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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

EARTH ISLAND INSTITUTE and CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiffs,

v.

DEAN GOULD, in his official capacity as Forest Supervisor for the Sierra National Forest, and UNITED STATES FOREST SERVICE, an agency of the Department of Agriculture,

Defendants.

Case No.1:14-cv-01140 KJM-SKO

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' REQUEST FOR TEMPORARY RESTRAINING ORDER

Hearing date: August 1, 2014
Time: 10:00 a.m.
Courtroom: 3

INTRODUCTION

Defendants' wrongful bias against fire and the habitat it creates is not only present in their EA, but permeates their brief and much of the improper declaration of Dean Gould[1], and illuminates why the EA could not provide a rational connection between the facts found and their ultimate conclusion that there was no potential for any significant impact from this salvage logging project.

Defendants' Opposition fails to address what Plaintiffs' case is actually about – the logging of complex early seral forest in the *limited* areas of the Aspen Fire where mature forest experienced moderate and high intensity effects from fire. We encourage the Court to ignore Defendants' attempts to avoid Plaintiffs' claims or minimize the project effects by misstating the scale of the operations in relation to mature forest which experienced moderate and high intensity fire, and to focus on what it is they left out of their effects analysis, because that is where the violation of law exists.

ARGUMENT

A. Plaintiffs Raise Serious Questions And Are Likely To Succeed On The Merits Because The Forest Service's Aspen Project Violates NEPA and NFMA

1. Defendants failed to take a Hard Look the Impacts of the Aspen Project

California Spotted Owl: Defendants insist that they took a 'hard look' at everything related to the Spotted Owl (Doc. 53 at 3, 10-12). However, nowhere in the record do Defendants recognize or analyze the multiple lines of evidence that removal of the Spotted Owl's preferred foraging habitat (moderate/high-intensity fire areas) causes a loss of occupancy of the owls, even when there still remain areas of nesting and roosting habitat, as would be the case here. Plaintiffs' comments on Aspen EA (AR28217-21, citing Lee et al. 2012 [AR29256]; DellaSala et al. 2010 [AR28868]; Clark et al. 2013 [BHAR 7325]; Bond et al. 2009 [AR28476]; and Bond 2011 [AR 28361]). In addition, while Defendants acknowledge in the record that Spotted Owls *preferentially select* moderate- and high-intensity burned areas for foraging (AR207 ["Bond's paper showed most owls foraged in high severity burned forest more than in all other burn categories"]; *Id.* [recognizing that the "high/moderate mortality category would be foraging habitat" if left unlogged])—meaning that the owls depend most

[1] The Gould Declaration is an effort to circumvent page limits and reargues information that is in the Administrative Record. Attached to this Reply is a Response to, and Motion to Strike, the Gould Declaration.

upon these areas for the food they need to survive—Defendants simply refuse to incorporate this into their effects analysis. *See, e.g.*, AR206 ("salvage operations would occur in a relatively small area of potential suitable habitat [defining habitat as low-severity fire areas] and that those salvage operations would most exclusively remove dead or dying trees…"); AR365, 433 (stating post-fire logging in moderate/high-intensity areas would not remove **"any"** spotted owl habitat, while, *in the same sentence*, admitting the owl's preferred foraging habitat is moderate/high-intensity areas).

NEPA does not permit the Forest Service to hide behind a decade-old "definition" of suitability of green forest for owls to minimize the potential impacts of the removal of over 1,580 acres of preferred foraging habitat on this Sensitive Species. AR204. Nowhere in the EA or accompanying project documents do Defendants claim that foraging habitat, especially that which is preferentially selected by the owls, is inconsequential to the survival of this Sensitive Species. Here, Defendants' decision to assess the impacts to owls from this project by looking only at nesting and roosting habitat (low and very low severity areas) was arbitrary and capricious, and their failure to consider an important aspect of the problem--namely the effect on the owls of removing almost 1/3rd of their preferred foraging habitat[2]--runs afoul of NEPA's hard look requirement. *Nw. Coal. for Alternatives to Pesticides v. U.S. E.P.A.*, 544 F.3d 1043, 1047-48 and 1052 n.7 (9th Cir. 2008) (citations omitted).

Pacific Fisher: Defendants state that they discussed the Hanson (2013) study (the only study to ever directly investigate the relationship between Pacific fishers and post-fire habitat), and "[t]hat ends the matter". Doc. 53 at 10. Not so. Defendants violated NEPA's hard look standard not because they failed to mention Hanson (2013) but, rather, because they refused to, and failed to, recognize the key findings from Hanson (2013). Hanson (2013) found: a) "fishers selected areas with greater proportions of higher-severity fire", and this result was statistically significant (AR29132) (higher-severity fire was *very clearly* defined as more than 50% tree mortality [AR29130]); and b) fishers used combined moderate/high-severity fire areas more than low-severity areas and, while their selection for

[2] Defendants at page 3 of their brief (Doc. 53) state that they are retaining over 10,000 acres of "formerly suitable habitat", once again attempting to minimize the impacts from their logging. In point of fact, the fire only created 5,795 acres of preferred owl foraging habitat and Defendants are going to remove 1,580 acres of it. AR204. And this removal is going to take place mostly in, near, or adjacent to owl sites, creating a high likelihood that these owls will actually leave this area. (AR195, 205, 281, 1683); *see also* studies cited in previously in this section.

moderate/higher-severity areas was not statistically significant (AR29132), the author concluded that this result clearly contradicts Defendants' assumption that these higher-severity fire areas are, categorically, not fisher habitat (AR29132) (the results "cannot be reconciled with the hypothesis that moderate- or higher-severity fire simply represents a loss of suitable fisher habitat…"). Defendants cite AR533-534, 540, 581, 583, 616, and 4108 (Doc. 53 at 10), but none of these pages recognize these key findings. Rather, Defendants flatly ignored the findings from Hanson (2013) that they found inconvenient so that they could justify concluding that these areas are "no longer suitable habitat for fisher because [they] burned at high/moderate mortality categories." AR209. Defendants followed this categorical statement by further minimizing adverse effects to fishers, claiming that the results of Hanson (2013) only show that fishers "may move through" a fire area (AR209). This is precisely the sort of agency effort to hide, sidestep, bury, or otherwise ignore or minimize adverse impacts, in the context of post-fire logging, that the Ninth Circuit has held violates NEPA's hard look standard. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212-14 (9th Cir. 1998).

Black-backed Woodpecker: With regard to logging Black-backed Woodpecker habitat in nesting season, of the two record pages cited by Defendants (Doc. 53 at 12), AR4014 says nothing about impacts from logging in nesting season, and the only "analysis" in AR4031 is the suggestion of "possible behavioral disturbance to nesting BBWO [Black-backed Woodpeckers] from logging or other associated activities within or adjacent to occupied habitat which could inhibit nesting or reduce nesting success." This is hardly an adequate, "hard look", response to the lead author of the Forest Service's own Black-backed Woodpecker Conservation Strategy, Monica Bond, who concluded:

> The failure to follow the Black- backed Woodpecker Conservation Strategy with regard to logging in nesting season is of particular concern because it creates an ecological trap scenario (post-fire habitat attracts breeding Black-backed Woodpeckers, whose chicks could be subject to mortality from post-fire logging in nesting season). This effect compounds adverse impacts of post-fire logging on already imperiled Black-backed…populations.

AR1631; *see also* AR27976 (Monica Bond commenting that "the failure to apply an LOP [limited operating period—to avoid logging in nesting season] for this species will very likely result in the direct killing of nestlings, in direct opposition to the Recommendation 1.5 in the Strategy."). *Blue Mountains*, 161 F.3d at 1213 ("We have warned that 'general statements about 'possible' effects and

'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided.'").

2. Preparation of an EIS was Required

a) Highly Uncertain or Unknown Risks: California Spotted Owl

Defendants insist that the effects of this project are not highly uncertain and do not involve unknown risks to the California spotted owl. However, Defendants do not have the basis to make that determination because they utterly failed to take a hard look at the effects of removing over 1,580 acres of habitat which owls preferentially select for foraging. As a result, the effects of logging this much owl foraging habitat in this project area presents unknown risks and is highly uncertain. In addition, the body of science, which finds that when such areas are logged it results in a loss of owl occupancy, raises substantial questions about whether the effects of this project on spotted owls is significant. Thus, an EIS was required. Additionally, Defendants themselves highlight the uncertainty necessary to require an EIS with their treatment of the new studies which demonstrate a decline in Spotted Owl populations. Specifically, Defendants state that one of the methods indicates a declining population, while the other method in these studies suggests a decline but is not certain. AR527.

b) <u>Highly Uncertain or Unknown Risks--Pacific Fisher</u>: Given the actual findings of Hanson (2013) (section A.1, *supra*), the undisclosed effects of removing 1,936 acres, or 29% (AR209, Table 64) of preferred Fisher foraging habitat creates highly uncertain and unknown risks to this endangered species and meets the low threshold necessary to require preparation of an EIS. In addition, the significance factor regarding effects of the project on threatened or endangered species is also implicated. Here, unlike the circumstance in S*ierra Nev. Forest Prot. Campaign v. U.S. Forest Serv,*, 2005 WL 1366507,*12 ftnt 9, (E.D. Cal. May 26, 2005), the US Fish and Wildlife Service has determined that biologically the Fisher should be listed as threatened or endangered, but were unable to finalize the listing at that time due to administrative overload. AR198. Thus, for the purposes of a NEPA significance determination, this species should be considered by the Forest Service as threatened or endangered. *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 558-59, and footnote 5 (9th Cir. 2000) (*biological* status of a species relevant to determining NEPA significance).

c) Unique Characteristics and Ecologically Critical Areas: Defendants claim that the Forest Service's determination was "well supported" that the project area "does not contain unique characteristics, including ecologically-critical areas" (Doc. 53 at 7), but do not provide any citation to back up this statement. As discussed below in the Irreparable Harm section, Defendants could not be further off the mark. Next, Defendants claim that "burned forest is not rare" (Doc. 53 at 8), providing no citation, and similarly claim that "burned forest is not in short supply in the Sierra Nevada" (*id.*), again providing no citation to support this assertion. Tellingly, Defendants do not deny the fact that suitable habitat for the Black-backed Woodpecker—the bellwether species chosen by the Forest Service to represent this unique post-fire habitat—comprises only a fraction of 1% of the forest on the Sierra National Forest. Doc. 47-2 at 7-8.[3] Nor do they explain how this habitat which comprises such a small percentage of the forest, and which transformed the area from one with only 2.8 snags/acre (AR129) to areas with over 50 snags/acre (*id.*) could be anything but unique and rare.[4]

3. Failure to Consider the Best Available Science

Defendants claim that 36 CFR 219.35 (2011) was eliminated by 36 C.F.R. § 219.17(c); however, this rule has been applied to a site-specific project since the 36 C.F.R. §219.17(c) was promulgated. Defendants' attempt to distinguish *Alliance for the Wild Rockies v. Bradford*, 2014 U.S. Dist. LEXIS 89590 (D. Mont. June 30, 2014), is without merit, as Plaintiffs in that case were also challenging a site-specific project and also claimed that the Forest Service violated the best available science requirement of 36 C.F.R. § 219.35 (*see* Exhibit A attached hereto). And, in that case, Defendants did not contest that this requirement existed, as they are doing here. *See* Exhibit B attached hereto. Thus, the *Bradford* holding stems from the requirement found in 36 C.F.R. § 219.35.

Here, Defendants were presented with new scientific information clearly demonstrating that the agency's assumptions about, for example, the suitability of high-intensity fire areas for California spotted owl foraging and the potential for harm from logging these areas, were outdated and flawed,

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[3] Defendants' citation to *Earth Island Institute v. U.S. Forest Service* and *Earth Island Institute v. Carlton* (Doc. 53 at 9, footnote 4) is misplaced here, as those cases dealt with distinctly different facts, and claims (neither involved a claim against the USFS for failure to prepare an EIS).

[4] Even if the current French fire gets far larger, the amount of this habitat on the forest would be less than 2%.

and the Forest Service refused to carefully consider this information. *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 658-6660 (9th Cir. 2009). This violates the best available science requirement. Defendants would like nothing more than to make this a battle of the experts. However, here, Defendants did not actually disagree with the findings of the submitted studies; rather, they either ignored or misrepresented their findings *or recited* the findings, and then pretended that the findings didn't exist when they prepared their effects analysis. *See* Section A.1 *infra*, and Doc.47-2 at 3-5, 10-11. Defendants' attempt to create a "battle" with improper testimony in the Gould declaration must fail.

Overall, Defendants' position here is disturbing. On the one hand they claim they are not required to consider the best available science in site-specific project documents, while on the other hand they claim they are not required to supplement an outdated Forest Plan (see discussion below). Even though the Secretary has determined that Planning regulations are necessary (16 U.S.C. § 1613) and has promulgated said regulations to ensure that projects are ultimately bound by the best available science (36 C.F.R. § 219.3; and 16 U.S.C. § 1604(i)), the Forest Service has decided that it can circumvent this system, for up to 15 years, while old outdated Forest Plans are revised. Such an interpretation is not consistent with NFMA or the Planning Regulations and is not entitled to deference.

4. Significant New Information, Including Best Available Science, Requires Rejection of the FONSIs, and Supplementation of the 2004 Framework

To maintain scientific credibility, the Forest Service, when confronted with significant new information, is obligated under NEPA to perform a supplemental analysis. 40 C.F.R. § 1502.9(c)(1). Instead of supplementing the 2004 Framework, however, Defendants seek to avoid the issue entirely, arguing that they are not legally bound to correct their invalid assumptions. Defendants attempt to hide behind the Supreme Court decision in *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004). But that case has no bearing to the facts of this case, and if followed, would result in an absurd outcome in which the Forest Service is allowed to execute Projects that – because the projects are bound by, tier to and implement the 2004 Framework – take actions that are not scientifically credible.

Ohio Forestry, a case Defendants cite to, illustrates this point, but in *Plaintiffs'* favor. *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998). *Ohio Forestry* explicitly states that the Forest Plan at issue in that case was not ripe for review because the plaintiffs *only* challenged *the plan itself* – there

were no on-the-ground projects at issue in the case to guide the Court. *Id.* at 736. What Defendants ignore about *Ohio Forestry* is the same thing they ignore about *SUWA* – that in both cases, the plaintiffs did not challenge specific, ongoing, on-the-ground agency actions, as Plaintiffs do here. Consequently, while Defendants are right that the mere "*continued existence*" of a Forest Plan is not sufficient to demonstrate an ongoing federal action (Doc. No. 53 at 15 [emphasis added]), that has never been Plaintiffs' argument. In this case, because there exists a project, and because that Project is bound by, directly tiers to and implements the 2004 Framework, there exists a live "ongoing major Federal action that could require supplementation." *SUWA*, 542 U.S. at 73.[5]

B. Harm from Proposed Logging Will Be Irreparable Absent Injunctive Relief

Defendants' assertion (Doc. 53 at 17, ftnt 10) that salvage logging is not inherently damaging to forests is incorrect. An overwhelming consensus of current scientific literature concludes that mature forest that burns at moderate and high intensity is extremely rare and important habitat and that post-fire logging is ecologically damaging the environment. BHAR7751-7785 (DellaSala et al. 2014, in press [complex early seral forest created by high-intensity fire in mature forest is the rarest and one of the most ecologically important of all forest habitat types, and is severely threatened by post-fire logging]); AR28870 (Donato et al. 2006 finding that post-fire logging kills natural forest regeneration]); AR28533 (Burnett et al. 2010 [habitat created by high-intensity fire has highest biodiversity]); AR29260 (Lindenmayer et al. 2004 [post-fire logging destroys wildlife habitat]); BHAR7325 (Clark et al. 2013 [post-fire logging reduces spotted owl occupancy]); AR29256 (Lee et al. 2012 [all spotted owl territories with post-fire logging lost occupancy, whereas fire alone did not reduce occupancy); AR29136 (Hanson and North 2008 [post-fire logging extirpates Black-backed Woodpeckers]); AR29172 (Hutto 2006 [explaining that there are few things in forest management as close to 100% negative, ecologically, as post-fire logging]). Of course, the Forest Service knows this, as a number of the studies are their own, or were done by persons they have contracted. *See, e.g.*,

[5] The Project is very explicit that it proposed what it did *because of the 2004 Framework* (also known as "SNFPA") to justify its decisions (*e.g.,* "The Project is subject to . . . SNFPA"' [AR32]; "The snag retention strategy is designed to meet the equivalent of 4 snags per acre (SNFPA S&G 11)." [AR48]; "Harvest activities may occur in [spotted owl] PACs that have been rendered unsuitable . . . ." [AR67, 88]; "Treatments are designed to comply with the 2004 SNFPA." [AR142]; "The SNFPA (2004) provides direction to designate PACs and HRCAs compromised of the best habitat" [AR192]).

AR28533 (finding that the habitat created by high-intensity fire supports levels of biodiversity and wildlife abundance as high or higher than unburned mature forest); AR28762 (finding that post-fire logging significantly reduces wildlife abundance and diversity). In fact, 250 independent scientists recently wrote to Congress explaining just how damaging this practice is. AR1701-02 (letter from 250 scientists to Congress). The scientists concluded the following:

> This post-fire habitat, known as 'complex early seral forest,' is quite simply some of the best wildlife habitat in forests and is an essential stage of natural forest processes. Moreover, it is the least protected of all forest habitat types and is often as rare, or rarer, than old-growth forest, due to damaging forest practices encouraged by post-fire logging policies… Numerous studies also document the cumulative impacts of post-fire logging on natural ecosystems, including the elimination of bird species that are most dependent on such conditions, compaction of soils, elimination of biological legacies (snags and downed logs) that are essential in supporting new forest growth, spread of invasive species, accumulation of logging slash that can add to future fire risks, increased mortality of conifer seedlings and other important re-establishing vegetation (from logs dragged uphill in logging operations), and increased chronic sedimentation in streams due to the extensive road network and runoff from logging operations . . . .

The case-specific, fact-bound inquiry, which this Court must engage in here, demonstrates the irreparable nature of Plaintiffs' injury and injury to the environment as well as its likelihood.[6] Here, logging will begin on August 1, 2014. Doc 52 (Duysen Dec.). As soon as the logging begins, the abundance of standing dead trees ("snags"), native plants, flowers and shrubs and naturally regenerating conifer seedlings, which make up complex early seral forest (the few thousand acre subset of the fire area), will be removed from the landscape. The complex early seral forest (*a.k.a.*, "snag forest habitat") from which Plaintiffs' members derive enjoyment, and upon which the Black-backed Woodpecker depends, and Spotted Owl and Fisher benefit, will not exist in these areas again in Plaintiffs' lifetime (*i.e.,* harm will be of long duration), and during that time Plaintiffs' members' excursions to these areas will be plagued by stump fields and denuded ground (logging will remove snags and ground-cover and herbicides will remove ecologically vital shrub habitat), and the memory

[6] Because the harm and balancing inquiry is one unique to each case, Defendants' reliance on *Earth Island Inst. v. Carlton*, 626 F.3d 462 (9th Cir. 2010) is misplaced. This is especially true considering that a majority of the issues in this case relate to new scientific information that was not available when the project decision in *Carlton* was issued. Even still, the Ninth Circuit determined the following: "It is undisputed that forests burned at high intensity form a new type of ecologically rich ecosystem. This case concerns a subset of such an ecosystem, namely so-called 'snag forest habitat.'" *Id.* at 467. The Court recognized that "snag forest habitat is extremely scarce in the Sierra Nevadas due to fire suppression and post-fire logging" (*id*.), and found that species-level harm is not necessary to establish irreparable injury. *Id.* at 474.

of what used to be. Such an experience is an affront to the aesthetic enjoyment of these areas and prevents scientific study of the natural ecosystem. Hanson Dec. ¶7-8.[7] This harm cannot be remedied by money damages or some other legal remedy, and thus is irreparable. *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764-65 (9th Cir. 2014).

Defendants' argument that harm here cannot be irreparable because they are not removing all of the habitat or their speculation that Plaintiffs could just go elsewhere[8], Doc. No. 53 at 17, has already been rejected. The Ninth Circuit in *Cottrell* found that the logging at issue would result in irreparable harm because it would prevent the "use and enjoyment of 1,652 acres of forest [to be logged]" by AWR members, even though it would only affect 6% of the overall fire area. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Here, the numbers are much higher, as the Aspen project would prevent the use and enjoyment of over 2,000 acres scheduled to be logged, which equates to 13% of the fire area but, more importantly, the logging will remove 43% of the moderate and high intensity burn areas that are so rich in biodiversity and at issue in this case. Thus, *Cottrell* is directly on point, and the irreparable harm from the loss of enjoyment of habitat on thousands of acres of National Forest lands does not somehow become *non-irreparable* because adjacent to the logged wasteland some amount of habitat still exists. *Cottrell*, 632 F.3d at 1135.

C. The Balance of Hardships Tips Sharply in Plaintiffs Favor and the Public Interest Would be Served by an Injunction

With regard to balancing of harms and public interest, Defendants attempt to fan the flames of fear with regard to roadside hazard trees, fire and fuels, and conifer regeneration. Doc. 53 at 18-20. However, as Plaintiffs have stated repeatedly, Plaintiffs do not seek to halt the felling of hazard trees on

[7] Defendants' attacks on Dr. Hanson's declaration are unfounded. The fact that he has both general (use and enjoyment) and particular (scientific inquiry) harms from this project does not mean that he will not suffer irreparable harm, or that he is not representing the injury that other of Plaintiffs' members will suffer. In addition, Dr. Hanson clearly articulated why the pervasive logging in the project area would preclude his study of how the Pacific Fisher uses unlogged snag forest habitat. Hanson Dec. ¶7.

[8] Defendants rely on the Gould declaration for the proposition that the two new "catastrophic" fires that are burning have already created 9,460 acres of additional habitat is pure speculation. Whether these fires actually create complex early seral forest that Plaintiffs could use and enjoy is entirely dependent on: the elevation of the fires; the vegetation that is now burning (much is non-forest, chapparal or oak woodland); an assessment of the areas 1 year post-fire to ascertain the actual level of tree mortality in the burn area; and of course how much will be lost to post-fire logging.

roads used by the public, roadside hazard tree felling has already occurred on these roads[9] and will continue under another timber sale contract not challenged here, and all of the main roads in the fire area are currently open.[10] Hanson Decl., ¶9 (see also Sierra National Forest website for list of open roads and campgrounds). Defendants argue that hazard tree removal at recreation sites, trailheads and parking areas is also necessary; however, there are no citations to the record for this position. Doc. No. 53 at 18. In addition, the one campground mentioned in the Gould Declaration (¶14) is on the edge of the fire area and is open (see Sierra National Forest Website campground information), Huntington Lake is miles *before* the fire by car, and the Pryor trailhead is not in the fire area at all. AR281.

Regarding fire, every scientific study that has investigated this issue has found that post-fire logging does not effectively reduce future fire intensity and often increases it because it removes the relatively non-combustible large tree trunks and leaves behind combustible logging "slash" debris (branches, tree tops). AR21899-00 (Plaintiffs' comments, summarizing this science). Defendants do not address or deny these findings. Further, Defendants refuse to acknowledge the abundance of natural conifer regeneration (mostly pine) already occurring in the moderate/high-intensity fire areas in the Aspen fire (Hanson Decl., ¶6)—natural regeneration that would be killed by planned tractor logging. AR28907. Finally, for Defendants' claim about increasing fire severity, they cite only to completely unsupported assumptions articulated in two paragraphs of the declaration of Dean Gould (Doc. 53 at 20), who cites no scientific sources and is not an expert on this issue (Mr. Gould is an engineer). The record shows that fire severity is not increasing in the Sierra Nevada. AR29150.

Here, aside from a reduction in personal revue to Defendants and Intervenors , they also assert a potential loss of economic benefit to the community if the logging is enjoined. However, economic loss during the pendency of an injunction does not represent a complete and total loss, akin to the loss of habitat, but rather a delay and potentially a reduction in revenue. *League of Wilderness Defenders*, 752 F.3d at 764-68. Here, as in *League of Wilderness Defenders*, the likely irreparable injury to Black-backed Woodpecker, California Spotted Owl and Pacific Fisher habitat and Plaintiffs' use and

[9] This was from a commercial logging project which Plaintiffs did not challenge in the fire area.

[10] Because the main road is open and any additional hazard trees which may develop along this road are permitted to be felled under any injunction, those seeking emergency egress from the area would not be impeded.

enjoyment of that habitat outweighs the economic interests of the private logging companies and any short lived economic bump to the local communities. *Id.* Here, this is true even if an injunction impedes the full implementation of the project.[11]

CONCLUSION

Plaintiffs have met the requirements for issuance of a TRO in this case, and respectfully request that the Court issue appropriate relief to protect these areas while Plaintiffs' Motion for Preliminary Injunction is reviewed.

Dated: July 31, 2014

Respectfully submitted,

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[11] And, while counsel alludes to the fact that the project might not get done at all if enjoined (Doc.53 at 18), logging activities on the project will continue for more than one year. AR52 (project implementation schedule showing "hazard and salvage removal" would occur from 2014-2017).

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2014, I electronically filed the foregoing **Reply Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Temporary Restraining Order, Motion to Strike and Response to Gould Dec.; and Exhibit A & B** with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the all counsel of record.

s/ Rachel M. Fazio

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