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Jeffrey Pike

Boston College Law School, jeffrey.pike@bc.edu

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ENDANGERED PRECEDENT: INTERPRETING AGENCY ACTION AND THE DUTY TO CONSULT UNDER SECTION 7 OF THE ESA IN LIGHT OF *KARUK*

JEFFREY PIKE*

Abstract: Following the designation of the West Coast coho salmon as a threatened species under the Endangered Species Act, and the ensuing designation of the Klamath River system in the Pacific Northwest as critical habitat for the species, the indigenous Karuk Tribe challenged the U.S. Forest Service's mining permit approval practices in *Karuk Tribe of California v. U.S. Forest Service*. Under Section 7 of the ESA, an agency must consult with one of two outside resources in instances where the agency's actions "may affect" an endangered population. In reversing the district court's denial of summary judgment on the Tribe's ESA claim, the Ninth Circuit held that the Forest Service's approval of mining applications without consultation constituted discretionary agency action that may affect the region's coho salmon population. This Comment argues that this broad interpretation of agency action accurately reflects Section 7's requirements. Furthermore, because this standard is clear, courts should apply this broad interpretation in future cases to avoid inconsistency and protect the environment in accord with congressional intent.

INTRODUCTION

In January of 1848, a construction work crew led by James Marshall was stationed in Coloma, California.¹ A skilled carpenter, Marshall contracted with John Sutter to build a sawmill on the American River.² It was at this location that on January 24, 1848 Marshall spotted the first tiny flecks of metal that would trigger the California Gold Rush of 1849 and forever change the West.³ Approximately eighty thousand immigrants left their homes in 1849 for California, and by the 1850s, miners

* Staff Writer, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2012-2013.

¹ *The California Gold Rush*, CAL. NAT. RESOURCES AGENCY, <http://ceres.ca.gov/ceres/calweb/geology/goldrush.html> (last visited July 11, 2013).

² *California Gold Discovery*, COLOMA-LOTUS CHAMBER OF COMM., <http://www.coloma.com/california-gold-discovery> (last visited July 11, 2013).

³ *Id.*

from around the world had travelled to the West in the hopes of striking it rich.⁴ Over time, however, as profits began to subside, the viability of a career in mining deteriorated.⁵

Nevertheless, recreational miners today continue to spend weekends forging the rivers of California and the Pacific Northwest for traces of gold.⁶ One such river system is the Klamath, which spans 250 miles from southeastern Oregon to northern California.⁷ The river passes through the Six Rivers and Klamath National Forests in northern California, home to the Karuk Tribe (“Tribe”).⁸

An indigenous population that has inhabited the region for generations, the Tribe is dependent on the natural resources of the Klamath River Valley.⁹ Specifically, the Tribe relies on the coho salmon for subsistence, cultural, economic, and religious purposes.¹⁰ A species of Pacific salmon, the anadromous West Coast coho salmon leave freshwater in the spring and re-enter freshwater from September to November to spawn in small streams with stable gravels.¹¹ In 1997, the National Marine Fisheries Service (NMFS) listed coho salmon were listed as “threatened” under the Endangered Species Act (ESA).¹² As a result, the NMFS designated the Klamath River system as critical habitat for the species in 1999.¹³ As of 2011, the Klamath River Basin’s coho salmon population

⁴ *See id.*

⁵ *See* Carl J. Meyer, Comment, *The 1872 Mining Law: Historical Origins of the Discovery Rule*, 53 U. CH. L. REV. 624, 639 (1986). Gold production in the U.S. reached a high of \$65 million in 1853, but dropped to \$39.2 million in 1862. *Id.*

⁶ *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1012 (9th Cir. 2012).

⁷ *Id.*; *The Klamath River*, AM. RIVERS, http://www.americanrivers.org/assets/pdfs/dam-removal-docs/Klamath_Fact_Sheet8394.pdf (last visited July 11, 2013).

⁸ *Karuk*, 681 F.3d at 1011. Having gained federal recognition in 1979, the Tribe had an enrollment of 3620 members in 2011. Shelby King, *The Tribes of the Klamath River*, HERALD AND NEWS (Oregon) (Mar. 8, 2012, 11:58 AM), http://www.heraldandnews.com/article_6e3cb47a-5cbe-11e1-bd35-001871e3ce6c.html.

⁹ *Karuk*, 681 F.3d at 1011.

¹⁰ *Id.*; Glen Spain, *Dams, Water Reforms, and Endangered Species in the Klamath Basin*, 22 J. ENVTL. L. & LITIG. 49, 51 (2007).

¹¹ NAT’L OCEANIC AND ATMOSPHERIC ASS’N, *UPDATED STATUS OF FEDERALLY LISTED ESUs OF WEST COAST SALMON AND STEELHEAD* 311 (Thomas P. Good et al. eds., June 2005), available at http://www.nwfsc.noaa.gov/assets/25/6226_08302005_132955_brttechmemo66final2.pdf; *see NEFSC Fish FAQ*, NOAA FISHERIES SERV.: NE. FISHERIES SCI. CTR., <http://www.nefsc.noaa.gov/faq/fishfaq1a.html> (last modified June 16, 2011).

¹² Endangered and Threatened Species, Threatened Status for Southern Oregon/Northern California Coast Evolutionarily Significant Unit (ESU) of Coho Salmon, 62 Fed. Reg. 24,588, 24,588 (May 6, 1997) (codified at 50 C.F.R. pt. 227).

¹³ Designated Critical Habitat; Central California Coast and Southern Oregon/Northern California Coasts Coho Salmon, 64 Fed. Reg. 24,049, 24,049 (May 5, 1999) (codified at 50 C.F.R. pt. 226).

was considered to be at a substantial risk of extinction with run numbers at less than one percent of their historical average.¹⁴

In response to the threat of extinction arguably caused in part by the recreational mining activities in the Klamath River system, petitioners in *Karuk Tribe of California v. U.S. Forest Service* challenged the U.S. Forest Service's ("Forest Service") approval of four Notices of Intent (NOI) for proposed mining activities in the Klamath River system under Section 7 of the ESA.¹⁵ Section 7 requires that agencies consult with one of two outside resources in instances where that agency's actions "may affect" an endangered population.¹⁶

In *Karuk*, the court held that the Forest Service's approval of the NOIs constituted discretionary agency action that "may affect" the forest system's coho salmon population.¹⁷ In so doing, the majority constrained the Forest Service by requiring the park's District Rangers to consult with outside wildlife experts.¹⁸ The line between what constitutes informal advice that would not require consultation and affirmative authorization requiring consultation, however, is often blurred and poorly defined.¹⁹ This Comment argues that broadly interpreting agency action, as done in *Karuk*, provides an accurate reflection of Section 7 of the ESA.²⁰ Furthermore, because this standard is clear, the *Karuk* court's broad interpretation should be applied in future cases to avoid inconsistency and to protect the environment in accord with congressional intent.²¹

¹⁴ NAT'L MARINE FISHERIES SERV., KLAMATH RIVER BASIN: 2011 REPORT TO CONGRESS 5, available at <http://www.nmfs.noaa.gov/pr/pdfs/species/klamathriverbasin2011.pdf>; *Bring the Salmon Home*, KARUK TRIBE, http://www.karuk.us/press/bring_salmon_home.php (last visited Feb. 24, 2013).

¹⁵ *Karuk*, 681 F.3d at 1016.

¹⁶ 16 U.S.C. § 1536(a)(2) (2006); *Karuk*, 681 F.3d at 1020 ("Section 7 imposes on all agencies a duty to consult . . . before engaging in any discretionary action that may affect a listed species or critical habitat.").

¹⁷ 681 F.3d at 1027, 1029.

¹⁸ *See id.*

¹⁹ *Compare* Natural Res. Def. Council v. Salazar, 686 F.3d 1092, 1099 (9th Cir. 2012) (finding U.S. Bureau of Reclamation's renewal of water contracts was not discretionary agency action subject to Section 7 of the ESA), *with* Natural Res. Def. Council v. Houston, 146 F.3d 1118, 1125–26 (9th Cir. 1998) (finding U.S. Bureau of Reclamation's renewal of water contracts was discretionary agency action subject to Section 7 of the ESA).

²⁰ *See* 681 F.3d at 1020; *see also* Holly Doremus, *Ninth Circuit Corrects Itself on Gold Mining and the ESA*, LEGAL PLANET (June 3, 2012), <http://legalplanet.wordpress.com/2012/06/03/ninth-circuit-corrects-itself-on-gold-mining-and-the-esa/>.

²¹ *See* 681 F.3d at 1030.

I. FACTS AND PROCEDURAL HISTORY

Since the passage of the General Mining Law of 1872, Congress has provided the public with a statutory right to enter public land for the purposes of mining and prospecting, subject to limitations by the Secretary of Agriculture and local authorities.²² In an effort to minimize the environmental impact of this statutory right, the Forest Service promulgated revised regulations in 1974.²³ Depending on the potential impact of the proposed activity, the regulations require a miner to file one of two documents with the Forest Service: a NOI or a Plan of Operations (“Plan”).²⁴ A NOI only requires the miner declare basic 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.”²⁵ In contrast, a Plan more exhaustively requires detailed information describing the mining location, size of mining areas, and more involved precautionary details concerning the “measures to be taken to meet the requirements for environmental protection.”²⁶ It is thus advantageous to the miner to avoid the necessity of a Plan if it is possible for a NOI to suffice.²⁷

Though commercial gold mining involving hydraulic pumps was banned over a century ago, in part because of the adverse environmental impact, recreational miners in the Klamath River Valley con-

²² See 30 U.S.C. § 22 (2006). Congress has expanded the General Mining Law of 1872, most notably by the Organic Administration Act of 1897 and by 1974 regulations modifying the right to mine areas under Forest Service control. See 16 U.S.C. §§ 482, 551 (2006); 36 C.F.R. § 228.1 (2011); National Forests Surface use Under U.S. Mining Laws, 39 Fed. Reg. 31,317, 31,317 (Aug. 28, 1974) (codified at 36 C.F.R. pt. 251).

²³ See National Forests Surface use Under U.S. Mining Laws, 39 Fed. Reg. at 31,317.

²⁴ See *id.* at 31,318.

²⁵ 36 C.F.R. § 228.4(a).

²⁶ See *id.* § 228.4(c)(3).

²⁷ See *Karuk*, 681 F.3d at 1013. To determine which document is required, the Forest Service regulations establish three categories of mining. *Id.* at 1012. The first category, *de-minimus* mining activities, include those activities that “will not cause” significant disturbance of surface resources. 36 C.F.R. § 228.4(a)(1)(v). Miners who propose activities that will not cause a significant disturbance can proceed without authorization from, or notice to, the Forest Service. See *id.* In the second category, activities that “might cause” significant disturbance of surface resources, the Forest Service requires miners to file an NOI. *Id.* § 228.4(a). After submission of the NOI, the District Ranger must determine within fifteen days whether the proposed activity “will likely cause” significant disturbance of surface resources, in which case a Plan will be required. *Id.* § 228.4(a)(2). In the third category, activities that “will likely cause” significant disturbance of surface resources, the miner must automatically submit a Plan. *Id.* § 228.4(a)(3).

tinue to conduct small-scale mining operations in one of three forms.²⁸ The most invasive form, mechanical “suction dredging,” occurs within the stream itself.²⁹ Gasoline-powered engines utilize flexible intake hoses to extract water and sediment from the stream.³⁰ The material is deposited into a floating sluice box with the excess discharged into a tailings pile either in the stream itself or on the nearby bank.³¹

Prior to the 2004 mining season, members of the Karuk Tribe concerned about the impact of mechanical suction dredge mining on the coho salmon population in the Klamath River system began talks with the Forest Service.³² After meeting with the various affected parties and Forest Service biologists, the District Ranger for the Happy Camp District of the Klamath National Forest identified three primary areas of concern: (1) protection of the cold water areas in the Klamath River; (2) the magnitude of dredge activities; and (3) the stability of spawning gravels.³³

In 2005, the Tribe requested declaratory and injunctive relief in the U.S. District Court for the Northern District of California for alleged violations of the ESA by the Forest Service’s approval of four NOIs in the Happy Camp District without prior consultation with federal wildlife agencies during the 2004 mining season.³⁴ The first challenged NOI involved the New 49ers, a recreational mining company that owned and leased various claims throughout the Klamath and Six Rivers National Forests.³⁵ The other three challenged NOIs involved individual miners.³⁶ All four of the challenged NOIs involved suction dredge mining.³⁷

The Tribe alleged that by issuing the permits without consultation, the Forest Service violated its statutory duty under Section 7 of the ESA

²⁸ See *Karuk*, 681 F.3d at 1011–12. In conformance with tradition, some recreational miners continue to “pan” for gold. *Id.* at 1012. Pan miners sift sand, gravel, and debris manually in search of gold, an activity that imparts virtually no adverse impact on the surrounding ecosystem. See *id.* Miners also engage in “motorized sluicing” whereby rocks, gravel, and sand are excavated into a sluice box when water is pumped onto the stream banks. *Id.* Gold is captured in the bottom of the device and the remaining material collects to form a tailings pile. *Id.*

²⁹ See *id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 1013.

³³ *Id.*

³⁴ *Karuk*, 681 F.3d at 1012, 1016.

³⁵ *Id.* at 1014.

³⁶ *Id.* at 1015.

³⁷ See *id.* at 1014–15.

to protect the coho salmon from harmful mining activities.³⁸ The Forest Service conceded that the approval of a NOI may affect surface resources and the agency did not consult with either the U.S. Fish & Wildlife Service or the NMFS with regard to any of the four challenged NOIs.³⁹ The Forest Service countered, however, that such an argument was moot because approving NOIs did not constitute affirmative, discretionary action, and therefore the agency had no duty to seek consultation.⁴⁰

The district court rejected the Tribe's motion for summary judgment in July 2005 and ruled against it on all remaining claims.⁴¹ In 2011, a divided panel of the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's denial of summary judgment in holding that the approval of proposed activities pursuant to a NOI does not constitute agency action.⁴² Subsequently, the Tribe requested rehearing, which the court granted en banc.⁴³

II. LEGAL BACKGROUND

Passed in 1973, Congress designed the Endangered Species Act (ESA) to protect critical species and their respective habitats.⁴⁴ Although it might appear that the 1974 U.S. Forest Service regulations leave a District Ranger with broad discretion to evaluate mining activities, Section 7 of the ESA imposes upon federal agencies a "*duty to con-*

³⁸ *Id.* at 1012.

³⁹ *Id.* at 1015, 1027.

⁴⁰ *See id.* at 1023. Despite argumentation from the miners, the court found that the proposed activities met the "low threshold" set by the "may affect" standard. *Id.* at 1029.

⁴¹ *Karuk*, 681 F.3d at 1016. All parties stayed briefing on appeal in anticipation of the court's decision regarding a similar claim involving the Siskiyou National Forest in Oregon. *Id.* at 1016–17; *Siskiyou Reg'l Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545 (9th Cir. 2009).

⁴² *Karuk*, 681 F.3d at 1017. Since the NOIs in question expired on December 31, 2004 with the end of the 2004 mining season, the appellate court en banc considered whether the Tribe's claims were moot. *Id.* The court found the claims to be justiciable as "capable of repetition, yet evading review," an exception to the mootness doctrine that applies where either full litigation is impossible due to the short duration of the challenged action or where there is reasonable expectation that the Forest Service will be subjected to the challenged action again. *Id.* at 1018. Since the Forest Service allows mining activities on a seasonal, yearly basis, the court found the challenged NOIs to be too short in duration to be fully litigated before their expiration. *Id.* Furthermore, given the multitude of approved NOIs in the region inhabited by the coho salmon, and the potential of similar actions in the future, the court found the controversy to be capable of repetition. *Id.*

⁴³ *See id.* at 1017.

⁴⁴ *See* 16 U.S.C. § 1536(a)(1) (2006); *see also* *ESA Basics*, U.S. FISH & WILDLIFE SERVICE (Jan. 2013), http://www.fws.gov/endangered/esa-library/pdf/ESA_basics.pdf.

sult with either the” U.S. Fish & Wildlife Service (FWS) or National Marine Fisheries Service (NMFS) “before engaging in any discretionary action that *may affect* a listed species or critical habitat.”⁴⁵ In requiring the agency to use its legal authority to consult with wildlife experts, the ESA aims to “identify reasonable and prudent alternatives that will avoid the action’s unfavorable impacts.”⁴⁶

In enacting Section 7 of the ESA, Congress intended that the definition of agency action be construed broadly.⁴⁷ The Supreme Court first supported this principle in 1978 in the seminal case *Tennessee Valley Authority v. Hill*.⁴⁸ In *Hill*, following designation of a small fish species as endangered, respondents brought suit to enjoin completion of the Tellico Dam on the Little Tennessee River.⁴⁹ In response, petitioner claimed that the ESA did not apply to the particular project, which was over seventy percent complete.⁵⁰ The Court, in affirming an order enjoining completion of the dam, discussed Section 7, noting:

One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command 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. . . .” This language admits of no exception.⁵¹

As is evident, therefore, there must be a finding of “agency action” that “may affect” a listed species.⁵² To evaluate whether an agency has acted

⁴⁵ See *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1020 (9th Cir. 2012) (emphasis added); *Turtle Island Restoration Network v. Nat’l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003). Specifically, Section 7(a)(2) instructs: “Each Federal agency shall . . . insure 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).

⁴⁶ *Karuk*, 681 F.3d at 1020; see *Turtle Island*, 340 F.3d at 974; see also *ESA Basics*, *supra* note 43.

⁴⁷ See *Karuk*, 681 F.3d at 1020; *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1125 (9th Cir. 1998); *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1054 (9th Cir. 1994).

⁴⁸ See 437 U.S. 153, 173 (1978).

⁴⁹ *Id.* at 161, 164.

⁵⁰ *Id.* at 165.

⁵¹ *Id.* at 173.

⁵² See *Karuk*, 681 F.3d at 1020; 50 C.F.R. § 402.13(a) (2006). After a finding of agency action, the court will continue to the second step of the analysis to consider whether that action “may affect” the listed species or critical habitat and thereby trigger the consultation

so as to trigger the requirement, the courts must find that: the agency (1) made an affirmative act or authorization;⁵³ and (2) exerted discretionary involvement or control that could benefit the listed species.⁵⁴

The Ninth Circuit has at times broadly interpreted Section 7 of the ESA to find sufficient discretionary agency action that may affect a listed species.⁵⁵ In *Natural Resources Defense Council v. Houston*, environmental groups brought suit against various irrigation and water districts alleging that the Bureau of Reclamation (“Bureau”) violated Section 7 of the ESA when it renewed multiple federal water contracts without first seeking formal consultation with the NMFS, thereby potentially harming threatened Chinook salmon populations.⁵⁶ In 1998, the Ninth Circuit affirmed the district court’s grant of summary judgment, holding that negotiating and executing contracts is agency action and therefore the Bureau violated the ESA by not consulting with the NMFS.⁵⁷ The court noted that though the ESA only applies where there is sufficient agency discretion to act, even if the contract renewals were automatic, the Bureau could alter key terms and therefore retained sufficient discretion.⁵⁸

Furthermore, the Ninth Circuit has held that an agency that can act to protect an endangered species must seek consultation.⁵⁹ In 2004, in *Turtle Island Restoration Network v. National Marine Fisheries Service*, the court found that the NMFS had sufficient discretion to place conditions on fishing permits to protect local endangered species and there-

requirement. *Karuk*, 681 F.3d at 1020, 1027. The Secretaries of Commerce and Interior, who have the responsibility for administration and enforcement of the ESA, have delegated such to the NMFS with regard to marine species, and to the FWS with regard to terrestrial species. *Turtle Island*, 340 F.3d at 973–74. This consultation can be formal or informal, thereby providing agencies with added flexibility. See *Karuk*, 681 F.3d at 1027. Conversely, an agency can avoid the consultation requirement, despite exerting agency action with discretion, only if that action will have “no affect” on a listed species or critical habitat. *Id.*

⁵³ See 50 C.F.R. § 402.02 (“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.”).

⁵⁴ See *Karuk*, 681 F.3d at 1021; see also *Turtle Island*, 340 F.3d at 974 (noting “the discretionary control retained by the federal agency must have the ability to inure to the benefit of a protected species”); *Houston*, 146 F.3d at 1125–26 (“Where there is no agency discretion to act, the ESA does not apply.”).

⁵⁵ See *Karuk*, 681 F.3d at 1024; *Turtle Island*, 340 F.3d at 974; *Houston*, 146 F.3d at 1125.

⁵⁶ See 146 F.3d at 1123–1124.

⁵⁷ *Id.* at 1125–26, 1133.

⁵⁸ *Id.* at 1125–26.

⁵⁹ *Turtle Island*, 340 F.3d at 977.

by triggered the consultation requirement.⁶⁰ To reach that conclusion, the court considered whether the agency could influence a private activity to benefit a listed species, not whether it must do so.⁶¹ Therefore, because the NMFS had the discretion to place conditions on the fishing permits, regardless of whether it chose to do so, the ESA required consultation.⁶²

In contrast, the Ninth Circuit has found no duty to consult where an agency has not affirmatively acted.⁶³ In *Western Watersheds Project v. Matejko*, plaintiffs challenged the Bureau of Land Management's (BLM) decision to not impose water-use conditions on private landowners who constructed water diversions on public lands in central Idaho.⁶⁴ The district court broadly interpreted agency action and ruled in favor of plaintiffs, finding agency action to include the decision to ignore, or not act.⁶⁵ In reversing the lower court decision in 2006, the Ninth Circuit distinguished action from inaction and explained that there must be *affirmative* action to trigger the consultation requirement.⁶⁶ Since BLM did not affirmatively act, the Ninth Circuit held that there was no duty to consult.⁶⁷

Similarly, in 1996 in *Marbled Murrelet v. Babbitt*, the Ninth Circuit held that the FWS did not affirmatively act when the agency discussed proposed cutting and removal of dead, dying, and decayed trees with various lumber companies.⁶⁸ The FWS had co-signed a letter outlining procedures for the lumber companies to follow to avoid a take.⁶⁹ The Environmental Protection Information Center sought declaratory and injunctive relief, arguing that the FWS had failed to satisfy the consulta-

⁶⁰ *Id.* The threatened species included four turtle species and the short-tailed albatross. *Id.* at 970, 971–72. The court explained, “When the acting agency is . . . the Fisheries Service . . . the obligation to consult is not relieved, instead, the agency must consult within its own agency to fulfill its statutory mandate.” *Id.* at 974.

⁶¹ *Id.* at 977.

⁶² *Id.*

⁶³ *See* *Natural Res. Def. Council v. Salazar*, 686 F.3d 1092, 1099 (9th Cir. 2012) (finding that the consultation requirement is not triggered when an agency lacks sufficient discretion to act); *W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1102 (9th Cir. 2006) (finding there is no duty to consult where an agency has not affirmatively acted); *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1074 (9th Cir. 1996) (finding there is no agency action where the agency lacks sufficient discretion).

⁶⁴ *See* 468 F.3d at 1103.

⁶⁵ *Id.* at 1106.

⁶⁶ *See id.* at 1108.

⁶⁷ *Id.* at 1107.

⁶⁸ 83 F.3d at 1070, 1074.

⁶⁹ *Id.* at 1072.

tion requirement imposed by Section 7 of the ESA.⁷⁰ The Ninth Circuit held, however, that there is no agency action where an agency “lacks the discretion to influence the private action” and therefore the proffer of suggestions constituted mere informal advice that does not trigger the consultation requirement.⁷¹ The court reasoned that to mandate the “burdensome” requirements of Section 7 when the agency is responding to a party seeking advice would be a disincentive to provide such advice, and an impermissible detriment to the protection of the endangered species.⁷²

Relying on similar reasoning in 2012, the Ninth Circuit ruled in *Natural Resources Defense Council v. Salazar* that consultation is not required where an agency’s discretion is so limited that it does not trigger the provisions of the ESA.⁷³ In *Salazar*, various environmental groups challenged the Bureau’s renewal of forty-one water contracts without consultation in 2004 and 2005, citing harm to the delta smelt population of the region.⁷⁴ The Bureau argued that it lacked discretion because it was statutorily required to renew requested senior water rights contracts.⁷⁵ In affirming the district court’s grant of summary judgment for defendant, the Ninth Circuit held that the renewal of the water delivery contracts was automatic based on the terms of the original contracts and therefore there was no opportunity for negotiation.⁷⁶ Without the ability to negotiate, the court ruled that the Bureau lacked sufficient discretion and was thus not bound by the consultation requirements of the ESA.⁷⁷

III. ANALYSIS

In *Karuk Tribe of California v. United States Forest Service*, the Ninth Circuit held that there was agency action under Section 7 of the Endan-

⁷⁰ *Id.* at 1073.

⁷¹ *Id.* at 1074 (citing *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509, 1511 (9th Cir. 1995) (finding that BLM’s issuance of an “approval” letter for a road right-of-way was not an “authorization” or affirmative act that would trigger consultation where the letter specifically expressed the agency’s limited discretion)).

⁷² *Id.* at 1074–75.

⁷³ 686 F.3d at 1099.

⁷⁴ *Id.* at 1095.

⁷⁵ *Id.* at 1099.

⁷⁶ *Id.*

⁷⁷ *Id.* *But see id.* at 1105 (Pacz, J., dissenting) (suggesting that the water delivery contracts provided flexibility in that the terms and conditions of the renewal contracts must be “mutually agreeable” and that therefore there was in fact sufficient discretion available to the agency).

gered Species Act (ESA).⁷⁸ The court found that the U.S. Forest Service (“Forest Service”) affirmatively acted while retaining discretion by authorizing mining activities under specified protective criteria without prior consultation to the appropriate wildlife service.⁷⁹ Moreover, the activities approved under the Notices of Intent (NOI) sufficiently satisfied the “may affect” standard to trigger the duty to consult.⁸⁰

In reaching its determination, the court interpreted the chosen options of the Forest Service regulations, in either permitting the potential miner to operate after proffer of a NOI or requiring that miner to submit a Plan of Operations (“Plan”), to be affirmative acts.⁸¹ Distinguishing the circumstances from *Marbled Murrelet v. Babbitt*, where the court found no duty to consult, the Ninth Circuit held that the Forest Service’s approval of four NOIs constituted action that went beyond informal advice.⁸² Moreover, the court found that the Forest Service exercised discretion in three distinct ways: the formulation of criteria for the protection of the coho salmon habitat, the refusal of a NOI proposed by the New 49ers, and the application of different criteria when evaluating a proposed NOI in different districts of the Klamath National Forest.⁸³ Therefore, because such discretion could, and was in fact designed to, benefit the coho salmon, the Forest Service exercised sufficient discretionary agency action to trigger the consultation requirement.⁸⁴

The dissent argued that the majority decision transforms the NOI from its intended role as an information-gathering tool to an automatic trigger requiring consultation.⁸⁵ Likening the facts of *Karuk* to the 1996 case *Marbled Murrelet v. Babbitt*, the dissent reasoned that the NOI is an informal proffer of advice prior to agency action that allows miners to “change their plans in a way that will avoid causing significant surface resource disturbances.”⁸⁶ Furthermore, the dissent reasoned that the majority position could waste time and resources.⁸⁷

Six weeks after the court’s decision in *Karuk*, the Ninth Circuit applied a narrow definition of agency action in *National Resources Defense*

⁷⁸ See 681 F.3d 1006, 1030 (9th Cir. 2012).

⁷⁹ *Id.*

⁸⁰ *Id.* at 1029.

⁸¹ *Id.* at 1022.

⁸² See *id.* at 1021; *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1075 (9th Cir. 1996).

⁸³ *Karuk*, 681 F.3d at 1025–26.

⁸⁴ See *id.* at 1027.

⁸⁵ See *id.* at 1034 (Smith, J., dissenting).

⁸⁶ *Id.* at 1036, 1038.

⁸⁷ See *id.* at 1034.

Council v. Salazar.⁸⁸ Given the range of decisions emerging from the Ninth Circuit regarding agency action, an agency's compliance with the requirements of Section 7 of the ESA appears to be highly fact-specific and has left the court without a consistent body of law.⁸⁹ To avoid relying on an artificial distinction between action and inaction, the Ninth Circuit should consistently apply a broad definition of agency action.⁹⁰ In addition to providing the court with necessary guidance, doing so conforms to circuit precedent.⁹¹

The Ninth Circuit has appropriately found sufficient discretionary agency action in cases similar to *Karuk*.⁹² In *Turtle Island*, longline fishermen were required to obtain a permit from the National Marine Fisheries Service ("NMFS") prior to fishing.⁹³ Similarly in *Karuk*, miners are required to submit a NOI in instances where operations may cause significant disturbances to endangered species or critical habitat.⁹⁴ In both circumstances, the agency is left with one of two options: the agency can approve the application and thereby allow the respective activity to commence, or the agency can deny the application.⁹⁵ In the case of *Karuk*, following the denial of a NOI, the miner must submit a Plan if the District Ranger determines that the operation will likely cause disruption of surface resources.⁹⁶ Therefore, just as with the NMFS in *Turtle Island*, accepting or denying NOIs affords the Forest Service significant discretion to manage the parks' endangered species, including the coho salmon, as intended.⁹⁷

In utilizing that discretion, even a minimal action distinguishes the agency from a passive onlooker.⁹⁸ In *Karuk*, the Ninth Circuit noted that had the District Ranger consulted with the U.S. Fish & Wildlife Service or the NMFS instead of looking to internal biologists, the con-

⁸⁸ See Natural Res. Def. Council v. Salazar, 686 F.3d 1092, 1099 (9th Cir. 2012); *Karuk*, 681 F.3d at 1130.

⁸⁹ See *The Ninth Circuit Interprets "Agency Action" Under the Endangered Species Act—Again*, PERKINS COIE (July 25, 2012), http://www.perkinscoie.com/files/upload/12_07_EER%20_Update_9th_Circ_Interp_Agcy_Act_Under_Endangered_Species_Act_Again.pdf.

⁹⁰ See *Karuk*, 681 F.3d at 1024; *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003); *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1127 (9th Cir. 1998).

⁹¹ See *Karuk*, 681 F.3d at 1024; *Turtle Island*, 340 F.3d at 974; *Houston*, 146 F.3d at 1127.

⁹² See *Turtle Island*, 340 F.3d at 977; *Houston*, 146 F.3d at 1126.

⁹³ 340 F.3d at 974.

⁹⁴ 681 F.3d at 1013.

⁹⁵ See *id.*; *Turtle Island*, 340 F.3d at 974.

⁹⁶ 681 F.3d at 1013.

⁹⁷ See *id.* at 1013, 1025; *Turtle Island*, 340 F.3d at 974.

⁹⁸ See *Karuk*, 681 F.3d at 1025; Doremus, *supra* note 20.

sultation requirement would have been met.⁹⁹ Since the consultation requirement was not met, despite an affirmative act, the Forest Service acted in a similar fashion to the Bureau of Reclamation (“Bureau”) in *Natural Resources Defense Council v. Houston*, where the Bureau both retained sufficient discretion and affirmatively acted by negotiating and executing contracts.¹⁰⁰ In both *Karuk* and *Houston*, because there was an affirmative act, the Ninth Circuit distinguished agencies from passive onlookers and required consultation with the appropriate outside authorities.¹⁰¹

If the agency does not act in any way, or has such limited discretion that it cannot protect the endangered species or habitat, there is no duty to consult.¹⁰² In a situation such as in *Western Watersheds Project v. Matejko*, where the Bureau of Land Management did not stop private parties with a vested right from diverting waterways on public land, requiring the agency to consult could be seen as a waste of resources.¹⁰³ Such a distinction, however, is in practice a meaningless artificial construct that leads to inconsistent results.¹⁰⁴

For example, where an agency has already acted, but it is unclear whether that agency has retained sufficient discretion to ensure protection of the endangered species, applying an unduly narrow definition of agency action is improper.¹⁰⁵ The *Salazar* decision exemplifies the inconsistency emerging from the Ninth Circuit and seems to be out of line with circuit precedent.¹⁰⁶ The facts of *Houston* align almost exactly with those in *Salazar*: the Bureau renewed existing water contracts without consulting the NMFS.¹⁰⁷ Nevertheless, whereas the *Houston* court ruled that the Bureau had not met its obligations under the ESA, the *Salazar* court inexplicably held that the agency lacked sufficient discretion and was thus not bound by the ESA.¹⁰⁸ Under *Salazar*’s reason-

⁹⁹ 681 F.3d at 1029–30.

¹⁰⁰ See *Karuk*, 681 F.3d at 1027; *Houston*, 146 F.3d at 1125–26.

¹⁰¹ See *Karuk*, 681 F.3d at 1027; *Houston*, 146 F.3d at 1125–26; Doremus, *supra* note 20.

¹⁰² See *W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1110 (9th Cir. 2006); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1511–12 (9th Cir. 1995).

¹⁰³ See 468 F.3d at 1110; see also *Karuk*, 681 F.3d at 1034 (Smith, J., dissenting).

¹⁰⁴ See *infra* notes 105–109 and accompanying text.

¹⁰⁵ See *Salazar*, 686 F.3d at 1099 (finding no duty to consult where an agency’s discretion is limited by contract terms).

¹⁰⁶ Compare 686 F.3d at 1099, with *Houston*, 146 F.3d at 1126–27.

¹⁰⁷ *Salazar*, 686 F.3d at 1095; *Houston*, 146 F.3d at 1124.

¹⁰⁸ See *Salazar*, 686 F.3d at 1099 (finding “the Bureau’s renewal of the Settlement Contracts is not subject to . . . the ESA because its action is not a ‘discretionary action’”); *Houston*, 146 F.3d at 1125 (“Clearly, negotiating and executing contracts is ‘agency action.’”). Before *Salazar*, a contract renewal was assumed to be an agency action.

ing, the Forest Service in *Karuk* might have been able to ignore a NOI submitted by a potential miner and take no further action, which would be contrary to the purposes of the ESA.¹⁰⁹

The broad standard expounded in *Karuk* reflects congressional intent and should be adopted in future cases to avoid artificially constructing a distinction between action and inaction.¹¹⁰ The ESA was created to protect endangered species and critical habitat despite the potential drawbacks on industry.¹¹¹ The Supreme Court's ruling in *Tennessee Valley Authority v. Hill* discussed Section 7 of the ESA, explaining that, "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities."¹¹² By requiring an agency to seek expert consultation, the agency is statutorily required to consider alternatives that ensure protection of the endangered species.¹¹³ Though such a broad interpretation could arguably delay a project by requiring the agency to consult the proper authority,¹¹⁴ that mechanism best serves the interests of the environment while preserving the private right to use the land, thereby balancing agency discretion and environmental protection.¹¹⁵

Furthermore, as evidenced by the range of decisions resulting from similar facts, a finding of sufficient discretion is often arbitrary and unpredictable.¹¹⁶ This possibility frustrates the purposes of the ESA and the consultation requirement, which aim to stimulate reasonable and prudent alternatives.¹¹⁷ Even if there is no better alternative, the process was designed to at least require some sort of due diligence on the part of the agency to determine whether the agency *could* influence a private activity to protect the endangered species or habitat.¹¹⁸ Applying a narrow interpretation of agency action based on a distinction be-

¹⁰⁹ See *Salazar*, 686 F.3d at 1099; *Karuk*, 681 F.3d at 1020.

¹¹⁰ See *Karuk*, 681 F.3d at 1020.

¹¹¹ See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 165, 194 (1978) (finding in favor of the protection of the endangered snail darter in conformance with the ESA despite an estimated economic loss of fifty-three million dollars).

¹¹² *Id.* at 194.

¹¹³ *Karuk*, 681 F.3d at 1020, 1024; *Turtle Island*, 340 F.3d at 974.

¹¹⁴ See *Karuk*, 681 F.3d at 1039 (Smith, J., dissenting) ("The informal Notice of Intent process allows projects to proceed within a few weeks. In contrast, ESA interagency consultation requires a formal biological assessment and conferences, and can delay projects for months or years.").

¹¹⁵ See Doremus, *supra* note 20.

¹¹⁶ Compare *Salazar*, 686 F.3d at 1099, with *Houston*, 146 F.3d at 1126–27.

¹¹⁷ See *Karuk*, 681 F.3d at 1020; *Turtle Island*, 340 F.3d at 974.

¹¹⁸ See *Karuk*, 681 F.3d at 1025; *Turtle Island*, 340 F.3d at 977.

tween action and inaction has great potential to ignore the ESA's purpose, allow for inconsistency, and should be abandoned.¹¹⁹

CONCLUSION

The Ninth Circuit should begin to consistently apply a broad definition to “agency action” when evaluating the consultation requirements imposed by Section 7 of the Endangered Species Act. The Supreme Court's decision in *Tennessee Valley Authority v. Hill* provides guidance that has been ignored—the ESA was created to force agencies to evaluate alternatives to proposed actions, with the balance tilting in favor of the endangered species. By consistently applying the expansive definition of agency action as developed in *Karuk Tribe of California v. United States Forest Service*, the Ninth Circuit can restore regulatory predictability and maintain the statutory right to private action, while protecting vulnerable endangered species.

¹¹⁹ See *supra* notes 104–118 and accompanying text.

