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

PLAINTIFFS' COMBINED REPLY TO DEFENDANTS' AND INTERVNEORS' OPPOSISTIONS TO EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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I. Defendants' Failed to Take a Hard Look at Impacts to Spotted Owls

Defendants plainly admit that their analysis of impacts to California spotted owls in the Rim fire "was based on PACs"—*i.e.*, the 300-acre Protected Activity Centers that represent the immediate vicinity around nest/roost sites. Defendants' Opposition ("Def. Opp.") at 11; see also Def. Opp. at 6-7 (Forest Service "focused on Protected Activity Centers"), and 11-12 (stating that all PACs "are protected from salvage logging") (emphasis in original). And, Defendants do not deny, as Plaintiffs noted (Motion ("Mtn.") at 10), that they have long since determined that the 300-acre "PACs alone are not an adequate conservation strategy for maintaining a viable population of owls" (ER 3), and that the territories spotted owls actually depend upon for survival are about 2,500 to 4,700 acres in size—many times larger than PACs. ER 1. Yet Defendants refused to incorporate removal of the owl's preferred foraging habitat outside of PACs—*i.e.*, mature forest that experiences high-intensity fire—into the analysis of adverse impacts on spotted owls, or into the Forest Service's assessment leading to their ultimate conclusion that the Rim fire logging project would not lead to a trend toward listing California spotted owls under the Endangered Species Act (ESA). Mtn at 5-11. This is precisely what the Ninth Circuit already held to be illegal under NEPA's hard look standard under nearly identical facts. *Earth Island Institute v. U.S. Forest Service ("Earth Island II")*, 442 F.3d 1147, 1169-73 (9th Cir. 2006); *see also* Mtn. at 8-11. The Ninth Circuit also found issuance of an injunction pending appeal was appropriate in such a circumstance. *Earth Island II*, 442 F.3d at 1156.

Defendants assert that the Ninth Circuit's ruling in *Earth Island II* can be ignored, ostensibly because, here, the Forest Service "acknowledg[ed] the possibility" that spotted owls use areas that include high-intensity fire patches. Def. Opp. at 13. However, as Plaintiffs explained (with no response or disagreement from Defendants), the central holding in *Earth Island II* was that the Forest Service violated NEPA's hard look standard by refusing to incorporate into the ultimate analysis of impacts—including the population viability conclusion—the adverse effects of removing, through post-fire logging, thousands of acres of owl *foraging habitat* (created by high-intensity fire) *outside of the PACs*. Mtn. at 9-10; *Earth Island II* at 1171-73. Simply because in this case Defendants "acknowledge" the importance of the foraging habitat, whereas in *Earth Island II* they would not even do that, does not satisfy NEPA when the foraging habitat at issue is committed to be logged absent any site specific analysis. *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 975-78 (9th Cir. 2006) (site specific analysis must be completed prior to irretrievably committing resources).

In *Earth Island II*, the Forest Service also concluded—just as they did here—that "there would be no trend resulting in the federal listing of the California spotted owl" as a result of the planned post-fire logging. *Id.*, at 1171; *compare* ER 54-55 (concluding that the Rim fire logging project "is not likely to result in a trend toward Federal listing or loss of viability" for spotted owls). The Ninth Circuit held that, because the Forest Service's analysis of impacts to California spotted owls from planned post-fire logging excluded impacts from the removal of foraging habitat in

high-intensity fire areas outside of PACs, the Forest Service acted arbitrarily and capriciously, and violated NEPA's hard look standard. *Earth Island II* at 1172-73; *see also id.* (noting that a NEPA hard look requires addressing "the *actual* impact of proposed projects") (emphasis added). Here, Defendants perpetrated the same violation, and desire a different result. Mtn. at 8-9.

Moreover, the Ninth Circuit made clear that the Forest Service cannot forego addressing the impacts from removal of foraging habitat by arguing that there is not complete certainty about the data. *Earth Island II* at 1172-73. Here, Defendants make this same argument that they lost on in 2006: that they can exclude analysis of impacts from logging in high-intensity fire areas outside PACs because Defendants believe there is some "uncertainty", Def. Opp. at 13, or believe "there is no scientific consensus" about the impacts of their proposed logging (Def. Opp. at 8 (emphasis in original)). The Ninth Circuit has clearly rejected this excuse, and holds that agencies cannot fail, or refuse, to disclose adverse impacts to the public based upon the argument that there is less than absolute certainty—a position that, if countenanced, would render NEPA meaningless. *Earth Island II* at 1171-72 (explaining that the Forest Service's argument "that it considered the information concerning the owl's use of post-fire habitat and determined that the findings were too inconclusive" was unlawful because an FEIS "cannot assume that simply because the owl habitat studies are preliminary, the adverse impacts discussed therein will not occur."). In fact, the very same data that was at issue in *Earth Island II*, and found necessary to be addressed

by the Court then, is now even more robust because it has subsequently gone through peer review and been published in a prominent wildlife journal. ER 397-405.

In an effort to bolster their claim that there is "no scientific consensus", Defendants blatantly misrepresent the scientific studies pertaining to spotted owls and fire, suggesting that Bond et al. (2009) reported that their results were "equivocal" (ER 397), and that Bond et al. (2013) concluded that "'little is known' about the issue" (ER 407) Def. Opp. at 8. In fact, these quotes both come from the Introductions of each of the two studies, Bond et al. (2009) and Bond et al. (2013), and evidence the state of information which existed *prior* to the completion of their studies, not, as Defendants imply, the state of information after these scientific studies were conducted. The fact is these studies were done to provide unequivocal answers regarding owls use of burned forest, and to establish a state of knowledge with regard to what owls eat in high-intensity burn areas. Similarly, Defendants other cites do not support their assertion that "no scientific consensus exists" . Def. Opp. at 8.

Defendants also try to attack Plaintiffs' focus on the 1.5 km surrounding the known nest/roost or spotted owl detection site claiming that it "is not a recognized owl habitat classification." Def. Opp. at 8 (emphasis in original). Defendants misrepresent the record. The 1.5-km radius is recognized in the scientific literature, such as Bond et al. (2009), as having a meaningful (and statistically significant) relationship with owl foraging practices in high intensity burn areas. ER 402 (concluding that, for most spotted owls, the "strongest selection for foraging areas

was in high-severity burned forest within 1.5 km from the center of their foraging ranges"). "Selection" means use exceeding availability, which is the same scientific method that is relied upon to determine suitable owl nesting/roosting habitat. PSER 4 ("By comparing the amount of time owls spend in various habitat types to amount of habitat available, researchers determined that owls preferentially used areas").

Indeed, for all of Defendants' herculean efforts to sow the seeds of doubt and uncertainty, the record is starkly clear about the dramatic adverse impact of post-fire logging of high-intensity fire areas within territories occupied by California spotted owls. ER 480 (Lee et al. (2012) (all 7 of the post-fire logged California spotted owl territories lost occupancy); ER 288-89 (Lee Dec.); ER 454, (DellaSala et. al. (2010), all California spotted owl territories that were post-fire logged lost occupancy); ER 293-94 (DellaSala Dec.) ER 439 (Clark et al. 2013, "Our results also indicated a negative impact of salvage logging on site occupancy by spotted owls. We recommend restricting salvage logging after fires on public lands within 2.2 km of spotted owl territories (the median home range size in this portion of the spotted owl's range) to limit the negative impacts of salvage logging."); ER 276-77 (Bond Dec.) ("Clark (2007) found loss of spotted owl occupancy where post-fire logging averaged about 16% within territories."); ER 403-04 (Bond et al. (2009), showing that for California spotted owls, scientists recommend, at the very least, that post-fire logging should not

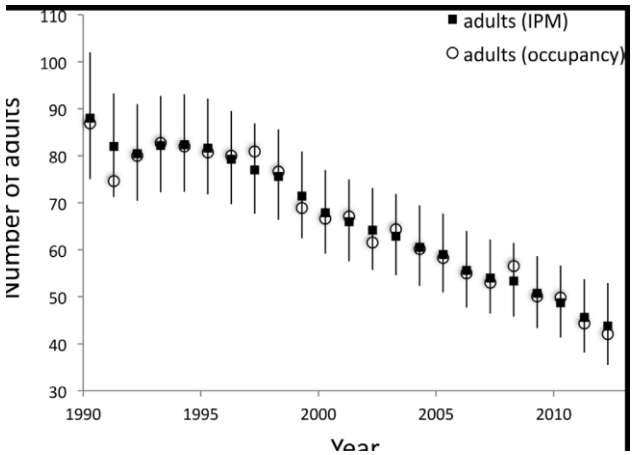
be conducted within an owl's territory core area, *i.e.*, within 1.5 kilometers (km) of nest/roost locations).[1] Defendants' Opposition avoids mention of this central fact.

Defendants next argue that they can sidestep *Earth Island II* supposedly because, under the *Lands Council v. McNair* decision, they have the "discretion" to "choose a method" for analyzing adverse impacts to spotted owls. Def. Opp. at 11. But any method they choose must be "reasonable" and, as discussed herein, only choosing to analyze site specific impacts to Protected Activity Centers is not reasonable because it ignores an entire aspect of what owls need to survive – namely, the foraging habitat where they find their food. *Earth Island II* at a1172-73. Further, because Defendants never actually prepared an analysis of the impacts of logging thousands of acres of owl foraging habitat within 39 occupied territories, there is nothing for this Court to defer to. *Or. Natural Desert Ass'n. v. BLM*, 625 F.3d 1092, 1121 (9th Cir. 2010) (" We cannot defer to a void.")

In fact, the only real differences between the facts in *Earth Island II* and those here are that the Rim fire logging is in an even more sensitive area (an Area of Concern, see Mtn. at 4) and the fact that, in 2006, the California spotted owl

[1] Defendants here try to improperly rely on the illegal, *post-hoc* litigation declaration of Patricia Manley, which contains numerous misleading and false statements. *See* PSER at 5-11 (excerpt from Plaintiffs' district court Reply Brief). This declaration was not accepted or considered by the District Court (ER 376), a disposition which (unlike Plaintiffs) Defendants did not challenge on appeal. Even though this declaration is not properly before this Court, it is worth noting that Dr. Manley recognizes both the 1.5 km radius and the fact that post-fire logging within this portion of an owl's territory "may result in territory abandonment". SER at 256.

population was believed to be stable (*id.*, at 1169) while, now, it is acknowledged that the population is declining where logging, including post-fire logging, is allowed (the vast majority of the range), and are only stable population on the very small fraction of the range that is protected. Mtn. at 4; ER 442, 449, 484, 489, and 497. The population is not merely declining, it is plummeting in the area nearest the Rim Fire (*see* figure below, from ER 497)—a fact Defendants notably avoid.



Similarly, Defendants' citation to SER 112-14 to support their claim that they "discussed the effect the Project might have on owl foraging in burned areas outside PACs" (Def. Opp. at 12) is spurious. Those pages in the FEIS merely provide brief background on spotted owls and fire. They do not do what *Earth Island II* requires: incorporate the loss of preferred spotted owl foraging habitat that would actually occur in the logging project into the impacts analysis/conclusions the way Defendants did for nest/roost habitat in PACs.[2] *Earth Island II* at 1169-73.

[2] Defendants also claim (Def. Opp. at 12) that they analyzed impacts to owls in light of the "new [2014] owl survey results" in the Rim fire,, citing SER 147-48 and SER

Finally, Defendants insist that their actions were proper because they believe that long-term benefits outweigh the short-term impacts of post-fire logging on the owl. Def.Opp. at 14. However, because they did not acutally prepare the short-term analysis regarding the Project's direct effects to spotted owl foraging habitat within occupied owl territories, and what the likely impact of this logging would be on the spotted owls, this so called *balancing* is not due deference. *Earth Island II* at 1169-73.

II. Significant New Information Requires Supplemental NEPA Analysis

Defendants open their opposition on this legal issue with conclusory statements, insisting that the new owl survey data was "incorporated in the EIS" and "shaped the final decision" – but then offer no evidence of actual divulgement or analysis of the new information, other than that six improperly dropped Protected Activity Centers were re-established. Def.Opp. at 15; *see also* Mtn. at 14. None of the pages cited by Defendants are pages from the FEIS or ROD disclosing to the public the results of the owl surveys (such as the 92% occupancy and the existence of 39 occupied owl territories), the amount of logging within the occupied territories that would impact foraging habitat (which extends far beyond the PACs that Defendants and Intervenors speak to), or the likely effects of this logging on owl survival.

217-18. However, SER 147-48 provides no information about what the 2014 surveys actually found, and SER 217-18 is a two-page internal Forest Service letter that was never publicly disclosed, did not divulge what the 2014 surveys found, and states explicitly that it was written in response to an August 27, 2014 pre-litigation settlement offer from Plaintiffs, not in response to the 2014 survey results described in Monica Bond's August 21, 2014 letter. ER130-245.

Defendants next claim that the "EIS . . . discussed the effect of the Project on non-PAC foraging habitat based on th[e] understanding that owls forage in burned forests. . . ." But the pages cited (SER 112-114, 128, 134-135), although they even acknowledge "that owls preferentially select high-severity fire areas for foraging" (SER 128), offer no analysis of the impacts of the Project to the preferred foraging habitat that exists in the 39 occupied territories. The pages do not even recognize the existence of the 39 occupied territories. Defendants try to muster support for their failure to disclose and analyze this information by insisting that the new information "did not present 'a seriously different picture of the likely environmental harms stemming from the proposed project.'" Def.Opp. at 15. But in the case they cite – *Tri-Valley CARES* – the agency had conducted a "supplemental report," whereas here, Defendants steadfastly refuse to do so. In addition, Defendants never actually explain why the 2014 survey data does not present "a seriously different picture" or "did [not] change the on the ground effects of the Project." Def.Opp. at 16. Nor do they even respond to the *Warm Springs* case raised in Plaintiffs' Motion (at 13-14), which lays out 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." No reasoned determination exists here given Defendants' refusal to analyze the new information in relationship to the Project's logging units. This is especially so given that the location of the logging in regard to the 39 occupied territories is essential to determining the

"on-the-ground effects of the Project." Indeed, here, Plaintiffs' analysis of the 2014 survey data shows that all 39 occupied territories would lose 5% or more of their preferred owl foraging habitat to logging, 17 would lose 21-50% of it, and 8 occupied territories would lose over 50%. ER341-47. The eight owl territories at issue here would lose between 29% and 75% of their core foraging habitat, with most losing almost half of this habitat, through the proposed salvage logging. 27-3 Certificate at 1-2. All of the scientific research which has looked at post-fire logging within owl territories indicates that the likely outcome of such activity is loss of occupancy (*i.e.*, owls abandoning their territories), which results in a decline in the species' population. Mtn. at 10; *see also supra* at 5-6(citing ER 288-89, 293-94, 439, 454, 480). Thus, under these circumstances, there can be no justification for Defendants' failure to conduct supplemental NEPA analysis and divulge this information and impacts to the public.

Defendants also incorrectly insist that because Plaintiffs (a small subset of the general public) had "actual notice" of the relevant facts (*i.e.*, the existence and location of owls in the Project area), then "NEPA is satisfied." Def.Opp at 16. But the case they cite says nothing of that sort. Rather, *Kootenai Tribe* states that "actual notice [to plaintiffs] *supplements* notice from the maps [already] provided to the public. . . . [T]he maps within the DEIS and FEIS in context gave reasonable notice of the roadless areas that would be affected by the rule." *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1117 (9th Cir. 2002). Here, on the other hand, there are no maps of the 39

occupied territories in the DEIS or FEIS and, in fact, there is nothing at all in the DEIS/FEIS/ROD providing reasonable notice to the public as to this information.

Moreover, while Plaintiffs were finally given the survey data (after multiple requests), they had to do their own analysis in order to ascertain the information's relationship to the logging units. And, even after Plaintiffs provided the Forest Service with an in-depth, detailed analysis showing the impacts of the Project to occupied owl territories (ER 130-245), the agency still refused to divulge that information in the FEIS or provide any analysis in the FEIS. The other case Defendants cite to – *Westlands Water Dist. v. Dep't of Interior*, 376 F.3d 853, 873 (9th Cir. 2004) – merely stands for the proposition that: "When new information emerges after the circulation and public comment period of the DEIS, it may be validly included in the FEIS without recirculation." Here, however, the new information is *not* divulged in the FEIS or ROD, let alone analyzed in the FEIS. Thus, the fact that Plaintiffs obtained the 2014 survey data in no way obviates the need for Defendants to publically disclose this information and incorporate it into their NEPA analysis.

Finally, Defendants, in tacit recognition that they did not in fact prepare a site specific analysis of impacts to California spotted owls from removing thousands of acres of preferred foraging habitat from 39 occupied owl territories, rest on their so called "scientific judgment" that only looking at direct impacts of the project on PACs satisfies their obligation under NEPA. However, as explained above, this cannot represent the exercise of the agency's "reasonable" judgment because the 300 acre owl

PACs are not designed to provide owls with all of their life necessities. *See also*, Mtn. at 9-10. Because the direct impacts to owl foraging habitat within occupied owl territories was not addressed by the Rim Fire FEIS, a supplemental EIS is required to comply with NEPA.

III. Plaintiffs Have Established Likely Irreparable Harm

Defendants begin, while not actually challenging Plaintiffs' standing to sue in this matter[3], by attempting to parlay (absent any supporting authority) the requirements of Article III standing to the irreparable injury prong of the test for an injunction pending appeal. Def.Opp. at 17. In making this argument Defendants grossly and inaccurately understate the degree and extent of irreparable harm posed by this Project, ignoring the fact that the areas that Plaintiffs' members enjoy (complex early seral forest created when mature and old forest burns at high intensity) represent a small fraction of the overall burned on the Stanislaus National Forest (approximately 25,000 acres) and are overwhelmingly targeted by the proposed logging (removing in excess of 15,000 acres of this habitat). *See* Mtn. at 1-2. Defendants' vague assertion about lack of specific interests completely ignores not only the submitted declarations (Mtn. at 15-16 *citing* ER 246-269), but also controlling

[3] This is a futile argument because Plaintiffs' Declarants clearly indicate a time when they will return to the area to view the complex early seral forest. *See e.g.*, ER 255, 258, 262. In addition, Earth Island member Chad Hanson has twice attempted to visit the areas scheduled for logging, to document what is there before it is gone, and has been twice denied access. *See e.g.* Fazio Dec. Ex. B.

Ninth Circuit case law which has determined that for purposes of securing a preliminary injunction the harms alleged here by Plaintiffs satisfy the irreparable harm prong of the test for injunctive relief, even if some areas of the forest are left intact.[4] *See e.g. Alliance for the Wild Rockies v. Cottrell, 6*22 F.3d 1045, 1053 (9th Cir. 2010).

Next, Defendants and Intervenors insist there is no *likely* irreparable harm to California spotted owls from the removal of thousands of acres of foraging habitat from within occupied spotted owl territories. Def.Opp. at 17. But the science indicates that irreparable harm, in the form of loss of owl occupancy or territory abandonment resulting in further population declines for this species, is likely from the proposed activity. Mtn. at 10; *see also supra*. pp. 5-6. Defendants have no evidence to support an assertion to the contrary, that post-fire logging between 29% and 75% of foraging grounds within the occupied owl territories at issue here will not likely cause irreparable harm to these resident owls. 27-3 Cert. at 2; Mtn. at 2-3; *see also* ER 301-08; ER 344-346; ER 276-277 at ¶15(a)-(c); ER 287-289 at ¶6-10.[5]

[4] Similarly, the fact that Plaintiffs harm is larger than the injunction requested is not a factor which diminishes likely irreparable harm since the tailored injunction is tied to the scope of the alleged legal violations.

[5] *Conservation Cong. v. United States Forest Serv.*, No. CIV. S-13-0832 LKK/DAD, 2013 U.S. Dist. LEXIS 127671, *20 (E.D. Cal. Sept. 6, 2013) ("Bond, in the cited papers, specifically recommended that 'post-fire logging be avoided within 1.5 kilometers (at least) of Spotted Owl nest sites.' . . . Also, [the Forest Service] identifies no literature that indicates that it would be appropriate to log within 1.5 km from the nest site.")

Intervenors take another tack, based mostly on incorrect assertions regarding owl biology. Int.Opp. at 6-7. First, California spotted owls are a cavity nesting species: "In Sierran conifer forests, [spotted owl] nests are usually in cavities or on broken-topped trees or snags. . .[C]avity nests dominate nest types of California spotted owls in the Sierra Nevada…" PSER 1. Next, the fact that logging will not happen during nesting season does not weigh against irreparable harm to owls, because regardless of when the logging occurs it is likely that extensive removal of foraging habitat from an occupied owl territory will render the territory unsuitable and the owls will abandon it. (27-3 Cert. at 3; Mtn. at 2-3; 10; 14; and 16). Similarly, the fact that none of the eight territories at issue here had confirmed nesting pairs (6 of the 8 were in fact pairs) also does not argue against harm to these owls, because owls do not nest every year and maintaining the territory for future years matters to their overall population. PSER 2, 3. Finally, the existence of other foraging habitat outside of occupied territories (*i.e.*, in an area where the owls are not residing) does not guard against loss of occupancy from removing foraging habitat within 1.5 km of the owl sites. *See* ER 278 (Bond Dec., discussing how "*where* foraging habitat exists on the landscape matters").[6] As discussed previously (Mtn. at 10), the so called mitigation measures relied upon by Intervenors (Int.Opp. at 7) and Defendants (Def.Opp at 9) also do not eliminate the likely irreparable harm that this project will have on these California spotted owls.

[6] Similarly the photograph submitted by Intervenors (Wayland Dec. Ex. 1) also does nothing to address or mitigate the impact of removing hundreds of acres from each of

Notably, neither Defendants nor Intervenors address the likely irreparable harm to spotted owls in relation to the precipitous decline this species is experiencing in managed (logged) landscapes, or the fact that the geographic location of the Rim Fire logging is in a designated Area of Concern for this species. *Compare* Def.Opp. at 16-18 and Int.Opp. at 6-7 *with* 27-3 Cert. at 3-4 and Mtn. at 3; 6-7; 8. These facts make it even more likely that impacts to individual owls translate to likely irreparable harm to the population. 27-3 Cert. at 3-4.

Finally, Defendants insist that the lapse in time between the district court's denial of preliminary injunction and the filing of Plaintiffs' motion for injunction pending appeal undermines Plaintiffs' claim of imminent, irreparable harm. However, in making this argument Defendants misstate the facts – logging on Triple A did not begin until October 17, 2014 and logging on DoubleFork has still yet to commence. 27-3 Cert. at 2 and 6. In addition, the cases cited by Defendants do not support their argument here. *Oakland Tribune*'s holding turned on the fact that Plaintiffs in that case had waited years to file their legal action. *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985). Similarly, *Arc of California v. Douglas* reversed the Eastern District of California's finding of undue delay, determining that the respective two year and three month lapses in time between harm and filing was not probative because the harm alleged was cumulative in nature, was ongoing and worsening with each legislative cut in compensation. *Arc of California v. Douglas*, 757 F.3d 975, 990-991

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the owl territories at issue here. ER301-308.

(9th Cir. 2014). Here, only a brief period of time (21 days) passed before Plaintiffs filed for an injunction pending appeal, and harm is occurring in stages, is cumulative in nature, is ongoing ,and has yet to begin on DoubleFork. 27-3 Cert. at 2; 6.

IV. Balancing and Public Interest Weigh in Favor of Injunction

As an initial matter, Defendants' and Intervenors' claims of harm are overly broad for the purposes of balancing in the context of the tailored injunction and the timeframe (remainder of fall, over winter and early spring/summer) during which this injunction would be in place; nevertheless, their contentions are addressed below.

Ignoring the fact that there are over 8,000 acres proposed for salvage logging or roadside hazard tree removal and an additional 4,353 acres of deer emphasis and fuels treatment logging which do not intersect with any occupied owl territories, and would not be enjoined by this injunction pending appeal (Mtn. at 18), Defendants make the incredible claim that enjoining the remainder of logging in 8 owl territories threatens implementation of the entire Project. Def.Opp. at 18-20. This nonsensical statement is made even more so by the fact that: hazard tree logging is largely completed (Mtn. at 19); required roadwork on Triple A and Nevergreen has been completed and/or is ongoing (*see e.g.* ER354-355); Plaintiffs don't object to hauling through owl territories; and Intervenors do not indicate that they would abandon these sales if such an injunction were put in place (Int.Opp. at 7-12). Thus, failure to continue to implement these timber sales, outside of owl territories, or pursue work in

other parts of the Project area which do not intersect with owl territories, would simply be done by choice and should not weigh against the limited injunction here.

Next, Intervenors and Defendants focus on potential loss of revenue. Def.Opp. at 19-20; Int.Opp. at 11. However, economic loss is remedied by money damages, it is not irreparable. Mtn. at 18. SPI and the surrounding communities have been, and will continue to be, enriched by the logging that has already occurred in the Rim Fire Project area, is ongoing, and would continue even under an injunction pending appeal. Intervenors focus on lost timber value, but they are already operating outside of the normal operating period (which usually runs from 5/1 to 10/31 , *see e.g.* ER354), and their contracts run through 2016/2017 (Mtn. at 18). Their complaints of lost value will occur almost exclusively due to the winter hiatus which naturally occurs once weather sets in, and not from any injunction pending appeal issued here.

Defendants other arguments include: we must remove the amazing wildlife habitat created by high intensity fire (ER11-23) in order to enhance wildlife habitat (Def.Opp. at 19); and their assertion that the Project has broad public support (*Id.* at 20; Int.Opp. at 8). Defendants ignore that the vast majority of comments were against the proposed logging (*see e.g.,* PSER 12), and the fact that their "supporters" were never informed of the likely impacts of this project on California spotted owls.

Next, because owls use and benefit from high intensity fire, and salvage logging in occupied territory core areas likely results in the owls abandoning these territories, logging to reduce fuels to prevent another fire is simply not a benefit to owls.

Furthermore the science indicates that salvage logging does not reduce the risk of future severe fire. Mtn. at 19; *see also* ER503 (Thompson et al (2007) ("Areas that were salvage-logged and planted after the initial fire burned more severely than comparable unmanged areas"). Finally, the Forest is now open (Fazio Dec. Ex. B), conifer seedlings are naturally regenerating (ER 262 ; ER248), and there exists very little intersection between where salvage logging is going to occur and private land inholdings. ER351 In light of the foregoing the balance of harms and public interest tip sharply in favor of the requested injunction.

Dated: November 21, 2014

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on November 21, 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