No. 12-289

In the Supreme Court of the United States

THE NEW 49'ERS, INC., ET AL., PETITIONERS

v.

KARUK TRIBE OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Forest Service's determination that proposed mining activities are not likely to cause significant disturbance of surface resources—and therefore do not require approval to proceed—qualifies as agency authorization of those activities, triggering the agency's obligation to engage in interagency consultation pursuant to Section 7 of the Endangered Species Act.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1-76) is reported at 681 F.3d 1006. The opinion of the district court (Pet. App. 154-222) is reported at 379 F. Supp. 2d 1071.

JURISDICTION

The judgment of the court appeals was entered on June 1, 2012. The petition for a writ of certiorari was filed on August 29, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Mining Law of 1872 authorizes any citizen to enter certain federal lands for the purpose of prospecting, locating, and developing valuable mineral deposits. 30 U.S.C. 22 ("Except as otherwise provided, all valuable mineral deposits in lands belonging to the

United States * * * shall be free and open to exploration and purchase."). The Organic Administration Act of 1897 (Organic Act) applied the Mining Law to all lands that were set aside as forest reserves (and are now part of the National Forest System). 16 U.S.C. 482. The Organic Act authorizes the Secretary of Agriculture to regulate activities conducted on National Forest System lands, 16 U.S.C. 551, but provides that the Secretary may not "prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof," 16 U.S.C. 478. The Organic Act further provides that any such persons who do enter national forests for lawful purposes, including those related to mining, "must comply with the rules and regulations covering such national forests." *Ibid.*

b. Pursuant to the Organic Act, 16 U.S.C. 551, the Secretary of Agriculture promulgated regulations governing the use of surface resources in connection with mining operations on the national forests. See generally 36 C.F.R. Pt. 228, Subpart A. When promulgating those regulations, the Forest Service "recognize[d] that prospectors and miners have a statutory right, not mere privilege, under the 1872 mining law and the [Organic Act], to go upon and use the open public domain lands of the National Forest System for the purposes of mineral exploration, development and production." 39 Fed. Reg. 31,317 (Aug. 28, 1974). The regulations explicitly recognized that the "[e]xercise of that right may not be unreasonably restricted." *Ibid.*

Under the Part 228, Subpart A regulations,[1] an individual who plans to engage in mining operations that "might cause disturbance of surface resources" must submit to the appropriate District Ranger a "notice of intention to operate," 36 C.F.R. 228.4(a), unless the operations "will not involve the use of mechanized earthmoving equipment," 36 C.F.R. 228.4(a)(2)(iii), or otherwise will fall within certain other exceptions not applicable in this case. See 36 C.F.R. 228.4(a)(1)(i)-(v). The required notice from the miner—commonly referred to as a "notice of intent"—usually comes in the form of a letter, but no particular form is required. A notice of intent need only contain 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." 36 C.F.R. 228.4(a)(2)(iii). When a miner submits a notice of intent to the Forest Service, "the District Ranger will, within 15 days of receipt thereof, notify the operator whether a plan of operations is required." *Ibid.* The District Ranger will require a "plan of operations" if he determines that any proposed operation "will likely cause significant disturbance of surface resources." 36 C.F.R. 228.4(a).

If a plan of operations is required, the miner must submit additional information. 36 C.F.R. 228.4(c)(1)-(3). The Forest Service may require the miner to reasonably modify the proposed plan of operations or impose conditions and requirements on the operator to, *inter alia*, further protect affected species and environmental resources. 36 C.F.R. 228.5(a)(3), 228.8(e) and 228.8(g)(5). If a miner is required to submit a plan of operations, the

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[1] References throughout this brief to regulations in Part 228 of 36 C.F.R. are to the 2004 version of the regulations, which were applicable in this case. Those regulations have since been revised.

miner may not begin to conduct mining operations until the Forest Service approves the proposed plan. See 36 C.F.R. 228.5(a).

Because the Forest Service's approval of a plan of operations, when one is required, permits mining operations to proceed and involves some discretionary control over the terms and conditions of such allowed operations, the Forest Service's approval of such a plan must also comply with other environmental statutes such as the National Environmental Policy Act of 1969 (NEPA), the National Historic Preservation Act, and the Clean Water Act. See generally 36 C.F.R. 228.5(a)(5), 228.8(b)-(c). In contrast, when a "plan of operations" is *not* required, the miner is permitted to proceed without further action by the miner or the Forest Service (assuming, of course, that the miner complies with all other applicable state and federal laws).

c. Section 7 of the Endangered Species Act of 1973 (ESA) requires every federal agency to ensure 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 designated critical habitat for any such species. 16 U.S.C. 1536(a)(2). The ESA's implementing regulations explain that the requirements of Section 7 apply "to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. 402.03.

Under Section 7 of the ESA, a federal agency proposing to take a qualifying action must consult with the Secretary of the Interior or the Secretary of Commerce. 16 U.S.C. 1532(15) and 1536(a)(2). The duty to consult has been delegated by the Secretaries of the Interior and Commerce either to the United States Fish and

Wildlife Service or to the National Marine Fisheries Service, depending on which species is involved. 50 C.F.R. 402.01(b). A federal agency must consult with the appropriate federal wildlife agency whenever a proposed federal action "may affect" a threatened or endangered species. 50 C.F.R. 402.14(a).

2. Respondent Karuk Tribe of California (Tribe) is a federally recognized Indian Tribe located in Happy Camp, California. Pet. App. 155. The Tribe has traditionally depended on certain species of fish—including coho salmon, which has been designated as a "threatened" species under the ESA—found in the Klamath River system, which runs through the Six Rivers and Klamath National Forests. *Id.* at 3. The Klamath River contains gold, and some small-scale gold mining occurs along the River. *Id.* at 3-4.

This case concerns the Forest Service's response to four "notices of intent" submitted by gold miners who intended to use a method of mining called "suction dredging" in and along the banks of the Klamath River during the 2004 mining season. Pet. App. 4-13. Suction dredging is a form of placer mining in which a gasoline-powered vacuum device is used to suction up and sort through sediment at the bottom of the river. *Id.* at 4. Each of the dredges at issue in this case had a flexible intake hose with an opening at the end of four or five inches in diameter. *Ibid.*; *id.* at 7-13, 175. Before the start of the 2004 mining season, the District Ranger for the Happy Camp District of the Klamath National Forest in northern California (the official to whom the notices of intent were submitted) met with representatives of the Tribe as well as with petitioner The New 49'ers and other mining operators. *Id.* at 7-13. The District Ranger also solicited reports from Forest Service em-

ployees about the potential effects of suction dredging on species within the boundaries of the National Forest. *Id.* at 8-9. The District Ranger prepared a list of criteria he would use to determine whether any particular proposal would "likely cause significant disturbance of surface resources," for purposes of 36 C.F.R. 228.4(a). See Pet. App. 172-173. Applying those criteria, the District Ranger concluded that none of the mining activities described in the four notices of intent at issue in this case would require a plan of operations. *Id.* at 9-13, 173-175.

3. The Tribe filed suit against the Forest Service, alleging that its treatment of the four notices of intent was arbitrary or capricious under the Administrative Procedure Act, 5 U.S.C. 706, and that the Forest Service had violated the ESA, NEPA, and the National Forest Management Act of 1976 in approving the mining operations described in the notices of intent. Pet. App. 16, 177-178. Petitioners (The New 49'ers and Raymond Koons, who leases mining claims to The New 49'ers) intervened. *Id.* at 16, 156, 178.

The district court granted summary judgment to the Forest Service, holding that the Forest Service's consideration of and consultation about the notices of intent did not qualify as "a federal action that triggers the ESA." Pet. App. 221. While observing that the ESA is to be broadly construed, the court held that the ESA is not "so broad as to encompass activities—such as the [notice-of-intent] review process—where the only federal involvement is (1) the agency's internal policy determinations with respect to the parameters of the review process; and (2) the review process itself." *Ibid.* The district court concluded that the Tribe's "reading of the ESA * * * would essentially eviscerate any meaning-

ful distinction between the [notice-of-intent] and the [plan-of-operations] processes whatsoever." *Ibid.* The district court therefore held that the government's actions were not arbitrary, capricious, or contrary to law. *Ibid.*

4. A panel of the Ninth Circuit affirmed. Pet. App. 77-150. The panel majority rejected the Tribe's argument "that the [notice-of-intent process] is a decision to authorize the operations described in the [notice of intent]," holding instead that the process was a "simple notification procedure." *Id.* at 96. The panel relied in part on prior statements of the Forest Service describing the notice-of-intent process, *id.* at 96-97 (citing 70 Fed. Reg. 32,728 (June 6, 2005)), in holding that the process "is not 'authorization' of private activities when those activities are already authorized by other law," *id.* at 97. Instead, the court concluded, the process "is merely a precautionary agency notification procedure, which is at most a preliminary step prior to agency action being taken." *Ibid.*

The panel explained that the Forest Service's response to a notice of intent is "merely an internal decision not to regulate miners' exercise of their preexisting rights to prospect in national forests." Pet. App. 99. The panel relied on a series of Ninth Circuit cases holding that, in order for an agency's action to constitute an "authorization," there must be an "affirmative" action on the part of the agency to permit an action not otherwise permitted. *Id.* at 97-98 (citing *California Sportfishing Prot. Alliance* v. *FERC*, 472 F.3d 593 (9th Cir. 2006); *Western Watersheds Project* v. *Matejko*, 468 F.3d 1099 (9th Cir. 2006); *Marbled Murrelet* v. *Babbitt*, 83 F.3d 1068 (9th Cir. 1996); *Sierra Club* v. *Babbitt*, 65 F.3d 1502 (9th Cir. 1995)); see *id.* at 97-102. In summa-

rizing, the panel explained that requiring the Forest Service to engage in interagency consultation under the ESA when it considers notices of intent would undermine the "careful balancing act" embodied in the notice-of-intent process. *Id.* at 107.

Judge William Fletcher dissented. Pet. App. 112-150. Judge Fletcher would have held that the Forest Service's approval of the notices of intent qualified as "agency action" under Section 7 of the ESA because they were "discretionary decision[s] about whether, or under what conditions, to allow private activity to proceed." *Id.* at 113; see *id.* at 122-128, 140-144. He also would have held that the suction dredge mining described in the notice of intent "'may affect' critical habitat of the listed coho salmon," thus triggering the Forest Service's consultation obligation under the ESA. *Id.* at 113; see *id.* at 128-129, 144-148.

5. The Tribe filed a petition for rehearing en banc, which the court of appeals granted. Pet. App. 151. By that time, the facts on the ground had changed considerably. First, the agency's responses to the four notices of intent that gave rise to the Tribe's standing lost all legal effect at the end of 2004. See *id.* at 29. Second, before the en banc oral argument, the State of California imposed a temporary moratorium on all suction-dredge mining in the State. Cal. Fish & Game Code § 5653.1(b) (West 2011). The moratorium was set to expire either in 2016 or when the state regulatory agencies met certain conditions. *Ibid.* Among the conditions was that the California Department of Fish and Game must promulgate and implement regulations that will "fully mitigate all identified significant environmental impacts" of suction dredging. *Id.* § 5653.1(b)(1)-(4). The Forest Service moved to dismiss the appeal as moot because suction

dredging was no longer occurring in California (where the Tribe resides) and because any future suction dredging would be governed by a different regulatory regime.

a. A divided en banc panel of the Ninth Circuit held that the appeal presented a live controversy, and reversed the decision of the district court. Pet. App. 1-49. The en banc majority rejected the government's (and petitioner's) mootness argument, holding that the questions of statutory and regulatory interpretation posed by this case were "capable of repetition yet evading review." *Id.* at 20-24. The court reasoned that the second amended complaint was written broadly to challenge both suction dredging and other mining activities that were not subject to the State's temporary moratorium. *Id.* at 21-22. The court also explained that the State's moratorium on suction dredging would expire in 2016. *Id.* at 21-23. The court thus concluded that the Forest Service's "continued approval of [notices of intent] allowing mining activities in coho salmon critical habitat along the Klamath River, without consultation under the ESA, makes clear that the alleged violations will recur." *Id.* at 23-24.

On the merits, the en banc majority held that the Forest Service's response to a notice of intent qualifies as an "authoriz[ation]" of the mining even though the Mining Law itself gives miners the right to engage in the underlying mining activities. Pet. App. 33. The court explained that "private activities can and do have more than one source of authority, and more than one source of restrictions on that authority." *Ibid.* The court relied on the Forest Service's concession that a district ranger's approval of a plan of operations (when one is required) qualifies as an "agency action" subject to ESA Section 7 consultation. *Ibid.* The court ex-

plained that the mining activities that would be governed by a plan of operations have also "presumably" been authorized by the Mining Law and concluded that the same approach should also apply to the agency's approval of a notice of intent. *Ibid.*

b. Four judges dissented. Pet. App. 50-76. In an opinion authored by Judge Milan Smith, the author of the first panel's opinion, the dissenters rejected the majority's conclusion that a decision by the Forest Service not to require a plan of operation for activities described in a notice of intent "constitutes an *implicit authorization* of those mining activities." *Id.* at 58. The dissent emphasized that the District Ranger's response to a notice of intent "merely" provides "notice of the agency's review decision." *Ibid.* "It is not a permit," the dissenters explained, "and does not impose regulations on private conduct as does a Plan of Operations." *Ibid.* In the dissenters' view, the notice-of-intent process "is merely a precautionary agency notification procedure, which is at most a preliminary step prior to agency action being taken." *Id.* at 60. The dissenters therefore would have held that the District Ranger's determination not to require a plan of operations is not an "implicit agency action * * * approving, authorizing, or rejecting anything." *Id.* at 66 (emphasis omitted).

ARGUMENT

Petitioners ask (Pet. 19-32) this Court to review the court of appeals' determination that the Forest Service's treatment of a notice of intent qualifies as agency action requiring consultation pursuant to Section 7 of the Endangered Species Act of 1973, 16 U.S.C. 1536(a)(2).[2]

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[2] In the "Questions Presented for Review" section of the petition for a writ of certiorari, petitioners also ask this Court to consider

Although the court of appeals' decision is incorrect, review by this Court is not warranted because the decision does not conflict with any decision of this Court or of any other court of appeals and because the practical effect of the decision on future mining operations will be limited.

1. The government agrees with petitioners that the court of appeals erred in holding that the Forest Service's treatment of a notice of intent constitutes authorization of the mining operations described in the notice of intent, thereby triggering an obligation to engage in interagency consultation pursuant to Section 7 of the ESA. Section 7 of the ESA requires interagency consultation only for actions that are "authorized, funded, or carried out by" a federal agency. 16 U.S.C. 1536(a)(2). The critical question in this case is therefore whether the Forest Service's consideration of the four notices of intent at issue—and its decision not to require the relevant miners to submit plans of operation—constituted "authoriz[ation]" of the mining activities described in the notices of intent. The court of appeals erred in answering that question in the affirmative because the mining activities at issue were already authorized by Congress in the Mining Law, which provides that "all valuable mineral deposits in lands belonging to the United States * * * shall be free and open to exploration." 30 U.S.C. 22. Although the Organic Act authorized the Secretary of Agriculture to regulate activities on lands that are part of the National Forest System, see 16 U.S.C. 551, it also applied the Mining Law to such

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"[w]hether the federal courts lack jurisdiction over" this case "in light of changed circumstances." Pet. i. But petitioners do not argue in the rest of their petition that the court of appeals erred in concluding that the Tribe's claims are not moot.

lands, see 16 U.S.C. 482, and expressly provided that the Secretary may not "prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof," 16 U.S.C. 478.

In accordance with those mandates, the Secretary's regulations require miners who propose "to conduct operations which might cause disturbance of surface resources" to submit a notice of intent describing their proposed activities. 36 C.F.R. 228.4(a). But notice is all that is required at that stage. Although the regulations provide that the relevant Forest Service District Ranger may take 15 days to evaluate whether there is a need for a plan of operations, 36 C.F.R. 228.4(a)(2)(iii), the Forest Service's regulations do not prohibit a miner from beginning operations before that time period has expired. Nor do they provide express penalties for failure to submit a notice of intent. The District Ranger may require a miner to submit a plan of operations (and thereby submit to further regulation) only if the ranger concludes that the proposed mining operations "will likely cause significant disturbance of surface resources." 36 C.F.R. 228.4(a).

If that threshold is crossed—which it was not in this case—then the Forest Service may impose additional requirements and restrictions on the miner. If a miner is required to submit a plan of operations, for example, it may not proceed with its mining operations unless and until the Forest Service approves the miner's proposed plan. See 36 C.F.R. 228.7(a). But in cases where the District Ranger does not require a plan of operations (because he agrees that the proposed activities are not likely to cause significant disturbance of surface resources), the Mining Law has already authorized the

proposed activities. In those cases, the Forest Service has taken no action that constitutes authorization of the mining activities. Nor does the Forest Service have discretion in those circumstances to influence the private mining activity described in the notice of intent. The Forest Service's consideration of a notice of intent therefore does not qualify as agency action that triggers its obligations under Section 7 of the ESA, at least when the District Ranger does not require the miner to file a plan of operations.[3]

The court of appeals thus erred in holding that the District Ranger's election not to require a plan of operations establishes ongoing "discretionary Federal involvement or control" on the part of the District Ranger, which would trigger the ESA's consultation obligation pursuant to 50 C.F.R. 402.03. The court erroneously focused on whether the District Ranger's decision was "discretionary," ignoring the fact that the Ranger's determination did not lead to any "Federal involvement or control." *Ibid.* It is true that a District Ranger exercises judgment in determining whether the activities described in a notice of intent are likely to cause significant disturbance of surface resources and therefore require that the miner submit and obtain approval of a plan of operations. But this case involves only determinations by the Ranger that a plan of operations was *not* required. Once the Ranger makes that determination, the Forest Service's surface-use regulations no longer provide for any "Federal involvement or control" over

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[3] Although the court of appeals relied heavily on the District Ranger's written responses to the notices of intent at issue in this case, see Pet. App. 9-16, the dissent correctly noted that the phrasing of a letter from an employee of the Forest Service cannot create or expand the agency's statutory authority, see *id.* at 67-68.

the mining activity. Consultation pursuant to Section 7 of the ESA is therefore not required.

2. Although, for the reasons discussed, the court of appeals erred in concluding that the Forest Service's consideration of the four notices of intent at issue in this case constituted the type of agency action that requires interagency consultation under the ESA, review of that erroneous decision is not warranted. The decision does not conflict with any decision of this Court or of any other court of appeals, and the effects of the decision are limited.

Petitioner does not even assert that the court of appeals' conclusion that interagency consultation was required under Section 7 of the ESA conflicts with the decision of any other court of appeals. Indeed, no other court of appeals has addressed the applicability of Section 7 to the Forest Service's surface-use regulations in general, or to the agency's review of a notice of intent in particular. That is a sufficient reason to deny the petition for a writ of certiorari.

In any case, the court of appeals' decision will have little practical effect. In describing what it viewed as the significant "downside" of the court's decision, Pet. App. 70, the en banc dissent stated that the court's decision "effectively shuts down the entire suction dredge mining industry" and pointed to the number of suction dredge mining permits issued by the State of California in 2008, *id.* at 71. But, as petitioners point out (Pet. 15, 35), California recently made permanent the formerly temporary moratorium on suction dredging. Cal. Fish & Game Code § 5653.1 (West 2012 Supp.); Pet. App. 232-234. The court of appeals' decision will therefore have no effect on the ability of miners who use suction dredging to operate in California.

Finally, petitioners rely (Pet. 32) on the dissenting judges' colorful invocation of Dante's *Inferno* (see Pet. App. 75-76) to urge review by this Court in light of what it views as a series of Ninth Circuit cases exceeding the court's proper role in reviewing federal agencies' application of environmental laws (although petitioners do not cite those cases by name). This case, however, involves only one such law. And given the limited effect the decision below will have, this would be a very poor vehicle with which to address any such concerns. In addition, there is a serious question of justiciability lurking in this case. The proposed mining activity that gave rise to this suit was geographically limited to California. As noted, the type of mining described in the notices of intent is no longer legal in California. The temporary nature of the then-existing moratorium was one of the bases on which the court of appeals concluded that a live controversy remained. Pet. App. 18-24. That reasoning is no longer sound, and it is difficult to see now what basis the Tribe would have for maintaining its request for injunctive relief. At the very least, the Court would have to pass on that threshold jurisdictional question before it could reach the merits of the court of appeals' decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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