UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASE NO. 16-15818

KARUK TRIBE, ENVIRONMENTAL PROTECTION INFORMATION CENTER, CENTER FOR BIOLOGICAL DIVERSITY, KLAMATH RIVERKEEPER, and KLAMATH-SISKIYOU WILDLANDS CENTER,
Plaintiffs-Appellants,

v.

WILLIAM STELLE; NATIONAL MARINE FISHERIES SERVICE; PATRICIA A. GRANTHAM, Klamath National Forest Supervisor; UNITED STATES FOREST SERVICE; SISKIYOU COUNTY, a political subdivision of the State of California, AMERICAN FOREST RESOURCE COUNCIL, an Oregon nonprofit corporation, GARY RAINEY, and GEORGE HARPER.
Defendants-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, Civ. No. 3:16-1079-MMC

PLAINTIFFS'-APPELLANTS' OPENING BRIEF

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I. INTRODUCTION & SUMMARY OF THE ARGUMENT.

In the wake of the 2014 wildfires in northern California, the United States Forest Service proposed and is now implementing the Westside Fire Recovery Project, perhaps the most aggressive post-fire logging project ever proposed for lands managed according to the provisions of the Northwest Forest Plan. In his comments on the Westside Project, eminent ecologist and coauthor of the Northwest Forest Plan, Dr. Jerry Franklin, explained that

> Naturally disturbed, early successional habitat undergoing slow natural reforestation (without salvage or planting) is currently the rarest of the natural forest developmental stages in the Pacific Northwest – even more so than old-growth forests... Salvage logging of large snags and down boles does not contribute to recovery of late-successional forest habitat; in fact, the only activity more antithetical to the recovery processes would be removal of surviving green trees from burned sites. Large snags and logs of decay resistant species, such as Douglas-fir and cedars, are particularly critical as early and late-successional wildlife habitat as well as for sustaining key ecological processes....

Excerpts of Record (ER), 385-386.

Although the lands affected by the 2014 wildfires – old growth forest reserves known as Late-Successional Reserves or LSRs – were designed to withstand large disturbance events and allow natural recovery processes to transpire, the Forest Service has consistently argued that the Westside Project is necessary to prevent future wildfires and to grow new forests faster. However, as Dr. Franklin observed, this motivation is contrary to the intent of the LSR network:

> The team that designed the LSR system knew that large stand replacing disturbances would impact LSRs and, therefore, that the LSR network needed to be able to accommodate such disturbances...Hence, the team built sufficient redundancy into the LSR system so that it could accommodate large disturbances and still remain viable as a regional network. This redundancy would also allow for natural recovery processes within impacted LSRs. Building reserve systems that will accommodate natural disturbance regimes is, of course, a first principle in conservation biology (Lindenmayer and Franklin 2003)... One could say that the LSR system was overbuilt in terms of immediate habitat needs. A major reason for doing this was the FEMAT planners belief that natural recovery processes could and should be accommodated following major disturbances to LSRs.

ER 387-388. Based on his review of the Westside Project, Dr. Franklin was prompted to "conclude that the salvage activities proposed within LSRs as part of the Westside Fire Recovery Plan are inconsistent with NWFP intent and direction for management of LSRs, including their treatment following a major disturbance." ER 392. This Circuit's case law firmly supports Dr. Franklin's assessment, but was erroneously disregarded by the district court.

The Forest Service has capitalized on a fear of fire to argue that the 2014 wildfires were "catastrophic" and compel extreme action to prevent another such conflagration. In reality, while sizeable, the 2014 fires were not uncharacteristic: only about 27% of the fires burned at "high" severity (meaning most trees were killed), whereas 73% of the fires burned at lower severities. This type of effect is to be expected in the Klamath-Siskiyou bioregion, where fire used to be a frequent

visitor and actor, until the federal government successfully suppressed fire in this fire-dependent ecosystem.

Instead, the Westside project is about recovering the economic value of fire-affected old growth forests from reserves, not restoration. The Forest Service has repeatedly argued that it must remove the large, economically valuable trees from the fire area to pay for hazardous fuels reduction and replanting, which it says must occur if the agency is to achieve its objective of reducing future fire risk and growing new forests faster. Unfortunately, even though the Forest Service has targeted for removal large, economically (and ecologically) valuable old trees from the Westside Project area, it will not receive anywhere near the amount of revenue necessary to pay for needed restoration activities. Although the Forest Service predicted it would receive more than $10 million in revenue from the sale of Westside timber, the agency has indicated in this litigation that it expects to garner only approximately $800,000: some timber sales are selling for ***.3%*** of the expected price. At these fire sale prices, restoration activities will not occur, new forests will not be replanted, and the fire risk will remain dangerously high for decades.

Much of the proposed salvage logging is located on steep and unstable slopes, where the Northwest Forest Plan precludes logging unless "required" to meet water quality objectives, a showing that the Forest Service has not attempted

in this case. Such a demonstration is important, because many of the waterways in the planning area are already water quality limited for sediment from past management actions, particularly timber harvest and road construction and use, which has led to the precarious condition of Threatened coho salmon. To attempt to address this, the Forest Service proposed to the National Marine Fisheries Service (NMFS) that the action agency would undertake treatment of "legacy sediment sites," areas on the landscape that are chronically bleeding sediment into listed fish habitat. NMFS relied on the treatment of these legacy sediment sites, as well as the proposed hazardous fuels reduction and replanting, when reaching its no jeopardy conclusion in its biological opinion for the Project. However, not only is there insufficient funding to pay for these treatments – which were to be paid for out of timber sale receipts – but also most legacy sediment sites are not located in watersheds where logging will occur and will take up to *twenty years to complete*, much longer than the three-year life cycle of coho.

Implementation of the Westside Project has been underway since March 2016, and is actively causing Appellants irreparable harm. In particular, the Karuk Tribe, which has occupied the Project area since time immemorial, can no longer use its cultural lands (Panamaniik, Katimiin, Aamaikiaraam, Helkau, and Inam) for food, fuel, housing, and clothing as it has done since the Spirit People handed these lands to Karuk to steward for all time. Having originated from the land, the Tribe is

spiritually tied to it, such that the spiritual health of the Tribe is intimately connected to the ecological health of the land. The Tribe has a spiritual duty to properly tend and manage the land, which it cannot do now that salvage logging has commenced.

It did not have to be this way, however. The Tribe proposed an alternative to the Forest Service that would have reduced hazardous fuels, created fuel breaks, conducted prescribed burning, and mitigated danger trees along roadways used by the public and federal land managers. While this common sense alternative had the support of the conservation organization plaintiffs who also use and enjoy these lands, the agency elected not to move forward with it because it would not target old growth forests for logging. In any event, the Tribe has not opposed removing danger trees along 320 miles of roads in the planning area, which is currently underway and providing revenue and local jobs. The Tribe does not seek to stop the roadside logging on appeal.

Despite this showing, the district court ignored applicable legal precedent and made factual errors in denying the Tribe's motion for preliminary relief. As demonstrated herein, the Tribe has shown that it is likely to prevail on the merits, and that the public interest favors a preliminary injunction to preserve the status quo.

II. STATEMENT OF JURISDICTION.

Plaintiffs-Appellants Karuk Tribe, Environmental Protection Information Center, Center for Biological Diversity, Klamath Riverkeeper, and Klamath-Siskiyou Wildlands Center (collectively, the Tribe) claims arise from the National Marine Fisheries Service's (NMFS') and Regional Administrator for the West Coast Region of NMFS William Stelle's violations of the Endangered Species Act (ESA) of 1973 (16 U.S.C. §§ 1531-1544) and Administrative Procedure Act (APA) (5 U.S.C. § 702 et seq.) in relying on uncertain to occur project activities for the Westside Fire Recovery Project (Westside, or the Project) when it issued its biological opinion for coho salmon for the Project. The Tribe's claims also arise from the United States Forest Service's (Forest Service's) decision, made by Klamath National Forest Supervisor Patricia Grantham, to authorize the Project pursuant to the National Forest Management Act of 1976 (NFMA), 16 U.S.C. § 1600 et seq.

The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question), 2201 (injunctive relief), 2202 (declaratory relief), and 28 U.S.C. § 1346 (United States as a defendant), and because the Tribe sought judicial review of a final agency action pursuant to the APA (5 U.S.C. §§ 702-706). The district court's denial of the Tribe's motion for a preliminary injunction is an

appealable interlocutory order. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1292.

The Tribe intends to seek attorney's fees and costs for this case, including this appeal, at an appropriate stage of the litigation, pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, and the ESA, 16 U.S.C. § 1540(g)(4).

III. ISSUES PRESENTED.

1. Did the Forest Service violate the National Forest Management Act (NFMA) when it authorized large diameter snag removal from the Seiad and Eddy Gulch Late-Successional Reserves?

2. Did the Forest Service violate NFMA by authorizing logging in Riparian Reserves that are unstable and potentially unstable?

3. Did NMFS violate the ESA by relying on unenforceable and uncertain restoration activities in reaching its no jeopardy determination?

4. Has the Tribe met its burden such that a preliminary injunction should issue?

IV. STATEMENT OF THE CASE.

This is a civil action for declaratory and injunctive relief under the APA (5 U.S.C. §§ 702-706), arising from the violations of the ESA and NFMA committed by Defendants-Appellees NMFS, William Stelle, Patricia Grantham, and the Forest Service. Plaintiffs-Appellants Karuk Tribe challenge NMFS's biological opinion, and the Forest Service's final environmental impact statement (FEIS) and record of

decision (ROD), both of which authorized the Westside Fire Recovery Project. The Tribe seeks to enjoin further implementation of the Project until the violations of law are remedied. As logging is currently underway, the Tribe respectfully ask this court to issue a preliminary injunction barring further implementation the Project pending a decision on the merits.

A. LEGAL BACKGROUND.

The Endangered Species Act (ESA) is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation" and "reflects a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180, 185 (1978). The ESA contains substantive and procedural requirements. Procedurally, ESA Section 7 requires a federal agency to consult with the respective Service if its proposed action "may affect" a listed species or its critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Formal consultation results in a biological opinion (BiOp) that determines whether the action is likely to jeopardize the continued existence of a listed species or adversely modify its critical habitat. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h). Substantively, ESA Section 9 establishes "a blanket prohibition" on any entity from causing "take," *Or. Nat. Res. Council v. Allen*, 476 F.3d 1031, 1033 (9th Cir. 2007), which

includes "harm" to a listed species resulting from "habitat modification." *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1067 (9th Cir. 1996) (*citing* 50 C.F.R. § 17.3).

A BiOp 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). To make its jeopardy determination, NMFS must evaluate "'the current status of the listed species or critical habitat,' the 'effects of the action,' and 'cumulative effects.'" *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 924 (9th Cir. 2008) (*citing* 50 C.F.R. § 402.14(g)(2)-(3)). In doing so, NMFS must "use the best information available." *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 525 (9th Cir. 2010). If NMFS "concludes that the action is not likely to jeopardize the species, but is likely to result in some take," it must provide an Incidental Take Statement (ITS) along with the BiOp. *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 909 (9th Cir. 2012) (*citing* 50 C.F.R. § 402.14(i)). Among other things, an ITS must specify "the impact, i.e., the amount or extent, of such incidental taking on the species[.]" 50 C.F.R. § 402.14(i). "Take that complies with the terms and conditions of an ITS is not a prohibited take under Section 9." *Salazar*, 695 F.3d at 909 (citations omitted).

The National Forest Management Act (NFMA) requires the Forest Service to develop comprehensive land and resource management plans (LRMPs) for each unit of the National Forest System. 16 U.S.C. § 1604(a). Subsequent "plans,

permits, contracts, and other instruments for the use and occupancy" of the national forests must be consistent with the local LRMP, in this case, the Klamath National Forest Land and Resource Management Plan, as amended by the Northwest Forest Plan. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.10(e).

In 1994, the Bureau of Land Management and the United States Forest Service issued a Record of Decision for the Northwest Forest Plan (NFP), which established management requirements for all Forest Service land within the range of the northern spotted owl and amended all National Forest LRMPs within the range of the owl, including the Klamath National Forest LRMP. Late-Successional Reserves (LSRs) are land use allocations under the NFP where the primary objective is to protect and enhance the conditions of old-growth forests that serve as habitat for the northern spotted owl and other late-successional habitat-associated species by creating a network of large "reserves" or blocks of habitat. The NFP requires the Forest Service to manage LSRs 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." ER 510.

The NFP permits logging in LSRs, but restricts the timing, location, type, and amount of salvage logging that may occur. First, the NFP requires salvage logging within LSRs to be consistent with LSR Objectives, including the "development of old-growth forest characteristics including snags." ER 503. Snags

are standing dead trees. ER 283. Second, the NFP states that within LSRs, "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." ER 511. Third, the NFP states that following stand replacing events such as wildfire, the Forest Service must "focus on retaining snags that are likely to persist until late-successional conditions have developed and the new stand is again producing large snags." ER 512. Finally, the NFP states that in LSRs, salvage will not be driven by economic or timber sale program factors." *Or. Nat. Res. Council Fund v. Brong*, No. CIV.04-693-AA, 2004 WL 2554575, at *8 (D. Or. Nov. 8, 2004), *aff'd*, 492 F.3d 1120 (9th Cir. 2007) (*citing* NFP Appendix F, F-21).

The Aquatic Conservation Strategy (ACS) of the NFP was developed to restore and maintain the ecological health of watersheds and aquatic ecosystems contained within them, and to protect salmon and steelhead habitat on federal lands. The ACS accomplishes its goals through mandatory compliance with nine Aquatic Conservation Strategy Objectives (ACSOs) that each address various water quality parameters such as water temperature, sediment input thresholds, timing of water flows, and persistence of aquatic organisms. ER 506. "Management 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 505.

Riparian Reserves are a land allocation under the NFP covering "portions of watersheds where riparian-dependent resources receive primary emphasis and where special standards and guidelines apply." ER 507. Riparian Reserves generally parallel "standing and flowing water, intermittent stream channels and ephemeral ponds, and wetlands," and "also include other areas necessary for maintaining hydrologic, geomorphic, and ecologic processes" such as geologically "unstable and potentially unstable" areas. *Id.* The NFP requires the Forest Service to designate all Riparian Reserves, and to protect them from disturbance via no-entry or no-harvest buffers. For geological Riparian Reserves (i.e., unstable areas), the NFP states that "at a minimum, the Riparian Reserves must include: (a) The extent of unstable and potentially unstable areas (including earthflows); (b) The stream channel and extend to the top of the inner gorge; (c) The stream channel or wetland and the area from the edges of the stream channel or wetland to the outer edges of the riparian vegetation; and (d) Extension from the edges of the stream channel to a distance equal to the height of one site-potential tree, or 100 feet slope distance, whichever is greatest. A site-potential tree height is the average maximum height of the tallest dominant trees (200 years or older) for a given site class." ER 513.

The Northwest Forest Plan Standards and Guidelines "prohibit and regulate activities in Riparian Reserves that retard or prevent attainment of the Aquatic Conservation Strategy objectives." ER 507. Because Riparian Reserves are designed to protect the integrity of aquatic ecosystems, the NFP prohibits logging within a Riparian Reserve unless the Forest Service can demonstrate that logging is "required to attain" the nine Aquatic Conservation Strategy Objectives. ER 513.

B. FACTUAL BACKGROUND.

1. The Klamath-Siskiyou Bioregion.

The Klamath National Forest makes up the heart of the Klamath-Siskiyou Bioregion, an ecoregion covering approximately 10 million acres, stretching from the Umpqua River in Oregon to Mendocino County, California to the south, from the Pacific Ocean in the west to the Cascade Mountains in the east. The Klamath-Siskiyou Bioregion is marked by its complex geology, a tangled knot of steep, rugged mountains, numerous cold-water rivers, and unparalleled biodiversity.

Despite their important habitat and cultural values, the area's Klamath River, Scott River, and the North Fork of the Salmon River are all listed as impaired under section 303(d) of the Clean Water Act, meaning that these waters currently do not meet water quality standards for sediment, temperature, and other parameters. ER 286. Tributaries particularly impacted by the Westside Project

include Grider Creek and Walker Creek, which have a long and well-documented history of landslides and road-related sediment problems.

2. Coho Salmon (*Oncorhynchus kisutch*).

Coho salmon were historically distributed throughout the North Pacific Ocean from Central California north to Point Hope, Alaska. ER 458. The Klamath River and its tributaries, including those located in the Westside Project area, support several anadromous species during most of their in-river life stages, including coho salmon. ER 459A. The fishery on the Klamath River supports a sport fishing guide and resort industry, Native American subsistence and ceremonial culture, and commercial and sport fishing industries.

Coho salmon is an anadromous fish species that generally exhibits a three-year life cycle. ER 458. Adult coho typically begin their freshwater spawning migration in late summer and early fall, spawn by mid-winter, and then die. *Id.* Coho salmon spawning occurs mainly in November to December. *Id.* Spawning occurs in mainstem rivers, tributaries, and creeks. *Id.* Juvenile coho rear in fresh water for up to 15 months. *Id.* Rearing coho juveniles require a complex stream morphology of pools, riffles, and backwaters created by large downed trees in the stream channel. *Id.* Coho adults typically spend 15 months in the ocean before returning to their natal stream to spawn. *Id.*

NMFS has identified six "evolutionary significant units" (ESU) of coho. ER 458. One ESU comprises Southern Oregon/Northern California Coast (SONCC) coho, which includes forty-one coho populations. *Id.* In 1997, NMFS listed SONCC coho as Threatened with extinction under the ESA, and found that logging was one of the major activities responsible for the decline of SONCC coho by removing and disturbing natural vegetation that affects in-stream habitat. *Or. Nat. Res. Council Fund*, 2004 WL 2554575, at *8.Sediment generated by logging, road building and use, landing construction, and associated activities can harm SONCC coho salmon and their habitat by smothering eggs and preventing emergence, reducing inter-gravel oxygen, increasing turbidity in the water column that interferes with sight-feeding, burying macroinvertebrate insects and their habitat that provide food for coho, and aggrading streambeds. ER 490. In 1999, NMFS designated critical habitat for SONCC coho salmon that encompasses accessible reaches of all rivers (including estuaries areas and tributaries) between the Mattole River in California and the Elk River in Oregon. ER 458.

In 2011, NMFS completed a status review of SONCC coho and concluded that SONCC coho are trending in declining abundance. ER 458. NMFS has found that timber harvest remains a "high" or a "very high" threat to 20 of 39 populations of SONCC coho. The Westside Project will impact five coho populations within the SONCC coho ESU. These populations have a moderate to high extinction risk,

and two of three populations are likely below the depensation[1] threshold. ER 464, 463, 464, 465, 466.

3. Northern Spotted Owl (*Strix occidentalis caurina*).

The northern spotted owl was listed under the federal Endangered Species Act as "threatened" in 1990, citing loss of habitat as its primary threat. The Northwest Forest Plan was created in part to provide for the preservation of the northern spotted owl by amending the management plans for federal forests within the range of the species. Despite implementation of the Northwest Forest Plan, the northern spotted owl continues to decline across its range.

According to the Biological Opinion completed for the Project by the United States Fish and Wildlife Service, the Project is likely to result in the incidental take of up to 103 northern spotted owls because the Project will "significantly disrupt the breeding, feeding, and sheltering behavior of these [northern spotted owls] to an extent that causes injury or death." ER 453. No single timber sale implemented since the adoption of the Northwest Forest Plan has resulted in the incidental take of as many spotted owls as the Westside Fire Recovery Project.

[1] "Depensation" describes the situation where a spawning population is so small that the survival and production of eggs or offspring may suffer because it may be difficult for spawners to find mates, or predation pressure may be too great. ER 459. Depensation "accelerates a decline toward extinction." *Or. Nat. Res. Council Fund*, 2004 WL 2554575, at *8.

4. The Westside Fire Recovery Project.

In 2014, wildfires burned on the Happy Camp/Oak Knoll and Salmon/Scott River Ranger Districts of the Klamath National Forest, in the middle portion of the Klamath River Basin. The fires, known as the Westside Fire Complex, burned approximately 162,580 acres of national forestlands with mixed severity, which means that there is a mosaic of unburned, light, moderate, and severely burned areas within each fire. ER 217. Only about 27% of the fires burned at "high" severity, whereas 73% of the fires burned at lower severities. ER 252.

In March 2015, the Forest Service issued a draft environmental impact statement (DEIS) to assess the environmental consequences of the Westside Project, a final environmental impact statement (FEIS) for the Project in July 2015, and a Record of Decision for the Project in February 2016. The Tribe timely commented throughout the project planning process. In order to facilitate implementation of the project, the Forest Service sought an Emergency Situation Determination (ESD) from the Chief of the Forest Service pursuant to 36 C.F.R. § 218.21, which was granted in May 2015. ER 497. The ESD permits the Forest Service to implement the Project without administrative review.

The Westside Project authorizes "area salvage logging:" commercial salvage harvest and reforestation on 5,570 acres within the LSR and Riparian Reserve land

use allocations, largely within three Tier 1 Key Watersheds:[2] the Salmon River, Elk Creek, and Grider Creek Tier 1 Key Watersheds. ER 218. Standing dead, dying, and fire damaged trees (snags) at least 14 inches in diameter at breast height (dbh) will be selected for logging. ER 223. An additional 3,700 acres of "roadside hazard tree removal" will occur along about 320 miles of roadways for the purpose of public and administrative use and safety. ER 216A. The Tribe has not and does not contest or challenge hazard tree removal along roads, which has been ongoing for several months.

To facilitate logging, the Westside Project authorizes construction and use of approximately 12.7 miles of temporary roads, and the use of 40 existing landings for staging of log yarding and hauling operations. ER 221. In addition, 75 new landings comprising up to 130 acres will be constructed that will be used for individual helicopter landings, individual skyline landings, and ground-based landings. ER 456. These landings will be up to two acres in size. *Id*.

The Westside Project authorizes "fuel reduction treatments" on approximately 24,450 acres. ER 219. If funds are available, fuel reduction treatments will occur within ten years after salvage harvest and hazard tree

[2] Key Watersheds are "large refugia comprising watersheds that are crucial to at-risk fish species and stocks and provide high quality water," and are not a unique land classification but overlay other land use classification such as Late-Successional Reserves or Riparian Reserves. ER 507.

removal have been completed. The Project authorizes site preparation, artificial reforestation, and release on approximately 12,700 acres. ER 220. "Site preparation" means the reduction of fuels in areas that have previously been logged, and where fuel loads exceed seven tons per acre or in previous plantations identified as unable to naturally recover. ER 283. "Artificial reforestation" means the planting of conifer species to aid in the artificial reforestation of an area, and may be necessary to establish forests in areas that have been salvage logged, as logging inhibits the natural regeneration of forests. ER 282. "Release" means actions taken to reduce competition for conifers, such as cutting back competing brush, to encourage faster tree growth. *Id.* Cumulatively, these actions are intended to decrease the time to establish a new conifer forest. ER 222. Currently, natural forest regeneration (conifer and vegetative regrowth) is occurring within the planning area, including within units proposed for salvage and replanting.

The Westside Project authorizes "legacy sediment site treatments" at approximately 165 locations that are intended to reduce sediment mobilization and delivery into streams. ER 287. These treatments will occur along Forest Service roads and at stream crossings, and some legacy sites are located on existing landings or on roadbeds. Approximately 148 legacy sites are located in the Elk Creek Watershed, but there is little logging associated with the Westside Project located in this watershed. ER 284A (531 acres). Instead, the majority of Project

work likely to contribute sediment pollution will occur in the Grider Creek and Walker Creek watersheds, where very few legacy sediment sites are located. ER 262A. Treatment of legacy sites for the Westside Project is expected to begin in 2019, may take up to 20 years or longer to complete, and will only take place if funding is available. ER 457.

5. NMFS' Biological Opinion.

The majority of the watersheds in the Westside Project area have steep soil-covered hillslopes that are at or near "sediment mobilization thresholds," meaning they are highly prone to landslides. ER 461. The Westside Fire Complex made the landscape more vulnerable to surface erosion, soil movement, and sediment inputs due to the loss of ground cover, reduced soil cohesion from the loss of rooted plants, and increased water yield. ER 467. This elevated turbidity risk will persist as streams continue to incise through streambed sediment lenses; this winnowing process could take years. ER 468.

On January 16, 2016, NMFS issued a BiOp and ITS for the Westside Project. NMFS found the Westside Project will cause hydrologic alterations, increased sediment erosion and transport to streams, and altered ecological recovery in affected watersheds caused by ground disturbances from timber salvage harvest and yarding, construction of landings and temporary roads, and log hauling on roads. ER 469. NMFS found the Westside Project will cause an

increase in sedimentation in all but one of the watersheds affected by the project; an increase in erosion, landslide risk, and water temperatures; and a decrease in watershed recovery, habitat availability, availability of large woody debris, and water quality. ER 470-485. NMFS found that salvage harvest will result in adverse effects to individual SONCC coho salmon for approximately ten years. ER 491.

The 2014 fires increased the landslide risk in the Westside Project area through a loss of root strength caused by tree mortality. ER 460. NMFS concluded that post-fire logging, reopening and use of decommissioned roads, construction and use of temporary roads on new and existing roadbeds, and the construction and use of new landings will increase the landslide or "mass wasting" risk above the post-fire baseline. ER 487. The Grider Creek and Walker Creek watersheds are particularly susceptible to landslides. ER 496.

NMFS concluded that the duration of elevated landslide risk is influenced by the time to establish new vegetative growth and associated root strength, which serve to hold soils and slopes in place. ER 488. NMFS noted that post-fire logging may slow natural forest regeneration through injuring or removing naturally regenerated seedlings or root collar sprouts, compacting soils, reducing organic matter and soil moisture, increasing temperature from loss of shading, and other processes. *Id.* Consequently, NMFS concluded that Project activities including site preparation, planting, release, and legacy sediment site treatment are all expected

to reduce the long term duration of the elevated landslide risk from approximately 80 years to 30–40 years. *Id.* In particular, NMFS found that site preparation, planting, and release would help reestablish trees and associated root strength: these mitigating project activities are to be implemented only after post-fire logging has occurred and if sufficient funds are available. *Id.* NMFS relied on the occurrence of these activities to reach its no jeopardy conclusion in its BiOp, and did not analyze the impact to the duration of landslide risk should site preparation, replanting, and release, or legacy site treatment not occur or is substantially delayed.

6. Protected Reserves in the Westside Project.

The lands affected by the Westside Project lie largely within two Klamath Late Successional Reserves (LSRs): the Seiad LSR and Eddy Gulch LSR. ER 224. The Seiad LSR, given its size and juxtaposition to the Marble Mountain Wilderness, plays an important role in providing large refugia for spotted owls and numerous other late-successional associated species. ER 561. The Seiad LSR also provides direct refugia for anadromous species such as coho salmon. ER 560. The Eddy Gulch LSR has its origin as a Habitat Conservation Area (HCA) under early northern spotted owl protection regimes, and the intent of the designation was to provide habitat that would support 20 pairs of northern spotted owls in the future. ER 558. In addition to northern spotted owl habitat, the Eddy Gulch LSR

contributes to anadromous fish refugia primarily in the form of high quality water and watershed habitat elements such as large downed wood and gravel, to downstream habitat. ER 559.

> According to Dr. Jerry Franklin, one of the principle authors of the NFP, the
>
> Late Successional-Reserve (LSR) [network], a land use allocation that I helped to create and populate as a member of the Forest Ecosystem Management Assessment Team [FEMAT] (1993)...[was] designed as a robust system of ecological reserves, which could accommodate large intense natural disturbances and the natural recovery processes that were expected to follow them. The FEMAT team well understood that salvage operations would interfere with these recovery processes, which is why they recommended that salvage in LSRs should be very limited in the FEMAT report; this conservative direction with regards to salvage in LSRs was incorporated in the NWFP.

ER 385. Noting that "I rarely submit formal comments on projects but I feel I need to do so because extensive areas of Late Successional Reserves are proposed for treatment" in the Westside Project, Dr. Franklin concluded that "general salvage of large snags and logs is absolutely inconsistent with a goal of recovery of late-successional forest conditions." ER 386.

The Westside Project would allow significant logging within Riparian Reserves as well. Approximately 2,000 acres of salvage are "proposed on steep, weathered granitic lands (geological riparian reserves) in the proposed action." ER 262. In addition, up to 4,400 acres of roadside hazard tree removal, 3,900 acres of

fuel hazard treatments, and about 960 acres of site preparation and planting will occur on unstable lands considered to be geological Riparian Reserves. *Id.*

7. Post-fire Logging Economics.

The quintessential feature of post-fire or "salvage" logging is cutting and removing fire-affected trees. When post-fire logging is undertaken, managers attempt to cut and remove these trees as fast as possible, as insects and fungus begin to decompose the fire-affected trees shortly after the fire is out. Although "blue stain," a fungal infection which stains sapwood blue-gray in color, does not affect the structural integrity of the wood, it is traditionally been considered "undesirable" in the timber and building trade. While this perspective is changing,[3] the longer it takes to harvest trees affected by wildfire, the less stumpage value these trees have at the lumber mill.

Even under the best of situations, sales of federal timber often do not result in a positive economic return to the United States Treasury. ER 54. In the case of post-fire timber sales, the return on investment is even less certain. For the Westside Project, the Forest Service predicted that receipts from Project timber

[3] Indeed, blue stained pine and fir wood now occupies an important niche market. COUNCIL OF WESTERN STATE FORESTERS AND THE SOCIETY OF AMERICAN FORESTERS, *Blue Stain Wood Products*, http://www.wflccenter.org/news_pdf-/283_pdf.pdf (last visited May 28, 2016).

sales would fund only 32.6% of the "total restoration cost."[4] The activities the Forest Service and NMFS considered in this figure include hazardous fuels reduction, site preparation, and reforestation; the cost of legacy site treatments was not included in this analysis. ER 323. To generate 32.6% of the total restoration cost, the FEIS assumed that the Forest Service would receive an average of $173 per thousand board foot (mbf) of timber at auction. ER 324. Instead, it sold the first two Project timber sales for $11/mbf and $6.89/mbf, respectively. ER 205, 207 (sale prices for Slinkard and Walker sales). Since then, it has awarded additional timber sales based on bids incredibly of only *60 cents per mbf*. UNITED STATES FOREST SERVICE, KLAMATH NATIONAL FOREST, *Whites Fire Salvage Re-Offer II, Report of Timber Sold (2400-17)*, http://www.fs.usda.gov/Internet/FSE_-DOCUMENTS/fseprd500675.pdf (last visited May 28, 2016) (awarding sale to high bidder Timber Products).[5] Consequently, the Forest Supervisor admitted during the course of litigation that the Project may generate only $800,000 in

[4] The FEIS states receipts would fund 32.6% of restoration costs, ER 243; the Amendment to the Socioeconomic Report puts this figure at 36.9%. ER 325.

[5] The Tribe asks the Court to take judicial notice of the information available on the Forest Service's website, which consist of government information of public record. *Lee v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001); *Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 727 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 823 (2016) ("We may take judicial notice of "official information posted on a governmental website, the accuracy of which [is] undisputed").

timber sale receipts, a small fraction of the overall cost of implementing the Project. ER 16A.

At these fire sale prices, the Forest Service will never pay for or implement even one-third of the restoration components of the Project, much less all of them. Nor have Federal Defendants demonstrated that any other sources of sufficient funding are available, such as appropriated dollars. Instead, the EIS concedes that "[m]uch of the proposed project will not happen if appropriated dollars are the only funding mechanism." ER 253-254.

V. STANDARD OF REVIEW.

A. STANDARD OF REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT.

This Court must determine whether NMFS's and the Forest Service's actions were "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998). An agency action is arbitrary and capricious "if the agency 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." *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010).

B. STANDARD OF REVIEW FOR DENIAL OF A PRELIMINARY INJUNCTION.

The standard of review for a preliminary injunction is governed by Federal Rule of Civil Procedure 65. *See, Nw. Coal. for Alts. to Pesticides v. Lyng*, 673 F. Supp. 1019 (D. Or. 1987) (employing analysis of *Lopez v. Heckler*, 713 F.2d 1432 (9th Cir. 1983)). The purpose of a preliminary injunction is to preserve the status quo pending a determination of the issues on the merits*Chalk v. U.S. Dist. Court Cent. Dist.*, 840 F.2d 701, 704 (9th Cir. 1988). The denial of a preliminary injunction should be overturned if the lower court incorrectly applied the law, relied on clearly erroneous findings of fact, or otherwise abused its discretion*Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 730 (9th Cir. 1999); *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir. 1996).

A district court's decision is based on an erroneous legal standard if: (1) the court did not employ the appropriate legal standards that govern the issuance of a preliminary injunction; or (2) in applying the appropriate standards, the court misapprehended the law with respect to the underlying issues in the litigation*Sports Form, Inc. v. United Press Int'l*, 686 F.2d 750, 752 (9th Cir. 1982). In such circumstances this Court has found that the district court's decision is reviewed *de novoDoes 1-5*, 83 F.3d at 1152; *see also Sierra Club v. Penfold*, 857 F.2d 1307, 1313 (9th Cir. 1988). Additionally, this Court reviews *de novo* a district

court's review of agency action under § 706(2)(A) of the APA*Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 914 (9th Cir. 1995).

C. STANDARD FOR ISSUANCE OF AN INJUNCTION.

The purpose of an injunction is to preserve the relative positions of the parties pending a trial on the merits. *Univ. of Tex. v. Camenisch*, 451 U.S. 390 (1981). A preliminary injunction (PI) is warranted when a moving party can demonstrate that: (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in their favors, and (4) an injunction is in the public interest*Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008).

Additionally, courts may apply a "sliding scale" approach in their consideration of the success and harm factors*All. For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011) (continuing to apply the sliding scale approach after *Winter*). Under this approach, the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another: a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits. *Id.* at 1131. The Tribe, therefore, need only raise "serious questions going to the merits," so long as they can demonstrate that the balance of hardships tips sharply in their favor and that the other *Winter* factors have been met. *Id.* at 1135 ("the 'serious

questions' approach survives *Winter* when applied as part of the four-element *Winter* test").

In cases brought under the Endangered Species Act, however, Congress has already determined that the balance of equities and public interest favor an injunction*Tenn. Valley Auth.*, 437 U.S. at 194 ("Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities"). As the Ninth Circuit explained, "Congress has decided that under the ESA, the balance of hardships always tips sharply in favor of the endangered or threatened species." *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1035 (9th Cir. 2005); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 793-94 (9th Cir. 2005) ("[i]n cases involving the ESA, Congress removed from the courts their traditional equitable discretion in injunction proceedings of balancing the parties' competing interests").

VI. THE TRIBE HAS RAISED SERIOUS QUESTIONS AND IS LIKELY TO PREVAIL ON THE MERITS.

A. Large Snag Removal from Late-Successional Reserves Violates NFMA.

The Northwest Forest Plan ("NFP") "is a comprehensive response to a long and bitter legal battle over the scope of logging in old-growth forests, home to the endangered northern spotted owl. Indeed, it should be borne in mind that the NFP

is not an ordinary government land-management strategy; instead, the history and care in its creation bespeak the massive effort that led to its birth." *Oregon Nat. Res. Council Fund v. Brong*, 492 F.3d 1120, 1126 (9th Cir. 2007) (internal citations omitted). One of the key features of the NFP is the late-successional reserve (LSR) network, a system of large areas of forests older than 80 years of age designed "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 509.

1. Late-Successional Reserve Objective: Development of Old-Growth Forest Characteristics Including Snags.

The NFP requires salvage logging within LSRs in the Westside Project area to be consistent with LSR Objectives. ER 512 (in LSRs, "planning for salvage should focus on long-range objectives, which are based on desired future condition of the forest"). One important LSR Objective is the "development of old-growth forest characteristics including snags." ER 503. As the NFP explains: "Diseased and damaged trees and logs are key structural components of late-successional and old-growth forests. Salvage of dead trees affects the development of future stands and habitat quality for a number of organisms." ER 504.

The Forest Service authorized extensive large diameter snag removal across more than 5,500 acres from the Seiad and Eddy Gulch LSRs in the Westside

Project: *only* these critical old-growth forest features from the planning area. ER 261. Given that an important objective of late-successional forests is the development and retention of snags, and only snags will be removed from the Project, the Project is inconsistent with the LSR Objective of developing these old-growth forest characteristics. As Dr. Franklin noted, "Large snags and logs of decay resistant species, such as Douglas-fir and cedars, are particularly critical as early and late successional wildlife habitat," the retention of which is essential to meeting the objectives of the LSR land allocation. ER C-6102. The Forest Service does not dispute this point.

2. Focus on Retaining Snags Likely to Persist.

In order to develop old-growth forest characteristics including snags, the NFP states that following stand replacing events such as wildfire, 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." ER 512, 245 (Spotted owl "Recovery Action 12 speaks directly to the need for post-fire silvicultural treatments should focus on conserving and restoring habitat elements that take a long time to develop (e.g. large trees, medium, and large snags, down wood"). The Forest Service noted in the FEIS that snags larger than 14 inches in diameter at breast height ("DBH") are likely to persist in the Westside Douglas-fir ecosystem until late-successional conditions have developed

and the new stand is again producing large snags. ER 226, 242, 225, 244, 269, 444-452 (describing snag persistence of different tree species), 430-443, 522-552, 562-584, 101-103 (collecting cited research). Thus, the Westside Project proposes to remove the very snags that are likely to persist until the next stand is again producing large snags, even though the NFP prohibits this activity.

Moreover, most of the snags the Forest Service *is* retaining are not actually located within harvest units. For example, the FEIS states that "Units are larger than potential treatment areas because they include salvage harvest acres plus areas where no harvest will occur. These include hydrologic riparian reserves, areas with less than 50 percent mortality within unit boundaries, and additional snag retention areas." ER 255. With this approach, the Forest Service has drawn harvest unit boundaries larger than the footprint of the harvested acres, such that the unharvested areas will be where snags, if any, will be retained. ER 257, 268, 264 ("generally, the largest trees occur within hydrologic Riparian Reserves, which are retained"), 246 ("In units less than 100 acres snag retention will only occur in Riparian Reserves and where legacy components occur"). Moreover, FEIS Table G-6 very clearly shows that numerous harvest units have *zero* acres of snag retention at all. ER 227-228 (right hand column "sum of retention (acres)"). The problem with averaging snag retention across large areas, or pushing retention areas to the edge of logged units (and therefore contiguous with unharvested

areas), is that harvest units themselves may be devoid of large snags altogether, which will not provide for wildlife needs within logged areas. ER 255, 257, 268, 264, 227-228.

This management approach was flatly rejected as inconsistent with the NFP by the Ninth Circuit in *Brong*, where the BLM argued that retaining only some snags within LSRs post-harvest complied with the NFP. There, "the BLM asserts that the Project, which entails the removal of a significant number of large snags in late-successional areas, is nonetheless consistent with the NFP" because the BLM proposed to retain *some* snags likely to persist within harvest areas, but also pushed those retained snags to the edge of harvest units such that "over two-thirds of the affected acreage will be *completely* stripped of all salvageable trees." *Brong*, 492 F.3d at 1128, 1130 (emphases in original). The Ninth Circuit dismissed BLM's "some is enough" standard of retention of large diameter snags likely to persist: importantly, "the BLM can point to no part of the NFP to support its argument that using the some-is-enough standard satisfies the Plan." *Id.* at 1129. Indeed, that is because no such standard exists in the NFP. *Id.* at 1128.

BLM's argument also failed because "the amount of large snag retention the BLM claims to be "enough" to satisfy the NFP is only achieved by averaging salvaged and non-salvaged areas together across *all* the acres included in the logging." *Id*. As the Ninth Circuit explained, "if using such an approach was

permitted, the Project could clear-cut all 1,004 acres and still claim to be retaining eight to twelve snags per acre by merely expanding the Project to "include" more land. Clearly, this would be unreasonable, as any adverse environmental effect could be "diluted to insignificance." *Id.* at 1130 (footnotes omitted). The court further explained that "the BLM's attempt to dilute the effects of its proposed activities by averaging the snag retention over such a wide area is inconsistent with the NFP and improper under our precedent. *See Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1035–37 (9th Cir. 2001) (holding that an agency cannot try to "minimize" the environmental impact of an activity by simply adopting a scale of analysis so broad that it marginalizes the site-level impact of the activity on ecosystem health)." *Id.*; *see also, Forest Service Employees for Envtl. Ethics v. Forest Service*, 2005 WL 1514071 (N.D. Cal. June 27, 2005) (same); *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 961-64 (9th Cir. 2005); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213 (9th Cir. 1998).

The Tribe expects the Forest Service will attempt to characterize this argument as one where the Tribe seeks to retain *all* snags likely to persist until the next stand is again developing late-successional characteristics. To the contrary, the Tribe does not argue that *all* snags likely to persist must be retained, but instead that the NFP requires the Forest Service to demonstrate that its proposed salvage

logging activities "focus on retaining snags that are likely to persist until late successional conditions have developed and the new stand is again producing large snags," in about 80 years. Given that many harvest units under the project will have no snags retained, ER 227-228, and other units will only have snags retained in areas not subject to harvest such as hydrologic Riparian Reserves or in areas adjacent to but outside of harvest units, ER 255, 257, 268, 264, 227-228, the Forest Service has not "focused on retaining" snags likely to persist and instead is removing them through logging.[6] ER 265 (portraying the harvest prescription as only removing "some" large snags, as many more will be retained in areas not subject to harvest), 266, 267, 247.

3. Salvage Operations should not Diminish Habitat Suitability Now or in the Future.

Also when considering post-fire logging in LSRs, the NFP provides that "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." ER 511. The FEIS acknowledges that old growth-associated species such as spotted owls, fisher, marten, and several species of cavity excavators (woodpeckers) depend on large diameter snags for suitable

[6] For example, the Forest Service could have proposed a project, much like the Karuk Alternative proposed, that would have retained snags larger than 14" DBH in harvest units, but removed smaller diameter snags that contribute to fire hazard.

habitat and survival, and that their numbers and habitat will decline with the implementation of the project. For example, the FEIS states that "salvage harvest and hazard tree removal will remove many of the snags that would provide for future stand development" for northern spotted owls. ER 240. The FEIS explains that "any change in habitat will likely diminish the possibility of [spotted owl] reproduction...this will likely result in these activity centers having difficulty providing sufficient resources for reproduction as a result" of the Project. ER 273.

Salvage harvest will also negatively affect designated critical habitat for the owl by removing "primary constituent elements" of such habitat through logging: in this case, nesting, roosting, and foraging habitat that contains large diameter trees and high amounts of dead wood on the forest floor "that will be both removed and degraded by proposed activities." ER 238-239. Moreover, "salvage harvest may affect the future development of the stand by removing the large snags that would fall and become large downed logs." ER 241, 271 ("the maintenance of large trees and large woody debris may increase the quality of future NSO habitat"). Compared to the selected alternative, "the lack of treatment [in the no action alternative] will retain all the remaining habitat and important legacy structures to aid in the development of owl habitat by providing physical structure as the stand regenerates. Since northern spotted owls and their prey rely on these structures to fulfill their needs for survival and reproduction, the maintenance of

large trees and large woody debris will increase the quality of future owl habitat." ER 272. The selected alternative will not have these benefits. *Id.*

The FEIS expected that the project is "likely to adversely affect" at least 47 northern spotted owl pairs in a myriad of ways, including through habitat loss, noise harassment, helicopter disturbance, and cumulative effects from past projects. ER 229-237 (Tables G-18 and G-19). According to the Fish and Wildlife Service,

> [T]he proposed action is likely to result in the incidental take of 74 adult and up to 12-29 juvenile NSOs. The take is in the form of harm caused by habitat removal, downgrade, or degradation by implementation of the proposed action that affects approximately 19,700 acres of...habitat. This change in habitat condition is likely to significantly disrupt the breeding, feeding, and sheltering behavior of these NSOs to an extent that causes injury or death. Take of 12-29 juvenile NSOs is due to breeding season operations that may remove undetected nest trees. If this occurs, juvenile NSOs would likely either be crushed by the impact, or would fall out of the nest and be subject to predation or would die from exposure or starvation. Extensive noise disturbance during the breeding season may cause an increased flushing response or reduced feeding of juveniles by adult NSOs increasing the likelihood of exposure/ predation, or starvation of juvenile NSOs.

ER 453. "Overall, 18% of all activity centers on the west side of the KNF will be adversely affected by the proposed activities." ER 237.

But spotted owls are not the only species that will be adversely affected by a decrease in habitat suitability now and in the future. The FEIS explains that the project will reduce "habitat connectivity from 'moderate' to 'low,'" ER 274,

"within 14 of the 36 watersheds analyzed" for fisher, marten, and wolverine, which are late-successional and old growth forest-associated species. ER 276, 270.[7] Regarding snag-associated species in particular, the Project will affect 19,873 acres of snag habitat, which is 14% of these species' habitat in the planning area. ER 275. There can be no rational disagreement that the Westside Project will reduce habitat suitability now and in the future for a variety of species.

4. Salvage will not be Driven by Economic Factors.

The NFP states that in LSRs, "salvage will not be driven by economic…factors." *Brong*, 2004 WL 2554575, at *8. However, one of the principle objectives of the Westside Project is economic recovery of the burned timber. ER 251 (there is a "need for a project that is economically viable"), 253 ("Capturing the maximum economic value of the salvaged timber also benefits Siskiyou County"), 263 (alternative rejected because it "does not meet another part of the purpose and need of the project which is to obtain the maximum economic commodity and value from burned timber"), 256 ("Areas proposed for salvage harvest treatment include...Areas determined to be feasible in terms of...economics"), 258 (units were dropped if they were not economically viable),

[7] The NFP also requires the Forest Service to "Maintain and restore spatial and temporal connectivity within and between watersheds." ER 506. This requirement will not be met in the Project area.

259 (same), 260 (same). According to Dr. Franklin, a principle author of the Northwest Forest Plan and the LSR network, who reviewed the Project:

> One of the major motivating factors in conducting salvage logging in the Westside fire area – including the LSRs – seems to be economic and not ecologic (DEIS, 10-11), which is further indicated by the Chief's "Emergency Situation Determination" and the "Alternative Arrangements" secured from the Council on Environmental Quality. The NWFP specifically directs that, "Salvage will not be driven by economic or timber sale program factors" in LSRs (NFP SFEIS F-21). The teams that put together FEMAT and the NWFP specifically wanted the LSRs to be exempted from the pressures of programmed timber harvest, because the primary drivers in LSRs were ecological and not economic. Hence, it would seem that the salvage proposed within LSR segments as part of the Westside Salvage Project is inconsistent with the goals and principles of LSR management.

ER 388.

Removing large diameter, economically valuable snags from the Seiad and Eddy Gulch LSRs is inconsistent with the LSR objective of developing of snags, does not "focus on retaining snags likely to persist until the next stand develops," and "diminishes habitat suitability now or in the future." Indeed, as Dr. Franklin explained, "I would conclude that the salvage activities proposed within LSRs as part of the Westside Fire Recovery Plan are inconsistent with NWFP intent and direction for management of LSRs, including their treatment following a major disturbance. Salvage will make no positive contribution to the reestablishment of late-successional forest habitat or to the early successional ecosystems that provide habitat for NSO prey species, among many others." ER 392. Consequently, the

Westside Project is in contravention to the requirements of the NFP and Klamath LRMP, and is arbitrary and capricious. 5 U.S.C. § 706(2)(A); *Brong*, 492 F.3d 1120 (9th Cir. 2007).

B. The Failure to Protect All Riparian Reserves from Ground-Based Disturbance Violates NFMA.

The NFP requires the Forest Service to designate "unstable and potentially unstable" areas as Riparian Reserves. ER 513. These areas must be afforded a buffer equivalent to "the extent of unstable and potentially unstable areas (including earthflows)." *Id.* The NFP significantly constrains the types of activities that may occur within Riparian Reserves, including timber harvest, road construction, and fuel reduction work. ER 514-521. Protecting Riparian Reserves, including steep and unstable areas that the Forest Service in this case has termed "geological Riparian Reserves," is important because such protection is "necessary for maintaining hydrologic, geomorphic, and ecologic processes." ER 502; *Oregon Nat. Res. Council Fund v. Goodman*, 505 F.3d 884, 894-95 (9th Cir. 2007); *Oregon Nat. Res. Council Fund v. Brong*, 2004 WL 2554575, at *11 (D. Or. Nov. 8, 2004), *aff'd*, 492 F.3d 1120 (9th Cir. 2007). The authors of the NFP went to great length to explain the importance of protecting steep and unstable areas from mechanical entry, concluding that "land use activities need to be limited or excluded in parts of the watershed prone to instability." ER 415, 395-429. Logging

in Riparian Reserves is extremely limited, and restricted to situations in which salvage is "*required* to attain Aquatic Conservation Strategy objectives." ER 515 (emphasis added).

The Westside Project will conduct salvage logging on approximately 2,000 acres of steep and unstable slopes. ER 278-281. In addition, "There are three temporary access road are proposed that will likely be built directly on ultramafic bedrock," a very unstable landform in the planning area. ER 277-278. Many of these unstable areas are located in Walker Creek and Grider Creek watersheds: "Watersheds with a very high landslide risk have a high potential of landsliding that may affect human life and safety. These watersheds are Lower Grider and Walker Creek." ER 278.

According to the Forest Service,

> The Forest acknowledges the salvage harvest, site preparation and planting, hazard tree, and hazardous fuels treatments proposed for geologic Riparian Reserves. These geologic Riparian Reserves do not have active stream channels like hydrologic Riparian Reserves, and the treatments are proposed because it is anticipated that fuels reduction followed by planting will serve to reduce risk of future high-severity fire and sediment production from surface erosion and mass-wasting processes. A small number of log landings in Riparian Reserves were approved for use after field inspection by watershed staff.

ER 250. The Forest Service appears to justify logging, roading, and helicopter landing construction in geologic Riparian Reserves "because these areas will benefit from hazardous fuels reduction and site preparation and planting in that risk

of future high-severity wildfire will be reduced. Additionally, the areas will become re-forested more quickly (due to planting) thereby lowering the risk of sediment production from surface erosion and mass wasting processes." ER 249. This justification is flawed for at least three reasons. First, the plain language of the NFP restricts entry into Riparian Reserves unless "required to attain Aquatic Conservation Strategy Objectives," ER 515, and a second provision of the NFP prohibits relying on activities such as replanting and fuel reduction to justify entry into Riparian Reserves: the NFP states, "do not use mitigation or planned restoration as a substitute for preventing habitat degradation." ER 520 (WR-3). The Forest Service has not demonstrated how the Project complies with either of these provisions of the NFP.

Indeed, the Westside administrative record is devoid of support that logging is required in order to meet water quality objectives. For example, the ACS Report makes this distinguishing statement: "Active landslides, toe zones of dormant landslides and steep-weathered granitic lands are Riparian Reserves but for this report they will be referred to as unstable lands to avoid confusion." ER 284. The remaining 76 pages of this report do not mention unstable lands again, and nowhere does it demonstrate that these ground-disturbing activities are required to meet ACS Objectives. The Geology Report does discuss unstable lands but only mentions the ACS once, in terms of controlling sediment input into waterways:

nowhere does the geology report detail how or why ground-based activities on unstable lands are required to meet ACS Objectives. ER 322 ("The salvage, site preparation and reforestation will decrease the time needed to reestablish conifer forest on unstable lands....It also helps to meet the Aquatic Conservation Strategy objective focused on sediment regimes"). The Fire & Fuels and Soil Reports only discuss aquatic Riparian Reserves; they do not mention or discuss geologic Riparian Reserves or steep or unstable lands. ER 288-321, 326-384. The FEIS also fails to discuss how or why ground-based activities on unstable lands are required to meet ACS Objectives. Without administrative record support for its actions, the Forest Service's decision to conduct logging within geologic Riparian Reserves is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

Second, the courts have already rejected the Forest Service's failure to designate, buffer, and restrict activity within Riparian Reserves as required by the NFP. In the district court case affirmed on appeal in *Brong*, the court held that not only are Riparian Reserves required around unstable areas, but also rejected the argument that entry into these unstable areas was permissible because they were unlikely to contribute sediment or down wood to streams. *Oregon Nat. Res. Council Fund v. Brong*, 2004 WL 2554575, at *11 (D. Or. Nov. 8, 2004), *aff'd*, 492 F.3d 1120 (9th Cir. 2007) (observing that "the BLM's opinion that no sediment or CWD will reach the stream from these 92 acres (and thus render it

unnecessary to designate the land as Riparian Reserves) is immaterial. The Standards and Guidelines do not use "material delivery to streams" as a criterion for whether land is appropriately designated as Riparian Reserves. Instead, the S&Gs clearly state that the designation must be made on all 'unstable and potentially unstable areas'"); *see also*, *Goodman*, 505 F.3d at 894-95.

Similarly, here, the FEIS posited that entry into geologic Riparian Reserves is permissible "because salvage harvest and site preparation and planting will reduce fuels and hasten revegetation resulting in reduced risk of high-severity fire, surface erosion, and mass wasting in the future." ER 248. However, the NFP does not permit the Forest Service to consider these factors when developing salvage logging projects. *McNair*, 537 F.3d at 987 (holding that "we will reverse a decision as arbitrary and capricious only *if the agency relied on factors Congress did not intend it to consider*...") (emphasis added).

Finally, not only does the NFP preclude reliance on restoration to remedy habitat degradation, ER 520, but also any prospective benefit from salvage logging on ACS Objectives will only be realized if the follow-up hazardous fuels reduction and replanting work actually occurs: as the Forest Service acknowledges, it does not have and is unlikely to secure adequate funding for either fuel reduction or replanting, from timber sale receipts, appropriated, or other funds. *See supra* Section IV.B.7.

C. NMFS' Reliance on Unenforceable Restoration Violates the ESA.

NMFS relied on restoration activities required by the ROD to reach its no jeopardy finding as to the Project's effects on coho salmon. The BiOp describes project components as "fuels reduction, complete site preparation and reforestation, remove hazard trees along roads, and treat Legacy (sediment) sites within the Elk Creek watershed, while also salvaging merchantable dead and dying timber on generally high burn severity sites within the Happy Camp Complex and Whites Fire perimeters." ER 459A. The BiOp articulates NMFS' chief concerns as to the effects of the project on coho as the increased risk of landslides as a result of the fires and project activities, as well as the associated increase of sediment introduced to waterways, both of which can affect coho propagation and survival. ER 491 ("NMFS estimates the effects of salvage harvest, which will result in adverse effects to individual SONCC coho salmon will last for approximately 10 years...the Proposed Action will result in adverse effects to individuals in two watersheds used by the population, Grider and Walker Creek[s]"), 492 ("NMFS estimates the Proposed Action will result in a reduced rate of survival at emergence for SONCC coho salmon due to increased delivery of fine sediment from Project activities. The likelihood of adult coho returning to Grider and Walker creeks is low...").

Based on two specific project components – replanting of trees and the treatment of legacy sediment sites – NMFS ultimately determined that "the Project will, in the long term, following activities such as legacy site treatment and reforestation activities, reduce sediment deliveries resulting from wildfire effects." ER 486, 488 ("Project activities such as fuels treatment, planting, and legacy sediment site treatments, are all expected to reduce the long term duration of this elevated landslide risk from approximately 80 years down to 30-40 years"), 492 ("we expect long term benefits to the population's size from reforestation and legacy site treatments that improve baseline conditions...Because project activities such as tree planting (beginning in 2016) and treatment of legacy sediment sites (beginning in 2019) are proposed, NMFS expects that the baseline conditions will improve in the long term. Specifically, the long term risk of landsliding from wildfires and other means of sediment delivery will be reduced as a result of the proposed Project"), 493 ("The likely increase in long term sediment delivery from the 2014 fires that contributes to the currently degraded baseline conditions, will be reduced from pre-project levels as a result of reforestation and legacy sediment site treatments. Therefore, the fully-implemented project will actually improve the baseline conditions in the Action Area and increase the conservation value of the habitat in the long term").

Regarding the value of replanting trees, the BiOp explains that "project planting will accelerate recovery of trees and root strength...With the application of...revegetation activities, the proposed action may accelerate watershed recovery, or at least not cause significant delays in recovery of processes that affect streams." ER 488, 489 ("sediment delivery to streams as a result of the Project will be minimized through planting in portions of the landscape to accelerate establishment of root structures and stabilize soil"). Similarly, the BiOp explains that the "increase in landslide risk is expected to be greatest during Project implementation, will remain above pre-Project risk levels through the first winter after stabilization, then will return to pre-Project risk levels or below in watersheds were Legacy sites treatments have been completed." ER 487 ("legacy site treatment at 165 locations will further reduce the delivery of sediment to the Klamath National Forest streams"). Indeed, NMFS incorporated a term and condition into the ITS that is "non-discretionary," and requires the Forest Service to "Make concerted efforts to implement Legacy (sediment) site treatments as soon as possible, to help offset effects from Project implementation," ER 494, 495.

There are at least three fatal flaws in the BiOp. First, while NMFS incorporated replanting and legacy site treatments into the no jeopardy conclusion because these are inherent components of the Westside Project, the Forest Service has been clear that there is insufficient funding to implement reforestation and

legacy site treatments across the planning area. *See supra* Section IV.B.7. The only acknowledgement NMFS makes of this critical implementation fact is buried in the BiOp and pertains to legacy site treatment, stating that "the actual Legacy site treatment schedule will be determined by USFS consultation with the North Coast Water Quality Control Board *and funding availability*." ER 457 (emphasis added).

This Court has been clear that reliance on unenforceable project design criteria, mitigation measures, and other speculative actions undertaken to lessen the effects of a federal action and analyzed in a BiOp is arbitrary and capricious. In *Nat. Wildlife Fed'n v. NMFS*, 524 F.3d 917, 935-936 (9th Cir. 2007), this Court reviewed a BiOp in which NMFS relied on an action agency's intention to mitigate impacts from building a dam by installing fish passage structures "where feasible." The court invalidated the BiOp because it was "not persuaded that even a sincere general commitment to future improvements may be included in the proposed action in order to offset its certain immediate negative effects, absent specific and binding plans." *Id.*. In turn, in *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin.*, 99 F. Supp. 3d 1033 (N.D. Cal. 2015), the district court cited *Nat'l Wildlife* and other district court cases within this Circuit to hold that "[m]itigation measures supporting a biological opinion's no-jeopardy conclusion must be 'reasonably specific, certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-enforceable obligations; and most

important, they must address the threats to the species in a way that satisfied the jeopardy and adverse modification standards"). Instead, the "proper course" is for NMFS to "exclude [unenforceable measures] from the analysis and consider only those actions that are in fact under agency control or otherwise reasonably certain to occur." *Id*. at 1055 (citing *Nat'l Wildlife*, 524 F.3d at 936 n. 17; *see also, Center for Biological Diversity v. BLM*, 698 F.3d 1101, 1117 (9th Cir. 2012); *Sw Ctr. for Biological Diversity v. Bartel*, 470 F. Supp.2d 1118, 1141 (S.D. Cal. 2006); *Natural Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322, 350-51 (E.D. Cal. 2007); *Ctr. for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1151–53 (D. Ariz. 2002).

Here, however, the FEIS states that the Forest Service expected to obtain at best only 32% of the necessary funds to implement the complete suite of project activities, and more recent information provided by the agency indicate that it expects to recoup only $800,000, which will be inadequate to fund project-related activities.[8] Given the uncertain and speculative nature of funding to implement sediment site remediation and replanting, NMFS should have analyzed the effects of the Westside Project based on "only those actions that are in fact under agency

[8] Similarly, the admonishment that the Forest Service should "make concerted efforts to implement Legacy (sediment) site treatments as soon as possible" rings hollow, as "make concerted efforts" in no way obligates the Forest Service to actually undertake legacy site treatments. *Nat. Wildlife Fed'n*, 524 F.3d at 935-936.

control or otherwise reasonably certain to occur;" in this case, post-fire salvage logging and hazard tree removal. *Nat'l Wildlife Fed'n, 524 F.3d at 936 n. 17*. The BiOp does not undertake this analysis in reaching its no jeopardy conclusion.

Second, while it is plain that neither replanting nor legacy site treatments will be completed due to lack of funding, it is questionable at best whether the legacy sediment site treatments will have even the speculative benefits claimed. Notably, only 17 of 165 legacy sites are located in watersheds where post-fire logging will occur, ER 456, and only four sites occur in Walker and Grider Creeks, where NMFS determined coho are at the greatest risk due to the adverse cumulative effects of historical management effects, the 2014 wildfires, and the Project. *Id.* NMFS' BiOp does not include any analysis of the effects of the Westside Project on coho if these activities in Walker and Grider Creeks, or the rest of the watersheds where logging will take place, do not occur. The failure to undertake this analysis is arbitrary and capricious. *Nat. Wildlife Fed'n, 524 F.3d at 935-936*.

Finally, as this Court has held, NMFS must analyze impacts to species on a temporal and spatial scale matching the life-cycle of the species. *Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1037 (9th Cir. 2001) (BiOp analyzing impacts to salmon on a 10-year scale at the watershed level is invalid because "[t]his generous time frame ignores the life cycle and

migration cycle of anadromous fish" and because "assuming away site-specific degradations that could lead to a jeopardy finding contradicts the purpose of ESA and is arbitrary"); *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1094 (9th Cir. 2005); *Nat'l Wildlife Fed'n, 524 F.3d at 934-35*. Coho salmon have "a relatively simple three-year life cycle." ER 458. However, the BiOp states that any legacy site treatments (regardless of where they take place) will not begin until 2019, three years after project implementation, and even then "may take up to two decades to complete." ER 455, 457.

The amount of time it will take for any benefits of these speculative treatments to be realized impermissibly far exceeds the three-year life span of coho; as such, the treatments may "not protect the coho, for there will be none to protect." *Pac. Coast Fed'n.*, 426 F.3d at 1094 (finding that without an analysis of short-term impacts to coho, a project to be completed in ten years will not protect coho). NMFS' no jeopardy finding is unlawful because NMFS failed to adequately analyze impacts on the timescale that matters most: the life-cycle of the affected fish. Considering the impact to coho over a twenty-year period "entirely fail[s] to consider an important aspect of the problem." *Id.* (*citing Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43). An agency does not avoid the likelihood of jeopardy to a listed species when it disregards the life cycle of the species in crafting the measures designed to protect it, *Pac. Coast Fed'n v. BOR*, 426 F.3d at 1094,

particularly when those measures are unlawfully speculative and unlikely to occur, *Nat'l Wildlife Fed'n, 524 F.3d at 934-35*.

VII. THE TRIBE IS SUFFERING IRREPARABLE HARM IN THE ABSENCE OF INJUNCTIVE RELIEF, THE BALANCE OF EQUITIES TIPS IN FAVOR OF AN INJUNCTION, AND AN INJUNCTION IS IN THE PUBLIC INTEREST.

Because logging has been ongoing since mid-May, the Tribe and the conservation organizations have suffered irreparable harm in two significant ways. First, because NMFS' biological opinion erroneously reached a no jeopardy conclusion because it relied on unenforceable restoration actions, habitat modification and harm to listed coho salmon is occurring, harm that is irreparable. *See Or. Nat. Desert Ass'n v. Tidwell*, No. 07-1871-HA, 2010 WL 5464269, at *3 (D. Or. Dec. 30, 2010) ("habitat modification that is reasonably certain to injure an endangered species establishes irreparable injury") (*citing Defenders of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 1999)); *Earth Island Inst. v. Mosbacher*, 746 F. Supp. 964, 975 (N.D. Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991) ("for those species now threatened with extinction, the harm may be irreparable in the most extreme sense of that overused term"); *Forest Conserv. Council v. Rosboro Lumber Co.*, 50 F.3d 781, 785 (9th Cir. 1995) ("[o]nce a member of an endangered species has been injured, the task of preserving that species becomes all the more difficult"); *Ctr. for Biological Diversity v. Fish & Wildlife Serv.*, No. C-08-1278

EMC, 2011 WL 6813200, at *4 (N.D. Cal. Dec. 28, 2011) ("[a]lthough Defendants argue that harm to the species as a whole is required, Ninth Circuit case law does not support this proposition"); *Nat'l Wildlife Fed'n v. Burlington N.R.R.*, 23 F.3d 1508, 1512 n.8 (9th Cir. 1994) (recognizing that threat of extinction is not required before an injunction may issue under ESA, as that would be "contrary to the spirit of the statute").

Second, the loss of mature and old-growth forest habitat affected by wildfire, which the Tribe and its members use and enjoy, and which, by definition, cannot grow back within their lifetimes, is irreparable. *Cottrell*, 632 F.3d at 1135 (post-fire logging causes "actual and irreparable injury" to environmental plaintiffs' ability to view, experience, and utilize forested areas in their natural state, even when other areas nearby would remain unlogged); *Portland Audubon Soc'y v. Lujan*, 795 F. Supp. 1489, 1509 (D. Or. 1992) ("[c]ourts in this circuit have recognized that timber cutting causes irreparable damage and have enjoined cutting when it occurs without proper observance of NEPA procedures and other environmental laws"); *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1057 (9th Cir. 1994) ("timber sales constitute per se irreversible and irretrievable commitments of resources" under the ESA).

The Tribe has demonstrated a real interest in the health and recovery of post-fire environments, listed species such as coho and spotted owls, and intact

ecosystems recovering from natural disturbance. ER 17-199, 208-216 (First Declarations of Leaf Hillman, Joshua Saxon, Brittany Souza, Toz Soto, Bill Tripp, Luke Ruediger, George Sexton, Jay Lininger, and Carol Dyer). In particular, the Karuk Tribe is uniquely tied to the land as they have occupied this land since the beginning of time. ER 115, 117, 128. Having originated from the land, the Tribe is spiritually tied to it, such that the spiritual health of the Tribe is intimately connected to the ecological health of the land. ER 120, 128, 117, 25-26. The Tribe has a spiritual duty to properly tend and manage the land, as first delivered by the Spirit People and handed down over generations. ER 26. Salvage logging will harm the Tribe by degrading habitat and harming wildlife critical to Karuk ceremonies, ER 120, 116, degrading spiritually important areas, ER 117, as well as promoting management practices inconsistent with the spiritual direction passed down by ancestors. ER 28-29, 117, 124-125, 208-216, 17-23.

Coho salmon have long been an important foodstuff for the Karuk. ER 120-121. Declines in salmon have harmed the Karuk by reducing the amount of catchable fish, which negatively affects the health of the people. ER 123, 124. Salvage logging will further harm the Karuk by increasing sediment pollution and the risk of landslides. ER 213-215.

While the Karuk have lived in the project area since time immemorial, conservation organization members also live in the area and call it home. ER 139,

32. These individuals also use, recreate in, and otherwise enjoy the specific areas that are being logged and destroyed through project implementation, and plan to continue to do so in the future. ER 137-139, 68-72, 97, 33-36. Conservation organization members enjoy these areas in their unlogged state because they are natural and beautiful, even if affected by a wildfire, and will not be able to use and enjoy these areas as they have in the past now that many of them have been logged. ER 136, 138-139, 35, 97-101, 68-69. Moreover, there are no "substitute" areas where Plaintiffs may go to have the same experience; in *Cottrell*, the court specifically rejected the federal agency's argument that having other places to go, even places nearby and in a similar natural state, would prevent plaintiffs from suffering irreparable harm from the loss of a particular forested area from a specific logging project. 632 F.3d at 1135.

Having demonstrated they will suffer irreparable without injunctive relief, the Tribe need not demonstrate that the balance of the equities tips in its favor because in the context of coho salmon listed under the ESA, "Congress has decided that under the ESA, the balance of hardships always tips sharply in favor of the endangered or threatened species." *Wash. Toxics Coal.*, 413 F.3d at 1035; *Nat'l Wildlife Fed'n*, 422 F.3d at 793 ("[i]n cases involving the ESA, Congress removed from the courts their traditional equitable discretion in injunction proceedings of balancing the parties' competing interests"). As discussed

previously, courts have continued to follow the Supreme Court's ruling in *TVA* in ESA cases after the decision in *Winter*. *See Nw. Envtl. Def. Ctr. v. U.S. Army Corps of Eng'rs*, 817 F. Supp. 2d 1290, 1302 (D. Or. 2011) (applying standard).

Even if other factors are considered here, they weigh heavily in favor of an injunction. Notably, the injunction sought is only temporary in nature, and is narrowly tailored: the Tribe seeks to enjoin only the clear cut salvage unit logging for economic recovery, and does not seek to enjoin hazard tree removal along 320 miles of roads traveled by the public or needed for future management. Indeed, the Tribe has not opposed roadside hazard tree removal, which is ongoing, contributing to local economies, and rendering economic benefit through job creation. Granting an injunction on non-roadside salvage logging would not stop this fiscal contribution to the local economy and would protect public health and safety.[9]

As detailed above, the Tribe is suffering many varied, unique, and deeply felt injuries, should salvage logging continue. These injuries are perhaps most acute for Karuk as the Project will leave a scar on the spiritual, cultural, and subsistence use of their ancestral homelands. In contrast, preserving the status quo

[9] Preserving the status quo is also unlikely to greatly affect the local economy as the overall supply of logs in the local economy would remain unchanged. ER 46-49, 54. Furthermore, the economics costs of the ecological impacts of the proposed logging likely would exceed the timber-related benefits. ER 46, 49-53.

will not deeply injure the federal government or Intervenors, both of whom had notice of prospective litigation before this case was filed and espouse primarily an economic interest in the litigation. *National Forest Preservation Group v. Butz*, 485 F.2d 408, 411 (9th Cir. 1973) (holding that party acts "at his peril" if, after being notified of the lawsuit, he proceeds with action sought to be enjoined); *Idaho Rivers United v. Hudson*, 2015 WL 4170071, at *3 (D. Idaho July 10, 2015) (same).

Moreover, coho salmon in the planning area are highly vulnerable and local populations are near extinction, an occurrence that the public has a significant interest in preventing. *Tenn. Valley Auth.*, 437 U.S. at 194 ("Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities"). The overriding public interest of ensuring compliance with the applicable laws designed to prevent environmental harm outweighs any potential economic harm that could result from temporarily enjoining implementation of the Westside Project. *Cottrell*, 632 F.3d at 1138-39 ("the public interest in preserving nature and avoiding irreparable environmental injury outweighs economic concerns in cases where plaintiffs were likely to succeed on the merits of their underlying claim"). "Such compliance is especially appropriate in light of the strong public policy

expressed in the nation's environmental laws." *Citizen's Alert Regarding Environment v. U.S. Dep't of Justice*, 1995 WL 748246, *11 (D.D.C. 1995).

Once cut, the forests at issue here will not be suitable habitat for nearly a century, if not longer. Similarly, once extirpated from the area, coho salmon will be slow, if ever, to repopulate the area. Given Congress' clear direction in cases involving threatened species, and given how destructive and irreparable the logging authorized by the Forest Service is, the public interest and the balance of equities clearly favor an injunction.

VIII. CONCLUSION.

For the forgoing reasons, the Tribe respectfully requests that this Court grant an injunction pending appeal enjoining the Forest Service and its contractors from implementing the Westside Project.

Respectfully submitted this 29th day of May, 2016.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Karuk Tribe, Environmental Protection Information Center, Center for Biological Diversity, Klamath Riverkeeper, and Klamath-Siskiyou Wildlands Center state that they are non-profit entities that have not issued shares to the public and has no affiliates, parent companies, or subsidiaries issuing shares to the public.

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on the date stated below. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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STATEMENT OF RELATED CASE

Pursuant to Circuit Rule 28-2.6, counsel for Plaintiffs-Appellants certifies that to her knowledge no related case is pending in this Court.

Respectfully submitted this 29th day of May, 2016.

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