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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

FRIENDS OF GUALALA RIVER, et al.,

Plaintiffs,

v.

GUALALA REDWOOD TIMBER, LLC,

Defendant.

CASE NO. 3:20-cv-06453-JD

DEFENDANT GUALALA REDWOOD TIMBER, LLC'S OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION [CORRECTED]

Date: June 24, 2021
Time: 10:00 a.m.
Courtroom: 11
Judge: Hon. James Donato

Action Filed: September 15, 2020
Trial Date: None

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INTRODUCTION

This action concerns a Timber Harvesting Plan (THP) that covers private timberlands located in Sonoma County. The gist of the action is that implementation of the THP will allegedly result in take of protected species. The THP includes myriad requirements to avoid take and Plaintiffs' allegations are meritless.

A brief summary of recent events: In ***February 2021***, the California Court of Appeal issued an opinion upholding the THP. That opinion followed years of litigation involving Plaintiff FOGR and state court proceedings are now final. On ***May 4, 2021***, an expert agency responsible for water quality, the North Coast Regional Water Quality Control Board, approved harvesting under the THP, noting its staff had "closely scrutinized the proposed plan" and conducted multiple site inspections. Carr Decl. Ex. A. Following formal U.S. Fish & Wildlife Service (USFWS) take avoidance guidelines, Defendant conducted seasonal protocol surveys for the Northern Spotted Owl (NSO) and submitted them to the California Department of Forestry and Fire Protection (CALFIRE) for approval. Multiple surveys conducted during 2021 did not detect any NSO in the area covered by the THP. Town Decl. ¶ 8, Ex. C. CALFIRE approved of the NSO surveys on ***May 20, 2021***. Lastly, on ***May 24, 2021***, the California Department of Fish and Wildlife (CDFW) issued a final Streambed Alteration Agreement for operations under the THP, prohibiting take and imposing avoidance requirements, including for the species at issue. Carr Decl. Ex. B.

Multiple expert agencies have closely reviewed the THP and are familiar with Plaintiffs' alleged claims. The expert agencies do not agree. And the California Court of Appeal has now authorized operations to proceed, after previously enjoining the project. At this juncture, Plaintiffs are left only with generalized and extreme theories that can be easily dismissed. Plaintiffs should have brought this claim long ago and for that reason Defendant has separately moved to dismiss this action on res judicata grounds. Plaintiffs also suggest that the rigorous state law process was inadequate, but the THP itself implements relevant federal take avoidance requirements. And Plaintiffs are wrong on many facts. Plaintiffs tell this Court that areas were last logged 100 years ago and suggest it is old growth. Both statements are simply untrue. Plaintiffs know full well that these lands are industrial timberlands and that they have been logged numerous times in recent

years. As explained more fully below, we respectfully ask that the Court deny this motion and end this long-running litigation.

BACKGROUND

As noted, the THP has been the subject of years of litigation and that long history is detailed in the recent decision of the California Court of Appeal upholding the THP. ECF No. 41. A summary of the procedural history also is set forth in Defendant's pending motion for judgment on the pleadings.[1] ECF No. 63. To avoid unnecessary duplication, Defendant does not repeat that history here.

A. The Gualala River Watershed and Dogwood Area

The Dogwood THP is a timber harvesting plan located in far Northwestern Sonoma County, within the Gualala River watershed. McMahon Decl. ¶ 12; AR 5104-05. The area subject to the THP comprises 342 acres of timberlands on land owned by Defendant. *Id.*; AR 5111. Topography of the THP area is almost entirely flat with a few minor exceptions (e.g., unit #1 which is moderately steep). McMahon Decl. ¶ 12. Thus, the existing road and skid trail network in the THP is otherwise flat; no new roads or skid trails will be constructed. *Id.*

The Plaintiffs write that the Gualala floodplain was "[l]ast logged over 100 years ago…", is "primeval in quality, with towering redwoods and Douglas firs that evoke the old growth forests that formerly blanketed the coastal range to Santa Cruz and beyond." ECF No. 61 (Mot.) at 1. Plaintiffs also write: "it has been approximately 100 years since the lower floodplain of Gualala River was logged…" *id*. at 4, and that the THP area "was last logged approximately a century [ago]." *Id*. at 5. In fact, the forest in the THP area is comprised almost entirely of second growth redwood trees on industrial managed timberlands that have been selectively harvested at least two, and in some places three times, in the last 40 years. McMahon Decl. ¶¶ 9-10.

[1] During the multi-year review of the THP, a lengthy administrative record (AR) and a subsequent supplemental administrative record (SAR) were developed and each page is affixed with a Bates-range. Carr Decl. Ex. C. An electronic copy of the entire AR and SAR were previously lodged with the Court. The THP is part of the AR and SAR. For convenience, a stand-alone copy of the THP also was filed with the declaration of John Bennett. ECF No. 18. All citations to the AR and SAR are to the Bates-range stamped at the bottom of each page.

B. Primary Attributes of the Dogwood THP

Before initiating tree harvesting activities, Defendant was required by the California Forest Practice Rules to submit, and obtain CALFIRE review and approval of, a timber harvesting plan prepared by a Registered Professional Forester (RPF). Kent Decl. ¶ 7; Pub. Res. Code § 4581; 14 Cal Code Regs. (CCR) §§750-83 *et seq.*; 1035.1; 1600-1651 (RPF licensing requirements and duties). The Forest Practice Rules are highly prescriptive, dictating every aspect of timber operations, ranging from rotation age constraints (14 CCR § 913.l (a)(l)) to stream side buffer zones (14 CCR § 916.5) to replanting requirements (14 CCR §§ 913.5, 912.7). Kent Decl. ¶ 7. CALFIRE is prohibited by the Forest Practice Rules from approving a timber harvesting plan (in fact, it "shall disapprove" a timber harvesting plan) if "[i]mplementation of the plan as proposed would result in a 'taking'" of a listed species, or "would cause significant, long-term damage to listed species." 14 CCR § 898.2(d); Kent Decl. ¶ 8. For federally listed species, the Forest Practice Rules define "take" to be the same as the federal Endangered Species Act's definition of take. 14 CCR § 895.1.

The Forest Practice Rules have an entire, stand-alone article devoted to requirements and measures to ensure no adverse effects from harvesting, road and landing construction, and other timber operations on water quality, aquatic and riparian species, or riparian ecological functions, including from sediment and temperature. Kent Decl. ¶ 9; *see* 14 CCR §§916-916.12. Over the last three decades, these rules were revised multiple times to increase restrictions and limitations, and were made significantly more restrictive in 2010 when the Anadromous Salmonid Protection (ASP) Rules, adopted by the California State Board of Forestry in 2009, became effective. Kent Decl. ¶ 10; 14 CCR § 916.9; *see also* Gentry Decl. ¶¶ 5-11 (ASP Rule development process). And in 2015, substantial revision to the Forest Practice Rules to enhance the requirements to address sediment-related impacts from roads (the "Road Rules") became effective. Kent Decl. ¶ 10; 14 CCR § 923.2; *see also* Gentry Decl. ¶¶ 12-18 (Road Rule development process).

The logging operations required by the THP are highly-constrained. Kent Decl., ¶ 18. Defendant will not be engaged in "clearcutting" this site but rather will be utilizing light-touch selection harvesting techniques where some trees can be cut but a high percentage of the largest

trees will be retained, which is a requirement of the Forest Practice Rules within flood prone areas. *Id.* The majority of the larger trees in the areas covered by the THP will be preserved due to the requirement of the ASP Rules to "thin from below," which means releasing the larger dominant residual trees to grow larger by removing the co-dominant and smaller trees. *Id.* The ASP Rules are a special part of the Forest Practice Rules designed to protect salmonids and restore, over time, old growth habitat conditions that will benefit those species. *Id.*; McMahon Decl. ¶ 15. Thus, the THP is implementing "restoration forestry" that has increasingly been practiced on timberlands owned by state and federal parks and conservation organizations in the Coast Redwood Region. McMahon Decl. ¶¶ 26-28; Reynolds Decl. ¶¶ 4-6.

Logging will be accomplished outside the winter period (Nov. 1 to Apr. 1), utilizing ground-based yarding methods. McMahon Decl. ¶ 13. Plaintiffs claim "GRT will fell the trees, then drag them through the forest undergrowth"; "[l]andings – clearings carved out for the sorting and loading of logs for shipping – will be created." Mot. at 5. In reality, operations will be limited to existing, pre-flagged skid trails, and sorting and loading will also take place on existing landings that have been utilized in past harvest operations. MacMahon Decl. ¶ 13. No new road construction is allowed for the THP. *Id.* Because of the ASP Rules, the THP requires retention of canopy cover by zones and the 13 largest conifer trees on each acre that encompasses these zones. *Id.* at ¶ 16. It is likely that, rather than the 13 largest trees, approximately 20 of the largest trees will be retained in these zones and post-harvest canopy cover will be robust. *Id.*at ¶¶ 17-20.

C. The THP Operations Are Limited by the ASP and WLPZ Rules.

The Dogwood THP is governed by the Forest Practice Rule's highly restrictive Watercourse and Lake Protection Zone (WLPZ) and ASP regulations. 14 CCR §§ 916-916.12 (WLPZ); 14 CCR § 916.9(f)(3), Table 2 and Figure 5 (ASP); AR 5111-12. These restrictions, by zone, are helpfully set forth in the "Dogwood THP Silvicultural Summary" table and the "Class 1 WLPZs with flood prone areas" table showing canopy retention, large tree retention, silviculture and operational requirements in the THP. AR 5112, 5129. WLPZ and ASP operational requirements, including in-lieu requirements, are also set forth in narrative form in the THP. AR 5118-41.

The closer a zone is to the Gualala River or one of its tributaries (Class l), the more restrictive the harvesting and operational limits. *See* 14 CCR § 916.9 *and*, Figure 5 which is a graphic profile view of the Class 1 WLPZ zones in flood prone areas and channel migration zones. These and other requirements of the THP for the protection of water quality and fish and wildlife, including the listed species Plaintiffs put at issue in this case, were subject to formal, multi-agency review in which the Regional Water Board and CDFW experts participated. Kent Decl. ¶¶ 6-33; Gentry Decl. ¶¶ 25-36.

STATUTORY SCHEME

Section 9 of the Endangered Species Act (Act) prohibits "take" of endangered or threatened species. 16 U.S.C. § 1538(a)(1)(B). The term "take" is a technical term, which means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19); *see also* 50 C.F.R. § 17.3 (defining "harm" and "harass").

Take may include indirect harm (e.g., habitat modification), but only if it "actually kills or injures wildlife." *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 924-25 (9th Cir. 1999). "[H]abitat modification or degradation, standing alone, is not a taking pursuant to section 9. To be subject to section 9, the modification or degradation must be *significant*, must *significantly impair essential* behavioral patterns, and must result in *actual injury* to a protected wildlife species." *Az. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1238 (9th Cir. 2001) (quoting 46 Fed. Reg. 54748) (emphasis in original); *see also Seattle Audubon Soc'y v. Sutherland*, No. C06-1608MJP, 2007 WL 2220256, at *15 (W.D. Wash. Aug. 1, 2007) ("[E]vidence that recovery of a species is impaired, without a showing of likely death or injury, is insufficient to prove ESA take.").

Litigation under the Act often is brought directly against federal agencies to enforce Section 7 of the Act. 16 U.S.C. § 1536(a)(2). Such litigation is typically brought under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, which involves different standards relative to actions against private parties to enforce Section 9 of the Act. *See Az. Cattle Growers' Ass'n*, 273 F.3d at 1238; *Defs. of Wildlife v. U.S. Fish & Wildlife*, No. 16-CV-01993-LHK, 2016 WL 4382604, at *1 (N.D. Cal. Aug. 17, 2016).

Under some circumstances, a private party may obtain a permit authorizing incidental take of a protected species pursuant to Section 10 of the Act. 16 U.S.C. § 1539(a)(1)(B). However, the Ninth Circuit has explained that agencies cannot issue incidental take authorization in circumstances where there is insufficient evidence that take would occur if the permit were issued. *Az. Cattle Growers' Ass'n*, 273 F.3d at 1238. Avoiding take is the preferred policy of the Endangered Species Act. *See* 16 U.S.C. § 1531(c)(1) (policy to "conserve endangered species and threatened species").

Violations of the Act can result in civil and criminal liability, including monetary penalties and injunctive relief. 16 U.S.C. § 1540. The Act authorizes citizen suits but a private plaintiff's right to enforce the Act is limited. For example, a citizen plaintiff cannot obtain civil penalties, and it generally must provide 60 days' notice to relevant agencies before commencing suit. Only injunctive relief is available to a private plaintiff and it must show an imminent threat of take is "reasonably certain" to occur. *Marbled Murrelet v. Babbitt*, 83 F.3d 1061, 1066 (9th Cir. 1996).

STANDARD OF REVIEW

A preliminary injunction is an "extraordinary remedy." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id*. at 20. Following the Supreme Court's decision in *Winter*, the Ninth Circuit has recognized the continued viability of a sliding scale standard. "Under that standard, a plaintiff can meet the burden of obtaining a preliminary injunction even when there are 'serious questions going to the merits' – a lesser showing than a likelihood of success on the merits – if the balance of hardships strongly favors the plaintiff." *Cascadia Wildlands v. Scott Timber Co.*, 715 F. App'x 621, 623-24 (9th Cir. 2017). However, under the sliding-scale standard, a plaintiff must still show "there is a likelihood of irreparable injury and that the injunction is in the public interest." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). As an equitable remedy, "[f]ederal courts are not obligated to grant an injunction for every violation of the law." *Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1511 (9th Cir. 1994).

ARGUMENT

A. Plaintiffs' Declarations Are Flawed and Deserve Little, If Any, Weight.

Silviculture is a complex science that involves the sustainable management of timberlands in a manner that is consistent with water quality and wildlife protection. In California, Registered Professional Foresters are responsible for the development and implementation of Timber Harvesting Plans and have special expertise in a range of silviculture practices. They work closely with biologists, hydrologists, ecologists and others to develop sustainable harvesting plans.

Plaintiffs did not submit a single declaration from a Registered Professional Forester. And the declarations submitted by Plaintiffs reflect a fundamental misunderstanding of the highly technical requirements of the THP. For that reason, it is unsurprising Plaintiffs offer opinions that are fairly described as generalized and disconnected from the particulars of the THP and the physical features of the property. The Court should give little weight to such materials.

B. Plaintiffs Cannot Meet Their Burden.

Plaintiffs allege that implementation of the THP is "reasonably certain" to result in take of four listed species: California red-legged frog, the Northern spotted owl, coho salmon and steelhead. Plaintiffs are mistaken.

1. Likelihood of Success

As shown above, the THP includes myriad conditions based on the expert conclusions of state and federal agencies. Those agencies have concluded that the THP is not likely to result in take and Plaintiffs' allegations to the contrary have no merit. However, before explaining why the terms of the THP doom Plaintiffs' take theories, Defendant discusses why this action fails on procedural grounds.

a. Res Judicata

The doctrine of res judicata bars Plaintiffs' claims and Defendant has filed a separate motion asking that the Court dismiss this action for that reason. ECF No. 63. Under California law, res judicata bars relitigation of the same causes of action between the same parties or those in privity with them. *Rangel v. PLS Check Cashers of California, Inc.*, 899 F.3d 1106, 1110 (9th Cir. 2018). The phrase "cause of action" has a technical meaning and extends to all claims that were

brought or could have been brought to address the same injury regardless of the label of the claim or legal theory. *See Villacres v. ABM Indus. Inc.*, 189 Cal. App. 4th 562, 576 (2010). This is known as the "primary rights theory" under California law. And the Ninth Circuit has explained that the focus of the inquiry under the primary rights theory is on the specific harm alleged. *City of Martinez v. Texaco Trading & Transp., Inc.*, 353 F.3d 758, 762 (9th Cir. 2003).

As explained in Defendant's pending motion, Plaintiff FOGR filed three lawsuits in state court challenging the THP and those proceedings are now final for all purposes. Just like this case, Plaintiff FOGR alleged in the state court proceedings that it was seeking relief to prevent harm to its "personal, recreational and aesthetic interests." ECF No. 63-1 (Molina Decl. Ex. E, ¶ 16). Just like this case, the gist of the prior state court proceedings was that implementation of the THP allegedly would result in harm to wildlife and water quality, including to the California red-legged frog and salmonids. Both plaintiffs are in privity with one another given their alleged injuries and interests completely overlap. Res judicata prevents such vexatious litigation and each requirement for its application is met here.

b. **Reasonable Certainty**

i. California red-legged frog

Plaintiffs' contention that implementation of the THP is "reasonably certain to cause take of the CA red legged frog through both direct take and indirect take" is meritless. Mot. at 15. Throughout their opening papers, Plaintiffs either ignore the requirements of the THP or misread them. Plaintiffs do both here.

Plaintiffs state that the THP "acknowledges" that the proposed logging "will cause" through logging activities the "killing of certain slow-moving…animal species," citing page 146 of the THP. Mot. at 15 (citing SAR 7129). Plaintiffs then say the California red-legged frog are such slow-moving species, all in an apparent effort to suggest that the THP itself acknowledges take. *Id.* The contention is incorrect and misleading.

Plaintiffs cherry pick language from the THP's cumulative impacts section and fail to mention that the cited language comes from the biological assessment portion of the THP, which merely discusses "*potential* biological impacts." SAR 7129 (emphasis added). After identifying

potential impacts, the THP concludes on the next page that "no reasonably potential significant effects" are expected given the harvesting requirements, including with respect to biological impacts. AR 5308. The THP then devotes more than 50 pages to discussing a range of plants and animal species (including the California red-legged frog) and ultimately finds the "light selection harvesting" and other THP requirements will avoid significant cumulative adverse biological impacts. SAR 7151-95; SAR 7160-61 (California red-legged frog).

Nor do Plaintiffs offer any meaningful analysis of the THP's take avoidance requirements for the frog. The take avoidance requirements for the frog were developed specifically for California timberlands by the USFWS in collaboration with CALFIRE. If the federal guidelines are implemented, USFWS has determined that "take is not likely to occur when presence is known or assumed" under certain scenarios. Jennings Decl. Ex. D, ¶ 18. The THP conservatively assumes presence and implements the federal take avoidance guidelines (Scenario 4 during dry season), which require a 30-foot no-cut buffer within all suitable habitat, restricts equipment within the no-cut buffer, trees must be felled away from suitable habitat, restricts road and landings construction within 300 feet from suitable habitat, regulates water drafting (for dust abatement) drafting restrictions, and more. AR5142, 5152-64; *see also* Jennings Decl. Ex. D. Plaintiffs ignore these stringent requirements. In addition, on May 24, 2021, the CDFW re-issued a Lake or Streambed Alteration Agreement for the THP. Kent Decl. Ex. E. That agreement also imposes conditions on top of the THP, including pre-work surveys and vehicular requirements for the California red-legged frog (Sections 2.7, 2.9). *Id*.

Instead, Plaintiffs contend, in conclusory fashion, that the THP (i) "fails to account for a myriad of other areas of suitable habitat" and that (ii) "for these other areas [Defendant] has no plans to implement any take mitigation measures whatsoever." Mot. at 16. As to the former, Plaintiffs made a similar argument in state court, arguing that Registered Professional Forester did not properly map or survey for wetlands or wet areas. Plaintiffs lost. SAR 6624-6626. As to the latter, Plaintiffs overlook the THP's terms. For example, the THP requires the Licensed Timber Operator, an independent third-party that fells trees, to be on the "lookout for [relevant] species and report any observations to the supervising [Registered Professional Forester] who will report

presence to the [California Department of Fish & Wildlife] for consultation." AR 5142. The THP also directs the Licensed Timber Operator to do the following:

> If an unmapped spring is discovered [the Registered Professional Forester] shall be informed to investigate for the presence of Red-Legged Frogs. If a red-legged frog is discovered during timber operations, operations within 500 feet of the area will cease and CALFIRE and CDFW will be informed immediately.

AR-5142. So Plaintiffs' assertion that the THP has no other "mitigation measures whatsoever" is simply untrue. *See* Jennings Decl. ¶¶ 33-53.

Plaintiffs' reliance on the Kupferberg declaration also is misplaced. Kupferberg states her overall conclusion is that "to avoid take of Red-legged Frogs, [Defendant] should implement the maximum buffer of 1 mile around aquatic habitats as recommended by the [USFWS] in their recovery plan for this species (USFWS 2010)." No harvesting could occur with 1-mile buffers. Even if credited, that opinion effectively says that take will be avoided altogether if no harvesting occurs. That is not the standard under the Act. *See* Jennings Decl ¶¶ 26-30, 37 (explaining why 1-mile buffer is inapplicable). Kupferberg needed to persuasively show that implementation of the THP is "reasonably certain" to result in take of the frog. She did not even offer that opinion.

As to the opinions that were offered, Kupferberg qualifies them with terms such as "may" or "could have" and multiple assumptions in an effort to show what might be possible—but the law requires more than speculation. For example, Kupferberg speculates that take is reasonably certain to occur "*if* larvae are present, *and* vulnerable to water extraction *and* when recent metamorphs are present *and* vulnerable to vehicle strikes." Kupferberg Decl. Ex. A, at 12. Likewise, Kupferberg surmises that the "physical disturbance to the ground when logs are skidded is reasonably certain to cause take of Red-legged frogs *if* frogs are present *and* no actions are taken to inspect an area and clear it of frogs." *Id.* at Ex. A, at 10. Kupferberg's factual assumptions also are incorrect. Kupferberg assumes that "[r]oad construction" will likely lead to harm of Red-Legged Frogs. *Id.* at Ex. A, at 13. New road construction is not allowed under the THP; the existing road network must be used. AR 5132, 5328 [THP 27, 166].

Beyond that, Dr. Jennings, the foremost expert on the frog who petitioned for its listing, explains why Kupferberg's extreme positions deserve no weight. Jennings Decl. ¶¶ 18-21, 23, 37-

41, 44, 49, 54-57. For example, Dr. Jennings explains that the THP conservatively assumes the presence of the frog but in fact suitable habitat is "quite limited." *Id.* at ¶ 38. To support an extreme 1-mile buffer, Dr. Jennings observes that Kupferberg mistakenly refers to a 2010 USFWS document as a "recovery plan." *Id.* at ¶ 26. The 2010 document referenced by Kupferberg is not a recovery plan. Dr. Jennings (who participated in the drafting of the actual recovery plan from 2002) explains Kupferberg is actually referring to a Revised Designation of Critical Habitat document, "which refers to buffer zones for designated California red-legged frog critical habitat, the distances of which vary among the critical habitat units designated." *Id.* Dr. Jennings notes that Kupferberg does not reference the federal "THP-Specific Take Avoidance Guidance (2008)," which reflects "advances in science and conservation biology, and is supported by subsequent studies and the effective, professional work of federal and state wildlife biologists and regulators." *Id.* at ¶ 37. Consistent with the federal guidelines, Dr. Jennings explains that during the summer when harvesting is allowed under the THP that the frogs "will travel, at most, 30 feet from a wet area when it is dangerously hot and dry" and that such "distance is well within the buffers required by the Dogwood THP around wet areas." *Id.* at ¶ 39. Dr. Jennings concludes that take is "highly unlikely to occur from timber operations pursuant to and in compliance with the Dogwood THP." He agrees with the expert federal and state agencies. *Id.* at ¶ 57.

ii. Salmonids

Plaintiffs' contention that implementation of the THP is reasonably certain to cause take of coho and steelhead lacks merit. Mot. at 12. Plaintiffs' expert, Dr. Frissell asserts a panoply of mechanism to spin up a take theory. Each fails. As discussed below, those generalized theories are largely detached from the on-the-ground and in-the-watershed facts specific to the Dogwood THP. For the most part, they are based on general literature not specific to the Coast Redwood Region, which does not account for the Forest Practice Rules, and the ASP and Road Rules in particular. In some instances, the literature cited is inapposite or incorrectly applied.

Nor do Plaintiffs explain why the separate permitting requirements of the North Coast Regional Water Quality Control Board regulating sediment discharges and the California Department of Fish and Game regulating sediment inputs and water drafting fall short. Kent Decl.

¶¶11-13 and Exs. B-D; ¶¶14, 20-23 and Ex. E. In terms of the in-the-watershed facts, it is questionable whether coho are even present in the South Fork Gualala River, which Frissell seems to concede. Frissell Decl. at 1, 6-7. Serious limitations exist on extrapolating coho presence based on the eDNA sampling upon which Plaintiffs' rely. Berge Decl. ¶¶ 5, 6-10. Regardless, even if coho are present in the watershed and the South Fork, take of them is not likely and Plaintiffs' theories cannot overcome the considered views of expert agencies that have analyzed these same issues during the THP review process.

For example, Plaintiffs contend that implementation of the THP is reasonably certain to result in take of salmonids through reduction of large woody debris (LWD), which contributes to habitat in the river and on the floodplain beneficial to salmonids. Mot. at 12-13; Frissell Decl. at 15-18. Plaintiffs and their expert insist that there should be no harvest so trees can fall onto the floodplain and into watercourse by "natural self-thinning." Plaintiffs are mistaken and continue to misunderstand the requirements of the THP.

As explained by Dr. O'Connor, the THP, in implementing the ASP Rules, prohibits harvest within 30 feet of the river and requires retention of 80% canopy cover and the 13 largest trees per acre for some distance beyond that. O'Connor Decl. Ex. A, at 5-10 (explaining processes by which LWD enters the river and remains on the floodplain and the limitations on harvest by zones). He finds that the great majority of LWD enters streams from collapsing streambanks, and dead trees on the floodplain will face a picket fence of other trees impeding their floating to the main channel during high-flow conditions. *Id*. Expert fishery biologists concur with Dr. O'Connor. Halligan Decl. Ex. A, at 6-8; Berge Decl. ¶9, 11. Based on their field observations and experience with salmonids and LWD in the Coast Redwood Region, Dr. O'Connor and Halligan conclude that any short-term diminution in LWD delivery to streams or retention on floodplains in not likely to result in take of salmonids. O'Connor Decl. Ex. A, at 8, 10; Halligan Decl. Ex. A, at 8. Berge, based on his field observations and comparative perspective concurs. Berge Decl. ¶ 13.

Plaintiffs also speculate that using tractors to remove (yard) logs from the forest floor to landings and roads will damage floodplain features that provide refuges to fish during high-flow events (i.e., floods) and result in sediment delivery to streams where salmon will be killed or

injured. Mot. at 13; Frissell Decl. Ex. A, at 18-20. This theory is easily dismissed for many reasons. First, it ignores that only pre-existing, flagged skid trails will be used. Kent Decl. ¶¶ 28-30; McMahon Decl. ¶¶ 12-13. Moreover, yarding on these skid trails is insufficient to make an appreciable difference in the "roughness" of the floodplains and their ability to provide off-channel refuge during high-flows because of the light harvest. O'Connor Decl. Ex. A, at 14. This lack of impact on the structural features of the floodplains is confirmed by the fact that the floodplains have long functioned as a sediment sink, by slowing high flows. Halligan Decl. Ex. A, at 3-5; O'Connor Decl. Ex. A, at 10-13. Expert observations of units of the THP that had previously been harvested fortify this conclusion. McMahon Decl. ¶ 20; Berge Decl. ¶¶ 9, 11; Kent Decl ¶¶ 24-25 and Exs. F and G. Other off-channel features are given protection by the THP's requirements. Halligan Decl. Ex. A, at 8-9.

Plaintiffs' expert focuses on the sole unit within the 20+ unit Dogwood THP that is sloped to assert that sediment delivery will result from yarding on existing skid trails. Frissell Decl. Ex. A, at 19-20. But Halligan explains, based on his field observations as documented by photos, how this risk will be addressed in implementation of the THP. Halligan Decl. Ex. A, at 8-13. Plaintiffs also say that the THP will reduce canopy cover enough to raise stream temperatures to a level that makes them inhospitable to salmonids during the summer. Mot. at 14; Frissell Decl. Ex. A, at 25-27. Both Dr. O'Connor and Halligan explain why this claim is simply not plausible, especially in light of the prohibition against harvesting near the river under the ASP Rules. O'Connor Decl. Ex. A, at 13; Halligan Decl. Ex. A, at 13-15.

Plaintiffs' assertions of increased sediment loading fails for several reasons. Mot. at 13; Frissell Decl. Ex. A, at 20-22. Most simply, the THP is light touch, both in terms of tree removal and maintenance and use of the existing road network and skidtrails, and therefore sediment delivered from the upper watershed in winter storms each year overwhelms any potential contribution from the THP. O'Connor Decl. Ex. A, at 11-12; Kent Decl., ¶ 18. In other words, any sediment discharge is inconsequential. Plaintiffs' assertion, Mot. at 14, that harvesting will cause eutrophication and a fish die off is baseless and highly speculative, as explained by Dr. O'Connor and Halligan. O'Connor Decl. Ex. A, at 12-13; Halligan Decl. Ex. A, at 15-17. In short,

Defendants' experts explain in detail why Plaintiffs' theories fail.

Although Plaintiffs ignore them elsewhere, Plaintiffs attack the ASP Rules because the Rules apparently did not include everything NOAA Fisheries wanted during a lengthy rulemaking process. Mot. at 14-15; Frissell Decl. Ex. A, at 27. Even if that were true, it does not follow that the ASP Rules as applied here are insufficient or that the State of California violates the ESA when it implements them via THPs. Indeed, CALFIRE was required to make a finding that the THP would not result in take, which it did. 14 CCR § 898.2(d). In denying plaintiff FOGR's appeal, the California Court of Appeal also notes that "this THP will not add to, and in some respects may ameliorate, the environmental problems caused by past timber harvesting," ECF No. 41 at 16-17, through its implementation of the ASP Rules, *id.* at 17-28. In short, pointing to a generalized comment letter from one agency to another is not substitute for presenting competent evidence showing that take is reasonably certain to occur. Plaintiffs did not do that here.

iii. Northern spotted owl

Plaintiffs fail to show that take of Northern Spotted Owl (NSO) is reasonably certain to occur. Plaintiffs cite to a report prepared for this litigation by their expert, Dominick DellaSala, but his report (i) fails to identify any practices under the THP that do not comply with USFWS guidance on take avoidance; (ii) ignores the overwhelming scientific literature for the Coast Redwood Region and statements by USFWS that show his assumptions regarding ideal habitat for the NSO are wrong; and (iii) presents data on canopy coverage that proves that the THP fully complies with the recommended limits established by USFWS to avoid take of NSOs. Contrary to Plaintiffs' arguments, the evidence actually shows that the THP complies with USFWS guidance on take avoidance for NSOs, and that implementation of the THP is likely to benefit NSOs (if any are present) rather than causing harm.

First, Defendant notes that Plaintiffs offer no meaningful discussion or analysis as to why the formal 2019 take avoidance guidelines developed by USFWS are inadequate. Pursuant to those guidelines, Defendant retained an expert to conduct protocol surveys, which were completed last month and submitted to CALFIRE for approval. Stephens Decl. ¶¶ 6-14; Town Decl. ¶ 9. The protocols were approved by CALFIRE on May 20, 2021. Town Decl. Ex. C. The most recent

survey indicates that NSOs currently are not present in the Dogwood Area. Town Decl. ¶ 8. The THP assumes, however, that NSOs may be present and incorporates appropriate take avoidance measures that would prevent take due to harvesting activities, such as the protection of habitat in core areas of historical NSO activity centers. Stephens Decl. ¶¶ 20-21. Further, the evidence shows that the THP fully complies with the USFWS Guidance for NSO take avoidance in the Coast Redwood Region, *id*., ¶¶ 15-22, and Plaintiffs offer no evidence to the contrary. *See* AR 5147 (requiring completion of NSO surveys compliant with "the most recent approved USFWS survey protocols" before timber operations begin).

Second, Defendant observes that Plaintiffs contend that USFWS has criticized the THP's avoidance requirements and the Forest Practice Rules. Mot. at 18. That assertion is inaccurate. It appears Plaintiffs have misread the THP again because, as noted, the THP implements the take avoidance recommended by USFWS; the federal agency is not objecting to its own guidelines. Further, Plaintiffs cite a report issued by USFWS in 2009 regarding logging practices decades ago in the "Northern Interior Region" of California (2009 USFWS Report). Gross Decl. Ex. K; DellaSala Decl. Ex. A, at 2. The 2009 USFWS Report, however, did not address timber harvesting plans in the Coast Redwood Region, such as the Dogwood THP. Stephens Decl. ¶ 24. Also, the 2009 USFWS Report was issued nearly a decade before the Dogwood THP was approved. In the years after the 2009 USFWS Report was issued, USFWS and CALFIRE worked cooperatively to adopt guidelines to avoid take of NSOs, and in a November 1, 2019 letter transmitting its Take Avoidance and Analysis and Guidance for Northern Spotted Owl (USFWS Guidance), USFWS thanked CALFIRE for its "continued cooperation and support for effective conservation and recovery of Northern spotted owl in California." *Id.* ¶¶ 24-27; Ex. B.

Third, Plaintiffs' expert cites to the USFWS Guidance, but he does not identify *any* of its guidelines for avoidance of take with which the Dogwood THP does not comply. Nor do Plaintiffs or their expert acknowledge that the USFWS Guidance states that its "guidelines represent effective measures to avoid take of NSO," or that these same measures recommended by USFWS are incorporated in the Dogwood THP. *See* Stephens Decl., ¶¶ 15-20. Because Plaintiffs cannot show the THP fails to comply with the USFWS Guidance, they instead advance a generalized

argument as to the THP's avoidance requirements (Motion, at 18:14-20). That collateral attack, however, is anchored in cherry-picked studies of forest regions other than the Coast Redwood Region, and owl subspecies other than the NSO (such as the California Spotted Owl). *See* Stephens Decl. ¶¶ 43-49. The argument does not withstand scrutiny.

Plaintiffs' expert further claims that the light-touch harvesting activities approved by the THP will result in habitat changes that will favor Barred Owls over NSOs. Mot. at 17. This claim is shown false by the literature regarding Barred Owl and NSO interactions in the Coast Redwood Region, which USFWS and CDFW have cited but Plaintiffs' expert ignores. *See* Stephens Decl., ¶¶ 30-36. This literature shows that Barred Owls have consistently encroached on NSO habitat in forest lands in which no commercial logging activities are permitted, such as in old growth habitat in the Redwood National and State Parks, where CDFW reported in 2016 NSOs had been nearly extirpated by Barred Owls. *Id.* at ¶¶ 30-31. Moreover, both CDFW and USFWS report that in the Coast Redwood Region, in contrast to some other regions, NSOs fare *better* against Barred Owls in forests that contain a mix of older and younger trees, than they do in the type of homogenous older forests advocated by Plaintiffs' expert. *See* Stephens Decl. ¶¶ 32-35; DellaSala Decl. Ex. A, at 8-10. As with the 1-mile frog buffer, Plaintiffs offer an extreme position as to the owl. Plaintiffs concede that thinning of the forests improves foraging habitat for the owl by making it easier for the NSO to identify prey (i.e., food) on the forest floor. But then Plaintiffs argue that thinning comes at a price because it could harm nesting habitat by making it easier for predators to harm the NSO during nesting. So Plaintiffs conveniently claim no logging can occur. That reasoning overlooks the fact that owls will only nest if there is good foraging habitat, otherwise owls will expend too much energy traveling great distances to hunt for food. Put differently, NSOs prefer to build bedrooms (nesting) next to a stocked kitchen (foraging).

Further, Plaintiffs' contention that surveys may not detect all NSOs due to the presence of Barred Owls, Mot. at 18, ignores that the USFWS survey protocol requirements were updated in 2012 in response to this specific concern; they now include special procedures for detection of NSO in these conditions. Stephens Decl. ¶ 36; Town Decl. ¶ 9. The recently approved protocol surveys followed those special procedures. Town Decl. ¶ 9.

Furthermore, Plaintiffs' expert presents forest canopy opinions that are not based on the actual Dogwood THP canopy percentage requirements, or any other take avoidance guidelines that apply to NSOs. Stephens Decl., ¶ 42. Nor does the USFWS Guidance on which he relies endorse his use of ground-level photography to determine the percentage of canopy cover. *Id.*, ¶¶ 37-39; McMahon Decl. ¶¶21-25. Setting aside these issues, Dr. DellaSala's canopy estimates *support* the conclusion that the harvest activities permitted by the THP will comply with the habitat protection and take avoidance guidelines issued by USFWS, because they show canopy closure percentages that far exceed the USFWS Guidance threshold even for "Core Areas" of NSO habitat (≥66%). *Id*. at ¶¶ 41-42; DellaSala Decl. Ex. A, at 15-16.

In the end, Plaintiffs are grasping for a take theory but none will work given the stringent take avoidance requirements of the THP that were developed by federal and state biologists.[2] As with the frog, Plaintiffs assert they are right and everyone else is wrong. Such an extreme position should be rejected.

C. Plaintiffs Failed To Carry Their Burden To Show Irreparable Harm.

Plaintiffs must establish that "irreparable injury is likely in the absence of the requested injunction." *Winter*, 555 U.S. at 22 (internal quotations omitted). When asserting claims under the Act involving protected species, courts often decline to issue a preliminary injunction unless the alleged conduct is "likely" to "irreparably harm the species as a whole." *Nw. Envtl. Def. Ctr.v. U.S. Army Corps of Eng's*, 817 F. Supp. 2d 1290, 1314-15 (D. Or. 2011) (citations omitted); *see also Pac. Coast Fed'n of Fishermen's Associations v. Ross*, No. 120CV00431DADSAB, 2020 WL 1699980, at *4–7 (E.D. Cal. Apr. 7, 2020)(discussing ESA cases regarding population-level harm relative to irreparable harm). However, a party is not necessarily required to show an "extinction-level threat to listed species" to obtain a permanent injunction. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 819 (9th Cir. 2018). However, "[n]o court has held that as a matter of law, the taking of a single animal or egg, no matter the circumstance, constitutes

[2] Although unnecessary to address given the other flaws, DellaSala's report also applies the wrong standard for "take" under the Act, thereby further undermining his conclusions. DellaSala Decl. Ex. A, at 4 (stating that he is applying the definition of harm to include habitat that "may" kill or injure but 50 C.F.R. § 17.3 requires that "an act which actually kills or injures wildlife.")

irreparable harm." *Wild Equity Inst. v. City & Cty. of San Francisco*, 11-CV-00958-SI, 2011 WL 5975029, at *7 (N.D. Cal. Nov. 29, 2011). Although involving somewhat different issues under Section 7 of the Act, Plaintiffs themselves cite *Pacific Coast Federation of Fishermen's Associations v. Gutierrez*, 606 F. Supp. 2d 1195, 1210 (E.D. Cal. 2008) for the relevant irreparable harm inquiry. The court in *Pacific Coast Federation* likewise concluded that in the circumstances of that case irreparable harm referred to significant damage to the "overall population" of the species. *Id.*

As shown above, Plaintiffs do not come close to showing that the myriad take avoidance requirements will necessarily fail, and that take is reasonably certain to occur for any of the species. As a result, Plaintiffs cannot show any irreparable harm to them. Nor do Plaintiffs offer any competent or persuasive evidence regarding alleged harm to the overall population for any species.

Without analysis, Plaintiffs also cite a footnote from *National Wildlife Federation v. Burlington N. R.R.*, 23 F.3d 1508, 1512 (9th Cir. 1994), but that case offers them no aid. In that ESA case, a plaintiff sued a railroad company party for alleged take violations, the trial court agreed take had occurred, but still declined to issue a preliminary injunction to prevent alleged future take. The Ninth Circuit affirmed, explaining that it was not going so far as to require a showing of a "threat of extinction to the species" before an injunction can issue under the Act, but what is required at minimum is a "definitive threat of future harm to protected species, not mere speculation." *Nat'l Wildlife Fed'n*, 23 F.3d at 1512. Plaintiffs offer nothing more than rank speculation here and the mere theoretical possibility of take is not enough.

The Court should also reject Plaintiffs' generalized and conclusory assertion that the THP would "cut directly against the implementation of the recovery plans . . . intended to save them [the Species] extinction." Mot. at 19. Plaintiffs do not and cannot show that any recovery plan is being frustrated. For example, U.S. Fish & Wildlife Service developed the recovery plan for the owl. And Defendant is following the 2019 take avoidance requirements for the owl developed and approved by the U.S. Fish & Wildlife Service. The same is true for the frog.

On this type of record, courts routinely deny preliminary injunction motions due to an insufficient showing of irreparable harm. *See e.g., New Mexico Dep't of Game & Fish v. United*

States Dep't of the Interior, 854 F.3d 1236, 1253 (10th Cir. 2017) (affirming order denying motion for preliminary injunction where moving did not show harm "would affect the overall populations of the . . . herds"); *Pac. Coast Fed'n of Fishermen's Associations v. Ross*, No. 120CV00431DADSAB, 2020 WL 1699980, at *7 (E.D. Cal. Apr. 7, 2020) (denied preliminary injunction motion in ESA case due to insufficient showing of irreparable harm to species); *Conservation Cong. v. U.S. Forest Serv.*, No. 213CV01922TLNCMK, 2016 WL 6524860, at *5 (E.D. Cal. Nov. 3, 2016) (same); *All. for the Wild Rockies v. Kruger*, 35 F. Supp. 3d 1259, 1271 (D. Mont. 2014) (same). The Court should do the same.

D. Plaintiffs Do Not Meet the Remaining *Winter* Factors.

In ESA cases, the Ninth Circuit has concluded the traditional test for preliminary injunctions does not apply. *Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1510 (9th Cir. 1994). The Ninth Circuit has stated that Congress removed courts of their "traditional equitable discretion in injunction proceedings of balancing the parties' competing interests" because the ESA shows that the "balance of hardships and the public interest tips heavily in favor of protected species." *Id*. As recognized by this Court in the *Souza* case, there is some uncertainty regarding the interplay of the ESA and application of the *Winter* factors. *See also Ctr. for Biological Diversity v. Ross*, No. CV 18-112 (JEB), 2020 WL 4816458 (D.D.C. Aug. 19, 2020)(declining to follow Ninth Circuit and noting Circuit split).

Defendant contends Plaintiffs have not met their burden on this record. As noted above, the THP will implement the ASP Rules, which in turn are designed to improve salmonid habitat. The light touch harvesting technique will slightly thin the forest, thereby improving potential foraging habitat for the NSO. Implementation of the THP also will accelerate the growth of iconic California redwood trees, by eliminating some understory so there are more nutrients available to the largest trees.

A word on wildfires: In recent years, incredible damage has been caused by unprecedented wildfires in our local community, including in Sonoma County. We are in the midst of a drought and the Governor has declared an emergency due to drought conditions in Sonoma County, and elsewhere. Climate change is assuredly contributing to these challenges but proper forest

management also is needed so "fuel" is removed from timberlands. One uncontrolled fire can destroy hundreds of thousands of acres.

Expert public agencies responsible for protecting the environment worked closely with Defendant over the course of years to develop of the THP. It has been scrutinized by the California courts. In effect, Plaintiffs seek to "transform the district court into an appellate tribunal for state proceedings." *Adam Bros. Farming v. Cty. of Santa Barbara*, 604 F.3d 1142, 1150 (9th Cir. 2010). Further litigation does not promote the public interest. In an effort to convince the Court to block harvesting, Plaintiffs repeatedly claim the Gualala River floodplain "was last logged approximately a century [ago]." Mot. at 5. Plaintiffs also say the THP area is "primeval in quality," with trees that "evoke the old growth forests" that used to blanket the region. *Id.* at 1. Plaintiffs know full well that these statements are not true. The THP itself explains that "the flood plain has been selectively harvested on a periodic basis since the 1950's." SAR6663. The THP also states that the "the plan area has been thinned two or three times in the last 40 years under 27 previous THPs that overlap portions of the [Dogwood] THP." AR 705; McMahon Decl. ¶ 9. Nor is this an old growth forest; these are industrial timberlands that require active management. SAR6663; McMahon Decl. ¶¶ 9-10. Even assuming Plaintiffs had not read the THP, Defendant showed Plaintiffs during the April 2021 site visit that nearly half the site had been logged in 2016 before the prior state court injunction. The point of showing the logged area to Plaintiffs was to highlight that the light touch prescription was in fact working. Notably, Plaintiffs' own experts could not even distinguish between what areas had been logged five years ago from those that were not logged. Under the circumstances, Defendant submits that Plaintiffs have not met their burden here either.

We respectfully ask that the Court deny this motion.

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