No. 07-16892

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SIERRA FOREST LEGACY, *et al.*,

v.

MARK REY, in his official capacity as Under Secretary of Agriculture, *et al.*,

On Appeal From the United States District Court for the Eastern District of California
No. Civ. S-05-0205 MCE/GGH
The Honorable Morrison C. England, Jr., Judge

SUPPLEMENTAL BRIEF OF AMICUS CURIAE, EDMUND G. BROWN JR., ATTORNEY GENERAL, ON BEHALF OF APPELLANTS SIERRA FOREST LEGACY, ET AL.

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Introduction

This brief, filed by amicus curiae Edmund G. Brown Jr., Attorney General for the State of California ("California"), responds to the Panel's order dated January 6, 2009, requiring the simultaneous supplemental briefing of three issues: "(1) whether the district court's order in *Sierra Nevada Forest Protection Campaign v. Rey*, 573 F. Supp. 2d 1316 (E.D. Cal. 2008), renders any issues in this appeal moot; (2) the effect of *Winter v. NRDC, Inc.*, 129 S. Ct. 365 (2008), on our holding that Sierra Forest Legacy is entitled to a preliminary injunction; and (3) the impaired impartiality issue raised in the concurrence to our opinion. *See Sierra Forest Legacy v. Rey*, 526 F.3d 1228, 1234 (9th Cir. 2008) (Noonan, J., concurring)." California's interest in this matter and in forest planning generally is set forth fully in its amicus brief filed November 21, 2007.

As explained below, first, the district court's order does not render any issues moot. The district court has not entered final judgment on some or all claims and therefore has made no final decision whether a permanent injunction should issue. The controversy relating to the preliminary injunction therefore remains live. This Court can give Appellants effective relief – specifically, a preliminary injunction preventing the Forest Service

from cutting larger trees to generate funds (as is allowed under the 2004 Framework) until the district court makes a final, appealable decision on a permanent remedy. Second, the substance of this Court's holding is wholly consistent with *Winter* because Sierra Forest Legacy established not just a mere possibility, but a likelihood of harm, including the cutting of larger trees that cannot be replaced. Third, while the Forest Service's impartiality in its decision to reject the 2001 Framework and adopt the 2004 Framework is a matter of serious concern, this Court may impose an adequate remedy under the National Environmental Policy Act ("NEPA") to redress the resulting harm without resort to the constitutional doctrine of due process.

Recent Procedural History

On May 15, 2008, reversing the district court, this Court preliminarily enjoined three logging projects approved under the 2004 Framework, but at the same time allowed the projects to proceed to the extent they are consistent with the 2001 Framework. *Sierra Forest Legacy*, 526 F.3d at 1234. This Court determined that Sierra Forest Legacy had shown that it would succeed on the merits of its claim under NEPA, 42 U.S.C. § 4321 to 4370f, challenging the 2004 Framework and Supplemental Environmental Impact Statement ("SEIS"), the same claim asserted by California in its

related lawsuit. *Id.* at 1233. As this Court found, the Forest Service considered only its preferred Alternative S2 (the 2004 Framework), which relies on substantial increases in the logging of larger trees – trees that the agency concedes pose no fire danger – to fund its management activities. *Id.* at 1231-1233. The Court noted that various funding options had been brought to the Forest Service's attention by the California Attorney General and others, including requesting special appropriations, re-prioritizing other funding, and altering its fuel treatment program. In this Court's words, "[s]o long as these alternatives remain unexamined or unreexamined, so long does the SEIS fail to conform to the law." *Id.* at 1233. The Court held that the district court had abused its discretion in holding otherwise. *Id.* at 1233.[1]

[1] This Court further held that, for two reasons, the Forest Service could not remedy this fundamental defect by pointing to the alternatives considered and rejected in the process leading to the 2001 Framework. First, the Forest Service had changed its modeling techniques between issuance of the 2001 Framework Final Environmental Impact Statement and the 2004 SEIS, preventing any comparisons. *Id.* at 1231-32. Second, the 2004 Framework was designed to serve new, post-2001 objectives, primary among those the provision of funds for fuels reduction. The 2001 Framework alternatives were not designed with these objectives in mind and, therefore, were not true alternatives to rejection of the 2001 Framework. *Id.*

Because the NEPA claim was dispositive, this Court did not reach the merits of Sierra Forest Legacy's other claims.

After this Court's decision, the district court on August 1, 2008, issued its decision on the parties' previously submitted cross motions for summary judgment, reaching the merits of Sierra Forest Legacy's claims under the National Forest Management Act ("NFMA"), 16 U.S.C. § 1600 to 1614, and NEPA. The district court ruled in favor of the Forest Service on all claims challenging the 2004 Framework, except for the NEPA alternatives claim. Without conducting its own analysis, the district court summarily stated that the NEPA alternatives claim had been "squarely addressed by the Ninth Circuit[,]" and that "[g]iven the Ninth Circuit's clear precedent on the very issue presently before the Court, summary adjudication in [Sierra Forest Legacy's] favor must be granted ...." *Id.* at 1348.

The district court did not impose a remedy for the Forest Service's NEPA violation, but instead directed briefing on the issue. *Sierra Nevada Forest Protection Campaign*, 573 F. Supp. 2d at 1353. The parties completed briefing on December 10, 2008, in advance of a scheduled hearing date of December 19, 2008. Supplemental Request for Judicial Notice ("RJN"), Exhibit A, (docket, item 257). On December 18, 2008, the

district court took the matter off calendar, deeming the matter submitted without oral argument. *Id.* In an accompanying order, the district court explained: "Given the fact that the appellate decision underlying this Court's finding on behalf of Plaintiffs in this matter remains non-final ... it would be premature to fashion a remedy, and enter any final judgment in this matter, until after the rehearing petitions have been adjudicated ...." Supp. RJN, Exhibit B, p. 3. The district court strongly implied that it would revisit the NEPA alternatives claim should this Court vacate its May 15, 2008, order. "If the panel opinion in *Rey* is vacated, the need for a remedies hearing may be entirely obviated should this Court then determine that the 2004 Framework's consideration of project alternatives was otherwise sufficient." *Id.*[2]

The posture of California's related case, *People of the State of California v. United States Department of Agriculture*, No. Civ. S-05-0211 MCE/GGH, is substantially similar.[3]

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[2] As described in Sierra Forest Legacy's brief, on January 20, 2009, the district court denied the Appellants' separate, stand-alone motion for permanent injunction without prejudice in order to "clear[] the Court's pending docket until a decision from the Ninth Circuit is forthcoming …."

[3] California's claims are grounded in NEPA and the Administrative Procedure Act; it has no claims under the NFMA. On August 19, 2008, the (continued…)

Responses to Questions

1. The District Court's Order, Which is Subject to Revision and Does Not Impose a Remedy, Does Not Render Moot any Issue in this Appeal.

An appellate court "has an obligation to determine whether a case presents a live controversy, and is precluded from entering judgment in an appeal that has been rendered moot." *Granados-Oseguera v. Mukasey*, 546 F.3d 1011, 1014 (9th Cir. 2008). Mootness on appeal is not, however, lightly found. If "the appellate court can give the appellant any effective relief in the event that it decides the matter on the merits in his favor" then "the matter is not moot." *Garcia v. Lawn*, 805 F.2d 1400, 1402 (9th Cir. 1986). The question in this case is whether the district court's summary adjudication order prevents this Court from giving Appellants any effective relief on the current appeal.

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district court ruled on the cross motions for summary judgment in California's case, relying on this Court's order to hold that the Forest Service failed to consider reasonable alternatives, but otherwise rejecting California's claims. Supp. RJN, Exhibit C, pp. 65-66. On December 19, 2008, the district court issued an order stating that any remedy in California's action would be "premature" because rehearing petitions were pending in the appeal in the related case. Supp. RJN, Exhibit D, p. 3.

The Ninth Circuit has held that where a district court enters final judgment in an action, appeal of an order relating to a preliminary injunction generally is rendered moot. For example, in *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441 (9th Cir. 1992), while an appeal on a denial of preliminary injunction was pending, the district court certified an order of partial summary judgment on certain claims. *Id.* at 1448; *see* Fed. R. Civ. P. 54(b). This Court held that because its disposition of the summary judgment appeal affirmed the district court's grant of summary judgment in favor of defendants, a reversal of the district court's denial of preliminary injunctive relief would have no practical consequences, and the separate appeal of the denial of a preliminary injunction therefore was moot. *Id.* at 1450. *See also Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 314 (1999) (noting that "[g]enerally, an appeal from the grant of a preliminary injunction becomes moot when the trial court enters a permanent injunction, because the former merges into the latter"); *In re Estate of Ferdinand Marcos Human Rights Litigation*, 94 F.3d 539, 544 (9th Cir. 1996) (holding that where permanent injunction is issued in final judgment, interlocutory injunction becomes merged in the final decree, and appeal from preliminary order is moot).

Here, the district court has not entered final judgment on some or all claims, so the controversy relating to the preliminary injunction remains live. This Court can, and its existing order did, give Appellants effective relief – specifically, a preliminary injunction that will prevent the irreparable cutting of larger trees pending a final, appealable decision on whether a permanent injunction should issue.[4]

2. The Panel's Application of the Preliminary Injunction Standard is Consistent with *Winter v. NRDC, Inc.*

As discussed in more detail in Sierra Forest Legacy's supplemental brief, the Court's order of May 18, 2008, is wholly consistent with the Supreme Court's decision in *Winter*, though this Court may consider amending its order to reflect the *Winter* Court's articulation of the standard for issuing a preliminary injunction.

In *Winter*, the district court issued a preliminary injunction that curtailed in six respects the Navy's use of mid-frequency active ("MFA") sonar in its antisubmarine training exercises in order to protect marine

[4] California observes that judicial efficiency also warrants keeping the Court's current order in place. The district court has given clear indication that if this Court's order is vacated, it likely will revisit the decisions it has made in favor of Sierra Forest Legacy and California on their NEPA alternatives claims.

mammals pending completion of an in-progress Environmental Impact Statement ("EIS"). *Winter*, 129 S. Ct. at 373. The Navy challenged only two of the six requirements: (1) to shut down MFA sonar when a marine mammal is spotted within 2,200 yards of a vessel; and (2) to power down MFA sonar by 6 decibels during "surface ducting conditions." *Id.* The district court determined that the two challenged restrictions properly were part of the injunction, this Court affirmed, and the Supreme Court reversed.

The Supreme Court's decision in *Winter* largely is driven by the nature of the government defendant's interest – protecting national security. The environmental plaintiffs contended that the Navy's use of sonar would injure marine mammals or adversely alter their behavior. *Id.* at 377. The Supreme Court stated that while it did "not question the seriousness of these interests … the balance of equities and consideration of the overall public interest tips strongly in favor of the Navy." *Id.* at 378. The Court observed:

> [F]orcing the Navy to deploy an inadequately trained antisubmarine force jeopardizes the safety of the fleet. Active sonar is the only reliable technology for detecting and tracking enemy diesel-electric submarines, and the President-the Commander in Chief-has determined that training with active sonar is "essential to national security."

Id. at 378. In the Court's view, "the proper determination of where the public interest lies does not strike us as a close question." *Id.*

In this case, in contrast, national security is not implicated. While protecting Sierra forest resources and communities from severe wildfire certainly is an important interest, as this Court noted, it is not directly at issue, as the injunction does not prevent fire management. "[T]he question we address here is whether USFS's *choice of funding* for fire reduction – rather than fire reduction itself – outweighs California's preservation interests." *Sierra Forest Legacy*, 526 F.3d at 1234 (emphasis in original). This Court properly concluded that it did not, "given that 'special solicitude' should be afforded California's stake in its natural resources and that the Forest Service did not consider alternatives to its choice of funding." *Id.* (quoting *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 520 (2007)).

While the balancing of the equities was determinative in *Winter*, the Supreme Court also clarified the harm that a plaintiff must show to prevail on a motion for preliminary injunction. To be entitled to relief, the Court held that a plaintiff must show more than a mere "possibility" of irreparable harm, but rather must establish "that irreparable harm is *likely* in the absence of an injunction." *Id.* at 375 (emphasis in original).[5] The Court observed

[5] In the dissent, Justice Ginsberg noted that the majority's statement of the standard does not change the rule that claims for equitable relief are

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that it was unclear whether "articulating the incorrect standard" had affected the lower courts' analysis in light of the district court's conclusion that the environmental plaintiffs had established a "near certainty" of irreparable harm. *Id.* at 376. As discussed, the Supreme Court held that, in any event, such harm was outweighed by national security interests. *Id.* at 378.

This Court in its order stated that Sierra Forest Legacy had shown "the real possibility of irreparable harm" because the proposed removal of large trees would reduce established habitat for sensitive species. *Sierra Forest Legacy*, 526 F.3d 1228, 1233-34. In this case, harm is likely, not merely theoretically possible; if the logging projects go forward, a substantial number of larger trees that have taken decades to grow will be cut only for the funds they will generate, and all resources values associated with those trees, including habitat for sensitive species, will be destroyed.[6] Stated

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"evaluated on a 'sliding scale,' sometimes awarding relief based on a lower likelihood of harm where the likelihood of success is very high." *Winter*, 129 S. Ct. at 392. In this case, as this Court held, "[t]he legal merits of Sierra Forest's case … are strong." *Sierra Forest Legacy*, 526 F.3d 1233.

[6] In other cases, on similar facts, this Court has found harm sufficient to justify an injunction. *See, e.g.*, *The Lands Council v. Martin*, 479 F.3d 636, 643 (9th Cir. 2007) (logging live trees 21 inches in diameter and greater constituted "permanent environmental injury" justifying injunction); *Earth Island Institute v. U.S. Forest Service* 442 F.3d 1147, 1176-78 (9th Cir.

(continued…)

simply, "logged trees cannot be brought back[.]" *See Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1066 (9th Cir. 2002). On these facts, this Court may choose to amend the language of its May 18, 2008, order to clarify that harm to Sierra Forest Legacy, should the requested injunction not issue, is not merely possible, but likely – indeed virtually certain.

The *Winter* Court also clarified that a proper inquiry into the balance of harms must focus on the harm related to the particular injunction under consideration. The Court expressed concern that the district court in that case had considered only the potential harm to marine mammals from MFA sonar-training exercises generally, and had not considered harm in light of the four specific restrictions that the Navy had not challenged. *Winter*, 129 S. Ct. at 376. In this case, in contrast, this Court properly considered the

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2006) ("unnecessary cutting of trees that would otherwise survive, in harm to the California spotted owl" justified injunction); *see also Sierra Club v. Eubanks*, 335 F. Supp. 2d 1070, 1083 (E.D. Cal. 2004) (holding that plaintiffs had shown irreparable harm from logging since "once trees are removed from the landscape, they cannot be replaced"). Recognizing the cutting of trees as irreparable harm has a long history. *See Erhardt v. Boaro*, 113 U.S. 537 (1885) (noting that preliminary injunction pending quieting of title "is now a common practice in cases where irremediable mischief is being done or threatened … such as the … cutting down of timber").

likely harm from the requested tailored injunction – allowing management to proceed consistent with the 2001 Framework. As this Court observed, the resulting harm is not that the Forest Service is prevented from undertaking essential management activities such as fuel treatment, but that it is prevented from defaulting to its preferred method of funding – large scale cutting of larger trees that pose no fire danger.

In sum, with the clarification of the applicable standard, the Court's order of May 18, 2008, fully will comport with the *Winter* decision.

3. The Forest Service's Partiality is Appropriately Considered in Addressing Appellant's NEPA Claim.

California agrees with the concurrence in the Court's May 18, 2008, order that the Forest Service's partiality in this matter, arising from the agency's financial interest in awarding logging contracts for large trees, raises serious concerns. Whether the Forest Service's financial interest violates due process, however, raises difficult constitutional issues. To evaluate a due process claim, the Court must determine, for example, whether Sierra Forest Legacy's interests under NEPA, the Administrative Procedure Act, and the NFMA rise to the requisite liberty and property interests cognizable under the Due Process Clause and whether adopting a Framework forest management plan or awarding individual logging

contracts are judicial or quasi-judicial actions governed by due process requirements.

In general, a court may decline to reach a constitutional issue where a case may be decided on a narrower ground. *Greater New Orleans Broadcasting Ass'n, Inc. v. U.S.*, 527 U.S. 173, 184 (1999). In this case, the narrower ground is NEPA. Under NEPA, although an agency may "formulate a proposal or even identify a preferred course of action before completing an EIS[,]" *Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1185 (9th Cir. 1997), any agency preferences must not subvert the subsequent process into a *post hoc* justification for a decision already made. *State of California v. Block*, 690 F.2d 753, 770 (9th Cir. 1982). An agency cannot, consistent with NEPA, uncritically privilege its preferred course of action. *Oregon Natural Desert Ass'n v. Bureau of Land Management*, 531 F.3d 1114, 1145 (9th Cir. 2008) (quoting *Block*, 690 F.2d at 767). In short, any agency preferences cannot interfere with the agency's legal obligation to "[r]igorously explore and *objectively* evaluate" a reasonable range of alternatives. 40 C.F.R. § 1502.14(a) (emphasis added). In this case, the Forest Service violated NEPA not simply because it prefers

to fund its operations with large-scale logging, but because it allowed this preference to blind it to reasonable alternatives.

The harm arising from the Forest Service's partiality in this case may be redressed by a remedy tailored to the NEPA violation – enjoining management activities to the extent they are inconsistent with the 2001 Framework until the Forest Service complies with NEPA by rigorously exploring and objectively evaluating a reasonable range of alternatives to the 2004 Framework. Accordingly, in California's view, the Court need not reach the complicated constitutional issues inherent in a due process analysis.

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Respectfully submitted:

Dated: January 27, 2009

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January 27, 2009

Dated

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