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

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF EASTERN OREGON MINING ASSOCIATION, WALDO MINING DISTRICT, AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The Endangered Species Act requires consultation to ensure that federal "agency action" does not jeopardize listed species. *See* 16 U.S.C. § 1536(a)(2). The questions presented by the petition are:

1. Whether a federal official's decision not to invoke agency regulatory powers over private action constitutes "agency action" for purposes of Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2).

2. Whether a federal official's authority to determine whether a proposed private action "will likely cause significant disturbance of surface resources" is discretionary under *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007).

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to this Court's Rule 37.2(b), Eastern Oregon Mining Association, Waldo Mining District, and Pacific Legal Foundation respectfully request leave of the Court to file this brief amicus curiae in support of the Petition for Writ of Certiorari filed by The New 49'ers, Inc., *et al.*

Counsel of record for all parties received the notice of intent of Amici to file a brief amicus curiae at least ten days prior to the brief's filing. Counsel for Petitioners and Counsel for Respondent Karuk Tribe of California have consented in writing to this filing. Consent letters have been lodged with the Clerk of this Court.

Counsel for Respondent United States Forest Service, *et al.*, did not respond to the request of Amici for consent to file. Amici, therefore, respectfully submit this motion for leave to file the attached amicus curiae brief.

INTEREST OF AMICI CURIAE

Eastern Oregon Mining Association is a nonprofit organization representing and advocating for mining in the Pacific Northwest. EOMA is a grass-roots organization that for over 30 years has advocated for its more than 250 members, including corporations and other interested organizations. Although EOMA is headquartered in Baker City, Oregon, its membership is nationwide, and comprises small mine operators, prospectors, as well as others interested in mining, minerals, environment, and the outdoors. EOMA is dedicated to the preservation of American mineral

independence and proper stewardship of the environment. According to its by-laws, EOMA works "to oppose the unnecessary regulation of mining and the mineral industries." The decision below has already taken a toll on members attempting to conduct exploration. In watersheds where salmon and steelhead are present, even miners who are not conducting their exploration activities in-stream are shut down, notwithstanding their use of environmentally friendly settling ponds. EOMA believes that mining in the region will cease if miners are prohibited from conducting necessary exploration.

The Waldo Mining District was established on April 1, 1852, in the Oregon Territory and is recognized as the first government in southwest Oregon. The District is an unincorporated association of miners, roughly half of whom hold one or more mining claims within the Siskiyou or other national forests. Historically, and pursuant to the Mining Law of 1872, 30 U.S.C. § 22, *et seq.*, mining districts were considered government entities, and could make binding rules and regulations within their jurisdictions. Today, one of the principal purposes of the District is to promote the interests of its approximately 125 members, many of whom the United States Forest Service has characterized as finding their livelihood, recreation and, for some, their identity, in suction dredge mining. The District is located in Cave Junction, Oregon, just across the border from Happy Camp, California, the site of this controversy. The Ninth Circuit's decision will indefinitely halt the dredging operations of many of the District's members. While they await the

completion of the consultation process, members will not be able to work the claims that they own, nor will prospectors be permitted to explore for new claims using suction dredging. These undesirable effects will ensue notwithstanding that suction dredging is the most efficient method to recover gold from underwater streambed sediments.

Pacific Legal Foundation was founded nearly 40 years ago and is widely recognized as the largest and most experienced nonprofit legal organization of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide, advocating limited government, individual rights, free enterprise, and a balanced approach to environmental regulation. PLF attorneys have litigated numerous Endangered Species Act cases nationwide and have been counsel of record in this Court in many cases including *Sackett v. United States Environmental Protection Agency*, 132 S. Ct. 1367 (2012), and *Rapanos v. United States*, 547 U.S. 715 (2006).

Eastern Oregon Mining Association, Waldo Mining District, and Pacific Legal Foundation respectfully request that their motion for leave to file an amicus curiae brief be granted.

DATED: October, 2012.

Respectfully submitted,

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INTEREST OF AMICI CURIAE[1]

Pursuant to Supreme Court Rule 37, Eastern Oregon Mining Association (EOMA), Waldo Mining District (District), and Pacific Legal Foundation (PLF) submit this brief amicus curiae in support of the petition for writ of certiorari filed by Petitioners The New 49'ers, Inc., *et al.*

Eastern Oregon Mining Association is a nonprofit organization representing and advocating for mining in the Pacific Northwest. EOMA is a grass-roots organization that for over 30 years has advocated for its more than 250 members, including corporations and other interested organizations. Although EOMA is headquartered in Baker City, Oregon, its membership is nationwide, and comprises small mine operators, prospectors, as well as others interested in mining, minerals, environment, and the outdoors. EOMA is dedicated to the preservation of American mineral independence and proper stewardship of the environment. According to its by-laws, EOMA works "to oppose the unnecessary regulation of mining and

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[1] Pursuant to this Court's Rule 37.2(a), counsel of record for all parties received a notice of intent to file a brief amicus curiae at least ten days prior to the brief's filing. Counsel for Petitioners The New 49'ers, Inc., *et al.*, and Respondent Karuk Tribe of California have consented in writing to this filing. Consent letters have been lodged with the Clerk of this Court.

Counsel for Respondent United States Forest Service, *et al.*, did not respond to the request of Amici for consent to file.

Pursuant Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

the mineral industries." The decision below has already taken a toll on members attempting to conduct exploration. In watersheds where salmon and steelhead are present, even miners who are not conducting their exploration activities in-stream are shut down, notwithstanding their use of environmentally friendly settling ponds. EOMA believes that mining in the region will cease if miners are prohibited from conducting necessary exploration.

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most efficient method to recover gold from underwater streambed sediments.

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INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION[2]

Section 7(a)(2) of the Endangered Species Act (ESA) prescribes the steps that federal agencies must take to ensure that their actions do not jeopardize endangered flora and fauna. Subsection (a)(2) states that "[e]ach Federal agency shall, in consultation with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency

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[2] The New 49'ers' petition seeks review on several grounds. The brief of Amici addresses two issues raised by the petition's first question presented: whether a decision not to act constitutes "agency action," and whether the judgment exercised here was "discretionary" under *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 671-73 (2007). Amici do not address the other proposed grounds for review.

(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." 16 U.S.C. § 1536(a)(2). Regulations promulgated by the Secretaries of Commerce and the Interior provide that "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. In construing the scope of this regulation, the Court has distinguished those situations where an agency merely "may exercise some judgment" from those where an agency has sufficient discretion to trigger the consultation requirement. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 671-72 (2007). In *National Association of Home Builders*, the Court held that the determination of the Environmental Protection Agency (EPA) to transfer Clean Water Act permitting authority to the State of Arizona did not implicate "discretionary Federal involvement or control," notwithstanding that EPA's decision required significant judgment to determine whether the statutory criteria for the transfer of permitting authority had been met.

Below, Respondent Karuk Tribe challenged four notices of intent to operate (NOIs) because the Forest Service's District Ranger did not initiate consultation upon their receipt. App. 9-13. Pursuant to the relevant regulations promulgated by the Forest Service, 36 C.F.R. § 228.4(a),[3] any person proposing

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[3] References to the regulations in this brief are to the 2004 regulations which apply to the challenged NOIs. App. 7. These regulations have since been amended but the parties agree

(continued...)

mining activities that may cause disturbance of surface resources must submit an NOI containing 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' " to the appropriate District Ranger. App. 6 (quoting 36 C.F.R. § 228.4(a)). Within 15 days of receiving an NOI, the District Ranger must notify the miner whether a more detailed plan is required. App. 6-7. A plan must include "the approximate location and size of areas where surface resources will be disturbed" and "measures to be taken to meet the requirements for environmental protection." 36 C.F.R. § 228.4(c). The District Ranger will require a plan if he determines that the operation "will likely cause" significant disturbance of surface resources. 36 C.F.R. § 228.4(a).

The Ninth Circuit concluded that the District Ranger's receipt and consideration of an NOI is an affirmative, discretionary agency action triggering the Section 7(a)(2) consultation requirement. App. 49. The Ninth Circuit reached this conclusion by first determining that the act was discretionary, based on: (1) the correspondence between the Rangers and the miners, (2) the government's obligation to inform the miner whether a plan is required, and (3) the standards to be used to decide whether proposed activities are likely to cause significant disturbance of surface resources. App. 27-35. Second, the Ninth Circuit determined that the Forest Service's regulations and actions demonstrate that the decision whether to approve an NOI is a discretionary

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[3] (...continued)
that the 2005 revisions do not materially affect the issues on appeal. *Id.*

determination through which the agency can influence private mining activities to benefit listed species. App. 37.

This Court has never considered whether an agency's decision not to exercise regulatory authority over private activity requires Section 7(a)(2) consultation, but the Ninth Circuit's decision directly conflicts with the Seventh Circuit's resolution of this issue. *See Tex. Indep. Producers & Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 980 (7th Cir. 2005) (addressing a similar NOI procedure concerning stormwater pollution under the Clean Water Act). Because of this conflict, the petition should be granted.

Moreover, the Court should grant the petition because it raises an issue of national importance. Notices of Intent are not unique to mining law. Rather, they are used to give regulatory agencies notice of a private party's intent to take some action. Based on this notice, the agency may decide whether any statute or regulation would be violated. In addition to mining law, NOIs are used under the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1976), *see Envtl. Def. Fund v. Envtl. Prot. Agency*, 598 F.2d 62, 76 (D.C. Cir. 1978), and the Clean Water Act, *see Tex. Indep. Producers & Royalty Owners Ass'n*, 410 F.3d at 967-69. The Ninth Circuit's decision would require consultation for the countless occasions where government agencies do *not* take regulatory action after having received a Notice of Intent.

Finally, the Court should grant the petition to provide needed guidance on the distinction between discretion and judgment. In *National Association of Home Builders*, the Court recognized the distinction between circumstances in which an agency merely

exercises judgment, and circumstances in which an agency has discretion to act. This Court should grant the petition to guide the lower courts and agencies in how to determine whether a statute merely vests a government decision-maker with judgment in deciding whether certain factors are present or criteria met, or instead whether the statute goes further and gives the decision-maker discretion to decide *regardless* of the factors present or criteria met.

ARGUMENT

I

THE NINTH CIRCUIT'S DECISION HOLDING THAT AN AGENCY'S FAILURE TO REGULATE PRIVATE ACTIVITY PROPOSED BY A NOTICE OF INTENT IS A DISCRETIONARY AGENCY ACTION CONFLICTS WITH A DECISION OF THE SEVENTH CIRCUIT

The Seventh Circuit has previously considered the application of Section 7(a)(2) to a very similar NOI procedure in the Clean Water Act, and ultimately held that the procedure was not a discretionary agency action triggering a consultation obligation. *See Tex. Indep. Producers & Royalty Owners Ass'n*, 410 F.3d at 967-69. The court explained that in implementing Phase I of the National Pollutant Discharge Elimination System permitting program for stormwater discharges, EPA chose a general rather than an individual permit program. *Id.* at 968. Under the former, EPA issues a permit for specific types of activities and rules for complying with that permit. *Id.* Rather than applying for an individual permit, an

operator files an NOI stating that it plans to operate consistent with the general permit. *Id.* Absent a "negative" ruling from EPA that the proposed activity does not comply with the requirements set forth in the general permit, the operator who submits an NOI may discharge in compliance with the general permit. *Id.* This practice of allowing operators to proceed under an NOI was challenged as violating the ESA's consultation requirement. *Id.* at 979. The Seventh Circuit rejected the challenge because, in its view, Section 7(a)(2) only applies when federal action may affect a threatened or endangered species. *Id.* When a private party files the NOI, no federal action occurs unless EPA issues a negative ruling. *Id.* In this process, the Seventh Circuit recognized a clear distinction between agency action and inaction.

The Ninth Circuit's ruling conflicts with the Seventh Circuit's holding. Although the statutes analyzed by each court differ, the elements on which each decision turned were common. Those common points are as follows.

First, the government agency announces a general standard with which any private party can comply without triggering the Section 7(a)(2) process. In this case, the general standard is the Forest Service's regulation providing that a miner can operate under an NOI unless the District Ranger determines that the preferred mining is likely to cause significant disturbance of surface resources. 36 C.F.R. § 228.4(a). In *Texas Independent Producers & Royalty Owners*, the general standard was the general permit. 410 F.3d at 968.

Second, private parties file an NOI to conduct some operation in compliance with the general

standard. Here, the Tribe challenged four notices of intent to operate in the Klamath National Forest. App. 9-13. In *Texas Independent Producers & Royalty Owners*, an NOI procedure was adopted to implement the National Pollutant Discharge Eliminations System permit program for stormwater discharges.[4] 410 F.3d at 968.

Third, the agency considers whether the NOI is consistent with the general standard. Here, the regulation provides for the District Ranger to review NOIs to determine whether they are likely to cause significant disturbance of surface resources. 36 C.F.R. § 228.4(a)(4). If so, a plan is required. *Id.* The District Ranger did not determine that any of the four NOIs challenged here were likely to cause significant disturbance of surface resources. App. 9-13. In *Texas Independent Producers & Royalty Owners*, the challenged procedure provided that EPA would review a submitted NOI. *See* 410 F.3d at 968. Unless EPA made a negative finding, *i.e.*, a finding that the NOI was inconsistent with the general permit, the private activity could proceed. *Id.* Both cases considered the application of Section 7(a)(2) to circumstances where the agency reviewed an NOI and decided not to exercise regulatory authority.

Accordingly, the petition should be granted so that this Court can resolve the conflict between the Seventh and Ninth Circuits and settle whether, or when, a

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[4] No particular NOI was challenged in the Seventh Circuit case. Rather, the National Resources Defense Council challenged EPA's authority to implement National Pollutant Discharge Elimination System standards for stormwater discharges through a general permit and NOI scheme. *See Tex. Indep. Producers & Royalty Owners Ass'n*, 410 F.3d at 979.

government's decision not to act can be agency action under ESA Section 7(a)(2).

II

THE APPLICATION OF SECTION 7(a)(2) TO NOTICES OF INTENT IS AN IMPORTANT FEDERAL QUESTION, THE ANSWER TO WHICH WILL HAVE SIGNIFICANT IMPACTS ON PRIVATE ACTIVITY

The Ninth Circuit's decision will have a significant effect on mining in the Pacific Northwest. It has already hurt EOMA members who have attempted to conduct exploration in the region. In watersheds where salmon and steelhead are present, miners conducting exploration activities, whether or not in-stream, have been stopped, even if the miners are using environmentally friendly settling ponds. The Ninth Circuit's decision will put an end to most legal dredging, principally because of the delays associated with the ESA consultation process.

These significant regulatory burdens are particularly onerous for the small mine operators and prospectors who are members of EOMA and the District. If the Ninth Circuit's decision stands, District Rangers will be required to consult with the Fish and Wildlife Service each time they receive an NOI. These procedures are more burden than the agency can bear. *See* USDA Forest Service, *The Process Predicament: How Statutory, Regulatory, and Administrative Factors Affect National Forest Management* (June 2002), *available at* http://www.fs.fed.us/projects/documents/Process-Predicament.pdf. The consultation process would also require the preparation of biological

assessments for each NOI. *See* 16 U.S.C. § 1536(c). The delays associated with this process would be disastrous for small miners and prospectors. The ESA allows 90 days for the consultation process, but also authorizes extensions up to 150 days without the consent of the effected parties. *See* 16 U.S.C. § 1536(b).[5] Small mining operations cannot bear the burdens of hiring the legal representation and enduring the long delays that result from being subjected to the consultation process. The likely outcome is that small operators will have to close their businesses.

Because NOIs are required in a variety of statutes, the effects of subjecting NOIs to the consultation requirement will significantly alter the administration and enforcement of environmental statutes. The Toxic Substances Control Act (TSCA) is enforced, in part, by an NOI procedure. Under Section 5 of the TSCA, a person may not manufacture a new chemical substance unless the person first submits a notice to the administrator at least 90 days in advance. *See* 15 U.S.C. § 2604(a)(1). The Administrator uses this notice to determine whether there is a reasonable basis to conclude that the manufacture of the chemical substance presents an unreasonable risk of injury to health or the environment. *See id.* § 2604(f). If the Administrator makes this determination, he is authorized to issue proposed rules to mitigate these risks. *Id.* If the Administrator is required to go

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[5] Even under the Ninth Circuit's reading of the mining regulations at issue here, the District Ranger is required to inform the private party whether it can proceed under the NOI or a Plan is required. App. 28-29. The Ninth Circuit, however, offers no explanation for how the extensive consultation process could be completed in that time.

through the consultation process each time he receives a notice, even if he determines to take no action, this would substantially increase the regulatory burden under the TSCA.[6]

As mentioned above, EPA receives NOIs for certain stormwater discharges under the Clean Water Act, 33 U.S.C. § 1342. If NOIs under this program must undergo Section 7(a)(2) consultation in the Ninth Circuit, this could substantially increase the costs of complying with NPDES standards. The same would be true for the Clean Water Act nationwide permits that the United States Army Corps of Engineers superintends. *See id.* § 1344(e); Nationwide Permit General Condition 31, *available at* http://www.spn.usace.army.mil/regulatory/nwp/NWP_Gen_Cond.pdf (last visited Sept. 26, 2012).

If it is no longer necessary for an agency to take some affirmative step before triggering Section 7(a)(2) consultation, the regulatory burden of Section 7(a)(2) compliance could increase exponentially. Affirmative actions by government agencies are discrete and identifiable acts amenable to Section 7(a)(2) consultation. Inaction, however, is continuous and undetectable. Government agencies are constantly not acting to regulate private activity. The Ninth Circuit's decision does not depend on the extent of deliberation prior to the agency determining not to act. Therefore, any agency's failure to act could potentially be subject to the ESA's consultation requirements. If agency

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[6] Like the mining regulations at issue in this case, the TSCA permits the manufacturer to proceed after the 90-day review period is completed. 15 U.S.C. § 2604(a)(1). If consultation is required, the Secretary would face serious difficulty in completing the process prior to the end of the 90 days.

action is not distinguished from agency inaction, private activity will be converted into government activity. Such conversion will greatly expand the scope of activity subject to the consultation requirement, as well as significantly burden the ability of government agencies to comply with the consultation requirement.

This Court has never addressed the questions of whether and to what extent an agency's inaction can convert private action into agency action for purposes of Section 7(a)(2) consultation. Because of the far-reaching effects that the answers to these questions could have, this Court should grant the petition to address the application of ESA Section 7(a)(2) to agency inaction.

III

THE NINTH CIRCUIT IGNORED THE DISTINCTION BETWEEN TRUE DISCRETION AND MERE JUDGMENT, IN CONFLICT WITH THIS COURT'S DECISION IN *NATIONAL ASSOCIATION OF HOME BUILDERS*

In *National Association of Home Builders v. Defenders of Wildlife*, this Court recognized an important distinction between an agency exercising judgment and an agency exercising discretion. *See* 551 U.S. at 654. The Court considered the application of Section 7(a)(2)'s consultation requirement to the transfer of permitting authority under the Clean Water Act from EPA to the state of Arizona. The Court determined that the transfer was not a discretionary agency action. 551 U.S. at 654. The Clean Water Act provides for the transfer of permitting authority to the states upon the satisfaction of nine enumerated

criteria. *Id.* at 650-51. EPA concluded that, because each of the nine criteria was satisfied, it had no discretion to consider the effects of the transfer on listed species, and thus consultation was not required. *Id.* at 653-54. The Ninth Circuit disagreed. *Id.* at 656. Although it did not dispute that Arizona had satisfied each of the nine criteria, the Ninth Circuit interpreted Section 7(a)(2) as adding a tenth criterion. *Id.*

This Court reversed. *Id.* at 673. First, the Court resolved the apparent conflict between the command to transfer permitting authority and the command to consult by deferring to the regulations interpreting Section 7(a)(2) as applying only to discretionary agency activities. *Id.* at 666-67. To give effect to the regulations, however, the Court had to acknowledge that EPA's criteria analysis required a significant amount of agency judgment. *Id.* at 671. Similarly, the Court conceded that the criteria incorporated references to wildlife conservation that could introduce consideration of Section 7(a)(2)'s prohibition against jeopardizing a listed species. *Id.*

The Court resolved this tension by distinguishing between cases where an agency could exercise some judgment to determine whether a specified criterion has been satisfied, and cases that involve truly discretionary actions. *See id.* As this Court explained, an agency does not have discretion where it does not have the authority to add a criterion or factor. *See id.* The text of the Clean Water Act did not authorize EPA to consider the protection of threatened or endangered species as an end in itself when evaluating a transfer application; therefore, EPA did not have discretion to introduce this consideration and thus the consultation requirement did not apply. *See id.* The Court

concluded that Section 7(a)(2) consultation is limited to cases where an agency exercises true discretion. *See id.*

Despite this Court's observation that not all cases that call for the exercise of judgment constitute agency discretion, the Ninth Circuit did not apply the *Home Builders* analysis in determining that the Forest Service's NOI procedure is discretionary. Rather, the Ninth Circuit simply concluded that the District Ranger's exercise of judgment to determine whether an NOI is likely to cause a significant disturbance of surface resources is discretionary agency action. App. 36. The Ninth Circuit assumed without any support from the regulation or statute that the District Ranger can exercise power beyond the regulation or statute to benefit listed species. *Id.* At no point did the Ninth Circuit consider that the only authority granted to the District Ranger is to determine whether the regulatory criteria had been satisfied. It failed to do so even though the Forest Service conceded, based on the regulation, that it lacked discretion over the private activity pursued under NOIs. App. 95-96. The Ninth Circuit did not identify any provision in the regulation giving the District Ranger discretion to determine which criterion should be used to determine whether a plan of operations is necessary. Instead, the Ninth Circuit considered factors such as the complementary objectives of Section 7(a)(2) and the mining law on which the regulations are based. App. 36-37. This Court, however, rejected reliance on complementary objectives in *Home Builders*. 551 U.S. at 654 (rejecting EPA authority to directly consider the protection of listed species as an end in itself when evaluating transfer applications, even though some of the criteria are designed to result in environmental benefits).

The distinction between judgment and discretion is important to the reasonable implementation of the ESA. *See id.* at 654; *see also Douglas County v. Babbitt*, 48 F.3d 1495, 1507 (9th Cir. 1995) (rejecting the application of the National Environmental Policy Act to ESA critical habitat designations, in part because the Secretaries of Commerce and Interior are limited to exercising judgment to determine whether statutory criteria are met and therefore they lack discretion); *Pacific Legal Foundation v. Andrus*, 657 F.2d 829, 835-36, 839 (6th Cir. 1981) (rejecting the application of the National Environmental Policy Act to ESA listing decisions for the same reason). The distinction between judgment and true discretion set out in *Home Builders* is clear. An agency exercises judgment if it is constrained by statute or regulation to determine whether specified criteria have been satisfied. *See* 551 U.S. 671-72. An agency has discretion, however, when it is not constrained but can modify the considerations that determine an outcome. *Id.*

In *Home Builders*, this Court recognized that the failure to respect this distinction would result in Section 7(a)(2) repealing, by implication, the many laws that give agencies the power to make some judgments but do not invest them with discretion. *See id.* at 663-64. This Court has long recognized the principle that repeals by implication are disfavored and will not be presumed unless the intention of the legislature is clear. *See id.* This concern is as important here as it was in *Home Builders*. If the Ninth Circuit's decision stands, Section 7(a)(2) will disrupt the application of the 1872 Mining Act despite no clear indication that Congress intended to do so.

Accordingly, the petition should be granted so that this Court can provide further guidance on how to determine whether an agency merely exercises judgment or whether it has true discretion and thus must consult under Section 7(a)(2).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

DATED: October, 2012.

Respectfully submitted,

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