Appeal No. 07-16892

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA FOREST LEGACY, *et al.*

Plaintiffs - Appellants,

vs.

MARK REY, *et al.*,

Defendants – Appellees,

TUOLUMNE COUNTY ALLIANCE FOR RESOURCES & ENVIRONMENT, *et al.*,

Defendants-Intervenors - Appellees

On Appeal From the United States District Court
for the Eastern District of California, Sacramento
Hon. Morrison C. England, Jr.
Case No. D.C. No. CV-05-00205-MCE

SUPPLEMENTAL BRIEF OF DEFENDANT-INTERVENOR CALIFORNIA CATTLEMEN'S ASSOCIATION

WILLIAM J. THOMAS, Bar No. 67798
BEST BEST & KRIEGER LLP
400 Capitol Mall, Suite 1650
Sacramento, California 95814
Telephone: (916) 325-4000
Telecopier: (916) 325-4010

Attorneys for Defendant-Intervenor-Appellee
California Cattlemen's Association

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29.1, Defendant-Intervenor-Appelle California Cattlemen's Association states that it has no parent corporation and that no publicly held corporation owns more than 10% of its stock.

s/ *William J. Thomas*
William J. Thomas
Best Best & Krieger LLP
400 Capitol Mall, Suite 1650
Sacramento, CA 95814
Tel.: (916) 325-4000
Fax" (916) 325-4010

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

On behalf of the challenged cattle grazers, the California Cattlemen's Association ("CCA"), Intervenors in defense, hereby file a limited brief pursuant to the Court's Order of January 6, 2008.

BACKGROUND

Plaintiffs attempt by this action to curtail livestock grazing, timber operations and recreational enterprises by favoring the 2001 Framework over thoughtful revisions promulgated by the United States Forest Service ("USFS") in 2004. In evaluating the amendments which became the 2004 Framework the USFS considered extensive additional data and analysis not available when promulgating the Framework of 2001. With this additional information, the USFS was able to more intensively manage USFS forest resources and species. As to grazing, this was made clear by the District Court's decision in the State of California case.[1]

[1] Under the 2004 Framework, on the other hand, change was initiated that improved the ability to develop site-specific plans tailored to address conservation at a local level while still permitting grazing. While 2004 ROD still requires surveys and protections for occupied sites, it permits grazing on occupied sites where the Agency has developed a site-specific management strategy. SNFPA 3048. That strategy focuses on "protecting the next site and associated habitat during the breeding season and the long-term sustainability of suitable habitat at breeding sites." *Id*. This comports with the Review Team's observation that impacts from grazing (such as flycatcher nest bumping) could be addressed by working with permittees to adjust the timing, location, and intensity of grazing to keep livestock out of willow flycatcher territories during the bird's breeding period. SEIS_01_00067. (continued…)

Plaintiffs' remedial prayer seeks to completely overturn the 2004 Framework as it applies to the various multiple uses of the target forest lands. Plaintiffs, however, based their appeal to this Court on issues having to do with only three particular timber harvests. Such appeal did not raise any issues related to livestock grazing interests or suggest any impact on any of the three listed species potentially impacted by grazing (willow flycatcher, Yosemite toad, great gray owl). Plaintiffs are limited in their ability to challenge the lower court decision because the 2004 Framework increased on the ground management and improved environmental protection for the three listed species relative to grazing.

Grazing issues were not raised before this Court in the appeal of the three timber projects. Similarly, grazing issues were neither directly briefed nor argued before the lower Court. Consequently the lower Court's decision did not reference grazing. *Sierra Nevada Forest Protection Campaign v. Rey*, 573 F. Supp. 2d 1316 (E.D. Cal. 2008) The preliminary injunction sought by Plaintiffs is not limited to timber, and would impact all uses of forest lands in a very broad and negative manner. This "across the board" remedy would directly and severally impact the

---

(…continued)

Similarly, for the toad, the 2004 framework excludes grazing from occupied habitat except where an interdisciplinary team has developed a site-specific plan to successfully manage livestock around those areas. SNFPA 3001." *California ex rel. Lockyer v. Unites States Dep't of Agriculture*, 2008 U.S. Dist. LEXIS 72817, 39-40 (E.D. Cal. Aug. 18, 2008)

livestock industry and the cattlemen historically relying on these allotments.

ISSUES

I. The Decision In *Sierra Nevada Forest Protection Campaign v. Rey* 573 F. Supp. 2d 1316 (E.D. Cal. 2008) Renders All Issues On Appeal Moot.

District Court Judge England wrote definitive decisions in each of the three related challenges to the 2004 Framework. *Sierra Nevada Forest Protection Campaign v. Rey*, 573 F. Supp. 2d 1316 (E.D. Cal. 2008); *People of the State of California v. United States Dept. of Agricul.*, 2008 U.S. Dist. LEXIS 105923; *Pacific Rivers Council v. United States Forest Service*, 2008 U.S. Dist. LEXIS 85403. In each of these decisions, Judge England addressed the substantive and administrative issues in a thorough, global and integrated manner. The wisdom of these decisions should control these matters rather than an appeal of an injunction brought by Plaintiffs which deals with only three specific timber harvest plans, but which seeks an "across the board" remedy. At this point, it would be appropriate to deal with the case decision not an interlocutory limited issues appeal. As to grazing, Judge England, in the State of California decision, wrote:

> "Nonetheless, by allowing site-specific plans that permit grazing during periods not apt to significantly impact either the flycatcher or the toad, and thereby increasing the use of certain allotments, the Forest Service's actions are neither arbitrary or capricious for purposes of the APA. This decision to strike a different multiple use balancing between habitat protection and grazing is supported by the record, and amounts to a reasonable exercise of the Forest Service's discretion, as articulated above, to emphasize a different mix of the resources it is entrusted to manage." (*People of the State of California v. USFS, et al.*,

Case No. 05-CV-0211, Amended Memorandum and Order, Pages 28-31)

II. The *Winter v. NRDC, Inc*., 129 S. Ct. 365 (2008) Decision

In *Winter v. NRDC, Inc*., 129 S. Ct. 365 (2008) the Supreme Court addressed several issues that have a significant impact on this Court's holding that Sierra Forest Legacy is entitled to a preliminary injunction. The *Winter* court reinforced three overarching principles for injunctive relief and specifically redirected this Court on cases involving NEPA challenges. First, an applicant must demonstrate that they will likely suffer irreparable harm before an injunction can be awarded. Second, a preliminary injunction is an extraordinary remedy and is never awarded as a matter of right. Third, courts should give great deference to the professional judgment of governmental authorities concerning the administration of a particular governmental interest.

The specific standard, clarified by the Supreme Court, requires that an applicant must prove that irreparable injury is *likely* to occur absent an injunction. (Emphasis in original) The "possibility of harm standard is too lenient," and thus would improperly support injunctions. *Winter v. NRDC, Inc*., *supra*, 129 S. Ct. at p. 375. Plaintiffs in their appeal have not demonstrated that irreparable injury is *likely* to occur. The case at bar is a facial challenge to the USDA/USFS's adoption of the 2004 Framework. The 2004 Framework established environmental restrictions on virtually all of the multiple uses of forest resources across the

entirety of the Sierra Nevada Range. There is no "as applied" feature to the challenge, thus Plaintiffs face a difficult burden to show that it is likely that irreparable injury will occur. The Plaintiffs only generally cited certain differences between the 2001 Framework and the 2004 Framework, and made broad arguments based largely on conjecture and thereby asserted that they favored the earlier Framework and that amounted to the basis for their claim of irreparable injury. This falls well short of the *Winter* standard.

As to grazing, the 2004 Framework calls for "on-the-ground" intense management of the meadows supporting the willow flycatcher and the Yosemite toad by the USFS. It offers increased protection to these species and therefore directly works against the Plaintiffs' attempt to demonstrate the likelihood of "irreparable harm." Plaintiffs' entire argument is that there may be general environmental impacts caused by grazing to any of the three species: (1) the willow flycatcher, (2) the Yosemite toad, and (3) the great gray owl. Their general and hypothetical arguments of alleged impacts fail. Plaintiffs fail to show a likelihood of specific damage as their allegations are completely speculative, and the same assertions of injury are made across every allotment, and they completely ignore the focused management of the meadows called for in the 2004 Framework, or the differences in individual use and physical characteristics between the allotments. They do not, and are unable to demonstrate a likelihood of specific

irreparable injury to any of the three listed species on any allotment. Thus, because Plaintiffs only present an argument of a possibility of some remote hypothetical future injury, they have failed to meet their burden under *Winter*.

In an effort to further narrow this injunction standard the *Winter* Court stated, "We also find it pertinent that this is not a case in which defendant is conducting a new type of activity with completely unknown effects on the environment." *Winter v. NRDC, Inc*., *supra*, 129 S. Ct. at p. 376. This holding in *Winter* certainly has application to cattle grazing on U.S. Forest Service lands. Cattle have been grazing on governmental lands for over one hundred years. The effects of seasonal cattle grazing are known and are managed so that it does not injure the environment.

In *Winter*, the Supreme Court also reinforced that an "injunction is an extraordinary remedy never awarded as of right." *Winter v. NRDC, Inc*., *supra*, 129 S. Ct. at p. 376. In dealing with injunctions the Court is required to balance the competing claims of injury and consider the effect of an injunction on each party. *Ibid*. In light of *Winter*, caution is warranted because the grazing of the various allotments have gone on for many years, and cattlemen are totally reliant thereon, and this is pitted against the general, non-specific allegations of Plaintiffs' suggesting possible impact to species. Cattlemen have experienced significant reductions in seasonal grazing on these allotments over recent years, and by the

2004 regulatory Framework the USFS has sought to increase management and protection of the listed species.

The *Winter* court also underscored that courts must give great deference to the professional judgment of governmental experts concerning the relative importance of a particular governmental policy. *Winter v. NRDC, Inc*., *supra*, 129 S. Ct. at p. 377. In *Winter*, the Court explained that the record contained declarations of senior naval officers explaining the importance of the issues involved sonar training. *Ibid*. Here, the declarations of USFS professionals provide insight into the issues involved surrounding the 2004 grazing management, and must be given great weight by this Court. This coupled with this Court's recent ruling in *Lands Council v. McNair* that held that choosing between competing scientific positions is "not a proper role for a federal court." *Lands Council v. McNair*, 2008 WL 264001 (9th Cir. 2008) at *4.

Plaintiffs have failed to carry their burden on this element, and their request for an injunction should be denied.

In anticipation of Plaintiffs' attempt to dismiss the impact of the *Winter* decision, it is important to recognize that 1) the Court in *Winter* did not limit the deference requirement to only those situations where national security is involved, and 2) did not limit the requirement of demonstrating the likelihood of irreparable harm only in national security situations. The Court only referenced the security

interest after setting forth the rule on demonstrating the likelihood of irreparable harm.

III. The USFS Does Not Suffer From Impaired Impartiality

In the opinion of this Court in *Center for Biological Diversity, et al. v. Mark Rey, et al.*, 526 F.3d 1228, (pages 7-10) the majority analyzed the relationship of timber harvest based on tree size/board feet and financial return to the Forest Service to administer the program. Picking up on that issue, Judge Noonan in dissent discussed impaired impartiality by suggesting that any specific timber harvest project may unduly influence USFS professionals to favor timber harvest because of the revenue which may flow to the federal government.

Although theoretically intriguing, it should be recognized that most all governmental programs have historically and are increasingly being funded by regulatory and administrative program user fees. This is not unique to government in general and is particularly true as to the federal government dealing with resources (i.e. grazing, timber, fishing, hunting, mining, skiing, water, power, etc.). The administration of each of these programs is generally controlled by their organic acts and in the case of the Forest Service, they are specifically governed by forest plans, as well as all applicable environmental statutes. In fact, it is the belief of the regulated community that these agencies are far more inclined to act to protect the environment than the staff may be influenced by agency administrative

budgets.

These funding situations differ regarding the resource character and economics, however, each are entirely distinguishable from judges or courts being funded by ticket fine levels. As to grazing, the resource (annual growth of forbs and grasses) is very limited and has very limited value. The annual fee to graze for the three to six month season is controlled by a statutory formula and works out to be less than $1.50 per Animal Unit Month (AUM), which, depending on the allotment, would be several dozen acres. Thus, there is virtually no economic consequence, and certainly nothing that could give rise to impartiality.

The Supreme Court has held that due process has been denied when the fines imposed are a "substantial portion" of the government agency's income. *Ward v. Vill. Of Monroeville*, 409 U.S. 57, 59 (1972). Under this logic then, there would be no bias until an agency was making decisions over revenue that amounted to be a substantial portion of its income. Thus, in the case at bar, the amount of money generated from grazing as compared to the overall USFS budget would be the critical element that must be addressed before a determination of impartiality is made. *Sierra Forest Legacy v. Rey*, *supra*, 526 F.3d at p. 1235.

CONCLUSION

The decision in *Sierra Nevada Forest Protection Campaign v. Rey* renders the issues as to the three identified projects moot because Judge England addressed

those issues in a global and integrated manner. Using this approach, the lower Court was able to fashion an equitable remedy as between the parties and insure compliance with NEPA. The argument against an injunction is also supported by the Supreme Court decision in *Winter*. Further, the resource based fees to administer these programs does not constitute a bias that would preclude impartiality.

Dated: January 30, 2009

Best Best & Krieger LLP

By: s/ William J. Thomas
WILLIAM J. THOMAS
Attorney for Defendant-Intervenor-Appellee
California Cattlemen's Association

Certificate of Compliance
Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit
Rule 32-1 for Case Number 07-16982

I certify that:

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached Supplemental Brief is proportionately spaced, has a typeface of 14 points and contains 2,397 words.

January 30, 2009
Date

s/ *William J. Thomas*
Signature of Attorney

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2009, 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.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

Barclay T. Samford
DOJ - U.S. DEPARTMENT OF JUSTICE
Environment & Natural Resources Division
8th Floor
1961 Stout St.
Denver, CO 80207

Patrick Callagher
SIERRA CLUB ENVIRONMENTAL LAW PROGRAM
4th Floor
85 2nd Street
San Francisco, CA 94109-3441

McGregor W. Scott
USSAC - OFFICE OF THE U.S. ATTORNEY
Suite 10-100
501 I Street
Sacramento, CA 95814

Ronald J. Tenpas
DOJ - U.S. DEPARTMENT OF JUSTICE
Environment & Natural Resources Division
P.O. Box 663
Washington, DC 20044-0663

s/ *William J. Thomas*

SACRAMENTO\WTHOMAS\55803.3