No. 17-881

In the
# Supreme Court of the United States

SCOTT TIMBER CO. and
CARPENTERS INDUSTRIAL COUNCIL,
*Petitioners,*

v.

OREGON WILD and CASCADIA WILDLANDS,
*Respondents.*

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

## BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS


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## QUESTION PRESENTED

The United States Court of Appeals for the Ninth Circuit follows a "general rule" that a district court order vacating and remanding an agency action is immediately appealable only by the agency itself. Below, the Ninth Circuit held that this general rule applies even when the agency has elected to take no further action on remand.

The question presented is:

Is such a district court order immediately appealable by a defendant-intervenor when the order has the effect of enjoining an existing contract between the intervenor and the agency?

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## INTEREST OF *AMICUS CURIAE*[1]

Pacific Legal Foundation (PLF) is the nation's oldest public interest legal foundation that seeks to vindicate the right of private property and other liberties, and to ensure that the federal government abides by the Constitution's structural and procedural protections for individual freedom. Consistent with these goals, PLF attorneys served as counsel of record in two of the Court's recent decisions confirming the availability of judicial review of agency decision-making that menaces property rights and liberty. *See Sackett v. Envtl. Protection Agency*, 566 U.S. 120 (2012); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016). This case is important to PLF because, when agencies decide not to undertake further action in response to a remand order, that order may evade appellate review altogether, thereby exacerbating the odious effects of analogous sue-and-settle litigation. Further, this case is important because the Ninth Circuit's decision limits the availability of appellate review when agencies decide not to appeal district court remand orders, which in turn results in substantial and costly delay.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus curiae funded its preparation or submission. More than 10 days in advance, all parties received timely notice of Pacific Legal Foundation's intent to file this brief. Counsel for Petitioners filed a letter of consent to the filing of amicus curiae briefs, and it is on file with the Clerk. In correspondence with amicus curiae, counsel for Respondents consented to the filing of this brief.

## INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

In 2012, Petitioner Scott Timber Co. purchased the White Castle timber contract from the Bureau of Land Management to harvest 187 acres of a western Oregon forest designated for timber harvesting. Pet. Cert. Br. at 4-6. As part of the sale, the Bureau prepared an environmental assessment and a "Finding of No Significant Impact" pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370m-12. Pet. Cert. Br. at 5. Subsequently, Respondents Oregon Wild and Cascadia Wildlands sued the Bureau, challenging the validity of the sale and arguing that an environmental impact statement was required under NEPA. Pet. Cert. Br. at 7. Petitioners Scott Timber and Carpenters Industrial Council (Union) joined the case as intervenor-defendants. *Id*. The district court ruled on summary judgment in favor of Respondents and entered a final judgment to that effect on May 7, 2015. Pet. Cert. Br. at 7-9. Thus, even though a final judgment was entered, the court's order, practically speaking, remanded[2] the case to the Bureau to prepare an

[2] The district court did not issue a formal "remand order" directing the Bureau to conduct an environmental impact statement, but instead simply ordered that the Bureau's decision approving the White Castle timber sale be set aside and entered final judgment. Pet. Cert. Br. at 8-9. Thus, the Ninth Circuit's application of *Alsea Valley Alliance v. Dep't of Commerce*, 358 F.3d 1181 (9th Cir. 2004), is all the more troubling because there is no actual remand. Nevertheless, because the "set aside" order effectively operates as a remand order, precluding the timber sale unless and until the Bureau produces an environmental

environmental impact statement. Pet. Cert. Br. at 7-9. Scott Timber and the Union appealed that decision to the Ninth Circuit, but the Bureau did not. Pet. Cert. Br. at 9.

Shortly before oral argument, the Ninth Circuit vacated the scheduled argument and dismissed Scott Timber and the Union's appeal for lack of a final judgment under 28 U.S.C. § 1291. The Ninth Circuit cited its "general rule" that intervenor-defendants cannot appeal a remand order because their interests will be sufficiently considered during the remand. Pet. Cert. Br. at 10-11. But after the denial of rehearing, the Bureau notified Scott Timber via letter that, rather than complete an environmental impact statement for the White Castle sale, the agency would cancel and terminate the sale. Pet. Cert. Br. at 11. Therefore, the only avenue left to Scott Timber and the Union for review of the district court's holding that an environmental impact statement is required, and to revive the timber sale, is through Supreme Court reversal of the Ninth Circuit's dismissal of the appeal.

For two reasons, the Court should grant the petition for a writ of certiorari. First, the similarities between the actions of the Bureau in this case and those that typically occur in "sue-and-settle" litigation are stark. Unless the Court resolves the split between the Tenth and Ninth Circuit identified by Petitioners, then the Ninth Circuit's anomalous "general rule" that only defendant agencies—and not intervenor-defendants—can appeal adverse district court remand orders will undermine an important safeguard from abuse under the Administrative Procedure Act (APA).

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impact statement, this Brief will refer to the district court's decision as a "remand order."

Second, the decision below does not comport with the Court's recent decisions granting judicial review of previously unreviewable EPA and U.S. Army Corps of Engineers actions. In *Sackett* and *Hawkes*, the Court held EPA compliance orders and the Corps' approved jurisdictional determinations to be reviewable under the APA. Both cases involved agency action that resulted in costly and time-consuming consequences for the regulated parties and the agencies: the EPA compliance order frustrated the Sacketts' home-building project, and the jurisdictional determination subverted Hawkes's peat mining plans. In part because of these consequences, the Court held that judicial review was appropriate to review the challenged agency actions. Likewise here, the Bureau's decision not to produce an environmental impact statement frustrates Scott Timber's valuable timber contract, a consequence which supports immediate judicial review, as in *Sackett* and *Hawkes*.

## REASONS FOR GRANTING THE PETITION

### I
### THE NINTH CIRCUIT'S RESTRICTIVE RULE FOR APPELLATE REVIEW OF REMAND ORDERS WILL ENCOURAGE "SUE-AND-SETTLE" LITIGATION

"Sue-and-settle" is a term used to describe when an advocacy group sues a regulatory agency, and the agency, rather than defending itself at trial, settles with the group. Ben Tyson, Note, *An Empirical Analysis of Sue-and-Settle in Environmental Litigation*, 100 Va. L. Rev. 1545, 1545 (2014). The resulting settlement agreement then binds the agency

to take a specific action to resolve the group's claims. *Id*. Not allowing interested parties to intervene in sue-and-settle litigation results in the undermining of the APA because outcomes become predetermined during a period in which plaintiffs have purposefully excluded certain stakeholders. Kelli Hayes, Comments, *Sue and Settle: Forcing Government Regulation Through Litigation*, 40 U. Dayton L. Rev. 105, 118-22 (2015); *see* Environmental Protection Agency, *Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements* (Oct. 16, 2017).[3]

When an agency declines to appeal a remand order, as is the case here, the effects of such actions are similar to that of sue-and-settle litigation because the intervening party is left with no adequate means to defend against the outcome of the litigation without the right to appeal. The Bureau's acquiescence in the judgment in this case, and its decision not to complete an environmental impact statement, are contrary to Scott Timber and the Union's interest. In other words, the result in this case is similar to the results in sue-and-settle cases where a court refuses to allow interested parties the right to intervene in the judicial process.

Further, in sue-and-settle litigation, agencies are often predisposed to accept certain pre-negotiated outcomes. Tyson, 100 Va. L. Rev. at 1577. Agencies frequently propose rules that enact a negotiated consent decree or settlement agreement to avoid further litigation on the matter. Hayes, 40 U. Dayton

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[3] *Available at* https://www.epa.gov/sites/production/files/2017-10/documents/signed_consent_decree_and_settlement_agreement_directiveoct162017.pdf.

L. Rev. at 112. However, the processes that follow upon an agreement reached through sue-and-settle litigation do not necessarily protect the interests of the public. *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1028 (D.C. Cir. 1978). Additionally, if the outcome has already been predetermined, then any opportunities for notice and comment are a mere charade, having no real effect on the outcome. Instead, the only parties that are able to influence an agency's policy decisions are the groups that have the resources and inclination to file lawsuits and negotiate settlements—a practice that directly conflicts with the APA's regulatory rulemaking processes. *See* 5 U.S.C. § 553(c).

The APA requires administrative agencies to follow certain procedures when developing new regulatory rules, including allowing for public input. *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1483-84 (9th Cir. 1992). The rulemaking process requires agencies to send notice to interested parties who then may provide comments that the agency must consider before adopting a final rule. 5 U.S.C. § 553(c); *Riverbend Farms*, 958 F.2d at 1484; *see also Paulsen v. Daniels*, 413 F.3d 999, 1005 (9th Cir. 2005) ("It's antithetical to the structure and purpose of the APA for an agency to implement a rule first, and then seek comment later.").

Allowing affected parties to intervene in potential sue-and-settle lawsuits helps to protect the integrity of judicial review in APA cases. By allowing intervening parties to participate in cases in which the government does not adequately represent their interests, the intervention rule provides groups not originally included in the litigation the opportunity to have their views heard before legal consequences

attach. However, when the right to appeal decisions that have the effect of sue-and-settle—such as the remand order in this case—is removed, intervenors can no longer adequately defend against litigation for which the government is no longer willing to defend. Further, when it becomes too easy for certain groups to obtain their favored outcome simply because the government refuses to continue onward in its defense, the APA is undermined.

Thus, a robust ability for interested parties to intervene *and appeal* adverse decisions is necessary to provide appellate courts with the opportunity to consider arguments and evidence neglected by administrative agencies. Without generous rules favoring intervention and, in particular, appellate review, agency decision-making will go unchecked, resulting in the undermining of the APA and the allowance of motivated special interest groups to continue to circumvent the law and equity.

## II
## THE NINTH CIRCUIT'S RESTRICTIVE RULE DOES NOT COMPORT WITH THIS COURT'S PRECEDENTS

A judgment is final when it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). The core principle behind finality requirements is that they should "be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered." *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976). Applying these principles, the Court has drawn parallels between finality under 28 U.S.C.

§ 1291 (final decisions of district courts) and § 2101(b) (direct appeals to the Supreme Court), *see Riley v. Kennedy*, 553 U.S. 406, 419 n.5 (2008), as well as between § 1291 and abstention-based remand orders due to litigants being put "effectively out of court." *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-15 (1996). But there are additional parallels between 28 U.S.C. §§ 1291-1292(a)(1) and the Court's recent decisions in two analogous APA cases. Those cases (*Sackett* and *Hawkes*) provide further evidence of a trend in favor of expanding, not constricting, judicial (and appellate) review. Yet the Ninth Circuit's "general rule" that prohibits non-agency intervenor-defendants from appealing district court remand orders runs counter to that trend and, as is the case here, puts intervenor-defendants "effectively out of court." *See Quackenbush*, 517 U.S. at 713-14.

### A. *Sackett v. Environmental Protection Agency* is Sufficiently Analogous to Warrant Review of the District Court's Remand Order Here

In *Sackett*, 566 U.S. at 124, the petitioners owned a 2/3 acre residential lot in Idaho. The property sat near a lake, but several lots containing permanent structures were between the lake and the Sacketts' lot. *Id*. In preparation for building a home, the Sacketts used rock and dirt to fill in part of their lot. *Id*. Some months after filling it in, the Sacketts received a compliance order from EPA informing them that they were in violation of the Clean Water Act for filling in regulated wetlands, and directing them to restore their lot, among other things. *Id*. at 124-25. Believing that EPA was incorrect about the lot's

containing regulated wetlands, the Sacketts requested a hearing with the agency. *Id.* at 125. When their request was ignored, the Sacketts filed suit under the APA to challenge the compliance order. *Id.*

At issue before the Court in *Sackett* was whether the compliance order was final agency action subject to judicial review under the APA. *Id.* at 125-26. The district court and Ninth Circuit held that compliance orders were not final action subject to judicial review, but this Court reversed. *Id.* at 125, 131. Applying *Bennett v. Spear*, 520 U.S. 154, 178 (1997), the Court held that the Sacketts' compliance order was a final action because (1) the order was the "consummation" of EPA's decision-making process because it contained "Findings and Conclusions" that were not subject to additional agency review, (2) the order determined "rights or obligations" by requiring the Sacketts to restore their lot, and (3) "legal consequences . . . flow[ed]" from the order because EPA could impose severe financial penalties in an enforcement proceeding for violations of the order. 566 U.S. at 126-27. Further, the Court held that the APA's requirement that there be "no other adequate remedy in a court" was satisfied because the Sacketts could not initiate an EPA Clean Water Act enforcement proceeding against themselves. *Id.* at 127. Nor could they obtain adequate review by pursuing the permitting process with the Corps of Engineers. *Id.*

Here, the district court's de facto remand order is analogous to the compliance order in *Sackett*, and thus should be reviewable by immediate appeal. First, the remand order was the "consummation" of the district court's decision resolving the case, as no sale can proceed until the court's order is satisfied. Second,

the order determined rights or obligations, and produced legal consequences, because it set aside the timber sale and obligated the Bureau to produce a full environmental impact statement before proceeding with the timber harvest. Pet. Cert. Br. at 8; *cf*. *Sackett*, 566 U.S. at 126-27. Third, because the Bureau ultimately chose not to appeal the remand, and later informed Scott Timber that it would not complete an environmental impact statement to allow the timber sale to move forward, Scott Timber had "no other adequate remedy" to appeal the district court's determination that an environmental impact statement was required under NEPA. Indeed, if the Court does not reverse the Ninth Circuit's decision to vacate the appeal, then Scott Timber and the Union have no way to revive the sale.

### B. *U.S. Army Corps of Engineers v. Hawkes Co., Inc.* is Also Sufficiently Analogous to Warrant Review of the Remand Order

In *Hawkes*, 136 S. Ct. at 1812-13, a mining company sought a permit from the Corps that would allow it to mine peat in Minnesota on a 530-acre tract of land containing wetlands. During the permitting process, however, the Corps issued an "approved jurisdictional determination" stating that the property contained regulated "waters of the United States" because its wetlands had a "significant nexus" to a river about 120 miles away. *Id*. at 1813. As a result, the mining company was faced with substantial costs and years of delay before mining operations could be approved for the property. *See id*. The company administratively appealed and obtained a remand for further factfinding; but on remand, the

Corps affirmed the jurisdictional determination. *Id.* The mining company then sought judicial review under the APA, but the federal district court dismissed, holding that it lacked jurisdiction because the jurisdictional determination was not "final agency action for which there is no other adequate remedy in a court." *Id.* On appeal, however, the Eighth Circuit reversed. *Id.* This Court then granted review.

The questions before the Court on certiorari were whether the jurisdictional determination was final agency action and, if it was, whether there were adequate alternatives to judicial review. *Id.* Applying *Bennett*, 520 U.S. at 177-78, as the Court did in *Sackett*, the *Hawkes* Court held that approved jurisdictional determinations are final agency action. 136 S. Ct. at 1813-14. To begin with, the Court held that *Bennett*'s first prong was satisfied because a jurisdictional determination is issued only after extensive agency analysis, and will be changed only if "new information" counseling a different result emerges. *Id.*

Further, the Court held that legal consequences flow from a jurisdictional determination. *Id.* at 1814. For example, a "negative" jurisdictional determination, whereby the Corps determines that "waters of the United States" are not present on a property, results in the owners of that property receiving a five-year safe harbor from enforcement proceedings under the Clean Water Act. *See id.* at 1814-15. Thus, an approved jurisdictional determination finding such waters to be present necessarily deprives the property owner of that safe harbor, as well as increases the potential for criminal and civil liability for discharging pollutants into those

waters without a permit. *See id*. These effects, in the Court's estimation, were sufficient under *Bennett*, as well as the Court's long-held "pragmatic" approach to finality, for a jurisdictional determination to be deemed "final agency action." *Id*.

The Court in *Hawkes* also held that there was no adequate alternative to APA review of jurisdictional determinations, rejecting the Corps' two contrary arguments. 136 S. Ct. at 1815. The Corps' first alleged adequate alternative (discharge pollutants without a permit and challenge the necessity of a permit if enforcement proceedings were initiated) was inadequate, the Court explained, because "parties need not await enforcement proceedings before challenging final agency action where such proceedings carry" the potential of serious penalties. *Id*. Indeed, violations of the Clean Water Act can include criminal penalties as well as fines up to $37,500 for each day a party is in violation of the Act. *See id*. The Corps' second, purportedly adequate alternative (apply for a permit and seek judicial review if an unfavorable decision is made) was similarly inadequate because the permit process itself is "arduous, expensive, and long." *Id*. Requiring parties to undergo substantial expense and delay for a process that includes analyses and studies wholly separate from the question of whether the property contains "waters of the United States," or the finality of any agency determination about the presence of those waters, "adds nothing" to the jurisdictional determination. *Id*. at 1816. Thus, no adequate alternative to APA review existed, and so such review was merited. *Id*.

Just as the EPA compliance order in *Sackett* is analogous to the remand order here, so too is the approved jurisdictional determination in *Hawkes*.

First, the approved jurisdictional determination was a final agency action because a determination that a property contains "waters of the United States" is made only after substantial analysis of the property. 136 S. Ct. at 1813-14. Likewise, the remand order in this case is an appealable final decision because the timber sale cannot move forward until the Bureau completes an environmental impact statement (which the agency said it will not do). Pet. Cert. Br. at 8-9, 11. Thus, although appellate review is appropriate to determine whether the district court properly vacated the timber sale in the first instance, review is even more urgent, and merited, when the agency will take no further action on remand.

Second, because of the removal of the safe harbor from prosecution under the Clean Water Act, and the resulting potential liability, the *Hawkes* Court held that legal consequences flow from approved jurisdictional determinations. 136 S. Ct. at 1814-15. Similarly here, legal consequences flow from the district court's de facto remand order resulting in the blocking of the timber sale unless and until the Bureau conducts an environmental impact statement. Another clear legal consequence of the dismissal of Scott Timber's appeal is that the district court's decision remains in place, and the timber contract between the Bureau and Scott Timber remains a nullity.

Third, in *Hawkes*, the Court held that there were no adequate alternatives to APA review because the only proposed alternatives were impractical and

overly burdensome. *Id.* at 1815-16. Similarly, here, there is no adequate alternative to appellate review of the district court's determination that an environmental impact statement was required—a determination which invalidated the timber sale. In fact, there is *no* alternative to appellate review available, much less an adequate one, due to the Bureau's decision not to complete an environmental impact statement. Hence, at a minimum, appellate review is mandated given that Scott Timber and the Union's interest will necessarily not be represented as part of the non-existent remand.[4]

In sum, while the question as to whether judicial review of agency action is available under the APA is distinct from whether appellate jurisdiction arises when intervenor-defendants—and not the government—appeal district court remand orders, the Court's analysis and reasoning in the APA cases discussed above is analogous here. For those reasons, and because the Ninth Circuit's rule conflicts with the core principles behind finality requirements articulated in those cases, *see supra* at 7-8, the Court should grant the petition for certiorari.

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[4] The Bureau did not inform Scott Timber of its intent to not produce an environmental impact statement until after the Ninth Circuit dismissed Scott Timber's appeal. Pet. Cert. Br. at 11. Upon receipt of that information, Scott Timber requested the Ninth Circuit to recall the mandate in the case, but that request was denied on December 4, 2017. *Id.* Therefore, reversal by this Court is Scott Timber and the Union's only avenue for review of the remand order.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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Respectfully submitted,

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