No. 12-289

IN THE

Supreme Court of the United States

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

Petitioners,

v.

KARUK TRIBE OF CALIFORNIA, *ET AL.*,

Respondents.

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

RESPONDENT KARUK TRIBE OF CALIFORNIA'S BRIEF IN OPPOSITION

SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

ROGER FLYNN
Counsel of Record
WESTERN MINING ACTION PROJECT
P.O. Box 349
440 Main Street, #2
Lyons, CO 80540
(303) 823-5738
wmap@igc.org

Attorneys for Respondent Karuk Tribe of California

February 2013

QUESTIONS PRESENTED

1. Did the court of appeals err when, in addressing a question of first impression in the federal courts, it held that the U.S. Forest Service's review and authorization of proposed mining operations on public land pursuant to a miner's "notice of intent" to engage in mining operations is an "agency action" requiring interagency consultation under the Endangered Species Act, when the agency exercises broad discretion and authority over mining that adversely affects listed species and when the record in this case shows that the agency has exercised its authority to deny or impose conditions on mining proposed via a notice of intent?

2. Did this case become moot following the issuance of the court of appeals' decision when California enacted a permanent moratorium on one type of mining at issue in this case, in-stream suction dredging, even though other types of mining that were authorized in the challenged agency actions are not covered by the moratorium and would continue unabated and without ESA compliance absent the court of appeals' decision?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Constitutional Provisions, Statutes, and Rules:

Other:

INTRODUCTION

This case presents a narrow, fact-bound question on which there is no disagreement among the lower federal courts: whether the Forest Service takes an "agency action" subject to the interagency consultation provisions of the Endangered Species Act (ESA) when it exercises its discretion to allow mining operations on federal lands to proceed under a miner's "notice of intent" to operate. Recognizing that the agency exerts significant discretion and regulatory authority over mining on public lands and has the power to disallow a proposed mining operation or impose conditions upon it to benefit species protected by the ESA, the court of appeals held that the agency's approval of the proposed mining operations at issue constituted "agency action" under the ESA.

That holding reflects a faithful application of this Court's construction of the term "agency action" in *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). The court of appeals' application of *Home Builders* does not conflict with any federal appellate decision, for no other court of appeals has ever even *addressed* the fact-specific question whether the particular regulatory scheme at issue here results in "agency action" within the meaning of the ESA. Indeed, there is no reported decision at any level in any other case addressing the issue. Nor does the court's decision reflect some broader disagreement among the lower courts over the meaning of "agency action." The petitioners do not even attempt to identify any such conflict, and the federal respondents—who agree that review should be denied even though they lost on the merits below—acknowledge that there is none.

Petitioners, "the New 49'ers," request that this Court review this matter of first impression solely because they believe that the court of appeals erred in resolving it. The New 49'ers' claim of error is unpersuasive in light of the court of appeals' careful, record-based determination that the agency decisions at issue had all the characteristics of "agency action" under the ESA. More importantly, however, the New 49'ers' request that this Court review the correctness of the court of appeals' application of the *Home Builders* standard does not satisfy this Court's criteria for exercise of its discretionary jurisdiction, under which "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of … the misapplication of a properly stated rule of law." S. Ct. R. 10.

This case presents no reason to depart from this Court's practice of not reviewing fact-bound claims of error. The New 49'ers' contention that the court of appeals has made different errors in other environmental cases involving unrelated issues does not support review of *this* case. Moreover, the court of appeals' decision will have no far-reaching consequences of national significance that require this Court's intervention. The government, which is the party that must comply with the requirement of consultation under the ESA before taking "agency action," concedes that the court of appeals' ruling "will have little practical effect." Fed. Resp. Opp. 14. That concession is surely correct in light of the fact that the Forest Service's sister public lands agency, the Bureau of Land Management, which has similar responsibilities with respect to mining on federal lands under its jurisdiction, has long engaged in ESA consultation before approving similar mining activity with potential effects on protected species, with no material conse-

quences for the mining industry or the federal administrative process.

Finally, the New 49'ers' suggestion that the "agency action" issue may be moot and nonjusticiable in light of California's enactment of a "permanent" moratorium on one form of mining at issue in this case after the court of appeals issued its decision adds nothing to their request that this Court exercise discretionary review. The New 49'ers do not contend that anything about the mootness issue, which they only briefly discuss at the end of their petition, independently merits review by this Court. Indeed, the possible mootness of the merits issue on which they seek review would, as the government points out, normally be a reason *not* to grant certiorari. Fed. Resp. Opp. 15.

In any event, however, the court of appeals correctly held that a California state-law prohibition on suction-dredge mining would not moot this case because other forms of mining not subject to that prohibition are also at issue. The New 49'ers do not even acknowledge, let alone address the correctness of, that holding, which is as applicable to the permanent moratorium enacted after the court of appeals' decision as it was to the temporary moratorium in place when the court issued its *en banc* decision. Thus, the California moratorium on suction dredging does not moot this case. It does, however, significantly diminish the practical impact of the case because of the substantial reduction of the number of potential mining operations to which it may apply.

STATEMENT

A. Statutory and Regulatory Background

1. The ESA's Consultation Requirement

To further the ESA's goal of ensuring that the activities of federal agencies do not jeopardize a listed species or its critical habitat, section 7(a)(2) of the ESA requires that:

> Each federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior or Commerce], insure that any action authorized, funded or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat of such species ….

16 U.S.C. § 1536(a)(2). In complying with this mandate, the Forest Service must consult with NOAA Fisheries, as the delegated agent of the Secretary of Commerce, or the Fish and Wildlife Service ("FWS"), as the delegated agent of the Secretary of the Interior, whenever its actions "may affect" a listed species. 50 C.F.R. § 402.14(a). Formal consultation results in a biological opinion from NOAA or FWS that determines whether the action is likely to jeopardize the species; if so, the opinion may specify reasonable and prudent alternatives that will avoid jeopardy and allow the agency to proceed with the action. 16 U.S.C. § 1536(b)(3)(A).

For purposes of the ESA's consultation requirement, the triggering agency "actions" are defined to include

> *all* activities or programs of *any kind* authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, *but are not limited to*:
>
> (a) actions intended to conserve listed species or their habitat;
>
> (b) the promulgation of regulations;
>
> (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or
>
> (d) actions directly or indirectly causing modifications to the land, water, or air.

50 C.F.R. § 402.02 (emphasis added). Section 7's consultation duties apply to "all actions," as so defined, "in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03; *see also Home Builders*, 551 U.S. at 666.

2. The Forest Service's Authority over Mining Operations

Although the Mining Act of 1872, 30 U.S.C. §§ 21 *et seq*., makes federal lands available for mining by private enterprises, the Act requires that all mining be conducted "under regulations prescribed by law." 30 U.S.C. § 22. The Forest Service has broad authority to prescribe such regulations with respect to mining operations on the National Forests under its Organic Administration Act of 1897 ("Organic Act"), Act of June 4, 1897, ch. 2, 30 Stat. 35, *codified as amended at* 16 U.S.C. §§ 473–82, 551. The Organic Act authorizes the Forest Service to promulgate regulations for the national forests "to regulate their occupancy and use and to preserve the forests thereon from de-

struction." 16 U.S.C. § 551. The Organic Act "specifies that persons entering the national forests for the purpose of exploiting mineral resources 'must comply with the rules and regulations covering such national forests.'" *Clouser v. Espy*, 42 F.3d 1522, 1529 (9th Cir. 1994).[1]

Mining claims on National Forests and other federal lands are thus subject to overarching federal regulatory authority. They are not fee simple property rights, but a "unique form of property" subject to substantial regulatory limitations. *United States v. Locke*, 471 U.S. 84, 104 (1985). All mining claims "must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public." *Cameron v. United States,* 252 U.S. 450, 460 (1920).

> The United States, as owner of the underlying fee title to the public domain, maintains broad powers over the terms and conditions upon which the public lands can be used, leased, and acquired. … [Mining] [c]laimants thus must take their mineral interests with the knowledge that the Government retains substantial regulatory power over those interests.

Locke, 471 U.S. at 104–05 (1985). Mining claims "are held subject to the Government's substantial power to

---

[1] The Surface Resources Act of 1955 provides additional authority for Forest Service regulation of mining operations. Under that Act, "[r]ights under any mining claim … shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof." 30 U.S.C. § 612(b).

regulate for the public good the conditions under which business is carried out and to redistribute the benefits and burdens of economic life." *Id*. at 105. *See also Kunkes v. United States*, 78 F.3d 1549, 1552–53 (Fed. Cir. 1996) (imposition of financial and regulatory limitations on mining claims not a "taking"); *Reeves v. United States*, 54 Fed. Cl. 652, 667 (Fed. Cl. 2002) (denial of proposed mining plan not a "taking" because mining claims are subject to federal regulations protecting public lands and the environment).

Under these principles, courts have long recognized that requiring miners to obtain permission to enter public lands for more than *de minimis* mining operations does not violate the rights of mining claimants:

> [E]ven where a miner has a federal mining right, a "prior approval requirement does not 'endanger or materially interfere with' [the miner's] mining operations and is therefore permissible under the statutory scheme." *United States v. Backlund*, 689 F.3d 986, 996 (9th Cir. 2012) (quoting [*United States v.*] *Doremus*, 888 F.2d [630,] 633 [(9th Cir. 1989)]).

Public Lands for the People, Inc. v. U.S. Dept. of Agric., 697 F.3d 1192, 1198 (9th Cir. 2012) (upholding Forest Service restrictions on access to mining claims to protect environmental resources on public lands). Thus, although under the Organic Act the Forest Service cannot categorically prohibit mining, *see* 16 U.S.C. § 478, it has the authority to deny or condition proposed mining that would not be in compliance with its regulations or other federal wildlife and environmental laws.

The Forest Service has exercised this authority by promulgating mining regulations found at 36 C.F.R. Part 228. Those regulations provide that "all [mining] operations shall be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest resources." 36 C.F.R. § 228.8 (2004).[2] As this Court has recognized:

> Congress has delegated to the Secretary of Agriculture the authority to make "rules and regulations" to "regulate [the] occupancy and use" of national forests. 16 U.S.C. § 551. Through this delegation of authority, the Department of Agriculture's Forest Service has promulgated regulations so that "use of the surface of National Forest System lands" by those … who have unpatented mining claims authorized by the Mining Act of 1872, "shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources."

California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 582 (1987) (quoting 36 C.F.R. §§ 228.1, 228.3(d)).

The Forest Service's regulations provide it with authority to withhold approval of mining operations that may damage the National Forests:

> Under the regulations, the Forest Service must be notified of any mining-related operation that is likely to cause a disturbance of surface resources. The initiation or continuation of such an

---

[2] Quotations to the Part 228 regulations herein are to the version in effect in 2004. The Forest Service slightly revised these regulations in 2005, but "[t]he parties agree that the 2005 revisions do not materially affect the issues on appeal." App.7.

> operation is subject to the approval of the Forest Service.

United States v. Weiss, 642 F.2d 296, 297 (9th Cir. 1981). "The Forest Service may require the locator of an unpatented mining claim on national forest lands to use nondestructive methods of prospecting." *United States v. Richardson*, 599 F.2d 290, 291 (9th Cir. 1979); *see also Clouser*, 42 F.3d at 1529–30.

Under the 36 C.F.R. Part 228 regulations, anyone proposing to conduct substantial mining operations on National Forest lands must first submit either a notice of intent ("NOI") or a plan of operations.[3]

> Except as provided in paragraph (a)(2) of this section, a notice of intention to operate is required from any person proposing to conduct operations which might cause disturbance of surface resources. Such notice of intention shall be submitted to the District Ranger having jurisdiction over the area in which the operations will be conducted. If the District Ranger determines that such operations will likely cause significant disturbance of surface resources, the operator shall submit a proposed plan of operations to the District Ranger.

36 C.F.R. § 228.4(a).

Under the regulations, when mining operations are proposed on National Forest lands or waters, the

---

[3] There is a third, *de minimis*, level of mining-related activity, which would not have the potential to cause any surface disturbance, and does not require either an NOI or a plan of operations. This type of activity, which is not at issue here, includes, for example, mineral sampling and hand gold panning. *See* 36 C.F.R. §§ 228.4(a)(1) & (2).

Forest Service District Ranger determines whether mining should be regulated under an NOI or a plan of operations.

> Although this regulation requires a notice of intent in certain circumstances, it vests discretion in the district ranger to determine if the mining operation "will likely cause significant disturbance of surface resources." [36 C.F.R. § 228.4(a)]. In the event of such a determination, the mining operator must submit a proposed plan of operations.

Siskiyou Regional Educ. Proj. v. U.S. Forest Serv., 565 F.3d 545, 551 (9th Cir. 2009). The District Ranger's discretionary decision whether to regulate mining under an NOI or a plan of operations is based on the unique circumstances of each mining proposal. *See id.* at 556 ("§ 228.4(a) contemplates that a district ranger will undertake a case-by-case determination of whether a plan of operations is needed.").

By regulation, the Forest Service reviews each proposed mining operation and determines whether, and under what conditions, mining may be allowed to proceed under either an NOI or plan of operations. The regulations require that a miner submit an NOI *before* undertaking mining activities. 36 C.F.R. § 228.4(a) ("[A] notice of intention to operate is required from any person proposing to conduct operations which might cause disturbance of surface resources."); *see also* 70 Fed. Reg. 32713, 32728 (June 6, 2005) (describing the requirement for "submission of a notice of intent to operate *before an operator conducts proposed operations*" (emphasis added)). Only a miner conducting *de minimis* mining activities, such as gold panning or mineral sampling, may proceed

without submitting anything to, or receiving anything from, the Forest Service. 36 C.F.R. §§ 228.4(a)(1), (2)(ii).

If the District Ranger determines that an NOI is sufficient and adequately safeguards the environment, then the operation is allowed to proceed as proposed by the mining applicant. *Id.* § 228.4(a). If the Ranger determines that a revised NOI or plan of operations is needed, then the operator must submit a revised NOI or a plan of operations that complies with the regulations and adequately safeguards the environment before operations may proceed. *Id.* §§ 228.4 & 228.5. If a plan of operations is required by the District Ranger, the mining applicant may have to provide additional information regarding the environmental impacts of the proposed operation, including measures to protect threatened and endangered species. *See id.* § 228.5.

B. Factual Background of the Litigation

The narrow legal question presented by this case arises from the Forest Service's failure to engage in interagency consultations under the ESA before authorizing mining operations pursuant to NOIs in and along numerous streams and rivers in northern California within the designated critical habitat of the Southern Oregon/Northern California Coastal Coho Salmon (*Oncorhynchus kisutch*). This population of coho salmon was listed as "threatened" under the ESA in 1997. 62 Fed. Reg. 24588 (May 6, 1997). The Klamath River system and adjacent streamside riparian zones were designated as critical habitat for coho salmon in 1999. 64 Fed. Reg. 24049 (May 5, 1999).

The Klamath salmon fishery, including the threatened population of coho salmon, has long been important not only commercially and recreationally, but

also to the way of life of respondent Karuk Tribe of California.

> The Karuk Tribe has inhabited what is now northern California since time immemorial. The Klamath River originates in southeastern Oregon, runs through northern California, and empties into the Pacific Ocean about forty miles south of the California-Oregon border. In northern California, the Klamath River passes through the Six Rivers and Klamath National Forests. … The Karuk Tribe depends on coho salmon in the Klamath River system for cultural, religious, and subsistence uses.

App. 3.

In 2004, the Forest Service approved four mining operations proposed by the New 49'ers and others in four separate NOIs. The Karuk Tribe challenged those approvals in this litigation. The challenged agency decisions approved various types of mining along the Klamath River and its tributaries. These included "highbanking" and "motorized sluicing," which involves

> pumping water onto streambanks to process excavated rocks, gravel, and sand in a sluice box. As the material flows through the box, a small amount of the heavier material, including gold, is slowed by "riffles" and is then captured in the bottom of the box. The remaining material runs through the box and is deposited in a tailings pile.

App. 4.

The agency also approved suction dredging within the streams themselves. This method uses

> gasoline-powered engines to suck streambed material up through flexible intake hoses that are typically four or five inches in diameter. The streambed material is deposited into a floating sluice box, and the excess is discharged in a tailings pile in or beside the stream. Dredging depths are usually about five feet, but can be as great as twelve feet.

App. 4.

The record demonstrates the adverse impacts from small-scale mining on coho salmon and its critical habitat. The Forest Service's own biologist found that such mining "may harm the population viability of threatened species" and "can directly kill and indirectly increase mortality of fish." App. 46. *See also* App. 47 ("[A] long list of other [mining-related] factors—disturbance, turbidity, pollution, decrease in food base, and loss of cover associated with suction dredging—could combine to harm the salmon.").

The Forest Service admitted that it did not engage in any consultation under the ESA with the relevant agency, NOAA Fisheries, about the effects of the proposed mining on coho salmon before authorizing the New 49'ers to engage in mining operations under the NOIs, even though it "[did] not dispute that the mining activities in the Klamath River system 'may affect' the listed coho salmon and its critical habitat." App. 43. The agency maintained that consultation was not required, despite the possibility of adverse effects on a listed species, because its authorization of mining under an NOI was not "agency action" triggering the ESA's consultation and species-protection requirements. App. 2. The principal issue litigated and decided below was thus whether, when the agency imple-

mented the detailed scheme of regulation described above by making the discretionary determination to authorize mining to proceed under the NOIs, it took "agency action" within the meaning of the ESA as construed in *Home Builders*.

C. Decision Below

The appeals court's *en banc* decision held that the Forest Service's refusal to conduct any consultation with the federal wildlife agencies when it authorized the challenged mining operations violated the ESA. Applying the regulatory definition of "agency action" as construed in *Home Builders*, the court held that the agency exercised the requisite "discretionary federal involvement or control," over the mining operations. App. 35–41. The court relied on a voluminous record documenting instances where the agency not only had imposed significant conditions on NOI-level mining operations, but also had denied a similar NOI submitted by the New 49'ers because the proposed mining failed to adequately protect listed species. App. 38–41.

The court specifically held that this discretionary authority over whether to permit NOI-level mining comported with the construction given the term "agency action" by this Court in *Home Builders*. The court of appeals recognized that "discretion" under section 7 of the ESA exists when the agency has "the power or right to decide or act according to [its] own judgment." App. 40–41 (quoting *Home Builders*, 551 U.S. at 668). After a detailed review of the Forest Service's authority over mining, highlighting many instances in the record where the agency exercised this discretion, the court found the requisite "discretion-

ary federal involvement or control" over the NOI-level mining operations. App. 36–41.

The appeals court also found that the Forest Service's actions authorizing and allowing the mining to proceed satisfied the "affirmative act" part of the test for "agency action." The court noted that previous decisions had held that the agency's decision whether mining proposed under an NOI might cause significant adverse impacts (thus triggering the need for the applicant to submit a plan of operations), and whether to place conditions on such mining operations, was a "final agency action" subject to judicial review under the Administrative Procedure Act.

> [T]he Forest Service's approval of a NOI to conduct suction dredge mining constitutes "final agency action" under the APA. This holding confirms that a NOI approval is not merely advisory. Rather, it "'mark[s] the consummation of the agency's decision making process'" and is an action "'from which legal consequences will flow.'" *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 930 (9th Cir. 2010) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)).

App. 32 (citing *Siskiyou*, 565 F.3d at 554).

The court also highlighted the agency's admission that it "authorized" the NOI-level mining operations and that in other cases it had not allowed operations to proceed:

> The District Ranger's letter approving the New 49'ers NOI for the 2004 mining season stated, "You may begin your mining operations when you obtain all applicable State and Federal permits. This authorization expires December 31, 2004." The District Ranger's letters approving

> six NOIs for the 2010, 2011, and 2012 mining seasons stated, "I am allowing your proposed mining activities ... under a NOI with the following conditions." Another District Ranger stated in a letter rejecting a NOI for the 2004 season that he was "unable to allow your proposed mining operations ... under a NOI."

App. 29–30. As the appeals court explained, the factual record confirmed that the Forest Service's uniform practice was to take action either approving or denying all NOIs:

> The District Rangers affirmatively responded to all six non-withdrawn NOIs in the record for the 2004 mining season. The Forest Service approved four of them and denied two. The District Ranger for the Happy Camp District also affirmatively approved all six NOIs for the 2010, 2011, and 2012 mining seasons. There is no NOI in the record, other than the one that was withdrawn, that the Forest Service did not affirmatively act to approve or deny.

App. 31.

Lastly, the appeals court rejected the argument that the case was moot because of California's temporary moratorium on suction dredging (which was replaced by a "permanent" moratorium following the court's decision). Although the agency's approvals of the 2004 NOIs expired at the end of 2004, the court found that "the Tribe's claims are justiciable under the 'capable of repetition, yet evading review' exception to the mootness doctrine." App. 19. The court based its decision in part on the fact that the Forest Service had approved not only suction dredging, but also other forms of mining that were not subject to

the moratorium, without engaging in consultation. Because "the suction-dredge moratorium does not prohibit other mining activities at issue in this case," App. 21, the court concluded that it did not eliminate the likelihood that, absent the relief it sought in this case, the Tribe would again be adversely affected by the Forest Service's approval of NOIs without the required consultations under the ESA.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals' Application of the *Home Builders* Standard to the Particular Regulatory Scheme and Factual Circumstances in This Case Does Not Conflict with Any Federal Precedents and Presents No Legal Issue Requiring Review by This Court.

The New 49'ers do not allege, nor can they, that the court of appeals' decision in this case conflicts with any decision of this Court or any federal court of appeals, or, indeed, any court at any level. The question whether the authorization of mining in a National Forest under an NOI is an "agency action" within the meaning of the ESA is a question of first impression. The federal respondents, in urging that this Court deny the petition, correctly state that "review by this Court is not warranted because the decision does not conflict with any decision of this Court or of any court of appeals and because the practical effect of the decision on future mining operations will be limited." Fed. Resp. Opp. 11.

Nor is there anything about the manner in which the court of appeals addressed the "agency action" issue that suggests that this is one of those exceptional cases in which this Court should exercise its discre-

tionary review to address a claim of mere error by a lower court. The court of appeals carefully applied this Court's leading decision regarding what constitutes an "agency action" under the ESA, *Home Builders*, to the specific circumstances of this case. In *Home Builders*, this Court held that that an agency action based on the exercise of "judgment" reflects the level of "discretionary federal involvement or control" that is the hallmark of an "agency action" requiring consultation under the ESA: "Agency discretion presumes that an agency can exercise 'judgment' in connection with a particular action." *Home Builders*, 551 U.S. at 668. This Court defined "discretion" as "the power or right to decide or act according to one's own judgment." *Id*.

In *Home Builders*, the Court held that an agency's discretion is eliminated in cases where Congress specifically mandates agency decisions based on enumerated criteria. *Id*. at 669. Here, by contrast, the court of appeals' careful consideration of the regulatory framework and the record documenting how the Forest Service has implemented that framework demonstrated that the Forest Service is not constrained by mandatory criteria and has ample opportunities "to exercise judgment" in reviewing NOIs—and has routinely used that judgment in its regulation of mining pursuant to the NOI process. As detailed above, the record shows that the agency independently established the "operating conditions" for mining under NOIs and exercises its judgment in rejecting or limiting individual mining operations proposed via an NOI. *See* App. 7–16 (discussing numerous Forest Service

actions conditioning or denying operations proposed via NOIs).[4]

There is nothing remarkable about the court of appeals' record-based and narrow decision that the NOI review and approval process results in "agency action" under *Home Builders*. The New 49'ers' and Forest Service's disagreement with the appeals court's decision contradicts the agency's own regulations, which prohibit mining operations that have unacceptable adverse environmental effects on the National Forests, require an NOI *before* mining operations take place, and establish discretionary criteria under which the Forest Service can deny or condition a miner's ability to commence operations under an NOI. *See supra* at 5–11. Any suggestion that these regulations, framed in mandatory terms, are merely hortatory is untenable: A miner who proceeds in violation of the Forest Service's regulatory requirements is, as the Forest Service has elsewhere explained, subject to enforcement through "civil litigation seeking declaratory, injunctive, or other appropriate relief," 70 Fed. Reg. at 32721, or civil or criminal trespass proceedings. *See*, *e.g.*, *United States v. Tracy*, 401 Fed. Appx. 224 (9th Cir 2010); *United States v. Tracy*, 401 Fed. Appx. 232 (9th Cir. 2010).

Indeed, the record in this case shows many actions by the agency either denying or significantly conditioning mining in order to protect the coho salmon

---

[4] Accordingly, the suggestion of one *amicus curiae* that there is a conflict with *Home Builders* because the Forest Service allegedly has no discretionary authority to impose restrictive conditions on the proposed NOI-level mining is groundless. *See* Brief of Northwest Mining Association, at 19–20.

and its habitat. App. 7–16. Thus, as the appeals court correctly found, a miner's ability to conduct operations depends on the agency's discretionary decision whether and under what conditions to allow him to proceed—the essence of "agency action" under this Court's decision in *Home Builders*.

Notably, the Forest Service cites no precedents supporting its argument that it has taken no action in such circumstances, either in the context of mining or in any other sphere of regulation. *See* Fed. Resp. Opp. 10-14. Nor does the Forest Service argue that its continued disagreement with the court of appeals' ruling is, by itself, an issue of sufficient importance to merit consideration by this Court, let alone that that disagreement demonstrates that the court of appeals' decision represents such a "depart[ure] from the accepted and usual court of judicial proceedings … as to call for an exercise of this Court's supervisory power." S. Ct. R. 10(a). Unless and until some other court adopts a reading of *Home Builders* similar to that advanced by the federal respondents, their unpersuasive theoretical critique of the court of appeals' ruling offers no reason for review by this Court, as they themselves acknowledge.

Although neither the New 49'ers nor the federal respondents argue that the decision below conflicts with any decision of another court of appeals, the *amicus* brief of the Eastern Oregon Mining Association asserts that the lower court's decision conflicts with the Seventh Circuit's decision in *Texas Independent Producers & Royalty Owners Ass'n v. EPA*, 410 F.3d 964 (7th Cir. 2005). Eastern Oregon Mining Br. 7–9. That case, however, involved a completely different regulatory scheme, and, as the *en banc* decision

below notes, ESA consultation had in fact occurred at the appropriate stage in the regulatory process in that case. App. 48–49. In *Texas Independent Producers*, the EPA had issued a general permit under the Clean Water Act applicable to discharges of pollutants by a certain industrial class. Individual companies that wanted to discharge stormwater pollution under the general permit had to provide notice to EPA, and the court held that that such notices did not require additional consultation beyond that which occurred when the general permit was issued because, unlike in this case, their filing did not trigger any further discretionary action by the agency. 410 F.3d at 979. Moreover, the court stressed that "[c]onsultation was required earlier, when the EPA issued the General Permit, but at that time the EPA undertook and concluded informal consultation with the [Fish & Wildlife] Service on the issuance of the General Permit." *Id*. Here, by contrast, at no stage in the process of regulating or authorizing mining did the Forest Service engage in any ESA consultation.

II. The Court of Appeals' Ruling Does Not Involve Matters of Sufficient National Importance to Merit Review by This Court.

As the federal respondents recognize, the decision below will not have significant adverse effects on either the agency or the industry, but will merely require additional consultations before the agency determines whether to grant, deny, or condition a limited set of proposals to mine on federal lands—namely, those where the miner seeks to proceed under an NOI and where the agency recognizes that the proposed operations may adversely affect listed species. The federal respondents, who are in the best po-

sition to assess the impact of the decision below, foresee no effects of the ruling significant enough to merit intervention by this Court.

Nonetheless, the New 49'ers and their mining industry *amici* argue that the lower court's decision represents such an "unprecedented" departure from federal environmental, mining, and public land law that it deserves to be considered by this Court. These assertions are essentially policy arguments against federal regulation of smaller-scale mining operations. They ignore long-settled precedents of this Court, the Federal Circuit and Claims Court, and the regional courts of appeals, which have upheld substantial federal oversight of mining on federal lands and rejected the sort of unfettered and absolute "right to mine" claimed by the miners. *See supra*, at 6–9. Indeed, the issue posed here is not *whether* mining on the National Forests is subject to regulation by the Forest Service, nor even *what* substantive restrictions apply—those matters are governed by Forest Service regulations whose terms are not challenged here. The issue is only whether ESA consultation must be part of the Forest Service's procedure for determining whether to allow mining to proceed under an NOI, and, if mining is allowed, under what conditions.

Importantly, and ignored by the New 49'ers and their *amici*, the ESA consultation process required by the *en banc* decision is essentially the same consultation process for similar mining operations that has been part of mining regulations issued by the Interior Department's Bureau of Land Management (BLM)

since 2000.[5] As noted by the *en banc* dissent, these regulations, found at 43 C.F.R. Part 3809, are "almost identical" to the Forest Service regulations at issue in this case. App. 63. The BLM regulations use the same "three-tiered approach to regulating placer mining"—the "casual use," "notice/NOI," and "plan of operations" levels—as the Forest Service. *Id*.

Under the BLM regulations, however, the agency must consult with the wildlife agencies under the ESA for most mining, including suction dredging, that is proposed to occur in habitat for listed species—the basic process now required for the Forest Service in the appeals court decision. The BLM's consultation requirement includes operations that would be considered NOI-level activities under the Forest Service regulations. Under 43 C.F.R. § 3809.11(c)(6), BLM mining applicants have to submit a plan of operations (not an NOI) "for any operations causing surface disturbance greater than casual use in the following special status areas … (6) Any lands or waters known to contain Federally proposed or listed threatened or endangered species or their proposed or designated critical habitat …." The BLM requires consultation for all such applications.

Indeed, even for small-scale mining using "small portable suction dredges," which otherwise would qualify for "casual use" status under the BLM regulations, *see* 43 C.F.R. § 3809.5(1), ESA consultation is

---

[5] The BLM manages roughly 266 million acres of public land, whereas the Forest Service manages roughly 192 million acres. Coggins, et al., *Federal Public Land and Resources Law* 138 (5th ed. 2002).

required when the operation would threaten the habitat of an ESA-listed species:

> If your proposed suction dredging is located within any lands or waters known to contain Federally proposed or listed threatened or endangered species or their proposed or designated critical habitat, regardless of the level of disturbance, *you must not begin operations until BLM completes consultation the Endangered Species Act requires*.

43 C.F.R. § 3809.31(b)(2)(emphasis added). Thus, "regardless of the level of disturbance" (*i.e.*, casual use, NOI, or plan of operations), BLM requires ESA consultation if suction dredging and similar mining operations would affect listed species or their habitat.

In short, the Forest Service's sister public lands agency, BLM, already requires ESA consultation for small-scale mining, including suction dredging, in habitat for listed species. The decision of the court of appeals merely requires the Forest Service to do what BLM has been doing for over a dozen years with no evident material effects on either the agency or the mining industry. Thus, far from involving an "unprecedented" intrusion into the "rights" of mining claimants, the lower court's decision merely requires one agency to follow what has been the standard practice of another.

Indeed, if the lower court decision were reversed, mining claimants and the non-mining public who use and enjoy public lands would be subject to conflicting regulatory schemes and interpretations involving the ESA depending on the happenstance of which agency controlled the lands in question. Such a result would

create regulatory inconsistency and confusion when none now exists as a result of the ruling below.

Importantly, as the court of appeals observed, "the burden imposed by the consultation requirement need not be great." App. 47. Indeed, the court pointed out that the Forest Service officers who approved the NOI-level mining operations did review the proposed mining operations with their own agency's biologists, yet simply did not take the required next step—consultation with the federal wildlife agencies under the ESA. *Id*. 47–48. The appeals court also explained that, in many instances, mining would pose no threat to listed species and thus no consultation would be required at all. Other operations would require only "informal consultation," which "need be nothing more than discussions and correspondence with the appropriate wildlife agency." App. 47. As the court correctly recognized, however, in those limited situations where mining poses a real threat to listed species and designated critical habitat—as in this case—the agency must follow the procedure Congress mandated in the ESA.

III. The California Moratorium on Suction Dredging Does Not Moot This Case, As the Challenged Failures to Engage in ESA Consultation Also Involve Other Types of Mining Operations.

The New 49'ers suggest, with little or no argument or support, that because of California's post-judgment enactment of a permanent moratorium on one type of mining at issue in this case, in-stream suction dredging, this Court should consider vacating the decision below on mootness grounds. The New 49'ers make no effort to suggest that the mootness issue independent-

ly merits review by this Court, and they do not explain whether, and if so how, they believe the lower court erred in analyzing the mootness issue it decided based on the temporary moratorium that was in place when the court issued its decision. Nor do they appear to recognize that their suggestion of mootness undermines their principal submission that this Court should consider the merits of the court of appeals' decision.

In any event, the New 49'ers' argument ignores the uncontroverted fact that the mining approved in this case, and challenged by the Tribe, includes not only suction dredging, but riverbank mining operations such as the "highbanking" and "motorized sluicing" operations described above. In part because of its recognition that "the suction dredge moratorium does not prohibit other mining activities at issue in this case," App. 21, the appeals court rejected the argument that the temporary moratorium in place at the time of its decision mooted the case. And although the agency's approvals of the 2004 NOIs expired at the end of 2004, the court correctly found that "the Tribe's claims are justiciable under the 'capable of repetition, yet evading review' exception to the mootness doctrine." App. 19. *See also* App. 21–22 (noting that the agency continues to approve NOIs for mining activities not affected by the moratorium).

The New 49'ers offer no explanation of why this reasoning, which is equally valid now that the moratorium is permanent, merits rejection by this Court.[6]

---

[6] The moratorium is currently being challenged by mining groups in California state court, calling its "permanence" into potential question. *See In Re Suction Dredge Mining Cases*, Ju-

(*Footnote continued*)

And because the court of appeals has already considered the question of mootness and resolved it on a basis that is just as applicable to the permanent moratorium as to the temporary moratorium, the New 49'ers' suggestion of a remand to the court of appeals for further consideration of mootness is pointless.

Because the Forest Service's challenged decisions approved types of mining that are undisputedly unaffected by the moratorium, and because the record establishes that the Forest Service made similar decisions in subsequent years and would continue to approve such operations without ESA consultation absent the lower court decision, the New 49'ers have failed to meet their "heavy burden" to show that it is "absolutely clear" that the Karuk Tribe no longer has "any need of the judicial protection that it sought." App. 19 (quoting *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000)). The abbreviated claim of mootness tacked on to the New 49'ers equally untenable challenge to the correctness of the court of appeals' ruling thus does nothing to advance their assertion that this Court should review this case. Rather, although the moratorium by no means moots this case, the prohibition on one of the major forms of mining that would otherwise have damaging effects on California salmon habitat (and hence require ESA consultation before the Forest Service could approve it) limits the practical impact of the decision below and offers another reason why resolving it in this case is not a matter of sufficient importance to warrant this Court's attention.

---

dicial Council Proceeding No. JCPRS4720, Superior Court of California, County of San Bernardino.

CONCLUSION

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

Respectfully submitted,

ROGER FLYNN
Counsel of Record
WESTERN MINING ACTION PROJECT
P.O. Box 349
440 Main Street, #2
Lyons, CO 80540
(303) 823-5738
wmap@igc.org

SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Respondent Karuk Tribe of California

February 2013