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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL
DIVERSITY, EARTH ISLAND
INSTITUTE and CALIFORNIA
CHAPARRAL INSTITUTE,

Plaintiffs,

v.

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.

No. 1:14-cv-01382-GEB-GSA

**ORDER DENYING PLAINTIFFS' MOTION
FOR TEMPORARY RESTRAINING ORDER***

Plaintiffs seek a temporary restraining order enjoining implementation of the United States Forest Service ("Forest Service")'s Rim Fire Recovery Project ("the Project") in the Stanislaus National Forest.¹ Plaintiffs specifically seek to "enjoin logging and logging associated activities"² related to

* Pursuant to E.D. Cal. R. 230(g), this matter is suitable for decision without oral argument.

¹ Plaintiffs argue logging for the Nevergreen Timber Sale is set to begin "as early as Thursday, September 18 2014" and the Double Fork timber sale, "which may be awarded on Monday, September 15, 2014 and operations within occupied owl territories could commence on Thursday, September 18, 2014." (Mot. 2:8-11.)

² Plaintiffs define "logging and logging related activities" as "tractor, skyline and or helicopter logging, as well as, roadside logging on roads not maintained for public use (maintenance Level 1 and 2 roads), and any other activities associated with the planned logging, within occupied California

1 the Forest Service's upcoming Nevergreen Timber Sale and Double
2 Fork Timber Sale "within 1.5 km of occupied California spotted
3 owl territories. . . ." (Pls. Mot. for Prelim. Inj. ("Mot.")
4 6:14-16, ECF No. 22.)

5 Plaintiffs argue a preliminary injunction is required
6 since the Forest Service "violated NEPA's hard look requirement .
7 . . by: a) misrepresenting and sidestepping crucial scientific
8 evidence about serious adverse impacts [of the logging] to [the]
9 California spotted owl. . . [and] b) concluding that the Rim fire
10 logging project would not threaten the population viability of .
11 . . the California spotted owl, without first determining whether
12 the logging plan would push the owl's population below a critical
13 threshold." (Mot. 9:23-10:2.) Plaintiffs' also argue the Forest
14 Service violated NEPA when they "failed to meaningfully address
15 [2014 California spotted owl survey data] in relationship to the
16 Project's impact[. . . ." (Mot. 19:12-14.)

17 **I. BACKGROUND**

18 **The Rim Fire and Rim Fire Recovery Project:**

19 The motion concerns the following allegations.³ "The
20 Rim Fire [was] the third largest wildfire in California history
21

22 spotted owl territories." (Mot. 2:2-7.)

23 ³ Plaintiffs move "to supplement the administrative record in this case
24 with the declarations of Monica Bond, Derek Lee, and Dominick DellaSalla."
25 (Pls.' Mot. to Supplement the AR 2:7-8, ECF No. 32.) However, "[e]ven
26 considering the declarations, the [TRO] is denied at this time. Therefore, the
27 Court [need not decide the motion to supplement the administrative record when
28 deciding whether to issue a TRO.]" Willis v. Buffalo Pumps Inc., No. 12cv744
BTM (DHB), 2014 WL 1028437, at *3 n.1 (S.D. Cal. Mar. 17, 2014) (declining to
reach evidentiary objections raised in connection with motion for summary
judgment); accord Hernandez v. City of Oakley, No. C-11-02415 JCS, 2012 WL
5411781, at *3 n.4 (N.D. Cal. Nov. 6, 2012) ("The Court need not reach this
[evidentiary] objection because, even assuming these [deposition] excerpts are
admissible, it finds in favor of Defendants as to all of the remaining claims
in this action.").

1 and the largest wildfire in the recorded history of the Sierra
2 Nevada." AR B00111. In the summer of 2013, it burned more than
3 150,000 acres of National Forest including parts of the
4 Stanislaus National Forest. AR B0013. The Rim Fire "resulted in
5 areas of high, moderate and low vegetation burn severity." AR
6 B00112-14. In response to the fire, the Forest Service proposed
7 the Rim Fire Recovery Project. The Forest Service designed the
8 Project to "help[] restore the land impacted by the Rim Fire. . .
9 while simultaneously providing for public safety, ecological
10 integrity, scientific research, and socio-economic benefits." AR
11 0009. The "proposed action . . . includes: salvage of dead
12 trees[and] removal of hazard trees along roads open to the public
13 and roads used to access and implement proposed treatments." AR
14 B00121.

15 In connection with the Project, the Forest Service,
16 published a Notice of Intent on December 6, 2013. AR B00121.
17 "Interested parties submitted 4,200 total letters during the
18 comment period including 174 unique individual letters and 4,026
19 form letters." AR B00128. The Forest Service's "public outreach
20 began while the fire was still smoldering and continued up until
21 the point of the" final decision. AR A00035.

22 The Forest Service organized "public open houses,"
23 "hosted Rim Fire Technical Workshops to share the development of
24 alternatives status," "organized 24 tours into the Rim Fire
25 area" for government officials and interested parties, and held a
26 "30-day comment period." AR B00128. The Forest Service "asked for
27 public comment on the DEIS [Draft Environmental Impact
28 Statement]" and solicited public comments by "produc[ing]

1 materials for social media outlets" and "distribut[ing] some
2 60,000 newspaper inserts through the region explaining many of
3 the proposed activities." AR B00128-129. "Responses to public
4 comments were finalized during the development of the FEIS [Final
5 Environmental Impact Statement ("EIS")] and Record of Decision
6 ("ROD"). AR B00129. The FEIS and ROD were published in August
7 2014. Of the four alternative courses of action considered for
8 the Project, the Forest Service ultimately "selected Modified
9 Alternative 4." AR A00016.

10 Modified Alternative 4 "approves salvage logging and
11 fuel reduction on 15,383 acres including: 14,495 acres of ground
12 based; 651 acres of helicopter; and 237 acres of skyline
13 treatments." AR A00016. The Project covers around ten percent of
14 the National Forest area impacted by the Rim Fire. AR A00016;
15 B0013. Its "boundary is located within the Rim Fire perimeter
16 within portions of the Mi-Wok and Groveland Ranger Districts on
17 the Stanislaus National Forest." AR B00114. The "salvage harvest
18 of trees initially killed by the Rim Fire" will be "accomplished
19 through timbers sales" to occur "over the next 2 seasons,
20 culminating in winter 2015." AR A00018.

21 **California Spotted Owl:**

22 "Forest fire is one of the most important issues
23 affecting the [California] Spotted Owl's habitat." AR K01464.
24 "California spotted owls will occupy landscapes that experience
25 low- to moderate-severity wildfire, as well as areas with mixed-
26 severity wildfire that includes some proportion of high-severity
27 fire." AR K12141. They can "occupy territories and continue to
28 reproduce in burned habitats, including those with severely

1 burned patches." AR K01464; see also B00449. However post-fire
2 logging of burned trees within the California spotted owl's
3 habitat, may result in "occupancy declines." AR K13093.

4 These raptors nest, roost and forage in parts of the
5 Stanislaus National Forest impacted by the Rim Fire. AR B00003.
6 The Forest Service considers California spotted owls a "sensitive
7 species." AR B00432. They "have several characteristics that are
8 broadly associated with increased species vulnerability." AR
9 K12133. "[A]pproximately 6,500 acres of salvage, and 8,500 acres
10 of roadside logging, [as part of the Project] are slated to occur
11 within 1.5 km of [California spotted] owl sites." AR B00003.

12 **II. LEGAL STANDARD**

13 **A. Preliminary Injunction**

14 A preliminary injunction is "an extraordinary remedy
15 that may only be awarded upon a clear showing that the
16 plaintiff[s are] entitled to such relief." Winter v. Natural Res.
17 Def. Council, Inc., 555 U.S. 7, 22 (2008). "A plaintiff seeking a
18 preliminary injunction must establish [1] that he is likely to
19 succeed on the merits, [2] that he is likely to suffer
20 irreparable harm in the absence of preliminary relief, [3] that
21 the balance of equities tips in his favor, and [4] that an
22 injunction is in the public interest." Id. at 20.

23 Further, the Ninth Circuit's "'serious questions' test"
24 may be "applied as part of the four-element Winter test."
25 Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131-32
26 (9th Cir. 2011). Under this test test, "serious questions going
27 to the merits and a hardship balance that tips sharply toward the
28 plaintiff can support issuance of an injunction, assuming the

1 other two elements of the Winter test are also met. Id. at 1132.

2 **B. Review of Federal Agency Decisions Under the APA**

3 Plaintiffs argue the Forest Service violated the
4 National Environmental Policy Act ("NEPA") when issuing the FEIS
5 for the Project. (Compl. ¶¶ 37-43, ECF No. 1.) "NEPA aims to
6 establish procedural mechanisms that compel agencies. . . to take
7 seriously the potential environmental consequences of a proposed
8 action." Ocean Advocates v. U.S. Army Corps of Eng'rs, 402 F.3d
9 846, 864 (9th Cir. 2004). "NEPA imposes only procedural
10 requirements, it does not dictate a substantive result." Salmon
11 River Concerned Citizens v. Robertson, 32 F.3d 1346, 1355-56 (9th
12 Cir. 1994).

13 "Judicial review of agency decisions under NEPA. . . is
14 provided by the APA, which maintains that an agency action may be
15 overturned only when it is 'arbitrary, capricious, an abuse of
16 discretion, or otherwise not in accordance with law.'" Pit River
17 Tribe v. U.S. Forest Service, 469 F.3d 768, 778 (9th Cir. 2006)
18 (quoting 5 U.S.C. § 706 (2)(A)). "Review under this standard is
19 narrow, and the reviewing court may not substitute its judgment
20 for that of the agency." Earth Island Inst. v. U.S. Forest
21 Service, 442 F.3d 1147, 1156 (9th Cir. 2006) (citation omitted)
22 abrogated on other grounds by Winter, 555 U.S. 7.

23 Agencies must "[t]ak[e] a 'hard look'" when creating an
24 EIS, which "includes 'considering all foreseeable direct and
25 indirect impacts. Furthermore, a 'hard look' should involve a
26 discussion of adverse impacts that does not improperly minimize
27 negative side effects.'" League of Wilderness Defenders-Blue
28 Mountains Biodiversity Project v. U.S. Forest Service, 689 F.3d

1 1060, 1075 (9th Cir. 2012) (citing N. Alaska Env'tl. Ctr. v.
2 Kempthorne, 457 F.3d 969, 975 (9th Cir. 2006)). An agency has not
3 taken a "hard look" where its decision was not "based on a
4 consideration of the relevant factors, or [where] its actions
5 were arbitrary, capricious, an abuse of discretion, or otherwise
6 not in accordance with the law." Blue Mountains Biodiversity
7 Project v. Blackwood, 161 F.3d 1208, 1211 (9th Cir. 1998) (citing
8 5 U.S.C. § 706(2)(A)).

9 "Review under the arbitrary and capricious standard is
10 narrow and [we do] not substitute [our] judgment for that of the
11 agency. Rather, we will reverse a decision as arbitrary and
12 capricious only if the agency relied on factors Congress did not
13 intend it to consider, entirely failed to consider an important
14 aspect of the problem, or offered an explanation that runs
15 counter to the evidence before the agency or is so implausible
16 that it could not be ascribed to a difference in view or the
17 product of agency expertise." League of Wilderness Defenders, 615
18 F.3d at 1130 (citing Lands Council v. McNair, 537 F.3d 981, 987
19 (9th Cir. 2008) (en banc). Deference to agency decision-making "is
20 highest when reviewing an agency's technical analyses and
21 judgments involving the evaluation of complex scientific data
22 within the agency's technical expertise." League of Wilderness
23 Defenders Blue Mountains Biodiversity Project v. Allen, 615 F.3d
24 1122, 1130 (9th Cir. 2010). "Deference to an agency's technical
25 expertise and experience is particularly warranted with respect
26 to questions involving. . . scientific matters." United States
27 v. Alpine Land & Reservoir Co., 887 F.2d 207, 213 (9th Cir.
28 1989).

1 **III. Discussion**

2 **A. Likelihood of Success on the Merits**

3 Plaintiffs' Complaint is comprised of two claims that
4 Defendants violated NEPA: (1) "Failure to Prepare Supplemental
5 Environmental Analysis" and (2) "Failure to Take a 'Hard Look,'
6 to Adequately Explain Impacts, To Provide Necessary Information,
7 and To Ensure Scientific Integrity." (Compl. ¶¶ 37-43.)
8 Plaintiffs argue either of these claims independently justify an
9 injunction.

10 **1. Claim 1: Failure to Prepare Supplemental**
11 **Environmental Analysis**

12 Plaintiffs argue a Supplemental EIS ("SEIS") is
13 required before the Project proceeds since "the Forest Service
14 has failed to meaningfully address [] new information in
15 relationship to the Project's impacts where the new information"
16 "unequivocally raises substantial questions regarding the Rim
17 Project's impact on owls." (Mot. 19:12-13; 16:13-15.)

18 Plaintiffs argue the results of the Forest Service's
19 2014 owl survey "demonstrates widespread occupation of the Rim
20 fire area by California spotted owls, which was not anticipated
21 by the Forest Service," and indicates "the burned forest within
22 the Rim fire area contains adequate amounts of suitable habitat
23 for continued California spotted owl occupancy." (Mot. 14:21-24;
24 16:5-8.) Plaintiffs argue the FEIS does "not mention, let alone
25 analyze, the 2014 Rim fire survey data and thus did not analyze
26 what the impacts of the Project's logging would mean as to the 39
27 occupied owl territories. . . ." (Mot. 18:24-19:2; see also 18:5-
28 11.)

1 The U.S. Forest Service must “prepare supplements
2 to either draft or final environmental impact statements if there
3 are significant new circumstances or information relevant to
4 environmental concerns and bearing on the proposed action or its
5 impacts.” 40 C.F.R. § 1502.9(c)(1)(ii). “When determining whether
6 to issue a supplemental EIS, an agency must ‘apply a rule of
7 reason,’ not supplementing ‘every time new information comes to
8 light’ but continuing to maintain a ‘hard look’ at the impact of
9 agency action when the ‘new information is sufficient to show
10 that the remaining action will affect the quality of the human
11 environment in a significant manner or to a significant extent
12 not already considered.’” League of Wilderness Defenders/Blue
13 Mountains Biodiversity Project v. Connaughton, 752 F.3d 755, 760
14 (9th Cir. 2014) (citing Marsh v. Ore. Natural Res. Council, 490
15 U.S. 360, 373-74 (1989)).

16 Agency determinations regarding the necessity of a
17 supplemental EIS are only to be set aside if arbitrary and
18 capricious. N. Idaho Community Action Network v. U.S. Dep’t of
19 Transp., 545 F.3d 1147, 1154-55 (9th Cir. 2008). Where an agency
20 documents a “reasoned decision” regarding “whether an SEIS is
21 required,” it withstands scrutiny. Great Old Broads for
22 Wilderness v. Kimbell, 709 F.3d 836, 855 (9th Cir. 2013); see
23 also Tri-Valley, 671 F.3d at 1130 (“because the [agency]
24 determined in its supplemental report that the SA did not show a
25 ‘seriously different picture of the likely environmental harms
26 stemming from the proposed project,’ we must defer to the
27 [agency’s] finding that a supplemental REA was not required”);
28 cf. Friends of the Clearwater v. Dombeck, 222 F.3d 552, 558 (9th

1 Cir. 2000) (finding the Forest Service failed to comply with its
2 NEPA obligations where there was "no evidence in the record that,
3 before this action, the Forest Service ever considered whether
4 the [new data] were sufficiently significant to require
5 preparation of an SEIS."). "Whether new information requires
6 supplemental analysis is a 'classic example of a factual dispute
7 the resolution of which implicates substantial agency
8 expertise.'" Tri-Valley, 671 F.3d at 1130 (citing Marsh, 490 U.S.
9 at 376).

10 Here, Plaintiffs are mistaken in their argument that
11 the FEIS does "not mention, let alone analyze, the 2014 Rim fire
12 survey data." (Mot. 18:24-19:2.) The Administrative Record
13 includes the following information: "PACs . . . were . . .
14 reestablished based on the 2014 survey results (EIS Chapter
15 3.15/California Spotted Owl: Affected Environment) [and] were
16 redrawn to include the best available green habitat around the
17 detections," (AR B00839) and "the recent spotted owl survey data
18 . . . is information generated by the Forest Service,
19 incorporated in the EIS, and shaped the final decision;
20 therefore, the Forest Service considered this 'new information.'" AR
21 A00038; see also AR B00713-714; A00027; A00038. The 2014
22 survey was completed, considered and incorporated into the EIS by
23 the Forest Service; this information was integrated into the FEIS
24 and there was no need for the agency to create a SEIS. See
25 Headwaters, Inc. v. Bureau of Land Mgmt., 914 F.2d 1174, 1178
26 (9th Cir. 1990) (rejecting argument for SEIS where the "new"
27 information was "encompassed by the terms of the [original] EIS"
28 since the agency "specifically averted to the possibility that

1 there might be northern spotted owls in the [area]" and
2 "discussed the impact of cutting upon the owl habitat, and
3 adopted various measures recommended in the EIS to mitigate the
4 impact upon any owls in the area."). The same is true of Bond's
5 letter interpreting the survey data. AR A00038.

6 Additionally, the Forest Service explained in the ROD
7 that the 2014 owl survey did not produce significant new
8 information warranting a SEIS since "both the EIS and this
9 decision recognize that owls forage in burned forests, and the
10 EIS analyzes the effects of the various alternatives based on
11 this understanding; therefore the underlying point raised in the
12 August 21, 2014 comment letter, that implementing the Rim
13 Recovery Project may adversely affect spotted owls in the area,
14 was already addressed in the EIS and factored into this
15 decision." JA A00038. Neither the 2014 owl survey results nor
16 Bond's subsequent analysis produced data rising to the level of
17 significant new information. The Forest Service's reasoned
18 evaluation of the 2014 owl survey data is sufficient.

19 **2. Claim 2: Failure to Take a Hard Look, To Adequately**
20 **Explain Impacts, To Provide Necessary Information,**
21 **And To Ensure Scientific Integrity**

22 Defendants argue the Forrester Service "carefully
23 considered the science proffered by Plaintiffs and simply reached
24 different conclusion." Federal Defs. Opp'n to Pls. Appl. For TRO,
25 17:1-3, ECF No. 44.) Plaintiffs contend the Forest Service's
26 argument is insufficient to satisfy the Forest Service's NEPA
27 obligations since "justifications for not incorporating. . .
28 information into [an] assessment of impacts must be reasonable

1 and demonstrate a rational connection between the facts found and
2 the decision made," which the Forest Service did not do. (Mot.
3 10:5-16.) Plaintiffs specifically argue the Forest Service
4 "failed to . . . acknowledge the importance of the 1.5 km radius
5 surrounding a known owl site in meeting the foraging requirements
6 of resident owls[,] " failed to "disclose to the public the . . .
7 occupancy rate of resident spotted owls in the project area. . .
8 [and] the location of the 30 owl territories which were
9 discovered"; and "misrepresented the body of science [submitted]
10 regarding owls and fire" by mischaracterizing or refusing to rely
11 on some of the scientific evidence. (Mot. 10:20-11:2.)

12 Plaintiffs separately argue the Forest Service failed
13 to comply with its NEPA obligations when it "concluded that the
14 Rim Fire logging project would harm individual members of a
15 Sensitive Species. . . but would not result in a trend toward
16 federal listing under the Endangered Species Act" without "first
17 determining whether the project would push the species below a
18 critical population viability threshold." (Mot. 13:19-23.)

19 **i. Failed to Acknowledge or Disclose Important**
20 **Information**

21 Plaintiffs also argue the Forest Service "failed to . . .
22 . acknowledge the importance of the 1.5 km radius surrounding a
23 known owl site in meeting the foraging requirements of resident
24 owls" and failed to "disclose to the public the . . . occupancy
25 rate of resident spotted owls in the project area. . . [and] the
26 location of the 30 owl territories which were discovered" (Mot.
27 10:20-25.)

28 A court "may not 'flyspeck' and EIS" Half Moon

1 Bay Fishermans' Mktg. Ass'n v. Carlucci, 857 F.2d 505, 508 (9th
2 Cir. 1988). Instead, it "make[s] a pragmatic judgment about
3 whether the EIS's form, content and preparation foster both
4 informed decision-making and informed public participation." Id.

5 The Forest Service adequately addressed in the
6 Administrative Record comments and concerns regarding the 1.5 km
7 radius surrounding a known owl site. AR B00001; B00827-830;
8 B00836-837; E00973. Additionally, Plaintiffs fail to show how the
9 failure to "disclose to the public the . . . occupancy rate of
10 resident spotted owls in the project area" and "the location of
11 the 39 owl territories which were discovered in the Rim Fire area
12 and their special relationship to the planned logging," undermine
13 the comprehensiveness of the report. The report clearly and
14 repeatedly acknowledges the potential for the Project to impact
15 the California spotted owl habitat. AR A00026-027; A00032-33; B
16 00001-002; B00109; B00130; B00165; B00445-461; B00741-742;
17 B00824; B00839; B00842-844; C00336-360.

18 **ii. Misrepresented the Body of Science Regarding Owls**
19 **and Fire**

20 Plaintiffs argue the Forest Service also
21 "misrepresented the body of science regarding owls and fire" by
22 mischaracterizing or refusing to rely some of the scientific
23 evidence submitted. (Mot. 11:1-2.) Plaintiffs contend the
24 agency's decision does not amount to a "battle of the experts"
25 since "aside from ignoring or improperly dismissing the entire
26 body of science related to owls use of burned areas . . . the
27 Forest Service has no science of its own related to the
28 relationship of California spotted owls and burned forests . . .

1 ." (Mot. 12:24-28.) Plaintiffs challenge the Forest Service's
2 comments critical of Clark (2007), Lee et al. (2012), Clark et
3 al. (2013), DellaSala et al. (2010) and Monica Bond's August 21,
4 2014 letter to the Forest Service. (Mot. 11:2-12:13.)

5 The Ninth Circuit consistently holds "when specialists
6 express conflicting views, an agency must have discretion to rely
7 on the reasonable opinions of its own qualified experts even if,
8 as an original matter, a court might find contrary views more
9 persuasive. Price Rd. Neighborhood Ass'n, Inc. v. U.S. Dep't of
10 Transp., 113 F.3d 1505, 1511 (9th Cir. 1997) (quoting Greenpeace
11 Action v. Franklin, 14 F.3d 1324, 1332 (9th Cir. 1992)); Native
12 Ecosystems Council v. U.S. Forest Service, 428 F.3d 1233, 1244
13 (9th Cir. 2005); Wetlands Action Network v. U.S. Army Corps of
14 Eng'rs, 222 F.3d 1105, 1120-21 (9th Cir. 2000), abrogated on
15 other grounds by Wilderness Soc'y v. U.S. Forest Service, 630
16 F.3d 1173 (9th Cir. 2011).

17 Here, Plaintiffs misstate the Forest Service's reliance
18 on expert data since the Forest Service does not ignore or
19 dismiss the entire body of science on the subject. The
20 Administrative Record shows the agency's careful consideration of
21 and reliance on recent expert publications related to the
22 California spotted owl. AR B00445 (citing "Keane 2014, Conner et
23 al. 2013, Tempel and Gutiérrez 2013, and Tempel et al. 2014" as
24 well as the Forest Service's "own recent estimates."). The Forest
25 Service acknowledged the findings of Clark, Lee, Della Sala and
26 Bond referenced by Plaintiffs and provided articulate and
27 reasoned rationales for the weight they assigned to each report's
28 conclusions. AR B00001; B00446; B00451 B00741-742; B00829-830;

1 B00836-838; A00038. Plaintiffs' arguments are insufficient show
2 the agency's action fell outside the bounds of discretion
3 afforded in 5 U.S.C. § 706(2)(A).

4 Regarding Clark (2007), which Plaintiffs argue the
5 Forest Service mischaracterizes: although Plaintiffs' have a
6 different interpretation than the Forest Service, the Clark
7 (2007) report found "[o]wls residing inside the fire used all the
8 available habitat including moderate and high severity burns
9 (Figure 6.2), although habitat use was dominated by low severity
10 burns in NRF habitat," which is consistent with the Forest
11 Service's characterization of the report. AR K04467 (emphasis
12 added); B00446. Given the high degree of deference afforded to an
13 agency concerning matters within its expertise, Plaintiffs have
14 not demonstrated either the likelihood of success on the merits
15 or raised "serious questions" going to the merits.

16 **iii. Failed to Make a Proper Determination as to**
17 **Whether the Rim Fire Logging Project Would Push**
18 **Spotted Owls Below a Critical Viability Threshold**

19 Plaintiffs also argue the FEIS departs from NEPA
20 requirements since "Defendants concluded that the Rim Fire
21 logging project would harm individual members of a Sensitive
22 Species. . . but would not result in a trend toward federal
23 listing under the Endangered Species Act; yet the agency did so
24 without first determining whether the project would push the
25 species below a critical population viability threshold." (Mot.
26 13:19-23.)

27 An agency EIS stating the proposed project "would have
28 a negative impact" on a sensitive species "but would not result

1 in a trend toward federal listing” without providing a meaningful
2 explanation, is insufficient evidence the agency took a “hard
3 look.” Earth Island Inst., 442 F.3d at 1172 abrogated on other
4 grounds by Winters, 555 U.S. at 7.

5 Plaintiffs cite as evidence of the Forest Service’s
6 duty to determine whether the Project “would push spotted owls
7 below a critical viability threshold,” the Ninth Circuit’s
8 decision in Ecology Ctr. v. Austin, 430 F.3d 1057, 1067-68 (9th
9 Cir. 2005). (Mot. 13:12-18.)

10 In Austin, the parties agreed “prior to [the fires at
11 issue] there was a critical shortage of [the bird’s] habitat” and
12 the agency “considered the [birds] . . . to be ‘at extreme
13 risk.’” 430 F.3d at 1066. The agency determined the project “may
14 contribute to a trend towards federal listing or cause a loss of
15 viability to the population or species.” Id. at 1066. Yet, the
16 EIS “state[d] without meaningful explanation—that even though
17 [the project] may negatively impact individual [birds], it will
18 not likely result in a trend towards federal listing.’” Id. at
19 1067. Since further explanation was not provided in Austin, the
20 Ninth Circuit stated: the EIS “fail[ed] to adequately explain the
21 basis for the Forest Service’s conclusion,” and therefore the
22 court “cannot even be certain that the [agency] determined and
23 considered” all relevant factors. Id. at 1067.

24 Here, the situation is different since it has not been
25 shown that the Forest Service previously determined the logging
26 involved may contribute to a trend towards federal listing or
27 cause a loss of viability to the California spotted owl
28 population. Additionally, the Forest Service did more than state

1 without meaningful explanation that even though the Project may
2 negatively impact individual birds, it will not likely result in
3 a trend towards federal listing. AR B00460-461. The Forest
4 Service recognized the "[p]roposed activities may affect spotted
5 owls" since the land at issue is "still [a] viable and important
6 owl habitat" and "[b]ecause the fire burned through 46 California
7 spotted owl PACs, as well as thousands of acres of other critical
8 habitat, retaining old forest structures (large snags and downed
9 logs) is important at this time since future recruitment of these
10 old forest features is not expected to occur until decades to
11 centuries into the future." AR B00104; B00120; B00130.

12 The Forest Service demonstrated its appreciation of the
13 Project's impact on the California spotted owl by identifying the
14 indicators it used to "provide a relative measure of the direct
15 and indirect effects [of the Project] to the spotted owl and to
16 determine how well project alternatives comply with the Forest
17 Plan Direction and species conservation strategies." AR B00452.
18 Then, for each of the four proposed alternatives, the Forest
19 Service carefully considered each indicator. AR B00453-458. After
20 analyzing the data, the Forest Service gave a recommendation that
21 each of the four alternatives "may affect individuals but is not
22 likely to result in a trend toward Federal listing or loss of
23 viability for the California spotted owl." AR B00460-461. Under
24 each determination the Forest Service directly and methodically
25 disclosed the rationale for its conclusion. AR B00460-461.

26 This review satisfies the Forest Service's obligations
27 to provide a meaningful explanation in support of its decision
28 and Plaintiffs fail to meet their burden of showing to show the

1 agency omitted a meaningful explanation for its decision or that
2 the decision was "arbitrary, capricious, an abuse of discretion,
3 or otherwise not in accordance with law."

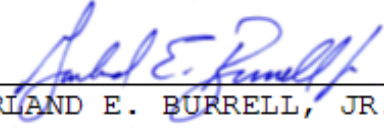
4 **B. Irreparable Harm / Balance of the Equities / Public Interest**

5 Plaintiffs fail to either show a likelihood of success
6 or raise a serious question on the merits regarding any of their
7 claims. Therefore, no discussion of the remaining three Winter
8 factors is required. Ass'n des Eleveurs de Canards et d'Oies du
9 Quebec v. Harris, 729 F.3d 937, 944 (9th Cir. 2013) ("When "a
10 plaintiff has failed to show the likelihood of success on the
11 merits," the court "'need not consider the remaining three Winter
12 elements.'" (citing DISH Network Corp., v. F.C.C., 653 F.3d 771,
13 776-77 (9th Cir. 2011); Haskell v. Harris, 669 F.3d 1040, 1053
14 (9th Cir. 2012); Advertise.com, Inc. v. AOL Advertising, Inc.,
15 616 F.3d 974, 982 (9th Cir. 2010); Doe v. Reed, 586 F.3d 681 n.14
16 (9th Cir. 2009) aff'd on other grounds, 561 U.S. 186 (2010).

17 **III. CONCLUSION**

18 For the reasons stated above, Plaintiffs' motion for a
19 temporary restraining order is DENIED.

20 Dated: September 16, 2014

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24 GARIAND E. BURRELL, JR.
25 Senior United States District Judge
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