No. 19-16133

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KLAMATH-SISKIYOU WILDLANDS CENTER; et al.,
Plaintiffs-Appellants,

v.

PATRICIA A. GRANTHAM, et al.,
Defendants-Appellees,

and

AMERICAN FOREST RESOURCES COUNCIL,
Intervenor-Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
No. 2:18-cv-02785-TLN-DMC, Honorable Judge Troy Nunley

EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL
PURSUANT TO CIR. R. 27-3
RELIEF REQUESTED BY JUNE 10, 2019

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NOTIFICATION AND SERVICE OF COUNSEL FOR PARTIES

On May 31, 2019, the District Court entered an order granting a motion filed by Federal Defendants United States Forest Service and Patricia A. Grantham (collectively, Forest Service) and Defendants/Intervenors American Forest Resources Council (AFRC) to stay the District Court's order granting a temporary restraining order/preliminary injunction in favor of KS Wild. On June 3, 2019, KS Wild filed a motion to stay the District Court's May 31 order, essentially seeking a reinstatement of the injunction issued by the District Court in January 2019. The Forest Service and AFRC oppose KS Wild's June 3 motion in the District Court. KS Wild has informed the District Court and opposing parties that it has elected to forgo its optional reply brief in support of its June 3 motion, as well as oral argument on the motion, given the exigency of impending logging operations that may begin as soon as June 10, 2019.

To protect its interests, KS Wild has also filed a notice of appeal of the District Court's May 31 order, docketed as Appeal No. 19-16133 and has apprised the parties that it intends to seek expedited consideration of its interlocutory appeal.

Also on June 3, 2019, KS Wild informed opposing parties that it intended to file this emergency motion pursuant to Circuit Rule 27-3. The Forest Service and AFRC oppose this motion.

Counsel for KS Wild contacted the Court of Appeals and agreed to submit this motion and opening appeal brief to the Court of Appeals via the Court's case management/electronic case files (CM/ECF) system. KS Wild informed the opposing parties that it would proceed to serve its motion and opening brief via the Court's ECF system.

DISTRICT COURT DISPOSITION

On October 16, 2018, KS Wild filed a complaint for declaratory and injunctive relief challenging the Seiad-Horse Risk Reduction Project (Project) on the Klamath National Forest, alleging that the Project violated the National Forest Management Act and the National Environmental Policy Act. On November 12, 2018, KS Wild filed a motion for a temporary restraining order and preliminary injunction seeking a narrowly-tailored injunction to halt area logging in targeted areas of the planning area. The District Court ordered briefing on the motion and held oral argument on January 10, 2019. On January 25, 2019, the District Court granted KS Wild's motion, finding that KS Wild was likely to prevail on all three of its claims, that it was likely to incur irreparable harm in the absence of an injunction, and that the equities tipped sharply in favor of the injunction.

On March 1, 2019 AFRC filed a notice of appeal with the Ninth Circuit Court of Appeals of the District Court's January 25, 2019 order granting an injunction; and this appeal was docketed as Appeal No. 19-15384. On March 25,

2019 the Forest Service filed its own notice of appeal, which was docketed as Appeal No. 19-15597. These two appeals were consolidated on April 11, 2019. Settlement discussions were unsuccessful, and on April 5, 2019 AFRC filed its opening appellate brief, followed by the Forest Service's opening appellate brief on May 6, 2019. On May 30, KS Wild filed its answering appellate brief. Responsive briefs for the Forest Service and AFRC are due on June 20, 2019.

On April 16, 2019, AFRC filed a motion for stay pending appeal of the District Court's order granting the injunction with the lower court. On April 26, 2019, the Forest Service filed a similar motion for stay pending appeal. The opposing parties represented that because logging could begin as soon as June 10, 2019, expeditious consideration of their motions was appropriate.

On May 31, 2019, the District Court granted the motions for stay pending appeal, reversing its earlier order and denying KS Wild's motion for injunctive relief. On June 3, 2019, KS Wild filed a motion for a stay of the District Court's May 31, 2019 order, seeking a reinstatement of the injunction. Also on June 3, 2019, KS Wild filed a protective notice of appeal with this Court of the District Court's May 31 order, which was docketed as Appeal No. 19-16133.

Undersigned counsel certifies that all of the grounds advanced in this Motion were also asserted in the District Court for its consideration. The issue raised in this Motion is whether the District Court abused its discretion when it based its

decision to grant the motions for stay pending appeal on an erroneous legal standard and/or a clearly erroneous finding of fact in evaluating the equities.

EXISTENCE AND NATURE OF EMERGENCY

KS Wild seeks emergency relief against the District Court's May 31, 2019 stay pending appeal of its January 2019 injunction. The District Court's order functions as a denial of KS Wild's motion for injunctive relief. KS Wild brings this emergency motion because it will be irreparably harmed in the absence of injunctive relief and because it is likely to prevail on the merits: the District Court has twice held (in its January 25, 2019 and May 31, 2019 orders) that KS Wild is likely to prevail on at least two of its claims. The District Court also twice held that KS Wild was likely to suffer irreparable harm in the absence of an injunction.

There are three timber sales associated with the Project: Low Gap, Pitchfork, and Copper. Logging at the Low Gap sale has been underway since spring 2018, and was not challenged by KS Wild; this logging is nearly or already complete.

Area logging has not yet begun at the Pitchfork sale: for this sale, KS Wild only challenged logging along the "Bee Camp Road," an unpaved, dead-end road that is surrounded by otherwise protected lands. Thus, area logging at the Pitchfork sale was not enjoined by the District Court's January 2019 order and may begin as soon as June 10, 2019: KS Wild does not challenge this area logging, but does challenge the logging along Bee Camp Road.

Area logging has not yet begun at the "Copper" sale, as this was enjoined by the District Court's January 2019 order: KS Wild *does* challenge this area logging, which may begin as soon as June 10, 2019.

Importantly, roadside hazard tree logging for public and administrative safety at the Low Gap, Pitchfork, and Copper sales was not challenged by KS Wild and may continue to go forward under the District Court's January 2019 order. The only "roadside hazard tree logging" challenged by KS Wild is that logging along the Bee Camp Road at the Pitchfork sale.

Given that the Forest Service asserted to the District Court that logging would begin as soon as June 10, 2019 in the absence of an injunction, and the urgency AFRC has expressed in commencing logging activities, KS Wild has no reason to believe that once begun, logging will stop until all of the trees are cut down. The Forest Service has indicated that it will not forgo logging operations while KS Wild's emergency motion is pending. Thus, immediate relief in the next six days is necessary to protect KS Wild's interests.

Due to the exigency of this matter, KS Wild waives its right to a reply brief in support of this motion, and will anticipate responsive arguments advanced by the Forest Service and AFRC: KS Wild's 27-3 motion will focus on the District Court's May 31 order and its erroneous findings of fact and law associated with the balance of equities analysis. For the same reason, KS Wild asks that this Court

shorten the time for responsive briefs for the Forest Service and AFRC pursuant to FRAP 27(a)(3)(A).

Should the June motions panel grants an injunction pending appeal to preserve the status quo, KS Wild believes that the existing briefing schedule in place in Appeal Nos. 19-15384 and 19-15597 will be sufficient to resolve all issues raised in Appeal No. 19-16133 as well as appeals 19-15384 and 19-15597.

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I. INTRODUCTION.

On October 16, 2018, Plaintiffs Klamath-Siskiyou Wildlands Center et al. (KS Wild) filed a complaint for declaratory and injunctive relief challenging the Seiad-Horse Risk Reduction Project (the Project) on the Klamath National Forest, raising two claims under the National Forest Management Act and one claim under the National Environmental Policy Act. Excerpts of Record (ER) 22 (ECF[1] 1). On November 12, 2018, KS Wild filed a motion for a temporary restraining order and preliminary injunction, *Id.* (ECF 13), seeking a narrowly-tailored injunction

> ...to prevent unit logging of the Johnny O'Neil Late-Successional Reserve-portion of the Copper timber sale while the legality of large diameter wildlife snag logging in the remainder of the Johnny O'Neil Late-Successional Reserve is determined by this Court. Plaintiffs do not seek an injunction against the roadside hazard tree removal portion of the Copper timber sale. Plaintiffs do not seek an injunction preventing the logging of the Low Gap timber sale units. Nor do Plaintiffs seek an injunction preventing the roadside hazard logging portion of the Low Gap timber sale. For the currently unsold Pitchfork timber sale, plaintiffs only seek to enjoin the logging associated with the "Bee Camp Road" that will impact the Kangaroo Inventoried Roadless Area and the Cook and Green Botanical Area. To summarize, Plaintiffs seek a narrow injunction to prevent clear-cut logging of crucial post-fire old-growth forest habitat located in the Johnny O'Neil Late-Successional Reserve while allowing extensive roadside and hazard tree logging to proceed throughout much of the project area.

ER 42, ¶¶ 3-8.[2] On January 25, 2019, the District Court granted KS Wild's motion, finding that KS Wild was likely to prevail on all three of its claims, that it was

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[1] "ECF" refers to the District Court's electronic court filing docket number.
[2] KS Wild requested this narrow injunction in light of this Court's case law admonishing lower courts for awarding broad equitable relief enjoining all post-

likely to incur irreparable harm, and that the equities tipped sharply in favor of the injunction. *Klamath-Siskiyou Wildlands Ctr. v. Grantham*, 2019 WL 331171 (E.D. Cal. Jan. 25, 2019). Almost three months later, on April 16, 2019 Intervenor-Defendant American Forest Resources Council (AFRC) filed a motion for stay pending appeal. ER 22 (ECF 64). On April 26, 2019 Federal Defendants United States Forest Service and Patricia A. Grantham (Forest Service) filed a similar motion for stay pending appeal. *Id.* (ECF 66). In their motions, both parties argued – without any evidence from the administrative record – that the narrowly-tailored injunction would effectively preclude implementation of the entire Project. They also argued that because logging could begin as soon as June 10, 2019, that expeditious consideration of their motions was appropriate. *Id*. (ECF 72, 73).

On the eve of the commencement of logging operations, on May 31, 2019, the District Court granted the motions for stay pending appeal. ER 1. The Court explained that while KS Wild was still likely to prevail on at least two of its claims and would experience irreparable harm in the absence of an injunction, the equities now tipped in favor of a stay of the injunction order. ER 4-9. The Court reasoned that based on the allegations of Defendant Grantham, "critical components of the Project will be 'doomed' should the injunction remain in place including: fuelbreaks to protect nearby communities from wildfire, salvage treatments to

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fire logging in other cases. *See*, *Conservation Cong. v. Forest Service*, No. 18-17165, slip op. at 6-8 (9th Cir. 2019).

reduce fuel loads abutting private property, and snag removal to ensure safety for future fire-fighting and public access," ER 9-10, such that the injunction was no longer appropriate.

In staying the injunction, the District Court committed reversible error. The District Court erroneously concluded – based solely on post-hoc rationalizations offered by the Forest Service without any administrative record support – that the equities now tip in favor of the government and against the injunction. This conclusion was based on the unsubstantiated allegation that because of the way in which the Forest Service designed the Project, that an injunction would effectively preclude implementation of other aspects of the Project, many of which KS Wild never challenged in this action. ER 9-10. This economic harm is not irreparable, and the District Court committed reversible error in deferring to the Forest Service's determination of the equities. ER 10; *cf. Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1186 (9th Cir. 2011).

The Ninth Circuit should issue an injunction against the District Court's May 31 order and reinstate the narrowly-tailored injunction before logging commences on June 10, 2019.

II. FACTUAL BACKGROUND.

The Seiad-Horse (pronounced "sī-ad") planning area has been heavily impacted by past management: approximately 75% of the planning area has

experienced some kind of intensive timber harvest in the past. Nonetheless, the Project area still contains important areas that are relatively intact, including two Inventoried Roadless Areas: the Condrey Mountain and Kangaroo Roadless Areas. The Pacific Crest Trail traverses the project area, and there are two designated Botanical Areas here: The Cook and Green, and Baker Cypress Botanical Areas. The Project area is home to the Threatened northern spotted owl and coho salmon and their designated critical habitat. The entire Project is also in the Johnny O'Neil Late-Successional Reserve.

The 2017 Abney Fire started on the Rogue River-Siskiyou National Forest in Oregon, but eventually spread to the Klamath National Forest in California, burning approximately 10,800 acres on the Klamath National Forest. About half of the acres burned at high severity, and half burned at low severity. The forest in the Project area is currently naturally regenerating, even in areas that burned at high severity.

In response to the Abney Fire, the Forest Service prepared the Project. It has seven components, only two of which KS Wild challenged below: post-fire "salvage" logging in the Copper and Pitchfork sale areas; and removal of roadside hazard trees along the "Bee Camp Road," a dead-end unpaved road surrounded by Inventoried Roadless Areas, a Botanical Area, and other protected lands. The Project will remove hazard trees along 39 miles of roads including some very large

old-growth trees and snags in excess of 45” diameter-at-breast-height (DBH), including within a northern spotted owl activity center core area and the Riparian Reserve land allocation; even so, KS Wild does not challenge this logging.

The Project will also conduct 1,110 acres of “risk reduction salvage with site preparation and planting,” of which KS Wild challenges the “risk reduction salvage” but not the “site preparation and planting.” The “risk reduction salvage” (post-fire logging) will remove trees equal to or larger than 14” DBH across 1,110 acres in the project area. Logging will occur within the Johnny O’Neil Late-Successional Reserve, Kangaroo Inventoried Roadless Area, Cook and Green Botanical Area, adjacent to the Pacific Crest Trail, and within designated critical habitat for the northern spotted owl.

III. LEGAL BACKGROUND.

The National Forest Management Act (NFMA) requires the Forest Service to develop comprehensive land and resource management plans for each unit of the National Forest System. 16 U.S.C. § 1604(a). Subsequent “plans, permits, contracts, and other instruments for the use and occupancy” of the national forests must be consistent with the local forest plan, in this case, the Klamath National Forest Land and Resource Management Plan (Klamath Plan), as amended by the Northwest Forest Plan. 16 U.S.C. § 1604(i).

In 1994, the Bureau of Land Management and the Forest Service issued a Record of Decision for the Northwest Forest Plan (NFP), which established management requirements for all Forest Service land within the range of the northern spotted owl and amended all National Forest forest plans within the range of the owl, including the Klamath National Forest plan. Late-Successional Reserves (LSRs) are NFP land use allocations where the primary objective is to protect and enhance conditions of old-growth forests that serve as habitat for the northern spotted owl and other late-successional habitat-associated species by creating a network of large "reserves" or blocks of habitat. LSRs must be managed to "protect and enhance conditions of late-successional and old-growth forest ecosystems, which serve as habitat for late-successional and old-growth related species." *Oregon Nat. Res. Council Fund v. Brong*, 492 F.3d 1120, 1126 (9th Cir. 2007). The NFP allows some logging in LSRs but restricts the timing, location, type, and amount of salvage logging that may occur. *Id*. The Project is entirely within the Johnny O'Neil Late-Successional Reserve.

The NFP also includes an Aquatic Conservation Strategy (ACS), which was developed to restore and maintain the ecological health of watersheds and aquatic ecosystems contained within them, and to protect salmon and steelhead habitat on federal lands. *Pac. Coast Fed'n of Fishermen's Ass'n, Inc. v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028 (9th Cir. 2001). The ACS requires compliance with

nine Aquatic Conservation Strategy Objectives, three of which are at issue in this case: (#4) Maintain and restore water quality necessary to support healthy riparian, aquatic, and wetland ecosystems. Water quality must remain within the range that maintains the biological, physical, and chemical integrity of the system and benefits survival, growth, reproduction, and migration of individuals composing aquatic and riparian communities; (#5) Maintain and restore the sediment regime under which aquatic ecosystems evolved. Elements of the sediment regime include the timing, volume, rate, and character of sediment input, storage, and transport; and (#6) Maintain and restore in-stream flows sufficient to create and sustain riparian, aquatic, and wetland habitats and to retain patterns of sediment, nutrient, and wood routing. The timing, magnitude, duration, and spatial distribution of peak, high, and low flows must be protected.

The National Environmental Policy Act (NEPA) requires federal agencies to assess the environmental impacts of proposed actions and to prepare an Environmental Impact Statement (EIS) when a major federal action is proposed that *may* significantly affect the quality of the environment. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4(a)(1). The Council on Environmental Quality promulgated uniform regulations to implement NEPA that are binding on all federal agencies. 42 U.S.C. § 4342; 40 C.F.R. §§ 1500 et seq. To determine whether a proposed action may "significantly" impact the environment, both the

context and intensity of the action must be considered. 40 C.F.R. §1508.27. In evaluating intensity, agencies must consider numerous "significance" factors including the unique characteristics of the geographic area such as proximity to ecologically critical areas; whether the action is related to other actions with individually insignificant but cumulatively significant impacts; and whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment. 40 C.F.R. §§ 1508.27(b)(3), (b)(7), (b)(10). "We have held that one of these factors may be sufficient to require preparation of an EIS." *Ocean Advocates v. United States Army Corps of Eng'rs*, 361 F.3d 1108, 1124-1125 (9th Cir. 2004).

IV. STATEMENT OF JURISDICTION.

The District Court's grant of the Forest Service's and AFRC's motion for stay pending appeal stays – or reverses – the lower court's injunction, which functions as a denial of the injunction in the first instance. Thus, denial of KS Wild's motion for a preliminary injunction is an appealable interlocutory order. This Court has jurisdiction over this motion pursuant to 28 U.S.C. § 1292 (2012).

V. STANDARD FOR INJUNCTION PENDING APPEAL.

The standard for issuance of an injunction pending appeal is the same as for a preliminary injunction. *Lopez v. Heckler*, 713 F.2d 1432 (9th Cir. 1983). A preliminary injunction is warranted when a movant demonstrates: (1) it is likely to

succeed on the merits, (2) it is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in its favor, and (4) an injunction is in the public interest. *Winter v. NRDC*, 555 US 7, 24 (2008). The most important *Winter* factor is likelihood of success on the merits. *Disney Enters., Inc. v. VidAngel, Inc*., 869 F.3d 848, 856 (9th Cir. 2017). The last two "factors merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009).

This Court recognizes these traditional criteria and, as an alternative, holds that a movant is entitled to a preliminary injunction if it demonstrates: (1) the existence of serious questions on the merits and (2) a balance of hardships tipping in its favor. *All. For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011). However, *Winter* does not change the continued vitality of the "sliding scale" approach, which states that a party is entitled to a preliminary injunction if it demonstrates (1) the existence of serious questions on the merits, and (2) a balance of hardships tipping in its favor. *Id.* KS Wild has met its burden under either test.

VI. ARGUMENT.

A. KS WILD HAS RAISED SERIOUS QUESTIONS, AND IS LIKELY TO PREVAIL ON THE MERITS.

The District Court has twice held that KS Wild is likely to prevail on the merits of two of its claims: one, that the Project violates the Aquatic Conservation Strategy of the Northwest Forest Plan because the Project will result in increased

sedimentation to Project waterways and increased cumulative watershed effects; and two, that the Project violates the National Environmental Policy Act because an environmental impact statement should have been prepared given the context and intensity of three "significance" factors. *Grantham*, 2019 WL 331171, at *6, *8; ER 4-5, 7-8. Under *Winter*, these merits holdings weigh in favor of the issuance of an injunction. *Disney Enters., Inc*., 869 F.3d at 856.

The Court initially correctly held that KS Wild was likely to prevail on the merits of its claim that the Project violates NFMA because the Project removes large diameter snags likely to persist from the planning area, which will result in a decline in habitat suitability for a variety of species including the northern spotted owl, which the NFP prohibits. *Grantham*, 2019 WL 331171, at *6–7; *see also*, *Brong*, 492 F.3d at 1125-27 (holding that the NFP precludes logging of large diameter snags likely to persist from an LSR). In its order granting a stay of the injunction pending appeal, however, the Court indicated that it was swayed by the Forest Service's argument that because the Project does not remove any "unburned *suitable habitat*," the Project does not contradict the NFP's requirement that "salvage operations should not diminish *habitat suitability* now or in the future." ER 7 (emphasis added). Specifically, the Court stated that "Plaintiffs fail to provide the Court with any citation to support their contention that these terms are

different. Without persuasive evidence to the contrary, the Court must defer to the Forest Service's finding that no suitable habitat will be removed." *Id*.

While KS Wild maintains that the District Court's May 31 finding that KS Wild was not likely to prevail on the merits of this claim was reversible error because there is a distinction with a difference between "suitable habitat" as understood by the ESA and "habitat suitability" as understood and protected by the NFP, KS Wild does not challenge that holding in this emergency motion and will reserve that issue for its own appeal, No. 19-16133. Regardless, because the District Court did find that KS Wild was likely to prevail on its other two substantive claims, these merits holdings weigh in favor of the issuance of an injunction. *Disney Enters., Inc*., 869 F.3d at 856. Consequently, KS Wild focuses its attention in this motion on the District Court's erroneous conclusion that the equities now tip against an injunction preserving the status quo.

B. THE DISTRICT COURT ERRED IN HOLDING THAT THE EQUITIES DO NOT WARRANT AN INJUNCTION WHEN IT BASED ITS DECISION ON AN ERRONEOUS LEGAL STANDARD AND CLEARLY ERRONEOUS FINDINGS OF FACT.

As it twice before held that KS Wild was likely to prevail on two of its claims, the District Court has twice held that KS Wild has demonstrated that it will be irreparably harmed by implementation of the Project. *Grantham*, 2019 WL 331171, at *8; ER 8-9. Thus, this Court's inquiry focuses on whether the District

Court based its decision on an erroneous legal standard and/or a clearly erroneous finding of fact in evaluating the equities. *Nken*, 556 U.S. at 435.

In reversing its grant of an injunction, the District Court relied exclusively on post-hoc rationalizations offered by the Forest Service regarding the "integrated" nature of the Project and the contention that "if the injunction remains in place, non-enjoined portions of the Project may actually become permanently futile if the enjoined salvage operations are precluded from taking place immediately." ER 8. This led to the District Court's conclusion that it "must defer to the Forest Service's determination that without a stay the harm will become truly irreparable," and that a stay pending appeal was warranted. ER 10.

There are at least two points of reversible error in the Court's ruling. First, the Ninth Circuit has held that agency assessments of equitable relief are due *no* deference by a reviewing court. In *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1186 (9th Cir. 2011), this Court held that "If the federal government's experts were always entitled to deference concerning the equities of an injunction, substantive relief against federal government policies would be nearly unattainable, as government experts will likely attest that the public interest favors the federal government's preferred policy, regardless of procedural failures. We hold that the district court abused its discretion by deferring to agency views concerning the equitable prerequisites for an injunction." This is exactly the

situation in the present case, where the District Court erroneously held that it "must defer" to the Forest Service's assessment of the equities of a stay pending appeal: in fact, the opposite is true. This is reversible error.

Second, the District Court committed reversible error when it entertained and accepted as true unsupported allegations and post-hoc rationalizations about the effect of the narrowly-tailored injunction. As KS Wild repeatedly pointed out in the lower court, there is *zero* economic analysis in the administrative record for the Project. Therefore, any arguments about the inability of the Forest Service to implement the Project because of the lack of funds from the enjoined portions of the Project are based on no admissible record evidence at all. *Oregon Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1121 (9th Cir. 2010) ("We cannot defer to a void").

For example, the Low Gap sale will be completed and funds from that sale – the most acreage and highest value of timber – will be available for other Project activities; but the Forest Service has failed to demonstrate that these funds are insufficient to cover other Project costs. Indeed, the administrative record for the Project is devoid of any information regarding how much any Project activities cost, so it is unknown whether in fact the Low Gap proceeds – or the proceeds from the highly lucrative roadside hazard tree removal that has never been enjoined – may cover the costs of these other project activities. Similarly, the

Forest Service failed to respond to KS Wild's argument that it can obtain and use congressionally appropriated funds to complete other Project activities.

Although the District Court's order several times cites to "evidence provided by Federal Defendants," ER 8-10, in fact this information comes only from the Declarations of Patty Grantham supplied during the course of litigation. *See*, ER 30-40, 44-60. The Ninth Circuit is clear that agency post-hoc rationalizations are due no deference and must not be accepted by a reviewing court. As the Ninth Circuit opined in *ONDA v. BLM*, "the courts may not accept appellate counsel's post hoc rationalizations for agency action. It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." 625 F.3d at 1120 (*citing Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 780 (9th Cir. 2006) *and quoting Auer v. Robbins*, 519 U.S. 452, 462 (1997); *Motor Vehicle Mfrs. Ass'n*, 463 U.S. 29, 50; *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). And, "while the [agency] can draw conclusions based on less than conclusive scientific evidence, it cannot base its conclusions on no evidence." *Pac. Coast Fed'n of Fishermen's Ass'ns v. United States Bureau of Reclamation*, 426 F.3d 1082, 1094 (9th Cir. 2005). In this case, Defendant Grantham has made numerous unsupported allegations about the revenue and cost of Project components "based on no evidence" or any citation to the Project's administrative record, and these assertions form the basis of the District Court's May 31st order.

Therefore, the District Court's opinion granting a stay pending appeal is based on reversible legal error.

In addition, the Forest Service's arguments that the Project is so "integrated" that enjoining one portion of it means that literally no other aspect of it may occur[3] is unsupported by any information in the administrative record. According to the agency's litigation theory, no injunction would ever be possible on a post-fire logging project (or any other kind of project), because every project on national forestlands is required to be "integrated" and designed by an "interdisciplinary team." *See*, 16 U.S.C. § 1604(g)(3)(F)(ii). It cannot be the law that a narrowly-tailored injunction pulls a thread that unravels an entire project such that a project that clearly violates the laws is nevertheless permitted to go forward because of its so-called "integrated" nature.

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[3] Notably, the Forest Service has only alleged that the District Court's January 2019 narrowly-tailored injunction "may" result in the Project becoming permanently futile. ER 8. However, *Winter* and *Cottrell* are clear that a showing of irreparable harm must be sufficiently likely such that injunctive relief is appropriate. Since the Forest Service has essentially advocated for an injunction enjoining an injunction, it, too, must demonstrate that its irreparable harm is sufficiently likely. However, it fails to do so because it has not pointed to any admissible information in the administrative record supporting its argument that *no* aspect of the Project may go forward if an injunction is imposed. This is reversible error. *Winter*, 555 U.S. at 22 (holding that a "possibility" of irreparable harm "is too lenient. Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction") (emphasis added).

The District Court also appears to have been persuaded that it "is no longer the case" that the agency is "not barred from eventually implementing the project" due to the narrowly-tailored injunction.[4] ER 9. However, the Forest Service has proffered no "new" information that it cannot still implement the Project after a resolution of the case on the merits. The Forest Service's arguments that "delaying the Project will result in the burned timber losing value" and "the salvage harvest is necessary both to safety and effectively implement[ing] site-preparation and reforestation" was based on information that was before the District Court from the outset of litigation, and therefore it is not "new." ER 8.

Moreover, the agency's argument attempt to prove too much. It is generally accepted that timber, as a living and organic resource and as opposed to mineral resources, is in a constant state of decomposition, and at some point, any given stand of trees will decay to the point that it would be of little, or no, economic value. When a tree is affected by fire, the economic value of the tree can and often does decline (although the ecological value of the tree persists and may increase). However, treating this ecological fact as determinative of whether an injunction is appropriate would allow the Forest Service to argue, as it has in this and almost

[4] The Court's May 31st Order restates with support Defendant Grantham's allegations that the narrowly-tailored injunction precludes Project actions such as site-preparation, reforestation, and "important roadside hazard reductions." ER 9, 10. KS Wild has not challenged the site-preparation or reforestation aspects of the Project, and the *only* challenged roadside hazard tree removal is along the unpaved, dead-end Bee Camp Road.

every other post-fire salvage project, that delaying the harvest of burned timber would result in economic harm to the government. This, too, cannot be the law because it would eviscerate judicial review, and yet it is the inevitable result of the agency's litigation position.

Finally, the District Court rightly observed that KS Wild's contention is that "Federal Defendant's argument boils down to the contention that if the injunction is not stayed, there will be economic harm to both the Forest Service and AFRC," and that this harm is not irreparable nor does it support an equitable determination that a stay pending appeal is appropriate. ER 8; *Los Angeles Mem. Coliseum v. National Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980) (economic harm is not irreparable); *Sampson v. Murray*, 415 U.S. 61, 90 (1974). While the District Court opined that it was not persuaded by KS Wild's argument, the Supreme Court and Ninth Circuit have frequently cast a skeptical eye on self-serving agency claims of economic harm. For example, the Supreme Court has long held that the appearance of financial bias in a decisionmaker gives rise to a Due Process violation. *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 875–84 (2009) (requiring recusal when an adjudicator has a "direct, personal, substantive, pecuniary interest" in the outcome of a matter).

The Ninth Circuit also has previously admonished the Forest Service for its biased decisionmaking when the agency's financial interests were implicated.

Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1178 (9th Cir. 2006) (Noonan, J., concurring); *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1309 (9th Cir. 2003) (Noonan, J., concurring); *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1024–26 (9th Cir. 2009) (Noonan, J., concurring); *see also*, Austin D. Saylor, Note, *The Quick and the Dead: Earth Island v. Forest Service and the Risk of Forest Service Financial Bias in Post-Fire Logging Adjudications*, 37 ENVTL. L. 847 (2007). As in *Sierra Forest Legacy*,

> In this case, the Forest Service makes no secret of the importance of the sales to its approval of the projects. Fund-raising for fuel-reduction is a substantial purpose… In the instant case the decision-makers are influenced by the monetary reward to their agency, a reward to be paid by a successful bidder as part of the agency's plan…Against this background of precedent, the Forest Service's own regulation requires that the Forest Service "objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a) (2000). Can an agency which has announced its strong financial interest in the outcome proceed objectively? Could an umpire call balls and strikes objectively if he were paid for the strikes he called?

Sierra Forest Legacy, 577 F.3d at 1025-26.

VII. CONCLUSION.

The District Court committed reversible error in granting the motions of the Forest Service and AFRC to stay its injunction pending appeal. This Court should preserve the *status quo ante* that existed before the lower court's May 31 order by reinstating the narrowly-tailored injunction entered by the District Court in January 2019 that halts post-fire logging in limited areas of the Project, allowing roadside hazard tree removal to occur to protect public health and safety.

Respectfully submitted this 6th day of June, 2019.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Klamath-Siskiyou Wildlands Center, Environmental Protection Information Center, and Klamath Forest Alliance state that they are non-profit entities that have not issued shares to the public and has no affiliates, parent companies, or subsidiaries issuing shares to the public.

Respectfully submitted this 4th day of June, 2019.

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, counsel for KS Wild certifies that there are two related cases to this appeal: American Forest Resources Council's appeal from the District Court's January 25, 2019 grant of a preliminary injunction, docketed as Ninth Circuit Case Number 19-15384; and the Forest Service's appeal from the District Court's January 25, 2019 grant of a preliminary injunction, docketed as Ninth Circuit Case Number 19-15597. These two cases were consolidated as Ninth Circuit Case Number 19-15384 by order of Appellate Court Mediator Roxane Ashe on April 11, 2019.

Respectfully submitted this 4th day of June, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on the date stated below. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Respectfully submitted this 4th day of June, 2019.

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