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The en banc 9th Circuit issued its opinion Friday in Karuk Tribe v. US Forest Service. This opinion brings a welcome reversal of a panel opinion from last April which had ruled in a split decision that the Forest Service did not have to consult with the wildlife agencies before authorizing suction dredging on the Klamath River. Judge Milan Smith wrote for the majority in the panel decision, with Judge William Fletcher in dissent. Those roles were reversed in the en banc opinion, with Judge Fletcher writing for the majority of the 11-judge en banc panel and Judge Smith writing a sharp dissent joined *CORRECTION — joined in part by 3 others, with only 1, Judge Kozinski, joining the over-the-top final section.

I want to make two points about this opinion. First, substantively, it is unquestionably correct. The panel's decision badly misinterpreted the context, potentially allowing federal mission agencies to escape the review by wildlife agencies the ESA quite deliberately requires. Second, the extraordinary rhetoric of the dissent highlights the fact that tea-party tactics are not limited to political debates. Their increasing use by conservative judges is an unfortunate development that threatens to undermine the proper functioning of the judicial branch, not to mention its credibility.

First, the en banc opinion is substantively correct in its reading of the ESA. The Ninth Circuit was right to take this case en banc, because the panel's decision was both wrong and important. The issue in this case was whether the Forest Service was required by section 7 of the ESA to consult with the National Marine Fisheries Service and U.S. Fish and Wildlife Service on the potential impacts of suction dredging and other recreational gold mining activities before allowing them to proceed. The panel said no, characterizing what the Forest Service did as inaction, simply allowing miners to go there merry way.

But that's not what happened, as Judge Fletcher pointed out in his panel dissent and explained again in his opinion for the en banc majority.

To understand the context, you need to know something about both the mining regulations and the ESA. Gold mining on Forest Service lands is governed by three different levels of regulation. Activities that "will not cause" significant surface disturbance can go ahead without any further review. Those that "will likely cause" significant disturbance cannot proceed until the Forest Service approves a detailed plan of operations. For those in a middle group, those that "might cause" significant disturbance, the miner must submit a notice of intent describing the proposed operations for review by the Forest Service, which uses it to decide whether a plan of operations is required. The ESA, in turn, requires that action agencies consult with NMFS or USFWS (depending on the species) to "insure that any action authorized, funded, or carried out" by the action agency will not cause prohibited harm to listed species. The action agency must have some discretion; it is not required to consult where the consultation cannot affect its action. But any time a federal agency permits, provides money for, or takes an action it is not statutorily required to take, where it has any discretion, it must consult if the action may affect a listed species.

The question in this case was whether the Forest Service was required to consult before allowing mining activities that "might cause" significant surface disturbance to go ahead without a plan of operations. Rhetorically, there are two ways to look at those cases: either the Forest Service was simply staying out of the way of miners, or it was affirmatively authorizing proposed mining. But only the latter view comports with reality. As Judge Fletcher's careful review of the factual background makes clear, the notice of intent procedure provided an opportunity for the Forest Service to negotiate with miners about their plans. Those negotiations turned on the environmental impacts, which were reviewed by Forest Service biologists. At the end of the review and discussions with the miners, the Forest Service sent written responses, approving, denying, or approving with conditions the proposed mining operations. The Forest Service was not a passive observer (or ignorer) of the mining operations; it was an active participant in determining where, when, and how mining would be carried out.

Requiring consultation in this context serves the (important) purpose of ESA section 7 without overstepping judicial boundaries. Section 7 implements a Congressional determination that action agencies, which may be deeply committed to their non-environmental missions, should not be the sole judges of what impacts their proposed actions will have on protected species. The ESA requires that federal agencies not jeopardize the continued existence of listed species. That substantive provision would have little effect, however, if action agencies could avoid recognizing the possible impacts of their actions. The consultation requirement, which brings in an agency with the mission of wildlife protection and puts that agency's views on the record, is essential to giving the

substantive standard real bite. Enforcing the consultation requirement, as the latest opinion does, prevents action agencies from evading Congress's command that they look after listed species. That's well within the courts' proper (indeed essential) role.

Nor does the decision impose burdensome new requirements on the Forest Service. The dissent is right that courts are not generally empowered to review agency *inaction*. Judicial oversight of inaction would leave agencies perpetually uncertain where they might be vulnerable to lawsuits, and could interfere with their decisions about how to expend their (always) limited resources. If there truly was not agency action here, of course consultation would not be required. So, for example, if a tipster calls the Forest Service complaining that someone is mining on Forest Service land without permission, the district ranger need not consult with NMFS or FWS about whether or not to investigate the complaint. The ESA remedy, if there was one, would have to be a suit against the miner. But here the Forest Service, through its regulations and its implementation of those regulations, affirmatively injected its personnel into the determination of what mining would occur. Having given itself a role in those decisions, the Forest Service must accept that consultation comes with the territory.

With that, a brief word on Judge Smith's over-the-top dissent. As I've explained, I think Judge Smith is wrong on the consultation question. But much more troubling is the way he approaches the opinion. The job of judges, I would have thought, is to engage in reasoned, *judicious*, discussion of the issues at hand. Of course they will disagree, and of course they will sometimes talk past one another because they see the issues so differently. Judge Smith starts with a quote from Gulliver's Travels, including an accompanying illustration of Gulliver restrained by dozens of tiny ropes. With quotes from Ronald Reagan — "Here we go again" (although the source is not acknowledged) — and Dante — "Abandon hope all ye who enter here" — following, the meaning and tone are clear. Out of control judges are hogtying action agencies.

Although Judge Smith denies any intent to offend his colleagues, his opinion is intentionally provocative. He takes typical tea party rhetoric one step further. It's common these days to see regulatory agencies accused of deliberately overstepping their boundaries to impose unnecessary regulations. Here, Judge Smith accuses the Ninth Circuit, in this case and others, of "[breaking] from decades of precedent and creat[ing] burdensome, entangling environmental regulations out of the vapors." Judge Smith sees this brand of judicial activism as limited to environmental decisions. Its consequence, he says, is "decimat[ion]" of entire industries, including the northwest's logging industry and California agriculture.

This case is a poor fit for this kind of rhetoric, not only because no precedents were ignored

but because no industry is at stake. The mining operations at issue in this case were entirely recreational. And although recreational miners do buy some equipment, they can hardly be said to support an entire industry or thousands of jobs.

But more importantly, rhetoric of this sort is out of place in the judicial enterprise. Explaining to your colleagues why they are wrong on the law is fair game, even if the criticism is strongly phrased. Judge Smith acts entirely within his role as a judge when he presents his view that there was no agency action here. Readers can agree or disagree, based on the arguments put forward.

But invoking Gulliver and Dante, accusing colleagues of deliberately seeking to stifle industry, and using this dispute as an opportunity to blast a series of unrelated opinions, is out of line. Judges should be in the business of rational argument, of seeing and considering the nuances, and of doing their best to make sure that agencies are held to congressional mandates. They should not be aiming their opinions at Fox News, and seeking to shortcut debate with careless and unsupported allegations of judicial activism. Given the dysfunction of our political fora, we need the judiciary to provide a forum where issues are discussed at length, with carefully supported arguments rather than blistering attacks that are closely identified with a particular political position but not closely tied to the particular legal context. No matter what their politics, judges who care about the continued vitality of their institution should resist the temptation to descend to that level.