No. 16-15818

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KARUK TRIBE, et al.,
Plaintiffs-Appellants,

v.

WILLIAM STELLE, et al.,
Defendants-Appellees.

On Appeal from the United States District Court,
Northern District of California, San Francisco Division
No. 3:16-cv-1079-MMC
Honorable Maxine M. Chesney, U.S. District Court Judge

ANSWERING BRIEF OF FEDERAL APPELLEES

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GLOSSARY

APA	Administrative Procedure Act
ER	Excerpts of Record
ESA	Endangered Species Act
LSR	Late-Successional Reserve
NEPA	National Environmental Policy Act
NFMA	National Forest Management Act
NMFS	National Marine Fisheries Service
SER	Supplemental Excerpts of Record*

* CITATION NOTE: In their Excerpts of Record, Appellants include some excerpts of the environmental impact statement, the Record of Decision, the Klamath Forest Plan, and the Northwest Forest Plan. The Supplemental Excerpts of Record include more complete sections of these documents. This brief primarily cites to the version of those documents included in the Supplemental Excerpts of Record.

INTRODUCTION

In 2014, wildfires ravaged the west side of the Klamath National Forest in Northern California. Fires burned for weeks, killing trees and ground vegetation on more than 160,000 acres of national forest. Some of the most intense fires burned on lands set aside as habitat to protect the northern spotted owl, a listed species protected by the Endangered Species Act. These severely burned areas no longer provide forest habitat for northern spotted owls.

The terrain in much of the fire area is rugged and characterized by steep slopes and highly dissected topography. Severely burned areas are particularly vulnerable to erosion. Hazardous dead trees cover the charred landscape and inhibit safe public recreation and other activities. These fire-killed trees are also a significant hazard to firefighters. In future fires, firefighters will be exposed not only to more intense fire and heat, but also to the danger of falling material.

Even as vegetation starts to regenerate, it is surrounded by standing and downed dead wood that will provide fuel in future fires. Wildlife habitat, already degraded or destroyed by fire, is at an even greater risk of loss from future high-severity fire.

To address these ecological and public safety concerns, the Forest Service conducted a detailed analysis of how to respond to the changed conditions in the forest. With robust public participation, the Forest Service designed a plan, known as the Westside Fire Recovery Project,

to help accelerate recovery on some of the lands impacted by the 2014 fires. Among other things, the recovery project uses targeted salvage logging to reduce the risk of high-severity fires, establishes fuel breaks in the forest, removes roadside hazards, and includes reforestation treatments.

The Karuk Tribe and its co-plaintiffs (collectively "the Tribe") seek to enjoin the recovery project, alleging that it will harm the northern spotted owl and coho salmon. Contrary to the Tribe's arguments, the project will protect habitat for these species in the long term by reducing the severity of inevitable future fires and reestablishing a fire-resilient mixed conifer and hardwood forest.

The district court rejected the Tribe's arguments when it denied its motion for a preliminary injunction. This Court should do the same.

JURISDICTIONAL STATEMENT

On March 3, 2016, the Tribe filed a complaint against the National Marine Fisheries Service seeking judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, et seq., of the biological opinion and incidental take statement issued by the Fisheries Service for the recovery project. Supplemental Excerpts of Record ("SER") at 25–42. The district court had subject matter jurisdiction under 28 U.S.C. § 1331.

On March 15, 2016, the Tribe filed an amended complaint, adding the Forest Service as a defendant and alleging that its approval of the project violated the National Forest Management Act. SER 43–78.

On April 18, 2016, the Tribe moved for a temporary restraining order seeking to enjoin the Forest Service from commencing post-fire salvage logging. Excerpts of Record ("ER") 10 (Dkt. # 36). The district court held a hearing, and the Tribe asked the court to consolidate its motion for a temporary restraining order with its motion for preliminary injunction. SER 79, 164–65. The district court agreed to do so and denied both motions at the hearing. ER 15–16.

On May 3, 2016, the Tribe filed a notice of appeal seeking review of the district court's order denying its motion for a preliminary injunction. ER 1–3. This Court has jurisdiction over this interlocutory appeal under 28 U.S.C. § 1292(a).

STATEMENT OF THE ISSUES

1. Whether the Tribe established a likelihood of success on the merits of its claim that the Forest Service violated the National Forest Management Act when it approved the salvage logging of fire-killed trees in late successional and riparian reserves.

2. Whether the Tribe established a likelihood of success on the merits of its claim that the National Marine Fisheries Service violated the Endangered Species Act when it issued a biological opinion and

incidental take statement for the coho salmon affected by the fire recovery project.

3. Whether the Tribe carried its burden to establish irreparable harm and that the balance of the equities favors an injunction, where an injunction will delay or prevent the Forest Service from achieving important environmental and socio-economic benefits on behalf of the public.

STATEMENT OF THE CASE

I. Legal and factual background

A. The 2014 fires

The terrain on the west side of the Klamath National Forest is extremely rugged. Before the 2014 fires, it was generally covered with oak trees, mixed conifers, as well as brush and grass. *See* SER 410. A large portion of the project area had not burned for "20 to 100 years prior to the 2014 fires." SER 411. But after three years of severe drought, as well as record-low snowpack, rainfall, and stream flows, the west side of the forest was exceptionally dry and vulnerable to fire in 2014.

Over the course of the 2014 fire season, lightning strikes sparked 127 wildfires, and visitors to the forest caused an additional 12 wildfires. *Id.* The fires burned extensive areas of the Klamath River, Scott River, and Salmon River watersheds. SER 412. Most of the large

fires burned with mixed severity—*i.e.*, "there was a mosaic of light, moderate, and severely burned forests within each fire area." *Id.* Yet the high-severity portion of these fires was much larger than contemporary or historical averages for fires in the region. *Id.* Approximately 27 percent of the Westside fires burned at high severity, killing the vast majority of ground vegetation and trees in those areas.[1] SER 412–13.

Fire at the scale and intensity of the Westside fires left lasting negative effects on the forest that well exceed those of past fire seasons. *See* SER 439–44. Wildfires in the Klamath historically burned at low to moderate severity, with less high-severity fire, so tree mortality and habitat loss was relatively low. SER 441. To the extent there were patches of high severity fires, those fires burned mainly along upper slopes "and on south and west-facing aspects." *Id.* More recent fires, especially those experienced in 2014, have different burn patterns. *Id.* The more recent fires tend to burn at a higher intensity over a much larger area. *Id.* "The large areas of nearly continuous fire-killed trees in the Westside Fire Recovery Project are not characteristic of the Klamath Province." *Id.*

[1] In contrast, experts "reported an average of 15.8 percent high severity, with the remainder burning at low to moderate severity" for historical fires that burned between 1987 and 2008. SER 440.

Perhaps most important here, the accumulation of dead standing and down trees creates a vicious cycle. As the fire-killed trees break and fall, they add to the density of surface fuels. This creates a nearly continuous bed of heavy ground fuel interspersed with deep brush and standing dead trees (referred to as "snags"). These areas of heavy ground fuels are likely to fuel future wildfires that will be more difficult to control. Future fires will burn with high intensity and kill even more trees. *See* SER 617. In a "reburn" situation, the young trees will not be large enough to survive the high-severity fire, so reestablishment of a coniferous forest may be delayed by decades or longer. *Id.*

The huge volume of standing dead trees left by the Westside fires also poses a hazard to work and recreation in the project area. SER 621–23. "Large patches of fire-killed trees affect hundreds of miles of roads that provide access to the Klamath National Forest for the public and forest workers." SER 622. In some parts of the forest, there is "checkerboard" ownership of private lands that are only accessible using these roads. *Id.* The Forest Service evacuated eight community and residential enclaves during the 2014 fires, and, if the fire-killed trees are not removed, there will be an increased risk of future high-severity fires in these areas. SER 621.

The public safety consequences of the fires extend beyond recreation: snags are a hazard to firefighters, SER 624, because they "promote problem fire behavior," SER 469. If snags are not removed,

firefighters combatting a future wildfire will be exposed not only to more intense fire and heat, but also to the danger of falling or rolling material. SER 468–70. Snags and downed trees also impede firefighter access and travel, forcing the Forest Service to rely on indirect fire suppression rather than direct firefighting. *Id.* It takes longer to put out the fire, which, in turn, increases the size of the area burned. *Id.*

Firefighters recently confronted this scenario in another area of the Klamath National Forest. On June 7, 2016, a lightning strike sparked a fire in an area covered with standing dead trees from a previous fire. *See* Pony Fire Report (June 8, 2016).[2] A crew responded to the fire but had to withdraw "when conditions became too dangerous." *Id.* The Forest Service had to rely on "retardant-dropping aircraft," and the fire continued to grow. *Id.* The fire was fueled by "[a]bundant dead snags and down logs" left over from a previous fire. Pony Fire Report (June 14, 2016).[3] Without treatment, the same thing will happen in the area consumed by the Westside fires.

Another consequence of the 2014 fires is the degradation of the soils and watershed in burned areas. High-severity burn areas located on steep grades are especially prone to accelerated surface erosion and landslides. SER 615. "Larger debris flows and landslides have the

[2] Available at http://go.usa.gov/xqwmY (last visited June 27, 2016).

[3] Available at http://go.usa.gov/xqwmQ (last visited June 27, 2016).

potential to adversely impact public safety, private property and infrastructure." SER 616. The 2014 fires also removed ground cover and decreased the ability of the soil to absorb water, causing more water to run off the steep slopes. The damaged soil leads to high erosion which, in turn, delivers even more sediment into streams. SER 651.

The Forest Service recognized "that not every acre of ground burned by the Westside fires requires, or would even benefit from, human intervention." SER 619. However, given the consequences of the 2014 fire season, some responsible human intervention is required to forestall further environmental degradation in the Klamath National Forest.

This human intervention, reflected in the Westside Fire Recovery Project, impacts about 20 percent of the forest land burned in the 2014 fires; about 80 percent of the burned forest "has no proposed recovery actions of any kind." *Id.* Salvage harvest, to which the Tribe objects, affects about 4 percent of the project area. SER 659.

B. The recovery project

To respond to the "landscape-level changes," the Forest Service engaged in a robust public engagement process and conducted a detailed analysis immediately following the fires. SER 597; *see also* SER 426. The Forest Service identified a need to provide: public safety and access; safe conditions for firefighting; an economically viable

project; and restoration of the forest ecosystem. SER 419–23. The Forest Service considered seven alternatives in detail that could meet this defined need, as well as an alternative proposed by the Tribe. SER 408.

Before it could choose the specific parameters of a recovery project, the Forest Service needed to follow the procedures established by the National Environmental Policy Act, 42 U.S.C. § 4321, et seq. ("NEPA"). Under NEPA, federal agencies must prepare an environmental impact statement evaluating the consequences of major federal actions. *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1150–51 (9th Cir. 1997). The content of an environmental impact statement is dictated in part by "the underlying purpose and need to which the agency is responding," 40 C.F.R. § 1502.13, and must analyze alternatives that are consistent with the nature and scope of that action, *see City of Carmel-by-the-Sea*, 123 F.3d at 1155; *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982).

While developing and considering alternatives, the Forest Service "conducted robust public engagement." SER 426. The Forest Service held public meetings, issued press releases, and posted project documents online for anyone to review.[4] *Id.* Public engagement

[4] Westside Fire Recovery Project, http://www.fs.fed.us/nepa/nepa_project_exp.php?project=45579 (last visited June 26, 2016)

allowed the Forest Service to develop a range of alternatives, including various forms of salvage logging and treatments. The day before the Service was to print the draft environmental impact statement for public comment, the Tribe submitted its proposed plan, referred to as "the Karuk Alternative." SER 315–22; *see also* SER 433–37.

In its plan, the Tribe proposed roadside hazard treatment (*i.e.*, removing fire-killed trees along the roadways for public safety) and "salvage harvest" (*i.e.*, logging) to protect firefighters and people living in communities adjacent to the forest. SER 315–16; *see also* SER 433–34. The Tribe proposed salvage logging on about 2,930 acres of burned forest using ground-based operations, helicopters, and skyline systems (*i.e.*, using suspended steel cables to remove logs). *See* SER 434 (Table 2-43). But the Tribe did not allow for site preparation or planting under its plan. SER 315–16, 433. The Klamath-Siskiyou Wildlands Center, Environmental Protection Information Center, and Klamath Riverkeeper, co-plaintiffs in this litigation, formally endorsed the Tribe's plan.

The Forest Service ultimately selected a modified alternative, which incorporated elements proposed by the Karuk Tribe and endorsed by its co-plaintiffs. SER 602. In selecting that alternative, the Forest Service "intended to strike a balance between" the risk of future fire and the potential short-term impacts on northern spotted owls and the watershed. *Id.* The Forest Service explained how the selected plan best

satisfied the need for public safety, safe conditions for firefighting, an economically viable project, and restoration of the forest ecosystem. SER 620–42.

The Westside Fire Recovery Project includes the salvage of dead trees from about 5,600 acres and the removal of roadside hazard trees from about 4,200 acres, a small fraction of the total area affected by the 2014 fires. SER 602–03. Importantly, this salvage work will reduce the heightened risk of severe fire—*i.e.*, the catastrophic reburn of the already ravaged fire areas—because it removes "heavy fuels" (fire-killed trees), which contribute to fire severity, from strategic locations. SER 619; *see also* SER 441–44, 617. By strategically removing fire-killed trees from the landscape, the project will protect firefighters and adjacent communities. SER 626–29.

The recovery project also includes reforestation and treatments to reduce future fire hazards, facilitate watershed restoration, and improve wildlife habitat. SER 629–38. These treatments are designed to restore a fire resilient ecosystem through two actions. SER 630. First, the treatments will reduce the density and continuity of all fuel classes, but, in particular, heavy fuels at strategic locations in the forest. *Id.* This reduction will, in turn, reduce the intensity and severity of future fires. Second, the Forest Service will restore coniferous forest habitats through site preparation and planting, which will help reduce soil erosion in the future. SER 632.

The project will cost approximately $28 million to restore portions of the landscape affected by the 2014 fires. SER 477. That includes site preparation, slash treatment, planting, and fuels reduction. *Id.* Revenue generated from salvage contracts will help cover the costs of these restoration actions. However, these contracts "become economically infeasible to implement" as the potentially salvageable timber deteriorates. SER 599; *see also* SER 10 (¶ 18). By midsummer 2016, there may "be little to no recoverable commodity value from the fire-killed trees." SER 226 (¶ 10).

This crucial salvage and restoration work must be done, and, without commercial timber sales, the costs to remove heavy fuels, in addition to the restoration work, will be borne solely by United States taxpayers. SER 599; *see also* SER 14 (¶¶ 28, 30). Even if the Forest Service receives less direct revenue from the sale of fire-killed trees, the Forest Service will save the taxpayers several million dollars by contracting for the removal of these fire-killed trees through timber sales. SER 7 (¶ 13).

C. National Forest Management Act

The National Forest Management Act ("NFMA") in part states Congress's policy "that all forested lands in the National Forest System shall be maintained in appropriate forest cover with species of trees, degree of stocking, rate of growth, and conditions of stand designed to secure the maximum benefits of multiple use sustained yield

management in accordance with land management plans." 16 U.S.C. § 1601(d)(1).[5]

The Forest Service designed the recovery project to accomplish NFMA's objective. SER 597. Following fires, the Forest Service pursues projects like the Westside Project to maintain existing forest cover and restore lost cover through fuels reduction and reforestation treatments in key locations. Without such action, large areas of the forest would be dominated not by desired forest cover, but instead by seas of snags, down logs and dense brush that will feed future high-severity fires. *See id.*

NFMA specifically directs the Secretary of Agriculture to develop and maintain "land and resource management plans for units of the National Forest System." 16 U.S.C. § 1604(a). The Forest Service, an agency within the Department of Agriculture, uses these plans as a guide to manage national forests. *See* 36 C.F.R. § 219.1. The plans are programmatic statements of intent that guide future site-specific decisions within each forest. *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 729 (1998).

Each forest plan must "provide for multiple use and sustained yield of the products and services" derived from the national forests, including "outdoor recreation, range, timber, watershed, wildlife and

[5] The term "stand" means "[a] group of trees that occupies a specific area and is similar in species, age and condition." SER 488.

fish, and wilderness. . . ." 16 U.S.C. § 1604(e)(1). And all site-specific projects—including the Westside Fire Recovery Project—must be consistent with the applicable forest plan, which, in this case, is the Klamath Forest Plan.

Consistent with the statutory requirements of NFMA and the Klamath Forest Plan, the project was designed to restore "fire-resilient, forested ecosystems while providing for public safety and access, community protection, and economic benefit." SER 597. In response to the draft environmental impact statement, the Forest Service received comments questioning whether economic considerations should be a factor for salvage operations in areas known as Late-Successional Reserves ("LSRs")—*i.e.*, specifically-designated areas with large, late-successional and old-growth trees.[6] SER 444–45. In particular, comments suggested that LSR salvage could be inconsistent with the Northwest Forest Plan, which provides forest management guidance for the Pacific Northwest (*i.e.*, northern spotted-owl habitat). *Id.*

[6] In general, "[l]ate-successional forests include mature forest stands greater than 80 years old, stands of mixed age (mature and old-growth forests), and old-growth forests." Forest-Wide LSR Assessment at 1-7, http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5403298.pdf. Old-growth refers to forest areas that developed over a long "period essentially free of catastrophic (including humans) disturbance." *Id.* at O-6. "In the Pacific Northwest, an old-growth forest generally ranges in age from 200 to 750 years or more." *Id.*

The Northwest Forest Plan was released in 1994, and it amended all forest management plans in the range of the northern spotted owl. The Klamath Forest Plan adopted and incorporated in its entirety the management direction of the Northwest Forest Plan while providing additional management direction specific to the Klamath. SER 445–46.

Responding to these comments, the Forest Service acknowledged that the project "must be consistent with the goals and principles of LSR management," which are found in the Klamath Forest Plan. SER 445. The Forest Service explained that the project is consistent with the Northwest Forest Plan because it allows recovery of fire-killed timber "in those instances where catastrophic events clearly kill more trees . . . than are needed to maintain late successional conditions." *Id.* (italics omitted).

The Forest Service supported its interpretation of the Northwest Forest Plan by quoting this Court's decision in *Oregon Natural Resources Council Fund v. Brong*, 492 F.3d 1120 (9th Cir. 2007). "[T]he 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 explicitly contemplated by the Northwest Forest Plan." SER 446 (italics omitted). The Forest Service acknowledged that the Northwest Forest Plan "does not permit a salvage project in an LSR for the purpose of recovering the economic value of timber without at least explaining—in the administrative

record—how" the project is consistent with the Northwest Forest Plan's "direction to protect and enhance late-successional ecosystems." *Id.* (quoting *Brong*, 492 F.3d at 1127) (italics omitted).

The Forest Service explained that the Klamath Forest Plan (page 4-83 found at SER 267) provides direction to "protect and enhance late-successional ecosystems." *Id.* And the Plan contemplates limited risk-reducing salvage operations in LSRs if the Forest Service's analysis is "done at a level of detail sufficient to assess whether the activities are consistent with the objectives of the LSRs." SER 267 (permitting limited salvage operations).

The Westside Fire Recovery Project follows this direction: it protects and enhances late-successional forests by reducing the probability of future stand-replacement fire and accelerating the development of late successional stand conditions by reforesting salvage units (*i.e.*, logging locations) in areas severely burned in the 2014 fires. SER 447. The Regional Ecosystem Office, an interagency body tasked with implementing the Northwest Forest Plan, reviewed the LSR salvage component of the Westside Fire Recovery Project, and concurred that it was consistent with the Forest Plan. SER 446.

D. Effects on the northern spotted owl and coho salmon

Northern Spotted Owl. The northern spotted owl is a listed species protected by the Endangered Species Act ("ESA"). *Conservation Cong. v. Finley*, 774 F.3d 611, 616 (9th Cir. 2014). The Klamath Forest

Plan designates late-successional reserves within the forest to protect habitat for spotted owls and other species. SER 267. More than 81,000 acres of LSR-forest burned during the 2014 fire season. SER 499. Of that, more than 20,000 acres—or about 27%—experienced severe or "high mortality" where most or all of the trees were killed. *Id.* These severely burned areas no longer provide the late-successional forest habitat for which the LSR land allocation was established (*i.e.*, protecting spotted owls). SER 617.

To comply with Section 7 of the ESA, the Forest Service prepared a biological assessment and requested a biological opinion from the Fish and Wildlife Service regarding the project's impact on the spotted owl. *See* 16 U.S.C. §§ 1536(a)(2), (b)(3)(A). The biological opinion concluded that the project "would adversely affect" spotted owls "and their critical habitat but not to such an extent that it would jeopardize the species or adversely modify its designated critical habitat." SER 692. The Fish and Wildlife Service also issued an incidental take statement. *See* ER 453. The Tribe challenges neither the biological opinion nor the incidental take statement issued for the northern spotted owl.

Coho Salmon. The Forest Service also determined that the project may affect the coho salmon, a species listed as threatened under the ESA. *See* SER 650–52. The Forest Service prepared a biological assessment and requested a biological opinion from the National Marine Fisheries Service ("NMFS"). When it provides a biological

opinion, NMFS must include a "detailed discussion of the effects of the action on the listed species or critical habitat," 50 C.F.R. § 402.14(h)(2), based on the "best scientific and commercial data available," 16 U.S.C. § 1536(a)(2).

NMFS did that here. Based on the best available scientific and commercial information, NMFS concluded that the recovery project "was not likely to jeopardize the continued existence of" the coho salmon, and was not likely to destroy or adversely modify its critical habitat. ER 454. NMFS also issued an incidental take statement pursuant to 16 U.S.C. § 1536(b)(4).

The "primary concern" related to the effects of the project on the coho salmon habitat is the accumulation of fine sediment in the watershed. SER 651. To address the potential delivery of fine sediments, the Forest Service incorporates "terms and conditions" from NMFS's biological opinion, which are designed to minimize the project's potential impacts on the salmon habitat. SER 673–74. For example, the project requires drainage features on temporary roads to disperse runoff as much as possible; covering and inspecting skid trails (temporary pathways for dragging or "skidding" logs); and ongoing monitoring and reporting. *Id.*

The project also incorporates treatments designed to reduce or eliminate chronic sources of sediment in areas both within and outside of the salvage areas. ER 456. These "legacy" treatments focus on

upgrading and repairing existing infrastructure—*e.g.*, upgrades to culverts, constructing retaining walls, and fill removal to improve "aquatic organism passage." *Id.*

The Klamath Forest Plan designates riparian reserves, which "generally include an aquatic ecosystem and adjacent upland areas that directly affect it." SER 277. Riparian reserves include areas along streams that provide habitat to the coho salmon. Consistent with the Northwest Forest Plan, the Klamath Forest Plan generally prohibits (with some exceptions) timber harvest in riparian reserves. *See* SER 284 (MA10-54).

Relevant to the project, and in accordance with the Klamath Forest Plan, there are two kinds of riparian reserves: (1) a "Hydrologic" riparian reserve; and (2) a "Geologic" riparian reserve. *See* SER 487 (definition of Riparian Reserve); *see also* SER 252–53, 60 (discussing riparian management). For each kind of riparian reserve, the Klamath Forest Plan provides an exception allowing timber harvest under certain circumstances.

The recovery project does not include any salvage activity in hydrologic riparian reserves. SER 603 ("[N]o salvage harvest units are located in . . . riparian reserves associated with stream channels (hydrological riparian reserves)."). However, the project includes limited salvage logging in some geological riparian reserves to satisfy project needs (*i.e.*, reducing the risk of future high-severity fire,

providing public and firefighter safety, and restoring fire-resilient forest ecosystems). *Id.* n.8.

II. Procedural background

The Tribe challenged the Westside Fire Recovery Project in district court. On April 18, 2016, the Tribe sought a temporary restraining order to enjoin the Forest Service from commencing post-fire salvage logging authorized by the project. ER 10 (Dkt. # 36). The Tribe argued that the project violates NFMA because it allows logging in late-successional reserves and fails to protect riparian reserves. The Tribe further alleged that NMFS violated the ESA when it issued a biological opinion and incidental take statement concerning the project's impact on the coho salmon.

On April 25, 2016, the district court held a hearing and ruled from the bench. SER 164–65. The court considered whether the Tribe was likely to succeed on the merits; whether it would suffer irreparable harm absent relief; the balance of equities; and whether an injunction is in the public interest. *See Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008).

NFMA Claim. On the merits, the district court was "not prepared" to conclude that the Tribe's NFMA claim was likely to succeed. SER __(Tr. 79). The district court acknowledged that removing dead trees is an irreparable action weighing in the Tribe's favor. SER 158. But balancing the equities, the district court found

"that there are a great number of factors" weighing in favor of the Forest Service. *Id.* First and foremost is the "fear of another catastrophic fire." *Id.* Contrary to the Tribe's argument, the district court found that the project was not "being driven by economic concerns." *Id.*

The fire "had a tremendous adverse effect on the environment, [and] on the species." SER 159. The Forest Service, the district court found, had not acted arbitrarily or capriciously as it tried to figure out "how to deal with a difficult problem." SER 160. Indeed, the Forest Service tried to accommodate the Tribe's "concerns along the way." *Id.* The district court denied an injunction based on the Tribe's NFMA claim. *Id.*

ESA Claim. Addressing the Tribe's ESA claim, the district court found no significant impact on the coho salmon and that NMFS did not rely on mitigation measures to support its no jeopardy conclusion. SER 160–61. Even assuming "for argument's sake" that the Tribe had made a showing of irreparable harm, the court weighed the equities and concluded that they "don't weigh, even somewhat, let alone sharply, in favor of an injunction here." SER 162–63. Regarding funding, the court found no authority for the Tribe's argument that the Forest Service needed "to have the funds in hand" to complete the entire project. *Id.*

The Tribe requested an injunction pending appeal, and the district court denied it. SER 166. The Tribe filed its notice of appeal eight days later. ER 1–2.

Seeking immediate relief in this Court, the Tribe filed an emergency motion for an injunction pending appeal. This Court (Judges Reinhardt and Murguia) denied the emergency motion, concluding that the Tribe "made an insufficient showing of likelihood of success on the merits." SER 24 (citing *Winter*, 555 U.S. at 20).

SUMMARY OF ARGUMENT

The Court should affirm the denial of the preliminary injunction because the Tribe cannot establish the four factors from *Winter*. The Tribe is not likely to succeed on the merits; it will not suffer irreparable harm in the absence of preliminary relief; the balance of equities tips in favor of the Forest Service; and an injunction is not in the public interest.

The Forest Service complied with the statutory requirements of NFMA when it approved the Westside Fire Recovery Project to restore "fire-resilient, forested ecosystems while providing for public safety and access, community protection, and economic benefit." SER 597. Consistent with guidance provided in the Klamath Forest Plan, as well as the Northwest Forest Plan, the project allows for the limited removal of fire-killed trees in late-successional reserves to reduce the risk of high-severity fire in the future. The Forest Service reasonably

explained that it cannot protect and enhance the old-growth ecosystem without limited intervention after the 2014 fires. If too many dead trees are left on the landscape, it will create dangerous conditions that could fuel high-severity fires in the future, which will put firefighters and the public at risk.

The recovery project also allows for the limited removal of fire-killed trees in geologic riparian reserves. Consistent with applicable guidance, the project's limited salvage harvest in geologic riparian reserves satisfies coarse woody debris needs and will not adversely affect Aquatic Conservation Strategy objectives.

The Tribe's challenge to NMFS's conclusion that the project will not likely jeopardize the continued existence of the coho salmon, nor likely destroy or adversely modify its critical habitat, must fail. NMFS's jeopardy determination was rational, did not rely on uncertain mitigation measures, and is entitled to substantial deference.

Even if there was any merit to the Tribe's arguments, it cannot obtain the extraordinary relief of a preliminary injunction. The Tribe has demonstrated neither the likelihood of irreparable harm nor that any alleged harm to the Tribe and its co-plaintiffs outweighs the harm to the public.

STANDARD OF REVIEW

"An injunction is a matter of equitable discretion," and is "an extraordinary remedy that may only be awarded upon a clear showing

that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22, 32. To justify a preliminary injunction, the Tribe needs to establish: (1) a "likelihood of success on the merits;" (2) it would be irreparably harmed in the absence of an injunction; (3) the balance of the equities favor an injunction; and (4) an injunction is in the public interest. *Id.* Because the Forest Service's interest in implementing the recovery project is for the public's benefit, the Court considers the third and fourth factors together. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

This Court reviews the district court's denial of a preliminary injunction for abuse of discretion. *Earth Island Inst. v. Carlton*, 626 F.3d 462, 468 (9th Cir. 2010). The district court abuses its discretion if it denies a request for a preliminary injunction based on an erroneous legal standard or clearly erroneous findings of fact. *Earth Island Ins. v. U.S. Forest Serv.*, 351 F.3d 1291, 1298 (9th Cir. 2003). This Court's "review is limited and deferential." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (per curiam). When it comes to legal issues, the Court reviews a district court's decision de novo. *Id.*

In reviewing the merits of the Tribe's NFMA and ESA claims, this Court applies the APA's deferential standard of review. The Court will uphold an agency action under the APA, unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "[T]his standard is highly deferential,

presuming that agency action to be valid." *Cal. Wilderness Coal. v. Dep't of Energy*, 631 F.3d 1072, 1084 (9th Cir. 2011). The Court must consider whether "the evidence in the administrative record permitted the agency to make the decision it did," *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985), without substituting its judgment for that of the agency, *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 7 (2001).

The Court's "role is simply to ensure that the Forest Service made no clear error of judgment that would render its action arbitrary and capricious." *Earth Island Inst.*, 626 F.3d at 472 (quotation marks omitted). The Court affords the Forest Service substantial deference when reviewing its interpretation and implementation of its own forest plan. *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097-99 (9th Cir. 2003). And the Court is "most deferential" when an agency makes decisions "within its special expertise." *Id.* at 1099.

ARGUMENT

I. The Tribe cannot prevail on the merits of its NFMA claim

The Tribe argues that the salvage of dead trees in late successional and riparian reserves violates NFMA. Appellants' Br. 29–44. The Tribe's argument misconstrues the record, misinterprets the Forest Service's decision, and fails to overcome the deferential standard of review.

A. Salvage logging to reduce the risk of high-severity fire in late-successional reserves is consistent with the Klamath Forest Plan

The Forest Service does not dispute that proposed salvage logging "must be consistent with the goals and principles of LSR management." SER 445; *see also* Appellants' Br. 30. The Tribe contends that the limited removal of standing fire-killed trees (or snags) is inconsistent with the LSR Objectives of the Northwest Forest Plan. *Id.* 30–35. To support its argument, the Tribe cherry-picks snippets of text from the objectives, relies on an inapposite report, and ignores important context.

1. The Klamath Forest Plan, like the Northwest Forest Plan, permits salvage logging to protect and enhance the LSR ecosystem

The Klamath Forest Plan allows the Forest Service to take "risk management activities" to "reduce the probability of major stand-replacing natural events such as fire." SER 270 (MA5-27). Salvage logging is a risk management activity. When the Forest Service engages in risk-reducing "[s]alvage activities" within LSRs, it "should focus on the reduction of catastrophic insect, disease and *fire threats*." *Id.* (MA5-28) (emphasis added). "Treatments should be designed to provide effective fuel breaks whenever possible." *Id.*

That is exactly what the project does. The Forest Service will conduct risk-reducing salvage activities in LSRs "to reduce fuel loading

and future fire severity." SER 630. The Forest Service specifically selected salvage units to provide "fuel breaks" and "control points for fire suppression." SER 631.

The Forest Service may approve salvage logging in older stands within an LSR to reduce high risks of fire if it: (1) will assure long-term maintenance of the LSR habitat; (2) is clearly needed to reduce risk; and (3) "will not prevent the [LSRs] from playing an effective role in the objectives for which they were established." SER 270–71; *see also* SER 311 (same); SER 418. The Forest Service demonstrated that the recovery project satisfies these criteria. SER 513–15 (Table 4).

The Tribe never grapples with the straightforward guidance from the Klamath Forest Plan. *See* Appellants' Br. 29–38. Instead, the Tribe cherry-picks language from the Northwest Forest Plan and claims that salvage logging is inconsistent with the goals and principles of LSR management based on its crabbed reading of the Northwest Forest Plan. Appellants' Br. 30.

The Northwest Forest Plan (like the Klamath Forest Plan) establishes guidelines, which authorize the Forest Service "in the aftermath" of a "large-scale disturbance"—"such as fire"—to approve management activities (*e.g.*, salvage logging) within old-growth late-successional reserves. SER 310. "In some cases, salvage operations may actually facilitate habitat recovery" by reducing the risk of future large-scale disturbances (e.g., another massive wildfire). SER 311. The

Northwest Forest Plan even contemplates "some commercial wood volume removal." *Id.*

When the Forest Service considers salvage logging in late-successional reserves, the Northwest Forest Plan tells the Forest Service that it "should focus on long-range objectives, which are based on desired future conditions of the forest." SER 312. Following a large-scale disturbance ("a stand-replacing event"), the Forest Service should design the management activity (salvage logging) "to accelerate or not impede the development of those [desired future] conditions." *Id.*

Consistent with this guidance, the Klamath Forest Plan has eleven guidelines for salvage logging. SER 271–72 (MA5-30) ("Guidelines for Salvage"). These guidelines allow salvage activities within LSRs, as long as the activities "are consistent" with the objective "to protect and enhance" the old-growth ecosystem, which provides habitat for species like the northern spotted owl. SER 267. The Westside Fire Recovery Project is consistent with these guidelines. SER 515–17. The Forest Service reasonably explained that it cannot protect and enhance that ecosystem by leaving all of the dead trees on the landscape because it "would create fuel conditions that would likely cause more uncharacteristic high severity fire in the future." SER 442. This Court should defer to the Forest Service's technical expertise. *Lands Council v. McNair*, 629 F.3d 1070, 1076–77 (9th Cir. 2010).

2. The Forest Service reasonably retains snags within LSRs

The Tribe insists that the Forest Service must protect and enhance the old-growth ecosystem in a specific way: by retaining virtually all snags (*i.e.*, every snag with a diameter larger than 14 inches at breast height) within the LSRs. Appellants' Br. 31. This argument misses the mark.

The Klamath Forest Plan explains that snags "provide a variety of habitat benefits for a variety of wildlife species associated with late-successional forests." SER 271 (MA5-30)(*3); *see also* SER 312 (same). And, after a large-scale disturbance like the 2014 fires, the Forest Service "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." *Id.* The project does that. SER 443–44.

The Forest Service reasonably explained how the recovery project complies with this guidance by retaining large "legacy" green trees, retaining snags in riparian reserves, designating additional snag retention areas, reducing fuels around riparian reserves, and treating small flammable fuels in riparian reserves and snag retention areas. *Id.* In addition, the Forest Service has marked green trees and large "legacy" snags for retention where they occur. SER 527.

The Forest Service retains 90% of the large-diameter (more than 24-inch diameter at breast height) snags located in the Seiad and Eddy

Gulch LSRs, where it approved salvage logging. SER 447. "[R]emoval of large trees is indeed limited." *Id.*

Even if the project did not fully satisfy these standards for retention, the Klamath Forest Plan states: "Some salvage that does not meet the preceding guidelines [*i.e.*, MA5-30 *1 through *4, including guidelines for persistence of snags] will be allowed when salvage is essential to reduce the future risk of fire or insect damage to late-successional forest conditions." SER 271 (MA5-30)(*5).

By sequencing the guidelines this way, the Klamath Forest Plan establishes risk reduction as a primary objective and the persistence of snags as a secondary objective, so long as the LSR continues to function for its intended purpose. In this case, the project authorizes salvage harvest on approximately 3,900 acres (less than 5 percent) of the 81,200 acres of LSR. SER 507. Where salvage harvest does occur, the Forest Service takes reasonable steps to ensure the persistence of large snags. SER 443–44.

But that is not enough for the Tribe. It suggests that the Forest Service needs to retain smaller diameter snags (14-inch diameter at breast height). Appellants' Br. 31. The Forest Service's environmental impact statement, according to the Tribe, says that snags with more than a 14-inch diameter "are likely to persist" until late-successional conditions are reestablished (in other words, for at least 80 years), and therefore must be retained. Appellants' Br. 31–32 (providing a string of

ER citations). That is incorrect. The Forest Service said no such thing; there is no valid support for the Tribe's statement in its string of record citations.

In fact, the Tribe's own declarant, Jay Lininger, discredits the Tribe's argument because he concluded that only large snags (*i.e.*, 20-inches or more) "*may* remain standing for 80 years." ER 102 (¶ 19) (emphasis added). The environmental impact statement, on the other hand, states that most of the snags from fire-killed trees will fall to the ground and become fuel over the next 10 to 30 years. SER 442. The Tribe fails to recognize the role of fire in the Klamath. If the Forest Service retained the quantities of dead trees proposed by the Tribe, it would "actually increase the probability of future high severity fire that would consume snags and down wood." SER 443.

The Forest Service reasonably explained that the project "focuses on" the retention of snags that may persist on the landscape as required by the Forest Plan. SER 443–44. "Approximately 1,800 snags greater than 14 inches in diameter and 700 snags greater than 20 inches in diameter in any given 100 acre area will be retained." SER 516. The retention of these snags "meets or exceeds" the applicable guidelines from the Klamath Forest Plan. *Id.*; SER 265.

The Forest Service will also retain all "large green trees" wherever they occur because these trees "are more likely to persist until the next stand can develop large structures." SER 443. And the Forest Service

will retain snags in riparian areas because those locations "historically burned with less intensity," making it more likely for the snags to persist. *Id.* The Forest Service also designated "snag retention areas" to create "pockets of larger trees," particularly on the lower slopes that historically have burned with lower intensity. *Id.* The Forest Service thus satisfies the specific area-regulated snag retention standards provided in the Klamath Forest Plan. *See* SER 527–28.

The Tribe nonetheless faults the Forest Service. Pointing to Table G-6, contained in the final environmental impact statement, ER 227–28, the Tribe claims that the Forest Service is not retaining snags to promote wildlife needs. Appellants' Br. 32. Because "Table G-6 very clearly shows that numerous harvest units have *zero* acres of snag retention," the Tribe says that the Forest Service is not focused on snag retention. *Id.* The Tribes uses apples to argue against oranges.

The Forest Service prepared Table G-6 as part of a biological assessment addressing the project's effects on the northern spotted owl. *See* SER 530–32. As required by the biological assessment, the Forest Service considered information inside the footprint of the project—indeed, each column of Table G-6 refers to the area inside the boundary of a particular salvage unit. ER 227–28. The salvage units primarily occur in severely burned areas that, because of the high-severity fire, no longer provide the late-successional forest habitat for which the LSR

land allocation was established (*i.e.*, protecting northern spotted owls). SER 617.

Even so, the Forest Service left "large, continuous areas of fire-killed trees that remain untreated," particularly in the Grider Creek and Walker Creek watersheds, to provide habitat for snag-dependent species (including the northern spotted owl). SER 627. These untreated areas are adjacent to, or near, the areas where salvage logging will occur. *See* SER 443–44; SER 520–21.

The standard for a biological assessment is *not* the same standard for land resource management planning under NFMA. SER 442 (discussing guidelines used by the Forest Service when determining "how much dead wood should be retained on the landscape"); *see also* SER 519–21. Table G-6 paints an incomplete picture of the surrounding landscape since it does not consider snags located outside of salvage unit boundaries that also provide habitat for owls and other wildlife. SER 443–44; SER 520–21. Nor does Table G-6 consider live trees left standing, green trees left in salvage units, marked legacy snags, or preexisting snags. *Id.*

The Tribe further faults the methodology employed by the Forest Service to ensure that the snags designated for retention will have the greatest chance of persistence. Appellants' Br. 32–33. In its incorrect view, the Tribe claims that the Forest Service inappropriately "averag[es] snag retention across large areas." Appellants' Br. 32. Of

course, "[a]verage snag counts on a per-acre basis" only provides one measure of snag density. SER 443. That is why the Forest Service varies its retention of snags "by position on the landscape"—in other words, it leaves fewer snags in fire-prone areas, and retains more snags in areas "that typically experience lower fire severity." *Id.*

The land resource management planning guidelines do not require the Forest Service to satisfy applicable "snag metrics" on every acre. SER 520. The guidelines instead require the Forest Service to retain the appropriate number of snags "within any 100-acre area." *Id.*

According to the Tribe, this Court "flatly rejected" that approach in *Brong*, 492 F.3d at 1129–30. Appellants' Br. 33. The Tribe misreads the opinion. In *Brong*, the Court rejected the Bureau of Land Management's snag-retention methodology as "grossly misleading" because "two-thirds of the affected acreage will be *completely* stripped of all salvageable trees." *Id.* at 1130 (emphasis in original). That is not true here.

The Forest Service reasonably selected a snag-retention methodology supported by expert literature and consistent with the Klamath Forest Plan. SER 443. The selected methodology does not completely strip two-thirds of the designated areas of all snags. *See* SER 527–28. Instead, the Forest Service varies snag retention "to more closely approximate the landscape patterns of snags and down wood." SER 443.

3. The Forest Service reasonably protects wildlife habitat within LSRs

In the preamble to its "Guidelines for Salvage," the Northwest Forest Plan states that "[s]alvage guidelines are intended to prevent negative effects on late-successional habitat." SER 311. The preamble further acknowledges that salvage logging may help reduce the risk of future large-scale disturbances like high-severity wildfires. *Id.* And in the following sentence, the Northwest Forest Plan states: "While priority should be given to salvage in areas where it will have a positive effect on late-successional forest habitat, salvage operations should not diminish habitat suitability now or in the future." *Id.*

The Tribe rips this sentence out of context and suggests that it prevents the Forest Service from implementing the recovery project if it will have any effect on wildlife habitat in late-successional reserves. *See* Appellants' Br. 35–38. The Tribe's reading of this sentence not only conflicts with the preceding guidance to reduce the risk of a large-scale disturbance, but it would also mean that the Forest Service could never take action to prevent future large-scale disturbances if that action somehow diminished late-successional habitat in the short term. The Tribe's strained reading falls apart upon inspection.

The Northwest Forest Plan says that "salvage operations *should not* diminish habitat suitability now or in the future." SER 311 (emphasis added). The Plan does not say that salvage operations "must

not" or "shall not" diminish habitat suitability. *See Olmstead v. Zimring*, 527 U.S. 581, 599–600 (1999) (comparing non-mandatory "aspirational terms" like "should" with "mandatory language" like "shall").

Contrary to the Tribe's reading, the Northwest Forest Plan does not create a mandatory rule that strictly limits the Forest Service's authority to approve salvage operations within late-successional forest habitat under limited circumstances. *See Ecology Ctr. v. Castaneda*, 574 F.3d 652, 661 (9th Cir. 2009). Where, as here, "the guideline language underlying the [Tribe's] claim is merely advisory or aspirational," the Forest Service's alleged failure to satisfy that guideline cannot sustain a violation of NFMA. *Id.*

The Tribe's reading also conflicts with the Klamath Forest Plan's forest-wide goals (which include LSRs) for fire management. *See* SER 262. The Forest Service must: "Reduce unacceptable fuel buildups and potential acreage of future high intensity wildfires." *Id.*

In any event, the Forest Service complied with applicable guidelines. The Klamath Forest Plan "encourage[s]" management activities (*e.g.*, salvage logging) in high-risk areas "even if a portion of the activities must take place in currently late-successional habitat." SER 270 (MA5-29). Risk-reduction activities "may be appropriate" in older-growth late-successional reserves if: "(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 LSRs from playing an effective role in the objectives for which they were established." *Id.* The Forest Service reasonably explained how it complied with this direction throughout the environmental impact statement. SER 441–47; *see also* SER 516.

The Northwest Forest Plan also provides general guidelines for limited salvage logging in late-successional habitats. SER 312. The Klamath Forest Plan adopted these guidelines for salvage. SER 271–72. They address: (1) sites where salvage logging may be appropriate; (2) the retention of surviving trees; (3) snag retention; and (4) the retention of coarse woody debris. *Id.*

Not one of these general guidelines contains language suggesting that the Forest Service could not take action to prevent future large-scale disturbances if that action somehow diminished late-successional habitat in the short term. The Tribe ignores these guidelines.

To balance risk-reduction and protection of habitat, the Klamath Forest Plan gives clear instructions. "[T]he scale of salvage and other treatments should not generally result in degeneration of *currently suitable* owl habitat or other late-successional conditions." SER 270 (MA5-28) (emphasis added). The project complies with this guidance because it does not remove or degrade any "currently suitable" owl habitat. SER 533–34. After all, the large severely burned areas within

the LSRs no longer provide "late-successional forest habitat" for northern spotted owls. SER 617. Even so, the project "maintains the complex fire mosaic pattern . . . that benefits [northern spotted owls]" because it retains small patches with less severe burns. SER 448.

The Fish and Wildlife Service, the Tribe points out, provided an incidental take statement for the norther spotted owl. Appellants' Br. 37 (citing ER 453). That statement tells only a partial story. The biological opinion explained that, even though the fire recovery project "would adversely affect" spotted owls "and their critical habitat," it would not be "to such an extent that it would jeopardize the species or adversely modify its designated critical habitat." SER 692. The Tribe has not challenged that determination.

The Tribe instead suggests that the recovery project violates the Northwest Forest Plan because it diminishes owl habitat. Appellants' Br. 35 (citing ER 511 ("salvage operations should not diminish habitat suitability now or in the future")). Again, context matters because, in the same paragraph, the Northwest Forest Plan states that "salvage operations may actually *facilitate habitat recovery*" in some cases. ER 511 (emphasis added).

That is certainly true here. The Forest Service explained that the project will affect only 18% of all spotted owl "activity centers on the west side" of the forest. SER 535. This estimate considers all activities in the Westside Fire Recovery Project—salvage, roadside hazard

removal, site preparation, and fuels reduction. The majority of the potential adverse impact to owl activity centers occurs as a result of roadside hazard removal and fuels reduction (activities the Tribe does not oppose), and not salvage harvest. SER 697–723.

Doing nothing runs an even greater risk of a severe fire in the future, which would undoubtedly further diminish the spotted owl's habitat devastated by the 2014 fires. *See* SER 463–64. The Forest Service did not violate the Northwest Forest Plan nor NFMA simply because the recovery project will have an adverse effect on 18% of the spotted owl's activity centers. *See League of Wilderness Defenders v. Allen*, 615 F.3d 1122, 1134 (9th Cir. 2010) (deferring to agency's determination that risk-reduction benefits justified project implementation).

Finally, the Tribe suggests that the recovery project is improperly driven by the "economic recovery" of burned timber. Appellants' Br. 38. The Tribe misreads the record. The Forest Service identified "a need for a project that is economically viable." SER 420. But that need does not in any way trump environmental conservation. As the Forest Service reasonably explained: the project will comply "with the requirements of the Forest Plan" and be "economically viable." SER 638; *see also League of Wilderness Defenders*, 615 F.3d at 1126 & n.1 (approving project that authorized commercial logging in LSR); *Siskiyou Reg'l Educ. Project v. Goodman*, 219 F. App'x 692, 695 (9th Cir. 2007) ("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 [Northwest Forest Plant's] primary goals of forest protection and restoration.").

B. Consistent with NMFA, the recovery project allows limited salvage logging to reduce the risk of high-severity fire in geologic riparian reserves

The Tribe claims that the project impermissibly authorizes logging in riparian reserves. Appellants' Br. 40–44. Under its (incorrect) reading, the Northwest Forest Plan permits logging in riparian reserves only if the logging is *required* to attain Aquatic Conservation Strategy objectives. *Id.* 41 (citing ER 515). Again, the Tribe ignores context and detail.

The Tribe misinterprets the Northwest Forest Plan, which provides a "general rule" that the "standards and guidelines for Riparian Reserves prohibit *or regulate activities* in Riparian Reserves that retard or prevent attainment of the Aquatic Conservation Strategy objectives." ER 515 (emphasis added); *see also* SER 277. When it comes to the Aquatic Conservation Strategy objectives, the standards and guidelines from the Northwest Forest Plan "focus on 'meeting' and 'not preventing attainment'" of those objectives. SER 306. A project that "does not retard or prevent attainment" of the objectives is consistent

with the Northwest Forest Plan, *id.*, as well as the Klamath Forest Plan, *see* SER 277, 649.

Following this general rule, the Klamath Forest Plan regulates activities in riparian reserves through standards and guidelines. *See* SER 277–79. The Tribe suggests that the Forest Service can allow an activity within a riparian reserve only if it is required to accomplish Aquatic Conservation Strategy objectives. But this reading ignores the framework of the Northwest Forest Plan and the Klamath Forest Plan, as well as the text of the standards and guidelines.

In line with the Northwest Forest Plan, the Klamath Forest Plan as a general rule prohibits timber harvest in riparian reserves. *See* SER 284 (MA10-54). The Klamath Forest Plan provides two exceptions to this general rule. The Tribe confuses these exceptions as one and the same. *See* Appellants' Br. 40–43.

The first exception states that timber harvest may occur in "degraded *riparian conditions* . . . if required to attain Aquatic Conservation Strategy objectives" after a catastrophic event (like a wildfire).[7] SER 284 (MA10-54(a)). But this exception, listed as subpart (a), only applies to *hydrologic* riparian reserves because

[7] In general, "[t]he aquatic conservation strategy provides direction for maintaining watershed health." SER 251. The Aquatic Conservation Strategy objectives are listed in the Klamath Forest Plan, SER 261, and the Northwest Forest Plan, ER 506.

degraded riparian conditions can exist only in "hydrologic" areas associated with bodies of water, such as stream channels, ponds, and wetlands where *riparian conditions* exist. *See* SER 487. This exception does not apply to the recovery project because the Forest Service did not authorize any salvage activity in a hydrologic riparian reserve. SER 603.

The recovery project allows salvage logging to occur only in geologic riparian reserves. *Id.* n.8. In contrast to a hydrologic riparian reserve, a geologic riparian reserve refers to unstable and potentially unstable lands. *See* SER 483 ("Geologic Riparian Reserves"); SER 487 ("Riparian Reserves"); SER 489 ("Unstable Lands"). As with hydrologic riparian reserves, the Klamath Forest Plan generally prohibits timber harvest in geologic riparian reserves. SER 284 (MA10-54). But, under the exception at subpart (b), the Forest Service may "[s]alvage trees only when watershed analysis determines that present and future [coarse woody debris] needs are met and other Aquatic Conservation Strategy objectives are not adversely affected." *Id.*

The project falls squarely within this exception, as it proposes salvage harvest only in geologic riparian reserves that do not have riparian features. Coarse woody debris needs will be met, and salvage logging in the geological riparian reserves will not adversely affect Aquatic Conservation Strategy objectives. *See* SER 349. In fact, the analysis shows that post-salvage reforestation will help reduce

landslide risk in 10 of the 12 affected watersheds. SER 474. This is consistent with direction in the Klamath Forest Plan to "to maintain or enhance slope stability" on geologically unstable lands. SER 264.

The Tribe tries to bolster its argument by pointing out that the authors of the Northwest Forest Plan "went to great length to explain the importance of protecting steep and unstable areas from mechanical entry." Appellants' Br. 40 (citing ER 395-429). Yet the Tribe is relying on an inapposite report written by the Forest Ecosystem Management Assessment Team (FEMAT) in 1993. Convened by President Clinton, the assessment team developed a range of options and recommendations for the management of federal lands within the range of the spotted owl. SER 513. The report ultimately provided a basis for the Northwest Forest Plan, but it is not binding guidance that the Forest Service must follow. "It is the Forest Plan of the Klamath National Forest that provides management direction for the Westside Recovery Project, not the FEMAT report or the Northwest Forest Plan." SER 663; *see also* SER 444–45.

The Klamath Forest Plan does protect steep an unstable areas from mechanical entry, but it does not *prohibit* entry. That is because a mechanical entry can occur if it does not prevent or retard attainment of Aquatic Conservation Strategy objectives. *See* SER 277–79. Put another away, it is the effect of the action that is of concern, not the action itself.

The Forest Service cannot accomplish project objectives without removing fire-killed trees from geologic riparian reserves. *See* SER 603. The Tribe's overly narrow reading would frustrate project objectives even though there is no evidence that recovery project activities will prevent attainment of Aquatic Conservation Strategy. SER 649.

In any event, the Tribe defeats its own argument. During the project's NEPA process, the Tribe advanced the "Karuk Alternative." SER 434. Similar to the project ultimately approved by the Forest Service, the Karuk Alternative avoids salvage operations within hydrologic riparian reserves, *see id.*, while allowing salvage harvest on approximately 973 acres of geologic riparian reserves. *See* SER 16 (¶ 31 & n.2); SER 20–21, 23 (maps depicting locations). Co-plaintiffs Klamath-Siskiyou Wildlands Center, Environmental Protection Information Center, and Klamath Riverkeeper formally endorsed the Tribe's plan. Their position in this appeal—that salvage logging in all riparian reserves is prohibited by the Forest Plan unless it is "required to attain ACS objectives"—is therefore contradicted by the very proposal they submitted and endorsed.

* * *

In sum, the Tribe presents a false choice. Take no or very limited action, which the Tribe says will have no risk in either the long or short term. Or take action, which the Tribe says will have great short-term risks and no long-term benefits.

The Forest Service's careful reasoning presents the true picture: only targeted treatments will help conserve and restore late-successional and riparian habitats as directed and authorized by the Klamath Forest Plan (as well as the Northwest Forest Plan). The Forest Service, in its expert judgment, determined that some short-term risks are necessary to protect the forest against much greater long-term threats. The Tribe's preference for a different balance cannot override this reasoned agency decision.

II. The Tribe's ESA claim lacks merit

In this case, there is no NMFS action for the Court to enjoin. *See Alsea Valley All. v. Dep't of Commerce*, 358 F.3d 1181, 1186 (9th Cir. 2004) (an order declaring NMFS's action arbitrary is not the same as "enjoining" the Service). NMFS is not implementing the recovery project, and its biological opinion, while relevant to the Forest Service's decision to proceed, did not, as a matter of law, authorize it. *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997) (the action agency "retains ultimate responsibility for determining whether and how a proposed action shall go forward" (citing 50 C.F.R. § 402.15)).

Because the Tribe never challenged the Forest Service's actions under the ESA, this Court cannot review them for ESA compliance. *See ALCOA v. Adm'r, Bonneville Power Admin.*, 175 F.3d 1156, 1160 (9th Cir. 1999). The Tribe's motion to enjoin the Forest Service based on an

ESA claim against NMFS is therefore inappropriate. Even if the Court decides to consider the Tribe's ESA claim, it lacks merit.

Based on the best available scientific and commercial information, NMFS concluded that the recovery project "was not likely to jeopardize the continued existence of" the coho salmon, and was not likely to destroy or adversely modify its critical habitat. ER 454. The Tribe contends that NMFS's conclusion has "at least three fatal flaws." Appellants' Br. 47. First, the Tribe suggests that NMFS relied on replanting and legacy treatments that the Forest Service may never implement because of an alleged lack of funding. *Id.* at 47–48. Second, even if those treatments are implemented, the Tribe claims that NMFS miscalculated the benefits to the coho salmon. *Id.* at 50. Third, the Tribe says that NMFS failed to analyze the impacts to the coho salmon based on its life-cycle. *Id.* at 50–52.

These flaws do not exist; the record demonstrates that NMFS's analysis was reasonable and comprehensive. NMFS "examined an extensive amount of information from a variety of sources." SER 553. NMFS's jeopardy determination was rational and did not rely on uncertain and discretionary mitigation measures. NMFS's expert decision is entitled to "substantial deference." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 981 (9th Cir. 2014).

The Tribe misconstrues the biological opinion. Appellants' Br. 45. NMFS identified the risk of landslides and sediment in the waterways

to the coho salmon, and it reasonably determined that the project would not likely jeopardize the continued existence of coho salmon.

"If landslides were to occur in the [project] area," NMFS reasonably explained that they would likely be caused by "a large precipitation event," not project activities. ER 488. Indeed, "project activities would likely only contribute a *minor amount* to the overall landslide risk and not rise to the level of adverse effects to [the] coho salmon or their critical habitat." *Id.* (emphasis added). NMFS further explained that, the "minor amount" of increased landslide risk "in the first years following salvage harvest and the associated road construction" will be offset by other "Project activities such as fuels treatment, planting, and legacy sediment site treatments." *Id.*

Fine sediment in streambeds, as a result of erosion from project activities, could adversely affect coho salmon. ER 490. Although NMFS determined that coho salmon would be exposed to fine sediment effects in the Grider and Walker creeks, only eggs and alevins (newly hatched salmon still attached to the yolk sac) would be impacted. SER 585–87. In fact, NMFS determined the reduced survival of this single life stage ranged, at most, between 2 and 3%. SER 586 (Table 8). NMFS further described the limited function of these two watersheds (Grider and Walker creeks) in the context of the coho salmon population as a whole. SER 590–91. Because coho salmon rarely use these watersheds for spawning, the reduced survival of eggs will have an insignificant effect

on the population. SER 590. NMFS therefore concluded that the effects on the entire coho species (ranging from Punta Gorda, California, up to Cape Blanco, Oregon) are negligible and nowhere near the jeopardy threshold. SER 592.

The Tribe latches onto one line from the biological opinion—referring to "funding availability" for the legacy site treatments, ER 457—to suggest that NMFS's analysis is flawed. Appellants' Br. 48. NMFS, in the Tribe's incorrect view, relied on "speculative actions" (*i.e.*, unfunded legacy treatments) as "mitigation measures" to lessen the effects of the project on the coho salmon. *Id.* The Tribe then knocks down its strawman argument by citing two cases—*Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917 (9th Cir. 2007), and *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin.*, 99 F. Supp. 3d 1033 (N.D. Cal. 2015)—which reject improper mitigation analyses.

The Tribe conveniently ignores the record, which shows that NMFS did not rely on mitigation measures to support its no jeopardy conclusion. NMFS noted the "long term benefits" to the coho salmon "from reforestation and legacy site treatments," ER 492, but it did not rely on those benefits as mitigation measures when it made its jeopardy

and adverse modification determinations.[8] *See* SER 240 (¶ 12) ("While NMFS assumed that their beneficial effects would help offset adverse effects from the Project over time, these future activities were not analyzed as mitigation for Project effects in the near/short term."). As the district court correctly explained, NMFS had no need to rely on the potential benefits of mitigation measures because there was no significant impact on the coho salmon in the first place. SER 160–61.

As a last-gasp argument, the Tribe claims that NMFS failed to analyze the project's effects on the coho salmon within the three-year life cycle of the species. Appellants' Br. 50–51. In essence, the Tribe appears to argue that NMFS failed to adequately assess the short-term impacts of the project on the coho salmon. *See id.* at 50 (citing *Pac. Coast Fed'n of Fishermen's Ass'n, Inc. v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1037 (9th Cir. 2001)). The record belies its claim. NMFS specifically addressed potential short-term effects on the coho salmon throughout its analysis. *See, e.g.*, ER 483–84 (insignificant "short-term" effects of water drafting); ER 489 (insignificant "short

[8] To describe the effects to individual coho salmon, NMFS assesses baseline conditions over the long term. NMFS treats all proposed actions as "reasonably certain to occur" and had no reason to doubt that the Forest Service will not implement the proposed actions. SER 589. Therefore, NMFS needed to consider the beneficial actions of reforestation and legacy site treatments as improvements to the baseline conditions over time. SER 591–92.

term" effects from road/stream crossing); ER 490 ("fleeting" effects on suspended sediment).

* * *

NMFS, an expert agency charged with administering the ESA, reasonably concluded that the recovery project would not likely jeopardize the continued existence of coho salmon because the impacts from the project on the coho salmon are minimal. ER 454. Given the "substantial deference" this Court should provide NMFS's conclusion, *San Luis & Delta-Mendota Water Auth.*, 776 F.3d at 980, the Tribe has not established a likelihood of success on the merits of its ESA claim, *Winter*, 555 U.S. at 20.

III. The equities do not favor a preliminary injunction

To obtain an injunction, the Tribe must establish irreparable harm and that the harm caused by the recovery project is greater than the harm to the public of an injunction. It cannot do that.

A. The Tribe cannot establish irreparable harm

Neither the Tribe, nor any of its co-plaintiffs, can show a likelihood that its members will actually be harmed by the recovery project. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000). This Court "squarely rejected" the argument that logging always constitutes irreparable harm. *Earth Island Inst.*, 626 F.3d at 474. Logging "thousands of *mature* trees" may be irreparable harm, *League of Wilderness Defs./Blue Mountain Biodiversity Project v.*

Connaughton, 752 F.3d 755, 764 (9th Cir. 2014) (emphasis added), but this case is a far cry from those circumstances. The project only authorizes the salvage of fire-killed trees.

Contrary to the Tribe's argument, Appellants' Br. 29, 57, simply alleging environmental injury cannot lessen the Tribe's burden for an injunction. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). The 2014 fires burned more than 160,000 acres of national forest, yet only a small fraction of the burned area is scheduled to be treated as part of the salvage timber sales at issue. *See* SER 600. The Tribe points to *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011), as proof "that having other places to go" cannot defeat its claim of irreparable harm. Appellants' Br. 55. But the Tribe misses an important distinction. In *Alliance for the Wild Rockies*, the plaintiffs identified an "*actual* and irreparable injury" tied directly to "the areas subject to logging under the Project." 632 F.3d at 1135 (emphasis added).

Not one of the plaintiffs' declarations, ER 17–42, is specific enough to establish an interest in the specific areas subject to salvage logging in this case. *All. for the Wild Rockies*, 632 F.3d at 1135; *cf. Summers v. Earth Island Inst.*, 555 U.S. 488, 495 (2009). Even if some of the individual plaintiffs could establish a specific interest in visiting severely-burned, untreated landscape within the forest, there are vast areas of post-fire landscape that will remain untreated. *See* SER 619

("about 80 percent" of the forest burned in the 2014 fires "has no proposed recovery actions of any kind").

NFMA Injury. The Tribe defeats its own argument because even it proposed nearly 3,000 acres of salvage logging to reduce heavy fuels in many of the same locations as the approved recovery project. SER 434 (discussing Karuk Alternative). To the extent the Tribe contends that the affected area is important to its enjoyment of the northern spotted owl, it cannot demonstrate irreparable harm that is "likely, not just possible," in the absence of an injunction, *All. for the Wild Rockies*, 632 F.3d at 1131, or that the harm implicates the species as a whole, *see, e.g.*, *Humane Soc'y v. Gutierrez*, 523 F.3d 990, 991 (9th Cir. 2008) (loss of up to 2000 endangered salmon does not tip balance).

ESA Injury. Because the Westside Fire Recovery Project has no significant impact on the coho salmon, SER 160–61; ER 454, the Tribe cannot establish irreparable injury. Nor does it try. Instead, the Tribe and its co-plaintiffs merely allege a general interest in salmon and suggest that the recovery project has the potential to impact the species in the future by possibly increasing landslide risks. ER 210–13. As NMFS's declarant attests: there is no physical mechanism for the project to cause landslides; only a tiny fraction of the species could even potentially be affected by the project; and, given the myriad protection measures built into the project, there is no likelihood of irreparable harm from the sales at issue. SER 238–42 (¶¶ 5–22).

B. Granting an injunction will greatly harm the public interest

Even if the Tribe could show that it will be irreparably harmed in the absence of an injunction, the Court should not issue an injunction unless the balance of harms "tips sharply" in its favor. *All. for the Wild Rockies*, 632 F.3d at 1135. It does not.

The district court found "that there are a great number of factors" weighing in favor of the Forest Service and public. SER 158. First and foremost "is the fear of another catastrophic fire." *Id.*; *see also* SER 8–9 (¶¶ 15–16). The public has a "paramount" interest in protecting firefighters as well as protecting life and property by containing future fires within a single watershed. SER 9 (¶ 17); *see also* SER 624–26.

The public also has an interest in restoring the forest. SER 629–32; *see also* SER 11–12 (¶ 21). Indeed, Congress recognized the vital importance of America's forests and tasked the Forest Service with maintaining a sufficient cover of trees on forest lands. *See* 16 U.S.C. § 1601(d)(1). The Forest Service designed the recovery project to accomplish this objective. SER 597; *see United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001) ("[A] court sitting in equity cannot ignore the judgment of Congress, deliberately expressed in legislation.").

If the recovery project is delayed any further, "the ability to leverage the commercial value of these dead trees to pay for their

removal and for hazardous fuel reduction actions becomes increasingly less likely." SER 10 (¶ 18); *see also* SER 598 ("Some of the trees killed by the fires have lost substantial economic and commodity value."). If the dead trees are not removed, reforestation will be prohibitively dangerous. SER 11–12 (¶ 21). The Forest Service would not replant trees in those areas. *Id.*

Although plaintiffs are concerned about the project's short-term effects on the spotted owl and coho salmon, severe fire is one of the primary risks to survival of habitat for both species. SER 602. Active management is necessary to protect owl and salmon habitat. The record shows that the recovery project will have long-term benefits by reducing the risk of habitat loss, plus speeding the development of the owl's favored habitat.

An injunction would at best delay realization of these benefits to the spotted owl, and at worst risk further loss of late-successional habitat to catastrophic fire in the project area. The Tribe's narrow interests do not outweigh these broad public interests.

IV. The Tribe's funding argument is a red herring

The district court found no authority for the Tribe's argument that the Forest Service needed "to have the funds in hand" to complete the entire project. SER 163. Undeterred by the district court's conclusion, the Tribe doubles down in this appeal on the same unsupported

argument about funding. *See, e.g.*, Appellants' Br. 4, 20, 26, 44, 47–50. The argument has no merit. As the Forest Service reasonably explained, there is "no requirement that the Forest Service have funding in hand for a project." SER 15 (¶ 30). The Forest Service intends to complete the project in stages, and will seek appropriate funds as necessary. *Id.*

CONCLUSION

This Court should affirm the district court's decision to deny a preliminary injunction.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Attorneys for the Federal Defendants-Appellees are not aware of any related cases as defined in Ninth Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,360 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Fed. Cir. R. 32(b).

I certify that 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 I prepared it using Microsoft Word in a proportionally-spaced typeface, Century Schoolbook 14-point.

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, which will serve the other participants in this case.

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