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15 **IN THE UNITED STATES DISTRICT COURT**
16 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
17 **FRESNO DIVISION**

18
19 CENTER FOR BIOLOGICAL
DIVERSITY, EARTH ISLAND
20 INSTITUTE, and CALIFORNIA
CHAPARRAL INSTITUTE

21 Plaintiffs,

22 v.

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

26 Defendants.
27
28

Case No. 1:14-cv-01382 GSA

**MOTION AND MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF PLAINTIFFS'
REQUEST FOR PRELIMINARY
INJUNCTION AND/OR
TEMPORARY RESTRAINING
ORDER**

Requested Hearing date: September 17, 2014
Time:
Courtroom:

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 In the Record of Decision (“ROD”) for the Rim Fire Recovery Project (“Rim Fire Logging
4 Project”) is more apt as in this instance “recovery” primarily means “recovery” of the economic value of
5 dead trees), Forest Supervisor Susan Skalski discusses and acknowledges her obligation to protect the
6 California spotted owl, a Forest Service Sensitive Species whose population in the Sierra Nevada is
7 declining, stating generally that her decision weighed and balanced competing interests but still affords
8 protections for this species. What Supervisor Skalski fails to disclose, however, is that California
9 spotted owl occupancy in the Rim Fire area is unexpectedly high – over 90% – significantly higher than
10 occupancy in territories in unburned forest in any given year (typically 67-76%). These approximately
11 70 owls that have chosen the Rim fire area as their home (mostly in pairs distributed between 39
12 territories) have located their territories in areas where significant portions of their essential foraging
13 grounds exist in areas that burned at high intensity, but the Rim Fire logging project will log this
14 preferred habitat in every single occupied territory. A few territories will lose 5-16% of their core
15 habitat to logging, but the majority of territories will lose nearly a third of this habitat, and eight will
16 lose 50% or more. It is likely that Supervisor Skalski failed to discuss the many owls currently living
17 in the Rim fire area in her Decision because the Rim Fire logging project Final Environmental Impact
18 Statement (“FEIS”) and accompanying documents never actually disclose this information to the public
19 or analyzed the consequences of such intensive logging in the core of resident owls’ territories, even
20 though the literature has found that logging within this core area increases and/or causes owls to
21 abandon their territories, and that this loss of occupancy directly contributes to further population
22 declines. These failures of public disclosure and candid assessment of impacts to this iconic, revered,
23 and sometimes despised species in the Rim Fire logging project analysis renders the FEIS inadequate
24 under the National Environmental Policy Act (“NEPA”). Logging within these territories should
25 therefore be enjoined until the Forest Service meets its obligation under the law to disclose and take a
26 “hard look” at the impacts of this Project on the many California spotted owls occupying the Project
27 area so that the public can be informed of the true consequences of this action and the Forest Service
28 can proceed having made an informed decision.

REQUEST FOR RELIEF

1
2 Plaintiffs request that this Court enjoin tractor, skyline and or helicopter logging, as well as,
3 roadside logging on roads not maintained for public use (maintenance Level 1 and 2 roads), and any
4 other activities associated with the planned logging, within occupied California spotted owl territories:
5 specifically within 1.5 kilometers of the best 2014 location for the territory center—in most cases, nest
6 or roost sites. *See* Declaration of Curt Bradley, Exhibits A & B; Declaration of Justin Augustine,
7 Exhibit D (showing maps of logging units in relationship to owl territories and project area).

8 This immediate request for temporary injunctive relief is in relation to the Nevergreen Timber
9 Sale for which logging is scheduled to begin as early as Thursday, September 18, 2014; and the Double
10 Fork timber sale, which may be awarded on Monday, September 15, 2014 and operations within
11 occupied owl territories could commence on Thursday, September 18, 2014 as well. *See* Exhibits A
12 (Bradley Dec.) and D (Augustine Dec.) (maps showing Nevergreen and Double Fork logging units in
13 relationship to owl territories). It should be noted that this is a tailored injunction, and any logging and
14 logging related activities outside of the areas described above, which do not necessitate habitat
15 destruction or tree removal within the 1.5 kilometer owl territory areas may proceed unencumbered.

STATUTORY BACKGROUND

17 *The National Environmental Policy Act*

18 NEPA is “our basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a).
19 NEPA’s twin aims are to ensure that federal agencies consider the environmental impacts of their
20 proposed actions and inform the public that environmental concerns have been considered. NEPA
21 requires “responsible [federal] officials” to prepare an environmental impact statement (“EIS”) to
22 consider the effects of each “major Federal action[] significantly affecting the quality of the human
23 environment.” 42 U.S.C. § 4332(2)(C)(i). Preparation of an EIS is mandated if “substantial questions
24 are raised as to whether a project . . . may cause significant degradation of some human environmental
25 factor.” *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d
26 1172, 1219-20 (9th Cir. 2008) (emphasis added). In the analysis of impacts, the agency must articulate
27 a rational connection between the facts found and the decision made. *Ocean Advocates v. United States*
28 *Army Corps of Engineers*, 361 F.3d 846, 865 (9th Cir. 2003). If significant new information or

1 changed circumstances arise, an agency must prepare a supplemental analysis. 40 C.F.R. § 1502.9(c);
2 *Price Road Neighborhood Ass’n, Inc. v. U.S. Dept. of Transp.*, 113 F.3d 1505, 1508-1509 (9th Cir.
3 1997).

4 **FACTS RELEVANT TO THE RESOLUTION OF PLAINTIFFS’ CLAIMS**

5 **The Rim Fire:** The Rim fire occurred in the summer of 2013, ultimately spanning 257,314
6 acres, primarily on the Stanislaus National Forest in the western Sierra Nevada. AR B00103.¹
7 Approximately 40%, or a little over 100,000 of these acres, did not burn in conifer forests (forests made
8 up of pine and fir trees), but rather burned in grassland, shrubland, oak woodland, and some rock
9 outcroppings. AR E003348. The Rim Fire burned, as all fires do, in a mosaic pattern of mixed
10 intensities with over 54% of the conifer forest burning at low intensity, about 13% of conifer forest
11 burning at moderate intensity, and approximately 33% of the conifer forest burning at high intensity,
12 wherein most or all trees are killed. AR E003348-3349; *see also* AR C00889 (Table 6). These patches
13 of high-intensity fire in mature conifer forest create a rare and very ecologically rich habitat type
14 known as “complex early seral forest”, which is characterized by an abundance of standing trees killed
15 by fire (“snags”), downed logs, montane chaparral (flowering native shrubs), and naturally-regenerating
16 conifer seedlings and saplings. AR B00254-69.

17 In January of 2014, a group of about 150 scientists from across the nation sent a letter to the
18 Stanislaus National Forest urging the Forest Service not to log or artificially plant the Rim fire area.
19 AR G02893-2905. The scientists noted that this habitat is the most biodiverse and wildlife-abundant
20 forest type in the Sierra Nevada, and has declined substantially in recent decades due to fire suppression
21 and post-fire management (*e.g.*, post-fire logging, and removal of native shrubs as part of artificial
22 conifer planting), and they concluded that “there is a consensus of scientific opinion that post-fire
23 logging and artificial conifer plantation establishment is one of the most ecologically damaging
24 activities that could occur after mixed-severity fire.” AR G02894-95.

25 **California Spotted Owl:** The California spotted owl is a rare raptor, living mostly in the
26 forests of the Sierra Nevada, and has been designated as a Sensitive Species by the U.S. Forest Service,
27 _____

28 ¹ Citations to AR _____, are citations to the administrative record which Defendants will be providing to the Court today.

1 meaning that there is a recognized concern about threats to the viability of the population. AR B00445.
2 The California spotted owl is declining in population on national forest lands where mechanical
3 thinning and post-fire logging are allowed, and is only maintaining stable populations on the small
4 portion of the Sierra Nevada that is protected from logging, on national park lands. AR K04876, 25430;
5 see also Declaration of Monica Bond (Bond Dec.), ¶ 6. One factor which contributes to and
6 exacerbates a decline in California spotted owl populations is a loss of occupancy in owl territories.
7 When an event like logging causes the owl to abandon its territory, this is equated to a loss of that bird
8 or birds because it is likely that a displaced owl/owls will not survive due to competition for scarce
9 habitat, potential starvation and/or predation. *See* Bond Dec., ¶¶16-22; Declaration of Derek Lee (Lee
10 Dec.), ¶¶7-14; Declaration of Dominick DellaSala (DellaSala Dec.), ¶¶4-6.

11 The area on the Stanislaus National Forest where the Rim Fire burned is a special “Area of
12 Concern” for the California spotted owl due to “habitat fragmentation, which creates a potential
13 bottleneck in the distribution of owls”. AR B00448.

14 The spotted owl selects dense, mature stands with low/moderate-intensity fire effects (or
15 unburned) for nesting/roosting, and preferentially selects unlogged, high-severity fire areas (complex
16 early seral forest) for foraging/hunting within 1.5 kilometers of nest/roost locations when such areas are
17 available on the landscape (AR K01310), due to the abundant small mammal prey base living in the
18 montane chaparral (native shrubs), downed logs, and snags in complex early seral forest created by the
19 fire. AR K01464.

20 Mixed-intensity wildland fire does not cause California spotted owls to abandon their territories
21 and therefore does not reduce California spotted owl occupancy (AR K13085), and spotted owl
22 territories generally remain occupied even when they are affected mostly by high-intensity fire. AR
23 K13091 (study showing that even owl territories with over 50% high intensity fire effects remained
24 occupied so long as they were not logged). However, post-fire logging within 1.5 kilometers of
25 nest/roost locations dramatically reduces or completely eliminates occupancy after fire. AR K13093;
26 *see also* AR O00181-82 (letter from DellaSala et al.). The recommendation from the top scientists
27 studying spotted owls and fire is that, in order to protect resident owls and ensure that they do not
28 abandon their territories, no post-fire logging should occur within 1.5 kilometers (km) of nest/roost

1 locations (AR K01316-17) – a recommendation reiterated by the world’s most-published scientific
2 expert on spotted owls and fire, in comments on the draft Rim fire proposal. AR E03435, E0975-84.

3 **Rim Fire Logging Project:** The Rim fire logging project (decision signed August 28, 2014),
4 challenged in this action, would remove the *majority* of the complex early seral forest (which was
5 created when the Rim fire burned intensely in conifer forests) on the Stanislaus National Forest, mostly
6 through the 15,383 acres of post-fire “salvage” logging and the 17,335 acres of roadside logging along
7 non-public roads approved by the Rim Recovery logging project. A00016-17.

8 The Final Environmental Impact Statement for the Rim Fire logging project assumed that
9 California spotted owls would not occupy much of the Rim fire area ostensibly because it burned too
10 intensely. AR B0447. However, surveys conducted by the Forest Service’s own wildlife biologists in
11 2014, prior to logging under the Rim fire logging project, revealed that:

- 12 a. 39 spotted owl territories (mostly pairs) are occupied in the Rim fire (AR E00978-80);
- 13 b. overall occupancy in the Rim fire, after accounting for probability of detection (i.e.,
14 adjusting for the fact that you might not find owls even when they are present), is 92%,
15 which is substantially higher than average annual occupancy in unburned mature/old forest
16 which is typically 60-76% (in any given year, a portion of historical territories are invariably
17 unoccupied) AR E00980-81; Bond Dec. ¶18f.
- 18 c. pair occupancy was not reduced in the Rim Fire even in the territories with mostly high-
19 intensity fire effects. *Id.*

20 The Rim Fire logging Project approved logging in all 39 occupied California spotted owl
21 territories, logging on average 33% of the area within 1.5 kilometers of each owl location (equating to a
22 much higher proportion of their preferred foraging /hunting grounds created by high intensity fire in
23 particular), with most territories losing almost a third, or in some cases substantially more, of their
24 habitat by the planned logging. Bond Dec., ¶¶ 15-16. Approximately 15,000 acres of the 32,718 acres
25 of proposed post-fire logging would occur within 1.5 km of occupied spotted owl sites under the chosen
26 Rim fire logging decision. AR B00003.

27 The Forest Service conducted the owl surveys, and completed them in early August of 2014.
28 This information was therefore available to the Forest Service two weeks before the FEIS and Record

1 of Decision (ROD) were released. Moreover, nine days after Plaintiffs received the survey data, and
2 one week before the FEIS and ROD were released, spotted owl expert Monica Bond submitted a letter
3 to the Forest Service explaining the 2014 owl survey data and what it meant in relationship to the
4 proposed logging. (AR E00973-84). Nowhere does the FEIS divulge this new owl information (the
5 high level of occupancy or the location of the owls in relation to the planned logging) or analyze the
6 adverse impacts of the removal of habitat in the owls primary hunting grounds (*i.e.*, within 1.5 km of
7 owl sites). Bond Dec., ¶¶15-18.

8 To date, the Forest Service has advertised two timber sales, Nevergreen and Double Fork.
9 (<http://www.fs.usda.gov/resources/stanislaus/landmanagement/resourcemanagement>). Plaintiffs were
10 told that Sierra Pacific Industries was identified as the high bidder on Nevergreen on September 11,
11 2014. The Double Fork timber sale was advertised on Friday, September 5, 2014 with a bid opening
12 scheduled for Monday, September 15, 2014. A third timber sale called Triple A is scheduled to be
13 advertised in the next week or so.

14 In this motion for temporary restraining order and/or preliminary injunction, Plaintiffs seek to
15 enjoin logging and logging associated activities within 1.5 km of occupied California spotted owl
16 territories, leaving *most* of the planned logging within the project area able to proceed unchallenged.
17 Complaint (see ¶2 of Prayer for Relief section); *see also* AR B00003-4 (August 27, 2014 letter to the
18 Forest Service from Plaintiffs). In response, rather than focusing initial Rim fire timber sales outside of
19 the 1.5 km zones around occupied California spotted owl territories, which would allow this Court
20 more time to fully consider Plaintiffs' case and the impacts of planned logging, Defendants have
21 instead responded by choosing to heavily target occupied spotted owl territories, with about *three-*
22 *quarters* of the initial three timber sales (Nevergreen, Double Fork, and Triple A) being planned within
23 occupied spotted owl territories. *See* Declaration of Curt Bradley Exhibit A&B; Declaration of Justin
24 Augustine Exhibit D, (September 9, 2014 map from U.S. Forest Service, and map of logging units and
25 owl territories across the entire Rim fire).

26 STANDARD OF REVIEW

27 Judicial review of Plaintiffs' claims is governed by the Administrative Procedures Act ("APA").
28 *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc). Under the APA, a court must

1 “hold unlawful and set aside agency action found to be . . . arbitrary, capricious, and an abuse of
2 discretion, or otherwise not in accordance with the law . . . [or] without observance of procedure
3 required by law.” 5 U.S.C. § 706(2). Courts must conduct a “searching and careful” review of
4 challenged decisions. *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 859 (9th Cir.
5 2005). Though the scope of this review is narrow, a court “must not ‘rubber-stamp’ . . . administrative
6 decisions that [we] deem inconsistent with a statutory mandate or that frustrate the congressional policy
7 underlying a statute.” *Id.*; see also *NW Coalition for Alternatives to Pesticides v. U.S. Env’tl. Prot.*
8 *Agency*, 544 F.3d 1043, 1052 n.7 (9th Cir. 2008) (internal quotations and citations omitted).

9 Ultimately a Court must determine whether an agency decision “was based on a consideration
10 of the relevant factors and whether there has been a clear error of judgment.” *Idaho Sporting Cong. v.*
11 *Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998) (*citation omitted*). A reviewing court may reverse an
12 agency decision if the agency failed to consider an important aspect of the issue, offered an explanation
13 for its decision in contradiction of the evidence before the agency, or made a determination so
14 implausible that it could not be ascribed to a mere difference of opinion or the product of agency
15 expertise. *Pac. Coast Fed’n of Fishermen’s Ass’n, Inc. v. NMFS*, 265 F.3d 1028, 1034 (9th Cir. 2001).

16 TEST FOR INJUNCTIVE RELIEF

17 Issuance of injunctions and of temporary restraining orders is governed by Federal Rule of Civil
18 Procedure 65.

19 The standard for issuing a temporary restraining order is essentially the same as that for
20 issuing a preliminary injunction. The moving party must demonstrate that (1) it is likely
21 to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of
22 preliminary relief; (3) the balance of equities tips in its favor; and (4) that the relief
23 sought is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20,
24 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). The Ninth Circuit has held that injunctive relief
25 may issue, even if the moving party cannot show a likelihood of success on the merits, if
26 “serious questions going to the merits and a hardship balance that tips sharply toward the
27 plaintiff can support issuance of an injunction, assuming the other two elements of the
28 Winter test are also met.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135
(9th Cir. 2011) (internal quotation omitted).

Conservation Cong. v. U.S. Forest Serv., 2014 U.S. Dist. LEXIS 37774, 11-12 (E.D. Cal. Mar. 21, 2014)..”

1 Defendants will likely argue that this court, in exercising its equitable jurisdiction, may reject
2 issuance of an injunction based solely upon the third and fourth prongs of the test for injunctive relief,
3 because the Supreme Court in *Winter* overturned a grant of a preliminary injunction based upon a
4 failure to meet the third and fourth prongs (balancing of harms and public interest) of the test. *Winter v.*
5 *Nat. Res. Def. Council Inc.*, 555 U.S. at 23-24 (“As explained in the next section, even if plaintiffs have
6 shown irreparable injury from the Navy’s training exercises, any such injury is outweighed by the
7 public interest and the Navy’s interest in effective, realistic training of its sailors. A proper
8 consideration of these factors alone requires denial of the requested injunctive relief.”) Such a limited
9 review, focused on only two parts of the injunction test, was possible in that circumstance because the
10 Ninth Circuit had already reviewed all four prongs and determined that the Plaintiffs had met each of
11 them. Since meeting all four prongs is a prerequisite for obtaining injunctive relief, a reviewing court
12 which finds that one of the prongs has not been met must overturn the granting of the injunction. It
13 does not, however, follow from this logic that a district court, in initially reviewing a request for
14 injunctive relief, can do so without first determining whether a violation of law has likely been
15 perpetrated. The Ninth Circuit recently articulated the proper approach for determining whether to
16 issue a preliminary injunction:

17 We **first** analyze whether the LOWD plaintiffs are likely to succeed on the merits of any
18 of their claims under prong one of *Winter*. Upon determining that they are, we then
19 proceed to consider the remaining prongs of the *Winter* test to determine whether the
20 LOWD plaintiffs face irreparable injury, to balance the equities between the parties, and
21 to examine the public interest to determine whether a preliminary injunction is warranted.

22 *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755,
23 760 (9th Cir. 2014) (emphasis added).

24 This only stands to reason because there is no need for a Court to exercise its equitable
25 jurisdiction to balance harms or assess how the public interest will be affected by an injunction if there
26 is not a likely violation of law. *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531 (1987); *Porter v.*
27 *Warner Holding Co.*, 328 U.S. 395 (1946). In addition, to apply the sliding scale in the Ninth Circuit, a
28 court determines the degree to which Plaintiffs must demonstrate that the balance of harms favors an
injunction by first establishing the degree of success on the merits which Plaintiffs have demonstrated.

1 Skipping over the first prong of the test for injunctive relief is especially inappropriate in agency review
2 cases where often the legal challenges brought by Plaintiffs call into question an agency's conclusions
3 or assessment of the impacts or harms associated with implementation of the project (as is the case
4 here). In such a circumstance, reliance on the agency's own assessment of balancing, public interest
5 and harms, without first determining whether said assessments are reasonably based, can lead to the
6 inequitable denial of a request for injunctive relief.

8 ARGUMENT

9 Under either of the standards for injunctive relief, Plaintiffs, as explained below, are entitled to
10 injunctive relief in light of the strength of Plaintiffs' claims and clear harm from Defendants' actions.

11 **I. Plaintiffs Raise Serious Questions And Are Likely To Succeed On The Merits** 12 **Because The Forest Service's Rim Fire Project Violates NEPA**

13 **A. The Forest Service Did Not Take a Hard Look at Impacts of the Rim Fire** 14 **Project on California Spotted Owls Residing in the Rim Fire Area on the** 15 **Stanislaus National Forest**

16 NEPA establishes procedural requirements to ensure that agencies take a "hard look" at the
17 environmental impacts of their actions. *See Ocean Advocates*, 361 F.3d at 1125. Agencies must
18 consider all foreseeable direct, indirect, and cumulative impacts and include a candid discussion of
19 adverse impacts – one that does not improperly minimize negative side effects. *Earth Island Inst. v.*
20 *U.S. Forest Service*, 442 F.3d 1147, 1154, 1159 (9th Cir. 2006) ("*Earth Island II*") (citations omitted).
21 In reviewing the adequacy of an EIS or EA, the Ninth Circuit applies the "rule of reason" standard,
22 "which requires 'a pragmatic judgment whether the EIS's form, content and preparation foster both
23 informed decision-making and informed public participation.'" *Native Ecosystem Counsel v. U.S.*
24 *Forest Service*, 418 F.3d 953, 960 (9th Cir. 2005). Defendants violated NEPA's hard look requirement
25 here by: a) misrepresenting and sidestepping crucial scientific evidence about serious adverse impacts
26 to California spotted owl occupancy from planned logging in high severity fire patches located within
27 resident spotted owl's core area, represented by a 1.5KM radius (or a 1745 acre area) surrounding their
28 best known location (detection/roost, or nest site) ; and b) concluding that the Rim fire logging project

1 would not threaten the population viability of the rare and declining California spotted owl, without
2 first determining whether the logging plan would push the owl's populations below a critical threshold.

3 **1. The Forest Service Consistently Misrepresented, Ignored, or Improperly**
4 **Minimized Adverse Impacts to Spotted Owls from Planned Logging**

5 Plaintiffs, during comments, submitted numerous sources of scientific evidence regarding the
6 serious adverse impacts of post-fire logging on spotted owl occupancy but, rather than honestly
7 addressing this evidence and candidly disclosing and assessing adverse impacts to owl occupancy
8 which could flow from their proposed logging, the Forest Service instead chose to dodge and
9 prevaricate in order to justify its conclusion that the Rim fire logging project "may affect individuals
10 but is not likely to result in a trend toward Federal listing or loss of viability for the California spotted
11 owl". AR460-61. This is precisely what NEPA's "hard look" standard prohibits.

12 Defendants will likely argue that they *considered* the information submitted by Plaintiffs, and
13 found them lacking, thus their duty has been discharged. However, their justifications for not
14 incorporating the information into their assessment of impacts must be reasonable and demonstrate a
15 rational connection between the facts found and the decision made – here Defendants have failed on all
16 accounts. *Mont. Wilderness Ass'n v. Connell*, 725 F.3d 988, 1011 (9th Cir. 2013) ("Under the APA, an
17 agency must examine the relevant data and articulate a satisfactory explanation for its action including
18 a rational connection between the facts found and the choice made.") (internal citation and quotations
19 omitted)

20 First, Defendants failed to even acknowledge the importance of the 1.5 km [kilometer] radius
21 surrounding a known owl site in meeting the foraging requirements of resident owls [Bond Dec. at ¶¶
22 15-17 and 18(a)], nor (as discussed in detail in the Section B below) did they disclose to the public the
23 astonishing (compared to their previous assumption) occupancy rate of resident spotted owls in the
24 project area (over 90%) nor the location of the 39 owl territories which were discovered in the Rim Fire
25 area and their spatial relationship to the planned logging. These failures, on their own, demonstrate that
26 Defendants assessment of impacts to California Spotted Owls was not based on a consideration of all
27 the relevant factors and thus their Rim Logging Project EIS fails to meet NEPA's hard look
28 requirement.

1 However, in addition to simply ignoring relevant information, Defendants also misrepresented
2 the body of science regarding owls and fire. For example the FEIS stated: “Clark (2007) found that
3 while spotted owls did roost and forage within high severity burn areas, the use was very low. The
4 results suggest that this cover type was poor habitat for spotted owls.” AR B00446. This is a
5 fundamental misrepresentation of the findings. *See* AR K04468, Figure 6.2. Clark found that spotted
6 owls use pre-fire dense, mature/old forest (pre-fire nesting/roosting /foraging habitat) that burned at
7 moderate- and high-severity (and was not subjected to post-fire logging) at levels that exceeded the
8 abundance of such areas on the landscape—*i.e.*, the owls went out of their way to forage in these areas;
9 that they generally, burned areas with few large snags, such as burned forest subjected to post-fire
10 logging and were only found in areas of logging units which were excluded from heavy cutting (like
11 riparian areas). AR E03338; Bond Dec. at ¶18 (b). But the Forest Service failed to incorporate these
12 findings into their analysis of impacts to spotted owls from this project because they dismissed
13 consideration of the study on generic and inaccurate grounds.

14 Similarly, Defendants improperly and conveniently dismissed all the evidence which indicates
15 that post fire logging in occupied owl territories harms California spotted owls. First, the FEIS claimed
16 that “Lee et al. (2012) do not provide information or have any data pertaining to the question of
17 occupancy responses to logging postfire,” and claimed that “it is not possible to attribute change in owl
18 occupancy *solely* to salvage logging.” AR B00829 (emphasis added). But Lee et al. (2012) found that
19 every single spotted owl territory that was occupied after the fire and then subjected to post-fire logging
20 lost occupancy, while most unlogged territories in mixed-severity fire areas—even those dominated by
21 high-severity fire—remained occupied. AR E03332, 3451. A key finding of the study (AR K13093)
22 was that loss of occupancy was likely a result of post-fire logging within owl territories; 100% certainty
23 is rarely achievable in science and is not a reasonable justification for failing to incorporate these
24 findings into an analysis of potential impacts of the project on the California spotted owl. Bond Dec.
25 ¶18(c); Declaration of Derek Lee ¶¶5-10. Next, the Forest Service dismissed Clark et al (2013)
26 claiming that the study did not conclude that logging played a role in a loss of occupancy for California
27 spotted owls (AR B00829), when in fact the Clark et al. (2013) concluded, very clearly, that the loss of
28 occupancy was due to the “combined effects” of “wildfire *and subsequent salvage logging . . .*” AR

1 K04569. The authors further determined the following: “Our results also indicated a negative impact of
2 salvage logging on site occupancy by spotted owls. We recommend restricting salvage logging after
3 fires on public lands within 2.2 km [kilometers] of spotted owl territories (the median home range size
4 in this portion of the spotted owl’s range) to limit the negative impacts of salvage logging.” AR
5 K04583; Bond Dec. ¶18 (d). Here, there was a fire, and the Forest Service is proposing to heavily log
6 occupied spotted owl territories, the exact thing that was studied by Clark (2013). This study, as well
7 as the others discussed above, bear directly on the question of potential impacts to the California
8 spotted owl. The Forest Service’s refusal to analyze the impacts to Rim Fire resident spotted owls in
9 light of their findings is arbitrary, capricious and runs afoul of NEPA’s hard look requirement.

10 Defendants final attempt to avoid any discussion of the likely adverse impacts to California
11 spotted owls from the removal of high intensity burned forest within occupied owl territories is to
12 dismiss DellaSala et al. (2010), and Monica Bond’s August 21, 2014 letter to the Forest Service,
13 because they are preliminary or not peer-reviewed. AR B00836-7; AR A00038; *see also* Bond Dec.
14 ¶18(e) –(f); Declaration of Dominick DellaSala (DellaSala Dec.), ¶¶4-6; AR E03333 and AR E00975-
15 984. However NEPA is about taking a hard look at potential impacts, not impacts that are 100%
16 certain to occur, which is precisely why the Ninth Circuit has previously rejected this very same
17 justification in a completely analogous circumstance. *Earth Island II*, 442 F.3d at 1172-73 (9th Cir.
18 2006) (holding that, in a post-fire logging project, the Forest Service violated NEPA’s hard look
19 requirement by improperly dismissing from its effects analysis unpublished and preliminary data
20 indicating adverse impacts of post-fire logging on spotted owls). NEPA simply does not allow such a
21 deliberate effort by an agency to avoid, hide and bury scientific evidence regarding serious adverse
22 impacts—especially to a designated Sensitive Species that is known to be in substantial decline. *Blue*
23 *Mountains v. Blackwood*, 161 F.3d 1208, 1212-16 (9th Cir. 1998).

24 There is no battle of the experts here because aside from ignoring or improperly dismissing the
25 entire body of science related to owls use of burned areas and the impacts of salvage logging on
26 California spotted owl occupancy, the Forest Service has no science of its own related to the
27 relationship of California spotted owls and burned forest which indicates that the logging proposed here
28 would not result in a loss of occupancy or contribute to the owl’s already declining population. *See also*

1 *Conservation Cong. v. United States Forest Serv.*, No. CIV. S-13-0832 LKK/DAD, 2013 U.S. Dist.
2 LEXIS 127671, *20 (E.D. Cal. Sept. 6, 2013) (“Bond, in the cited papers, specifically recommended
3 that ‘post-fire logging be avoided within 1.5 kilometers (at least) of Spotted Owl nest sites.’ . . . Also,
4 [the Forest Service] identifies no literature that indicates that it would be appropriate to log within 1.5
5 km from the nest site.”) Thus, there is no reasonable basis for their conclusions regarding impacts to
6 this Sensitive species.

7 **2. The Forest Service Failed to Make a Proper Determination as to Whether the**
8 **Rim Fire Logging Project Would Push Spotted Owls Below a Critical Viability**
9 **Threshold**

10 The Ninth Circuit has held that an EIS violates NEPA’s hard look requirement when it states,
11 “without meaningful explanation”, that a “post-fire salvage project would have a negative impact” on a
12 designated Sensitive Species “but would not result in a trend toward federal listing”. *Earth Island II*,
13 442 F.3d at 1172, citing *Ecology Center v. Austin*, 430 F.3d 1057, 1067 (9th Cir. 2005). Specifically,
14 with regard to designated Sensitive Species, the Ninth Circuit has interpreted NEPA’s hard look
15 standard to require the Forest Service to *first* determine whether the post-fire logging project in
16 question would push the species’ population below a critical viability threshold *before* stating a
17 conclusion in an EIS that the project would not threaten the viability of the population. *Ecology Center*
18 *v. Austin*, 430 F.3d 1057, 1067-68 (9th Cir. 2005), *overruled on other grounds* (pertaining to the
19 National Forest Management Act), *McNair*, 537 F.3d at 990-94.

20 In the case at hand, just as in *Ecology Center v. Austin*, Defendants concluded that the Rim fire
21 logging project would harm individual members of a Sensitive Species—California spotted owls in this
22 case—but would not result in a trend toward federal listing under the Endangered Species Act; yet the
23 agency did so without first determining whether the project would push the species below a critical
24 population viability threshold. AR B00460-61. Nowhere in the FEIS can such a determination be
25 found. The Ninth Circuit held that, in such a circumstance, the Forest Service has “failed to either
26 adequately explain its impact assessment or provide the information that is necessary to understand and
27 evaluate the Forest Service's decision to permit salvaging of the [Sensitive Species’] rare habitat, in
28 violation of NEPA.” *Ecology Center*, 430 F.3d at 1067-68 (“To be reasonably certain that the post-
Project habitat levels would be sufficient to ensure species viability, one must know where the

1 threshold between ‘critical’ and ‘sufficient’ levels of burned habitat lies. Because the EIS does not
2 disclose what this threshold is, much less explain how the threshold was determined, we cannot
3 evaluate the Service's decision. Indeed, we cannot even be certain that the Service determined and
4 considered this factor when making its assessment.”).

5 **B. Significant New Information Requires Preparation of a Supplemental EIS to Assess**
6 **Impacts to the California Spotted Owl Before Logging In Occupied Owl Territories**
7 **is Allowed to Proceed**

8 **1. The California spotted owl survey data that was released in August 2014**
9 **is significant new information that requires supplemental analysis**

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

18 Here, the 2014 California spotted owl survey data for the Rim fire area is “significant new
19 circumstances or information” in regard to the logging approved by the Rim fire Project ROD/FEIS.
20 This survey data (*see* AR E01032-76) – which was only made publicly available in its complete form in
21 August of 2014 after surveys had been completed, well after the end of the public comment period for
22 the Project’s DEIS – demonstrates widespread occupation of the Rim fire area by California spotted
23 owls, which was not anticipated by the Forest Service. In fact, the Forest Service’s DEIS had assumed
24 that some of the burned forest within the Rim Fire could not possibly support owls due to the intense
25 fire impacts and yet, as discussed below, those areas do in fact support owls.

26 The DEIS in this case does not contain any statements about the 2014 occupancy status of the
27 Rim fire area, or where any actual owls are located on the landscape in relationship to the Project’s
28 logging units. This information was available however *prior* to the completion of the FEIS and the
signing of the ROD (August 29, 2014), but the information was still not disclosed to the public in these

1 documents, nor were the impacts of logging in occupied owl territories analyzed as they must be if
2 there is to be meaningful NEPA compliance. In fact, only because the Plaintiffs in this case repeatedly
3 asked the Forest Service for the survey data, and then submitted a comment letter to the Forest Service
4 describing that data and its relationship to the logging units, was this information even brought to light.
5 (AR E00973-1115). In other words, the only analysis of the owl survey data that has thus far been
6 conducted was performed by Plaintiffs, not the Forest Service, and the Forest Service has yet to even
7 acknowledge its duty to address and analyze the new information.

8 As background for the Court in addressing this issue, it is important to understand how owl
9 habitat is generally managed by the Forest Service. On National Forests in the Sierras, the Forest
10 Service designates what are referred to as “Protected Activity Centers” (PACs), which are boundaries
11 drawn on a map comprising 300 acres of old, dense forest near a known spotted owl nest or roost (or
12 other type of sighting if biologists are unable to locate a nest or roost). AR MO2318. The Protected
13 Activity Center represents a best guess of a spotted owl’s best nesting and roosting habitat. The Forest
14 Service also designates an area around a Protected Activity Center called the “Home Range Core Area”
15 (HRCAs). AR MO2320. This is generally an additional 700 acres of old, dense forest around the 300-
16 acre Protected Activity Center, and is supposed to represent a larger area where the owls can forage to
17 find their food. *Id.* Importantly for the situation at issue here, because PACs and HRCAs are
18 designated by the Forest Service, and because the Forest Service intentionally does *not* include
19 intensely burned forest in any PACs or HRCAs it designates (AR MO2318, MO2320), intensely burned
20 forest will not be part of a PAC or HRCA even though, as explained below, California spotted owls
21 have been found to preferentially select intensely burned forest when searching for food to survive (AR
22 KO1310-1317). In short, in post-fire landscapes, the Forest Service’s assumptions about owls and owl
23 habitat, and the reality of what owls have been found to prefer, are vastly different, and as discussed
24 below, it is resulting in widespread logging of habitat that owls are themselves selecting, and thus likely
25 need to survive, in the Rim fire area.

26 Prior to the Rim fire, there existed 46 PACs and their associated HRCAs within what is now the
27 perimeter of the Rim Fire; however, because the Forest Service did not regularly survey these 46
28 PACs/HRCAs (*see* AR EO1030-31; EO3388-90), it is unknown how many of them were occupied in

1 2012 or 2013, prior to the fire occurring. After the Rim fire, during the spring and summer of 2014, the
2 Forest Service surveyed 45 out of the 46 PACs/HRCAs (AR E00978), and found 39 occupied owl
3 territories (AR E00978-80; AR EO1030-31).

4 As explained in the August 21, 2014, letter that Plaintiffs submitted to the Forest Service, the
5 rate of owl occupancy in the Rim fire area (compared to other areas of the Sierras that have been
6 surveyed for occupancy) is astoundingly high—even higher than in unburned mature forest (AR
7 E00978-80), and indicates that the burned forest within the Rim fire area contains adequate amounts of
8 suitable habitat for continued California spotted owl occupancy (AR E00980). How many owls are
9 present in the Rim fire area, and where those owls are on the landscape, matters greatly because it
10 directly influences whether and to what degree the resident California spotted owls will be impacted by
11 the logging approved by the Project. When examined in relationship to the Project and the body of
12 science related to the relationship between owls, burned areas and post-fire salvage logging, this just
13 released 2014 survey data unequivocally raises substantial questions regarding the Rim Project’s
14 impact on owls and therefore requires further analysis by the Forest Service before logging proceeds in
15 the occupied owl territories. As discussed in the August 21, 2014 letter (AR E00975-84) that Plaintiffs
16 submitted to the Forest Service, the agency’s lack of analysis as to the 2014 survey data matters for
17 several key reasons:

- 18 1. The California spotted owl is classified as a Forest Service “sensitive species”² and is currently
19 in serious decline on National Forest Service lands (based on the best available, published
20 scientific literature). AR E00975-77. In fact, although the California spotted owl is not
21 currently listed under the federal Endangered Species Act, the reasons identified in 2006 for not
22 listing it are no longer valid. Specifically, in 2006 the owl was not listed because of a lack of a
23 statistically significant decline; the most recent scientific studies (Connor et al. 2013 and
24 Tempel et al. 2014), however, using additional data and robust statistical methodology, have
25 very clearly demonstrated that California spotted owl populations are declining throughout the
26 range of the subspecies. AR E00975-77.

27 _____
28 ² Defined as “Those plant and animal species identified by a Regional Forester for which population
viability is a concern”

- 1 2. This recent science also shows that the owl declines in the Sierras are associated with areas
2 characterized by past and ongoing extensive logging (AR E00977): “[R]ecent published
3 research from three long-term demographic studies in the Sierra Nevada show that on managed
4 national forest lands, owl populations are significantly declining, whereas in unmanaged forests
5 of the Sequoia/Kings Canyon national parks the owl population is stable.”
- 6 3. The entire Rim fire Project area is within an “Area of Concern” for California spotted owls.
7 (AR B00448). This means that any adverse impacts to spotted owls in this area will likely be
8 disproportionately harmful to the owls. This is in part because any impacts risk severing – by
9 eliminating or fragmenting owl habitat – the connections between spotted owls north and south
10 of the Project area, thus furthering the population declines that are already occurring.
- 11 4. Bond et al. 2009 (AR K01310-18) shows that, in a post-fire landscape, spotted owls not only
12 use unlogged, burned forest within 1.5 km of their nests/roosts for finding the food they need to
13 survive, they a) preferentially select the burned forest over unburned forest, and b) preferentially
14 select the burned forest that burned at high severity. This is why Bond et al. 2009 states that
15 post-fire logging should not occur within 1.5 km of owl core-use sites. *Id.*; *see also*
16 *Conservation Cong. v. United States Forest Serv.*, No. CIV. S-13-0832 LKK/DAD, 2013 U.S.
17 Dist. LEXIS 127671, *20 (E.D. Cal. Sept. 6, 2013) (“Bond, in the cited papers, specifically
18 recommended that ‘post-fire logging be avoided within 1.5 kilometers (at least) of Spotted Owl
19 nest sites.’ . . . Also, [the Forest Service] identifies no literature that indicates that it would be
20 appropriate to log within 1.5 km from the nest site.”)
- 21 5. Bond et al. 2009 (AR K01310-18) is the only published, peer-reviewed study that used radio-
22 telemetry to determine how California spotted owls utilize a burned forest landscape. The
23 study, when examined in relationship to the Rim Project’s logging units, shows that adverse
24 impacts are in fact likely from the Rim fire Project because the Project will not only log within
25 occupied owl territories, it will *target* for logging the habitat that is preferred by these owls for
26 finding their food – *i.e.*, intensely burned forest within 1.5 km of occupied owls sites. The
27 Forest Service, in the Rim fire ROD/FEIS, allows logging to proceed within 1.5 km of *all* the
28 occupied post-fire owl territories that exist within the Rim Fire. Bond Dec., ¶15.

1 6. As discussed in detail, *supra*, multiple lines of scientific evidence demonstrate that post-fire
2 logging of intensely burned forest within 1.5 km of spotted owl sites strongly tends to result in
3 territory abandonment, which leads to starvation and predation of spotted owls and further
4 population declines. Bond Dec., ¶17; Lee Dec., ¶¶7-14; DellaSala Dec., ¶4-6.

5 The Forest Service “must be alert to new information that may alter the results of its original
6 environmental analysis, and continue to take a hard look at the environmental effects of its planned
7 action, even after a proposal has received initial approval.” *Friends of the Clearwater v. Dombeck*, 222
8 F.3d 552, 557 (9th Cir. 2000). The new owl survey data clearly upends the original environmental
9 analysis for the Rim Fire Project because, for example, it establishes owl occupancy – *extremely high*
10 *occupancy* – that the agency was not previously aware of, nor even anticipating. In fact, both the DEIS
11 and FEIS assume that, due to the fire, owls cannot possibly exist in 10 owl territories. AR B00447.
12 Yet, in reality, 6 out of these 10 territories do in fact have owls associated with them! A00027.³ Had
13 the 2014 surveys not been conducted, these owls would have been assumed by the Forest Service to *not*
14 *exist*, when in fact just the opposite is true. Moreover, not only does the 2014 survey data contradict
15 the DEIS’ assumptions about owl occupancy in the Rim fire area, it establishes *where* on the landscape
16 the owls actually are which is crucial for assessing impacts to the owls – it is axiomatic that one cannot
17 begin to assess impacts to actual owls without first knowing where they are. This is especially so given
18 that research of owls in a post-fire landscape shows that they focus primarily within 1.5 km of their
19 core sites when searching for food (Bond et al. 2009, Fig. 1, AR K01315), and given that, as discussed
20 above, post-fire logging within this area tends to eliminate territories. The Forest Service must
21 therefore prepare supplemental analysis and revisit its ROD in light of this information.

22 “Informed public participation in reviewing environmental impacts is essential to the proper
23 functioning of NEPA. Without supplemental analysis of impacts . . . the public would be at risk of
24 proceeding on mistaken assumptions.” *League of Wilderness Defenders*, 752 F.3d at 761. The DEIS, as
25 well as the FEIS, do not mention, let alone analyze, the 2014 Rim fire survey data and thus did not
26 analyze what the impacts of the Project’s logging would mean as to the 39 occupied owl territories; in

27 _____
28 ³ The Forest Service has not, however, designated HRCAs for these six areas and yet is allowing
logging to proceed before it does.

1 fact, neither the DEIS nor the FEIS discuss the locations at which the owls were discovered in 2014—
2 one year post-fire—and how much of their territories within 1.5 km would be logged (in some cases,
3 *most* of the territory would be logged, based upon 2014 locations: Bond Dec., ¶15). Furthermore, the
4 DEIS as well as the FEIS do not mention, let alone analyze, what loss of occupancy of any or all of the
5 39 occupied owl territories would mean for the local population of California spotted owls or for the
6 subspecies in the Sierras. Such analysis is especially important in light of, as noted above, the current
7 declining status of owls in the Sierras, that loss of territory occupancy exacerbates that decline, and the
8 fact that this area is an “Area of Concern” for this species.

9 “It is the agency, not an environmental plaintiff, that has a ‘continuing duty to gather and
10 evaluate new information relevant to the environmental impact of its actions,’ even after release of an
11 EIS.” *Friends of the Clearwater*, 222 F.3d at 559 (quoting *Warm Springs Dam Task Force v. Gribble*,
12 621 F.2d 1017, 1023 (9th Cir. 1980). Here, the Forest Service has failed to meaningfully address the
13 new information in relationship to the Project’s impacts and should therefore be ordered to conduct
14 supplemental analysis before being permitted to log in these occupied spotted owl territories. *See also*
15 *Seattle Audubon Soc. v. Espy*, 998 F.2d 699, 704 (9th Cir. 1993) (an agency must re-examine its
16 decision when the environmental analysis “rests on stale scientific evidence”).

17 In the Rim Fire Project ROD, the Forest Service attempts to evade its NEPA obligations,
18 generically stating that the agency “considered this ‘new information’”, that “the new owl survey data
19 do not substantially change the scope of the action or the environmental consequences of the
20 alternatives,” and that “both the EIS and [the ROD] recognize that owls forage in burned forests, and
21 the EIS analyzes the effects of the various alternatives based on this understanding.” AR A00038. But
22 these assertions are disingenuous because nowhere in the FEIS or ROD is any of the 2014 survey data,
23 or the extremely high occupancy levels, even disclosed, let alone described or analyzed, such that the
24 public is privy to the fact that not only are owls present in the Rim Fire area, they are present at a
25 higher occupancy rate than is found in unburned Sierra forest; moreover, nowhere is the *degree* of post-
26 fire logging within the occupied owl territories, based upon locations in the 2014 surveys, disclosed.
27 “When the public reviews an EIS to assess the environmental harms a project will cause and weighs
28 them against the benefits of that project, the public should not be required to parse the agency’s

1 statements to determine how an area will be impacted, and particularly to determine which portions of
2 the agency's analysis rely on accurate and up-to-date information, and which portions are no longer
3 relevant." *League of Wilderness Defenders*, 752 F.3d at 761. The Forest Service must therefore
4 examine the impact of the Project as to occupied owl territories in a way that *publicly* demonstrates
5 they have properly analyzed the new information, and have done so while taking into consideration the
6 owls' currently declining status in the Sierras, the current owl locations in the Rim fire and the extent of
7 planned logging in occupied territories. Indeed, rather than disclose textually and visually (with maps)
8 the high occupancy rate (over 85%) of the Rim fire, and the locations of spotted owls on the Rim Fire
9 landscape relative to planned logging, the FEIS continues to assert that areas that burned at high
10 intensity "have very low to no probability of continued occupancy" when in fact owls were found to
11 have occupancy as to most of those areas and, in fact, the territories with the highest levels of high-
12 intensity fire did not have lower occupancy levels of spotted owl pairs than territories with low levels
13 of high-intensity fire. AR E00980-81. The Forest Service has clearly not evaluated and considered the
14 impacts of the Rim Project as to the many actual owls that are occupying the Rim Fire area, and
15 therefore is in violation of NEPA.

16 **2. The Only Owl Experts Who Have Studied California Spotted Owl Use of Intensely**
17 **Burned Sierra Forests Have Determined That The New Survey Data Shows That**
18 **The Rim Project Will Likely Harm California Spotted Owls To A Significant**
19 **Degree**

19 Plaintiffs have submitted with this Memorandum the Declaration of Monica Bond and the
20 Declaration of Derek Lee.⁴ Ms. Bond is the lead author of Bond et al. 2009, the only published paper
21 that has examined California spotted owl use of severely burned forest, and is the world's top expert on
22 the relationship between spotted owls and fire. Bond Dec., ¶2-3. Mr. Lee is the lead author of Lee et al.
23 2012, the most comprehensive published paper that has examined California spotted owl occupancy
24

25 _____
26 ⁴ In this situation, Plaintiffs are not limited to the Administrative Record to make their case. "An action
27 to compel an agency to prepare [supplemental NEPA analysis] . . . is not a challenge to a final agency
28 decision, but rather an action arising under 5 U.S.C. § 706(1), to compel agency action unlawfully
withheld or unreasonably delayed. In such cases, review is not limited to the record as it existed at any
single point in time, because there is no final agency action to demarcate the limits of the record."
Friends of the Clearwater v. Dombeck, 222 F.3d 552, 560-561 (9th Cir. 2000).

1 rates in burned forest versus unburned forest. Moreover, Mr. Lee’s 2012 paper examined data
2 regarding spotted owl use of logged, post-fire areas – the study found that in 7 owl territories that were
3 occupied post-fire but pre-logging, all 7 becoming unoccupied post-logging. Both conclude that, based
4 upon the 2014 survey results and the locations of the owls relative to planned logging within 1.5 km of
5 occupied sites, the Rim Project will have a major adverse impacts on spotted owls. Bond Dec., ¶¶5-22;
6 Lee Dec., ¶¶6-14.

7 “If an agency has had time to respond to new information, and declines to make any expert
8 determination, it foregoes any claim of deference and must submit to a court’s *de novo* determination of
9 whether a Supplemental EIS is required.” *Native Songbird Care & Conservation v. Lahood*, 2013 U.S.
10 Dist. LEXIS 93120 (N.D. Cal. July 2, 2013). Here, such a *de novo* determination is required in light of
11 the Forest Service’s refusal to analyze the 2014 owl locations and the 2014 occupancy rate. Moreover,
12 the Court has in front of it the expert determinations/declarations that matter – those from scientists
13 who have actually studied the relationship between owls and post-fire landscapes. These declarations
14 emphatically demonstrate that the Rim Project’s logging will likely cause great harm to California
15 spotted owls in the Rim Fire area thus likely leading to loss of occupancy and further population
16 decline in the Sierras at a time when the owls are already in significant decline. Thus, supplemental
17 analysis is absolutely necessary if the Forest Service is to meet its NEPA obligations.

18 **II. Harm to Plaintiffs Will Be Irreparable Absent Preliminary Relief**

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

24 The initial implementation of the Rim fire logging project—*i.e.*, the implementation relevant to
25 a temporary restraining order/preliminary injunction timeline—unnecessarily targets occupied
26 California spotted owl territories (*see, e.g.*, Exhibit A to Bradley Dec., Exhibit D to Augustine Dec.)
27 despite the fact that the Forest Service has about 60% of the project that it could instead log (because
28 Plaintiffs are only seeking an injunction against logging in these owl territories—not the entire project),

1 without doing any logging or logging associated activities at all in occupied spotted owl territories,
2 while the Court considers Plaintiffs' motion for preliminary injunction (Indeed, if Defendants focused
3 activities in the 60% not challenged by Plaintiffs, we could potentially avoid the preliminary injunction
4 stage completely and proceed to summary judgment). The world's top scientists on the relationship
5 between California spotted owls, fire, and post-fire logging submitted declarations concluding that, if
6 the Rim Project is allowed to proceed within the spotted owl territories (within 1.5 km of the territory
7 core), it will cause severe adverse impacts, including territory abandonment, starvation and death, and
8 will exacerbate the ongoing population decline, likely to necessitate the listing of this species as
9 threatened or endangered. Bond Dec., ¶¶1-22; Lee Dec., ¶¶1-14; see also DellaSala Dec. ¶3-6.

10 Moreover, the implementation of the Rim fire logging project would irreparably harm the
11 interests of Plaintiffs' members, by eliminating, on the acres that would be logged, the reasons that they
12 seek out, and spend time in, unmanaged post-fire habitat, including scenic beauty, wildlife viewing
13 spiritual rejuvenation, recreation, and scientific research opportunities. Declaration of Victoria
14 Carpenter.; Declaration of Doug Bevington.; Declaration of Richard Halsey; Declaration of Brian
15 Nowicki; and Declaration of Chad Hanson. In fact, harm to Plaintiffs' members from the logging of
16 these acres would also extend beyond the boundaries of the logging units themselves. Carpenter Dec. ¶7
17 (destroying the aesthetic beauty of the area, making her not want to return); Nowicki Dec. ¶¶5&10
18 (adversely affecting the overall conservation of the California Spotted Owl, reducing populations and
19 making it even more rare and harder to find, contemplate and enjoy); Bevington Dec. ¶12 (witnessing
20 the devastation from logging while driving through the area will continually diminish enjoyment of the
21 areas that have not been logged).

22 These harms outlined above—to both the Plaintiffs' members and the wildlife that currently
23 inhabit this burned forest ecosystem which is proposed for logging—are likely because they would
24 occur as soon as the trees are felled within these occupied spotted owl territories, which according to
25 Defendants will begin September 17, 2014 in as many as seven occupied owl territories. As described
26 herein, these are exactly the type of harms the Ninth Circuit has found to be irreparable. *See, e.g.,*
27 *Cottrell*, 632 F.3d at 1053; *Earth Island II*, 442 F. 3d at 1169-73 (logging of several thousand acres of
28 post-fire California spotted owl habitat constitutes irreparable harm). These harms cannot be remedied

1 by money damages, and once the trees are cut, they will not be replaced on the landscape, as the habitat
2 they represent now, in the lifetime of Plaintiffs' members. The harm from the rim fire logging
3 proposed in occupied spotted owl territories will be irreparable.

4 **III. The Balance of Hardships Tips Sharply In Plaintiffs' Favor and the Public Interest Would** 5 **be Served by an Injunction**

6 In contrast with the likely irreparable harm to Plaintiffs and their members and to California
7 spotted owls and their preferred foraging habitat, there will be no irreparable harm to the Forest Service
8 from issuance of a preliminary injunction. "[I]f environmental injury is sufficiently likely, the balance
9 of harms will usually favor the issuance of an injunction to protect the environment." *Sierra Club*, 510
10 F.3d at 1033 (quoting *Amoco Prod. Co.*, 480 U.S. 531, 545 (1987)); *Earth Island Inst. v. U.S. Forest*
11 *Service*, 351 F.3d 1291, 1299 (9th Cir. 2003). Here, logging is scheduled to proceed as early as the
12 week of September 15th, 2014, and once the trees are cut down, Plaintiffs' harm, and the harm to
13 wildlife is realized. The main hardship the Forest Service may claim is that their revenue will be
14 reduced somewhat if Plaintiffs' request is granted, but the "loss of anticipated revenues ... does not
15 outweigh the potential irreparable damage to the environment." *Earth Island II*, 442 F.3d at 1177. The
16 Forest Service's interest in selling timber for the sake of revenue is not compelling. *Sierra Forest*
17 *Legacy v Rey*, 577 F.3d 1015, 1026 (9th Cir. 2009) (Noonan, J., concurring) ("Can an agency which has
18 announced its strong financial interest in the outcome proceed objectively?").

19 Plaintiffs' requested relief pertains solely to occupied California spotted owl territories, and
20 would affect only about 40% of the planned logging. *See, e.g.*, Bradley Dec., Exhibit A (overview
21 map). Plaintiffs asked Defendants to conduct logging and associated activities within the
22 approximately 60% of the Rim Project that does not intersect with the 1.5 km spotted owl territory
23 zones (AR E0975-984; B0003-4) prior to the issuance of the Decision in this case, and reiterated this
24 request after we filed our Complaint, at least during the preliminary injunction stage, but Defendants
25 chose instead to heavily prioritize logging of occupied spotted owl territories. *See* Bradley Dec.,
26 Exhibit A (overview map) and Augustine Dec. Exhibit D (Forest Service map). In addition, the Forest
27 Service fully recognizes that the timber will remain economically viable next year and is staging the
28 logging operations to keep pace with the lumber mill's capacity. AR A00018-20. Thus, any loss from

1 the deterioration of wood in occupied spotted owl territories would be no more or no less than the
2 deterioration of wood which is occurring in those areas outside of occupied owl sites which the Forest
3 Service has voluntarily chosen not to log at this time. As recently discussed by the Ninth Circuit,
4 economic loss during the pendency of an injunction does not represent a complete and total loss, akin to
5 the loss of habitat, but rather a delay and potentially a reduction in revenue. *League of Wilderness*
6 *Defenders/Blue Mountains Biodiversity Project*, 752 F.3d at 764-68. Here, as in *League of Wilderness*
7 *Defenders/Blue Mountains Biodiversity Project*, the likely irreparable injury to California spotted owls,
8 and to Plaintiffs' use and enjoyment of that habitat, outweighs the economic interests of the Forest
9 Service, and private logging companies. *Id.* Here, this is especially true since an injunction would not
10 impede the implementation of *most* of the project.

11 Further, threats to public safety during the timeframe of a preliminary injunction are minimal
12 for three reasons. First, the area is closed to the public, and has been for over
13 year (<http://www.fs.usda.gov/alerts/stanislaus/alerts-notice/?aid=20774>). Second, roadside logging on
14 the main public roads (maintenance level 3, 4, and 5) was subject to a previous NEPA decision issued
15 in April and has consequently largely been completed (B00507) and is not the subject of this injunction
16 request. And third, the vast majority of roadside logging remaining is on Level 2 roads ("Roads open
17 for use by high clearance vehicles", AR B00612), or on Level 1 Roads (that are actually considered
18 closed by the Forest Service, AR B00612). In fact, most of the Hazard Tree logging authorized by the
19 Rim Fire Logging Project is not being prioritized by the Forest Service (*see* Exhibit A (overview map
20 of Project) to Bradley Dec), and aside from imminent hazards in logging areas, purchasers may opt to
21 remove them or not. In addition, only the portions of these roads (many of which are dead-end logging
22 roads) which transect occupied spotted owl territories (for the sole purpose of accessing logging units
23 within those territories) would be the subject of this requested injunction, leaving the vast majority of
24 these roads to be logged should the purchaser so choose, or should the Forest Service put such contracts
25 out to bid. Therefore, there is no genuine "hazard" tree risk, particularly during the limited duration
26 which any preliminary injunction or temporary restraining order would be in place.

27 For the foregoing reasons, the balance of harms and the public interest strongly favor an
28 injunction on logging regarding the approximately 40% of the planned logging challenged here.

1 **IV. No Bond or a Nominal Bond Should Be Required**

2 It is well established in the Ninth Circuit that, pursuant to Fed. Rule of Civ. Pro. 65(c), Federal
3 courts have discretion as to the amount of security to require for issuance of a preliminary injunction
4 and may even dispense with the security requirement altogether. *See Johnson v. Couturier*, 572 F.3d
5 1067, 1086 (9th Cir. 2009) (“Rule 65(c) invests the district court with discretion as to the amount of
6 security required, *if any.*” (quoting *Jorgensen v. Cassidy*, 320 F.3d 906, 919 (9th Cir.2003)

7 In addition, the Ninth Circuit recognizes a public interest exception to the imposition of a
8 substantial bond in order to ensure that the mechanisms established by Congress for private
9 enforcement are not frustrated. *Cal. ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d
10 1319, 1325-26 (9th Cir. 1985); *Friends of the Earth v. Brinegar*, 518 F.2d 322, 323 (9th Cir. 1975). In
11 the present case, Plaintiffs seek to enforce the National Environmental Policy Act through the
12 Administrative Procedure Act (“APA”). The APA specifically contemplates actions by citizens. As
13 explained by the Supreme Court construing analogous citizen suit provisions, Congress, in enacting
14 such provisions, “has opted to rely heavily on private enforcement to implement public policy and to
15 allow counsel fees so as to encourage private litigation.” *Alyeska Pipeline Serv. Co. v. Wilderness*
16 *Soc’y*, 421 U.S. 240, 163 (1975). A bond order that exposes citizen plaintiffs to substantial financial
17 liability effectively cancels out the incentive to enforce law created by Congress. “The same
18 individuals whom Congress encourages to sue by permitting the recovery of attorneys’ fees should not
19 be discouraged from seeking interlocutory relief by the risk of a tremendous liability.” Note, *Recovery*
20 *for Wrongful Interlocutory Injunctions Under Rule 65(c)*, 99 Harv. L. Rev. 828, 835 n.29 (1986).

21 In addition, “Congress has indicated that private environmental organizations should assist in
22 enforcing NEPA. Section 101(a) of NEPA states:

23 Congress . . . declares that it is the continuing policy of the Federal Government in
24 cooperation with . . . concerned public and private [**3] organizations, to use all
25 practicable means and measures . . . to create and maintain conditions under which man
and nature can exist in productive harmony “ 42 U.S.C. §4331(a) (1970).

26 *Natural Resources Defense Council, Inc. v. Morton*, 337 F.Supp. 167, 168 (D.D.C. 1971).

27 Where the imposition of a substantial bond to protect a party against losses conflicts with
28 statutory intent of encouraging private citizen actions to protect the public interest, as exist in the APA

1 and NEPA, it is incumbent on the district court to ensure that the imposition of a “bond will not defeat
 2 the Plaintiff’s right to injunctive relief.” *Division 1, Detroit Brotherhood of Locomotive Engineers v.*
 3 *CONRAIL*, 844 F.2d 1218, 1227 (6th Cir. 1998). “Congress made clear that citizen groups are not to be
 4 treated as nuisances or troublemakers, but rather as welcomed participants in the vindication of
 5 environmental interests.” *Friends of the Earth v. Carey*, 535 F.2d 172 (2nd Cir. 1976). Indeed,
 6 “[S]pecial precautions to ensure access to the courts must be taken where Congress has provided for
 7 private enforcement of a statute.” *California ex rel. Van De Kamp*, 766 F.2d at 1325-26.

8 In fact, the only situations wherein a substantial bond has been deemed appropriate in an
 9 environmental enforcement action is when the Plaintiff fails to submit any evidence that they either
 10 cannot afford to post a substantial bond (*Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113 (9th Cir.
 11 2005)) or that the posting of a substantial bond would create an undue hardship. *Habitat Educ. Ctr. v.*
 12 *U.S. Forest Service*, 607 F.3d 453, 458 (7th Cir. 2010) (Plaintiff Habitat Education Center never
 13 submitted evidence that a substantial bond would be a hardship, and actually admitted that posting the
 14 \$10,000 bond had caused it no hardship.)

15 As the declarations submitted herewith demonstrate, the ability of the non-profit Plaintiffs in
 16 this case to go to court to enforce environmental laws would be profoundly and adversely affected by
 17 the imposition of anything more than a nominal bond because they have budgets dependent upon the
 18 timelines of the grants they have received and because their funds are restricted in their use, and any
 19 discretionary funds are necessary for standard operating expenses. *See generally* Declarations of David
 20 Phillips; Michael Sowle with attached Exhibits; Kieran Suckling with attached Exhibits; Hanson Dec.
 21 ¶¶9-18; and Halsey Dec. ¶5, filed herewith). Such a bond would not only preclude Plaintiffs from
 22 obtaining the injunctive relief in the present action, but would also curtail their ability to enforce
 23 environmental laws in the future. *Id.*

24 CONCLUSION

25 Plaintiffs have met the requirements for issuance of a Temporary Restraining Order and
 26 Preliminary Injunction in this case, have requested an injunction which is tailored to address the
 27 analytical failings of the Forest Service’s NEPA analysis while permitting the majority of the Rim Fire
 28 logging project to proceed, and thus respectfully request that the Court enjoin logging as specified

1 above while Defendants comply with the law.

2
3 Dated: September 12, 2014

Respectfully submitted,

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