

No. 14-16948

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY, a non-profit organization; EARTH ISLAND INSTITUTE, a non-profit organization; and CALIFORNIA CHAPARRAL INSTITUTE, a non-profit organization,

Plaintiffs and Appellants

vs.

SUSAN SKALSKI, in her official capacity as Forest Supervisor for the Stanislaus National Forest, and UNITED STATES FOREST SERVICE, an agency of the Department of Agriculture

Defendants and Appellees,

And

TUOLUMNE COUNTY, et al.,

Defendant-Intervenors and Appellee-Intervenors

APPEAL FROM DENIAL OF MOTION FOR PRELIMINARY INJUNCTION

By the United States District Court, Eastern District of California
Honorable Garland E. Burrell Jr., U.S. District Court Judge

EMERGENCY MOTION UNDER NINTH CIRCUIT RULE 27-3

Request for Injunction Pending Appeal

Relief Requested By November 24, 2014, or as soon thereafter as possible

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NINTH CIRCUIT RULE 27-3 CERTIFICATE

I. ADDRESSES AND TELEPHONE NUMBERS OF ATTORNEYS

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II. EXISTENCE AND NATURE OF EMERGENCY

Plaintiffs herein request an injunction pending appeal to enjoin the post-fire “salvage” logging of California spotted owl foraging habitat within the core areas of occupied owl territories located within the Rim Fire project area on the Stanislaus National Forest. Logging in owl territories represents only a subset of the logging which was authorized pursuant to the Nevergreen, Triple A and DoubleFork timber sales challenged here.

Absent an injunction pending appeal, the Nevergreen and Triple A timber sales will remove much or most of core habitat in the following occupied California spotted owl territories prior to resolution of Plaintiffs’ appeal: **0027**

North Bear Mountain (single owl, territory to lose 75% of core habitat: Excerpt of Record Volume II (“ER.II”) at 303, 346); **040B Mather** (owl pair, territory to lose 29% of core habitat: ER.II at 302, 344); **0040 Middle Fork Tuolumne** (owl pair; territory to lose 37% of core habitat: ER.II at 307, 344); **0177 Ascension Mountain West** (owl pair, territory to lose 46% of core habitat: ER.II at 304, 345); and **0039 Ackerson Mountain** (owl pair, territory to lose 47% of core habitat: ER.II at 305, 345). The DoubleFork timber sale would permit the logging of core habitat in owl territories designated as: **0028 Bear Mountain** (single owl, territory to lose 71% of core habitat: ER.II at 306, 346); **0025 Middle Fork** (owl pair; territory to lose 58% of core habitat: ER.II at 307, 346); and **0085 Harden Flat NW** (owl pair, territory to lose 51% of core habitat: ER.II at 308, 345). All of these spotted owl territories are clustered in the same area of the Rim Fire Project. ER.II at 299, 351.

While logging has been ongoing on the Nevergreen timber sale since Plaintiffs’ Motion for Temporary Restraining Order was denied (Sept. 17, 2014), and on the Triple A timber sale since October 17, 2014, logging has not yet begun on the DoubleFork timber sale. Declaration of Rachel Fazio (“Fazio Dec.”) ¶¶ 9, 15 and 17. None of these timber sales have been completed; thus there is still substantial irreparable harm that would be avoided if an injunction pending appeal were granted.

The reason that post-fire logging within core areas of occupied owl territories under the Rim Fire Project constitutes an emergency is because spotted owls preferentially select (*i.e.*, specifically seek out) mature forest that has burned at high-intensity (patches where most/all trees are killed), and is within the 1.5 km radius area surrounding the owl's known nest/roost or detection site (*i.e.*, the 1,745 acres surrounding this site), for foraging. ER.II at 397, 403. The scientific research demonstrates that owls rely on these areas for their foraging/hunting needs (just as the science demonstrates that owls preferentially select old growth forest for nesting/roosting) (ER.I at 39-40; ER.II at 397), and post-fire logging in this preferred foraging habitat, where the small mammals (prey) that owls eat are abundant (ER.I at 44-45; ER.II at 373 and 406-16), results in a destruction of these foraging grounds, which results in a reduction or elimination of prey and usually causes the owls to abandon their territories, a condition also known as loss of occupancy. ER.II at 480, 439; ER.I at 294, 273. Loss of occupancy results in population declines because owls without territories do not breed (or contribute to population growth) and often fall victim to predation and starvation. ER.I at 289, 294.

While this alone would certainly be enough to constitute the existence of an emergency, the situation in the Rim Fire area is even worse because impacts to any spotted owls (including the 14 owls at issue here) in the Rim fire area will likely

“have a disproportionate potential to affect the California spotted owl population” as a whole because the Rim fire area is a designated “Area of Concern” (AOC) for the owls, due to highly fragmented habitat and land ownership, creating “high[]” levels of “risk and uncertainty” with regard to maintaining viable owl populations. ER.I at 2; *see also* ER.I at 42. In fact, the situation on the Stanislaus National Forest is of “particular concern” (*id.*), where only a relatively narrow, fragmented vein of habitat exists to connect the northern and southern portions of the population in the Sierra Nevada, due to a “bottleneck in the distribution of owls on the west slope of the Sierra Nevada”, which creates a serious risk of isolating the northern and southern subpopulations and substantially increasing vulnerability and risks to the population’s viability. ER.I at 42.

In 2001, when the Forest Service believed California spotted owl populations were not declining, the agency concluded that “future problems” would be “greatest”, with regard to adverse impacts to AOCs, like the Rim fire area, if the “owl’s status in the Sierra Nevada were to deteriorate.” ER.I at 2. Since then, the owl’s status has indeed deteriorated, as its populations are now declining precipitously in the Sierra Nevada in areas where logging—including post-fire logging—is allowed. ER.II at 442, 449, 484, and 489 (Figure 1); *see also* Figure 2 in Tempel et al. (2014), ER.II at 497.

While logging may temporarily cease in the coming weeks due to winter weather, there is no way to know when logging will resume, or when Plaintiffs' merits appeal will be heard. Thus, this narrowly tailored injunction pending appeal, which protects occupied spotted owl territories, is necessary to maintain the status quo and guard against irreparable harm to Plaintiffs' members (ER.I at 246-270) and the environment while Plaintiffs' Appeal is decided.

III. NOTIFICATION TO OPPOSING COUNSEL

On November 10, 2014, undersigned counsel corresponded via e-mail with Defendants' counsel Dave Gunter and Intervenor's counsel Scott Horngren regarding this motion. The Parties discussed via e-mail and telephone a proposed briefing schedule, wherein Plaintiffs file this motion on November 12, 2014, Defendants, due to scheduling conflicts, and Intervenor, file their responses by close of business eastern time on November 19, 2014 (approximately 3:00 p.m. Pacific), and Plaintiffs file their reply by 2 p.m. Pacific on Friday, November 21, 2014. Since harm is ongoing, and every day potentially increases the harm, Plaintiffs herein respectfully request relief as soon after filing their reply as is practicable for the Motions panel. Intervenor has represented that during the pendency of this motion no felling operations (cutting of trees) will occur in occupied owl territories on the weekends (Nov. 15 &16; Nov. 22 &23).

IV. DISTRICT COURT DISPOSITION

Undersigned counsel certifies that all of the grounds advanced in this motion were also asserted in the lower court. Plaintiffs' request for an injunction pending appeal was denied by the district court on November 10, 2014 (ER at 368-70), which rested upon the district court's October 7, 2014 Order denying Preliminary Injunction. ER at 371-96. Plaintiffs filed their Notice of Appeal on October 8, 2014. Fazo Dec. at ¶11. Logging on the Nevergreen Timber Sale began on September 17, 2014. *Id.*, ¶9. Logging on the Triple A timber sale began on October 17, 2014. *Id.*, ¶15. A bid opening on the DoubleFork timber sale is scheduled for November 13, 2014 (Fazio Dec., Ex. A), and if purchased, logging could begin soon thereafter.¹

I hereby certify that all of the above statements are true and correct to the best of my knowledge.

Dated: November 12, 2014

Respectfully submitted,

/s/Rachel M. Fazio
RACHEL M. FAZIO

¹ In the District Court Defendants asserted that an injunction pending appeal should be denied because Plaintiffs filed their motion three weeks after the District Court denied their request for preliminary injunction. However, Plaintiffs have been diligent in their pursuit of relief in this case. Fazio Decl. at ¶¶5-17. Although some harm has occurred during this timeframe, this in no way diminishes the likely irreparable harm to Plaintiffs or the environment which is ongoing from logging within the core areas of occupied California spotted owl territories.

EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

PLAINTIFFS Center for Biological Diversity, Earth Island Institute and California Chaparral Institute (“Plaintiffs”), pursuant to Circuit Rule 27-3, move this Court for an emergency injunction pending appeal for the reasons stated in the accompanying Certificate and this Motion. Plaintiffs request that this Court enjoin the United States Forest Service from allowing salvage-logging within the core areas (the 1.5 km area [1,745 acres] surrounding the best known owl nest/roost or detection site) of the eight occupied owl territories which are to be logged in the Nevergreen, Triple A and DoubleFork timber sales, pending resolution of Plaintiffs’ Appeal of Denial of Preliminary Injunction. *See* ER.II at 351 (overview map of owl territories and three timber sales); 301-08 (maps of each of the eight impacted owl territories and logging associated with the three sales).

I. INTRODUCTION AND BACKGROUND FACTS

The Rim fire occurred in the summer of 2013, ultimately spanning 257,314 acres in the western Sierra Nevada, with 154,956 acres burning on the Stanislaus National Forest and the remainder burning mostly in Yosemite National Park. ER.I at 32, 89. Only 75,629 of the acres which burned on the Stanislaus burned in conifer forests made up of pine and fir trees. ER.I at 89. This “classic mixed severity fire” (ER.I at 38) burned in a mosaic pattern with the majority of the

conifer forest burning at low intensity (55%), and about 32% (or 25,946 acres) of the conifer forest burning at high intensity, where most or all trees are killed. *Id.*

The approximately 25,000 acres of high-intensity fire, which burned in mature conifer forest, created a rare and very ecologically-rich habitat type known as “complex early seral forest”, which is characterized by an abundance of standing dead trees (killed by the fire and referred to as “snags”), downed logs, montane chaparral (which are flowering native shrubs), and naturally-regenerating conifer seedlings and saplings, and often has higher levels of biodiversity than old growth forests. ER.I at 11-23 and ER.II at 455-70. This complex early seral forest also serves as preferred foraging habitat for California spotted owls when it exists within the 1,754-acre core area of an occupied owl territory. ER.II at 402.

The Rim Fire Recovery Project has approved the removal of most of the complex early seral forest (ER.I at 89) which was created by the Rim Fire, through the approval of 15,383 acres of “salvage” logging exclusively in high-intensity fire areas, and 17,335 acres of roadside logging—a significant portion of which is also in complex early seral forest. ER.I at 99-100. The logging has a disproportionate effect on California spotted owls residing in this area, as much of the habitat to be logged is within the core areas of 39 occupied owl territories. *See* ER.II at 299-339 (maps); 341-347 (providing percent of each territory impacted

by the logging); *see also* ER.I at 276-277 (Declaration of Monica Bond), ¶15(a)-(c); ER.I at 287-289 (Declaration of Derek Lee), ¶¶6-10.²

As discussed below, the Forest Service failed to disclose the existence of the 70 resident California spotted owls that are occupying 39 territories within the Project area. As a result, the Forest Service failed to analyze the impacts of removing the owls' preferred foraging habitat from the core areas of these 39 territories. This refusal is especially egregious because this geographic area is an Area of Concern for this Forest Service "Sensitive Species," which has recently been determined to be declining throughout managed lands in the Sierra Nevada. ER.I at 2, 42; ER.II at 442, 449, 484, 489 (Fig. 1) and 497 (Fig. 2). The removal of foraging habitat from occupied California spotted owl territory core areas is a factor which is highly relevant to the assessment of the impacts this Project will have on this species. The Forest Service's failure to evaluate the Project in light of this relevant factor in either the Final Environmental Impact Statement or a Supplemental EIS violates NEPA's "hard look" requirement.

² The District Court improperly rejected (ER.II at 376-379) consideration of three Declarations (ER.I at 271-294) submitted by Plaintiffs for the purpose of explaining technical material and illuminating the relevant factors which the agency failed to consider in preparing their NEPA analysis. *Asarco, Inc. v. U.S. Env't'l. Protection Agency*, 616 F.2d 1153, 1159 (9th Cir. 1980). Contrary to the District Court's finding (ER.II at 378), these declarations contain original analysis and explanation which is not already found in FEIS, especially with regard to the 2014 survey data, salvage logging impacts to occupancy, and the likely harm from

II. STANDARD OF REVIEW

The standard for issuance of an injunction pending appeal is the same as that for issuance of a preliminary injunction. *See Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers*, 472 F.3d 1097, 1100 (9th Cir. 2006). “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.” *Winter v. NRDC*, 555 U.S. 7 (2008). In addition, “serious questions going to the merits and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met.” *Alliance for Wild Rockies v. Cottrell*, 622 F.3d 1045, 1050 (9th Cir. 2010).

“Serious questions” are those that are “substantial, difficult and doubtful enough” to require more thorough investigation. *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988). These questions need not show a certainty of success, nor even demonstrate a probability of success, but rather “must involve a fair chance of success on the merits.” *Id.* (citation omitted).

the Rim Fire Project. These declarations should be considered here for the limited purposes for which they were submitted.

III. PLAINTIFFS HAVE RAISED SERIOUS QUESTIONS AND ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS ON APPEAL

A. Defendants Violated NEPA's Hard Look Requirement

NEPA establishes procedural requirements to ensure that agencies take a “hard look” at the environmental impacts of their actions. *See Ocean Advocates v. United States Army Corps of Engineers*, 402 F.3d 846, 864 (9th Cir. 2005).

Agencies must consider all foreseeable direct, indirect, and cumulative impacts and include a candid discussion of adverse impacts – one that does not improperly minimize negative side effects. *Earth Island Inst. v. U.S. Forest Service*, 442 F.3d 1147, 1154, 1159 (9th Cir. 2006) (“*Earth Island II*”) (citations omitted). In reviewing the adequacy of an EIS, the Ninth Circuit applies a “rule of reason” standard, “which requires ‘a pragmatic judgment whether the EIS’s form, content and preparation foster both informed decision-making and informed public participation.’” *Native Ecosystem Counsel v. U.S. Forest Service*, 418 F.3d 953, 960 (9th Cir. 2005).

As discussed, *supra*, in the “Existence and Nature of Emergency” section, spotted owls depend upon high-intensity fire areas for food, and these areas are targeted for logging by the Project. Post-fire logging strongly causes a loss of owl occupancy, and will therefore exacerbate the severe ongoing spotted owl population decline recently documented in the published literature. The Rim fire FEIS acknowledged there is a “Significant Issue[.]” because logging would

“damage” “important owl habitat.” ER.I at 33. The FEIS further acknowledged that high-intensity fire areas provide foraging habitat for the owls (ER.I at 44-45) and that “[p]ost-fire salvage logging may adversely affect rates of owl occupancy.” ER.I at 45. Despite these admissions, instead of analyzing the impacts of the Project’s logging of spotted owl foraging habitat in the 39 occupied owl territories, the Forest Service instead knowingly concealed vital information about resident spotted owls from the public. Specifically, the results of the agency’s own 2014 spotted owl occupancy surveys, which the agency completed in mid-August, 2014 (two weeks before the FEIS and ROD were published on August 27th and 28th), demonstrate *substantially higher* spotted owl occupancy in the Rim fire areas proposed for logging—including territories with mostly high-intensity fire effects—than in unburned old forest (ER.I at 133-36), strongly contradicting and undermining the FEIS’s characterization of the Rim fire as poor owl habitat due to its “overall size and severity” ER.I at 40; *see also* ER.I at 41 (claiming that 10 owl territories have “very low to no probability of continued occupancy”). Yet nowhere in the FEIS or ROD is this information divulged to the public, and nowhere do the FEIS or ROD disclose the amount of post-fire logging that would occur within the 39 occupied owl territories, or the extent to which this logging will further contribute to an already existing decline in the owls’ population. *See e.g.*, ER.II at 339-51 (Plaintiffs’ maps and table showing the extent of logging in

owl territories), and ER.I at 133-139, 142-245 (owl expert Monica Bond's analysis of survey data).

Given the site specific information available to the agency and the importance of preferred foraging habitat in maintaining occupancy of occupied owl territories, the Forest Service's vague statements that implementing the Rim Fire Project "may affect" (ER.I at 33), or "may adversely affect" (ER.I at 29, 45) some unspecified spotted owls, does not meet the rigors of NEPA's requirements for full and fair disclosure to the public of adverse impacts. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213 (9th Cir. 1998) ("We have warned that 'general statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided.'").

Because the California spotted owl is a Forest Service Sensitive Species, Defendants' FEIS purports to include an analysis which supports their conclusion that the Rim fire logging project may affect individual spotted owls but "is not likely to result in a trend toward Federal listing [under the Endangered Species Act] or loss of viability" ER.I at 54-55. However, the Forest Service has failed to articulate a rational connection between the facts in this case and this determination. *Mont. Wilderness Ass'n v. Connell*, 725 F.3d 988, 1011 (9th Cir. 2013). This is because, rather than incorporate into their analysis the fact that

preferred foraging habitat would be removed from the core areas of 39 occupied spotted owl territories through the approved post-fire logging of high-intensity fire areas, the Forest Service instead inexplicably decided to base their determination that the Project is not likely to result in a trend toward listing on the fact that the Project is almost exclusively logging areas which “burned at high-severity.” ER.I at 54-55. Given that the Forest Service itself has acknowledged that owls preferentially select these same high-severity burn areas for foraging when such areas are located in a territory’s 1.5 km core, and that post-fire logging of these preferred foraging grounds generally causes a loss of occupancy/territory abandonment, basing the profoundly important population viability threat determination on the fact that logging is almost exclusively going to remove *the very habitat that the owls rely upon* does not represent a reasonable explanation, let alone a meaningful one. *Earth Island Institute II*, 442 F.3d at 1172-73; *Ecology Center v Austin*, 430 F.3d 1057, 1067 (9th Cir. 2005).

This is especially true given that the FEIS, which purports to have determined that loss of population viability is not a concern, also fails to factor in the already precipitous decline of spotted owl populations in the central Sierra Nevada and the fact that because this is an Area of Concern for spotted owls, any impacts in this area will have “a disproportionate potential to affect the California spotted owl *population*.” ER.I at 2, 42 (emphasis added). Moreover, in *Earth*

Island II, the Ninth Circuit ruled that the Forest Service violated NEPA’s hard look requirement in essentially identical factual and legal circumstances. In the case at hand, Defendants refused to analyze impacts to the owl’s preferred foraging habitat, which is created by high-intensity fire, and based their analysis of impacts only on effects to lightly burned, dense, mature forest dominated by live trees (“late seral closed canopy coniferous forest”) and removal of live trees within this spotted owl *nesting/roosting* habitat (ER.II at 504-507; see also ER.I at 42 [Rim fire FEIS, relying upon MIS Report]), concluding on this basis (*i.e.*, after excluding impacts to foraging habitat) that there would be *zero* loss of suitable spotted owl habitat acres from the Rim Fire Project. ER.II at 504 (Table 2), 506-507 (“acres of late seral closed canopy coniferous habitat would not change [after logging] from the existing post-fire condition”). In precisely this circumstance, the Ninth Circuit held that the Forest Service violated NEPA’s hard look requirement when the agency concluded that two post-fire logging projects “would not reduce the overall amount of [spotted] owl habitat” (defined by the Forest Service in that case as lightly burned dense, mature conifer forest), but had refused to incorporate into the impacts analysis the extent to which the logging projects would “reduce potential foraging habitat” found in “heavily burned” areas. *Earth Island II* at 1172-1173.

While the FEIS does assess impacts to owls in relation to logging within Protected Activity Centers (“PACs”: the 300-acre nest area of a territory), the

Forest Service is very aware that spotted owl territories are much larger than a PAC (2,500 to 4,700 acres: ER.I at 1]) and that conservation of a PAC is not sufficient to maintain an owl territory. ER.I at 3.

The Forest Service also notes that they are maintaining some snags (4 to 6 per acre, mostly), and some downed logs, and will not log the very centermost portion of owl territories (within ¼-mile of the nest/roost location) while nesting season is occurring (but will log even nest centers after nesting season, as they are doing currently). However, these minor mitigations were exactly the same as those used on previous post-fire logging projects (under the same regional forest plan provisions), which destroyed spotted owl territories, and they were not sufficient to maintain occupancy in those territories (all owls were lost after post-fire logging: ER.I at 480; ER.I at 289-290, ¶14; ER.I at 453-454 and ER.I at 292-293, ¶¶4-5). The Forest Service has no reasonable basis to believe the same measures would be sufficient in these circumstances. *See* ER.I at 289-90.

Finally, the district court insists that, unlike in *Earth Island II*, here the Forest Service has taken a hard look at the impacts of its Rim Fire Logging Project because the agency admits that high intensity fire areas are suitable habitat for spotted owls. ER.II at 395. But in a circumstance where the end result is the same – the failure to actually assess the impacts associated with the removal of thousands of acres of *foraging* habitat within occupied owl territories – there is no

justification for allowing Defendants to evade application of *Earth Island II* to this case (*see Earth Island II at 1172-73*), as discussed *supra*.

Defendants here made a clear error of judgment when they refused to analyze the impacts of the removal of thousands of acres of preferred foraging habitat from the core areas of 39 occupied territories on the California spotted owl. As such, the Rim Fire FEIS and ROD should be set aside, and logging within these owl territories suspended, until this violation of law is remedied.

B. Significant New Information Requires Preparation of a Supplemental Environmental Impact Statement

NEPA's implementing regulations, 40 C.F.R. § 1502.9(c), require agencies to "prepare supplements to either draft or final environmental impact statements if . . . there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." Moreover, "the bar for whether significant effects may occur is a low standard." *League of Wilderness Defenders/Blue Mts. Biodiversity Project v. Connaughton*, 752 F.3d 755, 760 (9th Cir. 2014)(internal quotation marks and citations omitted). If the new circumstances or information "raise substantial questions regarding [the project's] impact [that is] enough to require further analysis before allowing the project to proceed." *Id.*

Here, significant new information exists in the form of the 2014 California spotted owl survey results (which did not become available until August 10, 2014,

almost two months after comments were due on the DEIS) (ER.I at 129), as well as the August 21, 2014 letter sent to the Forest Service, which contains interpretation and analysis of the 2014 survey data by an expert spotted owl biologist, Monica Bond. ER.I at 130-245.

This new information revealed for the first time that there exist 39 occupied California spotted owl territories within the Rim Fire area one year after the fire (ER.I at 133), that these territories are home to approximately 70 spotted owls (ER.I at 130), and that the occupancy rate (92%) within the Rim Fire area is extremely high, higher than typical owl occupancy in other areas where surveys have been conducted, including in unburned mature forests (ER.I at 135). Moreover, this information directly contradicts the ROD and FEIS, which assumed that the fire would *reduce* owl occupancy. *See* ER.I at 96 (“The fire destroyed . . . one quarter of the areas where spotted owls and goshawks roost and nest.”); ER.I at 41 (claiming that 10 owl territories have “very low to no probability” of occupancy, and claiming uncertain occupancy potential for 9 others).

Defendants fail to even disclose the actual results of this new information in their FEIS or ROD, let alone analyze it in relation to the proposed logging or to the current status of spotted owls. The District Court in this case nonetheless excused these shortcomings on the basis that Defendants had looked at the information and determined that it was not significant. ER.II at 384.

In *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1024 (9th Cir.

1980), this Circuit explained that:

When new information comes to light the agency must consider it, evaluate it, and make a reasoned determination whether it is of such significance as to require implementation of formal NEPA filing procedures. Reasonableness depends on such factors as the environmental significance of the new information, the probable accuracy of the information, the degree of care with which the agency considered the information and evaluated its impact, and the degree to which the agency supported its decision not to supplement with a statement of explanation or additional data.

Id. As described above, the information at issue has environmental significance because it illuminates the fact that thousands of acres of preferred owl foraging habitat will be removed within the core area of 39 occupied owl territories, a circumstance which will likely result in a loss of occupancy in these territories, furthering the already substantial decline of the California spotted owl.

Nor is the accuracy of the 2014 survey information or Ms. Bond's analysis in question, as the data was gathered by the Forest Service itself, and the analysis performed by Ms. Bond was based upon methods previously utilized in published peer reviewed papers and the Forest Service's own protocols. ER.I at 134-35. Additionally, "the degree of care" and "the degree to which the agency supported its decision not to supplement" are woefully inadequate. The agency devoted only one paragraph in its Record of Decision, ER.I at 121, and this paragraph mischaracterizes and wrongly downplays the importance of the new information,

all while avoiding actually disclosing the results of the 2014 survey data or the contents of the August 21st letter, including failing to inform the public that in light of this information logging will occur in all 39 territories, likely leading to territory abandonment and thus further contributing to the overall population decline of the spotted owl. *Id.*, compare with ER.I at 130-245.

The Forest Service offers no “statement of explanation” for why the substantial logging of preferred foraging habitat within the core area of 39 occupied owl territories has no significance. In fact, the only mention of the 2014 survey data in the ROD and FEIS is that it was used to reestablish six PACs in the Rim Fire area in places where the Forest Service had wrongly assumed that no owls would exist post-fire. ER.I at 110. While this was necessary for compliance with the National Forest Management Act, 16 U.S.C. §1604(i) (ER.I at 8), it in no way establishes compliance with NEPA. Not only does the Forest Service fail to mention anything about the other 33 occupied territories (improperly leaving the public to assume that there are only six owl territories with resident spotted owls in the entire project area)³, the Forest Service fails to analyze the impacts of logging foraging habitat to *any* of the 39 occupied territories, including these six, such as what impact the logging will likely have on the ability of the owls to continue to

³ “Informed public participation in reviewing environmental impacts is essential to the proper functioning of NEPA. Without supplemental analysis of impacts . . .

reside in these six territories. “When the public reviews an EIS to assess the environmental harms a project will cause and weighs them against the benefits of that project, the public should not be required to parse the agency’s statements to determine how an area will be impacted, and particularly to determine which portions of the agency’s analysis rely on accurate and up-to-date information, and which portions are no longer relevant.” *League of Wilderness Defenders*, 752 F.3d at 761. Thus, the Forest Service has failed to establish that its decision to not prepare a supplemental environmental impact statement was in any way reasonable.

IV. ABSENT AN INJUNCTION, IRREPARABLE HARM IS LIKELY

An injury is “irreparable” where it cannot be adequately remedied by money damages or other legal remedies, and where such injury is “permanent or at least of long duration.” *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). Such harm is likely if it is not speculative or remote. *Cottrell*, 632 F.3d at 1053 (post-fire logging that would harm “ability to ‘view, experience, and utilize’” the project area constitutes irreparable injury).

In this case, the implementation of the Rim fire logging project would irreparably harm the interests of Plaintiffs’ members by eliminating their ability to enjoy unlogged post-fire habitat, including scenic beauty and wildlife viewing,

the public would be at risk of proceeding on mistaken assumptions.” *League of*

such as searching for California spotted owls. ER.I at 267-69 (Declaration of Victoria Carpenter); ER.I at 246-52 (Declaration of Doug Bevington); ER.I at 257-59 (Declaration of Richard Halsey); ER.I at 253-56 (Declaration of Brian Nowicki); and ER.I at 260-66 (Declaration of Chad Hanson). Moreover, harm to Plaintiffs' members from the logging of these acres extends far beyond the boundaries of the logging units. *E.g.*, ER.I at 269 (Carpenter Dec.) (loss of aesthetic beauty, making her not want to return to entire area); ER.I at 254-56 (Nowicki Dec.) (adverse effects to the overall California spotted owl population, making it even more rare and harder to find, contemplate and enjoy).

In addition, there is a consensus among scientists that post-fire logging is the single-most ecologically damaging activity which can take place after a wildfire. *E.g.*, ER.I at 11-23. This widespread harm to the environment caused by post-fire logging is especially acute in this case with regard to California spotted owls. The removal of thousands of acres of preferred owl foraging habitat will likely cause severe adverse impacts – such as territory abandonment, starvation, or death – thus exacerbating the owls' ongoing population decline and likely necessitating the listing of this species as threatened. *See e.g.*, ER.I at 284.

These harms – to Plaintiffs' members, the environment and the wildlife that currently inhabit this burned forest – are both imminent and likely because logging

Wilderness Defenders, 752 F.3d at 761.

is ongoing, and habitat is currently being and will continue to be lost absent injunctive relief. This loss of habitat began on September 17, 2014, increased with the more recent implementation of the TripleA sale, and will again be magnified once operations on the DoubleFork sale commence. These harms cannot be remedied by money damages, are long lasting or permanent, and are exactly the type of harm the Ninth Circuit has found to be irreparable for purposes of securing preliminary injunctive relief. *See, e.g., League of Wilderness Defenders*, 752 F.3d at 764; *Cottrell*, 632 F.3d at 1053; *Earth Island II*, 442 F.3d at 1169-73 (logging of several thousand acres of post-fire owl habitat constitutes irreparable harm).

V. THE BALANCE OF HARMS AND PUBLIC INTEREST FAVOR AN INJUNCTION

Courts must apply the balance of harms analysis in environmental cases, and must also ensure that the injunction is in the public interest. *Stormans, Inc. v. Selecky*, 571 F.3d 960, 987-89 (9th Cir. 2009). However, the Supreme Court has recognized that “[i]f environmental injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment”. *Amoco Prod. Co.*, 480 U.S. at 545. In addition, the balancing of harms must take place in the context of the requested tailored injunction and the likely duration of that relief. *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1022 (9th Cir. 2009); *League of Wilderness Defenders*, 752 F.3d at 765.

Here, Plaintiffs have requested a very tailored injunction which pertains

solely to enjoining post-fire logging within the 1.5 km radius core area of occupied California spotted owl territories. This injunction would affect only about 40% of the proposed logging. *See, e.g.*, ER.II at 299, 367. Thus, logging outside of these important areas, even within the Nevergreen, Triple A, and Doublefork timber sales, would be permitted even if an injunction pending appeal were issued. In fact, the continued implementation of *most* of the Rim Fire Logging project would be allowed to proceed – there exist over 8,000 acres proposed for “salvage” logging or roadside hazard tree removal (*see* ER.II at 367), as well as an additional 4,535 acres of “deer emphasis” and fuels treatment logging, none of which intersects with any of the occupied owl territories, and are not the subject of injunctive relief. *Id.*

While Defendants and Intervenors may claim that their revenue will be reduced somewhat if Plaintiffs’ request is granted, the “loss of anticipated revenues ... does not outweigh the potential irreparable damage to the environment.” *Earth Island II*, 442 F.3d at 1177; *accord League of Wilderness Defenders*, 752 F.3d at 764-68. Here, the Forest Service fully recognizes that the timber will remain economically viable next year and the timber sale contracts at issue here run through 2016 and 2017. ER.II at 352-58; Fazio Dec., Ex. A. Thus, this logging could easily take place next year if Plaintiffs’ Appeal proves unsuccessful; and any claimed loss from the deterioration of wood from deferring

logging in occupied spotted owl territories would be no more or no less than the deterioration of wood which is occurring in those areas outside of occupied owl sites which the Forest Service has voluntarily chosen *not* to log at this time.

Further, any threats to public safety (beyond the normal uncertainties when one explores the natural world) during the timeframe of an injunction pending appeal are minimal because: a) the Forest Service is in the process of opening the Rim Fire area to the public as of November 18, 2014 when the closure order expires (Fazio Decl., Exhibit B); and b) roadside logging on the main public roads (maintenance level 3, 4, and 5) is largely complete and not the subject of this injunction request. In addition, there is no risk of “future fire” during the brief pendency of a preliminary injunction (ER.I at 37 [Table 3.05-8]; compare ER.I at 35 [Table 3.05-7]: low fire potential in both action alternatives and no action in less than 5 years post-fire). In fact, all scientific studies which have evaluated whether post-fire logging reduces future fire severity have found that it does not – contrary to Defendants’ theoretical modeling for this project. ER.II at 471, 483, 503. For the foregoing reasons, the balance of harms and the public interest strongly favor the tailored injunction requested herein.

IV. CONCLUSION

For the reasons stated herein, Plaintiffs request that this Court issue an Injunction Pending Appeal that would prohibit the post-fire logging of all trees

within the core areas (*i.e.*, 1.5km radius surrounding best owl location) of the 0027 North Bear Mountain, 040B Mather, 0040 Middle Fork Tuolumne, 0177 Ascension Mountain West, 0039 Ackerson Mountain, 0028 Bear Mountain, 0025 Middle Fork, and 0085 Harden Flat NW spotted owl territories.

Dated: November 12, 2014

Respectfully submitted,

s/ Rachel M. Fazio
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PROOF OF SERVICE

I hereby certify that on November 12, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Rachel M. Fazio