No. 06-797

In the Supreme Court of the United States

UNITED STATES FOREST SERVICE, ET AL.,
PETITIONERS

v.

EARTH ISLAND INSTITUTE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In this action under the Administrative Procedure Act, respondents challenge two projects adopted by the Forest Service to restore portions of the Eldorado National Forest that were severely damaged by fire. The court of appeals ordered entry of a preliminary injunction barring the Forest Service from proceeding with those projects.

The question presented is whether the court of appeals erred in ordering a preliminary injunction, including by:

a. Relying on declarations filed by respondents in the district court, rather than confining its review to the administrative record, in determining that respondents had shown a likelihood of success on the merits;

b. Holding that respondents could satisfy the "irreparable injury" prong of the test for obtaining a preliminary injunction by showing only a "possibility" of such injury; and

c. Discounting competing interests in the use of Forest lands under multiple use principles, and the Forest Service's balance of those competing uses, in weighing the balance of harms and the public interest.

PARTIES TO THE PROCEEDINGS

Petitioners are: Dale Bosworth, Chief of the United States Forest Service; Ramiro Villalvazo, Forest Supervisor for the Eldorado National Forest; and the United States Forest Service, an agency of the United States Department of Agriculture.

Respondents who were Plaintiffs-Appellants below are: Earth Island Institute, a California non-profit organization; and the Center for Biological Diversity, a non-profit organization.

Respondent who was the Defendant-Intervenor-Appellee below is: Sierra Pacific Industries, Inc (SPI).

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The Solicitor General, on behalf of the United States Forest Service and the other federal parties, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-58a) is reported at 442 F.3d 1147. The opinion of the district court (App. 63a-78a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 2006. A petition for rehearing was denied on July 12, 2006 (App. 146a-147a). On September 30, 2006, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including November 9, 2006. On October 31, 2006, Justice Kennedy further extended the time

to December 8, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 706 of the Administrative Procedure Act (APA) provides, in relevant part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law[.] * * * The reviewing court shall—
>
> * * * * *
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]
>
> * * * * *
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party[.]

5 U.S.C. 706.

STATEMENT

In this action under the Administrative Procedure Act (APA), 5 U.S.C. 501 *et seq.*, the Ninth Circuit ordered the district court to enter a preliminary injunction barring the United States Forest Service (Forest Service) from further implementation of two projects in the Eldorado National Forest in California. Those projects were adopted by the Forest Service to address deteriorating conditions in the aftermath of serious fires in the Forest and to restore the burned areas. The court of appeals erred with respect to all four of the factors bearing on the propriety of a preliminary injunction. Of particular concern, it applied a watered-down standard of

irreparable injury—allowing the mere "possibility" of irreparable injury to suffice—and erred in evaluating the likelihood of success on the merits on the basis of declarations filed in court rather than the administrative record. The Court should grant review in this case to restore the proper framework for evaluating applications for preliminary injunctions in cases under the APA.

A. The Statutory Framework

The two forest projects respondents challenge in this case are subject to the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, and the National Forest Management Act of 1976 (NFMA), 16 U.S.C. 1600 *et seq.*

1. *NEPA*. NEPA mandates the procedure by which agencies must consider the environmental impacts of their actions, but it does not dictate substantive results. *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 371 (1989). Section 102(2)(C) of NEPA requires federal agencies to:

> include in every recommendation or report on * * * major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action.

42 U.S.C. 4332(2)(c)(i). NEPA is designed to "insure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decisionmaking unit of the agency." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978).

2. *NFMA*. NFMA governs the Forest Service's management of the National Forest System. See generally *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 728 (1998). NFMA directs the Forest Service to develop a land and resource

management plan (forest plan) for each unit of the System to provide for multiple uses and sustained yield of the various forest resources, including timber and wildlife. See 16 U.S.C. 1604(a) and (e); see also 16 U.S.C. 528-531 (requiring Forest Service to administer renewable resources of National Forests for multiple use and sustained yield). A forest plan is a broad, long-term programmatic planning document that establishes goals and objectives for units of the National Forest System, ensuring consideration of economic as well as environmental factors. 16 U.S.C. 1604(g)(1)-(3); 36 C.F.R. 219.1; see *Ohio Forestry*, 523 U.S. at 729-730. Where the forest plan also establishes specific limitations or rules for site-specific projects, an individual proposed project may proceed only if it is consistent with such provisions. See 16 U.S.C. 1604(i); *Ohio Forestry*, 523 U.S. at 730.

3. *APA*. Judicial review of a Forest Service decision approving a project is governed by the APA, under which review is limited to the administrative record and a court may set aside final agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). A reviewing court's inquiry is limited to whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 105 (1983). Factual determinations may be reviewed only to determine whether they are supported by substantial evidence. Such a determination by the agency must be upheld unless no reasonable fact-finder could have reached that conclusion based on the evidence in the administrative record, and the evidence is sufficient to sustain the agency's decision if, in a case to be tried to a jury, it would be sufficient to allow the court to refuse to direct a verdict. *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992); *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939).

B. The Facts And Proceedings Below

1. In October 2004, a fire known as the Power Fire consumed more than 14,000 acres of the Eldorado National Forest. Approximately 48% of that area burned with high intensity, killing between 75 and 100 percent of the trees and incinerating duff and natural litter protecting the soils. App. 64a. Less than ten days later, another fire, known as the Freds Fire, burned 4600 acres in the Forest, 2600 of which burned with high intensity. *Ibid.*

The Forest Service designed a project for each of the burned areas "to restore portions of the fire-ravaged landscape." App. 65a. The Forest Service identified four goals in that regard: (1) to reduce long-term fuel loading (the presence of combustible material) in order to reduce future fire severity and resistance to control; (2) to improve road drainage and establish effective ground cover in severely burned areas to alleviate erosion and sedimentation to streams; (3) to remove certain dead trees while they retain economic value; and (4) to reduce safety hazards to the public and forest workers from trees falling in the future. *Ibid.*; see *id.* at 81a-84a, 115a-120a (Forest Service Records of Decision).

The Forest Service issued Final Environmental Impact Statements (FEISs) for each of the projects on July 1, 2005. App. 65a. The Forest Service issued its Records of Decision (RODs) for the projects on August 1, 2005. The Power project permitted timber harvesting on 5574 acres in the area burned in the Power Fire, and contemplated harvesting of an additional 2600 acres depending on ultimate tree mortality. The Freds project allowed timber cutting on 2900 acres in the area burned by the Freds Fire. *Id.* at 65a-66a.

The projects included mitigation measures designed to minimize environmental effects. App. 65a. For example, the projects provided for "snag (dead tree) retention areas of various sizes, create[d] no harvest zones along perrenial streams, and call[ed] for the preservation of additional dead

trees in other harvest areas of various dimensions and configurations in order to accommodate wildlife dependent on such habitat." *Ibid.* In addition, "[t]ree harvest would be accomplished using skyline and helicopter methods on steeper slopes to minimize soil impacts, and slash (debris) from harvesting operations would be treated, so as to ensure acceptable fuel loading levels while, at the same time, creating ground cover as needed to reduce erosion." *Ibid.*

Because the timber to be harvested was deteriorating and its value declining rapidly, the Forest Service also issued emergency situation determinations, which allowed the projects to be implemented immediately without administrative appeals. App. 66a.

2. a. Respondents Earth Island Institute and the Center for Biological Diversity filed this action under the APA on August 11, 2005, challenging the Power and Freds projects on several grounds. In their Amended Complaint (Compl.), Earth Island Institute asserted a general interest in protecting "all federal public forest lands from commercial exploitation," and that it is "a membership organization with over 15,000 members in the U.S., over 3,000 of whom use and enjoy the National Forests of California for recreational, educational, aesthetic, spiritual and other purposes." Compl. para. 8. Earth Island alleged that it had recently appealed numerous timber sales in the Pacific Northwest and Sierra Nevada, and that it and its members participated in governmental decisionmaking processes concerning National Forests. *Ibid.* The Center for Biological Diversity alleged that it is concerned with "the preservation, protection, and restoration of biological diversity, native species and ecosystems in the Western United States and elsewhere." *Id.* para. 9. The complaint contained general allegations that the interests of both organizations and their members "will be irreparably harmed if the defendants continue to violate NEPA and NFMA," *id.* paras 8, 9, but did not describe how (or even allege that) any of their members would be injured specifically

by the measures to be undertaken in the Freds and Power projects.

b. On August 16, 2005, respondents (collectively Earth Island) moved for a temporary restraining order and preliminary injunction to prevent further implementation of the projects. Earth Island argued, *inter alia*, that the Forest Service (1) used faulty methodology in developing its guidelines for projecting tree mortality, which were used to determine which burnt trees would be cut; (2) ignored adverse impacts of the projects on the California Spotted Owl (CASPO); and (3) failed to compile sufficient population data for certain so-called Management Indicator Species (MIS) of birds identified in the applicable forest plan. App. 66a. In making those arguments, Earth Island relied upon expert declarations generated specifically for use in court. *Id.* at 22a, 34a, 39a, 68a. The declarations themselves totaled 45 pages, with dozens of additional pages of exhibits. Earth Island did not provide the declarations to the Forest Service during the comment period on the FEISs.[1] Like their complaint, respondents' motion did not identify any of their members who would visit the burned areas or how any such members would personally be injured by the two projects.

On August 18, 2005, the district court entered a temporary restraining order that prohibited further timber harvesting while the district court considered Earth Island's request for

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[1] A Notice of Availability of the Draft EIS for the Power project was published in the *Federal Register* on March 25, 2005. The comment period closed on May 9, 2005. App. 97a. The Forest Service provided the same time period for comment on the Freds Draft EIS. Both the Center for Biological Diversity and the John Muir Project (described as a project of Earth Island, see Compl., para. 8) submitted comments on the draft EISs, including comments from experts criticizing the tree mortality guidelines and the Forest Service's mitigation measures for bird species. During the litigation, however, Earth Island did not rely on the comment letters, but instead submitted new declarations that were not part of the administrative record.

a preliminary injunction. On August 25, 2005, the district court denied the motion for a preliminary injunction. App. 63a-78a. Invoking Ninth Circuit standards, the district court stated that, in order to obtain a preliminary injunction, "a party must demonstrate either: 1) a combination of probable success on the merits and the possibility of irreparable injury; or 2) that serious questions are raised and the balance of hardships tips sharply in [its] favor." *Id.* at 67a (citing *Stuhlbarg Int'l Sales Co.* v. *John D. Brush & Co.*, 240 F.3d 832, 839-840 (9th Cir. 2001)). The district court noted that those two alternatives represent two points on a sliding scale, "pursuant to which the required degree of irreparable harm increases or decreases in inverse correlation to the probability of success on the merits." *Ibid.* (citations omitted). The district court further explained, however, that "[u]nder any formulation of the test, plaintiff must demonstrate that there exists a significant threat of irreparable injury." *Ibid.* (citing *Oakland Tribune, Inc.* v. *Chronicle Publ'g Co.*, 762 F.2d 1374 (9th Cir. 1985)).

i. Applying that test, the district court first concluded that Earth Island had not demonstrated a probability of success with respect to any of its claims that the projects violated NEPA and NFMA, reviewing the agency decisions under the APA's arbitrary and capricious standard. App. 68a-77a.[2] Deferring to the opinions of the Forest Service's experts, the court concluded that Earth Island had not made that showing in its challenges to the Forest Service's tree mortality guidelines. *Id.* at 69a-71a. The court explained that examination of the FEISs "shows that the Forest Service identified the methodologies it used in reaching conclusions in these areas, provided supporting data for those conclusions, and cited the

[2] The district court did not specifically address the Forest Service's objection to respondents' reliance on the declarations filed for the first time in court.

scientific literature relied upon for said conclusions." *Id.* at 69a.

The district court also ruled that Earth Island was unlikely to succeed on its claim that the Forest Service violated NFMA by failing adequately to monitor populations of three species—the hairy woodpecker (HAW), black-backed woodpecker (BBW), and Williamson's sapsucker (WSS). The district court accepted Earth Island's contention that Appendix E to the FEIS for the 2001 Sierra Nevada Forest Plan Amendment (SNFPA)—a special framework applicable to several forest plans —requires some level of population monitoring for two of the species, the HAW and the WSS. App. 71a-72a. But it noted that the SNFPA expressly contemplated varying levels of monitoring and "may consequently be read as envisioning a lower level of monitoring, and some flexibility," for species identified in the SNFPA as being of "low" vulnerability, such as the HAW and WSS. *Id.* at 72a. The court concluded that the Forest Service had obtained sufficient information on those species from a Breeding Bird Survey. *Id.* at 70a-74a.

The district court further determined that, even assuming some monitoring violation had occurred, Earth Island had failed to show irreparable harm. The court explained:

> [E]ven if the Power and Freds projects proceed without proper population monitoring for the two woodpecker species at issue, that does not necessarily mean that any immediate and irreparable injury will occur in the absence of that monitoring. Any preference by those birds for severely burned habitat may be more than satisfied by the untreated/unharvested portions of the project areas, which total some 36 percent for Freds and 40 percent for Power. Additionally, even within areas to be harvested some snags will be retained, and acreage for cavity-nesting habitat is set aside in both projects * * * .

App. 74a (footnote omitted).

Finally, the court concluded that Earth Island had not shown a likelihood of success with respect to possible impacts on the CASPO. App. 75a-77a. The court noted that each of the fire areas contained designated protected activity centers (PAC) for the owls, but that it appeared undisputed that much of the area occupied by those PACs was severely burned. "Nonetheless," the court explained, "in an effort to accommodate the needs of the CASPO, the [Forest Service] not only retained as much suitable owl habitat that remained within the project area, but also attempted to retain many of the previously constituted PACs by including some burned habitat." *Id.* at 75a. The court also pointed out that the Forest Service had demonstrated that "prevailing scientific evidence supports the notion that preferred spotted owl habitat entails two canopy layers and between 40 and 70 percent canopy cover, depending on whether the use in question is for nesting or foraging," *id.* at 76a—features that typically would not be present in burned areas. Although Earth Island pointed to a study indicating that spotted owls in southwestern Oregon had spent a significant amount of time roosting and foraging in burned areas, *id.* at 75a, the court noted that both FEISs explained why that study was "preliminary and not dispositive as to suitability," *id.* at 76a.

ii. The district court further concluded that "[e]ven if [respondents] were successful in demonstrating some environmental harm, in balancing the relative hardships there is no presumption that environmental harm should outweigh other potential harm to the public interest." App. 77a. Here, the court observed, the projects serve important public interests, including protecting the Forest and its surrounding communities from the threat of future devastating fires, protecting forest workers and the public from the danger of falling trees, and generating funds for future reforestation. *Id.* at

77a-78a. The court thus concluded that the balance of hardships did not tip sharply in Earth Island's favor. *Id.* at 77a.

3. a. On March 24, 2006, the court of appeals reversed the district court and directed it to issue a preliminary injunction. App. 1a-58a. The court first determined that Earth Island's challenges to the projects were not moot, despite the substantial progress that had been made to implement the projects and harvest in the burned areas. The court reasoned that some timber harvest remained and, in any event, "revising the tree mortality guidelines, monitoring of the California spotted owl, and obtaining more accurate population surveys of MIS bird species" could provide "some effective relief" to Earth Island. *Id.* at 13a. The court then proceeded to address the four factors that must be considered in determining whether a preliminary injunction would be proper.

In first addressing the likelihood of success on the merits, the court conducted an essentially de novo review and reached a conclusion contrary to that of the district court, based primarily on Earth Island's non-administrative-record declarations. The Forest Service again objected to consideration of those declarations, but the court dismissed that objection, stating without elaboration that it could consider them to "determine whether the agency has considered all relevant factors and has explained its decision." App. 22a (quoting *Southwest Ctr. for Biological Diversity* v. *USFS*, 100 F.3d 1443, 1450 (9th Cir. 1996)). Crediting Earth Island's experts, the court concluded that Earth Island had shown a strong likelihood of success on its NEPA challenges to the accuracy of the tree mortality guidelines and to its related challenge to the adequacy of the FEISs' analyses of the projects' effects on the CASPO. *Id.* at 18a-33a, 38a-46a. The court also decided that Earth Island was likely to succeed on its NFMA claim that the Forest Service failed to conduct MIS monitoring allegedly required under the SNFPA. *Id.* at 46a-54a.

With respect to a showing of irreparable injury, the court of appeals held that the district court erred in requiring a

plaintiff to show a "significant threat of irreparable injury" in order to obtain preliminary injunctive relief. App. 13a-16a. Instead, the panel interpreted prior Ninth Circuit decisions to require a plaintiff to show only a "mere possibility of irreparable harm" if it demonstrates a probability of success on the merits. *Id.* at 15a. Here, the court held that Earth Island had made such a showing, because the projects "may result in the unnecessary cutting of trees that would otherwise survive, in harm to the [CASPO], and * * * to several MIS bird species." *Id.* at 54a-55a.

The court also concluded, contrary to the district court, that "the balance of hardships * * * tips in Earth Island's favor." App. 55a. The court characterized the injuries to the Forest Service and intervenor Sierra Pacific Industries (SPI) as merely "economic losses"—presumably referring to the lost economic value of the deteriorating timber—and ruled that the public interest in prevention of potential irreparable environmental damage was paramount. *Ibid.* In considering the public interest, the court did not mention the fire prevention, public safety, and forest reforestation benefits of the projects that the Forest Service had identified and that the district court cited as supporting the denial of injunctive relief.

b. Judge Noonan filed a concurring opinion. App. 57a-58a. Judge Noonan suggested that the Forest Service has a financial conflict of interest when it sells timber from National Forests. *Id.* at 57a. He reiterated his previously stated view that if the Forest Service is a "biased adjudicator," then "its determination is a nullity." *Ibid.* (citation omitted). However, unlike the panel majority, Judge Noonan was uncertain as to Earth Island's likelihood of success. He observed that it is difficult for a reviewing court to master the large record in an environmental case "and to be confident in its discrimination between expert opinions." *Ibid.* Therefore, he would have remanded the case to the district court to conduct an "investigation and evaluation" of the Forest Service's finan-

cial interest in the timber sales, to apply the correct legal standard, and "to make its own estimate of the probability of Earth Island's success on the merits." *Ibid*.

4. After the court of appeals denied the government's petition for rehearing en banc, the case was remanded to the district court. That court entered the required preliminary injunction on August 31, 2006. Order Granting Prelim. Inj. 1-5 (Aug. 31, 2006).[3] The court allowed the Forest Service to remove logs that have already been cut and hazard trees, but enjoined further timber harvest. Although some of the timber has deteriorated in value, timber not yet harvested retains economic value and would be harvested if the injunction is vacated.

REASONS FOR GRANTING THE PETITION

In reversing the district court's decision denying a preliminary injunction, the court of appeals seriously erred with respect to the showing a plaintiff must make to justify the entry of a preliminary injunction. First, in determining that respondents had demonstrated a likelihood of success on the merits, the court of appeals relied on its own de novo review of declarations and appended material filed by respondents in the district court, rather than confining itself to determining whether the Forest Service's decisions were arbitrary and capricious on the basis of the administrative record. Second, the court also held that respondents could satisfy the irreparable injury prong by demonstrating a "mere possibility of irreparable harm," App. 15a, expressly rejecting any requirement that they must show at least a significant risk of irreparable harm, *id*. at 15a-16a. Those rulings are fundamentally wrong and squarely conflict with decisions of this Court and other courts of appeals.

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[3] The court of appeals had granted an emergency injunction pending appeal on January 11, 2006. App. 59a-60a. A motions panel of the court had previously denied such an injunction. *Id.* at 61a-62a.

In addition, the court of appeals erred in evaluating the third and fourth factors, the balance of harms and the public interest. On both factors, the court gave dispositive weight to impacts it perceived on habitat of certain species of birds, none of which is listed as endangered or threatened under the Endangered Species Act of 1973, without addressing whether there would be any resulting significant impact on the viability of the species themselves. At the same time, the court discounted or ignored entirely other interests that, by statute, must be considered by the Forest Service in the administration of National Forests under principles of multiple use and sustained yield. The net effect was to deprive the Forest Service of its statutorily conferred role in weighing competing objectives.

Review by this Court is warranted to correct the Ninth Circuit's significant legal errors and resolve the resulting conflicts with decisions of this Court and other courts of appeals. Review is also warranted because of the decision's considerable practical importance, given the vast tracts of public land in the Ninth Circuit and the disruption to management of those lands and circumvention of orderly administrative processes that it allows. Review will enable this Court to restore a workable standard for preliminary injunctions in the Ninth Circuit for actions brought under the APA.

I. The Ninth Circuit Erred With Respect To Each Of The Four Factors To Be Considered In Ruling On A Motion For A Preliminary Injunction

A. Likelihood of success on the merits. The court of appeals departed dramatically from this Court's precedents and those of other courts of appeals by relying on evidentiary submissions outside the administrative record to hold that Earth Island had established a likelihood of success on the merits. The "scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n*

v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). And as the Court has repeatedly stressed, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (quoting *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam)). The court therefore must review the agency's decision under the APA's arbitrary and capricious test on the basis of the administrative record, *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 743-744 (1985); *Citizens to Preserve Overton Park Inc.* v. *Volpe*, 401 US. 402, 415, 419-420 (1971) (*Overton Park*), and must sustain the agency's factual determinations unless any reasonable fact-finder would be compelled to reach a contrary conclusion under the standards applicable to a directed verdict or judgment notwithstanding a jury verdict in court. See *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992).

The rule limiting judicial review to the administrative record on which the agency made its decision applies with equal force to NEPA cases, see *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 553-555 (1978), and to rulings on preliminary injunction motions, see *American Biosci., Inc.* v. *Thompson*, 243 F.3d 579, 582 (D.C. Cir. 2001). By confining judicial review to the administrative record, the APA precludes the reviewing court from substituting its opinion for that of the agency, *United States* v. *Morgan*, 313 U.S. 409, 422 (1941), and maintains the integrity and primacy of the administrative process by requiring a party who wishes to oppose the agency's proposed action to submit his evidence and arguments to the agency in the first instance, *Department of Transportation* v. *Public Citizen*, 541 U.S. 752, 764-765 (2004).

The Ninth Circuit nonetheless held that it could consider Earth Island's new evidentiary submissions in court to "determine whether the agency has considered all relevant factors and has explained its decision." App. 22a (quoting *South-*

west Ctr. for Biological Diversity, 100 F.3d at 1450). In fact, Earth Island offered the non-record declarations of Dr. Edwin Royce and Monica Bond as new grounds for attacking the Forest's Service's data and evaluations, and that is the purpose for which they were used by the court of appeals. *Id.* at 19a-45a. The court of appeals performed a detailed, side-by-side comparison of those declarations and the competing expert declarations the government felt compelled to file to respond to those of Earth Island, decided that the opinions of Earth Island's experts were more persuasive, and found on the basis of that exercise that Earth Island was likely to succeed on the merits. *Ibid.*

The court of appeals' approach finds no support in this Court's decisions and is fundamentally incompatible with standard principles of deferential review of agency action. This Court has made clear that supplementing the administrative record is allowed only when that record is so inadequate that the reviewing court cannot understand the agency's decision or the basis of that decision. And even in that situation, any supplementation of the record would be in the form of an explanation *by the agency* of the basis for its decision. See *Camp* v. *Pitts*, 411 U.S. at 142-143 ("If * * * there was such failure to explain administrative action as to frustrate effective judicial review, the remedy [is] * * * to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary."); *Overton Park*, 401 U.S. at 420 (stating that where there are no formal findings, examining the decisionmakers themselves may be the only way there can be effective judicial review).[4]

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[4] The preferable course where the agency's explanation is inadequate might instead often be to remand to the agency to afford it an opportunity to furnish a more complete explanation within the established procedures for agency decisionmaking.

That limited exception would not apply in a case like this, in which the agency record includes a ROD and FEIS for each project, as well as extensive administrative record material. Those materials are far more than sufficient for the reviewing court to understand the basis of the agency's decision. And in any event, the limited exception identified in *Camp* v. *Pitts* and *Overton Park* would not permit consideration of new evidentiary materials submitted in court by parties challenging the agency's decision.[5]

Other courts of appeals limit the exception to those cases in which the agency's decision is inadequately explained. *E.g.*, *Voyageurs Nat. Park Ass'n* v. *Norton*, 381 F.3d 759, 766 (8th Cir. 2004); *Commercial Drapery Contractors, Inc.* v. *United States*, 133 F.3d 1, 7 (D.C. Cir. 1998). When there is "a contemporaneous administrative record and no need for additional explanation of the agency decision, 'there must be a strong showing of bad faith or improper behavior' before the reviewing court may permit discovery and evidentiary supplementation of the administrative record." *Newton County Wildlife Ass'n* v. *Rogers*, 141 F.3d 803, 807-808 (8th Cir. 1998) (quoting *Overton Park*, 401 U.S. at 420). Consistent with these principles, most courts of appeals do not permit plaintiffs to attack the agency's decision on the basis of materials outside the administrative record. See, *e.g.*, *American Coke & Coal Chems. Inst.* v. *EPA*, 452 F.3d 930, 945 (D.C. Cir. 2006); *NVE, Inc.* v. *Department of Health & Human*

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[5] The Ninth Circuit itself has, in other cases, recognized the prohibitions on the use of extra-record materials to attack the substantive basis of the agency's decision. See, *e.g.*, *Center for Biological Diversity* v. *United States Fish & Wildlife Serv.*, 450 F.3d 930, 943-944 (9th Cir. 2006); *Southwest Ctr. for Biological Diversity*, 100 F.3d at 1450-1451; *Association of Pac. Fisheries* v. *EPA*, 615 F.2d 794, 811-812 (9th Cir. 1980).

Serv., 436 F.3d 182, 189 (3d Cir. 2006); *Custer County Action Ass'n* v. *Garvey*, 256 F.3d 1024, 1028 n.1 (10th Cir. 2001).[6]

The court of appeals' decision to consider such extra-record materials here thus was wrong, inconsistent with this Court's decisions, and in conflict with decisions of other courts of appeals. The court's consideration of those materials tainted virtually its entire analysis of respondents' likelihood of success on the merits. If review is confined to the administrative record, under the arbitrary and capricious standard, Earth Island has not begun to make the required showing of a likelihood of success on the merits.

The court of appeals believed that the two projects must be enjoined because the Forest Service had not conducted adequate monitoring of certain MIS species of birds. See App. 46a-54a. The general framework applicable to the Eldorado National Forest under the SNFPA does contemplate some degree of monitoring for the HAW and WSS, although as the district court noted, it also contemplates flexibility in the case of such species, whose vulnerability is "low." See Resp. C.A. E.R., Tab 1, at E-62 to E-64. More fundamentally, however, the Forest Service interprets the monitoring provision as a plan-level goal dependent upon future funding, not a binding commitment. See Pet. C.A. Br. 25-26 n.8. As this Court made clear in *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 72 (2004), such "'will do' projections of agency action set forth in land use plans" are "not a legally binding commitment." But even if the Forest Service had an

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[6] In *National Audubon Soc'y* v. *Hoffman*, 132 F.3d 7, 15 (2nd Cir. 1997), the Second Circuit suggested that the scope of a court's authority to allow supplementation of the record might be greater in NEPA cases, reasoning that the court needs to understand whether the agency has ignored significant environmental impacts of its action and the agency record itself may not answer that question. That suggestion cannot be squared with this Court's decision in *Public Citizen*, 541 U.S. at 764-765, which requires that objections to the NEPA analysis be provided to the agency during the comment period.

obligation to conduct greater monitoring than it did, nothing in the SNFPA purports to condition the Forest Service's authority to approve site-specific actions on the performance of such general monitoring. Moreover, as the district court ruled, the data from the Breeding Bird Survey, on which the Forest Service relied, furnished an adequate evidentiary basis for the Forest Service's decisions for these two projects.

With respect to the possible impact on the CASPO, the court of appeals acknowledged the extensive mitigation measures undertaken by the Forest Service to protect areas for those birds. See App. 40a-43a. In nevertheless finding that respondents had established a likelihood of success on the merits, the court relied almost entirely on factual assertions made in respondents' declarations concerning the CASPO, *id.* at 39a-40a, 45a, and on the court's criticism of the Forest Service's mortality guidelines for selecting which trees to cut, *id.* at 44a-45a, which in turn was also based on such assertions and was itself confused and seriously flawed. Moreover, as the district court pointed out, App. 75a-76a, the FEISs specifically addressed the study cited by respondents suggesting that spotted owls might use burned habitat, and explained why the Forest Service did not find it sufficiently probative.

B. Irreparable injury. The Ninth Circuit's decision also waters down the irreparable harm component of the plaintiff's burden in seeking a preliminary injunction to the point that the requirement is effectively meaningless. On that ruling as well, the Ninth Circuit's decision conflicts with decisions of this Court. It also conflicts with decisions of other courts of appeals, which have held that at least a significant likelihood of irreparable harm must be shown regardless of the plaintiff's likelihood of success on the merits.

1. The Ninth Circuit has generally applied a sliding scale approach to preliminary injunctions, under which the required degree of irreparable harm increases as the probability of success decreases. See, *e.g.*, *Clear Channel Outdoor Inc.* v. *City of Los Angeles*, 340 F.3d 810 (2003); *Los Angeles*

Mem'l Coliseum Comm'n v. *NFL*, 634 F.2d 1197, 1200-1201 (1980). The district court in this case held that no matter where the case falls on the sliding scale, "plaintiffs must demonstrate a significant threat of irreparable injury." App. 67a. The court of appeals expressly disagreed, holding that a showing of a "mere possibility" of irreparable harm was sufficient for Earth Island to carry its burden. *Id.* at 15a.[7]

a. The Ninth Circuit's dilution of the irreparable harm requirement conflicts with decisions of this Court. "The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Sampson* v. *Murray*, 415 U.S. 61, 88 (1974) (quoting *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 506-507 (1959), and citing *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921 (9th Cir. 1958)); accord *Mazurek* v. *Armstrong*, 520 U.S. 968, 972 (1997); *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312 (1982). In *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975), the Court held that "[t]he traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he *will suffer* irreparable injury *and also* that he is likely to prevail on the merits." (emphasis added). The Court has continued to apply that test. See *Ashcroft* v. *ACLU*, 542 U.S. 656, 666 (2004); *Grupo Mexicano*

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[7] This express disavowal of a "significant risk" requirement marks the resolution of two lines of decisions in the Ninth Circuit. In one line, the court had held that a preliminary injunction may be issued based on nothing more than a possibility of harm. See *Earth Island Inst.* v. *USFS*, 351 F.3d 1291, 1298 (9th Cir. 2003); *Kootenai Tribe* v. *Veneman*, 313 F.3d 1094, 1115 (9th Cir. 2002); *Sammartano* v. *First Judicial Dist. Court*, 303 F.3d 959, 972-973 (9th Cir. 2002); *Idaho Sporting Cong.* v. *Alexander*, 222 F.3d 562, 565 (9th Cir. 2000). In another line of cases, however, the Ninth Circuit had held that under any formulation of the sliding scale, "plaintiff must demonstrate that there exists a significant threat of irreparable injury." *Simula, Inc.* v. *Autoliv, Inc.*, 175 F.3d 716, 725 (1999); *Associated Gen. Contractors of Cal., Inc.* v. *Coalition for Econ. Equity*, 950 F.2d 1401, 1410 (1991), cert. denied, 503 U.S. 985 (1992); *Big Country Foods* v. *Board of Educ.*, 868 F.2d 1085, 1088 (1989); *Oakland Tribune Inc.* v. *Chronicle Publ'g Co.*, 762 F.2d 1374, 1376 (1985).

de Desarrollo S.A. v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 340 (1999) (Ginsburg, J., concurring in part and dissenting) (citing *Doran*, 422 U.S. at 931); *Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531, 545 (1987). See also *eBay Inc.* v. *MercExch., L.L.C.*, 126 S. Ct. 1837, 1839 (2006).[8]

This is not the first time the Ninth Circuit has departed from that requirement. In *Gambell*, the Ninth Circuit had ruled that "[i]rreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impacts of a proposed action." 774 F.2d 1414, 1423 (1985). It further decided that injunctive relief was the appropriate remedy for violation of an environmental statute "absent rare or unusual circumstances." *Ibid*. This Court reversed, reiterating its ruling in *Romero-Barcelo* that courts should apply traditional equitable principles in deciding whether to enjoin violations of environmental statutes absent an express limitation placed on those principles by Congress. 480 U.S. at 541-543. The Court also rejected the Ninth Circuit's presumption of irreparable harm and stated that irreparable injury must be "*sufficiently likely*" before an injunction is issued. *Id*. at 545 (emphasis added).

The Ninth Circuit's "possibility of irreparable harm" standard in some ways strays even farther from traditional equitable principles than the *Gambell* presumption, since a presumption of harm can be rebutted, while disproving a "mere possibility" of harm is rarely feasible, particularly in land-use cases where a site-specific action will almost always have some impact on the physical environment. Thus, the Ninth Circuit's "mere possibility" standard is akin to no standard at all. See *Beltran* v. *Smith*, 458 U.S. 1303, 1305 (1982) (mere possibility of additional risk did not rise to the level of irreparable injury necessary to obtain a preliminary injunction).

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[8] *eBay* involved a permanent injunction, but the test for irreparable harm is essentially the same when the plaintiff seeks a preliminary injunction. See *Gambell*, 480 U.S. at 546 n.12.

b. Consistent with this Court's requirements, the courts of appeals have generally insisted that a plaintiff seeking a preliminary injunction show that it will be irreparably harmed absent relief from the court, not just that such harm is possible. See, *e.g.*, *Globe Nuclear Servs. & Supply GNSS, Ltd.* v. *AO Techsnabexport* 376 F.3d 282, 287 (4th Cir. 2004); *Siegel* v. *LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc); *AlliedSignal, Inc.* v. *B.F. Goodrich Co.*, 183 F.3d 568, 573 (7th Cir. 1999); *Rushia* v. *Town of Ashburnham*, 701 F.2d 7, 9 (1st Cir. 1983). Accordingly, other courts of appeals have held that a mere possibility of irreparable harm is insufficient to justify an injunction, either by expressly so stating, see *Borey* v. *National Union Fire Ins. Co.*, 934 F.2d 30, 34 (2d Cir. 1991), or by holding that the plaintiff must show a "realistic prospect" or "significant risk" or "substantial likelihood" of irreparable injury, see, *e.g.*, *Matos ex rel. Matos* v. *Clinton Sch. Dist.*, 367 F.3d 68, 73 (1st Cir. 2004); *Greater Yellowstone Coal.* v. *Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003); *Adams* v. *Freedom Forge Corp.*, 204 F.3d 475, 484-485 (3d Cir. 2000); *Siegel*, 234 F.3d at 1179. Under those decisions, the plaintiff must at a minimum show a significant risk of irreparable harm in order to obtain an injunction. That standard is demanding. See *Adams*, 204 F.3d at 485.

Some circuits have adopted a version of a sliding scale, but their tests retain the requirement that the plaintiff show at least a significant risk of irreparable harm as the ticket for admission to the enjoining of an action, regardless of the action's illegality. For example, in the Fourth Circuit a plaintiff who raises serious questions on the merits, but cannot establish a likelihood of success on the merits, may obtain a preliminary injunction by showing that the balance of hardships strongly favors relief. See *Rum Creek Coal Sales, Inc.* v. *Caperton*, 926 F.2d 353 (4th Cir.1991); *Blackwelder Furniture Co.* v. *Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977). But the plaintiff still "must show that it will sustain irreparable harm without a preliminary injunction. The 'balance of hardship'

test does not negate the requirement that the [plaintiff] show some irreparable harm." *Rum Creek Coal Sales*, 926 F.2d at 360. Similarly, the Tenth Circuit has adopted a sliding scale but requires the plaintiff to show at least a significant risk of irreparable harm. See *Greater Yellowstone Coal.*, 321 F.3d at 1258, 1261-1262.

The Second Circuit has endorsed a sliding-scale approach in some circumstances (with a showing of irreparable harm as a necessary component), but it will not apply that approach when injunctive relief is sought "against government action taken in the public interest pursuant to a statutory or regulatory scheme." *Forest City Daly Housing, Inc.* v. *Town of N. Hempstead*, 175 F.3d 144, 149 (2d Cir. 1999). That rule reflects appropriate judicial deference to "legislation or regulations developed through presumptively reasoned democratic processes." *Ibid.* (quoting *Able* v. *United States*, 44 F.3d 128, 131 (2d Cir. 1995) (per curiam)). The Second Circuit also will not apply that approach when "an injunction will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits." *Id.* at 150 (citation omitted). Thus, the Second Circuit would not apply the sliding scale here, where the projects were undertaken pursuant to statutory directive to serve public interests identified by Congress. Moreover, for salvage logging projects such as these, which attempt to derive some value from a wasting asset, a preliminary injunction may grant the plaintiff substantially all the relief it seeks because the fire-damaged timber may deteriorate in value so much prior to final judgment that the Forest Service may have to cancel the timber sale even if it ultimately prevails.

2. Not only did the court of appeals base its ruling on a mere possibility of injury, the court did not identify any injury to any member of either of the respondents. Instead, the court pointed merely to the general possibility of environmental injury. App. 55a. That is insufficient to justify an injunction. In *Friends of the Earth* v. *Laidlaw*, 528 U.S. 167 (2000),

the Court explained that in cases alleging environmental injury, the relevant showing for purposes of Article III standing "is not injury to the environment, but injury *to the plaintiff*." *Id.* at 180-181 (emphasis added). "[T]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review *be himself among the injured*." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 563 (1992) (quoting *Sierra Club* v. *Morton*, 405 U.S. 727, 734-735 (1972)) (emphasis added).

Here, Earth Island's burden was much greater because "[a] plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief." *Caribbean Marine Servs. Co.* v. *Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (citation omitted). The plaintiff organizations failed to show that their members face any such threat from implementation of the projects. Their amended complaint alleged only generalized interests in public forest lands. Compl. paras. 8, 9. Even assuming that the record showed a possible risk of irreparable harm to Forest resources, the organizations failed to show that their members actually use those Forest resources, and that the members' use and enjoyment of those resources is in imminent danger of being irreparably injured if operations continue.

3. Had the court of appeals required Earth Island to demonstrate a significant threat of irreparable harm rather than a mere possibility of injury, Earth Island could not have prevailed. The court of appeals concluded that Earth Island had shown a "possibility" of injury to "several MIS bird species," without explaining the nature of that possible harm. App. 54a-55a. None of the MIS bird species for which the court of appeals found monitoring violations (the HAW, WSS, and BBW) is listed as an endangered or threatened species under the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.;* nor are they designated as sensitive species in Forest Service Region 5, C.A. E.R. Tab 9, at 184, Table 3-44. The

mere cutting of trees that a non-listed, non-sensitive bird species might otherwise use as habitat is not irreparable harm. See *Fund for Animals* v. *Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975).[9] Moreover, as the district court noted with respect to the HAW and WSS, "[a]ny preference by those birds for severely burned habitat may be more than satisfied by the untreated/unharvested portions of the project areas" and by burned habitat outside of the project areas. App. 73a-74a & n.2.[10]

As for the CASPO, while it is not a federally listed threatened or endangered species, it is designated as a "sensitive species" for the Eldorado National Forest.[11] The district court correctly concluded that, "in an effort to accommodate the needs of the CASPO, the [Forest Service] not only retained as much suitable owl habitat that remained within the project area, but also attempted to retain many of the previously constituted [protected activity centers for the CASPO]

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[9] In addition, the WSS is a "forest associate," a species "found to be less abundant in recent high intensity burned forest as compared to unburned forest." Power FEIS, C.A.E.R. Tab A at 197 & Table 3-51.

[10] The district court did not make any specific determination concerning harm to the BBW. It did not need to do so because population monitoring is not required for that species. The document the district court accepted as requiring population monitoring for the HAW and the WSS does not mention the BBW. Resp. C.A. E.R. Tab 1, Table E-9. In any event, the court of appeals failed to identify any irreparable injury to the BBW, and the record rebuts any such theory. See Power FEIS, C.A. S.E.R. 249, Table 3-77 (showing that, while timber harvest will reduce the heavily burned habitat added by the 2004 fires, the estimated available habitat and number of BBW individuals in the Power project area will still be greater after the timber harvest than before the fires).

[11] In June of 2005, the United States Fish and Wildlife Service issued a "90-day finding" under the ESA, 16 U.S.C. 1533(b)(3)(A), determining that sufficient information existed to warrant a review of whether the CASPO should be listed under the Act. 70 Fed. Reg. 35,607 (June 21, 2005). The Service has since determined that listing is not warranted. 71 Fed. Reg. 29,886 (May 24, 2006).

by including some burned habitat." App. 74a; see also App. 40a-43a.

C. Balance of harms and the public interest. Finally, the court of appeals erred in its cursory discussion of the balance of harms and the public interest insofar as it bears on the issuance of an injunction. The court acknowledged that, "with some reason," both the Forest Service and SPI contend that "they will suffer economic losses if we enjoin the timber sales." App. 55a. But the court pointed to what it regarded as the importance of "the public's interest in preserving precious, unreplenishable resources," and concluded that loss of anticipated revenues did not outweigh the potential irreparable damage to the environment. *Ibid.* (quotation omitted). Similarly, the court concluded that a preliminary injunction would advance the public interest, stating simply that "[t]he preservation of our environment, as required by NEPA and the NFMA, is clearly in the public interest." *Ibid.* The court's analysis was divorced from both the statutory scheme and the record in this case.

The Forest Service is charged with managing National Forests under principles of multiple use and sustained yield of resources. "Multiple use management is a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put." *Southern Utah Wilderness Alliance*, 542 U.S. at 58. Any consideration of the balance of harms and public interest in determining whether a court should exercise its equitable discretion to issue a preliminary injunction must be consistent with the governing statutory framework that itself establishes that all of these competing uses, not merely the use of some trees as habitat by certain non-endangered species of birds, are in the public interest. See *Gambell*, 480 U.S. at 545-546; *Virginia Ry. Co.* v. *System Fed'n No. 40*, 300 U.S. 515, 551 (1937). Indeed, because Congress has vested in the Secretary of Agriculture, through the Forest Service, the responsibility for balancing the various competing uses under

principles of multiple use and sustained yield, there is a decided public interest in respecting the balance that has been struck by the Forest Service, absent a clear showing at the preliminary-injunction stage of the case that the Forest Service's decision was arbitrary and capricious and that specifically identified and substantial irreparable injury will very likely ensue. A court should not be able to use its sense that some of the factors the agency must balance have at least the possibility of causing irreparable injury to allow it to frustrate the agency's decision and ultimately the entire statutory scheme.

Here, moreover, the court of appeals made no effort to ascertain the *weight* that should be accorded to the "possible" irreparable injuries to burned trees and the bird species that might use some of the habitat, much less the weight that should be accorded to the as-of-yet unidentified injuries to any of respondents' members that might result from any incremental impact on bird habitat. The court instead viewed the possibility of irreparable injury to those interests to be determinative.

The areas at issue in this case were already badly damaged by severe fires, and the Forest Service adopted projects having a variety of goals in response, including reducing fuel loading to decrease the risk of future fires, alleviating erosion, reducing safety hazards, and removing certain dead trees while they still had economic value. See pp. 5, 10, *supra*. In balancing harms, the court considered only the last factor, and dismissed it on the ground that it was a mere economic consideration. That approach, aside from focusing too narrowly on just one of the projects' goals, ignores the reality that the damaged timber was a wasting asset that the Forest Service, as a good steward of the public's resources, had an obligation to take into account, and that the loss of that asset would be irreparable if not harvested within a reasonable time after the fires. The court's approach also ignores the directive of Congress itself, in the statutes governing management

of the National Forests, that such competing uses should be taken into account by the Forest Service,[12] and therefore must be taken into account by a reviewing court as well when considering whether to enjoin the Forest Service from proceeding.

For these reasons, the court of appeals erred not only with respect to the likelihood that respondents would succeed on the merits and the mere "possibility" of irreparable harm, but also in weighing competing harms and considering the public interest.[13]

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[12] NFMA encourages salvage logging. 16 U.S.C. 1604(k), 1611(b). NFMA and related legislation also encourage the prevention of forest fires, public safety protection, and reforestation. See, *e.g.*, 16 U.S.C. 475, 551, 1601(d)(1), 1604(g)(3)(B), 1606a.

[13] The court of appeals also disregarded the deferential standard of review applicable to appellate review of preliminary injunction rulings, see *eBay,* 126 S. Ct. at 1839; *Doran*, 422 U.S. at 931-932 (citing *Brown* v. *Chote*, 411 U.S. 452, 457 (1973)), repeatedly ignoring the district court's evaluation of the evidence and substituting its judgment without pointing to any factual errors committed by the district court. A vivid example of that disregard is the manner in which it substituted its balancing of the hardships and interpretation of the public interest for the district court's exercise of its discretion. The district court concluded that "[e]ven if plaintiffs were successful in demonstrating some environmental harm," important public interests favored the denial of injunctive relief. App. 76a-77a. See pp. 27-28 & note 12. The court of appeals ignored the public interests the district court relied upon and substituted its view that the mere possibility of environmental injury outweighed the injuries to the government and SPI (which it incorrectly claimed are limited to "economic losses"). App. 55a. The abuse-of-discretion standard of review required the court of appeals to defer to the district court's reasonable balancing of the hardships. Its refusal to do so reflects a hostility to the Forest Service that it laid bare at the conclusion of its opinion, where it accused the Forest Service of putting financial considerations above compliance with the law. *Id.* at 57a.

II. Review By This Court Is Warranted

Review by this Court is warranted. As explained above, the Ninth Circuit erred with respect to the showing respondents were required to make on all four of the factors that must be considered in determining whether a preliminary injunction is proper. Moreover, as we have also explained, its decision conflicts with decisions of this Court and other courts of appeals.

In addition, the decision below is of substantial practical importance, especially given the vast tracts of public land in the Ninth Circuit that are now subject to the rules announced by that court. The Ninth Circuit encompasses more than 120 million acres of the 192.7 million acres in the National Forest System, and an additional 197 million acres of public lands under the jurisdiction of the Bureau of Land Management. The Ninth Circuit's decision opens up a wide avenue for wholesale circumvention of orderly agency processes by allowing parties challenging land-use decisions to rely in court on evidentiary materials never submitted to the agency. It also invites broad disruption of the ongoing management of federal lands by providing for the entry of a preliminary injunction on the basis of nothing more than a mere possibility of irreparable injury. And it disregards the substantial public interest in the balance struck by the agency, pursuant to statutory mandate, among the various potential competing considerations involved in the management of public lands. The Court should grant review to restore the proper standards for issuing preliminary injunctions in APA actions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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