No. 07-16892

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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SIERRA FOREST LEGACY, et al.,
Plaintiffs-Appellants,

-v.-

MARK REY, in his official capacity as Under Secretary of Agriculture; et al,
Defendant-Appellees,

and

TUOLUMNE CO. ALLIANCE FOR RESOURCES & ENVIRONMENT, et al.,
Defendant-Intervenors-Appellees

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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# DEFENDANT-INTERVENOR-APPELLEES' BRIEF

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## I. Introduction

On October 15, 2007, the United States District Court for the Eastern District of California issued a ruling denying the Plaintiff-Appellant's motion for preliminary injunction against logging activities at the Basin, Empire, and Slapjack sites. While the Eastern District Court pressed forward with the merits of the litigation, the Plaintiffs appealed the preliminary injunction ruling to the Ninth Circuit Court of Appeals.

On May 15, 2008, the appellate court overturned the District Court's ruling on the preliminary injunction and remanded the matter with instructions that a narrowly tailored injunction be issued immediately.

Meanwhile, the District Court continued on with the underlying case, and on August 1, 2008, ruled on cross motions for summary judgment. The Ninth Circuit responded by issuing an order calling for the parties to brief the court on: (1) whether the district court's order in *Sierra Nevada Forest Protection Campaign v. Rey*, 573 F.Supp. 2d 1316 (E.D. Cal. 2008), render any of the issues in this appeal moot; (2) the effect of *Winter v. NRDC, Inc*, 129 S.Ct. 365 (2008), on the holding that Sierra Forest Legacy is entitled to a preliminary injunction; and (3) the impaired impartiality issue raised in the concurrence to preliminary injunction appellate opinion in *Sierra Forest Legacy v. Rey*, 526 F.3d 1228, 1234 (9th Cir. 2008)(Noonan, J., concurring).

## II. The District Court's Order in *Sierra Nevada Forest Protection Campaign v. Rey*, 573 F. Supp. 2d 1316 (E.D. Cal. 2008), renders the issues of this appeal moot.

### *A. Purpose of a Preliminary Injunction*

Before determining if any of the issues raised by this appeal are moot, the Court must first examine the issues at hand. The primary issue in this case is whether or not the preliminary injunction is appropriate now that a ruling on the merits has been made by the District Court, and the answer is that it is not.

The "purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). This tenet is so fundamental that it is embedded as the standard for establishing a preliminary injunction – the demonstration of either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) a serious question going to the merits being raised with the balance of hardships tipping sharply in favor of the moving party. See, *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 990 (Ninth Cir. 2006) ("[t]he purpose of a preliminary injunction is to preserve rights pending resolution of the merits of the case by the trial").

The Ninth Circuit reiterated this principle by prefacing its ruling with an acknowledgment that, "[a]s the district court's decision is preliminary, so must our

decision be preliminary. ***It is not on the merits***." *Sierra Forest Legacy v. Rey*, 526 F.3d 1228, 1231 (Ninth Cir. 2008)(emphasis added).

In addition to clarifying that it was not making a decision on the merits, the Ninth Circuit also restricted its review to a "very limited and narrow issue" of whether or not the 2004 SEIS complies with the requirements of NEPA. *Sierra Forest Legacy v. Rey*, 526 F.3d at 1231. A ruling on a *preliminary* injunction is exactly that, *preliminary*. It seems axiomatic that a limited and narrow inquiry as to whether the Appellants could demonstrate a "*likelihood* of success on the merits" would thus fall far short of full adjudication of the merits themselves.

*B. Mootness*

A case becomes moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. *Erie v. Pap's A. M.*, 529 U.S. 277, 287 (2000)(citing *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979)). An appeal will generally be dismissed as moot, "when events occur which prevent the appellate court from granting any effective relief even if the dispute is decided in favor of the appellant." *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust*, 109 F.3d 602, 612 (Ninth Cir. 1997). Considering that the very purpose of a preliminary injunction is to prevent irreparable harm from occurring before a ruling on the merits can be made, a ruling on the merits constitutes that very type of event. The stay created by such an

injunction is a useful tool pending further appeal but, "once the Court resolves the merits of the appeal, the stay ceases to be relevant." *Winter v. NDRC, Inc.*, 129 S.Ct. at 381, fn. 5 (citing *Natural Resources v. Winter*, 518. F.3d 704 (9th Cir. 2008)). Being that preliminary injunctions are intended as a remedy for temporary relief, by its very definition it becomes irrelevant when a more permanent remedy is created. Thus, 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. *Grupo Mexicano De Desarrollo v. Alliance Bond Fund*, 527 U.S. 308, 314 (1999). Logic would also dictate that the same holds true when the court rules on the underlying merits, or chooses to deny a permanent injunction. In this case, both those events have occurred. The issue of the preliminary injunction is therefore moot.

*C. Ruling on the Merits*

Although the issue of the preliminary injunction has been rendered moot by virtue of the both the ruling on the merits and the denial of permanent injunction, the question of whether or not the U.S.F.S. adequately explored and evaluated all reasonable alternatives has yet to be decided. The Court of Appeals was asked to decide whether or not the District Court erred in denying the preliminary injunction. As a general rule, the standard of review in such a matter is whether or not the lower court abused its discretion. See, *Lands Council v. McNair*, 537 F.3d

981, 986 (9th Cir. 2008) (a district court's decision regarding preliminary injunctive relief is subject to "limited and deferential" review); *Earth Island Inst v. U.S. Forest Serv*. (Earth Island Inst. II), 442 F.3d 1147, 1156 (9th Cir. 2006)(denial of a preliminary injunction is reviewed for abuse of discretion). In this case, however, the Ninth circuit chose to review the law *de novo*, and by so doing, gave pause to the District Court when it was time to rule on the merits concerning this particular issue.

Although the Ninth Circuit stated that it intended to review the injunction *de novo*, it also expressly stated that the ruling was *preliminary*. *Sierra Forest Legacy v. Rey*, 526 F.3d at 1231 (Ninth Cir. 2008)(emphasis added). In fact, the Ninth Circuit expressly stated that it was not making a decision on the merits, and that it was looking very narrowly at the issue. *Id*. This declaration coincides with the purpose of a preliminary injunction, and seemingly marked the issue for a more in-depth analysis of the issue by the district court. However, rather than delving into the merits of the issue, the District Court deferred to the "clear precedent" set by the appellate decision. *Sierra Nevada Forest Protection Campaign v. Rey*, 573 F.Supp. 2d 1316, 1348 (E.D. Cal. 2008). Again, the appellate ruling was not a decision on the merits of whether or not the USFS had adequately considered sufficient reasonable alternatives. It was solely an examination of the narrow issue of whether or not irreparable harm would be done if logging were allowed to go

forward before a decision on the merits was made by the District Court. Any precedent that was created pertained to the appropriateness of the preliminary injunction. Thus, because the District Court relied exclusively on the "clear precedent" of the appellate ruling, a decision on the merits has yet to be made.

This court has previously held that "[t]he focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo." *Golden Gate Res. Assn. v. City*, 512 F.3d 1112, 1116 (Ninth Cir. 2008) (quoting, *Canal Authority of Florida v. Callaway*, 489 F.2d 567**,** 576 (5th Cir. 1974) ("If the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury"). The District Court's reliance on the preliminary ruling merely preserves the status quo of the preliminary injunction. Not only does that contradict the District Court's recent denial of the permanent injunction, but it also denies the parties a full adjudication of the issue. Certainly we can all agree that simply preserving the status quo without resolving the underlying issue risks some form of irreparable injury, either in the form of altered habitat or a catastrophic wildfire. Therefore, the appropriate action is to remand the issue to the District Court for decision on the merits, free from the "precedent" of the preliminary injunction.

## III. The Effect Of *Winter v. NRDC, Inc*, 129 S.Ct. 365 (2008), On The Holding That Sierra Forest Legacy Is Entitled To A Preliminary Injunction

*Winter v. NRDC, Inc.*, 129 S.Ct. 365 (2008), concerned the U.S. Navy's use of sonar off the coast of Southern California during training exercises. The Plaintiffs, asserting that the particular sonar being used caused serious injury to marine mammals, sought declaratory and injunctive relief on the grounds that the Navy violated the National Environmental Policy Act of 1969 (NEPA) by failing to prepare an Environmental Impact Statement (EIS) prior to commencing the training exercises. *Winter v. NRDC, Inc.*, 129 S.Ct. at 366. The Ninth Circuit ultimately upheld a preliminary injunction against the training exercises on the grounds that the plaintiffs had carried their burden of establishing a "possibility" of irreparable injury, and that the balance of hardships and consideration of other public interests favored the plaintiffs. *Id*. However, the decision was overturned by the Supreme Court of the United States, which held that the Ninth Circuit applied an incorrect standard for issuing a preliminary injunction and the public's interest outweighed the risk of harm.

*A. Likelihood of Irreparable Harm*

In *Winter*, the Supreme Court held that "the Ninth Circuit's 'possibility' standard is too lenient" and reaffirmed the long standing rule that a party seeking preliminary injunction is required "to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter v. NRDC, Inc.*, 129 S.Ct. at 375 (quoting, *Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983); *Granny Goose Foods, Inc. v.*

*Teamsters*, 415 U.S. 423, 441 (1974); *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974). It was the same "possibility" standard that was applied in the present matter. "To justify a preliminary halt to the projects the real possibility of irreparable harm is still required." *Sierra Forest Legacy v. Rey*, 526 F.3d at 1233. According to the holding in *Winter*, this standard is clearly too lenient.

Moreover, it was this mere "possibility" of harm that was balanced against the public interests. Acknowledging that, "[t]he proposed logging will not destroy the species," this court discussed only the possibility of a reduction in range of habitat. *Id.*, at 1234. It was this "possibility" which was found to outweigh the USFS's choice of funding for fire reduction.

*B. Balance of Equities*

*Winter* also solidifies the principle that even when a *likelihood* of irreparable harm is shown the injunction may be denied if the potential injury is outweighed by public interests. *Winter v. NRDC, Inc.*, 129 S.Ct. at 367. Particular regard must be given to the public consequences because the issuance of a preliminary injunction is such an extraordinary remedy. *Id.*, citing *Weinberger v. Romero-Barcelo*, 102 S.Ct. 1798 (1st Cir. 1982). In *Winter*, the public consequences at stake were both national security and the general safety of the public. If the *Winter* injunction were denied, "the most serious *possible* injury would be harm to an unknown number of marine mammals," whereas if the injunction were granted, it

could jeopardize people's safety. *Winter v. NRDC, Inc.*, 129 S.Ct. at 378 (emphasis added).

The consequences at stake in this case are similar. If the injunction is denied, there is a *possible* risk that some habitat ranges could be *reduced*. *Sierra Forest Legacy v. Rey*, 526 F.3d at 1234. On the other hand, if the injunction is granted, and fire prevention measures are not taken, catastrophic wildfires jeopardize communities as well as wildlife habitats. The court itself recognized that, "the avoidance of catastrophic fire in the national forests must rate a high priority among the needs of the nation" *Sierra Forest Legacy v. Rey*, 526 F.3d at 1233. While the dangers from wildfires obviously do not rival the destruction and loss of war, the damages caused by fire are far more certain than the indeterminate threats of war. No one can dispute that the annual occurrence of severe wildfires in the Sierra Nevada has increased dramatically. See, e.g., *Id.*, at 1232. Arguably, this increase in frequency and certainty with which these devastating fires occur make them an even greater risk to the public than threat of naval warfare. Indeed, that is why "[c]ontrol of wildfires is an imperative for the inhabitants of land bordering the forests." *Id*. at 1232.

Not only does the public have an interest in preserving national forest land from the destruction of fire, it also has a financial stake in the management of timber resources. The Supreme Court has held that "National forests were not to

be reserved for aesthetic, environmental, recreational, or wildlife preservation purposes." *United States v. New Mexico*, 438 U. S. 696, 708 (1978). Our National Forests, "are not parks set aside for nonuse, but have been established for economic reasons." 30 Cong. Rec. 966 (1897) (Cong. McRae). Thus, where the question being addressed is whether the USFS choice of funding for fire reduction outweighs the *possibility* of reduced habitat, the court should lean in favor of the economic reasoning of the Forest Service in protecting against total loss of this resource.

*C. Agency Discretion*

Finally, *Winter v. NRDC, Inc*. once again confirms the long held belief that agency decisions should be afforded great deference by the courts. As *Winter* noted, "We give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.'" *Winter v. NRDC, Inc.*, 129 S.Ct. at 377. Similarly, "[a]n agency must be permitted discretion in relying on the reasonable opinions of its own qualified experts, even if the court might find contrary views more persuasive." *Sierra Nevada Forest Protection Campaign v. Rey*, 573 F.Supp. 2d at 1345, (citing, *Kleppe v. Sierra Club*, 427 U.S. 390, 420, n.21 (1976)). In other words, the court may not substitute its own judgment for that of the agency. See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971)(overruled on other grounds by *Califano*

*v.Sanders*, 430 U.S. 99 (1977)). Assuming that the issue is not found to be moot, in light of the "possibility" standard being found too lenient by the *Winter* court, the matter should be remanded for further review. The district court should be given an opportunity to weigh the public interest in preserving the safety of forest communities and the economic purpose behind establishing National Forests in the context of the expertise of the agency that has been entrusted with managing our forests.

## IV. Review of the Impaired Impartiality Issue Raised in the Concurrence to Preliminary Injunction Appellate Opinion in *Sierra Forest Legacy v. Rey*, 526 F.3d 1228, 1234 (9th Cir. 2008)(Noonan, J., concurring)

The unique role of administrative agencies in our society requires them to perform a combination of administrative, legislative, and adjudicative functions. The concurring opinion to *Sierra Forest Legacy v. Rey*, 526 F.3d at 1234, raises the issue of whether or not an agency is actually capable of remaining impartial in an adjudicative or legislative capacity when that agency will be financially impacted. The opinion stated that, "[t]he financial incentive of the Forest Service in implementing the forest plan is as operative, as tangible, and as troublesome as it would be if instead of an impartial agency decision the agency was the paid accomplice of the loggers." *Id*., at 1236. The concurrence found that, "[t]he Forest Service introduces its bias at the state of making the forest plan," and went on to compare the agency to a corrupt legislator, guilty of accepting bribery. *Id*., at

1236. Not only was the issue discussed in the concurring opinion beyond the scope of the appeal, but the finding itself is contradicted by statute, precedent, and legislative intent.

*A. The Issue was not Ripe for Review*

The question of impartiality in the 2004 Sierra Nevada Framework decision was never raised in any of the proceedings against the three HFQLG projects that have been preliminarily enjoined by this Court, nor was it part of the summary judgment proceedings in the underlying case in the District Court. The issue does not automatically become an issue for appeal simply because the Framework involved the selling of national forest timber. Neither allegations nor evidence of improper conduct have been introduced against the 2004 Framework decision. If the parties had been aware that the issue was going to be raised, they would have been able to fully brief and argue the issue. Perhaps that would have obviated the need for even writing the concurring opinion. In the absence of either allegations or evidence, it can only be concluded that the Court's concurring opinion is to be read as a judicial finding that Forest Service timber sales are illegal on their face by virtue of the fact that the agency retains some of the timber sale receipts.

*B. The "Impaired Impartiality" described is contradicted by Statute, Precedent, and Legislative Intent*

The implications of applying this holding to the management of other government assets are far-reaching and dramatic. Under the principles espoused in

the concurring opinion, no state or Federal agency would be able to impartially decide whether or not to sell water, hydroelectric power, oil and gas, coal, minerals, electrical generation of all kinds, or even to make use of facilities on public lands. The claimed "impropriety of monetary benefit to the decision-makers," *Sierra Forest Legacy v. Rey*, 526 F.3d at 1236, would bar the myriad sales and leases managed by the many administrative agencies charged with managing our nation's resources. The Forest Service employees who plan and authorize timber sales are no more, and no less, "paid accomplices" than any other government official engaged in selling or permitting use of public lands and resources.

As early as 1911, the United States Supreme Court affirmed the legitimacy of federal agency decisions involving fees for use of public resources. See, *United States v. Grimaud*, 220 U.S. 506 (1911), a person charged and fined for grazing sheep on the Sierra Forest Reserve without a permit unsuccessfully challenged his fine. The Court found that federal agencies are entitled to make income with which to meet the expenses of management.

> In addition to the general power in the Act of 1897, already quoted, the Act of February first, 1905, 33 Stat. 628, c. 288, § 5, clearly indicates that *the Secretary was authorized to make charges out of which a revenue from forest resources was expected to arise*. For it declares that "all money received from the sale of any products or the use of any land or resources of said forest reserves" shall be covered into the Treasury, and be applied toward the payment of forest expenses.

*Id*. at 507 (emphasis added).

*Grimaud* affirmed that "a provision in an act of Congress as the use made of moneys received from government property clearly indicates an authority to the executive officer authorized by statute to make regulations regarding the property to impose a charge for its use." *Id*.

Rather than being an unlawful bias in decision-making and in NEPA processes, formulating forest management projects as timber sales is directed by Congress. It is not bias when it is a duty required by law. Three major authorizing statutes, as well as numerous others governing the uses of timber sale revenues, embody Congress's intentions that the national forests sell timber and that it fund some of its activities from portions of those timber sale receipts. Several recent laws include additional Congressional direction, including specific explicit direction affecting the three projects at issue here, that the Forest Service consider cost-effectiveness and efficiency in planning its projects. Several Congressional acts provide that money received from "any source of forest reservation revenue" should be covered into the Treasury, with several special fund accounts authorized for specific purposes.

Congress created the national forests for economic as well as conservation purposes, and directed the Forest Service to produce and sell timber from the national forests. The concurring opinion admits that "[f]undraising for fuel-

reduction is a substantial purpose," *Sierra Forest Legacy v. Rey*, 526 F.3d at 1235, and yet argues that national forests should not be used for timber production and sales. This holding is directly opposite the U.S. Supreme Court's ruling in *United States v. New Mexico*, supra, which held that our National Forests, "have been established for economic reasons." *United States v. New Mexico,* 438 U. S. 696 (1978) (citing, 30 Cong.Rec. 966 (1897) (Cong. McRae)). The court further held that the, "purpose set out in the 1897 act must be present." *Id*. at 715.

The National Park Service Organic Act (Act of June 4, 1897) (16 U.S.C. §§ 1. 473-478, 479-482 and 551, June 4, 1897, as amended 1905, 1911, 1925, 1962, 1964, 1968, and 1976), the original organic act governing the administration of national forest lands, specified that:

> No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, *and to furnish a continuous supply of timber for the use and necessities of citizens* of the United States.

*Id*. at 475 (emphasis added).

The National Forest Management Act of 1976 (Act of October 22, 1976) (P.L. 94-3. 588; 16 U.S.C. §§ 1600-1614, August 17, 1974, as amended 1976, 1978, 1980, 1981, 1983, 1985, 1988 and 1990) requires the Secretary of Agriculture to assess forest lands, develop a management program based on multiple-use, sustained-yield principles, and implement a resource management

plan for each unit of the National Forest System. It is the primary statute governing the administration of national forests, and it calls for the Forest Service to implement a resource management plan that is consistent with the Congressional purposes for maintain national forests.

The Forest and Rangeland Renewable Resources Planning Act Statement of Policy, Interior Department and Related Agencies Appropriations for Fiscal year 1981 (December 12, 1980) (Pub. L. 96-514, 96 Stat. 2957; 16 U.S.C. § 1606 note) Sec. 310, specifically declares that:

> (1) forests and rangeland, in all ownerships, should be managed to maximize their net social and *economic* contributions to the Nation's well being, in an environmentally sound manner. (2) the Nation's forested land, except such public land that is determined by law or policy to be maintained in its existing or natural state, should be managed at levels that realize its capabilities to satisfy the Nation's need for food, fiber, energy, water, soil stability, wildlife and fish, recreation, and esthetic values.

*Id*.

Additional acts include the Disposition of Receipts from National Forest Revenues Act (March 4, 1907) (Ch. 2907, 34 Stat. 1270, as amended; 16 U.S.C. § 499)[1]; the Brush Removal Fund of August 11, 1916 (Ch. 313, 39 Stat. 462; 16 U.S.C. § 490)[2]; and the Knutson-Vandenburg Act, June 9, 1930 (Ch. 416, 46 Stat.

[1] "All money received by or on account of the Forest Service for timber, or from any other source of national-forest revenue, including moneys received from sale of products from or for the use of lands in national forests created under section 471(b) 1 of this title, and moneys received on account of permits for hunting, fishing, or camping on lands acquired under authority of sections 513 to 517 and 521 of this title, shall be covered into the Treasury of the United States as a miscellaneous receipt."

[2] Purchasers of national-forest timber may be required by the Secretary of Agriculture to deposit the estimated

527; 16 U.S.C. § 576, 576a, 576b).[3]

Finally, beyond these and other statutes affecting the duties and operations of the Forest Service, there is also explicit Congressional direction in the Herger-Feinstein Quincy Library Group Forest Recovery Act of 1998 (P.L. 103-354, Sec. 401) to implement the HFQLG Pilot Project in a cost-effective manner.[4] This language is directly applicable to all three of the preliminarily enjoined projects, all of which are components of the HFQLG Pilot Project required by Congress.

## V. Conclusion

As discussed above, the issues raised in this appeal are believed to be moot in light of the District Court's order in *Sierra Nevada Forest Protection Campaign v. Rey*, 573 F.Supp. 2d 1316 (E.D. Cal. 2008). The recent holding of *Winter v. NRDC, Inc*, 129 S.Ct. 365 (2008), also impacts the finding that Sierra Forest Legacy is entitled to a preliminary injunction in this matter. Consequentially, the issues should be remanded to the District Court for a determination on the merits,

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cost to the United States of disposing of brush and other debris resulting from their cutting operations, such deposits to be covered into the Treasury and constitute a special fund, which is appropriated and shall remain available until expended: Provided, That any deposits in excess of the amount expended for disposals shall be transferred to miscellaneous receipts, forest reserve fund, to be credited to the receipts of the year in which such transfer is made. (16 U.S.C. 490).

[3] Sec. 3 of the Knutson-Vandenburg Act states, "The Secretary of Agriculture may, when in his judgment such action will be in the public interest, require any purchaser of national-forest timber to make deposits of money in addition to the payments for the timber, to cover the cost to the United States of (1) planting (including the production or purchase of young trees), (2) sowing with tree seeds (including the collection or purchase of such seeds), (3) cutting, destroying, or otherwise removing undesirable trees or other growth, on the national-forest land cut over by the purchaser, in order to improve the future stand of timber, or (4) protecting and improving the future productivity of the renewable resources of the forest land on such sale area, including sale area improvement operations, maintenance and construction, reforestation and wildlife habitat management."

[4] Sec. 401 "(e) Cost-Effectiveness.--In conducting the pilot project, Secretary shall use the most cost-effective means available, as determined by the Secretary, to implement resource management activities described in subsection (d)."

without regard to the impaired impartiality issue raised in the concurring opinion in *Sierra Forest Legacy v. Rey*, 526 F.3d 1228, 1234 (9th Cir. 2008)(Noonan, J., concurring), for the reasons set forth herein.

Dated: January 30, 2009

/s Michael B. Jackson
Michael B. Jackson
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Intervenors Appellees

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, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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