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# *Lands Council, Karuk Tribe, and the Great Environmental Divide in the Ninth Circuit*

## ABSTRACT

*The Ninth Circuit Court of Appeals, the nation's largest appellate court, with jurisdiction over 15 judicial districts and 61 million people—almost 20 percent of the nation's population—spans from Alaska to Arizona, from Montana to Hawaii. The Ninth Circuit has a reputation for being an environmentally sensitive court, but the court is as diverse as the terrain over which it has jurisdiction. Due to its size, the court's en banc reviews do not include all 29 judges but instead only panels of 11. Thus, Ninth Circuit en banc panels can reflect the kind of diversity of opinion they aim to reduce.*

*Recently, the two en banc decisions discussed in this article—Lands Council v. McNair and Karuk Tribe of California v. U.S. Forest Service—displayed the court's apparently schizophrenic approach to review of agency environmental decision-making. A unanimous court in Lands Council called for more deference to Forest Service decisions favoring timber harvests, while the Karuk Tribe majority, with barely a reference to Lands Council, gave close scrutiny to the Forest Service's interpretation of the Endangered Species Act. The latter decision prompted a bitter dissent from the author of Lands Council, Judge Milan Smith, which seemed to be more of a political diatribe than legal criticism and may have been aimed at attracting the attention of the U.S. Supreme Court. Although the varying results of the two cases can be reconciled, we think that they epitomize a deep philosophical rift within the court on environmental issues, and we include an appendix suggesting to litigators on which side of the environmental divide certain Ninth Circuit judges may fall.*

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## INTRODUCTION

The Ninth Circuit Court of Appeals, the federal appellate court for most of the West, is the nation's largest circuit court.<sup>1</sup> The court's geographic scope is immense, covering 1.4 million square miles from Alaska and Hawaii to Arizona.<sup>2</sup> The court has survived efforts to split it,<sup>3</sup> adopting measures to reduce the time required to decide appeals<sup>4</sup> and implementing an en banc procedure in which only 11 of its 29 active members sit.<sup>5</sup> The multiplicity of resulting opinions makes en banc decisions often necessary to attempt to achieve uniformity throughout the sprawling circuit. The court hears between 15 to 25 cases en banc each year.<sup>6</sup>

1. Compare United States Court of Appeals for the Ninth Circuit, *The Judges of this Court in Order of Seniority*, CA9.USCOURTS.GOV, [http://www.ca9.uscourts.gov/content/view\\_seniority\\_list.php?pk\\_id=0000000035](http://www.ca9.uscourts.gov/content/view_seniority_list.php?pk_id=0000000035) (last visited Aug. 4, 2013) (listing the 28 active judgeships of the Ninth Circuit) with United States Court of Appeals for the Fifth Circuit, *Fifth Circuit Clerk's Office & Judges*, CA9.USCOURTS.GOV, <http://www.ca5.uscourts.gov/clerk/docs/listing.pdf> (last visited August 4, 2013) (showing that the second largest circuit, the Fifth Circuit, has 17 active judgeships, with 2 vacancies), and United States Court of Appeals for the Sixth Circuit, *Court of Appeals-Judges*, CA6.USCOURTS.GOV, [http://www.ca6.uscourts.gov/internet/court\\_of\\_appeals/courtappeals\\_judges.htm](http://www.ca6.uscourts.gov/internet/court_of_appeals/courtappeals_judges.htm) (last visited August 4, 2013) (listing the 16 active judgeships of the Sixth Circuit).

2. H.R.J. 29, 21st Leg. (Ak. 1999), available at [http://www.legis.state.ak.us/basis/get\\_bill\\_text.asp?hsid=HJR029B&session=21](http://www.legis.state.ak.us/basis/get_bill_text.asp?hsid=HJR029B&session=21) (noting the size of the Ninth Circuit spans 1,400,000 square miles and supporting dividing the Circuit).

3. Over the years, Congress has considered various proposals to restructure the Ninth Circuit. See Circuit Court of Appeals Restructuring and Modernization Act of 2007, S. 525, 110th Cong. (2007); Circuit Court of Appeals Restructuring and Modernization Act of 2005, S. 1845, 109th Cong. (2005); Ninth Circuit Judgeship and Reorganization Act of 2005, H.R. 211, 109th Cong. (2005); Ninth Circuit Judgeship and Reorganization Act of 2004, S. 2278, 108th Cong. (2004); Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003, H.R. 2723, 108th Cong. (2003). See also Brian T. Fitzpatrick, *Disorder in the Court*, L. A. TIMES, July 11, 2007, <http://articles.latimes.com/2007/jul/11/opinion/oe-fitzpatrick11> (noting that splitting the Ninth Circuit may reduce the number of "extreme" judicial decisions likely to face reversal).

4. U.S. Ct. of App. 9th Cir. Rule E(4), ("Pursuant to FRAP 2, the Court also may in its discretion order that any individual case receive expedited treatment"); see also C. Athena Roussos, DAILY RECORDER, *Handling Expedited Appeals*, available at [http://athenaroussos-law.com/yahoo\\_site\\_admin/assets/docs/Daily\\_Recorder\\_Column\\_10.344162517.pdf](http://athenaroussos-law.com/yahoo_site_admin/assets/docs/Daily_Recorder_Column_10.344162517.pdf) (last visited Aug. 4, 2013) ("If an appeal is expedited, the court may order a shortened briefing schedule, may refuse any extensions without a compelling reason, and may order the case to be placed on the oral argument calendar within a few weeks after the briefs are filed.").

5. Arthur D. Hellman, *Getting It Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals*, 34 U.C. DAVIS L. REV. 425, 435 (2000) ("The Ninth Circuit, acting under the authority of a 1978 statute, convenes a 'limited en banc court' (LEBC) composed of the chief judge and ten other judges selected at random for each case.")

6. McGuire Coats LLP, *The Ninth Circuit's En Banc Review and Cases Slated to be Heard En Banc in June*, THE NINTH, May 22, 2010, <http://www.theninthcircuit.com/2010/05/22/the-ninth-circuits-active-en-banc-review-cases-slated-to-be-heard-en-banc-in-june/>.

Two recent en banc opinions speak less to uniformity than to deep legal and philosophical disagreements over the role of judicial review in environmental disputes involving administrative action. In 2008, in *Lands Council v. McNair* (“*Lands Council*”), a unanimous en banc panel—through an opinion written by Judge Milan Smith—reversed a three-judge panel and ruled that the National Forest Management Act (NFMA) does not require the U.S. Forest Service to verify its methodology with on-the-ground data or clarify scientific uncertainties, and upheld the agency’s assessment of environmental impacts of a commercial logging project under the National Environmental Policy Act (NEPA).<sup>7</sup> Some commentators saw this decision as ushering in a new era of more deferential review of agency decisions from the Ninth Circuit in environmental cases.<sup>8</sup> However, evidence of this new era has been scarce—for example, several recent decisions suggest that the circuit’s “hard look” review in environmental cases is continuing.<sup>9</sup>

The second en banc opinion reflects the kind of hard look reasoning seemingly eschewed by the *Lands Council* decision four years earlier. In *Karuk Tribe of California v. U.S. Forest Service* (“*Karuk Tribe*”), a different en banc panel in 2012 reversed a three-judge panel decision and held that the Forest Service must consult with wildlife agencies under the Endangered Species Act (ESA) before issuing a notice of intent authorizing mining on national forest lands.<sup>10</sup> Unlike *Lands Council*, this decision was not unanimous, drawing a three-member dissent, including a bitter disapprobation from the *Lands Council* author, Judge Smith.<sup>11</sup> The language, tone, and far-ranging scope of Judge Smith’s dissent reflects a deep di-

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7. *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008) (en banc).

8. See John Miller, *9th Circuit Judges Shouldn’t Act as Scientists*, SEATTLE TIMES, July 3, 2008, [http://seattletimes.com/html/localnews/2008032560\\_apwsttimberuling1stldwrite thru.html](http://seattletimes.com/html/localnews/2008032560_apwsttimberuling1stldwrite thru.html) (noting that the Department of Agriculture undersecretary stated that this case “established a much more limited framework for judicial review of Forest Service decisions” and noting that the timber industry believed this case would stop the court from declaring its opinion over the opinions of the agencies). See also Meline MacCurdy, *En Banc Panel of Ninth Circuit Shows Deference to Agency Action*, MARTEN LAW, July 23, 2008, <http://www.martenlaw.com/newsletter/20080723-deference-to-agency-action>.

9. See *Ctr. for Biological Diversity v. U.S. Dep’t of Interior*, 623 F.3d 633 (9th Cir. 2010) (holding that NEPA requires a comparative analysis of mining under federal and state law before a land exchange could proceed); see also *Native Ecosystems Council v. Weldon*, 848 F. Supp. 2d 1207, 1217 (D. Mont. 2012) (holding that the Forest Service violated NEPA “when it failed to explain why it did not use the elk herd home-range as its unit of analysis for analyzing road density”), *vacated*, CV 11-99-M-DWM, 2012 WL 5986475 (D. Mont. Nov. 20, 2012) (vacating the district court’s decision as moot because the Forest Service withdrew implementation of the project after a forest fire burned the project area).

10. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1030 (9th Cir. 2012) (en banc), *cert denied*, No. 12-289, 2013 WL 1091767 (U.S. Mar. 18, 2013).

11. *Id.* at 1039 (M. Smith, J., dissenting).

vide over the function of judicial review in environmental cases in the nation's largest appellate court.

Although it is possible to reconcile the results of *Lands Council* and *Karuk Tribe*—since the former concerned the type of scientific evidence necessary to satisfy NFMA, and the latter involved the applicability of ESA procedures to the Forest Service's acquiescence to mining on public land—we think the two cases reflect fundamentally different views of the role of courts in reviewing agency actions affecting the environment. Judge Smith's *Karuk Tribe* dissent warrants particularly close attention, since it exhibits what might be considered to be an air of intolerance toward his colleagues and a dismissive attitude toward what seemed like long-settled case law.

This article examines the divergent views concerning judicial scrutiny of agency actions in environmental cases that these two Ninth Circuit en banc decisions epitomize. Part I discusses the case law establishing close judicial review that preceded the en banc ruling in *Lands Council*, focusing especially on two decisions it reversed: the three-judge panel decision in the case<sup>12</sup> and *Ecology Law Center v. Austin*.<sup>13</sup> Part II examines the en banc court's unanimous opinion in *Lands Council* and its progeny. Part III turns to the *Karuk Tribe* decisions, analyzing both the three-judge panel decision and the en banc reversal. Part IV focuses on Judge Smith's heated dissent in terms of what it reveals about both the legal and the political wars that seem to be underway in the Ninth Circuit. Part V explains the Ninth Circuit cases following *Karuk Tribe*. We conclude by suggesting some lessons for Ninth Circuit advocates practicing before this deeply divided court with such widely varying views about the nature of judicial review of agency action.

## I. CLOSE JUDICIAL REVIEW OF FOREST SERVICE ACTIONS: POWELL, ECOLOGY CENTER, AND THE LANDS COUNCIL THREE-JUDGE PANEL

Prior to the *Lands Council* en banc reversal, the Ninth Circuit had closely scrutinized the Forest Service's actions, such as timber sales, under the Administrative Procedure Act (APA). The APA governs judicial review of challenges to agency compliance with NFMA, NEPA,<sup>14</sup> and

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12. *Lands Council v. McNair*, 494 F.3d 771 (9th Cir. 2007) *rev'd en banc*, 537 F.3d 981 (9th Cir. 2008).

13. *Ecology Ctr., Inc. v. Austin*, 430 F.3d 1057 (9th Cir. 2005), *overruled by* *Lands Council v. McNair*, 537 F.3d 981, 981 (9th Cir. 2009) (en banc).

14. *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010).

the ESA.<sup>15</sup> The APA authorizes courts to set aside agency decisions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>16</sup> Although courts give considerable deference to agencies, especially concerning the “scientific judgments and technical analyses [within the agency’s expertise],”<sup>17</sup> an agency must, according to the Ninth Circuit, articulate “a rational connection between the facts found and the choices made” in order for the court to uphold its decision.<sup>18</sup> The underlying substantive laws establish standards against which a court reviews agency actions under the APA.<sup>19</sup> For example, NFMA requires the Forest Service to develop a forest plan for each unit of the national forest system.<sup>20</sup> In so doing, the agency must use “a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences.”<sup>21</sup> Subsequent agency actions, such as timber sales, must conform to both the forest plan and NFMA.<sup>22</sup> The Forest Service must also “provide for diversity of plant and animal communities based on the suitability and capability of the specific land area”<sup>23</sup> and maintain “productivity of the land.”<sup>24</sup>

NEPA requires the Forest Service to prepare an environmental impact statement (EIS) for major federal actions “significantly affecting the quality of the human environment.”<sup>25</sup> An EIS must “provide full and fair discussion of significant environmental impacts” and “inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.”<sup>26</sup>

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15. *Karuk Tribe of Cal.*, 681 F.3d at 1017 (“An agency’s compliance with the ESA is reviewed under the Administrative Procedure Act. . .”).

16. 5 U.S.C. § 706(2)(A) (2012).

17. *Lands Council*, 629 F.3d at 1074.

18. *Id.* (quoting *Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008)); *Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (stating that a decision is arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”).

19. *See* 5 U.S.C. § 706(2)(A) (2012).

20. 16 U.S.C. § 1604(a) (2006). These plans are called “land and resource management plans.” *Id.*

21. *Id.* at (b).

22. *Id.* at (i).

23. *Id.* at (g)(3)(B).

24. *Id.* at (g)(3)(C).

25. 42 U.S.C. § 4332(2)(C) (2006).

26. CEQ Environmental Impact Statement Rule, 40 C.F.R. § 1502.1 (2011).

Similarly, the ESA requires the Forest Service to ensure that its discretionary activities will not jeopardize the continued existence of listed species or adversely modify designated critical habitat.<sup>27</sup> To this end, the Forest Service must consult with the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) before undertaking an agency action that may affect a listed species or its habitat.<sup>28</sup>

The Ninth Circuit has required the Forest Service to closely adhere to these standards. One example is *Lands Council v. Powell* (“*Powell*”), where the court reversed the district court and held that the Forest Service violated NFMA when it relied on spreadsheet model predictions to test soil conditions without on-the-ground verification of the model’s reliability.<sup>29</sup> A second example is *Ecology Center v. Austin*, where the court decided that the agency’s failure to verify the effect of salvage logging on old growth dependent species, and its reliance instead on predictions about species viability, violated NFMA.<sup>30</sup> The *Ecology Center* court also determined that the agency’s failure to address scientific uncertainty violated NEPA.<sup>31</sup> These cases led to the first Ninth Circuit decision in *Lands Council*, in which a three-judge panel ruled that the Forest Service violated NFMA because it failed to verify its methodology justifying another timber salvage sale with on-the-ground data. The first *Lands Council* panel also concluded that the Forest Service’s failure to address

27. 16 U.S.C. § 1536(a)(2) (2006) (“Each Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States. . . .”); *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1020 (9th Cir. 2012) (en banc), *cert denied*, No. 12-289, 2013 WL 1091767 (Mar. 18, 2013).

28. *Karuk Tribe of Cal.*, 681 F.3d at 1020. NMFS generally manages marine and anadromous species, while the FWS manages land and freshwater species. *See* *Pac. Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1085 (9th Cir. 2005) (“When an action has the potential to affect an anadromous fish species, the NMFS has responsibility for consultation.”); *see also* *San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp.2d 855 (E.D. Cal. 2010) (FWS has jurisdiction over non-anadromous fish such as the delta smelt.).

29. The Forest Service relied on aerial photographs and a computer model that used soil samples taken in the forest generally, but did not attempt to test the soil in the actual project area. *Lands Council v. Powell*, 395 F.3d 1019, 1034–35 (9th Cir. 2005) (“[W]e hold that Forest Service’s reliance on the spreadsheet models, unaccompanied by on-site spot verification of the model’s predictions, violated NFMA.”).

30. *Ecology Ctr., Inc. v. Austin*, 430 F.3d 1057, 1064 (9th Cir. 2005), *overruled by* *Lands Council v. McNair*, 537 F.3d 981, 981 (9th Cir. 2009) (en banc) (“[I]t is arbitrary and capricious for the Forest Service to irreversibly “treat” more and more old-growth forest without first determining that such treatment is safe and effective for dependent species.”).

31. *Id.* at 1065 (“[W]e also find that the Service’s analysis of the impact of treating old-growth to be inadequate under NEPA.”).

scientific uncertainty concerning the effects of its salvage sales violated NEPA.<sup>32</sup>

### A. *Lands Council v. Powell*

In *Powell*, environmentalists challenged a timber sale in the Idaho Panhandle National Forest on the ground that it violated a provision in the forest plan that prohibited the agency from approving an activity producing “detrimental soil conditions in fifteen percent of the project area.”<sup>33</sup> The agency did take soil samples in calculating whether the proposed sale would exceed the plan’s 15 percent threshold, but the samples were from the entire forest, not the project area.<sup>34</sup> Instead of site-specific samples, the Forest Service relied on a spreadsheet model to make predictions about the soil conditions in the project area,<sup>35</sup> even though reliance on such predictions had been called into question by a district court in an earlier case, *Kettle Range Conservation Group v. United States Forest Service*.<sup>36</sup> The *Powell* district court nevertheless upheld the agency’s decision, concluding that it did not violate NEPA and NFMA, and thus was not arbitrary and capricious.<sup>37</sup>

The Ninth Circuit reversed,<sup>38</sup> ruling that the agency’s modeling was not entitled to judicial deference because the Forest Service failed to verify its predictions and assumptions through field testing the land in the activity area, thus leaving the public with no way to know if the results produced by the model were reliable.<sup>39</sup> The panel concluded that relying on spreadsheet models without “on-site spot verification of the model’s predictions” violated NFMA.<sup>40</sup>

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32. *Lands Council v. McNair*, 494 F.3d 771, 777–78 (9th Cir. 2007) *rev’d en banc*, 537 F.3d 981 (9th Cir. 2008).

33. The panel cited the applicable regional soil quality standard. *Powell*, 395 F.3d at 1034.

34. *Id.*

35. *Id.* at 1036 (noting that the model was based on outdated data, “about fifteen years old, with inaccurate canopy closure estimates, and insufficient data on snags[.]” and thus could not be used to ensure wildlife viability).

36. *See id.* at 1034 (citing *Kettle Range Conservation Grp. v. U.S. Forest Serv.*, 148 F. Supp. 2d 1107, 1127 (E.D. Wash. 2001) (“The failure to [undertake site-specific soil analysis] is a violation of NEPA because it shows that USFS did not give a ‘hard look’ at the effects of the Project on the soils in the analysis area.”)).

37. *Id.* at 1024.

38. Judge Gould wrote the three-judge unanimous majority opinion, joined by Judge Wardlaw and Judge Canby. *Id.* at 1022.

39. *Id.* at 1035.

40. *Id.*

## B. *Ecology Center, Inc. v. Austin*

Following *Powell*, the Ninth Circuit decided *Ecology Center* in 2005, which involved a challenge to a timber-thinning project, the Lolo National Forest Post Burn Project.<sup>41</sup> Environmentalists contended that the Forest Service failed to properly assess the effects of salvage logging and prescribed burning in old-growth forest stands by not offering proof that this “treatment” did no harm to old-growth dependent species; thus, the agency could not be “reasonably certain” that the project was consistent with its statutory duty to “ensure species diversity and viability.”<sup>42</sup> The Forest Service maintained that it was not required to monitor the effects of the project because, based on a report documenting the presence of two species of woodpecker in the treated old-growth forest, it “ha[d] reason to believe” the results would be environmentally beneficial.<sup>43</sup>

The district court concluded that the Forest Service’s decision to proceed with the timber sale was not arbitrary and capricious.<sup>44</sup> But the Ninth Circuit reversed, ruling that the Forest Service’s methodology for testing species viability—that is, treating old growth forest stands based on general studies and predictions, when it could have tested its theory with on-the-ground analysis—was arbitrary.<sup>45</sup> The court explained that by using this “unverified hypothesis,” with no supporting field data on the effects of logging, the agency was essentially asking the court to “grant it license to continue [logging] old-growth forests while excusing it from ever having to verify that [the logging] is not harmful.”<sup>46</sup> Such a license, the court implied, is not within the agency’s discretion under NFMA.

The *Ecology Center* panel also concluded that the Forest Service’s NEPA analysis of the salvage logging in the Lolo National Forest was inadequate because the agency failed to meaningfully address the scientific uncertainty inherent in its prediction that the logging would benefit

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41. *Ecology Ctr., Inc. v. Austin*, 430 F.3d 1057, 1063 (9th Cir. 2005), *overruled by* *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008).

42. *Id.*; 16 U.S.C. § 1604(g)(3)(B).

43. *Ecology Ctr.*, 430 F.3d at 1063.

44. *Id.*

45. *Id.* at 1063–64 (“The Forest Service cites a number of studies that indicate such treatment is necessary to correct uncharacteristic forest development resulting from years of fire suppression. The Service also points out that the treatment is designed to leave most of the desirable old-growth trees in place and to improve their health.”).

46. *Id.* at 1064 (“Just as it would be arbitrary and capricious for a pharmaceutical company to market a drug to the general population without first conducting a clinical trial to verify that the drug is safe and effective, it is arbitrary and capricious for the Forest Service to irreversibly ‘treat’ more and more old-growth forest without first determining that such treatment is safe and effective for dependent species.”).

old-growth dependent species like the black-backed woodpecker.<sup>47</sup> The EIS only generally identified the public's concerns about the effects of logging on dependent species, but it failed to "actually explain in any detail the bases of those concerns, much less address them."<sup>48</sup> According to the majority, the Forest Service assumed beneficial results as a fact, instead of treating the issue as "an untested and debated hypothesis."<sup>49</sup> Although the court noted that the agency was free to decide not to undertake further study and proceed with logging, the Forest Service had to explain why more study was neither necessary nor feasible.<sup>50</sup> Not doing so, the court concluded, violated NEPA's requirement that the agency meaningfully address known sources of scientific uncertainty in its EIS.<sup>51</sup>

Judge Margaret McKeown dissented, accusing the majority of crossing the line from "reviewer" to "decisionmaker" and extending "arbitrary and capricious" review under the APA to an overly-demanding standard.<sup>52</sup> She focused on the majority's requirement that the Forest Service provide data to monitor the effects of logging and stated that the court improperly extended *Powell* beyond its context.<sup>53</sup> She criticized the majority for requiring not only that on-site data exist in all circumstances, but also that it had to meet a test of sufficiency.<sup>54</sup> According to Judge McKeown, *Powell* was limited to the principle that the agency cannot rely on an "unverified hypothesis" regarding soil quality in site-specific areas. She claimed that the *Ecology Center* majority changed the court's "posture of review" to one of "second-guess[ing] the minutiae" of agency decisions, marking an "unprecedented incursion into the administrative process" and inappropriately "ratchet[ing] up the scrutiny"<sup>55</sup> in

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47. *Id.* at 1065.

48. *Id.*

49. *Id.*

50. *Id.*

51. *See id.* (quoting *Seattle Audubon Soc'y v. Espy*, 998 F.2d 699, 704 (9th Cir. 1993) (ruling that the Forest Service violated NEPA when it did not "include a full discussion of the scientific uncertainty" regarding maintenance of owl viability)). *See also* 40 C.F.R. § 1502.1 (An EIS must provide "full and fair discussion of significant environmental impacts.").

52. *Ecology Ctr.*, 430 F.3d at 1072 (McKeown, J., dissenting).

53. *Id.* at 1073 ("From this judgment, we are left to conclude that not only does the court of appeals set bright-line rules, such as requiring an on-site, walk the territory inspection, but it also assesses the detail and quality of that analysis—even in the absence of contrary scientific evidence in the record.").

54. *Id.*

55. *Id.* at 1072.

judicial review of Forest Service actions.<sup>56</sup> Her dissent would prove influential in the *Lands Council* litigation.

### C. *Lands Council v. McNair*, the Three-Judge Panel

In *Lands Council*, environmentalists challenged the Forest Service's Mission Brush Project, which proposed selective, commercial logging on 3,829 acres in the Idaho Panhandle National Forest in order to restore the existing "dense, crowded" stands to the historic conditions of open ponderosa pine and Douglas-fir stands.<sup>57</sup> Environmentalists claimed that the Forest Service failed to prove that the method it used to ensure wildlife viability was reliable. They argued that the studies on which the Forest Service relied did not conclude that the logging would benefit dependent sensitive species, including the flammulated owl, northern gawshawk, the fisher, and the western toad, which they alleged was a violation of NFMA.<sup>58</sup> The environmentalists also argued that the Forest Service failed to address uncertainty regarding wildlife viability, thus violating NEPA.<sup>59</sup> The district court ruled that plaintiffs were unlikely to succeed on these claims and denied their motion for a preliminary injunction to halt the project, reasoning that the agency relied on adequate support in the record to conclude that the project ensured wildlife viability.<sup>60</sup>

The Ninth Circuit panel again reversed, concluding that the Forest Service's studies were insufficient under NFMA to verify its hypothesis that logging was beneficial to dependent species.<sup>61</sup> The agency claimed that it provided sufficient data about the effects of the logging on wildlife, relying mostly on its 2006 Dawson Ridge Flammulated Owl Habitat Monitoring study, in which the agency monitored five, one-fifth acre plots after the logging occurred.<sup>62</sup> In that study, the Forest Service detected one response—a so-called solitary hoot—and concluded that this "implied" that logging practices at least maintained suitable owl

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56. *Id.* at 1077 ("Apparently we no longer simply determine whether the Forest Service's methodology involves a 'hard look' through the use of 'hard data, but now are called upon to make fine-grained judgments of its worth.'").

57. *Lands Council v. McNair*, 494 F.3d 771, 774 (9th Cir. 2007), *rev'd en banc*, *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008).

58. *Id.* at 776.

59. *Id.* at 777–78.

60. *Lands Council v. McNair*, CV06-0425-EJL, 2006 WL 5883202 (D. Idaho 2006), *aff'd*, 537 F.3d 981 (9th Cir. 2008) ("Defendants point to a March 2006 report which concludes that the viability of the black-backed woodpecker and the northern goshawk species is good given the extent and connectivity of habitat and the level of timber harvests.")

61. *Lands Council*, 494 F.3d at 776.

62. *See id.*

habitat.<sup>63</sup> However, the study made no conclusions about whether the agency's treatment of old-growth forests would actually benefit the species or create suitable habitat.<sup>64</sup>

The Ninth Circuit panel determined that this study fell short of the requirements imposed by *Ecology Center* because the Forest Service failed to demonstrate the reliability of its scientific methodology. Instead, the agency's conclusion that the project would maintain habitat was "circumspect at best" because, by the Forest Service's own statement, the Dawson Ridge study merely resulted in an "encouraging implication" that habitat would be maintained, not the verified hypothesis necessary to demonstrate the reliability of its predictions.<sup>65</sup> The court observed that other studies the agency conducted on the effects of the logging on wildlife "[e]ven shorter" of meeting the *Ecology Center* standard because they contained no observations of the effect on dependent species to determine whether they would actually use the logged-over habitat.<sup>66</sup> This lack of on-the-ground analysis was, the panel concluded, a NFMA violation.<sup>67</sup>

The first *Lands Council* panel also ruled that plaintiffs were likely to succeed on their NEPA claim because the Forest Service failed to address the scientific uncertainty involved in its strategy to improve wildlife habitat through logging.<sup>68</sup> Relying on *Ecology Center*, the panel stated that an EIS must meaningfully address scientific uncertainties, not treat a prediction as a fact without any supporting evidence.<sup>69</sup> The Forest Service failed to meet this NEPA standard by providing no evidence in support of its claim that the project would maintain habitat, failing to address uncertainty in its supplemental EIS, and only citing sources on the historical conditions of the forest.<sup>70</sup> According to the majority, simply relying on the assumption that logging would benefit wildlife violated NEPA by failing to disclose to the public the uncertainties underlying its predictions.<sup>71</sup>

Judge Milan Smith specially concurred, arguing, as Judge McKeown had in her *Ecology Center* dissent,<sup>72</sup> that *Ecology Center* was wrongly

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63. *Id.*

64. *Id.*

65. *Id.* (quoting *Ecology Ctr.*, 430 F.3d at 1064).

66. *Id.* at 777.

67. *Id.*

68. *Id.* at 778.

69. *Id.*

70. *Id.* ("There is no discussion of the uncertainties regarding wildlife and their use of these habitats following treatment.")

71. *Id.*

72. *Ecology Ctr.*, 430 F.3d at 1077 (McKeown, J., dissenting).

decided because it extended “arbitrary and capricious” review beyond its appropriate role.<sup>73</sup> However, because *Ecology Center* was binding precedent, he acknowledged that it controlled the outcome of *Lands Council*.<sup>74</sup> Judge Smith questioned whether, without this “faulty” precedent, the majority in *Lands Council* could reach the result it did. He announced that he would overrule *Ecology Center* should the occasion arise.<sup>75</sup> Moreover, Judge Smith complained about the economic burden that the *Ecology Center* majority’s “incorrect construction” of environmental law imposed on the timber industry.<sup>76</sup> Thus, although Judge Smith’s hands were tied in the *Lands Council* three-judge panel decision, his concurrence spotlighted his trouble with the *Ecology Center* precedent, and what he considered the decision’s alarming economic implications.

Judge Ferguson, joined by Judge Reinhardt, wrote a concurrence that specifically responded to Judge Smith’s concurrence, maintaining that *Ecology Center* was correctly decided.<sup>77</sup> “More importantly,” Judge Ferguson conveyed, Judge Smith improperly assigned culpability for economic challenges in the timber industry to Ninth Circuit courts and “impugn[ed] the last several decades of our circuit’s environmental law jurisprudence” with no evidence for his assertion.<sup>78</sup> In Judge Ferguson’s view, the reviewing court exercises its proper role in environmental cases by enforcing Congress’s requirements and, contrary to Judge Smith’s claim, the court’s close judicial review hardly indicates “that there is something wrong with the courts’ handling of environmental

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73. *Lands Council*, 494 F.3d at 780 (M., Smith J., specially concurring) (“Following *Ecology Center* in the instant matter, compounds already serious errors of federal law because ‘the [*Ecology Center*] majority’s extension of [*Powell to Ecology Center*] represents an unprecedented incursion into the administrative process and ratchets up the scrutiny we apply to the scientific and administrative judgments of the Forest Service.’” (quoting *Ecology Ctr.*, 430 F.3d at 1072)).

74. *Lands Council*, 494 F.3d at 786 (M., Smith J., specially concurring) (“Because I respectfully contend that it was wrongly decided, I would (if the occasion arises) reverse the majority’s holding in *Ecology Center*, which would likely change the result in this case. However, because I am legally bound by *Ecology Center*, I reluctantly join my colleagues in reversing the lower court.”).

75. *Id.*

76. *Id.* at 784 (“The pattern of some courts within our circuit to occasionally hand down over-broad injunctions based upon incorrect constructions of federal law has substantially contributed to (even though it is not entirely responsible for) the decimation of the logging industry in the Pacific Northwest in the last two decades and the commensurate growth of logging in our neighbor to the north.”).

77. *Id.* at 786 (Ferguson, J., concurring) (“Judge Smith takes the plain fact that district courts in our circuit have enjoined logging projects in the past, adds the claim that the timber industry is declining, and asserts a causal relation between the two.”).

78. *Id.*

cases.”<sup>79</sup> Instead, judicial scrutiny is simply a response to unlawful agency action.<sup>80</sup>

Thus, in these three decisions, the Ninth Circuit was hardly deferential to agency decision making. The court refused to allow the Forest Service to rely on unverified conclusions about the effects of agency logging projects on wildlife, interpreting NFMA to impose on the Forest Service the burden of demonstrating the reliability of the scientific methodologies, including conducting site-specific, on-the-ground studies. The court also read NEPA to require disclosure of any scientific uncertainties inherent in its environmental predictions. In combination, these interpretations seemed to impose substantial obstacles on the Forest Service timber sale program and might have forced the Forest Service to look critically at the science underlying its assumption that timber sales, and salvage sales in particular, were beneficial to the environment in the wake of wildfires. On the other hand, the dissents and concurrences in these decisions demonstrated that some judges believed imposition of such obstacles overstepped the court’s role, setting the stage for the *Lands Council* en banc reversal.

## II. LANDS COUNCIL AND ITS LEGACY

In response to these decisions, a unanimous en banc panel reversed the *Lands Council* three-judge panel decision, overruled *Ecology Center*, and narrowed its interpretation of *Powell*.<sup>81</sup> Judge Smith wrote that the court took the case in an effort to “clarify some of [its] environmental jurisprudence with respect to [its] review of [Forest Service] actions” and cautioned that the court should not act as a “panel of scientists.”<sup>82</sup> This language seemed to signal a new era of more deferential review of agency actions. However, the decision has not generated quite the shift in jurisprudence that its sweeping language suggested it would, as “hard look” review in environmental cases appears to have survived in the Ninth Circuit.

### A. *Lands Council* and the Shift to Agency Deference

In January 2008, the court announced that a majority of non-re-cused active Ninth Circuit judges voted to review *Lands Council* en

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79. *Id.* at 786–87.

80. *Id.* at 787.

81. *Lands Council v. McNair*, 537 F.3d 981, 984, 991, 994 (9th Cir. 2008) (en banc).

82. *Id.* at 984, 988.

banc.<sup>83</sup> The en banc panel prefaced its decision by remarking that the plaintiff's arguments "illustrate how . . . [the court's] environmental jurisprudence has, at times, shifted away from the appropriate standard of review. . . ."<sup>84</sup> For the unanimous court, Judge Smith stated that the environmental plaintiff essentially asked the court "to act as a panel of scientists" by choosing among various scientific studies to evaluate the agency's compliance with the forest plan and "order[ing] the agency to explain every possible scientific uncertainty."<sup>85</sup> Such a role, Judge Smith declared, is an improper one for judicial review, and he proceeded to explain the court's proper role in reviewing agency actions under both NFMA and NEPA.

Concerning NFMA, the court rejected the environmentalists' argument that the Forest Service violated the statute by failing to verify its methodology with on-the-ground data. In doing so, the court expressly overruled *Ecology Center*, on which the *Lands Council* panel decision had heavily relied,<sup>86</sup> stating that in *Ecology Center* the Ninth Circuit "grafted onto [its] jurisprudence a broad rule that, in effect, requires the Forest Service to always 'demonstrate the reliability of its scientific methodology' or the hypotheses underlying the Service's methodology with 'on the ground analysis.'"<sup>87</sup> The en banc court identified three fatal errors in *Ecology Center*.

First, according to Judge Smith, *Ecology Center* improperly extended *Powell* beyond its factual context, thereby establishing a broad rule that the agency must always verify its methodology.<sup>88</sup> The en banc court instead adopted a narrow reading of *Powell* first suggested by Judge McKeown in her *Ecology Center* dissent—which limited the decision to requiring on-site verification in the narrow context of soil analysis—concluding that *Powell* did not impose the "categorical requirement" of on-site verification, as suggested by the *Ecology Center* majority.<sup>89</sup>

Second, the court concluded that *Ecology Center* "created a requirement not found in any relevant statute or regulation" by requiring the agency to verify its method for demonstrating compliance with NFMA.<sup>90</sup>

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83. *Lands Council v. McNair*, 512 F.3d 1204 (9th Cir. 2008). En banc panels in the Ninth Circuit are selected by lot.

84. *Lands Council*, 537 F.3d at 988.

85. *Id.*

86. *Lands Council v. McNair*, 494 F.3d 771, 777–78 (9th Cir. 2007), *rev'd en banc*, 537 F.3d 981 (9th Cir. 2008).

87. *Lands Council*, 537 F.3d at 990 (quoting *Ecology Ctr., Inc. v. Austin*, 430 F.3d 1057, 1064 (9th Cir. 2005), *overruled by Lands Council*, 537 F.3d at 981).

88. *Id.* at 990–91.

89. *See supra* notes 53–56 and accompanying text.

90. *Lands Council*, 537 F.3d at 991.

Although there is no question the Forest Service must provide for wildlife viability,<sup>91</sup> the court stated that neither NFMA, nor its regulations, nor the applicable forest plan specified *how* the Forest Service must demonstrate that its “site-specific plans” do so.<sup>92</sup> The court referred to its reluctance to require an agency to demonstrate to the court “by any particular means” how the environmental analysis of its proposed actions complied with NFMA.<sup>93</sup> According to the en banc panel, granting the Forest Service “latitude” in demonstrating compliance with NFMA’s requirement to ensure species viability was fully consistent with that reluctance and is the appropriate role for a reviewing court.<sup>94</sup>

Third, the court decided that the panel ignored the APA’s arbitrary and capricious standard of review, which requires that judges afford the agency substantial deference, by second-guessing the Forest Service’s determination that its evidence—a report documenting that two species of woodpeckers foraged in a treated portion of the forest—was adequate to support its wildlife viability conclusion.<sup>95</sup> The en banc panel claimed that *Ecology Center* “illustrates the consequences” of this failure to appropriately defer to an agency<sup>96</sup> by improperly engaging in “fine-grained judgments” of Forest Service reports.<sup>97</sup> The en banc court highlighted several examples of over-scrutiny in *Ecology Center*, such as inquiring into the qualifications of field scientists and the methodology employed, and questioning whether the studies confirmed Forest Service predictions.<sup>98</sup> This type of close review was, according to the en banc panel, not a court’s “proper role” under the APA.<sup>99</sup> Instead, the NFMA requires only that the Forest Service support its conclusions with studies that the agency itself considers to be reliable; an action is arbitrary and capricious only if the record “plainly demonstrates” that the agency made a “clear error in judgment” in determining whether a project satisfied the directives of NFMA.<sup>100</sup> The court overruled *Ecology Center*, concluding that the Forest Service’s reliance on studies the agency “deemed

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91. *Id.* at 992 (“The NFMA unquestionably requires the Forest Service to ‘provide for diversity of plant and animal communities . . . in order to meet overall multiple-use objectives.’” (quoting 16 U.S.C. § 1604(g)(3)(B))).

92. *Lands Council*, 537 F.3d at 992.

93. *Id.*

94. *Id.*

95. *Id.* (“Were we to grant less deference to the agency, we would be ignoring the APA’s arbitrary and capricious standard of review.”).

96. *Id.*

97. *Lands Council*, 537 F.3d at 993 (quoting *Ecology Ctr., Inc. v. Austin*, 430 F.3d 1057, 1077 (9th Cir. 2005) (McKeown, J., dissenting), overruled by *Lands Council*, 537 F.3d at 981).

98. *Id.* (quoting *Ecology Ctr.*, 430 F.3d at 1070).

99. *Id.*

100. *Id.* at 994.

reliable,” and its “reasonable assumption” that enhancing long-term owl habitat through logging would benefit the species met the requirements of NFMA and was not arbitrary and capricious.<sup>101</sup>

Regarding the NEPA issue, the court ruled that NEPA and its regulations did not require the Forest Service to “affirmatively present every uncertainty in its EIS.”<sup>102</sup> The en banc panel decided that the Ninth Circuit line of cases faulting the agency for failing to meaningfully address uncertainty was erroneous, noting that such an “onerous” requirement would burden the agency and perhaps prevent it from taking action.<sup>103</sup> The *Lands Council* en banc court concluded that the Forest Service took the necessary “hard look” at the environmental effects of logging on old-growth stands because it “did not ignore” potential adverse impacts but instead responded to comments claiming adverse effects from logging on wildlife with studies that supported its claim that the project would result in long-term wildlife habitat enhancement.<sup>104</sup>

The *Lands Council* en banc panel clearly aimed to steer the Ninth Circuit away from close review of the Forest Service’s actions, expressing a concern about imposing burdens on the timber industry. Subsequent case law, however, shows that the court’s “clarification” of its judicial review jurisprudence hardly prompted a clear response.

## B. *Lands Council*’s Inconsistent Legacy

Despite its sweeping critique of Ninth Circuit’s environmental jurisprudence, the specific rulings of the *Lands Council* court have not actually produced significant changes in the case law.<sup>105</sup> Perhaps this is an

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101. *Id.*

102. *Id.* at 1001.

103. The court, however, did reaffirm that NEPA required the Forest Service to respond to comments that raise significant uncertainties that are reasonably supported, but the agency need not anticipate such questions not necessary to its analysis or inadequately supported by authority. *Id.*

104. *Id.* at 1003 (noting that the agency discussed how the commercial logging project “would maintain dry-forest, old-growth stands and cited literature explaining that such [logging] improves tree vigor and resistance to insects and disease,” and also compared the proposed project to alternatives, demonstrating that the project “provided the greatest reduction in the risk of stand-replacing fires, thereby benefiting old-growth habitat”).

105. See Keith G. Bauerle, *The Ninth Circuit’s “Clarifications” in Lands Council v. McNair: Much Ado About Nothing?*, 2 GOLDEN GATE U. ENVTL. L.J. 203, 254 (2009) (concluding that the effect of *Lands Council* on substantive law was not substantial because few cases had addressed the precise NFMA and NEPA issues the court decided). See also Oral Argument Transcript of Proceedings before the Honorable Michael W. Mosman United States District Court Judge at 8, *Or. Natural Desert Ass’n v. Freeborn*, No. 3:06-cv-1311-MO (D. Or. May 29, 2012) (Judge Mosman of the District Court of Oregon, reflecting at oral argument about the application of *Lands Council*: “At first glance, I was analytically curious about a couple of

understandable result because the court did not, for example, announce a new standard for judicial review under the APA. Instead, the court cited to the Supreme Court's well-established "arbitrary and capricious" test, as articulated in *Marsh v. Oregon Natural Resources Council*, which the Court announced in the 1971 *Citizens to Preserve Overton Park, Inc. v. Volpe* decision.<sup>106</sup> But the court's general conclusion—that the "proper role" of the court is not to second-guess the Forest Service—has generated discussion in contexts well beyond the specifics at issue in *Lands Council*. Since the "arbitrary and capricious" standard applies to a broad scope of agency action and inherently provides the court with considerable room for discretion, it is hardly surprising that some ensuing opinions track the *Lands Council* en banc rationale more than others. For example, in *League of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen*, a case involving another Forest Service timber sale, a Ninth Circuit panel closely followed the reasoning of *Lands Council*.<sup>107</sup> The *Lands Council* reasoning has even sparked strong opinions in the context of judicial review of actions by different agencies, such as the EPA, and in opinions that did not garner a court majority.<sup>108</sup>

In the *League of Wilderness Defenders* case, environmentalists challenged the Forest Service's "Five Buttes Project" in Oregon, a proposal for forest management, including commercial logging, to reduce risk of fire and disease on approximately 160,000 acres of forest under NFMA and NEPA.<sup>109</sup> The environmentalists argued that the Forest Service failed to provide sufficient information to show that the project would comply

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cases that I think end up not meaning a lot here, but I'll mention them, and one is the *Lands Council* decision, which I don't think applies to this setting. *Lands Council* basically says that . . . in analyzing the bona fides, the validity of a NEPA decision by an agency, or any decision grounded in scientific evidence, that I don't sit as a super evaluator of the correctness of otherwise bona fide scientific evidence, meaning if the agency relies on good science to come to a decision, the fact that there's competing scientific evidence doesn't mean that I have to resolve which of the pieces of competing scientific evidence is stronger. Rather, I simply resolve whether the agency's reliance on scientific evidence is grounded in evidence that is good science or not, a semi-*Daubert* analysis.").

106. *Lands Council*, 537 F.3d at 993 (citing *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989)) ("As we observed in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971), in making the factual inquiry concerning whether an agency decision was 'arbitrary or capricious,' the reviewing court 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' This inquiry must 'be searching and careful,' but 'the ultimate standard of review is a narrow one.'").

107. *League Of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122 (9th Cir. 2010) (reversing the district court's grant of summary judgment to conservationists and holding that the Five Buttes Project did not violate NFMA or NEPA).

108. See *infra* notes 155–168.

109. *League of Wilderness Defenders*, 615 F.3d at 1126.

with NFMA and the applicable forest plan by “clearly result[ing] in greater assurance of long-term maintenance of habitat,” before allowing logging specifically in late successional reserve, or old-growth trees.<sup>110</sup> The district court ruled in favor of plaintiffs, deciding that the Forest Service failed to meet this standard established by the forest plan, and also deciding that the agency’s analysis of the cumulative effects of the logging was inadequate under NEPA.<sup>111</sup>

In another opinion by Judge Smith, the Ninth Circuit reversed, echoing some of the principles from the en banc panel decision of *Lands Council*. Judge Smith initially noted that his *Lands Council* en banc opinion “address[ed] what had been a gradual divergence from [the APA’s] highly deferential standard” in the Ninth Circuit by clarifying that arbitrary and capricious judicial review is “narrow” and does not allow courts to substitute their judgment for that of the agency.<sup>112</sup> Consequently, the court deferred to the Forest Service’s decision to allow logging in the late successional reserve based on its determination that this type of logging was necessary to prevent future fires and would maintain wildlife habitat.<sup>113</sup> Judge Smith’s opinion calls for closer scrutiny under NFMA, repeating the deferential “no clear error of judgment” standard articulated in *Lands Council* and reasoning that deciding how to fulfill the objectives of the forest plan goes to “the very heart of the Forest Service’s expertise.”<sup>114</sup> Thus, the court concluded, it “should be loathe to second guess their efforts absent some glaring error, oversight, or arbitrary action.”<sup>115</sup> The court maintained that the *Lands Council* court aimed to foreclose this type of “second-guessing of the Forest Service.”<sup>116</sup>

Concerning the NEPA claims, the court again deferred to the Forest Service, determining that the district court improperly concluded that a cumulative effects analysis under NEPA must be supported by “de-

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110. *Id.* at 1130–31.

111. League of Wilderness Defenders-Blue Mountains Biodiversity Project v. Weldon, Civil No. 07-6283-HO, 2008 WL 4279807 (D. Or. Sept. 11, 2008), *rev’d and vacated sub nom.* League of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen, 615 F.3d 1122, 1126 (9th Cir. 2011).

112. *League Of Wilderness Defenders*, 615 F.3d at 1130.

113. *Id.* at 1132 (“After comparing the alternatives, the Forest Service determined that this plan would ‘clearly result in greater assurance of long-term maintenance of habitat,’ given the high threat of another catastrophic wildfire. In fact, it concluded that the ‘[p]roposed activities would not only reduce risk of large-scale disturbance, but would accelerate the ability of the Davis LSR to play a role for which late-successional reserves were established.’”).

114. *Id.* at 1134.

115. *Id.*

116. *Id.* at 1131.

tailed, quantitative information about past projects.”<sup>117</sup> Instead, the Forest Service may use the “aggregate effects” approach, as described in a Council on Environmental Quality (CEQ) 2005 memorandum, under which agencies “are not required to list or analyze the effects of individual past actions unless such information is necessary to describe the cumulative effect of all past actions combined.”<sup>118</sup> The court concluded that the Forest Service’s 23 page analysis of spotted owl habitat addressing “declines, trends and threats” to the species, which concluded that logging would be beneficial and which addressed potentially overlapping effects from other actions such as wildfires and mushroom harvesting,<sup>119</sup> satisfied NEPA’s “hard look” standard.<sup>120</sup>

Several district courts have also applied *Lands Council* to support deference to Forest Service land management decisions. For example, in *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. U.S. Forest Service*, environmentalists challenged the Forest Service’s decision to increase herbicide use in the Wallowa-Whitman National Forest, arguing that the herbicide project failed to comply with the forest management plan and violated NFMA.<sup>121</sup> The Oregon district court rejected these arguments, applying the deferential standard of review of *Lands Council* and concluding that the Forest Service deserves deference because its explanation of its data was reasonable, and the agency appropriately analyzed its compliance with NFMA.<sup>122</sup> The court expressly declined to act as a “panel of scientists” in deciding whether the Forest Service reasonably explained why the risk of harm from the project was not significant, and why the mitigation measures it selected, such as buffers, would reduce the risk of the project and minimize its adverse

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117. *Id.* at 1137.

118. *Id.* at 1135 (quoting Memorandum from James L. Connaughton on *Guidance on the Consideration of Past Actions on Cumulative Effects Analysis* (June 24, 2005) available at [http://energy.gov/sites/prod/files/nepapub/nepa\\_documents/RedDont/G-CEQ-PastActsCumulEffects.pdf](http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-PastActsCumulEffects.pdf)).

119. *Id.* at 1136 (The Forest Service’s EIS “describes possible overlapping effects from other projects and natural disasters such as wildfires, mushroom harvesting, and planned vegetation projects, and conducts a similar analysis with regard to soil quality, fires, fuels, and other species,” and “[t]his analysis fully complies with the requirement that the EIS consider aggregate effects of past, present, and future actions.”).

120. *Id.* at 1138.

121. *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 883 F. Supp. 2d 979, 1005 (D. Or. 2012) (concluding that “[t]he basis for the Forest Service’s figure is thin, but courts must defer to agencies in their fields of expertise, particularly regarding their selection of methodology”).

122. *Id.* at 992–94. However, the court did decide that the Forest Service’s cumulative impacts analysis violated NEPA, concluding the Forest Service “did not adequately evaluate the cumulative impacts that the Project might have when considered in conjunction with other actions.” *Id.* at 983.

effects.<sup>123</sup> The court rejected the environmentalists' suggestion that the agency should reassess its model and explain how the project would reduce risk of harm because requiring this of the agency would overstep the court's role.<sup>124</sup> The district court also concluded that it was reasonable for the Forest Service to address the effect of herbicide use on a watershed-wide scale instead of a site-specific scale.

Finally, the court decided that the Forest Service need not affirmatively address how its project complies with all requirements in environmental law,<sup>125</sup> and rejected the plaintiff's argument that NEPA required the Forest Service to consider "each and every" requirement under the forest plan when approving a project.<sup>126</sup> The court reasoned that NEPA requires only consideration of enumerated requirements in the statute, and that requiring the agency to do more would "seek too much"<sup>127</sup> from the EIS process and run counter to the regulatory requirement that an EIS "shall be kept concise."<sup>128</sup> Thus, the *League of Wilderness Defenders* court was especially deferential to the agency's determination of its compliance with NFMA and its scientific modeling, and was also careful not to second-guess the agency's EIS under NEPA.<sup>129</sup>

On the other hand, a 2010 Ninth Circuit case, *Center for Biological Diversity v. U.S. Department of Interior*, reflected an almost complete lack of effect of *Lands Council* on NEPA analysis.<sup>130</sup> The case involved a challenge to the Bureau of Land Management's (BLM) approval of a land

123. *Id.* at 993–94, n.19 (noting that the project features "a 300-foot buffer zone between aerial applications of herbicides and any lakes, wetlands, and perennial wet intermittent streams," and that the Forest Service's determination that such buffers minimize risk was reasonable).

124. *Id.* at 994, n.19.

125. *Id.* at 994 ("NEPA requires an EIS to contain the specific items outlined in 42 U.S.C. § 4332(2)(C), as well as a 'full and fair discussion of environmental impacts.' These enumerated requirements do not include an analysis of the proposed action's compliance with other laws.") (citations omitted).

126. *Id.*

127. *Id.*

128. *Id.* (quoting 40 C.F.R. § 1502.2(c)) ("Environmental impact statements shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and with these regulations.")

129. *See also* *Or. Natural Desert Ass'n v. Tidwell*, 716 F. Supp. 2d 982, 1008 (D. Or. 2010) (concluding the "court is not empowered to specify how the Forest Service should comply with [Forest Service plan] requirements. The Forest Service maintains discretion regarding how it complies with the LRMP and PACFISH, as well as determining the type of data used to evaluate their compliance.") (citation omitted).

130. *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 623 F.3d 633, 646 (9th Cir. 2010) (holding that BLM violated NEPA by failing to take a "hard look" at environmental impacts of proposed land exchange by assuming in its EIS that mining would be the same under a federal mining plan of operations or state regulation).

exchange in southern Arizona between the federal government and a mining company, Asarco, under which the company would acquire fee simple to the 10,976 acres of land that provided important habitat for species like the desert bighorn sheep and the endangered desert tortoise.<sup>131</sup> Without the land exchange, Asarco would have to prepare a plan of operations in order to mine, including detailed information on the environmental effects of the proposed mining, and be subject to BLM approval under the 1872 General Mining Law.<sup>132</sup> After the exchange, however, the Mining Law would not apply, and Asarco could expand its mining operation, which already included a “265,000 ton-per-day open pit copper mine,” subject only to state regulation.<sup>133</sup> The BLM’s environmental analysis of this exchange assumed there would be no difference in mining whether or not the exchange occurred because Asarco already held federal mining claims.<sup>134</sup>

In the district court, the environmentalists argued that the BLM’s environmental analysis violated NEPA by assuming that the same mining would occur in the same manner regardless of the exchange.<sup>135</sup> The district court ruled against the environmentalists.<sup>136</sup> But the Ninth Circuit, with Judge Fletcher writing for the majority, reversed the district court and enjoined the proposal, determining that BLM had not taken a “hard look” at environmental effects of the land exchange.<sup>137</sup> The court reasoned that NEPA required a comparative analysis of mining with and without the exchange, including evaluating a “no action” alternative, and that it was arbitrary to assume there would be no meaningful difference between mining under the Mining Law and mining under state regulation.<sup>138</sup> The majority mentioned *Lands Council* only at the end of the decision and only to distinguish it in response to a vigorous dissent.<sup>139</sup>

That dissent was from Judge Richard Tallman, who argued that the majority’s opinion was “irreconcilable” with *Lands Council* because it expanded the “scope of judicial oversight and scrutiny of agency ac-

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131. *Id.* at 637.

132. *Id.* at 636.

133. *Id.*

134. *Id.* at 642–43.

135. *Ctr. for Biological Diversity v. U.S. Dep’t. of Interior*, 255 F. Supp. 2d 1030, 1033 (D. Ariz. 2003).

136. *Id.* at 1039.

137. *Ctr. for Biological Diversity*, 623 F.3d at 650.

138. *Id.* (“In this case, we conclude that the BLM acted arbitrarily and capriciously in assuming without explanation that the [plan of operations] process is a meaningless formality that provides no environmental protection and, based on that assumption, in failing to make a meaningful comparison between the proposed land exchange and the no action alternative.”)

139. *Id.* at 648–50.

tion.”<sup>140</sup> He accused the majority of “second-guessing” the agency in a highly specialized area.<sup>141</sup> The majority responded by remarking that its opinion adhered to the standard of deference that the court affords to agency actions, as articulated in *Lands Council*; the majority simply disagreed on the outcome of applying that standard.<sup>142</sup> Importantly, according to the majority, even under *Lands Council* a reviewing court was “compelled *not* to defer . . . when an agency has acted arbitrarily and capriciously.”<sup>143</sup> The majority noted that the dissent expressed a “definite” view that the land exchange was “beneficial” for policy reasons, but the majority eschewed this kind of political analysis, proclaiming: “[w]e confine ourselves to the legal questions before us.”<sup>144</sup> The majority’s interpretation of *Lands Council* suggested that the en banc opinion only restated the standard of review under the APA and had no effect at all on the NEPA analysis.

Other courts have viewed *Lands Council* as allowing judges to inquire into the adequacy of the Forest Service’s methodology, while giving effect to *Lands Council*’s other rulings, like not requiring site-specific soil studies. For example, in *Native Ecosystems Council v. Weldon*, environmentalists challenged the Custer National Forest’s Beaver Creek Landscape Management Project, which involved logging, road construction, and prescribed burning, as violating both NFMA and NEPA.<sup>145</sup> The court laid out the standard of review of Forest Service actions prescribed by *Lands Council*, noting that “it is unnecessary to ‘impose bright-line rules on the Forest Service regarding particular means that it m[u]st take in every case to show . . . that it has met the NFMA’s requirements.’”<sup>146</sup> Environmentalists claimed that the Forest Service improperly measured

140. *Id.* at 650–51 (Tallman, J., dissenting) (“It has been said that the life of a canary in a coal mine can be described in three words: short but meaningful. So, too, apparently was the life of our decision in [*Lands Council*].”).

141. *Id.*

142. *Id.* at 648 (majority opinion).

143. *Id.*

144. *Id.* (“Our colleague writes that our opinion is ‘based on a distaste for the particular industrial goals at issue.’ This is not true. We express no view—indeed, we have no view—on the question whether the proposed land exchange is a good or bad idea.”) (internal citations omitted).

145. See *Native Ecosystems Council v. Weldon*, 848 F. Supp. 2d 1207, 1217 (D. Mont. 2012) (criticizing the Forest Service’s use of scientific methodology “when it failed to explain why it did not apply . . . the elk herd home-range as its unit of analysis for analyzing road density”), *vacated*, CV 11-99-M-DWM, 2012 WL 5986475 (D. Mont. Nov. 20, 2012) (vacating as moot because the Forest Service withdrew implementation of the project after a forest fire burned the project area).

146. *Id.* at 1212 (“[T]he Forest Service must support its conclusions that a project meets the requirements of the NFMA and relevant Forest Plan with studies that the agency, in its expertise, deems reliable.”) (quoting *Lands Council*, 537 F.3d at 993–94).

the effect of road density on elk habitat in its EIS, which applied a unit of analysis that evaluated effects on habitat at an inappropriate scale.<sup>147</sup> The agency's scientists had recommended that the agency measure the effects on elk according to an elk herd home-range analysis, in order for the study to be "biologically meaningful."<sup>148</sup> Instead, without explanation, the agency ignored this recommendation and instead measured the effect of the project on elk habitat on the scale of the project area and Ashland Ranger District levels.<sup>149</sup> The court concluded that the Forest Service violated NEPA, regardless of what the proper unit of analysis was, because the agency failed to explain its decision to ignore its own scientists' recommendation, which was concededly the "best available science."<sup>150</sup> In its briefing to the court, the Service later explained that it rejected that range of analysis because it did not identify elk herd home-range units and because the elk were not migratory.<sup>151</sup> The court rejected this as "too little, too late" and held that an "afterthought of litigation" did not cure the deficient EIS.<sup>152</sup>

However, the *Weldon* court did give express effect to *Lands Council* by rejecting the environmentalists' claim that the Forest Service violated NFMA when it failed to include an elk habitat-specific standard in the plan.<sup>153</sup> The court reasoned that under *Lands Council*, the Forest Service need not ensure a "specific habitat standard for every species that might be found on a particular forest" in order to ensure wildlife viability.<sup>154</sup> *Weldon* thus reflected the survival of "hard look" analysis under NEPA, despite *Lands Council*'s highly deferential standard of review, while also giving effect to *Lands Council* concerning wildlife viability under NFMA.<sup>155</sup>

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147. *Id.* at 1216–17 ("This argument is predicated on the proposition that the Forest Service should have applied the standard to the 'elk herd home-range' instead of applying it to the Project Area and the entire Ashland Ranger District.").

148. *Id.* at 1217 (noting that the Forest Service's scientist concluded that "[t]o be biologically meaningful, analysis unit boundaries should be defined by the elk herd home-range . . . , and more specifically by the local herd home-range during hunting season" and that this constitutes the best available science).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* ("Regardless of whether that explanation holds water, it is too little, too late. An afterthought of litigation does not remedy the failure to make a reasoned decision in the Final EIS.").

153. *Id.* at 1213.

154. *Id.*

155. *See id.* at 1210 ("But the Forest Service's analysis of elk habitat in the Final Environmental Impact Statement . . . violates NEPA because the Service acted arbitrarily and capriciously in: (1) failing to explain why it analyzed road density only at the Project level and ranger-district level, (2) in failing to explain why it applied the road-density standard to

Other Ninth Circuit decisions have invoked *Lands Council* outside of the context of Forest Service decisions with the same varied results. For example, *Northwest Coalition for Alternatives to Pesticides (NCAP) v. United States Environmental Protection Agency* involved a dispute between the majority and dissent about the level of scrutiny that the court should afford the EPA in setting pesticide tolerances.<sup>156</sup> The Natural Resources Defense Council (NRDC) and Northwest Coalition for Alternatives to Pesticides (NCAP) petitioned for review of EPA's regulations establishing tolerance levels for the amount of pesticide residue that can remain on food commodities, including fruits and vegetables. In setting these levels, the Food Quality Protection Act required the EPA to use an extra ten-fold margin of safety for children or infant exposure, unless the agency could justify a deviation from this standard based on "reliable data."<sup>157</sup> The EPA did not apply the ten-fold presumptive margin of safety to any of the seven pesticide residue levels it established; instead, it applied a three-fold margin of safety for four pesticides and failed to apply a child safety margin at all for three other pesticides.<sup>158</sup>

The plaintiffs argued that the EPA's deviation from the statutory presumption was arbitrary and capricious because it was not based on reliable drinking water exposure or toxicity data.<sup>159</sup> The agency did not have sufficient drinking water exposure data on these pesticides; consequently, it relied on computer modeling to determine exposure. NRDC essentially argued that modeling results can never constitute "reliable data."<sup>160</sup> The Ninth Circuit rejected this argument, noting that acquiring data on the nation's waters for pesticide residue was no easy feat; that modeling may in fact be more reliable;<sup>161</sup> and that the agency adequately

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only Forest lands, and (3) in failing to analyze road density during Project implementation." Cf. *Or. Natural Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1121 (9th Cir. 2010) (holding that BLM had a duty in an EIS analyzing effects of off-road vehicle use to address environmentalists' concerns about wilderness characteristics and noting that "here, the BLM used *no* method to analyze or plan for the management of such values. We cannot defer to a void.").

156. *Nw. Coal. for Alts. to Pesticides v. EPA*, 544 F.3d 1043, 1052–53 (9th Cir. 2008).

157. *Id.* at 1045–47; 21 U.S.C. § 346a(b)(2)(C)(ii)(II) (EPA must use "an additional . . . margin of safety . . . to take into account potential pre-and post-natal toxicity and completeness of the data with respect to exposure and toxicity to infants and children" and the agency may "use a different margin of safety for the pesticide chemical residue only if, on the basis of reliable data, such margin will be safe for infants and children.").

158. *Nw. Coal for Alts. to Pesticides*, 544 F.3d at 1047.

159. *Id.* at 1047–48.

160. *Id.* at 1048.

161. *Id.* at 1048–49 (citing FIFRA SCIENTIFIC ADVISORY PANEL, A SET OF SCIENTIFIC ISSUES BEING CONSIDERED BY THE AGENCY IN CONNECTION WITH ESTIMATING DRINKING WATER EXPOSURE AS A COMPONENT OF DIETARY RISK ASSESSMENT 4–7 (1997), available at <http://epa.gov/scipoly/sap/meetings/1997/december/finaldec.pdf>).

explained why its models were reliable.<sup>162</sup> The NRDC also argued that the agency failed to explain why toxicological data supported its deviation from the presumptive standard regarding three of the pesticides. The EPA merely stated in its final order that toxicological data did not demonstrate “greater sensitivity by the young” or fetal abnormalities. On this issue the court ruled that the EPA failed to provide sufficient evidence that the lower safety level would account for risks to children and infants.<sup>163</sup> Consequently, the agency’s decision on pesticide tolerances was arbitrary and capricious because the EPA failed to connect the facts found to its decision to reduce the margin of safety.<sup>164</sup>

Judge Sandra Ikuta concurred in part but dissented from the court’s latter conclusion, relying on *Lands Council* and calling for greater deference to the EPA.<sup>165</sup> She noted that “*Lands Council* prohibits [the court] from indulging in the temptation to ‘act as a panel of scientists,’”<sup>166</sup> emphasizing that a court may not require an agency “to always demonstrate the reliability of its scientific methodology.”<sup>167</sup> According to Judge Ikuta, the EPA exhibited no such “clear error” of judgment;<sup>168</sup> thus, under *Lands Council* the *NCAP* court should have deferred to the EPA’s decision to deviate from the standard margin of safety.<sup>169</sup>

These decisions demonstrate that judges have often invoked *Lands Council* for the principles of deference that the decision announced, not

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162. *Id.* at 1050 (“The EPA explained that the models yield conservative data because the models incorporate the higher of the two values from surface and ground water in assessing the overall risk of exposure to the pesticides.”).

163. *Id.* at 1051–52.

164. *Id.* at 1052 (It is “entirely unclear why the EPA chose safety factors of 3x for pymetrozine and acetamiprid, and 1x for mepiquat, as opposed to 4x or 5x or 8x or 9x.”). On EPA’s authority to set safety margins, see *supra* note 157.

165. *Id.* at 1060.

166. *Id.* (quoting *Lands Council v. McNair*, 537 F.3d 981, 988 (9th Cir. 2008) (en banc)).

167. *Id.* (quoting *Lands Council*, 537 F.3d at 990).

168. *Id.* (“In light of the EPA’s reliance on a long-established and widely accepted protocol, the majority’s statement that ‘the EPA chose these lower safety levels arbitrarily’ is not supported by the record, and is contrary to our obligation to defer to the scientific analysis and judgments made by an agency operating within its area of special expertise.”).

169. *See id.* In another Ninth Circuit dissenting opinion, Judge Carlos Bea called for greater deference under *Lands Council* than the majority gave to the Minerals Management Service’s methodology for noise analysis on a decision to allow Shell to drill exploratory oil wells in the Alaska Beaufort Sea. *Alaska Wilderness League v. Kempthorne*, 548 F.3d 815, 842–43 (9th Cir. 2008) (Bea, J., dissenting), *superceded by*, *Alaska Wilderness League v. Salazar*, 571 F.3d 859 (9th Cir. 2009) (“If one substitutes the Forest Service’s sufficient statistical modeling simulation in *Lands Council* for [the Mineral Management Service’s] purportedly insufficient simulation of noise effects here, and the unnecessary on-the-ground observation by the Forest Service in *Lands Council* for the purportedly necessary on-site noise measurement here, one cannot help but conclude the panel majority here is overruling *Lands Council sub silentio*.”).

for changes in the Ninth Circuit's substantive environmental jurisprudence under NFMA or NEPA, such as not requiring that the agency verify its methods for testing wildlife viability in timber projects with on-the-ground data. The courts' use of *Lands Council* in ensuing dissenting and concurring opinions demonstrates that there is considerable disagreement as to how reviewing courts should apply the en banc panel's interpretation of the judicial deference owed to agency determinations and, more specifically, how closely a court should review agency decisions affecting resource-extraction industries, such as timber harvesting or mining. A later Ninth Circuit en banc decision, *Karuk Tribe v. U.S. Forest Service*,<sup>170</sup> clearly illustrated this divide, in both its majority and dissenting opinions, concerning the proper role of reviewing courts in environmental decisions.

### III. THE KARUK TRIBE PANEL AND EN BANC DECISIONS

In *Karuk Tribe*, which in several respects represents a counterpoint to the *Lands Council* decision, the tribe challenged the Forest Service's regulation of suction dredge mining in the Klamath River, which is designated as coho salmon critical habitat under the ESA.<sup>171</sup> Forest Service regulations require miners to submit to the local ranger a notice of intent (NOI) to mine before engaging in an activity that might disturb surface resources.<sup>172</sup> If the ranger determines the activity is "likely to significantly disturb surface resources," the miner must obtain a Forest Service-approved plan of operations before mining. Without a likely surface disturbance, the regulations allow the miner to proceed to mine.<sup>173</sup> In 2004, the Forest Service accepted four NOIs for suction dredge mining in the Klamath River without requiring the miners—the so-called "New 49ers"—to submit a plan.<sup>174</sup>

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170. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006 (9th Cir. 2012) (en banc) *cert denied*, No. 12-289, 2013 WL 1091767 (2013).

171. *Karuk Tribe of Cal.*, 681 F.3d at 1012. The tribe also filed NEPA and NFMA claims; however, the district court denied these claims, and the tribe did not appeal. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 640 F.3d 979, 986 (9th Cir. 2011) *rev'd* 681 F.3d 1006 (9th Cir. 2012).

172. *Karuk Tribe of Cal.*, 640 F.3d at 984–85 (quoting 36 C.F.R. § 228.4(a) (2005)); Organic Administration Act, 16 U.S.C. § 551 (1897) (The Organic Administration Act authorizes the Forest Service to regulate mining on forest land to protect the forest from destruction.).

173. *See* 36 C.F.R. § 228.4(a)(2) (2005); *Karuk Tribe of Cal.*, 640 F.3d at 985 (If the Ranger determines a plan is required, the ranger must notify the operator within 15 days; if the Ranger does not request that the operator submit a plan, the operator may proceed with the activity.).

174. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 379 F. Supp. 2d 1071, 1084 (N.D. Cal. 2005), *aff'd*, 640 F.3d 979 (9th Cir. 2011), *rev'd*, 681 F.3d 1006 (9th Cir. 2012).

The Karuk Tribe challenged the agency's summary approval of the mining, claiming that the Forest Service was required to engage in consultation under the ESA on the effect of mining on the listed coho salmon because the Forest Service's review of the NOI was a "federal action" triggering the ESA by effectively authorizing the mining.<sup>175</sup> The district court rejected this argument, ruling that the tribe failed to demonstrate that the Forest Service's NOI approval was an "federal action" because, among other things, the miners, not the agency, were undertaking the action.<sup>176</sup> The court thought the agency's approval process was more like review than an affirmative "authorization" and observed that the activity would be undertaken under mining rights previously granted by the 1872 General Mining Act.<sup>177</sup>

A Ninth Circuit panel affirmed in another deferential opinion authored by Judge Smith, who ruled that the NOI process was not an "agency action" sufficient to trigger the ESA.<sup>178</sup> The panel rejected the tribe's characterization of the process as a "decision to authorize . . . operations," concluding that it was instead simply a "notification" procedure: merely an initial step toward agency approval of a plan, if one is required.<sup>179</sup> The court relied on another Ninth Circuit decision, *Western Watersheds Project v. Matejko*, for the proposition that an "authorization" under Section 7 of the ESA, which triggers consultation, requires an affirmative act, not just acquiescence to private activity.<sup>180</sup> The court also cited Ninth Circuit precedent for the proposition that where an action is already "authorized" by another source of law, it is not an agency-authorized action.<sup>181</sup> Since in this case the federal mining law provided a "right, not [a] mere privilege"<sup>182</sup> to mine, the court decided that the For-

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175. *Id.* at 1100–01; 50 C.F.R. § 402.2 (Federal actions under the ESA include actions "authorized" by federal agencies.).

176. *Karuk Tribe of Cal.*, 379 F. Supp. 2d at 1101.

177. *Id.*

178. *Karuk Tribe of Cal.*, 640 F.3d at 990.

179. *Id.* at 989–90.

180. *Western Watersheds Project v. Matejko*, 468 F.3d 1099, 1107–08 (9th Cir. 2006) (holding that BLM's failure to regulate diversions of rights-of-way that are less than "substantial" was simply the agency's decision not to control an activity, and thus not an agency action).

181. The court stated that when a contract supplies the authorization, the action is already authorized by that source of law, and not the agency. *Karuk Tribe of Cal.*, 640 F.3d at 991 (citing *Sierra Club v. Babbitt*, 65 F.3d 1502, 1511 (9th Cir. 1995) (holding that BLM approval letters to private parties concerning construction of rights-of-way were not agency actions because the rights-holder had a contractual right to develop)).

182. *Id.* at 992 (quoting *National Forests Surface Use Under U.S. Mining Laws*, 39 Fed. Reg. at 31,317 (August 24, 1974) (to be codified at 36 C.F.R. §§ 251, 252, & 293)); see *General Mining Law of 1872*, 30 U.S.C. § 22 (2006), as amended by 30 U.S.C. § 612 (2006).

est Service's NOI process did not technically authorize the mining, and the NOI was thus not an agency action triggering Section 7 of the ESA.<sup>183</sup>

Judge William Fletcher dissented from the panel decision, maintaining that the Forest Service's approval of the NOIs was an "agency action" for purposes of Section 7. Agency action, according to Judge Fletcher, exists when an agency makes a "discretionary decision about whether, or under what conditions" to allow an action.<sup>184</sup> He thought that the Forest Service undertook at least three discretionary actions, not "dictated or controlled by precise rules," in deciding whether to approve NOIs for mining.<sup>185</sup> First, the agency used discretion by conditioning the approval of the NOIs on criteria established to protect coho salmon.<sup>186</sup> Second, the agency acted in a discretionary manner when it rejected one of the NOIs because it provided insufficient protection to fish habitat.<sup>187</sup> Finally, the Forest Service employed discretion when applying different criteria to protect fishery habitat in various districts in the Klamath National Forest.<sup>188</sup> Consequently, Judge Fletcher concluded that the agency's approval of mining NOIs was an agency action for the purposes of the ESA because the agency was making discretionary decisions as to whether to allow the mining and under what conditions.<sup>189</sup>

Judge Fletcher also maintained that NOI approval met the other trigger for ESA consultation because the approved mining "may affect" critical habitat.<sup>190</sup> Suction dredge mining necessarily includes surface disturbance, and the record demonstrated that the consequences of dredging may adversely affect the listed salmon.<sup>191</sup> Thus, in Judge Fletcher's

183. *Id.* at 992 ("Where the agency is not the authority that empowers or enables the activity, because a preexisting law or contract grants the *right* to engage in the activity subject *only to regulation*, the agency's decision *not* to regulate (be it based on a discretionary decision not to regulate or a legal bar to regulation) is not an agency action for ESA purposes.").

184. *Id.* at 996 (Fletcher, J., dissenting).

185. *Id.* at 1007–08.

186. *Id.* at 1008.

187. *Id.* ("Acting Forest Supervisor Metz refused to approve the NOI because, in his view, it provided insufficient protection of fisheries habitat.").

188. *Id.* ("The New 49'ers submitted an NOI to District Ranger Haupt in the Scott River District that complied in full with one of the criteria applied in the Happy Camp District by specifying the maximum number of dredges per mile. The NOI complied, to some degree, with a second Happy Camp criterion by committing to 'work[ing] with' the Forest Service to identify cold-water refugia. But the NOI did not promise to observe any particular cold-water refugia and did not promise to stay a specified distance from any creek mouth.") (alterations in original).

189. *Id.* at 1008–09.

190. *Id.* at 1009–10.

191. *Id.*

view, the Forest Service violated the ESA by not consulting on its approval of the NOIs.<sup>192</sup>

The tribe petitioned for rehearing en banc and, after granting review, an en banc panel reversed the three-judge panel decision.<sup>193</sup> The en banc court issued a 7–4 decision, unlike the unanimity in *Lands Council*, and essentially swapped Judge Smith’s majority opinion for Judge Fletcher’s dissent,<sup>194</sup> deciding that the Forest Service must consult with the appropriate wildlife agency before allowing mining under the NOI process.<sup>195</sup> As in his dissent to the panel opinion, Judge Fletcher stated that both triggers for ESA consultation were satisfied. First, he determined that the NOI process was an “agency action” because the Forest Service authorized the underlying activity, while retaining discretion to require the miners to submit an NOI, which the agency would either approve or reject.<sup>196</sup> The majority pointed to correspondence between the Forest Service and miners that reflected a mutual understanding that the approval of an NOI constituted agency authorization to mine.<sup>197</sup>

The *Karuk Tribe* en banc court rejected the Forest Service and miners’ contention, approved by Judge Smith in the panel decision, that mining laws—not the Forest Service—authorized the mining, and therefore there was no agency action.<sup>198</sup> Judge Fletcher reasoned that since the ESA extends to actions even partly authorized by the agency,<sup>199</sup> and Congress restricted the right to mine by requiring that mining be consistent with environmental regulation,<sup>200</sup> the Forest Service had regulatory authority to approve or deny mining, even though other laws also apply to the activity.<sup>201</sup>

The en banc panel also determined that the NOI process met the ESA standard of being an action “in which there is discretionary Federal

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192. *Id.* at 1011.

193. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 658 F.3d 953 (9th Cir. 2011).

194. *Karuk Tribe of Cal.*, 681 F.3d 1006, 1011 (9th Cir. 2012).

195. *Id.*

196. *Id.* at 1022 (noting that although the 2005 amendments to the applicable regulation, 36 C.F.R. § 228.4(a)(2), stated that notification must occur “if approval of a plan of operations is required” the change made no substantive change from the previous regulation, 36 C.F.R. § 228.4(a)(2)(iii), which stated that Forest Service must notify an operator “whether” a plan is required; notification is required in either case).

197. *Id.* (“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.’”).

198. *Id.* at 1023.

199. *Id.* at 1023.

200. *Id.* at 1023.

201. *Id.* at 1024.

involvement or control” with the capacity to benefit listed species.<sup>202</sup> The Forest Service had the capability of influencing the mining activity to the benefit of listed species by approving or disapproving NOIs based on conditions to protect habitat.<sup>203</sup> In concluding that approval of an NOI was in fact an agency action, triggering ESA Section 7 procedures, Judge Fletcher pointed to the same three examples of discretionary Forest Service action over proposed NOIs that he mentioned in his dissent to the panel opinion.<sup>204</sup>

Second, Judge Fletcher tracked the reasoning in his dissent to the panel opinion in concluding that mining may affect critical habitat of coho salmon, and that record evidence documented the adverse effects of mining on the salmon, thus demonstrating that the mining “may affect” the salmon.<sup>205</sup> The court concluded that the mining proposals therefore triggered ESA consultation, noting that the practical burden this obligation imposed on the Forest Service “need not be great,”<sup>206</sup> a point with which Judge Smith, in dissent, sharply disagreed.<sup>207</sup>

#### IV. JUDGE SMITH’S DISSENT IN *KARUK TRIBE*

Perhaps unsurprisingly, Judge Smith dissented from the en banc reversal of his panel majority opinion. In so doing, he launched an attack—or, more accurately, refueled the attack he levied in *Lands Council*—on the Ninth Circuit’s approach to judicial review of environmental agency actions. Beginning his dissent with an image from Jonathan Swift’s *Gulliver’s Travels*,<sup>208</sup> he claimed that the majority’s opinion, along with several other Ninth Circuit cases,<sup>209</sup> “undermine[s] the rule of law,” making Gulliver’s situation seem “fortunate” when compared to the “plight of those entangled in the ligatures of new rules created out of

202. *Id.* at 1024–25 (quoting 50 C.F.R. § 402.03).

203. *Id.* at 1025.

204. *Id.* at 1025–26.

205. *Id.* at 1027 (“If the phrase ‘might cause’ disturbance of fisheries habitat is given an ordinary meaning, it follows almost automatically that mining pursuant to the approved NOIs ‘may affect’ critical habitat of the coho salmon.”).

206. *Id.* at 1029 (noting that informal consultation may suffice for approval of an NOI, and “informal consultation need be nothing more than discussions and correspondence with the appropriate wildlife agency,” whereas approval of a plan of operations will often require formal consultation, involving the preparation of a biological opinion).

207. *Id.* at 1039 (M. Smith, J., dissenting) (“[T]he majority effectively shuts down the entire suction dredge mining industry in the states within our jurisdiction.”).

208. *Id.* at 1030.

209. *Nw. Env’tl. Def. Ctr. v. Brown*, 640 F.3d 1063 (9th Cir. 2011); *Pac. Rivers Council v. U.S. Forest Serv.*, 668 F.3d 609 (9th Cir. 2012); *San Luis & Delta-Mendota Water Auth. v. United States*, 672 F.3d 676 (9th Cir. 2012).

thin air by such decisions.”<sup>210</sup> Chief Judge Alex Kozinski, Judge Sandra Ikuta and Judge Mary Murguia joined in the parts in which Judge Smith addressed the meaning of “agency action.”<sup>211</sup> However, when he went far beyond legal matters in a political diatribe entitled “Brave New World,” he was joined only by Chief Judge Kozinski.<sup>212</sup>

First focusing on the majority’s discussion of “agency action,” which Judge Smith characterized as holding that “an agency’s decision not to act forces it into a bureaucratic morass,” he observed that the majority opinion “flouts” a “crystal-clear and common sense precedent” that agency inaction is not agency action.<sup>213</sup> First, Judge Smith claimed that the NOI was merely an “information-gathering tool,” not an affirmative authorization such as a permit or license.<sup>214</sup> Second, he thought the action was “inaction” because it did not involve an “affirmative step” that allowed private conduct to occur.<sup>215</sup> Third, he observed that the fact that both parties viewed the action as constituting an “authorization” was irrelevant to whether it met the legal question under the ESA.<sup>216</sup> Finally, Judge Smith criticized the majority’s reliance on informal discussions between miners and the Forest Service ranger as evidence of a discretionary act, noting that treatment of these discussions was a disincentive to miners voluntarily reducing adverse environmental effects of their operations.<sup>217</sup> Thus, according to Judge Smith, the NOI process did not constitute agency action.

Ordinarily, a dissent would end there. However, Judge Smith maintained that he could not conclude without discussing what he termed the real-world effect of the majority’s decision,<sup>218</sup> claiming it would make the Forest Service “impotent to meaningfully address low impact mining” and would effectively shut down the suction-dredge mining industry.<sup>219</sup> According to Judge Smith, ESA consultation can delay projects for months, even years, increasing expenses and leaving most miners with neither the “resources nor the patience” to pursue consultation, resulting in job losses while companies must either await the

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210. *Karuk Tribe of Cal.*, 681 F.3d at 1031 (M. Smith, J., dissenting).

211. *Id.* at 1030–39.

212. *Id.* at 1039–41 (Judge Smith opened with a quote from Dante, “Abandon all hope, ye who enter here.”).

213. *Id.* at 1031.

214. *Id.* at 1034.

215. *Id.* at 1037 (maintaining that the Forest Service’s response to a NOI is “not approving, authorizing or rejecting anything” instead, it is “receiving and analyzing information, and deciding not to take further action”).

216. *Id.* at 1038.

217. *Id.* at 1038–39.

218. *Id.* at 1039.

219. *Id.*

“lengthy and costly” ESA process or ignore it at their legal risk.<sup>220</sup> Alarmed at the alleged adverse economic effects of environmental regulation on industry, Judge Smith placed the blame squarely on his court, not Congress, claiming that the Ninth Circuit has improperly created, rather than interpreted law: “stray[ing] with lamentable frequency from its constitutionally limited role” in environmental cases, and, in so doing, threatening the independence of the judiciary.<sup>221</sup>

Judge Smith gave three examples of cases in which the Ninth Circuit has “broken from decades of precedent and created burdensome, entangling environmental regulations out of vapors.”<sup>222</sup> These cases spotlighted the ongoing environmental conflict in the Ninth Circuit concerning both deferential review of agency decisions and the imposition of economic burdens on extractive industries.<sup>223</sup>

First, Judge Smith remarked that in *Northwest Environmental Defense Center v. Brown*,<sup>224</sup> a decision also authored by Judge Fletcher, the Ninth Circuit imposed a requirement that would result in the “imminent decimation of what remains of the Northwest timber industry” by holding that the Clean Water Act requires permits for stormwater runoff from logging roads, despite the nearly four decades of Clean Water Act implementation without this requirement.<sup>225</sup> According to Judge Smith, requiring millions of new Clean Water Act permits would accelerate the unemployment that the industry already has experienced.<sup>226</sup> He lamented that because rural governments receive funding from the timber industry, the decision would result in shorter school days, fewer police, and library closures.<sup>227</sup>

Second, Judge Smith criticized another decision by Judge Fletcher, a 2012 divided panel decision in *Pacific Rivers Council v. United States Forest Service*, in which the majority ruled that a 2004 Forest Service plan

220. *Id.* at 1039–40.

221. *Id.* at 1041.

222. *Id.* at 1040.

223. *Id.* at 1039 (“My intent is solely to illuminate the downside of our actions in such environmental cases.”).

224. *Nw. Env'tl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1087 (9th Cir. 2011) (“[W]e conclude that stormwater runoff from logging roads that is collected by and then discharged from a system of ditches, culverts, and channels is a point source discharge for which an NPDES permit is required.”), *rev'd*, *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013) (holding that NPDES permits are not required for logging road discharges and deferring to EPA’s interpretation under *Auer v. Robbins*, 519 U.S. 452 (1997) that “the regulation extends only to traditional industrial buildings such as factories and associated sites and other relatively fixed facilities,” not to timber harvesting).

225. *Karuk Tribe of Cal.*, 681 F.3d at 1040.

226. *Id.* at 1041.

227. *Id.* at 1040.

that reduced logging and grazing restrictions and governed eleven national forests in the Sierra Nevada violated NEPA.<sup>228</sup> Judge Smith claimed the decision would “dramatically impede” logging in the West by overturning a forest management plan for not complying with NEPA’s hard look requirement and holding that NEPA analysis must occur when “reasonably possible,” not only when the agency makes a “critical decision” to act on a specific site.<sup>229</sup> This complaint echoed the dissent’s concern in *Pacific Rivers Council*, in which Judge Randy Smith<sup>230</sup> claimed that the majority improperly paid “lip service” to the deferential standard of review in *Lands Council* and failed to provide adequate deference to the Forest Service’s determination of when NEPA analysis of particular environmental impacts was appropriate.<sup>231</sup> In his view, *Lands Council* “irrevocably changed the legal landscape by setting forth the high level of deference owed by courts to agency action.”<sup>232</sup>

The majority in *Pacific Rivers Council*, however, concluded that the agency must provide information on individual species as soon as “rea-

228. *Pac. Rivers Council v. U.S. Forest Serv.*, 668 F.3d 609, 617 (9th Cir. 2012) *withdrawn and superseded on denial of reh’g en banc*, 689 F.3d 1012, 1026 (9th Cir. 2012) (The court held that the Forest Service failed to meet NEPA’s standard “that an EIS analyze environmental consequences of a proposed plan as soon as it is ‘reasonably possible’ to do so.” *Id.* The court also criticized the Forest Service’s EIS for being replete with “obfuscating bureaucratess” that undermined NEPA’s purpose to disclose the environmental effects of agency proposals to the public. *Id.* at 1018.), *cert granted*, *U.S. Forest Serv. v. Pac. Rivers Council*, 133 S.Ct. 1582 (2013), *judgment vacated and case dismissed as moot*, 133 S.Ct. 2843 (2013).

Two months after the Supreme Court granted certiorari, the environmental groups who brought the case effectively abandoned the appeal by agreeing with the federal government to petition the Court to vacate the judgment below and declare the case to be moot. See Richard Frank, *Not With a Bang, But With a Whimper*, LEGAL PLANET (June 18, 2013) <http://legal-planet.org/2013/06/18/not-with-a-bang-but-with-a-whimper/>. This result may have reflected the persuasiveness of Judge Smith’s dissent to the Supreme Court Justices, particularly in light the Court’s persistent interest in reversing Ninth Circuit opinions and its longstanding hostility to successful NEPA challenges in the lower courts. In light of the ultimate result in the *Pacific Rivers Council* case, one knowledgeable observer wondered if the results that can be expected from the Supreme Court in environmental cases have “become so predictable that litigants will effectively confess error and abandon their defense of favorable lower court rulings if and when a case reaches the Supreme Court?” *Id.*

229. *Karuk Tribe of Cal.*, 681 F.3d at 1040–41.

230. Judge Randy Smith is of no relation to Judge Milan Smith, the author of *Lands Council* and the *Karuk Tribe* dissent.

231. *Pac. Rivers Council v. U.S. Forest Serv.*, 689 F.3d 1012, 1036 (9th Cir. 2012) (R. Smith, J., dissenting) (“[T]hough the majority pays lip service to [*Lands Council*]’s deferential standard of review . . . [the majority] engage[s] in the same type of ‘fine-grained’ analysis that was rebuked in [*Lands Council*]”).

232. *Id.* at 1035.

sonably possible” and did not see *Lands Council* as an obstacle to this holding.<sup>233</sup> Similarly, the court noted that under *Kern v. Bureau of Land Management*, NEPA analysis on particular impacts is required as soon as reasonably possible<sup>234</sup> and observed that *Lands Council* did not overrule this holding.<sup>235</sup> Under that test, the agency’s EIS, which recommended amendments to a forest plan in the Sierra Nevada Mountains, should have included information that was already available on some of the 61 individual fish species<sup>236</sup> present in the Sierras, which it had included in a prior EIS that contained a 64-page detailed analysis of impacts on individual fish species.<sup>237</sup> Because the later EIS failed to address this information, the court concluded the Forest Service did not meaningfully address the forest plan’s effect and failed to take the “hard look” that NEPA required.<sup>238</sup> In his *Karuk Tribe* dissent, Judge Smith considered this reasoning to be beyond the scope of judicial review.<sup>239</sup>

Third, Judge Smith contended that resource users have “suffered” from the effect of “extreme” environmental cases, like the farmers in *San Luis & Delta-Mendota Water Authority v. United States*, who, according to him, would suffer unemployment and insufficient access to water for agriculture under the Ninth Circuit’s interpretation of the Central Valley Project Improvement Act.<sup>240</sup> That statute required farmers to designate a specified amount of water in the California’s Central Valley Project for “the primary purpose of implementing the fish, wildlife and habitat restoration purposes and measures,”<sup>241</sup> and the Ninth Circuit interpreted

233. *Pac. Rivers Council*, 689 F.3d at 1030 (The agency “might have been able to show that it is reasonable to postpone such analysis until it makes a site-specific proposal. But the Forest Service has provided no explanation.”).

234. *Id.* at 1020 (“Once an agency has an obligation to prepare an EIS, the scope of the analysis of environmental consequences in that EIS must be appropriate to the action in question . . . . If it is reasonably possible to analyze the environmental consequences in an EIS . . . , the agency is required to perform that analysis.” (quoting *Kern v. Bureau of Land Mgmt.*, 284 F.3d 1062, 1072 (9th Cir.2002))).

235. *Id.* at 1026 (“Our holding in [*Lands Council*] was that the analysis in the site-specific EIS at issue was sufficiently supported by studies and on-the-ground analysis. Our opinion nowhere mentioned *Kern*, nowhere mentioned a programmatic EIS, and nowhere suggested that environmental consequences need not be analyzed in a programmatic EIS if it is ‘reasonably possible’ to perform that analysis.”).

236. *Id.* at 1015.

237. *Id.* at 1024–25.

238. *Id.* at 1030.

239. *Karuk Tribe of Cal.*, 681 F.3d at 1041 (M. Smith, J., dissenting)(“[O]ur court has strayed with lamentable frequency from its constitutionally limited role . . . when it comes to construing environmental law.”).

240. *Id.* (citing *San Luis & Delta-Mendota Water Auth. v. United States*, 672 F.3d 676 (9th Cir. 2012)).

241. *San Luis & Delta-Mendota Water Auth.*, 672 F.3d at 685.

this directive to be met only where the water designation “predominantly contributes” to one of these purposes.<sup>242</sup> According to Judge Smith, the Ninth Circuit’s reading of the statute was inexplicable.<sup>243</sup> Judge Smith complained that the “practical impact” of this decision would mean less water for irrigation in the region’s \$20 billion agricultural industry, which has suffered from a lack of water and a 20 to 40-percent unemployment rate.<sup>244</sup>

Judge Smith is clearly unhappy about the imposition of environmental regulations on extractive industries, from timber to mining and agriculture. Far less clear is whether his economic criticism of their effect is appropriate. Despite Judge Smith’s declaration that “no legislature or regulatory agency would enact sweeping rules that create such economic chaos, shutter entire industries, and cause thousands of people to lose their jobs,”<sup>245</sup> Congress is of course free to impose requirements that some consider financial burdens.<sup>246</sup> Judge Smith maintained that his own court, not Congress, was imposing these burdens, but he did not support this claim.

This issue is one of statutory interpretation and the judicial role in ensuring that administrators faithfully implement congressional intent. So long as the reviewing court bases its decisions on an interpretation of the applicable statute, an economically based critique like that of Judge Smith should have little or no influence on the meaning of the law.<sup>247</sup>

242. *Id.* at 705 (“The district court drew an appropriate distinction between actions taken under the WQCP and/or ESA generally (which, as the district court acknowledged, could contribute to ‘primary purpose’ objectives) and actions under the WQCP and/or ESA that ‘predominantly contribut[e] to one of the primary purpose programs.’”) (internal citations omitted).

243. *Karuk Tribe of Cal.*, 681 F.3d at 1041.

244. *Id.*

245. *Id.*

246. One commentator thought Judge Smith’s dissent in *Karuk Tribe* was unconvincing on the point that these cases inappropriately flouted Ninth Circuit precedent, and that no politically accountable body would pass such a ruling. Posting of John Nagle, Professor, University of Notre Dame Law School, to listserv Envlawprofessors, University of Oregon (Jun. 7, 2012, 14:43:11 CST) (on file with author) (noting that “Congress may be willing to approve environmental regulations that cause economic dislocation in one place because voters in the rest of the country favors the environmental goals (see, e.g., the current ‘war on coal’). Or Congress often enacts environmental statutes with general provisions that are then applied to cause economic disruption in certain places (see, e.g., lots of ESA, CWA, and CAA disputes)”).

247. See Holly Doremus, *Ninth Circuit Corrects Itself on Gold Mining and the ESA*, LEGAL PLANET (Jun. 3, 2012), <http://legalplanet.wordpress.com/2012/06/03/ninth-circuit-corrects-itself-on-gold-mining-and-the-esa/> (arguing that Judge Smith’s dissent is “out of line” by “invoking [Swift] and Dante, accusing colleagues of deliberately seeking to stifle industry, and using this dispute as an opportunity to blast a series of unrelated opinions.” Pro-

Further, none of the cases Judge Smith criticized concerned the specific legal question at issue in *Karuk Tribe*, which had to do with the meaning of agency action under the ESA. His dissent therefore is not limited to particular statutes or legal questions and instead reflects a dissenting political view on environmental issues and, in particular, whether economic costs of imposing regulations to protect the environment are worth their benefits. This is a generic issue in environmental law, but it is one that is usually thought of as one for congressional, not judicial, resolution.

### V. KARUK TRIBE'S LEGACY

At least two Ninth Circuit cases decided after *Karuk Tribe* indicate that the legacy of *Karuk Tribe* may be fact-specific and limited to a question of statutory interpretation of the ESA. First, in *Grand Canyon Trust v. U.S. Bureau of Reclamation*, environmentalists argued that the U.S. Bureau of Reclamation violated the ESA by failing to subject a Colorado River dam's annual operating plans (AOP) to ESA consultation concerning the endangered humpback chub.<sup>248</sup> The federal district court in Arizona ruled that the AOPs were not agency actions, thus not triggering Section 7 procedures, reasoning that the Bureau had no discretion to act to benefit the species.<sup>249</sup> The Ninth Circuit affirmed, agreeing that the agency lacked discretion under *Karuk Tribe's* test because the Colorado River Basin Project Act required the Forest Service to approve AOPs under ex-

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fessor Doremus maintained that judicial reasoning should not be tied to "a particular political position but not closely tied to the particular legal context"):

Although Judge Smith's dissent expressed strong political views, the environmental divide is not always so black and white. For example, Judge Smith himself ruled in favor of environmentalists in a challenge to the L.A. County Flood Control District concerning compliance with the district's Clean Water Act permit. *NRDC v. County of Los Angeles*, No. 10-56017, at 26 (9th Cir. filed Aug. 8, 2013), available at <http://cdn.ca9.uscourts.gov/datastore/opinions/2013/08/08/10-56017.pdf> (interpreting the permit and concluding that "monitoring data [at mass-emissions monitoring stations] conclusively demonstrate[d] that the [permittees] are not 'in compliance' with the Permit conditions"). A possible distinction between the *L.A. County* case and the other cases discussed in this article is that *L.A. County* involved neither the imposition of an economic burden on an extractive industry using public lands nor judicial deference to agency decision-making. Instead, the case concerned a straightforward interpretation of a permit requirement. In this context, the court seemed less concerned with alleged economic costs.

248. *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1017 (9th Cir. 2012).

249. *Grand Canyon Trust v. U.S. Bureau of Reclamation*, No. CV-07-8164 PCT-DGC, 2008 WL 4417227, at \*15-16 (D. Ariz. Sept. 26, 2008), *aff'd*, 691 F.3d 1008 (9th Cir. 2012).

isting criteria, leaving the agency no discretion to impose criteria for the benefit of the species.<sup>250</sup>

In a second case, *Natural Resources Defense Council v. Salazar*, environmentalists challenged the Bureau of Reclamation's decision to renew water diversion contracts under the Central Valley Project without conducting an adequate ESA analysis of the effect on delta smelt.<sup>251</sup> The environmentalists claimed that the Bureau's renewal of settlement contracts was an agency action, triggering ESA procedures.<sup>252</sup> At the district court level, the court disagreed, determining that because the Sacramento River settlement contracts required that renewals must conform in "quantity" and "allocation" to the original contracts, the Bureau lacked discretion to impose benefits for the species, and thus renewal was not an agency action under the ESA regulations.<sup>253</sup> A Ninth Circuit panel affirmed, agreeing with the district court's reasoning and concluding that the Bureau's renewal of settlement contracts did not trigger the ESA because the agency's "hands are tied" by its obligation to renew the contracts and its duty to acknowledge senior water rights.<sup>254</sup> Thus, even if *Karuk Tribe* expanded the scope of "agency action" triggering ESA consultation, these cases reflect that there remains considerable room for judicial deference to an agency determination that taking action under an environmental statute is nondiscretionary.

## CONCLUSION

On one hand, the two en banc Ninth Circuit decisions this article examines are clearly reconcilable: *Lands Council* ruled that the NFMA did not require the Forest Service to justify its timber sale decisions with site-specific evidence supporting its claims that wildlife species would not be adversely affected by logging;<sup>255</sup> *Karuk Tribe* interpreted the ESA regula-

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250. Compare *Grand Canyon Trust*, 691 F.3d at 1021 (The Bureau of Reclamation did not have discretion in approving AOPs, and therefore was not subject to ESA consultation.) with *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1026–27 (9th Cir. 2012) (en banc), *cert denied*, 133 S.Ct. 1579 (Mar. 18, 2013) (The Forest Service had discretion in approving NOIs thereby satisfying the ESA's test for "agency action.").

251. *Natural Res. Def. Council v. Salazar*, 686 F.3d 1092, 1095 (9th Cir. 2012) *reh'g en banc granted*, 710 F.3d 874 (9th Cir. 2013).

252. *Id.* at 1098–99.

253. *Natural Res. Def. Council v. Kempthorne*, No. 1:05-cv-01207 OWW SMS, 2009 WL 2849626, at \*2 (E.D. Cal. Sept. 1, 2009) ("This substantially constrains Reclamation's discretion to reduce diversions of Base Supply water for the benefit of the delta smelt or any other reason, by fixing SRS Contractor quantities, allocations, and places of use upon renewal."), *aff'd sub nom. Natural Res. Def. Council*, 686 F.3d at 1092 *reh'g en banc granted*, 710 F.3d 874 (9th Cir. 2013).

254. *Natural Res. Def. Council*, 686 F.3d at 1099.

255. See *supra* notes 84–104 and accompanying text.

tions to trigger consultation requirements, even when the Forest Service seemed to merely acquiesce to dredge mining, subject to conditions the agency imposed.<sup>256</sup> Interpreting NFMA not to require rigorous scientific verification of the Forest Service's species diversity claims is quite distinct from requiring ESA consultation on mining operations in rivers with listed fish. There is no irreconcilable conflict between the holdings of *Lands Council* and *Karuk Tribe*.

On the other hand, the vast differences in the judicial approach evident in these two decisions epitomize a great environmental divide in the Ninth Circuit. The deferential scope of review embraced by Judge Smith in his majority opinion in *Lands Council* and in his dissent in *Karuk Tribe* contrasts sharply with the close judicial oversight evident in the panel decisions in *Lands Council* and *Ecology Center* as well as the majority opinion in *Karuk Tribe*. Ensuing decisions suggest that neither *Lands Council* nor *Karuk Tribe* has worked a sea change in Ninth Circuit review of agency action affecting the environment.<sup>257</sup>

Ninth Circuit courts reviewing agency action retain considerable discretion under the APA to employ either a "hard look" or a "soft glance."<sup>258</sup> This malleability suggests that the best predictor of the nature of the judicial review litigants can expect in Ninth Circuit environmental cases is the composition of the reviewing panel. As the appendix illustrates, Ninth Circuit judges vary considerably in the nature of the judicial review they employed in the cases discussed in this article. So while certainly government defendants will rely on *Lands Council* to call for judicial deference to their scientific expertise, and environmental plaintiffs will cite to *Karuk Tribe* in arguing that agency deference is far less appropriate concerning matters of statutory interpretation, litigants on both sides should pay close attention to the composition of the panel reviewing their cases.

Litigants should also scrutinize Judge Milan Smith's opinions, perhaps especially his dissents. His dissent in *Karuk Tribe*, for example, foreshadowed the Supreme Court's reversals in the *Northwest Environmental Defense Center* and *Pacific Rivers Council* cases.<sup>259</sup> Even though

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256. See *supra* notes 194–207 and accompanying text.

257. See *supra* notes 105–169, 248–254 and accompanying text.

258. See, e.g., David Sive, *The Scope and Depth of Judicial Review of Environmental and Administrative Action*, SA85 A.L.I.-A.B.A. 47, 49 (1996) ("[D]escriptions of the scope of judicial review tend to be mottled and malleable, filled with ifs and buts, and calico characterizations.").

259. See *supra* notes 224–227 and accompanying text (Judge Smith's criticism of *Nw. Envtl. Def. Ctr.*), 228–232 (Judge Smith's criticism of *Pacific Rivers Council*). The Supreme Court did not technically reverse the latter case, but the mere fact that the Court granted certiorari caused the environmentalists to abandon their appeal. See *supra* note 228.

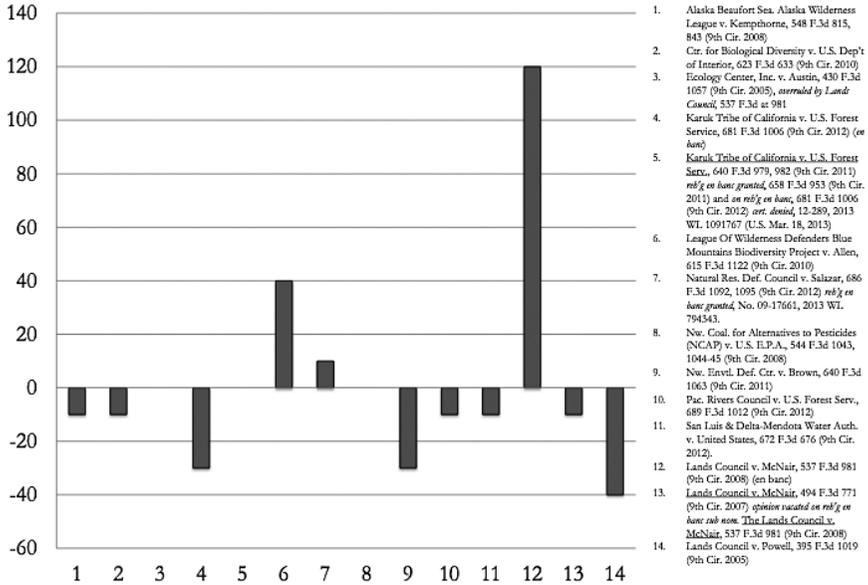
Judge Smith's criticism of those decisions was based more on economic policy analysis than legal doctrine,<sup>260</sup> his critiques may have attracted the attention of at least four members of the Supreme Court necessary to grant certiorari. If so, Judge Smith's dissent in *Karuk Tribe* may be even more consequential than his majority opinion in *Lands Council*.<sup>261</sup> This unanticipated outcome may be the most unsettling result of the deep divide among Ninth Circuit judges concerning their review of environmental agency actions, for it portends a continuing effort on the part of certain members of the Ninth Circuit to use their dissents as vehicles to call for Supreme Court intervention to overturn decisions protecting the environment.

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260. See *supra* notes 218, 219, 222, 223, 229, 238, 242 and accompanying text.

261. The Court granted certiorari in *Nw. Env'tl. Def. Ctr.* on June 25, 2012 and to *Pac. Rivers Council* on March 18, 2013. *Georgia-Pacific W., Inc., v. Nw. Env'tl. Def. Ctr.*, 133 S.Ct. 23 (2012); *U.S. Forest Serv. v. Pac. Rivers Council*, 133 S.Ct. 1582 (2013). The *Karuk Tribe* decision was filed on June 1, 2012. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006 (9th Cir. 2012) (en banc), *cert denied*, No. 12-289, 2013 WL 1091767 (U.S. Mar. 18, 2013)

**Appendix A: Deference score in the cases discussed in this article (+10 for deference, +20 for written opinion; -10 for no deference, -20 for written opinion)**



1. Alaska Beaufort Sea. Alaska Wilderness League v. Kempthorne, 548 F.3d 815, 843 (9th Cir. 2008)
2. Cir. for Biological Diversity v. U.S. Dep't of Interior, 623 F.3d 633 (9th Cir. 2010)
3. Ecology Center, Inc. v. Austin, 430 F.3d 1057 (9th Cir. 2005), *assisted by Lands Council*, 537 F.3d at 981
4. Karuk Tribe of California v. U.S. Forest Service, 681 F.3d 1006 (9th Cir. 2012) (*en banc*)
5. Karuk Tribe of California v. U.S. Forest Serv., 640 F.3d 979, 982 (9th Cir. 2011) *reh'g en banc granted*, 658 F.3d 953 (9th Cir. 2011) and *en reh'g en banc*, 681 F.3d 1006 (9th Cir. 2012), *cert. denied*, 12-289, 2013 WL 1091767 (U.S. Mar. 18, 2013)
6. League Of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen, 615 F.3d 1122 (9th Cir. 2010)
7. Natural Res. Def. Council v. Salazar, 686 F.3d 1092, 1095 (9th Cir. 2012) *reh'g en banc granted*, No. 09-17661, 2013 WL 794583.
8. Nw. Coal. for Alternatives to Pesticides (NCAP) v. U.S. E.P.A., 544 F.3d 1043, 1044-45 (9th Cir. 2008)
9. Nw. Envtl. Def. Ctr. v. Brown, 640 F.3d 1063 (9th Cir. 2011)
10. Pac. Rivers Council v. U.S. Forest Serv., 689 F.3d 1012 (9th Cir. 2012)
11. San Luis & Delta-Mendota Water Auth. v. United States, 672 F.3d 676 (9th Cir. 2012).
12. Lands Council v. McNair, 537 F.3d 981 (9th Cir. 2008) (*en banc*)
13. Lands Council v. McNair, 494 F.3d 771 (9th Cir. 2007) *opinion vacated on reh'g en banc reh'g none*. *The Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008)
14. Lands Council v. Powell, 395 F.3d 1019 (9th Cir. 2005)

**Appendix B: Comparison of Judges Deference Score**

