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

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The Ninth Circuit Court of Appeals, the nation’s largest appellate court, with jurisdiction over fifteen 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 twenty-nine judges but instead only panels of eleven. Thus, 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, that seemed more of a political diatribe than legal criticism and may have been aimed at attracting the attention of the 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.

Introduction

The Ninth Circuit Court of Appeals, the federal appellate court of most of the West, is the nation’s largest circuit court.¹ The court’s geographic scope is immense, covering 1.4 million square miles from Alaska and Hawaii to Arizona.² The court has survived efforts to split it,³

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adopting measures to reduce the time required to decide appeals and implementing an *en banc* procedure in which only eleven of its twenty-nine members sit. The multiplicity of resulting opinions makes *en banc* decisions often necessary to achieve uniformity throughout the sprawling circuit. The court hears from fifteen to twenty five cases *en banc* each year.

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—in an opinion written by Judge Milan Smith—reversed a three-judge panel and ruled that the National Forest Management Act (NMFA) does not require the 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). Some commentators saw this decision as ushering in a new era of more deferential review of agency decisions from the Ninth Circuit in

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4 U.S. Ct. of App. 9th Cir. Rule E(4), 28 U.S.C. ("Pursuant to FRAP 2, the Court also may in its discretion order that any individual case receive expedited treatment"); C. Athena Roussos, DAILY RECORDER, *Handling Expedited Appeals, available at* http://athenaroussoslaw.com/yahoo_site_admin/assets/docs/Daily_Recorder_Column_10.344162517.pdf (last visit Dec. 7, 2012) ("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.") Including senior judges., the Ninth Circuit has forty-five different judges to make up panels.


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

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”), the full court in 2012 reversed a three-judge panel decision and decided 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. Unlike Lands Council, this decision was not unanimous, drawing a three-member dissent, including a bitter disapprobation from the Lands Council author, Judge Smith. The language, tone, and far-ranging scope of Judge Smith’s dissent reflects a deep divide 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 of public land mining—we think the two cases reflect fundamentally different views of the role of courts in

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9 See, e.g., 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 law and under state law before a land exchange could proceed); 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.)


11 Id. at 1039 (M. Smith, J., dissenting).
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 long-settled case law.

This article examines the diverse views concerning judicial scrutiny of agency actions in environmental cases these two Ninth Circuit *en banc* decisions epitomize. Section I discusses the case law establishing close judicial review that led to the *en banc* ruling in *Lands Council*, focusing especially on two decisions it reversed, the three-judge panel decision in the case\(^{12}\) and *Ecology Law Center v. Austin*.\(^{13}\) Section II examines the court’s unanimous opinion in *Lands Council* and its progeny. Section III turns to the *Karuk Tribe* decisions, analyzing both the three-judge panel decision and the *en banc* reversal. Section IV focuses on Judge Smith’s heated dissent, both in terms of what it reveals about the legal and political war that seems to be underway in the Ninth Circuit. Section 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.

**I. Close Judicial Review of Forest Service Actions: Powell, Ecology Center and Lands Council I**

The Ninth Circuit has 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 National Forest Management Act (NFMA), the National Environmental Policy Act (NEPA),\(^{14}\) and the Endangered Species Act (ESA).\(^{15}\) The APA authorizes courts to set aside agency decisions that are “arbitrary, capricious, an abuse of

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\(^{12}\) *Lands Council v. McNair*, 494 F.3d 771 (9th Cir. 2007) (“*Lands Council II*”), rev’d *en banc*, 537 F.3d 981 (9th Cir. 2008).

\(^{13}\) *Ecology Center, Inc. v. Austin*, 430 F.3d 1057 (9th Cir. 2005), overruled by *Lands Council*, 537 F.3d at 981.

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

\(^{15}\) *Karuk Tribe*, 681 F.3d at 1017 (“An agency’s compliance with the ESA is reviewed under the Administrative Procedure Act.”).
discretion, or otherwise not in accordance with law.”16 Although courts give considerable
deer to agencies, especially concerning their “scientific judgments and technical
analyses,”17 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.18

The underlying substantive laws establish standards against which a court reviews agency
actions under the APA.19 For example, NFMA requires the Forest Service to develop a forest
plan for each unit of the national forest system.20 In so doing, the agency must use “a systematic
interdisciplinary approach to achieve integrated consideration of physical, biological, economic,
and other sciences.”21 Subsequent agency actions, such as timber sales, must conform to both
the forest plan and NFMA.22 The Forest Service must also “provide for diversity of plant and
animal communities based on the suitability and capability of the specific land area”23 and
maintain “productivity of the land.”24

NEPA requires the Forest Service to prepare an environmental impact statement (EIS) for
major federal actions “significantly affecting the quality of the human environment.”25 An EIS
must “provide full and fair discussion of significant environmental impacts” and “inform

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16 5 U.S.C. § 706(2)(A) (authorizing courts to set aside agency action that is “arbitrary, capricious, an abuse of
discretion, or otherwise not in accordance with law”).
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 of U.S., 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.”).
20 16 U.S.C. §1604(a). These plans are called “land and resource management plans.”
21 Id. §1604(b).
22 Id. §1604(i).
decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.”

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. To this end, the Forest Service must consult with the Fish and Wildlife Service or the National Marine Fisheries Service before undertaking an agency action that may affect a listed species or its habitat.

The Ninth Circuit has required the Forest Service to closely adhere to these standards. For example, in 2005, in *Lands Council v. Powell* (“Powell”), 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. Likewise, in *Ecology Center v. Austin*, the court decided that the agency’s failure to verify the effect of salvage logging on old growth dependent species, and instead relying on predictions about species viability, violated NFMA. The *Ecology Center* court also determined that the

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26 40 C.F.R. §1502.1 (Council of Environmental Quality’s NEPA regulations).
27 16 U.S.C. § 1536(a)(2) (“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*, 681 F.3d at 1020.
28 *Id.*; NMFS generally manages marine and anadromous species, while the FWS manages land and freshwater species. See 16 U.S.C. § 1532 (15) (“The term ‘Secretary’ means, except as otherwise herein provided, the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970. . . .”); see also *Pac. Coast Fed'n of Fishermen's Associations 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.”); *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 a computer model that used soil samples taken in the forest generally and on aerial photographs 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) (“*Powell*”) (“[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 Center*, 430 F.3d at 1064 (“[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.”).
agency’s failure to address scientific uncertainty violated NEPA.31 These cases led to *Lands Council v. McNair (“Lands Council II”)*, 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 *Lands Council II* panel also concluded that the Forest Service’s failure to address scientific uncertainty concerning the effects of its salvage sales violated NEPA.32

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.”33 The agency did take soil samples in calculating whether the proposed sale would exceed the plan’s fifteen percent threshold, but the samples were from the entire forest, not the project area.34 Instead of site-specific samples, the Forest Service relied on a spreadsheet model to make predictions about the soil conditions in the project area,35 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*.36 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.37

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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.”).
32 *Lands Council II*, 494 F.3d at 777–78.
33 *Powell*, 395 F.3d at 1034 (citing the Regional Soil Quality Standard).
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 date on snags” and thus could not be used to ensure wildlife viability).
36 See id. at 1034 (citing *Kettle Range Conservation Group v. United States 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.
The Ninth Circuit reversed,\textsuperscript{38} 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.\textsuperscript{39} The panel concluded that relying on spreadsheet models without “on-site spot verification of the model’s predictions” violated NFMA.\textsuperscript{40}

Following \textit{Powell}, the Ninth Circuit decided \textit{Ecology Center} in 2005, which involved a challenge to a timber-thinning project, the Lolo National Forest Post Burn Project.\textsuperscript{41} 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.”\textsuperscript{42} The Forest Service maintained that it was not required to monitor the effect 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.\textsuperscript{43}

The district court concluded that the Forest Service’s decision to proceed with the timber sale was not arbitrary and capricious.\textsuperscript{44} 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

\textsuperscript{38} Judge Gould wrote the three-judge unanimous majority opinion, joined by Judge Wardlaw and Judge Canby. \textit{Powell}, 395 F.3d at 1022.

\textsuperscript{39} \textit{Id.} at 1035.

\textsuperscript{40} \textit{Id.}

\textsuperscript{41} \textit{Ecology Center}, 430 F.3d at 1063.

\textsuperscript{42} \textit{Id.;} 16 U.S.C. §1604(g)(3)(B).

\textsuperscript{43} \textit{Ecology Center}, 430 F.3d at 1063.

\textsuperscript{44} \textit{Id.}
analysis—was arbitrary. 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.” 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 old-growth dependent species like the black-backed woodpecker. 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.” According to the majority, the Forest Service assumed beneficial results as a fact, instead of treating the issue as “an untested and debated hypothesis.” 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. Not doing so, the court concluded, violated NEPA’s requirement that the agency meaningfully address known sources of scientific uncertainty in its EIS.

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45 Ecology Center, 430 F.3d 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.”).
47 Id. at 1065.
48 Id.
49 Id.
50 Id.
51 See id (quoting Seattle Audobon 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
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.\(^2\) 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.\(^3\) She criticized the majority for requiring not only that on-site data exist in all circumstances, but that it had to meet a test of sufficiency.\(^4\) 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”\(^5\) in judicial review of Forest Service actions.\(^6\) Her dissent would prove influential in the *Lands Council* litigation.

In *Lands Council II* 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 “dense, crowded” stands to historic conditions of open ponderosa pine and Douglas-fir stands.\(^7\) Environmentalists claimed that the Forest Service failed to prove that the method it used to ensure wildlife viability was reliable because the studies on which the Forest Service relied did not conclude that the logging would benefit dependent

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\(^2\) Ecology Ctr., 430 F.3d at 1072 (McKeown, J., dissenting), overruled by The Lands Council v. McNair, 537 F.3d 981 (9th Cir. 2008).

\(^3\) 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.”).

\(^4\) Id.

\(^5\) Id. at 1072

\(^6\) 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.”).

\(^7\) Id. at 774.
sensitive species, including the flammulated owl, northern goshawk, the fisher, and the western toad, which they alleged was a violation of NFMA.\textsuperscript{58} The environmentalists also argued that the Forest Service failed to address uncertainty regarding wildlife viability, violating NEPA.\textsuperscript{59} 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 projects ensured wildlife viability.\textsuperscript{60}

The Ninth Circuit again reversed, concluding that the Forest Service’s studies were insufficient under NFMA to verify its hypothesis that logging was beneficial to dependent species.\textsuperscript{61} 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.\textsuperscript{62} 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 habitat.\textsuperscript{63} 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.\textsuperscript{64}

The Ninth Circuit determined that this study fell short of the requirements of \textit{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

\begin{itemize}
\item \textsuperscript{58} \textit{Lands Council II}, 494 F.3d at 776.
\item \textsuperscript{59} \textit{Id.}
\item \textsuperscript{60} The Lands Council v. McNair, CV06-0425-EJL, 2006 WL 5883202 (D. Idaho Dec. 18, 2006) ("\textit{Lands Council I}"), 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.")
\item \textsuperscript{61} \textit{Lands Council II}, 494 F.3d at 776.
\item \textsuperscript{62} See \textit{id.}
\item \textsuperscript{63} \textit{Id.}
\item \textsuperscript{64} \textit{Id.}
\end{itemize}
merely resulted in an “encouraging implication” that habitat would be maintained, not the verified hypothesis necessary to demonstrate the reliability of its predictions.\textsuperscript{65} The court observed that other studies the agency conducted on the wildlife effects of the logging “fell even shorter” of meeting the \textit{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.\textsuperscript{66} This lack of on-the-ground analysis was, the panel concluded, a NFMA violation.\textsuperscript{67}

\textit{Lands Council II} 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.\textsuperscript{68} Relying on \textit{Ecology Center}, the panel stated that an EIS must include analysis that meaningfully addresses scientific uncertainties, not treat a prediction as a fact without any supporting evidence.\textsuperscript{69} 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.\textsuperscript{70} 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.\textsuperscript{71}

Judge Smith specially concurred in \textit{Lands Council II}, arguing, as Judge McKeown had in her \textit{Ecology Center} dissent,\textsuperscript{72} that \textit{Ecology Center} was wrongly decided because it extended

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\item \textsuperscript{65} \textit{Id.} (quoting \textit{Ecology Law Center}, 430 F.3d at 1064).
\item \textsuperscript{66} \textit{Id.} at 777.
\item \textsuperscript{67} \textit{Id.}
\item \textsuperscript{68} \textit{Id.}
\item \textsuperscript{69} \textit{Id.}
\item \textsuperscript{70} \textit{Id.} (“There is no discussion of the uncertainties regarding wildlife and their use of these habitats following treatment.”).
\item \textsuperscript{71} \textit{Id.}
\item \textsuperscript{72} \textit{Ecology Center}, 430 F.3d at 1077 (McKeown, J., dissenting).
\end{itemize}
“arbitrary and capricious” review beyond its appropriate role. However, because *Ecology Center* was binding precedent, he acknowledged that it controlled the outcome of *Lands Council II*. However, Judge Smith questioned whether, without this “faulty” precedent, the majority in *Lands Council II* could reach the result it did. He announced that he would overrule *Ecology Center* should the occasion arise. Moreover, Judge Smith complained about the economic burden that the *Ecology Center* majority’s “incorrect construction” of environmental law imposed on the timber industry. Thus, although Judge Smith’s hands were tied in the *Lands Council II* 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. “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. In Judge Ferguson’s view, the reviewing court exercises its proper decision-making role beyond the *Ecology Center* precedent, highlighting what he considered the decision’s alarming economic implications.

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73 *Lands Council II*, 494 F.3d at 786 (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 (McEown, J., dissenting)).
74 *Lands Council II*, 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.
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 cases.” Instead, judicial scrutiny is simply a response to unlawful agency action.  

Thus, in these three decisions, the Ninth Circuit refused to allow the Forest Service to rely on unverified conclusions about the effects of 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 to 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 demonstrate that some judges believed imposition of such obstacles oversteps the court’s role, setting the stage for the Lands Council en banc reversal.

II. Lands Council and its Legacy

Responding to these decisions, in Lands Council v. McNair, a unanimous en banc panel reversed the Lands Council panel decision, overruled Ecology Center, and narrowed its interpretation of Powell. 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.” This language seemed to

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79 Id. at 786–87.
80 Id.
81 Lands Council, 537 F.3d at 984.
82 Id. at 988.
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 indicated it would, as “hard look” review in environmental cases appears to have survived in the Ninth Circuit.

A. Lands Council’s Clarification of Environmental Jurisprudence

In January 2008, the court announced that a majority of non-recused active Ninth Circuit judges voted to review Lands Council II en banc.83 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.”84 For a 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.”85 Such role, Judge Smith declared, is an improper role for judicial review, and he proceeded to refine its role in judicial review under both NFMA and NEPA.

Concerning NFMA, the court rejected Land Council’s 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,86 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.’”87 The en banc court identified three fatal errors in Ecology Center.

83 Lands Council v. McNair, 512 F.3d 1204 (9th Cir. 2008) (“Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Circuit Rule 35-3.”).
84 Lands Council, 537 F.3d at 984.
85 Id. at 988.
86 Lands Council II, 494 F.3d at 777–78.
87 Lands Council, 537 F.3d at 990 (quoting Ecology Ctr., 430 F.3d at 1064)
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.\(^{88}\) 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 *Ecology Center* majority.\(^{89}\)

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.\(^{90}\) Although there is no question the Forest Service must provide for wildlife viability,\(^{91}\) 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.\(^{92}\) 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.\(^{93}\) 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.\(^{94}\)

Third, the court decided that the panel ignored the APA’s arbitrary and capricious standard of review, which requires affording 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

\(^{88}\) *Id.*

\(^{89}\) See *supra* notes 53-56 and accompanying text.

\(^{90}\) 537 F.3d at 991.

\(^{91}\) *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)).

\(^{92}\) *Id.* at 992.

\(^{93}\) *Id.* at 991.

\(^{94}\) *Id.*
wildlife viability conclusion. The *en banc* panel claimed that *Ecology Center* “illustrates the consequences” of this failure to appropriately defer to an agency by improperly engaging in “fine-grained judgments” of Forest Service reports. 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. This type of close review was, according to the *en banc* panel, not the “proper role” under the APA. Instead, NFMA requires only that 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. Overruling *Ecology Center*, the court concluded that the Forest Service’s reliance on studies the agency “deemed 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.

Turning to 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.” 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

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95 Id. at 992 (“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 Id. at 993 (quoting *Ecology Center*, 430 F.3d at 1077 (McKeown, J., dissenting)).
98 Id. at 933 (quoting *Ecology Center*, 430 F.3d at 1070 (majority opinion)).
99 Id. at 994.
100 Id.
101 Id.
102 Id. at 1001.
agency and perhaps prevent it from taking action. The *Lands Council* full 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 and wildlife with studies supporting its claim that the project would result in long-term wildlife habitat enhancement.

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 Legacy**

Despite its sweeping critique of the court’s environmental jurisprudence, the specific rulings of the *Lands Council* court have actually produced significant changes in the case law, an understandable result because the court did not, for example, actually 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*

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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, *ONDA v. Freeborn* (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 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.”)
Council, which the Court announced in the 1971 Citizens to Preserve Overton Park, Inc. v. Volpe decision. 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, that some ensuing opinions track the Lands Council en banc rationale more than others is hardly surprising. 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. 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.

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. The environmentalists argued that the Forest Service failed to provide sufficient information to show that the project would comply with NFMA and the applicable forest plan by “clearly result[ing] in greater assurance of long-term maintenance of

106 The 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 155–68.  
109 Id. at 1126.
habitat,” before allowing logging specifically in late successional reserve, or old-growth trees.\footnote{Id. at 1130–31 (quoting Standards and Guidelines for Management of Late–Successional and Old–Growth Forest Related Species within the Range of the Northern Spotted Owl C–13 (April 13, 1994)).} 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.\footnote{League of Wilderness Defenders-Blue Mountains Biodiversity Project v. Weldon, CIV. 07-6283-HO, 2008 WL 4279807 (D. Or. Sept. 11, 2008), rev’d and vacated sub nom., League of Wilderness Defenders, 615 F.3d at 1126.} In another opinion by Judge Smith, the Ninth Circuit reversed, echoing some of the principles from the \textit{en banc} panel decision of \textit{Lands Council}.\footnote{League Of Wilderness Defenders, 615 F.3d at 1130.}

Judge Smith initially noted that his \textit{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.\footnote{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,’ . . . and found that the ‘[p]roposed activities would not only reduce risk of large-scale disturbance, but would accelerate the ability of the [late successional reserve] to play a role for which late-successional reserves were established’”).} Consequently, the court gave deference 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.\footnote{Id. at 1134.} The court rejected calls for closer scrutiny under NFMA, repeating the deferential “no clear error of judgment” standard articulated in \textit{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.”\footnote{Id.} Thus, the court concluded, it “should be loathe to second guess their efforts absent some glaring error, oversight, or arbitrary action.”\footnote{Id.} This type of “second-
guessing of the Forest Service,” the court maintained, the *Lands Council en banc* decision aimed to “foreclose.”\(^{116}\)

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 “detailed, quantitative information about past projects.”\(^{117}\) Instead, the Forest Service may use the “aggregate effects” approach, as described in a 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.”\(^{118}\) The court concluded that the Forest Service’s twenty-three 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,\(^{119}\) satisfied NEPA’s “hard look” standard.\(^{120}\)

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

\(^{116}\) *Id.* at 1131.

\(^{117}\) *Id.* at 1137.


\(^{119}\) *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 1136–37.
NFMA. 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. 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 effects. 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. The court also concluded that it was reasonable for the Forest Service to address the project’s effects of herbicide use on a watershed-wide scale instead of a site-specific scale.

Finally, the court concluded that the Forest Service need not affirmatively address how its project comply with all requirements in environmental law, rejecting the plaintiff’s argument that NEPA required the Forest Service to consider “each and every” requirement under the forest plan when approving a project. 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

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121 League of Wilderness Defenders/Blue Mountains Biodiversity Project v. U.S. Forest Serv., 3:10-CV-01397-SI, 2012 WL 3255083 (D. Or. Aug. 10, 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 However, the court did decide that the Forest Service’s cumulative impacts analysis violated NEPA. Id. (concluding the Forest Service “did not adequately evaluate the cumulative impacts that the Project might have when considered in conjunction with other actions”).
123 Id. (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.
125 Id. (“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.
much” 127 from the EIS process and run counter to the regulatory requirement that an EIS “shall be kept concise.”128 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.129

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.130 The case involved a challenge to BLM’s approval of a land exchange in southern Arizona between the federal government and a mining company, Asarco, under which Asarco would acquire fee simple to the 10,976 acres of land, which provided important habitat for species like the desert bighorn sheep and endangered desert tortoise.131 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 1872 General Mining Law.132 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.133 The BLM’s

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127 Id.
128 Id.; 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 Oregon Natural Desert Ass’n v. Tidwell, 716 F. Supp. 2d 982, 1008 (D. Or. 2010) (citing Lands Council to conclude that 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.”) However, plaintiffs still won on their NFMA claim because the court ruled that the Forest Service had not demonstrated that it had data or analysis to show it had complied with the Forest Plan [LRMP] standards.)
130 Center for Biological Diversity v. United States Department of the Interior, 623 F. 3d 633, 636 (9th Cir. 2010) (holding that BLM violated NEPA by failing to take a “hard look” at environmental impacts of proposed land exchange when it assumed in its EIS that mining would be the same whether or not a mining plan of operations would be required).
131 Id.
132 Id.
133 Id.
environmental analysis of this exchange assumed there would be no difference in mining whether or not the exchange occurred because Asarco already held mining federal claims.134

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.135 The district court ruled against the environmentalists.136 The Ninth Circuit, with Judge Fletcher writing for the majority, reversed, determining that BLM had not taken a “hard look” at environmental effects of the land exchange and enjoined the proposal.137 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.138 The majority mentioned Lands Council only at the end of the decision and only to distinguish it in response to a vigorous dissent.139

Judge Richard Tallman dissented, arguing that the majority’s opinion was “irreconcilable” with Lands Council because it expanded the “scope of judicial oversight and scrutiny of agency action.”140 He accused the majority of “second-guessing” the agency in a highly specialized area.141 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

134 Id. at 643.
136 Ctr. for Biological Diversity v. United States Department of the Interior, 623 F. 3d 633, 636 (9th Cir. 2010).
137 Id. 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.
140 Ctr. for Biological Diversity, 623 F. 3d 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.
simply disagreed on the outcome of applying that standard.\textsuperscript{142} Importantly, according to the majority, even under \textit{Lands Council} a reviewing court was “compelled \textit{not} to defer-when an agency acted arbitrarily and capriciously.”\textsuperscript{143} 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.”\textsuperscript{144} The majority’s interpretation of \textit{Lands Council} suggested that the en banc opinion only restated the standard of review the APA and had no effect at all on NEPA analysis.

Other courts have viewed \textit{Lands Council} as not limiting judicial review from inquiring even into the adequacy of the Forest Service’s methodology, while giving effect to \textit{Lands Council} on other claims. For example, in \textit{Native Ecosystems Council v. Weldon}, environmentalists challenged the Custer National Forest’s Beaver Creek Landscape Project, which involved logging, road construction, and prescribed burning, as violating both NFMA and NEPA.\textsuperscript{145} The court laid out the standard of review of Forest Service actions from \textit{Lands Council}, noting that “it is unnecessary to ‘impose bright-line rules on the Forest Service regarding particular means that it must take in every case to show . . . that it has met the NFMA’s requirements.’”\textsuperscript{146} Environmentalists claimed that the Forest Service improperly measured the effect of road density on elk habitat in its EIS, which applied a unit of analysis that evaluated

\textsuperscript{142} \textit{Ctr. for Biological Diversity}, 623 F. 3d at 650.

\textsuperscript{143} \textit{Id.}

\textsuperscript{144} \textit{Id.} (“Our colleague writes that our opinion is ‘based on a distaste for the particular industrial goals at issue.’ Dissent at 659. 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.”).

\textsuperscript{145} See \textit{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”) \textit{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.)

\textsuperscript{146} \textit{Id.} at 1212 quoting \textit{Lands Council}, 537 F.3d at 993–94, “[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.”).
effects on habitat at an inappropriate scale. 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.” Instead, with no explanation whatsoever, the agency ignored this recommendation and measured the effect of the project on elk habitat on the scale of the project area and Ashland Ranger District levels. 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 and the concededly “best available science.” 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. The court rejected this as “too little, too late” and held that an “afterthought of litigation” did not cure the EIS.

However, the court in Weldon 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. 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. This result thus reflected the survival of

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.
“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.155

Other Ninth Circuit decisions have invoked Lands Council outside of the context of Forest Service decisions. For example, Nw. Coal. for Alternatives to Pesticides (NCAP) v. U.S. E.P.A. involved a dispute between the majority and dissent about the level of scrutiny that the court should afford the EPA in setting pesticide tolerances.156 Environmental groups petitioned for Ninth Circuit review of EPA’s regulations establishing tolerance levels for the amount of pesticide residual 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.”157 EPA did not apply the ten-fold presumptive margin of safety to any of the seven pesticide residuals it established; instead, it applied a three-fold margin of safety for four pesticides and failed to supply a child safety margin at all for three pesticides.158

The plaintiff 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

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155 Id. at 1210 (“But the Forest Service's analysis of elk habitat in the Final Environmental Impact Statement (“EIS”) 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 only Forest lands, and (3) in failing to analyze road density during Project implementation.”); See also Oregon Natural Desert Ass'n v. Bureau of Land Mgmt., 625 F.3d 1092, 1121 (9th Cir. 2010) (holding that BLM had a duty in its EIS analyzing impacts 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 Alternatives to Pesticides (NCAP) v. U.S. E.P.A., 544 F.3d 1043, 1044-45 (9th Cir. 2008).

157 Id. at 1046; 21 U.S.C. § 346a(b)(2)(C) (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 NCAP, 544 F.3d. at 1048.
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.” 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, and that the agency adequately explained why its models were reliable. NRDC also argued that the agency failed to explain why toxicological data supported its deviation from the presumptive standard regarding three of the pesticides. EPA merely stated in its final order that toxicological data did not demonstrate “greater sensitivity to the young” or fetal abnormalities. The court ruled that EPA failed to provide sufficient evidence that the lower safety level would account for risks to children and infants. 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.

Judge Sandra Ikuta concurred in part but dissented from the court’s latter conclusion, relying on Lands Council and calling for greater deference to EPA. She noted that “Lands Council prohibits [the court] from indulging in the temptation to ‘act as a panel of scientists,’” emphasizing that a court may not require an agency “to always demonstrate the reliability of its scientific methodology.”

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159 Id.
160 Id.
162 Id. (“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.
164 Id. (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 156.
165 Id. at 1060.
166 Id. at 1060 (quoting Lands Council, 537 F.3d at 988).
167 Id.
judgment;\textsuperscript{168} thus, under \textit{Lands Council} the NCAP court should have deferred to EPA’s decision to deviate from the standard margin of safety.\textsuperscript{169}

These decisions demonstrate that judges often invoke \textit{Lands Council} for the principles of deference the decision announced, not for changes in the Ninth Circuit’s substantive environmental jurisprudence under NFMA or NEPA, such as not requiring the agency verify its methods for testing wildlife viability in timber projects with on-the-ground data. The courts’ use of \textit{Lands Council} in ensuing later dissenting and concurring opinions demonstrates that there is considerable disagreement as to how reviewing courts should apply the \textit{en banc} panel’s interpretation of the judicial deference owed 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 \textit{en banc} decision, \textit{Karuk Tribe of California v. U.S. Forest Service (“Karuk Tribe III”)},\textsuperscript{170} clearly illustrated this divide, in both its majority and dissenting opinions, concerning the proper role of reviewing courts in environmental decisions.

\textbf{III. The Karuk Tribe Panel and \textit{En banc} Decisions}

In \textit{Karuk Tribe of California v. U.S. Forest Service (“Karuk Tribe I”)}, the tribe challenged the Forest Service’s regulation of suction dredge mining in the Klamath River, which

\textsuperscript{168} \textit{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.”).

\textsuperscript{169} In another Ninth Circuit dissenting opinion, Judge Carlos Bea called for greater deference under \textit{Lands Council} than the majority gave to the Forest Service’s methodology for noise analysis, on a decision to allow Shell to drill exploratory oil wells in the Alaska Beaufort Sea. \textit{Alaska Wilderness League v. Kempthorne}, 548 F.3d 815, 843 (9th Cir. 2008) (Bea, J., dissenting) (“If one substitutes the Forest Service’s sufficient statistical modeling simulation in \textit{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 \textit{Lands Council} for the purportedly necessary on-site noise measurement here, one cannot help but conclude the panel majority here is overruling \textit{Lands Council sub silentio}.”). \textit{Alaska Wilderness League v. Kempthorne}, 571 F.3d 859 (9th Cir. 2009) (subsequently dismissed as moot when Shell withdrew its drilling plans).

\textsuperscript{170} \textit{Karuk Tribe}, 681 F.3d at 1006.
is designated coho salmon critical habitat under the ESA.\textsuperscript{171} Forest Service regulations require
miners to submit a notice of intent (NOI) to mine the local ranger before engaging in an activity
that might disturb surface resources.\textsuperscript{172} If the ranger determines the activity is “likely to
significantly disturb surfaces resources,” the miner must obtain a Forest Service-approved plan
of operations before mining; otherwise, under the regulations it may proceed to mine.\textsuperscript{173} In 2004,
the Forest Service accepted four NOIs for suction dredge mining in the Klamath River without
requiring that the miners—the so-called “New 49ers”—to submit a plan.\textsuperscript{174}

The 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 an “agency action”
triggering the ESA by effectively authorizing the mining.\textsuperscript{175} The district court rejected this
argument, ruling that the tribe failed to demonstrate that the Forest Service’s NOI approval was
an “agency action” because, among other things, the miners, not the agency, were undertaking
the action.\textsuperscript{176} The court thought the process was more like review than an affirmative
“authorization” and observed that the activity would be approval undertaken under mining rights
previously granted by the 1872 General Mining Act.\textsuperscript{177}

Karuk Tribe of California v. U.S. Forest Serv., 640 F.3d 979 (9th Cir. 2011) on reh’g en banc, 681 F.3d 1006 (9th
Cir. 2012) and rev’d and remanded sub nom. Karuk Tribe of California v. U.S. Forest Serv., 681 F.3d 1006 (9th Cir.
2012). The tribe also filed NEPA and NFMA claims; however, the district court denied these claims, and the tribe
did not appeal. \textit{Karuk Tribe II}, 640 F.3d at 986.

\textsuperscript{172} Karuk Tribe II, 640 F.3d at 984 (quoting 36 C.F.R. §228.4(a)); 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).

\textsuperscript{173} Id. at 985 (quoting 36 C.F.R. §228.5); 36 C.F.R. §228.4(a)(2) (if the ranger determines a plan is required, the
ranger must notify the operator within fifteen days; if the ranger does not request that the operator submit a plan, the
operator may proceed with the activity)).

\textsuperscript{174} Karuk Tribe I, 379 F.Supp.2d at 1084–85.

\textsuperscript{175} Id. at 1100–01; 50 C.F.R. §402.2 (agency actions under the ESA include actions “authorized” by Federal
agencies”).

\textsuperscript{176} Karuk Tribe I, 379 F.Supp.2d at 1101.

\textsuperscript{177} Id.
A Ninth Circuit panel affirmed in another opinion authored by Judge Smith, who ruled that the NOI process was not an “agency action” sufficient to trigger the ESA.\textsuperscript{178} 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.\textsuperscript{179} The court relied on another Ninth Circuit decision, \textit{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.\textsuperscript{180} 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.\textsuperscript{181} Since in this case federal mining law provided a “right, not [a] mere privilege”\textsuperscript{182} to mine, the court decided that the Forest Service’s NOI process did not authorize the mining, and the NOI was thus not an agency action triggering section 7 of the ESA.\textsuperscript{183}

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 whether, or

\begin{itemize}
\item \textsuperscript{178} \textit{Karuk Tribe II}, 640 F.3d at 990.
\item \textsuperscript{179} \textit{Id}. at 990.
\item \textsuperscript{180} \textit{W. Watershed Project v. Matejko}, 468 F.3d 1099, 1108 (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).
\item \textsuperscript{181} When a contract supplies the authorization, the action is already authorized by that source of law, and not the agency. \textit{Karuk Tribe II}, 640 F.3d at 990 (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 was not an agency action because the rights-holder had a contractual right to develop )).
\item \textsuperscript{183} \textit{Id}. at 992 (“Where the agency is not the authority that empowers or enables the activity, because a preexisting law or contract grants the \textit{right} to engage in the activity subject \textit{only} to regulation, the agency’s decision \textit{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.”).
\end{itemize}
under what conditions” to allow an action. 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. First, the agency used discretion by establishing criteria to protect coho salmon that conditioned the approval of NOIs. Second, the agency acted in a discretionary manner when it rejected one of the NOIs because it provided insufficient protection of fisheries habitat. Finally, the Forest Service employed discretion when applying different criteria to protect fishery habitat in various districts in the Klamath National Forest. Consequently, Judge Fletcher concluded that the agency’s approval of mining NOIs was an agency action for purposes of the ESA because the agency retained sufficient discretion to decide whether to allow the mining and under what conditions.

Judge Fletcher also maintained that NOI approval met the other trigger for ESA consultation because the approved mining “may affect” critical habitat. Suction dredge mining necessarily includes surface disturbance, and the record demonstrated that the consequences of dredging may adversely affect listed salmon. Thus, in Judge Fletcher’s view, the Forest Service violated the ESA by not consulting on its approval of the NOIs.

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184 Id. at 996 (Fletcher, J., dissenting).
185 Id. at 1008.
186 Id.
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 complies, 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.”)
189 Id.
190 Id.
191 Id. at 1009–10.
192 Id. at 1011.
The tribe petitioned for rehearing *en banc* and, after granting review, the full court reversed the panel decision.\(^{193}\) The *en banc* court issued a 7-4 decision, unlike the unanimity in *Lands Council*, and essentially swapped Judge Smith’s majority for Judge Fletcher’s dissent,\(^{194}\) deciding that the Forest Service must consult with the appropriate wildlife agency before allowing mining under the NOI process.\(^{195}\) 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.\(^{196}\) The court 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.\(^{197}\)

The full 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.\(^{198}\) Judge Fletcher reasoned that since the ESA extends to actions even partly authorized by the agency,\(^{199}\) and that Congress restricted the right to mine

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\(^{193}\) [Karuk Tribe of California v. U.S. Forest Serv.](https://www.casesonlaw.com) 658 F.3d 953 (9th Cir. 2011) (“Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Circuit Rule 35–3.”).

\(^{194}\) [Karuk Tribe](https://www.casesonlaw.com) 681 F.3d at 1011.

\(^{195}\) *Id.* at 1022.

\(^{196}\) *Id.* at 1022 (noting that although the 2005 amendments to the regulation, 36 C.F.R §228.4(a)(2), stated that notification must occur “if approval of a plan of operations is required” there is 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.* at 1022 (“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; 50 C.F.R. §402.02 (agency action under the ESA includes “all private activities authorized ‘in part’ by a federal agency”).
by requiring that mining be consistent with environmental regulation,\textsuperscript{200} the Forest Service had regulatory authority to approve mining, even though other laws also apply to the activity.\textsuperscript{201}

The \textit{en banc} panel also determined that the NOI process met the ESA standard of being an action “in which there is discretionary involvement or control” with the capacity to benefit listed species.\textsuperscript{202} The Forest Service had the capability of influencing the activity to the benefit of listed species by approving or disapproving NOIs based on conditions to protect habitat.\textsuperscript{203} 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 in concluding that approval of an NOI was in fact an agency action, triggering section 7 procedures.\textsuperscript{204}

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 effects of mining on the salmon and demonstrated that the mining “may affect” the salmon.\textsuperscript{205} The court concluded that the mining proposals triggered ESA consultation, noting that the practical burden this obligation imposed on the Forest Service “need not be great,”\textsuperscript{206} a point with which Judge Smith, in dissent, sharply disagreed.\textsuperscript{207}

\textbf{IV. Judge Smith’s Dissent in \textit{Karuk Tribe}}

\textsuperscript{200} \textit{Karuk Tribe}, 681 F.3d at 1023; 16 U.S.C. §478 (miners on forest land “must comply with the rules and regulations covering such national forests”).

\textsuperscript{201} \textit{Karuk Tribe}, 681 F.3d at 1024.

\textsuperscript{202} \textit{Karuk Tribe}, 681 F.3d at 1024 (quoting 50 C.F.R. §402.03 of the Forest Service’s regulations).

\textsuperscript{203} \textit{Id}.

\textsuperscript{204} \textit{Id}. at 1025–26.

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

\textsuperscript{206} \textit{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).

\textsuperscript{207} \textit{Karuk Tribe}, 681 F.3d at 1039 (M. Smith, J., dissenting) (“the majority effectively shuts down the entire suction dredge mining industry in the states within our jurisdiction”).
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 environmental cases. Beginning his dissent with an image from Jonathan Swift’s *Gulliver’s Travels*, he claimed that the majority’s opinion, along with several other Ninth Circuit cases, “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 thin air by such decisions.” 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.” However, when he went far beyond legal matters, he was joined only by Chief Judge Kozinski, in a political diatribe entitled “Brave New World.”

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. First, Judge Smith claimed that the NOI was merely an “information-gathering tool,” not an affirmative authorization such as a permit or license. Second, he thought the action was “inaction” because it did not involve an “affirmative step” that allowed private conduct to occur. 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

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208 *Id.* at 1031.
209 *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063 (9th Cir. 2011); *Pac. Rivers Council v. U.S. Forest Serv.*, 689 F.3d 1012, 1036 (9th Cir. 2012); *San Luis & Delta-Mendota Water Auth. v. United States*, 672 F.3d 676, 690 (9th Cir. 2012).
210 *Karuk Tribe*, 681 F.3d at 1039 (M. Smith, J., dissenting)
211 *Id.* at 1031–39.
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.*
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”).
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. 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, claiming it would make the Forest Service “impotent to meaningfully address low impact mining” and would effectively shut down the suction-dredge mining industry. According to Judge Smith, ESA consultation can delay projects for months, even years, increasing expenses and leaving most miners without the “resources nor the patience” to pursue consultation, resulting in job losses while companies must either await “lengthy and costly” ESA process or ignore the process at their legal risk. 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.

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.” These cases spotlight the ongoing environmental conflict in the Ninth Circuit

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216 Id. at 1038.
217 Id. at 1038–39.
218 Id. at 1039.
219 Id. at 1039.
220 Id. at 1039–40.
221 Id. at 1041.
222 Id. at 1041.
concerning both deferential review of agency decisions and the imposition of economic burdens on extractive industries.\textsuperscript{223}

First, Judge Smith remarked that in \textit{Northwest Environmental Defense Center v. Brown},\textsuperscript{224} 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.\textsuperscript{225} According to Judge Smith, requiring millions of new Clean Water Act permits would accelerate the decline in unemployment rates that the industry already has experienced.\textsuperscript{226} He lamented that because rural governments receive funding from the timber industry, the case would result in shorter school days, fewer police, and library closures.\textsuperscript{227}

Second, Judge Smith claimed that another decision by Judge Fletcher, the 2012 \textit{en banc} decision of \textit{Pacific Rivers Council v. United States Forest Service},\textsuperscript{228} 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.\textsuperscript{229} This

\textsuperscript{223} Id. at 1041 (“My intent is solely to illuminate the downside of our actions in such environmental cases.”).
\textsuperscript{224} Nw. Envtl. Def. Ctr. v. Brown, 640 F.3d 1063 (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. Envtl. Def. Ctr., No. 11-338 2013 WL 1131708 (U.S. Mar. 20, 2013) (holding that NPDES permits are not required for logging road discharges and deferring to EPA’s interpretation under [\textit{Auer v. Robbins}, 519 U.S. 452 (1997)] that “the regulation extends only to traditional industrial buildings such as factories and associated sites, as well as other relatively fixed facilities” and not to timber harvesting).
\textsuperscript{225} Karuk Tribe, 681 F.3d at 1040.
\textsuperscript{226} Id.
\textsuperscript{227} Id.
\textsuperscript{228} Pac. Rivers Council v. U.S. Forest Serv., 668 F.3d 609, 617 (2012) \textit{withdrawn and superseded on denial of reh’g en banc}, 689 F.3d 1012, 1026 (9th Cir. 2012) (holding 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.”) \textit{cert granted}, U.S. Forest Serv. v. Pac. Rivers Council, No. 12-623, 2013 WL 1091766.
\textsuperscript{229} Karuk Tribe, 681 F.3d at 1040-41.
complaint echoed the dissent’s concern in Pacific Rivers Council, in which Judge Randy Smith 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. In his view, Lands Council “irrevocably changed the legal landscape by setting forth the high level of deference owed by courts to agency action.”

The majority, however, concluded that the agency must provide information on individual species as soon as “reasonably possible” and did not see Lands Council as an obstacle to this holding. The court noted that under Kern v. Bureau of Land Management, NEPA analysis on particular impacts is required as soon as reasonably possible, and concluded that Lands Council did not overrule this holding. Under that test, the agency’s EIS, recommending amendments to the Forest Plan in the Sierra Nevada Mountains, should have included information that was already available on some of the 61 individual fish species present in the Sierras, which it had included in a prior EIS, containing a 64-page detailed analysis of impacts on individual fish species. Because its later EIS failed to address this information, the court

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230 Pac. Rivers Council v. U.S. Forest Serv., 689 F.3d 1012, 1036 (9th Cir. 2012) (R. Smith J., dissenting) (“though 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]”).
231 Id.
232 Pac. Rivers Council, 689 F.3d at 1030 (noting that 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.”).
233 Id. at 1020 quoting Kern v. Bureau of Land Mgmt., 284 F.3d 1062, 1071–72 (9th Cir.2002) (“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.”).
234 Id. at 1027 (“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.”)
235 Id. at 1015.
236 Id. at 1025.
concluded the Forest Service did not meaningfully address the Forest Plan’s impact and failed to take the “hard look” that NEPA required. 237

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. 238 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”239 and the Ninth Circuit interpreted this to require that water would count toward fish and wildlife purposes only where it “predominantly contributes” to one of these purposes.240 According to Judge Smith, the Ninth Circuit’s “reading of the statute was “inexplicabl[e].””241 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 twenty-to-forty-percent unemployment rate.242

Judge Smith is clearly unhappy about the imposition of environmental regulation on extractive industry, 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,” Congress is of course

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237 Id. at 1030.
238 San Luis & Delta-Mendota Water Auth. v. United States, 672 F.3d 676, 690 (9th Cir. 2012).
239 Id.
240 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 contribute[ ] to one of the primary purpose programs.”) (internal citations omitted).
241 Karuk Tribe, 681 F.3d at 1040-41.
242 Id.
free to impose requirements that some consider financial burdens. Judge Smith maintained that his own court, not Congress, was imposing these burdens.

The question seems to be 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’s should have little or no influence on the law means. Further, none of the cases Judge Smith criticized concern 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 it. 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 Tribes Legacy**

At least two Ninth Circuit cases decided after *Karuk Tribe* indicate that the legacy of *Karuk Tribe* is 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 Bureau of Reclamation violated the ESA by failing to subject annual operating plans (AOP) for the operation of a Colorado River dam to ESA consultation concerning the endangered humpback

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243 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. John Nagle, *Judge Smith’s dissent*, Enlawprofessors, University of Oregon, June 7, 2012 (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)”).

244 See Holly Doremus, *Ninth Circuit Corrects Itself on Gold Mining and the ESA*, LEGAL PLANET, June 3, 2012, available at http://legalplanet.wordpress.com/2012/06/03/ninth-circuit-corrects-itself-on-gold-mining-and-the-esa/ (last visit Dec. 30, 2012) (arguing that Judge Smith’s dissent is “out of line” for “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,” and arguing that judicial reasoning should not be tied to “a particular political position but not closely tied to the particular legal context”).
The federal district court in Arizona ruled that held the AOPs were not agency actions, and thus did not trigger the ESA, reasoning that the Bureau had no discretion to act to benefit to the species. 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 existing criteria, leaving the agency no discretion to impose criteria for the benefit of the species. The panel decision distinguished *Karuk Tribe* on the ground that the discretion the Forest Service had in approving NOIs met the test for “agency action” triggering ESA consultation, whereas the Bureau of Reclamation lacked discretion in approving AOPs.

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 sufficient ESA analysis of the effect on delta smelt. The environmentalists claimed that the Bureau’s renewal of settlement contracts was an agency action, triggering ESA procedures. The district court disagreed, determining that because the Sacramento River settlements 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. A Ninth Circuit affirmed, agreeing with the district court’s reasoning and concluding that the Bureau’s

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245 Grand Canyon Trust v. U.S. Bureau of Reclamation, 691 F.3d 1008, 1021 (9th Cir. 2012), as amended (Sept. 17, 2012).
247 Grand Canyon Trust, 691 F.3d at 1021; 43 U.S.C. § 1552(b).
249 Id. at 1098.
250 Id. (“In 1964, the Bureau and those asserting senior water rights entered into 145 settlement contracts for 40-year terms. The contracts did not resolve the seniority claims, but guaranteed Settlement Contractors a certain amount of ‘base water’ annually without any fee and other ‘project water’ for which they would pay a fee to receive.”).
renewal of settlement contracts did not trigger the ESA because the agency’s “hands are tied” by its obligation to renew the contracts and duty to acknowledge senior water rights. Thus, even if *Karuk Tribe* expanded the scope of “agency action” triggering ESA consultation, these cases demonstrate that there remains considerable room for judicial deference to an agency determination that an action is not discretionary.

**Conclusion**

On one hand, these two *en banc* Ninth Circuit decisions 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; *Karuk Tribe* interpreted the ESA regulations to trigger consultation requirements, even when Forest Service seemed to merely acquiesce to dredge mining subject to conditions the agency imposed. 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 inherent 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 the 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*. But ensuing

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252 *Id.* at 1099.
253 *See supra* notes 84–104 and accompanying text.
254 *See supra* notes 194–207 and accompanying text.
decisions suggest that neither Lands Council nor Karuk Tribe has worked a sea change in Ninth Circuit review of agency action affecting the environment.\textsuperscript{255}

Ninth Circuit courts reviewing agency action retain considerable discretion under the Administrative Procedure Act to employ either “hard look” or “soft glance.”\textsuperscript{256} 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 to this study illustrates, Ninth Circuit judges vary considerably in the nature of judicial review they employed in the cases discussed in this article. So while certainly government defendants will rely on Land 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 will pay close attention to the composition of the panel reviewing their cases.

Litigants will also scrutinize Judge 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.\textsuperscript{257} Even though Judge Smith’s criticism of those decisions was based more on economic policy analysis than legal doctrine,\textsuperscript{258} 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.\textsuperscript{259} This unexpected result

\textsuperscript{255}See supra notes 105–69, 245–52 and accompanying text.
\textsuperscript{256}See, e.g., David Sive, The Scope and Depth of Judicial Review of Environmental and Administrative Action, The American Law Institute (1995) (“[D]escriptions of the scope of judicial review tend to be mottled and malleable, filled with ifs and buts, and calico characterizations.”)
\textsuperscript{257}See supra notes 224–27 and accompanying text (Judge Smith’s criticism of Northwest Environmental Defense Center), 228–31 (Judge Smith’s criticism of Pacific Rivers Council).
\textsuperscript{258}See supra notes 218–19, 222–23, 229, 238, 242 and accompanying text.
\textsuperscript{259}The Court granted certiorari in Northwest Environmental Defense Center on June 25, 2012 and to Pacific Rivers Council on March 18, 2013. The Karuk Tribe decision was filed on June 1, 2012.
may be the most unsettling environmental result of this study of the deep divide among Ninth Circuit judges concerning their review of agency actions affecting the environment.

Appendix—Under construction.