No. 07-16892

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA FOREST LEGACY, *et al.*,
Plaintiff-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-Intervenor-Appellees.

On Appeal From an Order of the United States District Court
for the Eastern District of California
No. Civ. S-05-0205 MCE/GGH

APPELLANTS' SUPPLEMENTAL BRIEF

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INTRODUCTION

This case involves a challenge to the 2004 Framework, a programmatic plan governing management of 11 national forests in California's Sierra Nevada. Sierra Forest Legacy *et al.* ("Legacy") appeal from a District Court order denying Legacy's motion for preliminary injunctive relief with respect to the Basin, Slapjack and Empire logging projects in Plumas National Forest, three projects that implement the 2004 Framework. A panel of this Court reversed and directed the District Court to issue a preliminary injunction with respect to the three projects. *Sierra Forest Legacy v. Rey*, 526 F.3d 1228 (9th Cir. 2008). Subsequently, the federal appellees and intervenor-appellees filed petitions for rehearing and rehearing en banc (which remain pending), and the District Court granted in part and denied in part Legacy's motion for summary judgment. *Sierra Nevada Forest Protection Campaign v. Rey*, 573 F. Supp. 2d 1316 (E.D. Cal. 2008)

Legacy hereby responds to this Court's January 6, 2009 order directing the parties to file supplemental briefs addressing three issues: (1) whether the District Court's summary judgment order renders any issues in this appeal moot; (2) the effect of *Winter v. NRDC*, -- U.S. --, 129 S. Ct. 365 (2008), on the Court's holding that appellants are entitled to a preliminary injunction; and (3) the impaired impartiality issue raised in Judge Noonan's concurrence. *Sierra Forest Legacy*, 526 F.3d at 1234 (Noonan, J., concurring).

ARGUMENT

I. The Issues On Appeal Are Not Moot Because No Final Judgment or Permanent Injunction Has Been Entered.

Where there have been developments subsequent to filing of an appeal, the "central question" with respect to mootness is "whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief." *Center for Biological Diversity v. Lohn,* 511 F.3d 960, 963 (9th Cir. 2007)(quoting *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1129 (9th Cir.2005)(en banc)). If the appeals court can "give the appellant any effective relief," then the appeal is not moot. *Garcia v. Long,* 805 F.2d 1400, 1402 (9th Cir. 1986). Here, because the District Court has yet to issue final judgment or any order with respect to permanent relief, this Court's order directing a preliminary injunction remains effective. Therefore, the appeal is not moot.

When a final judgment or permanent injunction is entered while a preliminary injunction appeal is pending, the appeal becomes moot because the preliminary injunction has effectively been superseded. *See, e.g., Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.,* 527 U.S. 308, 314 (1999) ("Generally, 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."); *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1450 (9th Cir. 1992) (affirmance of grant of summary judgment by appellate court in favor of

defendants moots appeal of denial of preliminary injunction); *In re Estate of Ferdinand Marcos Human Rights Litigation*, 94 F.3d 539, 544 (9th Cir. 1996) (issuance of permanent injunction and final judgment renders appeal from preliminary order moot). In this case, the District Court has yet to issue final judgment or any ruling with respect to permanent relief.

Although this Court directed the District Court "to grant immediately a preliminary injunction on the three proposed projects," *Sierra Forest Legacy*, 526 F.3d at 1234, mandate has yet to issue and the District Court has not issued any preliminary or permanent relief with respect to the three projects. Subsequent to this Court's opinion, the District Court issued a ruling on cross-motions for summary judgment. *Sierra Nevada Forest Protection Campaign v. Rey*, 573 F. Supp. 2d 1316 (E.D. Cal. 2008). The District Court ruled in Legacy's favor that the Forest Service violated NEPA by failing to consider reasonable alternatives in adopting the 2004 Framework, based upon this Court's prior ruling that Legacy had demonstrated a strong likelihood of success with respect to this issue. *Id.* at 1348. With respect to all other issues, the District Court issued summary judgment in favor of federal defendants.

In ruling on summary judgment, the District Court deferred any ruling on permanent relief, stating that "remedies issues . . . shall be adjudicated following further briefing." *Id.* at 1353. After the parties submitted remedies briefs, the

District Court decided to delay any order on remedy until this Court finalizes its preliminary injunction ruling. *See* December 19, 2008 Order (District Court Docket No. 281) at 3 ("this Court believes it would be premature to fashion a remedy, and enter any final judgment in this matter, until after the rehearing petitions have been adjudicated and mandate has been formally transferred back to the Court"); January 21, 2009 Order (District Court Docket No. 282) at 2 (denying Legacy's motion for permanent injunction "until a decision from the Ninth Circuit is forthcoming . . . without prejudice to its renewal once the Petitions for Rehearing in the *Sierra Forest Legacy v. Rey* matter have been adjudicated").

In short, because the District Court has yet to issue a final judgment or any ruling with respect to permanent relief, this Court's preliminary injunction order continues to provide Legacy with "meaningful relief." *Center for Biological Diversity v. Lohn,* 511 F.3d at 963. Therefore, the appeal is not moot.[1] In addition, this Court's ruling in the preliminary injunction appeal remains both meaningful and effective because the District Court relied heavily on the ruling in granting

[1] Nor have "the terms of the injunction" ordered by this panel "been fully and irrevocably carried out." *University of Texas v. Camenisch*, 451 U.S. 390, 398 (1981). The Forest Service has not withdrawn or otherwise changed the legal status of the three projects at issue on appeal. As described in Legacy's Opening Brief at 12, the Forest Service has issued final decisions and awarded timber sale contracts with respect to the three projects. A preliminary injunction remains necessary to keep these projects from moving forward as proposed.

summary judgment in Legacy's failure with respect to the NEPA alternatives issue. *See Sierra Nevada Forest Protection Campaign,* 573 F. Supp. 2d at 1348 ("[g]iven the Ninth Circuit's clear precedent on the very issue presently before the Court, summary adjudication in [Legacy's] favor must be granted"). Moreover, it is apparent that, should this Court vacate or reverse its prior opinion, it is likely that the District Court would amend its previous summary judgment ruling and grant summary judgment in favor of the Forest Service on all issues. *See* December 19, 2008 Order (District Court Docket No. 281) at 3 ("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.").

Finally, the District Court's issuance of summary judgment in the Forest Service's favor with respect to Legacy's additional legal claims should not preclude this Court from addressing these claims *de novo* as part of the preliminary injunction appeal.[2] Unlike the typical preliminary injunction case, here the District Court's preliminary injunction ruling was based on a full administrative record and complete summary judgment briefing.[3] On appeal from a preliminary injunction,

[2] In addition to the NEPA alternatives issues addressed in the panel's opinion, Legacy raised on appeal several other claims under NEPA as well as claims under the National Forest Management Act. *See* Legacy's Opening Brief at 16-43.

[3] Cross-motions for summary judgment were fully briefed and argued and

the District Court's legal rulings are reviewed *de novo*. *Sierra Forest Legacy,* 526 F.3d at 1231; *see also McCreary County v. American Civil Liberties Union,* 545 U.S. 844, 867 (2005) ("This case comes to us on appeal from a preliminary injunction. We accordingly review the District Court's legal rulings *de novo*.").

In sum, neither the appeal as a whole, nor any of the issues raised in the appeal, have been rendered moot by the District Court's summary judgment ruling.

II. *Winter v. NRDC* Does Not Change the Result in this Case Because the Proposed Logging Will Result In Irreparable Harm.

Winter v. NRDC, 129 S. Ct. 365 (2008), has no bearing on the result in this case. In ordering that a preliminary injunction issue, this Court stated that Legacy must demonstrate "the real possibility of irreparable harm."[4] *Sierra Forest Legacy,* 526 F.3d at 1233. In *Winter*, the Supreme Court held that "the Ninth Circuit's 'possibility' standard is too lenient," and that "plaintiffs seeking preliminary relief [must] demonstrate that irreparable injury is *likely* in the absence of an injunction."

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submitted for decision in June 2006, over a year before Legacy's motion for preliminary injunction was filed. The merits portion of Legacy's preliminary injunction brief simply incorporated by reference its previous summary judgment briefing, rather than including additional argument. *See* District Court Docket No. 221-2 at 8.

[4] In finding "the real possibility of irreparable harm" to the California spotted owl, the Court emphasized that it was "not necessary to canvass all the species that may be affected and all the environmental harm that might ensue" in the absence of an injunction. *Sierra Forest Legacy,* 526 F.3d at 1233-34.

129 S. Ct. at 375 (emphasis in original). Although the standard is different, the result here is the same.

In this case, irreparable harm is not only likely, but certain. The three projects at issue will together log over 12,000 acres of national forest land, including removing many large trees up to 30" diameter.[5] Most of the logging will degrade or eliminate old forests that provide habitat for the California spotted owl and other old forest species. *See* Legacy's Opening Brief at 10-12, 44-46.

As a result of over a century of logging, old forests – also described as "old growth forests" or "late-successional forests" – have been greatly reduced in the Sierra Nevada. According to the Forest Service, "[o]ld forests are one of the most altered ecosystems in the Sierra Nevada, and they have declined in quality, quantity, and distribution." ER 264. Historically, between 50 and 90 percent of the forests in Sierra Nevada were in an old forest condition. ER 252-53. By contrast, largely as a result of logging, national forests in the Sierra Nevada "currently contain between 2 and 20 percent old forest habitat." ER 253.

Logging of old forests, as proposed in the three projects at issue in this appeal, will result in irreparable environmental harm:

[5] For example, the projects will create several thousand acres of clearcuts, known as "group selection," in which all trees up to 30" diameter will be removed from 1-2 acre areas. *See* Legacy's Opening Brief at 11-12.

> The old growth forests plaintiffs seek to protect would, if cut, take hundreds of years to reproduce. The forests will be enjoyed not principally by plaintiffs and their members but by many generations of the public, as well as by owls.

Portland Audubon Soc'y v. Lujan, 884 F.2d 1233, 1241 (9th Cir. 1989); *see also Neighbors of Cuddy Mountain v. United States Forest Serv.,* 137 F.3d 1372, 1382 (9th Cir. 1998).

> The destruction of owl habitat without compliance with law is a significant and irreparable injury. Old growth forests are lost for generations, and no amount of monetary compensation can replace the environmental loss. Courts in this circuit have recognized that timber cutting causes irreparable damage and have enjoined cutting when it occurs without proper observance of NEPA procedures or other environmental laws.

Portland Audubon Soc'y v. Lujan, 795 F. Supp. 1489, 1509 (D. Or. 1992), *aff'd sub nom. Portland Audubon Soc'y v. Babbitt*, 998 F.2d 705 (9th Cir. 1993).

The Supreme Court has held that environmental harm is considered irreparable if it is "permanent or at least of long duration." *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). Once large trees are removed from the landscape, "they cannot be replaced." *Sierra Club v. Eubanks*, 335 F. Supp. 2d 1070, 1083 (E.D. Cal. 2004). Therefore, as this Court has held, "logging of old-growth trees" 21" diameter and larger constitutes "a permanent environmental injury" supporting an injunction. *Lands Council v. Martin*, 479 F.3d 636, 643 (9th Cir. 2007); *see also Earth Island Inst. v. United States Forest Serv. ("Earth Island II")*, 442 F.3d 1147, 1169-73 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1829 (2007)

(logging of several thousand acres of California spotted owl habitat constitutes irreparable harm).

In addition to the irreparable harm to old forests and habitat that will occur in the absence of an injunction, the proposed logging is also likely to irreparably harm the California spotted owl, American marten, and Pacific fisher.[6] *See* Legacy's Opening Brief at 7-9, 45-49. For example, the projects will log over 2,000 acres of spotted owl Home Range Core Areas ("HRCAs"), which constitute "the best available spotted owl habitat in the closest proximity to the owl [activity centers] where the most concentrated owl foraging activity is likely to occur." *Earth Island Institute v. United States Forest Serv.*, 351 F.3d 1291, 1296 (9th Cir. 2003). *See* Legacy's Opening Brief at 44. According to owl scientists, the degradation and elimination of habitat within HRCAs "will have significant impacts on the viability of spotted owls in the project area." ER 1021; ER 131; ER 167-68. Similarly, forest carnivore experts have concluded that the proposed logging would be "likely to render marten habitat unsuitable" and "increas[e] the

[6] The Forest Service has designated each of these as "sensitive species," indicating that their "population viability is a concern, as evidenced by" either "[s]ignificant current or predicted downward trends in population numbers or density" or "[s]ignificant current or predicted downward trends in habitat capability that would reduce a species existing distribution." Forest Serv. Manual § 2670.5 (19) (reproduced at p. 22 of the Addendum to the Response Brief of the Federal Defendants-Appellees).

risk of local extirpation." ER 174. Overall, the three projects at issue in this appeal would implement the 2004 Framework, which will adversely affect the owl, marten, and fisher and will threaten the viability and distribution of these species in the Sierra Nevada. *See* Legacy's Opening Brief at 7-9.

Beyond clarifying the irreparable harm threshold, *Winter* did not modify the standard four-part test for granting a preliminary injunction, which the panel properly recited and applied. Because the three logging projects will result in irreparable harm to old forests and sensitive wildlife, application of *Winter*'s standard that irreparable injury must be likely in the absence of an injunction does not change the result in this case.

In *Winter,* the Supreme Court partially overturned a preliminary injunction in a NEPA case based upon overriding national security concerns that are not present here.[7] *Winter* is best understood as a reflection of the extraordinary facts presented by the case. *Winter* involved Navy training exercises that the President

[7] The Supreme Court in *Winter* only addressed two of six conditions on the Navy's use of sonar that were part of the preliminary injunction imposed by the lower courts, and the other four elements of the preliminary injunction remain in effect. *See* 129 S. Ct. at 373, 382 (vacating injunction only "to the extent it has been challenged by the Navy"). Therefore, *Winter* does not stand for the proposition that no injunction is warranted in a NEPA case when there are overriding public interests.

determined were "essential to national security" during a period of wartime. 129 S.Ct. at 378. The Supreme Court concluded that:

> forcing 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. On the other side of the balance, the environmental plaintiffs asserted that the use of sonar could adversely affect marine mammals. Although the Court stated that it did "not question the seriousness of these interests," *id.,* it found that similar sonar training exercises "had been going on for 40 years with no documented episode of harm." *Id.* at 381; *see also id.* at 371, 375-76. Under these unique circumstances, the Court held that "the balance of equities and consideration of the overall public interest tips strongly in favor of the Navy." *Id.* at 378.

In this case, by contrast, national security is not implicated.[8] Aside from clarifying that irreparable harm must be likely to warrant an injunction, *Winter* does not alter the balancing of harms and weighing of the public interest that must occur in determining the appropriateness of an injunction. Here, the Court properly addressed the competing considerations, particularly the increased risk of

[8] Thus, the Supreme Court's emphasis on the need to "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest," *Winter,* 129 S. Ct. at 377 (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)), is not relevant here.

wildfire that might occur if an injunction issues. In short, nothing in *Winter* dictates a different result in this case.[9]

III. It Is Not Necessary To Reach the Constitutional Issues Raised in Judge Noonan's Concurrence.

Judge Noonan, in his concurrence, concluded that the Forest Service's impaired impartiality has vitiated the integrity of its decisions so far as "to require judicial setting aside of the implementation of the process." *Sierra Forest Legacy,* 526 F.3d at 1236 (Noonan, J., concurring). Although Judge Noonan's factual concerns are well founded, to the extent that this Court affirms that Legacy is likely to prevail on the merits of its federal statutory arguments, it is not necessary to reach the constitutional issues raised by the concurrence.

The factual underpinnings of Judge Noonan's concerns are straightforward. The Forest Service has several sources of funding that are established by permanent appropriations and are replenished by timber sale receipts. For this reason, according to the Congressional Research Service, "timber programs . . . may fare better than other resource programs" that lack such permanent appropriations; this raises a "concern . . . that the permanent appropriations prevent Congress and the American people from exercising adequate oversight and control over the timber program, and thus grant the agency excessive discretion."[10]

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[9] This Court's opinion, written in the context of a preliminary injunction appeal and in the aftermath of an emergency motion for an injunction pending appeal, was relatively brief and succinct. Should the Court wish to undertake a more detailed written exposition of the balance of harms and public interest, the record and the briefing amply support the result the Court reached.

[10] R.W. GORTE & M. LYNNE CORN, THE FOREST SERVICE BUDGET: TRUST FUNDS

Indeed, in this case, the Forest Service admits that it is logging large trees to provide additional funding for its fuels reduction program. *Sierra Forest Legacy,* 526 F.3d at 1231-33.

Because of the link between the approval of logging and increases in the agency's budget, "[u]niquely potent financial incentives impel the Forest Service to favor timber harvesting . . . over other forest uses."[11] According to this Court, such financial incentives have contributed to numerous decisions where the Forest Service failed to comply with federal environmental laws:

> We have noticed a disturbing trend in the USFS's recent timber-harvesting and timber-sale activities. . . .
>
> It has not escaped our notice that the USFS has a substantial financial interest in the harvesting of timber in the National Forest. We regret to say that in this case, like the others just cited, the USFS appears to have been more interested in harvesting timber than in complying with our environmental laws.

Earth Island II, 442 F.3d at 1177-78 (multiple citations omitted).

However, as Judge Noonan recognizes in his concurrence, "impaired impartiality" caused by financial bias does not automatically translate into a violation of the due process clause. To assert a violation of due process, a party must possess a liberty or property interest that is constitutionally protected. *See, e.g., Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 569-72 (1972).

AND SPECIAL ACCOUNTS, Cong. Research Service Rep. 95-604 ENR at 1 (1995) available at http://ncseonline.org/nle/crsreports/forests/for-10.cfm.

[11] Austin D. Saylor, *Earth Island v. Forest Service and the Risk of Forest Service*

Although Legacy possesses an interest in national forest management in the Sierra Nevada sufficient to support standing, *Sierra Forest Legacy,* 526 F.3d at 1235-36 (Noonan, J., concurring), such a standing interest does not necessarily equate to a property interest cognizable under the due process clause. Property interests protected by the due process clause may take many forms, *see, e.g., Board of Regents,* 408 U.S. at 576-78, but Legacy is unaware of any case law holding that an organization's interest in public land management constitutes such a protected interest. Although the expansion of property interests to such contexts has been suggested by commentators,[12] Legacy respectfully suggests that this due process issue need not be reached by the panel given that there are alternative, statutory grounds for resolving the appeal in Legacy's favor.

Whether or not the Forest Service's "impaired impartiality" violates the due process clause, it does bear on the statutory issues raised in Legacy's appeal. Specifically, as the panel noted, NEPA requires that federal agencies "[r]igorously explore and objectively evaluate all reasonable alternatives." *Sierra Forest Legacy,* 526 F.3d at 1231 (quoting 40 C.F.R. § 1502.14). In this case the Forest Service chose an alternative involving logging of large trees for the purpose of generating revenue, without taking a hard look at reasonable alternatives that

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Financial Bias in Post-Fire Logging Adjudications, 37 ENVTL. L. 847, 863 (2007).

[12] *See id.* at 882-83.

would not involve such logging. In this and other respects, as this Court properly found, Legacy has made a "strong" showing that the Forest Service's failure to consider reasonable alternatives in adopting the 2004 Framework violated NEPA. *Sierra Forest Legacy,* 526 F.3d at 1233.

CONCLUSION

The panel's previous order should be affirmed.

Respectfully submitted,

Dated: January 30, 2009

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(a)(7)(C)
AND CIRCUIT RULE 32-1
FOR CASE NUMBER 07-16892

I certify that:

This brief complies with a page limitation established by court order dated January 6, 2009, because the word count (3,031), divided by 280, does not exceed the 20 page limit.

Dated: January 30, 2009

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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 sent the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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I certify under penalty of perjury that the foregoing is true and correct. Executed on January 30, 2009 in Berkeley, California.

/s/ David B. Edelson
DAVID B. EDELSON