Case No. 19-15384

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KLAMATH-SISKIYOU WILDLANDS CENTER, et al.,

Plaintiff-Appellees,

v.

PATRICIA A. GRANTHAM and UNITED STATES FOREST SERVICE.,

Federal Defendants,

and

AMERICAN FOREST RESOURCE COUNCIL,

Defendant-Intervenor-Appellant.

Appeal from the United States District Court for the E. District of California,
Case No. 2:18-cv-02785-TLN-DMC, Honorable Troy Nunley, U.S. District Judge
(Grant of a Preliminary Injunction)

DEFENDANT-INTERVENOR-APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF JURISDICTION 5

A. Basis for Jurisdiction in the District Court 5

B. Basis for Jurisdiction in this Court 5

III. ISSUE PRESENTED FOR REVIEW 5

IV. STATEMENT OF THE CASE 6

V. STATEMENT OF FACTS 7

VI. SUMMARY OF ARGUMENT 10

VII. STANDARD OF REVIEW 11

VIII. ARGUMENT 14

A. The District Court Erred in Holding that the Balance of Equities and Public Interest Tip Sharply in Appellees' Favor 14

1. The district court presumed that the balance of equities and public interest tipped sharply in appellees' favor, thereby wrongly granting an automatic injunction 15

2. The public interest counseled strongly against an injunction 18

3. The balance of harms favored Project implementation 22

B. Appellees Did Not Establish a Likelihood of Irreparable Harm from Project Implementation 24

C. The District Court Erred in Holding that Appellees Established Serious Questions on the Merits of Their NFMA and NEPA Claims 27

1. Appellees did not establish serious questions on their NFMA claim challenging salvage harvest in a late successional reserve 28

2. Appellees did not establish serious questions on their NFMA claim challenging the Project's consistency with the Aquatic Conservation Strategy 42

3. Appellees did not establish serious questions on their NEPA claim 50

IX. CONCLUSION 55

TABLE OF AUTHORITIES

Page(s)

CASES

Akiak Native Cmty. v. U.S. Postal Serv.,
213 F.3d 1140 (9th Cir. 2000) 51

Alaska Eskimo Whaling Comm'n v. U.S. E.P.A,
791 F.3d 1088 (9th Cir. 2015) 48

All. for the Wild Rockies v. Peña,
865 F.3d 1211 (9th Cir. 2017) 11-12

Amoco Prod. Co. v. Village of Gambell,
480 U.S. 531 (1987).....16

Auer v. Robbins,
519 U.S. 452 (1997).....13, 14

Bark v. U.S. Bureau of Land Mgm't,
643 F.Supp.2d 1214 (D. Or. 2009) 44, 45

Barnes v. F.A.A.,
865 F.3d 1266 (9th Cir. 2017) 51

California v. Azar,
911 F.3d 558 (9th Cir. 2018) 11

Conservation Cong. v. U.S. Forest Serv.,
720 F.3d 1048 (9th Cir. 2013) 40

Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.,
789 F.3d 1075 (9th Cir. 2015) 25

Ctr. for Biological Diversity v. Hays,
No. 2:15-CV-01627-TLN-CMK, 2015 WL 5916739 (E.D. Cal.
Oct. 8, 2015) 25, 26

Ctr. for Biological Diversity v. Nat'l Hwy. Traffic Safety Admin.,
538 F.3d 1172 (9th Cir. 2008) 51

Earth Island Inst. v. Gould,
No. 1:14-CV-01140-KJM-SKO, 2014 WL 4082021 (E.D. Cal. Aug. 19, 2014) 23

Earth Island Inst. v. Quinn,
No. 2:14-CV-01723-GEB-EF, 2014 WL 3842912 (E.D. Cal. July 31, 2014) 23

Earth Island Institute v. Carlton,
626 F.3d 462 (9th Cir. 2010) 19, 23, 26

Ecology Ctr. v. Castaneda,
574 F.3d 652 (9th Cir. 2009) 43

Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.,
451 F.3d 1005 (9th Cir. 2006) 50

Forest Guardians v. U.S. Forest Serv.,
329 F.3d 1089 (9th Cir.2003) 13-14

Gifford Pinchot Task Force v. U.S. FWS,
378 F.3d 1059 (9th Cir.), *amended by* 387 F.3d 968 (9th Cir. 2004).....29

Holmes v. Helms,
705 F.2d 343 (9th Cir. 1983) 18

Kisor v. Wilkie,
139 S. Ct. 657 (U.S. Dec. 10, 2018) (granting *certiorari*; argument held Mar. 27, 2019).....13

Klamath Siskiyou Wildlands Ctr. v. Grantham,
424 F. App'x 635 (9th Cir. 2011) (unpublished).....44

Lands Council v. McNair,
537 F.3d 981 (9th Cir. 2008) (en banc) .....passim

League of Wilderness Defs./Blue Mtn. Biodiversity Proj. v. Allen,
615 F.3d 1122 (9th Cir. 2010) 13, 32, 33, 48

Marsh v. Or. Nat. Res. Council,
490 U.S. 360 (1989).....51

Miller v. Gammie,
335 F.3d 889 (9th Cir. 2003) (en banc) 33

Monsanto Co. v. Geertson Seed Farms,
561 U.S. 139 (2010).....17

Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.,
886 F.3d 803 (9th Cir. 2018) 25

Native Ecosystems Council v. Marten,
883 F.3d 783 (9th Cir. 2018) 13, 43

Native Ecosystems Council v. U.S. Forest Serv.,
418 F.3d 953 (9th Cir. 2005) 13

Native Ecosystems Council v. U.S. Forest Serv.,
428 F.3d 1233 (9th Cir. 2005) 52

Natural Resources Defense Council, Inc. v. Winter,
502 F.3d 859 (9th Cir. 2007) 16

Oregon Nat. Res. Council Fund v. Goodman,
505 F.3d 884 (9th Cir. 2007) 44

Oregon Natural Resources Council v. Brong,
492 F.3d 1120 (9th Cir. 2007) .....passim

Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv.,
71 F.Supp.2d 1063, *aff'd in part and vacated in part*, 265 F.3d 1028.....44

Pacific Coast Federation of Fishermen's Ass'n, Inc. v. National Marine Fisheries Serv.,
265 F.3d 1028 (9th Cir. 2001) 43, 44, 48, 49

Pimentel v. Dreyfus,
670 F.3d 1096 (9th Cir. 2012) 11

Presidio Golf Club v. National Park Serv.,
155 F.3d 1153 (9th Cir. 1998) 52

Republic of the Philippines v. Marcos,
862 F.2d 1355 (9th Cir. 1988) 12

Siskiyou Reg'l Educ. Project v. Goodman,
219 Fed. Appx. 692 (9th Cir. 2007).....38

Siskiyou Regional Education Project v. U.S. Forest Serv.,
565 F.3d 545 (9th Cir. 2009) 13

Smith v. U.S. Forest Serv.,
33 F.3d 1072 (9th Cir. 1994) 52

Thomas Jefferson Univ. v. Shalala,
512 U.S. 504 (1994).....13, 14

Weinberger v. Romero-Barcelo,
456 U.S. 305 (1982).....16

WildEarth Guardians v. Provencio,
--- F.3d ----, No. 17-17373, 2019 WL 1143186 (9th Cir. Mar. 13, 2019) 51

Winter v. Nat. Res. Def. Council, Inc.,
555 U.S. 7 (2008).....passim

STATUTES

5 U.S.C. § 701 et seq.....5

5 U.S.C. § 706(2)(A).....12

16 U.S.C. § 1600 et seq.....5

28 U.S.C. § 1292(a)(1).....5

28 U.S. C. § 1331 5

42 U.S.C. § 4321 et seq.....5

42 U.S.C. § 4332(2)(C).....50

OTHER AUTHORITIES

40 C.F.R. § 1501.4(b) 50

40 C.F.R. § 1508.27 .....50, 51, 52, 55

Federal Rule of Appellate Procedure 4(a)(1)(B) 5

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, defendant-intervenor-appellant states that the American Forest Resource Council is an Oregon non-profit corporation that does not issue shares to the public and has no parent corporation or subsidiaries.

DATED this 5th day of April, 2019.

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I. INTRODUCTION.

In this preliminary injunction appeal, defendant-intervenor-appellant American Forest Resource Council (AFRC) seeks reversal of an unjustified preliminary injunction order obtained by plaintiff-appellees Klamath-Siskiyou Wildlands Center et al. (collectively KSWild) in connection with the U.S. Forest Service's Seiad-Horse Risk Reduction Project on the Klamath National Forest.[1] The Seiad-Horse Project was designed in response to the destruction of late-successional reserve (LSR) forest habitat on the Klamath National Forest from the 2017 Abney Fire, one of the many wildfires that have plagued northern California in recent years. The Project is a modest and public safety-driven effort that aims to strategically manage a small area of burned landscape to promote the "[s]afety of the public and adjacent private landowners," particularly the community of Seiad Valley, and "[s]afe conditions for forest workers, including firefighters and tree planters," while also facilitating reforestation of areas that otherwise would not recover for decades or centuries, if ever. Excerpts of Record (ER) 50-51 (Environmental Assessment (EA) 1-2). Without action, fuels will remain on the landscape at dangerous levels, ER 57 (EA 67), creating extreme risk of future high-

[1] The Forest Service defendants filed a separate Notice of Appeal on March 25, 2019. That appeal is docketed as Ninth Circuit Case No. 19-15597.

severity fire that will destroy any regenerating forest. ER 116 (Decision Notice (DN) 3).

KSWild seeks to impede full implementation of the Project, which is urgently needed to address fire risk, improve public safety, and capture the value of deteriorating timber which can be used to offset some of the costs of the Seiad-Horse Project. Because Project restoration activities will be partly funded by timber sale receipts, and because burned timber deteriorates rapidly, time is of the essence. In post-fire salvage cases, there truly is no stable status quo, and no realistic way to maintain a status quo. The physical and biological processes that cause burned timber to decay, including beetles and other insects, are undeterred by preliminary injunction orders.

The district court issued its preliminary injunction order after a hearing at which the court failed to give any consideration to non-merits factors. ER 222 (Transcript (TR) at 36). For that matter, the court refused to hear *any* argument at the hearing from AFRC, a party to the case which had submitted substantial information on these factors. ER 221 (TR at 13); *see, e.g.*, ER 170-77 (Declaration of Andy Geissler (Geissler Decl)). The order rests on questionable findings that KSWild demonstrated serious questions on the merits of its legal claims and made a sufficient showing regarding the likelihood of irreparable harm. But the preliminary injunction order is truly remarkable for what it did not do, namely

follow the law by actually considering the evidence going to the balance of harms and public interest elements of the four-part test for an injunction. Instead, the district court *presumed* the balance of equities and public interest tipped sharply in KSWild's favor, based solely on the district court's findings of serious questions on the merits and a likelihood of irreparable harm absent an injunction. ER 21 (Preliminary Injunction (PI) Order at 15). The district court thus granted KSWild an automatic injunction, despite the many admonitions against doing so from the Supreme Court and this Court.

The damage to forest resources from the Abney Fire was intense, as illustrated by this photograph:

ER 56 (EA 52, Figure 9) (showing one of the risk reduction salvage units). Unfortunately for species associated with late-successional habitat, almost all of the "high severity burned area is within the LSR land allocation of the Klamath Forest Plan." ER 115 (DN 2). The injunction obtained by KSWild did not shut down Project operations in their entirety, but the injunction will hinder efforts to restore burned late-successional habitat given the interrelated nature of strategically-located Project operations. *See, e.g.*, ER 183 (Declaration of Forest Supervisor Patricia Grantham (Grantham Decl.) ¶ 14) (explaining that "project components challenged by [KSWild] were designed as a part of an integrated treatment plan for safety and ecological purposes, which cannot be effectively achieved without the risk reduction salvage and hazard tree removal," among other things).

Reversal is warranted. As this brief demonstrates, the district court erred in granting KSWild the extraordinary remedy of a preliminary injunction, particularly by granting an automatic injunction without any consideration of the balance of harms and the public interest. Full implementation of the Project is an urgent need for the forest, the safety of local communities, and support for local workers.

II. STATEMENT OF JURISDICTION.

A. Basis for Jurisdiction in the District Court.

KSWild's claims against the Forest Service defendants arose under the National Forest Management Act (NFMA), 16 U.S.C. § 1600 et seq., the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., and the Administrative Procedure Act (APA), 5 U.S.C. § 701 et seq. ER 38-40 (Compl. ¶¶ 111-18, 119-23, 124-33). KSWild invoked the jurisdiction of the district court pursuant to 28 U.S. C. § 1331. ER 24 (Compl. ¶ 13).

B. Basis for Jurisdiction in this Court.

AFRC's appeal is from the district court's Order Granting Motion for Injunctive Relief entered on January 25, 2019. ER 230 (District Court Record (CR) 52). In accordance with Federal Rule of Appellate Procedure 4(a)(1)(B), AFRC filed a timely notice of appeal on March 25, 2019. ER 231 (CR 62). This Court thus has jurisdiction over the appeal pursuant to 28 U.S.C. § 1292(a)(1).

III. ISSUE PRESENTED FOR REVIEW.

Did the district court err in granting KSWild's motion for a preliminary injunction where, after overgenerously finding that KSWild had demonstrated serious questions on the merits of its NFMA and NEPA claims and met its burden of showing a likelihood of irreparable harm, the district court equated those

findings with a per se showing that the balance of the equities and the public interest tipped sharply in KSWild's favor?

IV. STATEMENT OF THE CASE.

On October 16, 2018, KSWild sued the Forest Service defendants in an effort to halt implementation of the Seiad-Horse Risk Reduction Project. ER 22-41 (Compl.). KSWild alleged the Forest Service violated NFMA and NEPA when it authorized the Project pursuant to a September 28, 2018 Decision Notice and Finding of No Significant Impact. *See generally* ER 114-33 (DN). KSWild moved on November 12 for a temporary restraining order and preliminary injunction. ER 226 (CR 13, 14).

On November 20, 2018, AFRC moved to intervene in the lawsuit on the side of the Forest Service. ER 227 (CR 25). The following day, AFRC submitted a brief in opposition to the motion for injunctive relief. ER 228 (CR 33). The district court granted intervention on December 5, 2018. *Id.* (CR 37).

On January 10, 2019, the district court heard argument on KSWild's motion for injunctive relief. ER 229 (CR 47). AFRC was not afforded an opportunity to participate in the hearing. ER 221 (TR at 13). On January 25, 2019, the district court entered the preliminary injunction order at issue on appeal. ER 230 (CR 52).

On March 1, 2019, AFRC appealed the district court's preliminary injunction order. *Id.* (CR 55). The Forest Service subsequently filed a separate

appeal from the district court's order. ER 230-31 (CR 60). *See also* ER 231 (CR 62, assigning Case No. 19-15597 to the Forest Service's appeal).

V. STATEMENT OF FACTS.

The Forest Service developed the Seiad-Horse Project in response to the 2017 Abney Fire, which burned about 10,800 acres on the Klamath National Forest. ER 115 (DN 2). About half of that acreage "burned at high severity" – meaning that most of the trees were killed – with almost all of that acreage occurring "within the LSR land allocation" on the Forest. *Id.* The loss of LSR acreage was particularly concerning because it threatens "the ability of the Forest to achieve LSR habitat objectives established in the Forest Plan," objectives designed to benefit species like the northern spotted owl that are associated with late-successional forest habitat. *Id.* In this region, wildfire is identified in the owl's Recovery Plan as a key factor in habitat loss. ER 135 (Northern Spotted Owl (NSO) Report at 6).

In the aftermath of the fire, the agency developed the Project to remove "dead and dying trees in strategic areas on the landscape . . . ." ER 115 (DN 2). By implementing the strategically-developed Project, "current and anticipated fuels continuity can be disrupted so that the next large fire will burn at lower severities than were seen in 2017's Abney Fire." *Id.* Sadly, there *will* be a next large fire – the Forest Supervisor's "concern for human safety and . . . belief in the urgency of

this Project was reinforced by [the 2018 summer's] staggering series of large, severe, and damaging fires in northern California, which resulted in the tragic loss of lives and property." ER 186 (Grantham Decl. ¶ 24).

The Project's purpose and need focuses on a compelling need for human safety and a restored environment, particularly a need for:

- Safety of the public and adjacent private landowners . . . .
- Safe conditions for forest workers, including firefighters and tree planters.
- Reduced fuels to reduce the risk of future large-scale high severity fire losses of late successional habitat . . . .
- A fire-resilient coniferous forest in severely burned areas to meet the desired conditions for late successional reserves . . . .
- Restored and enhanced fish habitat that contributes to attainment of this desired condition and Aquatic Conservation Strategy objectives . . . .

ER 50-51 (EA 1-2). To meet the Project needs, the agency authorized the removal of roadside hazard trees "along 39 miles of National Forest System roads," fuels reduction "on 139 acres of National Forest System lands adjacent to private property," and salvage timber harvest on about 1,269 severely burned acres. ER 114 (DN 1). Authorized actions also include reforestation of almost 1,000 acres and restoration and improvement of "fish habitat along 1.4 miles of" an important stream. *Id.* Many parts of the Project area, if not treated, would become "semi-

permanent brush fields for decades rather than accelerating the development of late-successional stand conditions." ER 111 (EA App. E at 13).

The injunction obtained by KSWild did not halt Project operations in their entirety, but it did enjoin important salvage harvest in LSR that was authorized under the Copper Reoffer Timber Sale. *See* ER 213 (Second Declaration of Susan Jane Brown ¶ 3). *See also* ER 173 (Geissler Decl. ¶¶ 8, 9) (describing the Copper Sale purchased by Mark Crawford Logging, Inc.). Because the various Project components are interrelated, the injunction compromises the Project as a whole. For example, the salvage harvest challenged by KSWild is "part of an integrated treatment plan for safety and ecological purposes, which cannot be effectively achieved without the risk reduction salvage . . . ." ER 183 (Grantham Decl. ¶ 14). *See also id.* (explaining that "project components that do not involve commercial timber harvest are nonetheless dependent on commercial timber harvest occurring . . . in order to remove safety hazards and increase the efficacy of the later management actions"). Thus, by halting operations on the Copper Sale, the injunction not only "damage[s] the feasibility of the [Copper Sale]," but it also threatens the loss of beneficial Project activities which "will never be implemented," with a concomitant loss of "the public benefits associated with those activities . . . ." ER 182-83 (Grantham Decl. ¶ 12).

VI. SUMMARY OF ARGUMENT.

The district court erred in granting KSWild's motion for the extraordinary remedy of a preliminary injunction. Most fundamentally, the district court presumed the existence of two of the four elements of the four-part test for an injunction, thereby granting KSWild a preliminary injunction in contravention of the law. Specifically, the district court presumed that the balance of equities and the public interest tipped sharply in KSWild's favor without considering the evidence put before the court, which counseled strongly against injunctive relief. The district court also erred in concluding that KSWild made a sufficient showing on the irreparable harm element of the four-part test for an injunction. On this point, flouting Circuit precedent, the district court improperly equated generic "logging" with per se irreparable harm from Project implementation.

The district court further erred by concluding that KSWild had raised serious questions on the merits of its NFMA claims challenging the Project's limited salvage harvest in a late successional reserve and its consistency with the Northwest Forest Plan's (NWFP) Aquatic Conservation Strategy. On the merits, the district court both misconstrued the facts and afforded the Forest Service no deference on highly technical topics implicating substantial agency expertise.

As a result of the district court's errors, and based on the record demonstrating that preliminary injunctive relief was not warranted, the Court

should reverse the district court's determination and vacate the preliminary injunction.

VII. STANDARD OF REVIEW.

This Court reviews a preliminary injunction for abuse of discretion. *California v. Azar*, 911 F.3d 558, 568 (9th Cir. 2018). The review has two parts. First the Court will "determine de novo whether the trial court identified the correct legal rule to apply to the relief requested." *Id.* (quoting *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012)). Second, the Court determines "if the district court's application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Id.* (quoting *Pimentel*, 670 F.3d at 1105).

KSWild and the district court relied on the "sliding scale" or "serious questions" test for a preliminary injunction. *See, e.g.*, ER 21 (PI Order at 15). A preliminary injunction "is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Ordinarily, to obtain relief, a plaintiff must demonstrate four elements: "that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. Alternatively, where a plaintiff "can only show that there are 'serious questions going to the merits'—a lesser showing than

likelihood of success on the merits—then a preliminary injunction may still issue if the 'balance of hardships tips sharply in the plaintiff's favor,' and the other two *Winter* factors are satisfied." *All. for the Wild Rockies v. Peña*, 865 F.3d 1211, 1217 (9th Cir. 2017) (citations and quotation marks omitted). This Court has defined "serious questions" as those "which cannot be resolved one way or the other at the hearing on the injunction and as to which the court perceives a need to preserve the status quo lest one side prevent resolution of the questions or execution of any judgment by altering the status quo." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988).

KSWild's claims against the Forest Service are reviewed under the deferential "arbitrary and capricious" standard of the APA, 5 U.S.C. § 706(2)(A). Under this standard, a court should not substitute its judgment for that of the agency. *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc), *abrogated in part on other grounds by Winter*, 555 U.S. 7 (2008). Rather, an agency may only be reversed as arbitrary and capricious where it:

> relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. (quotation marks and citations omitted).

Courts must defer to the Forest Service's interpretation of its own regulations, as well as its interpretations of forest plans. *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005); *League of Wilderness Defs./Blue Mtn. Biodiversity Proj. v. Allen*, 615 F.3d 1122, 1131 (9th Cir. 2010) (in review of a forest health project in the LSR land allocation, holding "[o]ur highest deference is owed to the Forest Service's technical analyses and judgments within its area of expertise").

The Supreme Court is considering whether to overrule *Auer v. Robbins*, 519 U.S. 452 (1997), which some decisions have relied on for the principle that the Forest Service's interpretations of its own plans are entitled to deference. *Kisor v. Wilkie*, 139 S. Ct. 657 (U.S. Dec. 10, 2018) (granting *certiorari*; argument held Mar. 27, 2019); *Native Ecosystems v. Marten*, 883 F.3d 783, 793 (9th Cir. 2018). If *Auer* is overruled, the Forest Service still should receive deference to its Forest Plans because of the technical nature of a Forest Plan.

Siskiyou Regional Education Project v. U.S. Forest Service, 565 F.3d 545 (9th Cir. 2009), recognized that this Court "ha[s] not explicitly relied on *Auer* in every case in which we have concluded that the Forest Service's interpretation of a forest plan was entitled to deference. In *Forest Guardians*, for example, we cited to *Thomas Jefferson*, not *Auer*, as providing the appropriate level of deference." *Siskiyou,* 565 F.3d at 555 n.9 (citing *Forest Guardians v. U.S. Forest Serv.*, 329

F.3d 1089, 1099 (9th Cir.2003), and *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, (1994)). Thus, the principle of deference in interpreting a Forest Plan is independent of the continuing viability of *Auer*.

VIII. ARGUMENT.

A. The District Court Erred in Holding that the Balance of Equities and Public Interest Tip Sharply in Appellees' Favor.

The district court's preliminary injunction order incorrectly held that "the balance of equities and public interest tip sharply in favor of" KSWild. ER 21 (PI Order at 15). As set forth below, the balance of harms does *not* favor an injunction, let alone tip sharply in favor of KSWild, and the public interest is being *disserved* by the district court's preliminary injunction order. But the district court erred for a more basic reason: rather than applying the four-part test for injunctive relief, the district court erroneously presumed that injunctive relief was the inexorable outcome of its determination that KSWild had shown serious questions on the merits of its NFMA and NEPA claims and met its burden as to the likelihood of irreparable harm. *Id.* This was legal error. The Supreme Court has repeatedly instructed that injunctions do not flow automatically even from demonstrated violations of environmental laws. *See, e.g.*, *Winter*, 555 U.S. at 24 (stating in the context of NEPA that a "preliminary injunction is an extraordinary

remedy never awarded as of right."). The district court's departure from this core principle of equity merits reversal.

1. The district court presumed that the balance of equities and the public interest tipped sharply in appellees' favor, thereby wrongly granting an automatic injunction.

The district court failed to assess the balance of equities and failed to consider whether the public interest would be disserved by an injunction. Instead, the district court incorrectly assumed that those elements were satisfied as follows:

> *In light of Plaintiffs' showing of serious questions regarding their likelihood of success on the merits and of likely irreparable harm*, the balance of equities and public interest tip sharply in favor of Plaintiffs as any potential irreparable harm to Plaintiffs outweigh any harm a delay would cause Defendants.

ER 21 (PI Order at 15) (emphasis added). That was the extent of the district court's consideration of the balance of harms and public interest elements. In a similar vein, the district court declined to hear any argument on the balance of harms and public interest elements at the preliminary injunction hearing. ER 222 (Tr. at 36) ("Any other issues [besides certain merits issues], to me at least, really don't help me decide whether or not I should grant the requested relief that plaintiff is currently seeking . . . .").[2]

[2] The district court also declined to hear anything from AFRC at the hearing, refusing AFRC's request, if "amenable [to the court] . . . to make a few remarks at the appropriate time." ER 221 (Tr. at 13) ("No. That's not amenable to me.").

The district court's failure to consider the balance of harms and the public interest constitutes reversible error. *McNair*, 537 F.3d at 1003 (assuming the existence of serious questions on the merits, a litigant "is entitled to a preliminary injunction only if the balance of hardships tips sharply in its favor. . . . In addition to balancing the hardships, we also must take into account the public's interest"). In *Natural Resources Defense Council, Inc. v. Winter*, 502 F.3d 859 (9th Cir. 2007), this Court issued a stay of injunction where the district court "did not give serious consideration to the public interest factor." *Id*. at 863. In doing so, the Court pointed out that the public interest must be considered separately from the irreparable harm element. *Id.*

Again, injunctive relief is "never awarded as of right." *Winter*, 155 U.S. at 24. Indeed, the Supreme Court has emphasized that unless a statute unequivocally constrains a court's equitable discretion, a court retains full discretion to either grant or deny a request for injunctive relief. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 544-45 (1987) (affirming district court's decision not to enjoin project despite violation of the Alaska National Interests Lands Conservation Act); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 309 (1982) (upholding district court's decision to allow Navy to continue releasing bombs from aircraft into waters near Puerto Rico despite a violation of the Clean Water Act). NEPA and NFMA contain no language constraining a court's equitable

powers. *See, e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S 139, 157 (2010) ("No such thumb on the scales is warranted.").

The district court's decision further flouts the Supreme Court's teaching that in cases like this involving government action, the public interest element "deserves special attention." *Winter*, 555 U.S. at 24. Here, the district court paid *no* attention to the public interest element and made no acknowledgment of the strong public interest in reducing fire risk and preventing the forest from turning into scrubland. The only reference to the public interest is in a parenthetical where the district court cited a case standing for the alleged proposition that "issuance of an injunction pending consideration of environmental impacts under NEPA comported with the public interest." ER 21 (PI Order at 15). That sounds very much like the now-disavowed "erroneous assumption that an injunction is generally the appropriate remedy for a NEPA violation." *Monsanto*, 561 U.S. at 157.

The district court's presumption that the balance of harms and the public interest "tip sharply in" KSWild's favor ignores these Supreme Court holdings. The district court's automatic injunction also flies in the face of this Court's an banc holding in *McNair* that it is inappropriate "to adopt a rule that any *potential* environmental injury automatically merits an injunction." *McNair*, 537 F.3d at 1005 (emphasis added). *Cf.* ER 21 (PI Order at 15) (stating without analysis that

"any *potential* irreparable harm to Plaintiffs outweigh any harm a delay would cause Defendants") (emphasis added).

As recognized by *McNair*, it is unlawful to set aside any national forest for non-use. 537 F.3d at 990. Yet by failing to consider the balance of harms and the public interest before enjoining the Seiad-Horse Project, the district court did just that – it set aside the Project area for non-use in contravention of binding precedent. For all of these reasons, the Court should reverse the district court's grant of an injunction.

2. The public interest counseled strongly against an injunction.

The public interest, which the district court did not address, strongly disfavored an injunction for at least four reasons.

First, matters involving public safety implicate important public interests. *See, e.g.*, *Holmes v. Helms*, 705 F.2d 343, 346 (9th Cir. 1983) (public interest is synonymous with public safety). The first two identified needs for the Project directly implicate public safety, namely a need for "[s]afety of the public and adjacent private landowners," and "[s]afe conditions for forest workers, including firefighters and tree planters." ER 50-51 (EA 1-2). Consistent with these public safety concerns, when "designing the Project, the Forest identified strategic treatment areas (including area salvage harvest, roadside hazard treatments,

ridgetop fuel breaks, and fuels treatment zones along roads and private property boundaries), to maximize the protection of human life and property." ER 185 (Grantham Decl. ¶ 20). With full implementation of the Project, the agency's "strategic treatments will reduce snag densities across much of the landscape, lowering future fuel loading and subsequent fire severity." *Id.* Absent full implementation, this opportunity to protect the community of Seiad Valley from future wildfires will be lost. *Id.* There is nothing speculative about this public safety concern. ER 186 (Grantham Decl. ¶ 24) (Forest Supervisor's testimony regarding northern California's recent "staggering series of large, severe, and damaging fires").

Second, the public's interest in protecting and restoring natural resources on the Klamath Forest support Project implementation, not inaction. In *Earth Island Institute v. Carlton*, 626 F.3d 462 (9th Cir. 2010), the Court affirmed a district court's finding "that salvage logging was necessary to promote forest regeneration." *Id.* at 476 (concluding that district court did not abuse its discretion in denying a preliminary injunction where the evidence showed that absent salvage harvest and related restoration activities, "brush species would eventually dominate the area" to the detriment of forest resources). Here, the Abney Fire took a particularly heavy toll on the LSR land allocation. ER 115 (DN 2). With Project implementation (as opposed to an injunction), "obtaining mature forest conditions

can be achieved about 130 years" sooner. *Id.* This will benefit northern spotted owls and other species associated with late-successional forest habitat. Conversely, without Project implementation, decaying snags will fall to the forest flow, "mixing with re-sprouting shrubs, hardwoods, grasses, and small trees, to create a fuel load that will reburn at high severity when fire returns. [This] has the potential to convert the area to a non-forested brush field condition for a long term period." ER 189 (Grantham Decl. ¶ 32).

Third, the ongoing deterioration of the burned trees in the Project area, which constitutes an irreparable loss of a public resource, supported denial of an injunction. The Abney Fire burned the forest in 2017. The evidence in the record demonstrated that "[b]urned and dead timber rapidly deteriorates after a fire, and usually lacks any value by about two years after a fire." ER 173 (Geisler Decl. ¶ 9). The Forest Supervisor similarly testified that after a fire, "the majority of timber volume and value decline generally occurs within the first two years . . . ." ER 18 (Grantham Decl. ¶ 9) (further explaining that the inevitable loss of timber volume frustrates the agency's "ability to leverage the commercial value of dead trees to pay for their removal and for hazardous fuel reduction treatments"). The district court appears not to have recognized that microorganisms, insects and physical processes of decay are oblivious to injunctions. Instead, the court stated (in the context of evaluating irreparable harm) that if KSWild ultimately lost its

case, the Forest Service would not be "barred from eventually implementing the Project." ER 20 (PI Order at 14). That is not true. Wood lost to decay is lost forever. And wood lost to decay poses a safety hazard to firefighters that impedes their ability to assist with future fire suppression efforts. ER 186 (Grantham Decl. ¶ 21).

Fourth, benefitting the economic health of local communities constitutes a public interest that supported Project implementation. *McNair*, 537 F.3d at 1005 (acknowledgment by en banc panel that a national forest project benefitted the public's interest in a variety of ways, including by "aiding the struggling local economy and preventing job loss"). Project implementation would aid the economic health of the local community. *See, e.g.*, ER 172-74, 176 (Geissler Decl. ¶¶ 7, 9-11, 17) (discussing job creation associated with the Project along with AFRC members' need for timber from the Project to supply gainful operations in the wood products industry); ER 191 (Grantham Decl. ¶ 40) ("Although the creation of socio-economic benefits is not a purpose of the Project . . . the Project will provide jobs for the local community, support for the forest-management infrastructure, and timber for the public at large.").

In short, the evidence demonstrated that the public interest would be significantly disserved by issuance of an injunction. But the district court did not give consideration to the public interest factor. Because the district court did not

follow the law governing issuance (or non-issuance) of an injunction, reversal is warranted, and the injunction should be vacated.

3. The balance of harms favored Project implementation.

The balance of harms, which the district court also did not address, favored Project implementation. The district court appears to have treated KSWild's allegation of harm from salvage harvest as per se irreparable harm that trumped any harms alleged by AFRC or the Forest Service. ER 20 (PI Order at 14) ("As this Court previously noted, '[t]he very nature of logging is that its completion is irreparable.'").[3] Perhaps that is why the district court presumed, without any consideration of the evidence, that the balance of harms tipped sharply in KSWild's favor. ER 21 (PI Order at 15). It does not.

The balance of harms favors the Project. As discussed above, delaying Project implementation harms the natural resources of importance to AFRC and hence AFRC's private interests. There is an urgent need to get dead and dying trees removed while they still retain value and can help fund needed restoration efforts. ER 119 (DN 6); ER 177 (Geissler Decl ¶ 19). In post-fire cases, this Court and district courts within its jurisdiction have recognized that the balance of harms

[3] The district court originally made that statement when denying the Forest Service's motion for a stay of the hearing due to the 2018-2019 lapse in appropriations. ER 216 (Order Denying Motion to Stay at 3).

often weighs in favor of project implementation. For example, in *Carlton*, the Court affirmed a district court's finding that salvage logging was necessary to promote forest regeneration. 626 F.3d at 476. In *Earth Island Inst. v. Gould*, No. 1:14-CV-01140-KJM-SKO, 2014 WL 4082021 (E.D. Cal. Aug. 19, 2014), the district court reviewed evidence that "time is of the essence given the daily deterioration of timber" and "the limited period of time left in which to conduct timber operations." *Id.* at *8. And in *Earth Island Inst. v. Quinn*, No. 2:14-CV-01723-GEB-EF, 2014 WL 3842912, (E.D. Cal. July 31, 2014), the district court found that the balance of harms (and public interest) weighed in favor of the project, where deteriorating timber would result in permanent job loss and continuing threats to "public health and safety." *Id.* at *8.

If the district court had balanced the parties' respective harms, KSWild's enjoyment in experiencing burned forests and its interest in post-fire recovery of the forest would have come up short. *See* ER 20 (PI Order at 14) (discussing KSWild's allegations of irreparable harm). The evidence showed that the Forest Service "recognize[ed] the value in leaving a large portion of the Abney Fire area to recover through natural processes. This is why the vast majority of the Project area (over 88 percent) includes no salvage harvest." ER 191 (Grantham Decl. ¶ 38) (further explaining that the salvage authorized "focused on those strategic areas where human intervention is most needed to support ecological restoration and

improve human safety"). Balancing the alleged harms to KSWild from salvaging such a small fraction of burned forest against the benefit derived by AFRC and the Forest Service from that small amount of salvage would not have yielded a determination that the balance of equities tipped sharply in KSWild's favor. But the district court declined to engage in that analysis, instead presuming that KSWild had made the requisite balance of harms showing to obtain the extraordinary remedy of an injunction. This was legal error warranting reversal.

B. Appellees Did Not Establish a Likelihood of Irreparable Harm from Project Implementation.

The district court erred by treating KSWild's allegations of harm from salvage harvest as essentially per se irreparable harm. ER 20 (PI Order at 14) ("As this Court previously noted, '[t]he very nature of logging is that its completion is irreparable.'"). The district court reached that conclusion based on: (1) KSWild's contention that its "enjoyment of the areas at issue will be diminished and there are no 'substitute areas' where [KSWild] can go for the same experience;" and (2) KSWild's allegation that it showed "a real interest in the health and recovery of post-fire environments and intact ecosystems recovering from natural disturbance, such as old-growth forests 'which cannot grow back within their lifetimes.'" *Id.* (quoting KSWild's TRO/PI Mem.).

The district court abused its discretion in evaluating KSWild's showing on the irreparable harm factor. KSWild's showing on this element did not rise to the level of a *likelihood* of irreparable harm. *Winter*, 555 U.S. at 20-21.

There is "no presumption of irreparable injury" in environmental cases. *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1091 (9th Cir. 2015). A mere "possibility" of irreparable harm cannot support an injunction. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 818 (9th Cir. 2018). Although KSWild asserted the forest "'cannot grow back within their lifetimes,'" ER 20 (PI Order at 14 (quoting KSWild's TRO/PI Mem.), the loss of forest habitat in the Project area is attributable to the Abney Fire, not the limited salvage harvest at issue. The trees are dead – an injunction will not revive them. Moreover, left alone, the fire-killed late-successional habitat will not grow back within anyone's lifetime, as reforestation would take up to two centuries. But with the help of the Project's strategic restoration, "obtaining mature forest conditions can be achieved about 130 years" faster, ER 115 (DN 2), likely within 70 or so years. ER 58 (EA 75).

As the same district court judge once recognized, "[u]nlike . . . green timber . . . fire-killed trees are in a process of deterioration that, over time, will result in them breaking and falling over." *Ctr. for Biological Diversity v. Hays*, No. 2:15-CV-01627-TLN-CMK, 2015 WL 5916739, at *11 (E.D. Cal. Oct. 8, 2015). Thus,

the court concluded, post-fire salvage harvest did not constitute per se irreparable injury. *Id.* This is in line with this Court's decision in *Carlton*, which held that the "argument that logging is per se enough to warrant an injunction because it constituted irreparable environmental harm was squarely rejected by *McNair* where we declined 'to adopt a rule that *any* potential environmental injury automatically merits an injunction.'" 626 F.3d at 474 (quoting *McNair*, 537 F.3d at 1005).

Although the district court accepted KSWild's assertion that "'there are no 'substitute areas'" where KSWild could enjoy burned forest habitat absent an injunction, ER 20 (PI Order at 14), the evidence showed otherwise. The Project is retaining a significant amount of burned forest habitat – 88% of the Project area is undergoing "no risk reduction salvage." ER 118 (DN 5). Thus, to the extent a person desires to experience burned forest in the Project area (California unfortunately offers many additional opportunities for KSWild to experience burned forest), there is no dearth of opportunity. The Court's *Carlton* decision found no irreparable harm where the challenged project authorized the harvest of about 38% of the burned forest habitat. 626 F.3d at 467.

Finally, even in the 12% of the Project area undergoing strategic risk reduction salvage, dead and dying trees are being retained:

Photo point 5 (41.90670, -123.08250): located on 47N70A road looking upslope (north) into harvested portion of unit 25. Wildlife snags dispersed throughout unit.

ER 218, 219 (Second Grantham Decl. ¶ 4 & Ex. B at 3) (photograph taken prior to the injunction order showing the retention of dead and dying trees after harvest).

For all of these reasons, the court erred by equating generic "logging" with per se irreparable harm from Project implementation. *See* ER 20 (PI Order at 14).

C. The District Court Erred in Holding that Appellees Established Serious Questions on the Merits of Their NFMA and NEPA Claims.

The district court erred in concluding that KSWild established serious questions on the merits of its NFMA claims, which took issue with the Project's (1) limited salvage harvest in an LSR; and (2) consistency with the NWFP's

Aquatic Conservation Strategy. The district court also erred in concluding KSWild established serious questions on the merits of its NEPA claim, which challenged the Forest Service's use of an EA rather than an EIS. KSWild did not make a sufficient showing to establish serious questions on the merits under either NFMA or NEPA for purposes of obtaining preliminary injunctive relief.

1. Appellees did not establish serious questions on their NFMA claim challenging salvage harvest in a late successional reserve.

KSWild did not establish serious questions on the merits of its NFMA claim challenging salvage harvest in the Johnny O'Neil LSR. The district court's erroneous ruling relied on *Oregon Natural Resources Council v. Brong*, 492 F.3d 1120 (9th Cir. 2007), in taking issue with: (1) the Forest Service's snag retention protocol, particularly the boundaries of the Project's snag removal and retention areas, ER 17-18 (PI Order at 11-12); and (2) the Project's impacts on the short-term suitability of LSR habitat for the northern spotted owl. ER 18-19 (PI Order at 12-13). Contrary to the district court's determination, *Brong* is not controlling. And in reality, the Forest Service's decision to authorize a small amount of salvage harvest in the Johnny O'Neil LSR complies with NFMA and should have been afforded substantial deference. *McNair*, 537 F.3d at 993 (judicial review should be at its *most* deferential where an agency is addressing difficult issues within its area of special expertise).

The Forest Plan at issue is the Klamath Land and Resource Management Plan (LRMP). The Klamath LRMP incorporates the more general NWFP, a management plan covering the range of the northern spotted owl that classified forest lands into one of three general categories: (1) reserve areas, including LSRs; (2) matrix lands; and (3) adaptive management areas. *Gifford Pinchot Task Force v. U.S. FWS*, 378 F.3d 1059, 1064 (9th Cir.) (discussing land management rules applicable to the different land categories), *amended by* 387 F.3d 968 (9th Cir. 2004).

Although the Klamath LRMP is specifically tailored to the needs of the Klamath National Forest, it incorporated the NWFP's general management direction for LSR habitat.[4] *See, e.g.,* ER 195 (Klamath LRMP at 4-10) (explaining that the NWFP provides "regional direction for the Forest Plan" at a "broad level scale"). The NWFP established Standards and Guidelines (S&G) for the management of LSRs, under which the objective "is to protect and enhance conditions of late-successional and old growth forest ecosystems . . . ." ER 145 (S&G A-4). Towards that end, the NWFP expressly authorizes logging activities

[4] The Forest Plan identifies management direction derived from the NWFP by marking it "with an asterisk (*)." ER 193 (Klamath LRMP at 4-1). LSR management direction from the NWFP is incorporated into the Forest Plan. *See, e.g.*, ER 198-99 (Klamath LRMP at 4-86 to 4-87) (*MA5-27 to *MA5-29, Guidelines to Reduce Risks of Large-Scale Disturbance); ER 199-200 (Klamath LRMP at 4-87 to 4-88) (*MA5-30, Guidelines for Salvage).

within LSRs where "(1) the proposed management activities will clearly result in greater assurance of long-term maintenance of habitat, (2) the activities are clearly needed to reduce risks, and (3) the activities will not prevent the Late-Successional Reserves from playing an effective role in the objectives for which they were established." ER 151 (S&G C-13).

The NWFP encourages land managers to "seek a balanced approach that reduces risk of fire . . . ." ER 146 (S&G B-8). And the NWFP gives land managers wide discretion to manage LSRs in dry forests of northern California, like the dry forest habitat on the Klamath National Forest at issue in this case. ER 150-51 (S&G C-12 to C-13). The NWFP further gives guidance as to the appropriate scope of salvage in an LSR. ER 151-53a (S&G C-13 to C-16). It recognizes that even those guidelines may be too restrictive in fire-prone forests when, as here, "salvage is essential to reduce the future risk of fire or insect damage to late-successional forest conditions." ER 153 (S&G C-15).

KSWild's argument in the district court, and the district court's NFMA holding on LSR salvage, treated *Brong* as establishing a bright-line rule that the salvage of snags in an LSR violates NFMA, regardless of the facts of the particular case. *See, e.g.*, ER 17-19 (PI Order at 11-13). That is incorrect.

In *Brong*, which predated this Court's seminal en banc *McNair* decision, the Bureau of Land Management (BLM) proposed a salvage project (Timbered Rock)

that involved 961 acres of harvest within 11,700 burned LSR acres. 492 F.3d at 1123, 1128. More specifically, Timbered Rock involved the harvest of *all* snags on 679 acres and the retention of *all* snags on the remaining acres, which averaged out to 8-12 snags per acre. *Id.* at 1129. The Ninth Circuit found that BLM's decision to remove all the snags in some units contravened the NWFP's statement that salvage should "focus on retaining snags that are likely to persist until late-successional conditions have developed." *Id.* at 1128 (quoting S&G C-14).

Despite BLM having co-authored the NWFP, the panel held that BLM's interpretation of the NWFP's directives for LSR management deserved no deference. *Id.* at 1127. It then "rewrote" the plan to provide a "clear directive against removing large snags." *Id.* at 1128. The Ninth Circuit also second-guessed BLM's snag retention methodology and determined that leaving 8-12 snags per acre on average was insufficient because over two-thirds of the affected acreage would be "*completely* stripped of all salvageable trees." *Id.* at 1129 (emphasis in original). *Brong* further chided BLM for not explaining how snag removal would "maintain overall habitat suitability now or in the future . . . ." *Id.* at 1131.

Brong is not controlling here. First, *Brong* was decided before the Ninth Circuit took *McNair* en banc "to clarify some of the [Ninth Circuit's] environmental jurisprudence." 537 F.3d at 984. In *McNair*, the Ninth Circuit rejected an invitation to "act as a panel of scientists that instructs the Forest Service

how to validate its hypotheses . . . chooses among scientific studies in determining whether the Forest Service has complied with the underlying Forest Plan, and orders the agency to explain every possible scientific uncertainty." *Id.* at 988. Importantly, the Court abrogated precedents that had "shifted away" from the proper standard of review and reaffirmed that agencies are owed substantial deference by courts reviewing agency action, particularly that involving scientific matters. *Id.* Regarding NFMA, the Ninth Circuit rightly clarified that it is improper for courts "to impose bright-line rules on the Forest Service regarding particular means that it must take in every case to show us that it has met the NFMA's requirements." *Id.* at 993-94.

Subsequent to *McNair*, this Court has addressed forest land management decisions involving LSR habitat more deferentially. For example, in *Allen*, *supra*, the Court deferentially addressed whether a thinning project in an Oregon LSR violated the NWFP. 615 F.3d 1122. Citing *McNair*, the majority held that the Court's "highest deference is owed to the Forest Service's technical analyses and judgments within its area of expertise." *Id.* at 1131. The *Allen* majority got it right, unlike the district court in this case.

Since *Allen* did not directly confront the issue of snag retention, the panel majority had no need to distinguish *Brong*. Still, it took an approach diametrically opposed to *Brong*, with the majority reiterating that the en banc ruling in *McNair*

was designed "to foreclose precisely this type of second-guessing of the Forest Service" advocated by the dissent. *Allen*, 615 F.3d at 1131. To the extent *Brong* can be read to preclude removal of large snags in an LSR, *McNair* has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). *Brong*'s reasoning reflects the very same "shift[] away from the appropriate standard of review" that *McNair* sought to arrest. *McNair*, 537 F.3d at 988. Dissenting in *Brong*, Judge O'Scannlain said as much:

> The majority mistakenly reads the N[W]FP's requirement that the Forest Service ("Service") "focus on" snag retention as one that "expressly limits the removal" of snags. *Ante*, at 1128–29. One searches in vain for any such express limitation; a requirement to "focus on" retention, I suggest, more naturally reflects a presumption that snags will indeed need to be removed. The insistence upon its own best vision for silviculture, rather than upon the language of Congress or the professional expertise of the Service, pervades today's majority opinion, which far exceeds our limited role in reviewing agency action.

Brong, 492 F.3d at 1135–36 (O'Scannlain, J., dissenting). Accordingly, *Brong* should be held "no longer binding on district judges and three-judge panels of this court." *Miller*, 335 F.3d at 899.

Further, the Forest Service's snag retention methodology for the Project is not the same as that disapproved in *Brong*. Although KSWild (and the district court) tried to analogize the two snag retention protocols by suggesting the Forest

Service manipulated Project unit boundaries to influence snag retention metrics, *see* ER 17 (PI Order at 11), that is untrue. The Project applies its snag retention standards at a fine scale, with the sampling data showing that for every 100 acres, 1,369 snags greater than 12 inches in diameter at breast height will be retained. ER 139 (Wildlife MIS Report at 14). *See also id.* ("[O]n average, an acre of forested land affected by moderate or high fire severity contains about 14 conifer snags ranging in size from 12 to over 46 inches in diameter at breast height."). The Project's modeling estimates showed a substantially higher number of snags being retained per acre. ER 140 (Wildlife MIS Report at 16) (estimating "that the salvage harvest units contain about 113 dead conifer trees (greater than 12 inches in diameter) per acre").

Salvage units include both treatment and retention areas to varying degrees depending on unit site characteristics. *See, e.g.*, ER 53 (EA 10). Under the Forest Plan, snag metrics need not and should not be met on every acre. ER 196 (Klamath LRMP at 4-30) ("The number of snags on a given acre will vary, depending on the site and on the number of snags within the landscape."). Instead, "within any 100-acre area, the appropriate number of snags be retained. This allows project design to mimic the natural snag distribution as described by [scientific reports] as concentration of snags in time and space, and intervening areas where snags would be relatively sparse or would not occur." ER 138

(Wildlife MIS Report at 12). *See also* ER 55 (EA 44) (explaining that recent research "shows that the amount of dead wood" on the forest floor is excessive for the Klamath Mountains when compared with historical norms). On this record, where the Forest Service's snag retention protocol was based on the requirements of the Forest Plan, there is no colorable argument that the agency tried to mask Project effects by averaging snag retention over a larger area, particularly when viewed through a properly deferential lens. *See McNair*, 537 F.3d at 993 ("[O]ur law . . . requires us to defer to an agency's determination in an area involving a 'high level of technical expertise'") (citation omitted). *Cf.* ER 18 (PI Order at 12) (finding "*Brong* illustrative" in conclusory fashion and then making the illogical and non-deferential leap to a finding of "serious questions as to whether the boundaries of the Project were in compliance with the [NWFP]").

The district court acknowledged that the Forest Plan includes "a forest-wide standard that allows for the averaging of snags per 100 acres . . . ." ER 17 (PI Order at 11). But the court disregarded that Forest Plan management direction because it was not specific to the northern spotted owl. ER 17-18 (PI Order at 11-12). The court's reasoning was flawed for two reasons.

First, the Forest Plan standard requiring snag retention metrics to be calculated over 100-acre areas involves Management Indicator Species like woodpeckers and sapsuckers. *See, e.g.*, ER 196 (Klamath LRMP at 4-30); ER 138

(Wildlife MIS Report at 12). As their name suggests, Management Indicator Species are species whose population changes are thought to be indicative of the effects of land management. The Forest Plan's snag retention requirements were "developed to represent habitats or features important for many plant and animal species," not just for the listed Management Indicator Species. *Id.* Thus, the fact that the northern spotted owl wasn't listed on page 4-30 of the Forest Plan does not support the district court's wholesale dismissal of the Forest Plan's snag retention direction. And in any case, the court's reasoning ignores the landscape nature of the NWFP. The plan is designed to take "an ecosystem management approach," ER 144a (S&G A-1), with LSRs managed "to protect and enhance conditions of late-successional and old-growth forest ecosystems, which serve as habitat for late-successional and old-growth related species including the northern spotted owl." ER 149a (S&G C-11).

Second, the Forest Plan guidance specific to the owl simply provides that "following stand-replacing disturbance," land management "should focus on retaining snags that are likely to persist until late-successional conditions have developed and the new stand is again producing large snags," which takes at least 80 years. ER 199 (Klamath LRMP at 4-87) (*MA5-30, Guideline *3.). *Accord* ER 152 (S&G C-14). In the Project area, most snags do not persist on the

landscape under the natural fire regime.[5] ER 55 (EA 44). The fire regime for the Klamath Mountains "is different than those of the Coast Range and Oregon and Washington Cascades." *Id.* In the Klamath Mountains, "fire history resulted in a 'landscape with many of the snags and logs clustered in both time and space, and very sparsely distributed in the intervening time and space . . . . it is unlikely that much large woody material survived long enough to decompose fully in fire regimes that preceded the fire-suppression era.'" *Id.* (quoting scientific reports). *Brong*, which involved wetter forest habitat in Oregon, did not address LSR management in the context of drier forests such as the Klamath. *See* ER 151 (S&G C-13) ("[M]anagement activities designed to reduce risk levels are *encouraged* in [LSRs in the California Klamath Province.]") (emphasis added).

The district court also erred in equating the Forest Service's ancillary consideration of economic factors in this case with the improper elevation of economic factors above environmental considerations described in *Brong*. Unlike the BLM in *Brong*, the Forest Service in this case did not treat economic factors and environmental concerns about LSR salvage as being equal, or let economic considerations drive Project development. *Cf. Brong*, 492 F.3d at 1127. *See also*

[5] Even though most snags in the Project area will not persist for 80 years, "the vast majority of the project area (over 88 percent) will have no risk reduction salvage undertaken." ER 118 (DN 5).

ER 18 (PI Order at 12) (criticizing the Forest Service because, in the court's opinion, "economic factors were central to the agency's decision-making"). Although the NWFP prohibits projects that maximize economic gain to the detriment of other requirements, "the fact that there may be some incidental economic benefit from the recovery project's sale of burned trees is not contrary to and does not overshadow the NWFP's primary goals of forest protection and restoration." *Siskiyou Reg'l Educ. Project v. Goodman*, 219 Fed. Appx. 692, 695 (9th Cir. 2007). Even *Brong* recognized that "the Forest Service may consider economic interests in choosing how it will conduct LSR salvage operations; that it may do so is not only a matter of common sense, but it is also something contemplated by the [NWFP]." *Brong*, 492 F.3d at 1127 (citing NWFP). *See also* ER 151-52 (S&G C-13 to C-14) (stating that "management planning for [LSRs] must acknowledge the considerable value of retaining dead and dying trees as well as the benefits from salvage activities").

The Project was not driven by a desire to maximize economic gain or elevate economic factors above environmental concerns. If it had been, the Forest Service would not have excluded more than 88% of the Project area from salvage harvest. Rather, the purpose of LSR salvage is to reduce "fuels to reduce the risk of future large-scale high severity fire losses of late successional habitat (Forest Plan, p. 4-86 to 87)." ER 51 (EA 2). *See also* ER 109a (EA 148) ("Salvage harvest in the

LSR is being done to reduce risk of future high severity fire, not recover volume."); *id.* (pointing out that the "vast majority of the fire killed trees in the LSR will remain unharvested").

The Forest Service considered the economic aspects of and benefits from salvage activities, just as the NWFP allows and common sense requires. *See, e.g.*, ER 181 (Grantham Decl. ¶ 8). Considering economic benefits from Project implementation, and the way in which economic benefits can be protective of human life and the environment, cannot be fairly equated with improperly elevating economic factors above environmental considerations. Nor does it make the balance struck by the Forest Service in this case analogous to the unlawful balance struck by the BLM in *Brong*. The district court thus erred on this point as well. ER 18 (PI Order at 12).

Finally, the district court erred in concluding that KSWild had demonstrated serious questions regarding the Project's impacts on the "short-term habitat suitability of the northern spotted owl . . . ." ER 19 (PI Order at 13). The district court's determination was based on a portion of one sentence in the EA:

> [T]he EA on its face states that "substantial amounts of habitat are projected to be degraded by the proposed actions." (EC [sic] at 113). While the EA explains that this will not affect the viability of the northern spotted owl in the long-term, it does not appear to explain whether the current habitat suitability will be maintained, as required by the [NWFP], other than stating that the viability of the species as a whole will be maintained. (EA at 113). This analysis of the short-

term impacts of the Project is insufficient under *Brong*.

ER 19 (PI Order at 13). The court erroneously equated "degrade" with a loss of suitability. "Degraded" means the treatment will reduce habitat elements, "but not to the degree where existing habitat function is changed." *Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1052 (9th Cir. 2013). Further, the EA clarified that even considering cumulative effects, no habitat would be removed (lose suitability), and habitat downgrade would be minimal. ER 92 (EA 113). The Project also was designed to be consistent with the recovery plan for the spotted owl. ER 53, 91 (EA 10, 112).

Nor can the district court's conclusion survive a broader review of the record. The EA explained that "post-fire habitat does not play a substantial role in the life cycle of the northern spotted owl . . . ." ER 91 (EA 112). Because "severely burned habitat does not meet the characteristics of NSO nesting, roosting and foraging habitat, salvage harvest is not expected to represent a meaningful change in habitat availability" for the owl. ER 92 (EA 113). *See also id.* (explaining that most salvage harvest will "occur within areas of high and moderate fire severity, and generally within larger blocks of high tree mortality, and . . . not within areas considered to be NSO nesting/roosting or foraging habitat"). In addition, any value of post-fire foraging habitat to the owl is of limited duration because the snags will "fall and decay." ER 91 (EA 112).

Even though burned LSR habitat plays a minimal role in the owl's life cycle, the Project was designed to minimize effects to burned LSR habitat, for example by including "snag and green tree retention patches, and modified prescriptions within [owl] core areas and riparian reserves that retain more of the habitat elements important for the NSO." *Id.* Other ways in which the Project was designed to avoid short term impacts include:

> 1) implementing seasonal restrictions during the sensitive reproductive period, 2) targeting only high and moderate severity burned areas for salvage harvest (where NSO use is expected to be limited as compared to unburned or lightly burned habitat – see BA for additional information), 3) limiting the size of trees removed from within specific core areas, 4) by retaining many of the larger trees and snags as whole downed logs that contribute to the large woody debris component and 5) conducting pre-implementation protocol surveys.

Id. The EA disclosed still other ways that any existing suitability of habitat in salvage units will be maintained for the owl. ER 92 (EA 113).

Ultimately, the Forest Service concluded the Project's short term impacts on the northern spotted owl and its habitat would "not be significant." *Id.* ("The short-term impacts of the project will not be significant since it will not impact the viability of the species or *its territories*. In addition to not having short-term impacts, the project will also not have long-term significant impacts.") (emphasis added). The detailed NSO report similarly found that:

> the project largely avoided NSO nesting/roosting and foraging habitat and where treatment did occur in NSO nesting/roosting and foraging

> habitat, we adjusted the treatment prescriptions to retain the NSO habitat function, where possible. Given the project design that resulted in minimizing effects to NSO habitat, the results of these analyses show small to no change in the analysis indicators.

ER 136 (NSO Report at 12).

In short, the district court's effort to analogize this case to *Brong* based on a portion of a single sentence in the EA is misplaced. ER 19 (PI Order at 13). The court erred in concluding the Forest Service ignored the issue of current habitat suitability for the northern spotted owl.

Based on the foregoing, the district court's finding of serious questions under NFMA with respect to salvage harvest in an LSR must be reversed.

2. Appellees did not establish serious questions on their NFMA claim challenging the Project's consistency with the Aquatic Conservation Strategy.

The district court also erred in finding serious questions under NFMA with respect to the Project's consistency with the NWFP's Aquatic Conservation Strategy (ACS). The ACS is designed to "restore and maintain the ecological health of watersheds and aquatic ecosystems contained within them on public lands."[6] ER 147 (S&G B-9). Because the ACS "is based on natural disturbance processes, it may take decades, *possibly more than a century*, to accomplish all of

[6] The Forest Plan incorporates the NWFP's ACS objectives. *See, e.g.*, ER 194 (Klamath LRMP at 4-6).

its objectives." *Id.* (emphasis added). The ACS states that "[m]anagement actions that do not maintain the existing condition or lead to improved conditions in the long term would not 'meet' the intent of the [ACS] and thus, should not be implemented." ER 148 (S&G B-10).

This generic and aspirational direction leaves it to the individual Forest Service decision-makers to interpret and apply the Forest Plan's ACS direction to specific projects. This Court has stated it will "adopt[] the agency's interpretation of parts of the [Forest] Plan that are 'susceptible to more than one meaning unless the interpretation is plainly erroneous or inconsistent with the [Forest Plan].'" *Native Ecosystems Council v. Marten*, 883 F.3d at 793 (quoting *Siskiyou*, 565 F.3d at 555 & n.9). *See Ecology Ctr. v. Castaneda*, 574 F.3d 652, 661 (9th Cir. 2009) (holding that language incorporated into Forest Plan did not create a mandatory duty where it was "cast in suggestive (i.e., 'should' and 'may') rather than mandatory (e.g., 'must' or 'only') terms.").

This Court has not had occasion to directly construe the ACS provisions, but in *Pacific Coast Federation of Fishermen's Ass'n, Inc. v. National Marine Fisheries Service*, 265 F.3d 1028 (9th Cir. 2001), it rejected a programmatic effort at Endangered Species Act compliance for 23 timber projects which was based on ACS consistency. *Id.* at 1035. The agency's analysis, the Court held, failed to sufficiently consider site-specific degradation or short-term degradation when

reviewing actions at the watershed level. *Id.* at 1035-37. This means a "plan that does not properly account for short-term, localized effects—in addition to long-term, watershed scale impacts—is arbitrary and capricious." *Bark v. U.S. Bureau of Land Mgm't*, 643 F.Supp.2d 1214, 1234 (D. Or. 2009). But it does not mean that *any* degradation is impermissible. *Id.*

Because the ACS focuses on the long term, "evidence . . . that a project will result in some degradation does not, standing alone, constitute ACS noncompliance." *Id.* at 1234-35 (quoting *Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv.*, 71 F.Supp.2d 1063, 1070 (W.D. Wash.1999), *aff'd in part and vacated in part*, 265 F.3d 1028). Thus, "individual projects can be consistent with the ACS '[n]otwithstanding the potential for minor, short term adverse effects.'" 71 F.Supp.2d at 1070 (citation omitted). *See also Klamath Siskiyou Wildlands Ctr. v. Grantham*, 424 F. App'x 635, 637 (9th Cir. 2011) (unpublished) (holding "we are not convinced that the Forest Plan must be read so narrowly as to allow only activities required to prevent failure of ACS objectives").

The ACS is primarily implemented through the establishment of riparian reserves and standards and guidelines for activities in such reserves. *Oregon Nat. Res. Council Fund v. Goodman*, 505 F.3d 884, 893 (9th Cir. 2007); ER 154-62 (S&G C-30 to C-38). The Seiad-Horse Project involves minimal activities in riparian reserves, with felled hazard trees left onsite rather than removed. ER 52,

71, 103 (EA 8, 88 (chart of activities), 139); ER 112-13 (EA App. E at 64-65). The Project also is not in a key watershed. ER 98 (EA 134). Thus, the Project furthers many ACS goals simply through avoidance.

The Project also complies with the ACS at a more detailed level. The ACS has nine overarching objectives. ER 149 (S&G B-11). The Forest Service closely analyzed how the Project impacts all these ACS objectives and implemented mitigation measures and best practices for each. ER 96-109 (EA 132-45 (App. C)). The agency ultimately concluded that "the Project meets or does not prevent attainment of these objectives." ER 93 (EA 116). Project activities will "maintain and restore" each of the nine objectives. ER 100, 101, 103, 104, 105, 108, 109 (EA 136, 137, 139, 140, 141, 144, 145). The Forest Service also delineated how the Project complies with each ACS standard and guideline, including 77 standards and guidelines specific to riparian reserves. ER 202-03, 205-11 (Consistency Checklist at 7-9, 50-56). This is similar to the EA approved in *Bark*, where the agency detailed "each of the nine ACS objectives and how the project either immediately impacts the environment, or reasons that the BLM found there would be no significant effect at a short-term, localized scale." *Bark*, 643 F.Supp.2d at 1234.

In the district court, KSWild specifically attacked the Project's consistency with objectives 4, 5, and 6, relating to water quality, sediment regime, and stream

flows. *See* ER 15 (PI Order at 9 n.2); ER 103-05 (EA 139-41). The district court addressed only ACS objective 4, which states:

> Forest Service and BLM-administered lands within the range of the northern spotted owl will be managed to … [m]aintain and restore water quality necessary to support healthy riparian, aquatic, and wetland ecosystems. Water quality must remain within the range that maintains the biological, physical, and chemical integrity of the system and benefits survival, growth, reproduction, and migration of individuals composing aquatic and riparian communities.

ER 149 (S&G B-11). Consistency with this objective is measured over the long term, given that the objective may not be achieved for decades or even centuries.

The Project is consistent with ACS objective 4. The Forest Service candidly disclosed that because "the existing [post-fire] condition of the watershed is already detrimental to aquatic species," the Project's short-term effects "would slightly increase sediment delivery to streams" and "be adversely cumulative." ER 73 (EA 90). But the agency further explained that:

> Project elements would maintain and restore ACS Objective 4 because: (1) While water temperature may be increased in the short term at the site scale, stream shading will be improved by riparian planting in the long term; and (2) While turbidity will be increased in the short term and at the site scale during legacy sediment site treatment and large wood placement it will be improved drastically by these treatments in the long term. Legacy sediment site treatments will also have a net sediment savings at the seventh through fifth field watershed scale.

ER 104 (EA App. C at 140). Modeling showed that the legacy site treatments will treat up to 23,000 cubic yards of sediment, "much more" than the impact from

project activities. ER 103-04 (EA App. C at 139-40). For comparison purposes, the agency estimated sediment impacts from the Project at 26.6 cubic yards per year, or 266 cubic yards in a decade, which is 1% of the benefit from legacy treatments. ER 66 (EA 83).

In concluding that KSWild had demonstrated serious questions regarding the Project's consistency with the ACS, the district court ignored the Forest Service's analysis, misstated facts and mischaracterized the agency's rationale. For example, the district court said:

> Despite Defendants' contention that the short-term impacts are within the natural range of variability, and the long-term results will be beneficial . . . it is clear that for at least some of the watersheds, the *increase* in sedimentation is well above the threshold for the natural range of variability. (See EA at 82 (recognizing a 33% "[i]ncrease above [t]hreshold" in the Salt Gulch Watershed).)

ER 16 (PI Order at 10). This is wrong, as it attributes preexisting background conditions to Project activity. What the EA actually states is that the Project will cause a 2.5% increase over background, of 138 cubic yards per decade. ER 65 (EA 82). For the Salt Gulch Watershed, the cumulative landslide volume above background (i.e., existing conditions including effects of the fire) was 12,800 cubic yards per decade, or 233% of background, and therefore 33% over the concern threshold. *Id.* The district court confused Project effects with existing conditions,

and erroneously overruled the Forest Service on a highly technical matter. This was an abuse of discretion. *Allen*, 615 F.3d at 1131.

The district court mischaracterized the agency's position as claiming that short-term impacts are within the natural range of variability. ER 16 (PI Order at 10). The agency's actual rationale was that short-term sediment increases will be offset by long-term decreases of much greater magnitude. ER 103 (EA 139). The district court thus erred as a matter of law. "'[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.'" *Alaska Eskimo Whaling Comm'n v. U.S. E.P.A*, 791 F.3d 1088, 1093 (9th Cir. 2015) (quoting *SEC v Chenery Corp.*, 332 U.S. 194, 196 (1947)).

The district court also appeared to require that these short-term impacts be within the range of natural variation. ER 16 (PI Order at 10 n.3). The ACS has no such requirement. The ACS instead urges management actions that maintain the existing condition or lead to improved conditions in the long term. ER 148 (S&G B-10). KSWild misleadingly argued in the district court that under *PCFFA*, there are no "de minimis" exceptions to the ACS. ER 164 (TRO/PI Mem. at 7). But the words "de minimis" don't appear in *PCFFA*. Rather, there the Court found "nothing in the record to authorize NMFS to assume away *significant* habitat degradation." *PCFFA*, 265 F.3d at 1037 (emphasis added). Because the decision

in *PCFFA* hinged on the agency's total failure to examine and account for short-term effects, *PCFFA* is inapposite.

Not to be deterred, the district court also inaccurately alleged that the agency had improperly "'ignore[d] site degradations because they are too small to affect the accomplishment of that goal at the watershed scale,'" ER 16 (PI Order at 10) (quoting *PCFFA*, 265 F.3d at 1035), and further claimed that "'other than a conclusion that in the long-term there may be some restorative benefit from the reconstruction, there is no analysis of the extent of the short-term degradation in the context of ACS objectives.'" ER 16 (PI Order at 10) (citation omitted). These boilerplate statements have no support in the record. In reality, the Forest Service found:

> Turbidity will be increased in the short term at the site scale by large wood placement and legacy sediment site treatments, as well as by project activities occurring outside riparian reserves. The increase in sediment can be seen in the universal soil loss equation (USLE) and the mass wasting (GEO) modeling done in the cumulative watershed effects section.

ER 103 (EA 139). *See also* ER 59-74 (EA 76-91) (exhaustive analysis of hydrology and aquatic impacts, including detailed data).

In sum, the Forest Service considered the Project's short-term impacts, disclosed those impacts in detail, and determined the Project would still be consistent with the ACS. The district court inappropriately ignored and/or

mischaracterized this analysis, leading to the legally erroneous conclusion that the project may violate the ACS.

3. Appellees did not establish serious questions on their NEPA claim.

The district court incorrectly found serious questions on KSWild's NEPA claim, which alleges the Project requires a full Environmental Impact Statement (EIS) rather than an EA. ER 19-20 (PI Order at 13-14). The district court's ruling again demonstrates a failure to defer appropriately to the agency on scientific matters implicating substantial agency expertise, and an improper presumption than an injunction was the necessary outcome for purported serious questions under NEPA. Contrary to the district court's conclusory determination, the record shows that KSWild's challenge to the Forest Service's decision not to prepare an EIS does not rise to the level of serious questions on the merits.

Under NEPA, federal agencies must prepare an EIS for "major Federal actions significantly affecting the quality of the human environment . . . ." 42 U.S.C. § 4332(2)(C). To determine whether an action requires an EIS, an agency may prepare an EA. 40 C.F.R. § 1501.4(b). The determination whether an EIS is required hinges on the term "significantly," 40 C.F.R. § 1508.27, and "depends on the project's 'context' and its 'intensity.'" *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1009 (9th Cir. 2006). Context refers to the scope and setting

of the action. 40 C.F.R. § 1508.27(a). Intensity refers to the "severity" of the impact and is based on evaluation of ten regulatory factors. 40 C.F.R. § 1508.27(b).

An agency's determination that a project requires no EIS will be upheld unless it is arbitrary or capricious. *Barnes v. F.A.A.*, 865 F.3d 1266, 1269-70 (9th Cir. 2017). Only "[i]f there is a *substantial question* whether an action 'may have a significant effect' on the environment" must an agency prepare an EIS. *Ctr. for Biological Diversity v. Nat'l Hwy. Traffic Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008)). The Court's standard of review on this issue "is quite narrow." *Akiak Native Cmty. v. U.S. Postal Serv.*, 213 F.3d 1140, 1146 (9th Cir. 2000) (upholding an EA while "[m]indful of the limited scope of our review"). An agency's determination that a particular effect is insignificant will generally be "'a classic example of a factual dispute the resolution of which implicates substantial agency expertise.'" *WildEarth Guardians v. Provencio*, --- F.3d ----, No. 17-17373, 2019 WL 1143186, at *10 (9th Cir. Mar. 13, 2019) (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 376 (1989)).

The Forest Service examined each of the regulatory factors and appropriately found the Project will not have "significant" impacts on the environment. Of the ten factors, KSWild focused on the Project's proximity to so-called "unique" areas, ER 165-69 (TRO/PI Mem. at 13-17 (citing 40 C.F.R. §

1508.27(b)(3)), mentioning other factors only in passing. ER 169-69a (TRO/PI Mem. at 17-18 (single paragraphs regarding cumulative effects and "violation of law" factors). However, the district court rested its conclusion only on a purported violation of law, namely the purported NFMA violations, and expressly declined to consider the "unique areas" factor. ER 19-20 (PI Order at 13-14 & n.4). *See* 40 C.F.R. § 1508.27(b)(10) (setting forth the "violation of law" factor). But as discussed above, there were no such NFMA violations, so the district court improperly concluded an EIS was required.

Nor do the unique areas factor or cumulative effects require an EIS.

Project implementation will not significantly impact any sensitive areas. In fact, the Project was carefully designed to avoid impacts to such areas. *See generally* ER 85-87 (EA 105-07). This Court has rejected per se rules regarding potential impacts to "sensitive" areas. For example, in *Smith v. U.S. Forest Service*, 33 F.3d 1072 (9th Cir. 1994), the Court held that logging in a roadless area does not automatically warrant an EIS. *Id.* at 1079. Further, as a general rule under NEPA, "it does not follow that the presence of some negative effects necessarily rises to the level of demonstrating a significant effect on the environment." *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1240 (9th Cir. 2005). Thus, just as it was sufficient in *Presidio Golf Club v. National Park Service*, 155 F.3d 1153, 1162 (9th Cir. 1998), that the agency

considered the project's "proximity to historic resources," so it is sufficient here that the Forest Service considered sensitive areas and designed the Project to avoid or substantially lessen impacts.

In particular, the Project design specifically took into account:

Riparian Reserves. Project activities within riparian reserves are limited, ER 71 (EA 88), and ground-disturbing activities "will occur mostly outside of Riparian Reserves." ER 84 (EA 104). Trees felled in riparian reserves will be left in place, ER 96 (EA 132), not commercially removed. In addition, the Project includes placement of additional large woody debris for the benefit of aquatic species. ER 97 (EA 133).

Johnny O'Neil LSR. The salvage in this LSR was designed under the NWFP's standards and guidelines for risk reduction and is consistent with the Forest's Late Successional Reserve Assessment. ER 94-95 (EA 117-18). This LSR is part of a network of over 7 million acres of LSRs, ER 145 (S&G A-4), and the Project's very purpose is to "reduce the risk of future large-scale high severity fire losses of late successional habitat" and reestablish coniferous forests that will develop into late-successional habitat. ER 51 (EA 2).

Essential Habitat Connectivity Areas. The Project will not meaningfully change habitat connectivity. ER 78 (EA 96). The potential change in habitat connectivity would not be significant in the short term, and connectivity would

improve in the long term. ER 78, 90 (EA 96, 110). This is a logical conclusion since severely-burned habitat does not provide connectivity, particularly if forested conditions are not restored. *See* ER 175 (Geissler Decl. ¶ 16); ER 142-43 (Biological Evaluation at 39-40).

Cook and Green Botanical Area. The Project "would not alter or damage the unique characteristics for which the Cook and Green Botanical Area was established." ER 86 (EA 106). The Forest Service designed procedures to "minimize negative effects to protected botanical species and their habitat" and "maintain or promote plant biodiversity." *Id.* These procedures include carefully timed underburning and limiting hazard treatments to 0.6 miles of road bordering (not within) the botanical area. *Id.*

Kangaroo Inventoried Roadless Area. Project implementation will not impact the area's roadless character because only two percent of the Kangaroo Inventoried Roadless Area would be treated or affected. ER 75 (EA 92). Project activities also are limited in this area to protect roadless character – actions within the roadless area are "minimal." ER 54 (EA 19).

Pacific Crest Trail. Project design features were developed "to minimize potential unnatural appearances" from the Pacific Crest Trail; any resulting impacts would be consistent with "Forest Plan direction." ER 76-77 (EA 93-94). The agency closely analyzed impacts on viewsheds. ER 79-83 (EA 97-101).

There also was no merit to KSWild's assertion that cumulative watershed effects required an EIS. ER 166-67 (TRO/PI Mem. at 17-18 (citing 40 C.F.R. § 1508.27(b)(7)). After including private logging efforts in its watershed modeling and taking into account past management actions, the Forest Service concluded no significant impacts exist. ER 88-90 (EA 108-10). Thus, "the cumulative effects of the project will not exceed the loading capacity of the watershed and [applicable] water quality standards . . . are fully attained." ER 89 (EA 109). Further, "[l]egacy sediment sites will be treated for this project and others within the watershed further reducing the risk of sedimentation both in the short and long term." ER 89-90 (EA 109-10).

The foregoing demonstrates the agency's careful consideration and minimization of potential environmental impacts from the Project. Put simply, the district court's conclusory merits determination under NEPA is contradicted by the record. *See* ER 19 (PI Order at 13).

IX. CONCLUSION.

The district court wrongly granted KSWild's request for the extraordinary remedy of a preliminary injunction. Contrary to the district court's conclusion, KSWild failed to demonstrate serious questions on the merits of its NFMA and NEPA claims or a likelihood of irreparable harm from implementation of the Seiad-Horse Project. In a more fundamental error, the district court wrongly

equated its findings in favor of KSWild on the merits and as to irreparable harm with a per se showing that the balance of the equities and the public interest tipped sharply in KSWild's favor. Because the district court got the law wrong and as a result reached the wrong result, this Court should reverse the grant of a preliminary injunction and instead allow all Seiad-Horse Project operations to proceed unhindered.

DATED this 5th day of April, 2019.

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STATEMENT OF RELATED CASES

Defendant-intervenor-appellant American Forest Resource Council is aware of one related case as defined in Ninth Circuit Rule 28–2.6, namely the federal defendants' separate appeal from the district court's preliminary injunction order at issue in this case, which has been docketed as Ninth Circuit Case No. 19-15597.

DATED this 5th day of April, 2019.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,949 words, excluding the parts of the brief exempted by Fed R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word Version 1808, font size 14 and Times New Roman type style.

DATED this 5th day of April, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of April, 2019, I caused the foregoing **DEFENDANT-INTERVENOR-APPELLANT'S OPENING BRIEF** to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit 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 I have caused the foregoing document to be sent by electronic mail to the following non-CM/ECF participant:

None

/s/ Julie A. Weis
Julie A. Weis