No. 07-16892

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

-v.-

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

and

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

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

SUPPLEMENTAL BRIEF OF
THE FEDERAL DEFENDANTS-APPELLEES

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INTRODUCTION

The federal defendants-appellees and defendant-intervenor-appellees filed petitions for rehearing en banc, which are pending. On January 6, 2009, the Court requested that all parties submit simultaneous supplemental briefs addressing three issues: 1) whether the district court's order, Sierra Nevada Forest Protection Campaign v. Rey, 573 F. Supp. 2d 1316 (E.D. Cal. 2008), renders any issues in this preliminary injunction appeal moot; 2) the effect of Winter v. NRDC, 129 S. Ct. 365 (2008), on the panel's holding that the plaintiffs (collectively, "Legacy") are entitled to a preliminary injunction; and 3) the due process issue raised in Judge Noonan's concurring opinion in this case.

For the reasons explained below, this appeal is not moot, the Supreme Court's decision in Winter requires this Court to conclude that the plaintiffs are not entitled to a preliminary injunction, and there is no basis for concluding that the Forest Service has violated due process.

I. NO ISSUES RAISED BY THE GOVERNMENT'S EN BANC PETITION ARE MOOT.

After the panel ruled in Legacy's favor on the preliminary injunction appeal, the district court issued an opinion resolving the parties' cross motions for summary judgment. Sierra Nevada Forest Prot. Campaign v. Rey, 573 F. Supp. 2d 1316 (E.D. Cal. 2008). This appeal is not moot, however, because the district

court has not yet issued a ruling on the appropriate remedy, and it postponed indefinitely a scheduled hearing on what the appropriate remedy should be, in light of the pending en banc petitions in this appeal. See Att. A. Until the district court issues a ruling on Legacy's request for a permanent injunction, the preliminary injunction remains operative and the appeal is not moot. See N. Cheyenne Tribe v. Norton, 503 F.3d 836, 843 (9th Cir. 2007) (permanent injunction for NEPA violation "is not automatic").

Moreover, the district court found in favor of the federal defendants on all counts, except for the count on which the panel concluded that Legacy was likely to succeed on the merits: Legacy's claim that the agency did not adequately consider alternatives. The district court appeared to believe that it was bound by the panel's discussion of the merits, 573 F. Supp. 2d at 1348, and has indicated that it might revisit its summary judgment ruling if this Court reaches a different conclusion as a result of the rehearing petitions. See Att. A at 3. Thus, the question of whether Legacy is likely to succeed on the merits of its claim that the Forest Service's alternatives analysis is allegedly inadequate is also not mooted by the district court's opinion.

II. WINTER SHOWS THAT LEGACY WAS NOT ENTITLED TO A PRELIMINARY INJUNCTION.

A. Legacy Has Not Shown a Likelihood of Irreparable Harm.

In Winter, the Supreme Court rejected this Court's standard for finding irreparable harm when evaluating a request for an injunction. Winter held that an injunction cannot be issued based on a showing of the "'possibility'" of irreparable harm because that standard "is too lenient." Winter, 129 S. Ct. at 375. Rather, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Id. at 374 (emphasis added). "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy." Id. at 375-76.

The panel here applied the incorrect standard, holding only that Legacy had shown a possibility of harm. See Fed. Pet. 14. Legacy has not shown the requisite likelihood of irreparable harm. It argued in the district court and on appeal that the projects here would cause irreparable harm because of the harm to the California spotted owl, the Pacific fisher and the American marten. See Legacy Opening Br. 43-50. Neither the fisher nor marten have been present in any of the project areas for many years. Therefore, the district court's conclusion that neither

of those species would be irreparably harmed is clearly supported by the record. ER 12, 122, SER 350, 952, 956-57, 698.

Legacy has also not shown a likelihood of irreparable harm to the owl, because, as the district court found, there is no evidence that these projects will have any "population impact" on the owl in the Plumas National Forest, where the owl appears to be "thriving" and the owl's numbers are "well above" the projected population numbers. Dist. Ct. Op. 12, 23. Moreover, as the Herger-Feinstein Quincy Library Group Forest Recovery Act ("HFQLG Act") requires, none of the projects at issue here would harvest any timber in the areas most important to owl breeding and adult survival.[1/] HFQLG Act, Pub. L. No. 105-277, 112 Stat. 2681-231, § 401(c)(1) (Oct. 21, 1998); SER 953, 1062, 1084; Dist. Ct. Op. 10, 13, 22-23, 25-26. Outside of these critical areas, the amount of forested habitat affected by each project is small, even as compared with the project areas (and even tinier when compared with the Plumas or the Sierra Nevada forests as a whole). See, e.g., SER 648, 1085, 1062, 927. There is also no evidence whatsoever to support

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[1/] The HFQLG Act is a result of efforts at collaborative management. Environmental organizations, timber industry representatives, local officials, and other community members came together to overcome longstanding divisions regarding management of the Sierra Nevada National Forests and developed a forest management proposal that would promote forest health, ecological integrity, an adequate timber supply, and local economic stability. The proposal was submitted to Congress and enacted as the HFQLG Act.

the panel's assertion that the projects would have an impact on the owl's "range." Sierra Forest Legacy, 526 F.3d at 1234.

Rather, the impact to the owl – apart from the positive impacts noted infra at 8-11 – is, at most, the downgrading of a tiny percentage of its habitat in the short-term, which does not amount to a likelihood of irreparable harm to individual owls, much less to the local population or the species as a whole. As the Fish and Wildlife Service explained, if the 2004 Framework is fully implemented – and, here, only three projects on one national forest are at issue – less than one percent of presently "suitable" owl habitat will be downgraded to "unsuitable" habitat. In other words, if every activity anticipated by the 2004 Framework were implemented on all eleven national forests, over 99% of the existing 4 million acres of suitable owl habitat would remain exactly that – suitable for owl use. See ER 660. Even limiting the analysis to these particular projects, much of the treated areas will remain usable in the short term as owl foraging habitat. E.g., SER 1064. A small, short-term loss of habitat to a non-endangered species that will not seriously threaten that species's survival in the project area, where the project will help protect the species's habitat from catastrophic wildfire and will lead to long-term increases in habitat does not show a likelihood of an irreparable injury to Legacy. See Fed. Pet. 12 (explaining that Legacy did not show, as it must, a likelihood of irreparable injury to it, not just an impact to some owl

habitat).

Nor is Legacy correct that the mere fact that some trees up to 30 inches in diameter will be harvested constitutes irreparable harm. See Legacy response to federal defendants' Rule 28(j) letter on Winter (incorrectly characterizing such trees as "old-growth"). Legacy is proposing a per se rule that any logging of medium diameter trees shows a likelihood of irreparable harm. A per se rule of this kind is forbidden. Lands Council v. McNair, 537 F.3d 981, 1004-05 (9th Cir. 2008) (en banc). In reviewing the projects, this Court cannot ignore other relevant circumstances, such as the density of harvesting, the number of nearby medium- and large-diameter trees, the number of trees that will soon be medium-diameter, and the actual effects of the harvest on the owls and on Legacy. Here, of course, the projects consist not of large swaths of clear-cutting, but of DFPZs (relatively thin areas of forest where smaller trees have been removed to slow or stop the spread of highly destructive fires), group selection (creating small openings of a quarter-acre to two acres in size that mimic openings created by natural disturbances), and harvesting of individual trees. SER 478, 978, 999-1000; HFQLG Act, § 401(d). Legacy has not shown that it is likely to suffer an irreparable injury if these three projects proceed.

B. The Panel Opinion Failed to Defer to the Forest Service's Scientific Expertise.

Winter also made clear that when a court balances harms and analyzes the public interest – not just when it evaluates the merits of a case – deference is owed to the judgments of agency personnel acting within their expertise. Winter, 129 S. Ct. at 378 ("lower courts failed properly to defer to senior Navy officers' specific, predictive judgments" about the effect of the preliminary injunction on the effectiveness of the Navy's training), see also id. at 377, 379.

Although Legacy has urged that Winter be limited to its factual situation (Legacy Resp. to Winter Rule 28(j) letter), the Supreme Court suggested no such limitation. To the contrary, the Supreme Court and other courts have long held that deference should be afforded agency experts within their areas of expertise. E.g., Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2529 (2007) (agency's decision should not be disturbed unless, inter alia, its decision is so "'implausible that it could not be ascribed to a difference in view or the product of agency expertise'") (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)); Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989) ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts . . ."); McNair, 537 F.3d at 993 (Ninth Circuit law "requires us to

defer to an agency's determination in an area involving a 'high level of technical expertise.' We are to be 'most deferential' when the agency is 'making predictions, within its area of special expertise, at the frontiers of science.") (internal brackets and citations omitted). The reason for this rule is simple: most federal judges are not experts in forest management. Cf. Winter, 129 S. Ct. at 377 (most federal judges do not begin their days with national security briefings). The Supreme Court's deference to the testimony of military experts in Winter was not motivated by blanket deference to "the military," but by the fact that it was the testimony of agency experts within their area of expertise, which happened to be military issues.

Here, if appropriate deference is given to the expert judgments of the Forest Service and Fish and Wildlife Service, the district court's order must be affirmed. For example, after examining the potential harms to owl habitat (logging and wildfire), the Forest Service determined that the best thing to do for the owl was to reduce the greatest risk of harm to it: wildfires. The Forest Service found that there is a critical need to reduce wildfire risks in the Sierra Nevada and that the 2004 Framework is better at reducing wildfire risk than the 2001 Framework. E.g., ER 318, 520-21, 609-10, 638, 670. It would be contrary to law for a judicial decision intended to protect the owl to result in a greater risk of harm to it.

Proper deference also must be accorded to the judgment of the United States

Fish and Wildlife Service, which concluded that most California spotted owl populations in the Sierra Nevada are stable or increasing, and adult survival rates show an increasing trend. 71 Fed. Reg. 29,886 (May 24, 2006). The Fish and Wildlife Service also concluded that the 2004 Framework would not threaten the owl's continued existence and that fire was the most significant threat to the owl. 71 Fed. Reg. at 29,897.

If appropriate deference is given to the scientific judgment of the Forest Service and Fish and Wildlife Service, the only conclusion this Court can draw is that the district court was within its discretion to deny Legacy's request for a preliminary injunction where the expert agencies concluded that the 2004 Framework provided the owl with better protection against the greater risk (wildfire) than the 2001 Framework, which Legacy asks this Court to impose. See Native Ecosystems Council, 428 F.3d at 1251 ("long-term benefit of preventing stand-replacing fires, which completely destroy goshawk habitat, is preferable over any short-term benefit the goshawks might receive from retaining the dense forest structure in the project area").

C. The Panel Opinion Did Not Give Proper Consideration to the Public Interest and the Balance of Harms.

Even where a plaintiff shows likelihood of success on the merits and likely irreparable harm, "in each case, courts 'must balance the competing claims of

injury[,] must consider the effect on each party of the granting or withholding of the requested relief'" and must "'pay particular regard for the public consequences.'" Winter, 129 S. Ct. at 376-77. Here, the panel improperly ignored the harm from wildfire to both the owl and the public, and instead weighed the agency's choice of funding in the balance of harms analysis. Fed. Pet. 10-12. This analysis was clearly improper under Winter.[2/]

The reduction of the risk posed by catastrophic wildfire is undeniably in the public interest. Wildfire endangers both human life and wildlife in a way unlike any risk posed by the 2004 Framework. For example, the EIS for the 2004 Framework found that between 1999 and 2002, 18 owl protected activity centers ("PACs") were lost as a result of severe wildfire impacts. ER 538. In contrast, no PACs were lost between 2003-2008 from implementing the 2004 Framework.

Moreover, the district court correctly found that any short-term reduction in habitat suitability for the owl caused by these three projects is more than offset by reduction in wildfire risk and long-term prevention of habitat loss. ER 22-24;

[2/] Even if it were proper to ignore the benefits of fire reduction and instead weigh in the balance the Forest Service's choice of funding for fire reduction (which it was not), the panel's conclusion is still flawed. The record shows that the ratio of revenue to costs under the two frameworks means that at any given funding level, the 2004 Framework will allow the treatment of more acres than the 2001 Framework. See ER 617 (comparing revenue to cost ratios). Forcing the agency to operate under the 2001 Framework will mean that less fire reduction is undertaken.

SER 1061; see also Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233, 1251 (9th Cir. 2005); Wildwest Inst. v. Bull, 472 F.3d 587, 592 (9th Cir. 2006). In contrast, reinstating the 2001 Framework would cause irreparable harm to the public interest. See Northern Cheyenne Tribe v. Norton, 503 F.3d at 842-43 (when balancing harms, the court must "give due regard to the public interest"). In particular, reimposition of the 2001 Framework will harm the public interest in (1) reducing the threat of severe wildfire; (2) implementing the HFQLG Act pilot project; (3) restoring resilient and healthy forests and forest ecosystems; and (4) maintaining the industry and infrastructure necessary for effective forest management.

Finally, Winter confirmed that where a party fails to show the three required equitable factors (likelihood of irreparable harm in the absence of preliminary relief, that the balance of equities tips in favor of an injunction, and that an injunction is in the public interest), then no preliminary injunction may issue, regardless of whether a plaintiff has shown a likelihood of success on the merits. 129 S. Ct. at 376. Here, for the reasons expressed in the Federal Defendants' petition for rehearing and its brief on the merits, Legacy has not met its burden to show that any of these equitable factors tip in its favor.

III. THE FOREST SERVICE DID NOT VIOLATE DUE PROCESS

The concurring panel opinion incorrectly would have held that the three

site-specific projects at issue in this preliminary injunction appeal violate due process because Congress directed that the Forest Service retain a portion of the receipts from timber sales to undertake certain activities on the National Forests. Sierra Forest Legacy v. Rey, 526 F.3d 1228, 1236 (2008) (Noonan, J., concurring); see also Earth Island Institute v. U.S. Forest Serv., 442 F.3d 1147, 1178 (9th Cir. 2006) (Noonan, J., concurring); Earth Island Institute v. U.S. Forest Serv., 351 F.3d 1291, 1309 (9th Cir. 2003) (Noonan, J., concurring). Although the federal appellees did not seek rehearing of this theory, the panel's order directed all parties to address it. For at least three reasons, the theory raised by the concurrence does not nullify the agency actions at issue.

First, Legacy never raised a due process argument in this litigation. The argument is not properly before this Court. See Alaska Dept. of Envt'l Conservation v. EPA, 540 U.S. 461, 483 (2004).

Second, no interest protected by the Due Process Clause has been abridged here. Statutes "establish[] the maximum procedural requirements which Congress was willing to have the courts impose" on agency action. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 524 (1978). Without a statutory basis, courts may overturn agency action on procedural grounds only if it violates due process. "Such circumstances, if they exist, are extremely rare." Id. In finding a due process violation, the concurring opinion relied on cases finding a

due process violation where an adjudicator had the appearance of bias because it retained some funds from the imposition of fines. Sierra Forest Legacy, 526 F.3d at 1234-35 (citing, inter alia, Tumey v. Ohio, 273 U.S. 510 (1927)). However, the Forest Service's decisions to carry out the timber projects at issue in this appeal do not abridge any protected life, liberty, or property interests, therefore the Due Process Clause does not apply. See Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 570-71 (1972).

Legacy's interest in life is not at stake here. Nor does Legacy have a property interest in the Federal government's forests. The "right that we all possess to use the public lands is not the 'property' right of anyone." College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673 (1999). Legacy has no right to exclude others from the National Forests, therefore it lacks the defining "hallmark" of a protected property interest. Id.

Likewise, Legacy has no constitutionally protected liberty interest at stake. The core of due process liberty is freedom from physical restraint, Foucha v. Louisiana, 504 U.S. 71, 80 (1992), and the personal, negative aspect of due process liberty is a constant in the Supreme Court's jurisprudence. See, e.g., Ingraham v. Wright, 430 U.S. 651 (1977) (corporal punishment); Skinner v. Oklahoma, 316 U.S. 535 (1942) (sterilization); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (vaccination). We know of no case law that would interpret the

Due Process Clause's protection of liberty interests to include the "freedom" to have Federal lands managed in a particular way. To hold otherwise would enshrine in the Constitution a right not only to use government property, but to use it in a specific condition preferred by a member of the public.

The concurrence incorrectly suggests that Legacy has a protected liberty interest in the management of the National Forests because it has standing to bring a statutory challenge to the Forest Service's actions. 526 F.3d at 1235-36. However, standing to assert a statutory right is not equivalent to a protected liberty interest. Standing is simply a constitutional requirement that ensures that a particular plaintiff is entitled to have the judiciary decide the merits of its claims. E.g., Allen v. Wright, 468 U.S. 737, 750-51 (1984). In contrast, the Supreme Court has "repeatedly rejected 'the notion that any grievous loss visited upon a person by the [government] is sufficient to invoke the procedural protections of the Due Process Clause.'" Ingraham, 430 U.S. at 672 (quoting Meachum v. Fano, 427 U.S. 215, 224 (1976)). To stretch protected constitutionally protected "liberty" interests to encompass any person with standing to bring a statutory challenge to a government action – or to anything having any effect on "quality of life," see Sierra Forest Legacy, 526 F.3d at 1235 – would make the concept of liberty so broad as to be meaningless.

A second, independent reason for concluding that due process does not

apply to citizens' challenges to forest management decisions is that such decisions concern the Federal government's internal operations. In Bowen v. Roy, the Supreme Court rejected a challenge to the Federal Government's operational use of Social Security numbers. 476 U.S. 693 (1986). The Court held that the Free Exercise Clause "does not afford an individual a right to dictate the conduct of the Government's internal procedures." Id. at 693. Although Bowen concerned a Free Exercise claim, the line drawn by the Court applies equally here, because the Due Process Clause was also "written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." Bowen, 476 U.S. at 700 (internal quotation marks omitted). The Supreme Court addressed the application of Bowen to the management of National Forests in Lyng v. Northwest Indian Cemetery, 485 U.S. 439 (1986). The Court held that the building of a road and harvesting of timber from publicly owned land could not "meaningfully be distinguished" from the internal operations at issue in Bowen. Id. at 449. Both here and in Lyng, the plaintiffs' "rights do not divest the Government of its right to use what is, after all, its land." Id. at 453 (emphasis in original); see also Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1072-73 (9th Cir. 2008) (en banc) (petition for certiorari pending). Legacy thus has no liberty interest in the Federal Government's management of its property.

Third, regardless of whether Legacy has a protected interest at stake here

(which it does not) the concurrence's reliance on the Tumey line of cases is flawed for another reason – the Forest Service is not engaged in adjudication when it makes project-level decisions. There is "nothing to support" a contention that due process requires procedures besides those devised by Congress unless "an agency is making a quasi-judicial determination." Vermont Yankee, 435 U.S. at 542 & n. 16 (internal quotation marks omitted); see also Ass'n of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1174 (D.C. Cir. 1979). The Constitution contemplates that policy disputes will be resolved through the give and take of politics. Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915).

The concurrence disregards the "basic distinction between rulemaking and adjudication." United States v. East Florida Coast R.R. Co., 410 U.S. 224, 244 (1973). It characterizes the development of a forest plan as "rulemaking" that is "exempted from scrutiny for conflict of interest." 526 F.3d at 1236. However, it contends that site-specific projects are adjudications, not rulemakings, and are subject to review for bias. Id. The concurrence is mistaken: site-specific project decisions are not adjudications, but another stage of the policy-making process that begins with forest plans. Project decisions are not "'quasi-judicial' proceedings [that] determine the specific rights of particular individuals or entities." Marathon Oil Co. v EPA, 564 F.2d 1253, 1261 (9th Cir. 1977); cf. Portland Audubon Soc. v. Endangered Species Committee, 984 F.2d 1534, 1541

(9th Cir. 1993). They do not "depend[] on ascertainment of 'facts concerning the immediate parties who did what, where, when, how, and with what motive or intent.'" Nat'l Advertisers, 627 F.2d at 1161 (quoting 2 K. Davis, Administrative Law Treatise, s 15.03, at 353 (1958)). Rather, project decisions carry out NFMA's directive to manage the National Forests for "overall multiple-use objectives," 16U.S.C. § 1604(g)(3)(B), and "translate broad statutory commands into concrete social policies." See Nat'l Advertisers, 627 F.2d at 1169. The facts relied upon in deciding the parameters of particular timber sales – or whether to conduct a sale at all – are not specific to private parties to a dispute, but concern such legislative facts and policymaking subjects as agency priorities, legislative mandates, and forest characteristics. Such policy choices are properly left to the executive. E.g., Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 865-66 (1984). Hence, a project decision is no more an adjudication than the preparation of a forest plan. See Concerned Citizens of S. Ohio, Inc. v. Pine Creek Conservancy Dist., 429 U.S. 651, 656-57 (1977) (Rehnquist, J., dissenting) (addressing merits of claims not addressed by majority and concluding that Tumey line of cases does not apply to judges performing functions "essentially legislative in nature").

The concurrence here contends that the distinction between policymaking and adjudication does not matter because the "bribery of a congressman is a crime." 526 F.3d at 1236. However, the concurrence points to no evidence –

because there is none – that any Forest Service personnel involved in these decisions were bribed. Rather, the concurrence points only to inapposite cases involving fines or other individualized punishment imposed in adjudications.

The more apt analogy to what occurs in a timber sale is not bribery, but Congress's levying of taxes. Certainly Congress may decide to levy taxes without running afoul of the Due Process Clause even though every dollar is retained by the federal government and some of the taxes are used to pay the salaries of Congress and for programs that benefit individual Members of Congress and their constituents. Likewise, Congress does not violate the Due Process Clause when it decides to sell particular federal property (such as timber) and retain those funds in the Treasury or direct that the funds be used for certain purposes. Such a decision does not adjudicate any individual rights, but rather is a policy decision.[3/] Consistent with traditional administrative law principles, Congress may also delegate to a federal agency the task of deciding which particular property is subject to sale without violating due process. See, e.g., 40 U.S.C. §§ 541-558 (disposal of surplus property). Here, Congress directed that the Forest Service "may sell, at not less than appraised value, trees, portions of trees, or forest

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[3/] Cf., e.g., United States v. City and County of San Francisco, 310 U.S. 16, 29-30 (1940) ("The power over the public land . . . entrusted to Congress [by U.S. Const. art. 4, § 3, cl. 2] is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.'")

products located on National Forest System lands" and retain some of the funds to carry out specific tasks on the National Forests. E.g., National Forest Management Act of 1976, 16 U.S.C. § 472a(a), (h) (Salvage Sale Fund); Knutson-Vandenberg Act of 1930, 16 U.S.C. § 576b; Omnibus Consolidated Appropriations Act of FY 1999, as amended, 16 U.S.C. § 2104 note; see also United States v. Grimaud, 220 U.S. 506, 521-23 (1911). These statutes are not unconstitutional.

CONCLUSION

For the foregoing reasons, the panel should issue a new opinion affirming the district court's denial of the motion for a preliminary injunction or the Court should grant the appellees' petitions for rehearing en banc and affirm. The matter should then be remanded to the district court for further proceedings, including, if appropriate, a decision on what permanent remedy should be imposed.

If this Court concludes that a preliminary injunction is warranted, the matter still should be remanded to the district court because that court is in the best position to craft an appropriate preliminary injunction. The parties submitted substantial additional evidence during the permanent remedy phase, including multiple declarations explaining the serious risk posed to forest and wildlife health

if projects issued pursuant to the 2004 Framework are enjoined.[4/] The Forest Service also specifically addressed what remedy would be appropriate in light of the legal deficiency found by the panel and the harm allegedly suffered by Legacy.[5/] See Winter, 129 S. Ct. at 381 (a court that finds a NEPA violation "has many remedial tools at its disposal, including declaratory relief or an injunction tailored to the preparation of an EIS" rather than enjoining the agency's actions in the interim). The district court should be permitted to consider all of the information and arguments submitted by the parties and craft a preliminary injunction in the first instance.

Respectfully submitted,

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January 2009
90-1-4-11517

[4/] See, e.g, https://ecf.caed.uscourts.gov/cgi-bin/DktRpt.pl?364131309720453-L_801_0-1 (district court docket) at docket entries 261, 270.

[5/] Id. at docket entry 270.

CERTIFICATE OF COMPLIANCE

I certify that the attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it complies with a page limitation established by separate court order dated January 6, 2009. The brief is proportionately spaced, has a typeface of 14 points or more and contains 4,755 words, which divided by 280, does not exceed the designated page limit of 20 pages. See Circuit Rule 32-3.

1/30/2009
Date

s/Jennifer Scheller Neumann
Signature of Attorney or
Unrepresented Litigant

Certificate of Service When Not All Case Participants Are CM/ECF Participants

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 two copies of the foregoing document by First-Class Mail to the following non-CM/ECF participant:

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