlike the Forest Service regulations, the BLM regulations define "casual use" to include the operation of "small portable suction dredge," because this equipment "ordinarily result[s] in no or negligible disturbance of the public lands or resources". *See* 43 C.F.R. § 3809.5 (defining "casual use"). For this reason, suction dredge mining on BLM land typically does not even require notice to BLM.

The Tribe cites § 3809.11(c)(6) for the proposition that any activities greater than casual use in "lands or waters known to contain Federally proposed or listed threatened or endangered species" require ESA consultation, but this regulation is irrelevant insofar as suction dredging can constitute a "casual use". And even if a suction dredger does provide notice to BLM, another regulation not cited by the Tribe, § 3809.31(b), generally exempts suction dredging that is covered by state regulations from any ESA consultations. Only if there is no state regulatory system, a state of affairs unknown to petitioners, does BLM propose to engage in ESA consultations. *See id.* The Tribe fails to mention this important limitation to the material it quotes at length. (Karuk Br. 24.) Contrary to the Tribe's assertions (Karuk Br. 24-25), a greater inconsistency as between BLM and Forest Service lands would result from allowing the decision below to stand.

B. The Tribe's Assertion that this Case Concerns "Limited Exceptions Where Mining Poses a Real Threat to Listed Species" Is Unfounded.

The Tribe paints a picture in which suction dredging is both a serious menace to fish, yet somehow the consultations will essentially have no effect on mining. In fact, the mining has no effect on fish, but the consultations endanger mining.

The Tribe presents evidence concerning the impact of small-scale mining which it characterizes

as coming from the Forest Service's own biologist. In fact, the Forest Service had two biologists involved who could not come to agreement.[1] The quotes proffered by the Tribe from this biologist concern theoretical effects of theoretically-bad operations in theoretically bad places.

What the Tribe does not mention in its discussion of potential general effects is that the specific mining operations here were voluntarily limited precisely to avoid *any* effects, through extraordinarily detailed notices by the miners (*e.g.,* pp. 2-5 of the Miners' Excerpts of Record (MER02-05)) and monitoring by Forest Service and even NOAA employees (*e.g.*, SER07). The regulations required the rangers to consider adverse effects on fish, and had there been any, the Forest Service would have required a Plan of Operations and initiated consultation.

There is clearly a great difference of opinion between the majority and dissenting judges as to the practical effects of entangling small-scale miners in endangered species act consultations. But the majority's position lacks any foundation in fact. While the majority alludes to so-called "informal consultation," there is, in substance, no such thing. The Forest Service Manual (FSM)[2] requires virtually

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[1] Forest Service Memorandum to the Files, May 24, 2004, included as pp. 12-13 of the Federal Appellees' Supplemental Excerpts of Record (SER012-13).

[2] Petitioners request that the Court take judicial notice of these materials, which are available at

the same procedures for both formal and informal consultation (*See* FSM 2671.45 ("Consultation and Conference"); FSM 2671.45a ("Informal Consultation"); FSM 2671.45c ("Formal Consultation"). In particular, the same "standards for biological evaluations under FSM 2672.42" apply. *See* FSM 2671.44 ("Determination of Effects on Listed or Proposed Species"). Those standards require evaluations sufficiently complex as to trigger the "Process Predicament" we presented to the Court in our Petition (at p. 13). *See* FSM 2672.42.

The majority's suggestion that there need be "nothing more than discussions and correspondence with the appropriate wildlife agency" (App. 47) is flatly contrary to agency practice and all experience. The district court refused to allow evidence concerning how these procedures operate in the real world (as being irrelevant to the review on the administrative record), yet the majority offers extensive findings on this issue without the benefit of such evidence, or indeed any evidence.

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http://www.fs.fed.us/im/directives/dughtml/fsm.html (accessed 2/13/13).

II. THE NINTH CIRCUIT'S CONFLICT WITH SETTLED LAW MERITS A GRANT OF.

The Tribe does not dispute that this Court has never addressed whether and to what extent private activity can be deemed agency action, or that this is a vital question needing resolution as federal jurisdiction expands over nearly all private action. The Tribe does not dispute that the opinion below announces a rule in which consideration of potential federal jurisdiction is "discretionary federal involvement" within the meaning of 50 C.F.R. § 402.03 (consultation requirement applies to "all actions in which there is discretionary Federal *involvement* or control"). To the extent this regulation extends "involvement" to the mere receipt of notice and consideration of potential regulatory action, the regulation is not a reasonable implementation of the statutory language covering actions "authorized, funded, or carried out". 16 U.S.C. § 1536(a)(2).

The Tribe cites this Court's decision in *Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644 (2007) as upholding the regulation, claiming the Ninth Circuit faithfully applied *Home Builders*. (Karuk Br. 1.) In *Home Builders*, this Court rejected the Ninth Circuit's determination that the § 402.03 regulatory language was "coterminous" with the express statutory language. *See Home Builders*, 551 U.S. at 656, 668 ("this reading cannot be right"). The *Home Builders* opinion stands for the proposition that where agency authority is limited, actions cannot be said to have been "authorized, funded or

carried" out by the agency, in a context where action is mandated to occur under the pertinent statutory and regulatory criteria. Here, Congress mandated that mining action go forward unless and until a Forest Service official following the steps in 36 C.F.R. § 228.4 (like the EPA official applying program transfer criteria in *Home Builders*) reached a decision to require a plan of operations. The opinion below is in that sense directly contrary to *Home Builders*.

The Tribe points out that representatives of the Forest Service in fact exercised discretion to help the miners, in consultation with the Tribe and others, to avoid certain areas and make operational choices which, when memorialized in the notice of intent, would result in a no plan required/no consultation required determination under § 228.4. (Karuk Br. 18-19.) Again, in a world of ever expanding federal regulation, citizens must be able to consult with federal officials to avoid entanglement in federal regulatory schemes, a result entirely consistent with the fundamental structure and design of the Endangered Species Act's sharp divisions between public (§ 7) and private (§ 9) regulatory schemes. Under the majority opinion, a federal official's review of proposed private activities over which he or she in fact should under applicable law exercise no jurisdiction, becomes "agency action".

The Tribe does not respond to petitioner's demonstration that the majority opinion was contrary to *Home Builders* on this ground as well. (Petition at 25-26.) Nor does the Tribe address the

Ninth Circuit's evisceration of deference principles (Petition at 26-28), or the fact that its decision runs afoul of longstanding rules against interfering with what are in substance exercises of prosecutorial discretion over private activities (Petition at 29-30). The narrow focus of the Tribe's brief should not distract the Court from the extreme degree in which the majority substantially departured from the accepted and usual course of judicial proceedings. (Petition at 34-35.)

III. THE TRIBE'S ATTEMPT TO SUBORDINATE MINING TO OTHER USES OF PUBLIC LANDS SHOULD BE REJECTED.

The Tribe cites a good deal of new authority for the proposition that the Forest Service possesses broad regulatory power over mining claims. This authority is either not on point at all or fails correctly to navigate what Justice Powell once called the "almost impenetrable maze of arguably relevant legislation" in this context, *California Coastal Comm'n v. Granite Rock Co.,* 480 U.S. 572, 607 (Powell, J., dissenting). There are two points which are not always apparent within the maze of authority.

First, there is a category of law described in *Cameron v. United States*, 252 U.S. 450, 460 (1920) as "the law under which [mining claims] are initiated," and under this body of law, strict compliance is required in order to maintain the statutory property right of a mining claim, as in the case of *United States v. Locke*, 471 U.S. 84 (1985),

which addressed the lawfulness of timely filing requirements in Department of Interior regulations. As this Court explained in *Wilbur v. United States*, 280 U.S. 306, 317 (1930), "so long as [the miner] complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as secured by patent". There is no dispute that the United States enjoys a very broad scope of regulation in this area, and it is in this narrow context that this Court has made broad comments about the power of the federal government "to regulate for the public good". But the questions presented herein are not about the abstract power of the federal government to regulate; they are about the nature of regulation by the Forest Service under limited and delegated authority from Congress.

Second, the category of law that matters, all too often overlooked, is the unique substantive and statutory limitation on Forest Service regulation set forth in the mining law. The Forest Service must ensure that its efforts to protect the other resources under its jurisdiction, including fish and wildlife, do not "materially interfere" with the mining. 30 U.S.C. § 612(b); *see also* Petition at 8-9. For this reason, the regulatory initiatives must be reasonable and not impermissibly encroach on the right to use and enjoyment of the mining claims. *See, e.g., United States v. Shumway*, 199 F.3d 1093, 1107 (9th Cir. 1999). None of the authority cited by the Tribe in support of its general assertions of broad regulatory authority addresses this body of law at all. There is a curious parallel between the Tribe's invocation of potential environmental effects and potential

regulatory authority; both are divorced from the real world.

The Tribe's claim that the Forest Service might lawfully require "permission to enter public lands for more than *de minimis* mining operations" is both irrelevant and wrong. It is irrelevant because the Service here agrees that its notice procedure does not constitute granting permission in any sense of the word. It is wrong because the reasonableness of an advance approval requirement depends upon the specific activity at issue. In *United States v. Backlund*, 689 F.3d 986 (9th Cir. 2012), for example, the question concerned the lawfulness of a regulation requiring advance approval of residential occupancy within the forest, but the residential occupancy issue is not present in this case. In any event, mining on federal mining claims is an exercise of federally-guaranteed rights authorized by statute, not by the discretionary decision of the Forest Service. Whether or not the miners must comply with particular Forest Service rules, their activities are properly subject to § 9 of the Endangered Species Act, not § 7.

Conclusion

For the foregoing reasons, and the reasons stated in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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