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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

EARTH ISLAND INSTITUTE and
CENTER FOR BIOLOGICAL
DIVERSITY,

Plaintiffs,

v.

TOM QUINN, in his official capacity as
Forest Supervisor for the Tahoe National
Forest, 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.14-cv-03101 JST

**MOTION AND MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF PLAINTIFFS'
REQUEST FOR PRELIMINARY
INJUNCTION**

Hearing date: July 28, 2014

Time: 9:30 a.m.

Courtroom: 9

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1 **MOTION FOR PRELIMINARY INJUNCTION**

2 Pursuant to Rule 65 of the Federal Rules of Civil Procedure and Local Rule 7.2 Plaintiffs Earth
 3 Island Institute and Center for Biological Diversity hereby move for issuance of a preliminary
 4 injunction against the Big Hope and Aspen post-fire logging projects. Although there has been a
 5 revolution in scientific discovery regarding the importance, rarity and wildlife benefits of forest that
 6 burn at high and moderate intensity, these two Projects represent management firmly rooted in the past.
 7 Defendants here have run afoul of the National Environmental Policy Act (“NEPA”) (42 U.S.C.
 8 §§4321 *et seq.*); the National Forest Management Act (“NFMA”) (16 U.S.C. §§1600 *et seq.*) and the
 9 Administrative Procedures Act (“APA”) (5 U.S.C. §§501 *et seq.*), and as explained herein, Plaintiffs
 10 are entitled to preliminary injunctive relief. In support of this motion, Plaintiffs rely upon the
 11 Pleadings, the Memorandum of Points and Authorities argued below, and the declarations of Christina
 12 Sherr and Dr. Chad Hanson, filed herewith, the preliminary administrative records filed by Defendants,
 13 oral argument, and all such other matters and evidence that are properly before the Court.

14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15 **REQUEST FOR RELIEF**

16 Plaintiffs request that all logging of the Big Hope and Aspen projects be enjoined unless and
 17 until Defendants fully comply with NEPA and NFMA, except that true hazard trees may be felled on
 18 roads maintained for public use (otherwise known as maintenance level 3, 4 & 5 roads) after California
 19 Spotted Owl nesting season ends on August 31, 2014.

20 **STATUTORY BACKGROUND**

21 **A. The National Environmental Policy Act**

22 NEPA is “our basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a).
 23 NEPA’s twin aims are to ensure that federal agencies consider the environmental impacts of their
 24 proposed actions and inform the public that environmental concerns have been considered. NEPA
 25 requires “responsible [federal] officials” to prepare an environmental impact statement (“EIS”) to
 26 consider the effects of each “major Federal action[] significantly affecting the quality of the human
 27 environment.” 42 U.S.C. § 4332(2)(C)(i). Preparation of an EIS is mandated if “substantial questions
 28 are raised as to whether a project . . . *may* cause significant degradation of some human environmental

1 factor.” *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d
 2 1172, 1219-20 (9th Cir. 2008) (emphasis added). To determine whether the impacts of a proposed
 3 action are significant enough to warrant preparation of an EIS, the agency may first prepare an
 4 environmental assessment (“EA”). The EA must take a “hard look” at the impacts, and must not
 5 minimize adverse side effects, of the proposed action; if the agency decides the impacts are not
 6 significant, it must supply a convincing statement of reasons why. *Blue Mountains Biodiversity Project*
 7 *v. Blackwood*, 161 F.3d 1208 (9th Cir. 1998). In the analysis of impacts, the agency must articulate a
 8 rational connection between the facts found and the decision made. *Ocean Advocates v. United States*
 9 *Army Corps of Engineers*, 361 F.3d 846, 865 (9th Cir. 2003). If significant new information or changed
 10 circumstances arise, an agency must prepare a supplemental EA or EIS. 40 C.F.R. § 1502.9(c); *Price*
 11 *Road Neighborhood Ass’n, Inc. v. U.S. Dept. of Transp.*, 113 F.3d 1505, 1508-1509 (9th Cir. 1997).

12 **B. The National Forest Management Act**

13 NFMA establishes the statutory framework for management of the National Forest System.
 14 NFMA requires the Forest Service to develop a Land and Resource Management Plan (“Forest Plan”)
 15 for each national forest. Pursuant to NFMA, all site-specific actions taken within a national forest must
 16 be consistent with the applicable forest plan. 16 U.S.C. § 1604(i). In 2012, new NFMA planning
 17 regulations were issued, requiring consideration of the best available science. 36 C.F.R. § 219.3. Until
 18 all plan revisions are completed the Forest Service is required to “consider” the “best available science”
 19 in environmental analysis documents for site-specific projects. 36 C.F.R. § 219.35(a).

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

21 **Background:** “Complex early seral forest” (CESF) (AR1688), also known as snag forest
 22 habitat because of the high density of standing, dead trees, is one of the rarest and least protected of all
 23 forest habitat types in the Sierra Nevada (Hanson 2013 [AR 1689]¹). Due to fire suppression policies,
 24

25 _____
 26 ¹ AR_____, indicates citation to the Aspen Preliminary Administrative Record DVD and, BHAR_____,
 27 indicates citation to the Big Hope Preliminary Administrative Record DVD, both compiled by the Forest
 28 Service on July 11, 2014 and filed with this court. For efficiency reasons, the vast majority of citations
 to scientific studies in this brief will refer to the Aspen Preliminary Administrative Record DVD
 (AR_____); however, all studies (except Hanson 2013) were submitted on both the Aspen and the Big
 Hope Projects. AR1625-44, 1647-81; BHAR3231-50, 3251-87

1 it is estimated there is now about one-fourth as much higher-intensity fire—the type of fire that creates
2 complex early seral forest—as there was prior to the early 20th century (Hanson and Odion 2014
3 [AR29150]; Odion et al. 2014 [AR29616]). This deficit of CESF is further exacerbated by losses of
4 this habitat due to post-fire logging of snags (standing, fire-killed trees) and eradication of native fire-
5 following shrubs. AR1688-89. Complex early seral forest habitat—if not subjected to post-fire
6 logging—supports levels of native biodiversity and wildlife abundance comparable to, and even higher
7 than, that of unburned mature/old forest (Raphael et al. 1987 [AR29668]; Burnett et al. 2010
8 [AR28533,]; Swanson et al. 2011 [AR30435]).

9 The American fire occurred in August of 2013, covering about 27,440 acres on the Tahoe
10 National Forest in a remote area about 10-15 miles south of Interstate 80. The fire had a mosaic of
11 effects, with 64% of it comprised by “low or moderately low” fire effects (less than 50% mortality),
12 with the remaining 36% experiencing over 50% mortality (BHAR7). The Aspen fire occurred in July
13 of 2013, covering about 22,350 acres on the Sierra National Forest in a remote area about 8 miles west
14 of Huntington Lake. The fire had a mosaic of effects, with 80% of it comprised of low and moderate-
15 intensity fire effects (AR32-34).

16 The Big Hope and Aspen post-fire logging projects, challenged herein, are located on the Tahoe
17 and Sierra National Forests, respectively, in the Sierra Nevada mountains. According to the
18 Environmental Assessment (EA) for the Big Hope project, it would involve the logging of 3,443
19 acres—mostly of CESF—as well as an additional 3,271 acres of roadside logging (BHAR14-15).
20 According to the EA for the Aspen project, it would involve the logging of 1,835 acres—mostly of
21 CESF—as well as an additional 3,239 acres in areas wherein delayed tree mortality is predicted by the
22 Forest Service, plus 1,125 acres of roadside logging (AR41). Defendants state that a key purpose of
23 these logging projects is to generate revenue for the Forest Service’s budget (BHAR 9; AR 36).
24 According to the Decision Notices (DNs) for the two projects, the Forest Service granted itself an
25 economic “Emergency Situation Determination” (ESD) to facilitate more rapid logging, in order to
26 maximize the revenue to the Forest Service—the effect of which is that logging can begin once the
27 decision is signed, rather than allowing further public participation under federal law, which is what
28 would normally occur absent an ESD (BHAR298; AR12, 20).

1 **California Spotted Owl:** The California Spotted Owl is a rare raptor designated as a Sensitive
2 Species, meaning that the Forest Service recognizes that there is reason for concern about the
3 population viability of this species. The Forest Service is required to maintain viable populations of
4 Sensitive Species, including the California Spotted Owl. Forest Service Manual, Amendment 2600-
5 2005-1 (9/23/05), Section 2670.12.

6 The most current body of research regarding California spotted owls concludes that they select
7 dense, mature forest that is unburned or has low/moderate-intensity fire effects for nesting and roosting,
8 while unlogged high-intensity fire areas provide suitable foraging habitat; in fact, the owls *preferentially*
9 select these unlogged high-intensity fire areas in mature conifer forest for foraging (Bond et al. 2009
10 [AR 28469]), and also have levels of reproduction 60% higher in mixed intensity fire areas than in
11 green mature/old forest. (Roberts 2008 [AR29718]). This is often described as the “bedroom and
12 kitchen” effect, whereby the juxtaposition of dense, live forest and high-intensity burned forest (where
13 most or all trees have been killed by fire) provides optimal conditions for the owls (Bond comments on
14 the Aspen EA [AR 27971]). Spotted owls actively forage in post-fire habitat within 1.5 kilometers of
15 their nest/roost site. AR28469.

16 The scientific research has also found that recent fires in the Sierra Nevada, ranging from 0-
17 93% high-intensity fire effects (average of 32% high-intensity), have not reduced California spotted
18 owl occupancy, and over half (63%) of owl territories were found to remain occupied even with 50-
19 93% high-intensity fire effects (Lee et al. 2012 [AR 29248, 29254]). However, when post-fire logging
20 of moderate/high-intensity fire areas occurs near or adjacent to owl territory cores (such as designated
21 areas called Protected Activity Centers, or “PACs”), the scientific evidence indicates that occupancy is
22 greatly reduced (Bond 2011 [AR 28361]; Lee et al. 2012 [AR 29256]; Clark et al. 2013 [BHAR7325];
23 Plaintiffs’ Big Hope EA comments, AR1744-49; Plaintiffs’ Aspen EA comments, AR28217-23; Bond
24 comments on the Big Hope EA, AR1725; Bond comments on the Aspen EA, AR27973-75).

25 Monica Bond, who is a top researcher on the relationship between spotted owls and fire,
26 explained in her comments to the Forest Service that the scientific evidence shows that moderate and
27 high-intensity fire areas are suitable spotted owl habitat, and urged the Forest Service not to log these
28 areas (Bond comments on the Big Hope EA [AR1725]; Bond comments on the Aspen EA [AR27973-

1 75]). Specifically, in order to prevent serious adverse consequences to spotted owls and their habitat,
2 Ms. Bond's research recommends that any post-fire logging be avoided within 1.5 kilometers of spotted
3 owl nest/roost sites (Bond et al. 2009 [AR28475-76]). Under the Big Hope and Aspen EAs and DNs,
4 however, post-fire logging is allowed to occur in moderate and high-intensity fire patches within 1.5
5 kilometers of multiple spotted owl sites (BHAR849, 857; AR195, 281); *see also* maps submitted by
6 Plaintiffs showing overlay of salvage units in designated owl habitat [BHAR3287, AR1683).

7 The most recent spotted owl research also has determined that California spotted owl
8 populations are *declining* on national forest lands and private lands where logging occurs, but not on
9 Sequoia/Kings-Canyon national park lands protected from commercial logging (Conner et al. 2013
10 [AR28847, 28854]; Tempel and Gutiérrez 2013 [AR30649, 30655]; Tempel 2014 [AR30580-82]).
11 Neither the Big Hope nor the Aspen FONSIs even acknowledge this most recent demographic data.
12 Instead, in the Aspen EA, the Forest Service argues that the new data on population declines of
13 California Spotted Owls (the 2013 and 2014 studies cited above, which were submitted with Plaintiffs'
14 comments) was not yet published (Aspen Project Response to Comments [AR452]). These studies are
15 in fact published, however. The Big Hope Response to Comments did not respond to these studies
16 regarding declining populations.

17 Meanwhile, in both projects, all of, or portions of, spotted owl Protected Activity Centers
18 (PACs or nest stands) and Home Range Core Areas (HRCAs, or areas adjacent to PACs designed to
19 protect owl habitat) were dropped from such designation, opening them up to post-fire logging (*see*,
20 *e.g.*, AR748 [2004 Framework at p. 53] ("salvage harvests are prohibited in PACs . . .")). This
21 occurred because the Big Hope and Aspen projects rely on the Forest Service's 2004 Sierra Nevada
22 Forest Plan Amendment ("2004 Framework") conclusion that moderate/high-intensity fire areas are not
23 suitable habitat for the owls, rather than on the most current spotted owl research. (BHAR91, 96, 98,
24 187-188; ; AR197, 205-07, 220). This led to the claim by both Projects that: "Implementation of action
25 alternatives would not result in *any* additional reduction of habitat beyond what was caused by the
26 Aspen Fires" (AR365, 433) (emphasis added), *citing* the 2004 Framework (*accord* BHAR338-40, 44).

27 During the administrative comment period, the public presented multiple lines of evidence
28 showing adverse impacts to spotted owl habitat from post-fire logging. The Big Hope Response to

1 Comments (BHAR340-41) improperly dismissed two such lines of evidence because they are
2 preliminary or are unpublished studies, and did not respond at all to the other lines of evidence, while
3 the Aspen Project Response to Comments (AR365-67, 369) quoted public comments regarding serious
4 adverse effects to spotted owls from post-fire logging (*citing e.g.*, Lee et al. 2012, Clark et al. 2013),
5 but then offered no response to these studies.

6 Both EA’s conclusion that each “Project may affect individuals, but is not likely to result in a
7 trend toward Federal listing or loss of viability” (BHAR866; AR222) were predicated upon the
8 assertions/assumptions that a) suitable spotted owl habitat would not be removed by post-fire logging in
9 moderate/high-intensity fire areas, and b) owls are not declining.

10 **Pacific Fisher:** The Pacific fisher is a very rare carnivore—like a large mink or small
11 wolverine—that is restricted to the southern Sierra Nevada (Hanson 2013 [AR1684]). The Pacific
12 fisher lives in the area affected by the Aspen fire of 2013, and has been detected using the fire area in
13 2014 (AR200). Due to threats to this species, especially logging, the U.S. Fish and Wildlife Service
14 has determined that listing it under the federal Endangered Species Act (ESA) is warranted, and it is
15 currently designated as a Candidate Species. AR198.

16 The fisher selects dense, mature forest for denning and resting (Zielinski et al. 2006 [AR]),
17 but unlogged moderate- and high-intensity fire areas provide suitable foraging habitat (Hanson 2013
18 [AR1684, 1689]). Hanson (2013), using teams of dogs specially trained by the University of
19 Washington to detect fisher scat (droppings) in order to determine habitat use patterns, found that
20 fishers used moderate/higher-intensity fire areas at levels comparable to their use of low-intensity fire
21 areas and unburned mature forest. AR1684, 1688-89. Hanson (2013) concluded that his results “cannot
22 be reconciled with the hypothesis that moderate- or higher-severity fire simply represents a loss of
23 suitable fisher habitat” (AR1687), and further concluded that “detection rates were approximately the
24 same between dense, mature/old mixed-conifer forest with moderate/higher-severity fire and unburned
25 dense, mature/old mixed-conifer, indicating that such post-fire areas represent suitable fisher habitat . . .
26 .” *Id.* Hanson (2013) noted that his results for the Pacific fisher are consistent with the “bedroom and
27 kitchen” effect described in recent research with regard to California spotted owls. *Id.* Hanson (2013)
28 further concluded, with regard to post-fire logging: “My results indicate that fishers benefit not from

1 moderate/higher-severity fire in general but, rather, moderate/higher-severity fire in mature/old forest
2 with moderate to high pre-fire canopy cover. Such areas have high structural complexity . . . and can
3 have higher overall biomass (live and dead sources combined) than unburned old forest . . . Both of
4 these are reduced by postfire logging . . .”. AR1688.

5 Neither the Aspen EA, nor the Aspen Response to Comments (AR371), incorporated these
6 findings, and the Aspen EA (AR222) concluded that “the Project may affect individuals, but is not
7 likely to result in a trend toward Federal listing or loss of viability” of the Pacific Fisher, basing this
8 conclusion on the assertion/assumption that no suitable fisher habitat would be removed by post-fire
9 logging in moderate/high-intensity fire areas.

10 **Black-backed Woodpecker:** The Black-backed Woodpecker is a very rare species that is
11 strongly associated with large patches (generally at least 100-200 acres per pair) of dense, mature/old
12 conifer forest that has experienced moderate- to high-intensity fire (especially high-intensity) within the
13 past 8 years and has not been subjected to any significant amount of post-fire logging (BHAR138-139,
14 142). This species is “dependent” upon these conditions because they provide a sufficient supply of the
15 Woodpecker’s primary prey (larvae of wood-boring beetles, found deep under the bark of recently fire-
16 killed trees); further, Black-backed Woodpeckers have a natural camouflage against the charred bark of
17 fire-killed trees, protecting them from predation from raptors (BHAR138). One of only two
18 woodpecker species in North America with only three toes instead of four, the Black-backed
19 Woodpecker has enhanced heel mobility, and strike force, allowing it to access and extract beetle larvae
20 that other woodpeckers often cannot access (Bond et al. 2012[AR12079-80, 12092]). The Black-
21 backed Woodpecker has evolved fluid sacks that fill just before each strike, cushioning the brain
22 against impact that would otherwise cause damage. A “keystone species”, the Black-backed
23 Woodpecker excavates a new nest cavity every year, even when it stays in the same territory, allowing
24 previous nest cavities to be used by the many cavity-nesting wildlife species that cannot make their
25 own nest cavities, such as bluebirds and wrens (12079). Black-backed Woodpeckers only disperse
26 about 30 miles (AR12092, 12103). The Black-backed Woodpecker is also the sole Management
27 Indicator Species (MIS) chosen by the Forest Service to represent all other wildlife species associated
28 with high-intensity fire patches (AR12081).

1 In response to a 2012 Endangered Species Act (“ESA”) listing petition, on April 9, 2013, the
2 U.S. Fish and Wildlife Service issued a determination that the Black-backed Woodpecker population in
3 the Sierra Nevada “may be warranted” for listing under the federal ESA, due in substantial part to
4 habitat loss from fire suppression and post-fire logging (USFWS 2013). 78 FR 21086, 21096-97. The
5 USFWS has not yet issued a final decision on the listing petition.

6 In 2012, due to substantial concerns about threats to the viability of Black-backed Woodpecker
7 populations in the Sierra Nevada, the Forest Service commissioned a panel of Black-backed
8 Woodpecker scientists to produce a Conservation Strategy for this species (Bond et al. 2012
9 [AR12073]). The Strategy recommended, among other things, that nesting season (extending through
10 July 31st each year) be completely avoided, and that no post-fire logging occur during this time period
11 in order to avoid compounded adverse impacts, including the direct killing of chicks in the nest that
12 cannot yet fly (Bond et al. 2012 [AR12086]). These recommendations were made in order to “avoid a
13 serious risk to the viability of Black-backed Woodpecker populations” (Bond scoping comments on
14 Big Hope [BHAR3237-38]), yet logging within nesting season would be allowed under both the Big
15 Hope and the Aspen projects (Bond scoping comments on Big Hope [BHAR3237-38]; Bond comments
16 on Aspen EA [AR27976-77]; AR52).

17 The Aspen Response to Comments (AR430) concluded the following regarding the decision to
18 reject the Conservation Strategy recommendation to avoid logging in nesting season: “Based upon the
19 lack of effects to black-backed woodpecker habitat and nesting birds an additional alternative that
20 limited harvests for black-backed woodpecker habitat [to avoid nesting season] was considered
21 unnecessary”. The Big Hope Response to Comments (BHAR356-57) responded only to say that the
22 2004 Framework does not require the Forest Service to avoid post-fire logging of Black-backed habitat
23 in nesting season. The Big Hope project would remove 57% of suitable Black-backed Woodpecker
24 habitat (BHAR142, Table 44) and the Aspen project would remove 41% of suitable habitat (AR228) in
25 these project areas.

26 Both EAs also assert that, despite the logging of substantial Woodpecker habitat within the
27 Project areas – 57% on the Big Hope Project and 41% on the Aspen Project – there will not be
28 significant impacts to the species. AR15; BHAR297. Monica Bond, the lead author of the Forest

1 Service’s Conservation Strategy for the Black-backed Woodpecker, in her comments, challenged:
2 “What is the scientific basis for suggesting that removing this proportion of all potentially suitable
3 woodpecker habitat in the fire area on the national forest will not seriously threaten Black-backed
4 Woodpecker populations, especially in combination with large proportions to be removed in the post-
5 fire logging projects on the other national forests?” The Forest Service’s Response to Comments
6 evaded her question (BHAR359-360).

7 For the Big Hope project, the analysis area covered the entire western half of the Tahoe
8 National Forest (the entire forest spans approximately 850,000 acres), and the Forest Service admits
9 that, even including the American fire of 2013, there is currently only 5,785 acres of suitable Black-
10 backed Woodpecker habitat in this entire region—only about 1% of the forest (BHAR209), and only
11 3,501 acres would remain in the entire region if the Big Hope project is completed (BHAR210). On the
12 entire 1.3-million-acre Sierra National Forest, in addition to the 3,438 acres of suitable Black-backed
13 habitat in the Aspen fire—1,464 acres (41%) of which would be removed by planned logging—there is
14 only one other fire of any significant size on the entire national forest to provide suitable habitat for this
15 species—the 7,687-acre Tehipite fire (only a portion of which is suitable Black-backed habitat), which
16 will be 7 years old next nest season (already nearly too old to provide suitable habitat) (BHAR10105,
17 10109). If and when the Aspen logging projects is completed, the Tehipite fire of 2008 will be too old
18 to provide suitable habitat (AR230), and only about 2,000 acres of suitable habitat will remain on the
19 entire national forest (less than one-sixth of one percent of the forest).

20 **Significant New Information Arising Since the 2004 Framework was Issued:** In 2004, the
21 Forest Service issued what is now referred to as the 2004 Sierra Nevada Forest Plan Amendment
22 (“2004 Framework”). The Framework applies to all National Forests in the Sierra Nevada and has an
23 overarching goal of reducing wildfire in the Sierras. Since 2004, however, significant new scientific
24 information has arisen which directly contradicts, and has rendered outdated, the assumptions upon
25 which the 2004 Framework’s Environmental Impact Statement (EIS) and Record of Decision (ROD)
26 were based, and Plaintiffs submitted this new information to the Forest Service during comments on the
27 Aspen and Big Hope Projects (Plaintiffs’ Big Hope EA comments, pp. 25-44 [BHAR1754-73];
28 Plaintiffs’ Aspen EA comments, pp. 33-51 [AR28228-46]) (citing specific assumptions, and

1 corresponding pages, from the 2004 Framework, followed by the new science). This significant, new
 2 information includes but is not limited to the following: a) unlogged moderate- and high-intensity fire
 3 areas create suitable habitat for California spotted owls, but post-fire logging reduces spotted owl
 4 occupancy; b) California spotted owls are declining in population; c) unlogged moderate- and high-
 5 intensity fire areas create suitable foraging habitat for Pacific fishers, and post-fire logging removes the
 6 very structural conditions that fishers select in post-fire areas; d) Black-backed Woodpeckers are now
 7 extremely rare and depend upon large patches (100-200 acres at least per pair) of dense, mature conifer
 8 forest that has experienced moderate/high-intensity fire within the past 8 years and that has not been
 9 subjected to any significant amount of post-fire logging; e) post-fire logging of one-third or more of
 10 suitable Black-backed Woodpecker habitat creates a serious risk of extinction, in light of the current
 11 deficit of habitat; f) there now exists a deficit of post-fire habitat, with only one-half to one-fourth as
 12 much high-intensity fire currently as compared to conditions prior to fire suppression policies that
 13 began in the early 20th century; g) fire intensity is not increasing in the Sierra Nevada currently; h) the
 14 most long-unburned forests (the ones that have missed the most natural fire cycles) are not burning
 15 more intensely than more recently burned areas, and are burning mostly at low/moderate-intensity; and
 16 i) high-intensity fire creates “complex early seral forest”, which supports levels of native biodiversity
 17 and wildlife abundance comparable to or higher than those found in unburned old forest.

18 Defendants did not dispute that the foregoing represents significant new information that
 19 contradicts, and renders outdated, the fundamental assumptions upon which the 2004 Framework was
 20 based. Instead, Defendants simply stated that they are not obliged to reassess the 2004 Framework.
 21 BHAR309; AR456.

22 STANDARD OF REVIEW

23 Judicial review of Plaintiffs’ claims is governed by the Administrative Procedures Act (“APA”).
 24 *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc). Under the APA, a court must
 25 “hold unlawful and set aside agency action found to be . . . arbitrary, capricious, and an abuse of
 26 discretion, or otherwise not in accordance with the law . . . [or] without observance of procedure
 27 required by law.” 5 U.S.C. §§ 706(2).

28 A court is charged with conducting a “searching and careful” review of a challenged agency

1 decision. *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 859 (9th Cir. 2005).
 2 Although the scope of this review is narrow, a court “must not ‘rubber-stamp’ . . . administrative
 3 decisions that [we] deem inconsistent with a statutory mandate or that frustrate the congressional policy
 4 underlying a statute.” *Id.*; see also *NW Coalition for Alternatives to Pesticides v. U.S. Env’tl. Prot.*
 5 *Agency*, 544 F.3d 1043, 1052 n.7 (9th Cir. 2008) (internal quotations and citations omitted).

6 Ultimately a Court must determine whether an agency decision “was based on a consideration
 7 of the relevant factors and whether there has been a clear error of judgment.” *Idaho Sporting Cong.*,
 8 137 F.3d at 1149 (citing *Marsh v. Ore. Natural Res. Council*, 490 U.S. 360, 378 (1989)). A reviewing
 9 court may reverse an agency decision if the agency failed to consider an important aspect of the issue,
 10 offered an explanation for its decision in contradiction of the evidence before the agency, or made a
 11 determination so implausible that it could not be ascribed to a mere difference of opinion or the product
 12 of the agency’s expertise. *Pac. Coast Fed’n of Fishermen’s Ass’n, Inc. v. NMFS*, 265 F.3d 1028, 1034
 13 (9th Cir. 2001).

14 To obtain a preliminary injunction, plaintiffs must show they are “[1] likely to succeed on the
 15 merits, [2] likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of
 16 equities tips in [their] favor, and [4] that an injunction is in the public interest.” *Winter v. Natural Res.*
 17 *Def. Council*, 555 U.S. 7, 20 (2008). A court may also provide relief if a plaintiff shows “serious
 18 questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff’s
 19 favor.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011) (“*Cottrell*”).

20 ARGUMENT

21 Under either of the standards for injunctive relief identified above, Plaintiffs, as explained
 22 below, are entitled to injunctive relief in this case in light of the strength of Plaintiffs’ claims and the
 23 clear harm from Defendants’ actions.

24 **A. Plaintiffs Raise Serious Questions And Are Likely To Succeed On The Merits Because** 25 **The Forest Service’s Big Hope And Aspen Projects Violate NEPA and NFMA**

26 **1. The Forest Service’s Decision Not to Prepare an Environmental Impact** 27 **Statement for the Big Hope and Aspen Projects Violates NEPA**

28 Preparation of an Environmental Impact Statement (“EIS”) is mandated if “substantial questions

1 are raised as to whether a project . . . *may* cause significant degradation of some human environmental
2 factor.” *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 508 F.3d
3 508, 552 (9th Cir. 2007) (emphasis added) (citations omitted). Thus, the bar for whether “significant
4 effects” may occur is a low standard. *Klamath Siskiyou Wildlands Center v. Boody*, 468 F.3d 549, 562
5 (9th Cir. 2006). In evaluating whether a proposed action may have a “significant” impact, an agency
6 should consider both the context and intensity of the action. 40 C.F.R. § 1508.27. The context varies
7 depending on the scope of the project. *Id.* The intensity, or the “severity of the impact” of the proposed
8 action, should be evaluated based on a number of “significance” factors. *See* 40 C.F.R. 1508.27(b)(1)-
9 (10). The factors pertinent to this case include considering the unique characteristics of the geographic
10 area where the project is planned, including whether it is an “ecologically critical area”, the degree to
11 which the project’s impacts are highly uncertain, or involve unique or unknown risks, and the project’s
12 impacts on threatened or endangered species. 40 C.F.R. §1508.27(b)(3),(5),(9).

13 A court may find a substantial risk of a significant effect based on just one of these factors.
14 *Ocean Advocates*, 361 F.3d at 865. In addition, evidence regarding the significance of the impacts need
15 not be conclusive in order to compel preparation of an EIS. *LaFlamme v. F.E.R.C.*, 852 F.2d 389, 397
16 (9th Cir. 1988).

17 Both the Big Hope and Aspen project areas, as a result of being burned in a wildfire, now consist
18 of unique characteristics which are very rare on both the Tahoe and Sierra National Forests. *See* Facts
19 Relevant to Resolution of Plaintiffs’ Claims (“Facts section”) above, p. 9. These unique characteristics
20 include an abundance of snags (standing dead trees) – about 100 per acre or more in places, as opposed
21 to an average of 2-4 per acre that characterizes the unburned forest surrounding these areas, natural post-
22 fire conifer seedlings, and native shrubs, oaks, and flowers regenerating after the fire. AR117, 129;
23 BHAR43; Hanson Declaration, ¶¶5-7. In addition to these unique vegetation characteristics, these areas
24 attract unique avian residents, such as the Black-Backed Woodpecker, which is dependent on moderate-
25 and high-intensity fire areas for survival. AR223-225; BHAR138-139. Given the paucity of suitable
26 Black-backed Woodpecker habitat on both the Tahoe and Sierra national forests – only several thousand
27 acres on each, before logging (see Facts section above, p. 9), the fact that these areas will only serve as
28 suitable habitat for 8 years post-fire, the fact that Black-backed Woodpeckers only disperse

1 approximately 30 miles (AR12103 [Bond et al. 2012]), and the U.S. Fish and Wildlife Service’s
2 determination that this species may need to be listed under the ESA due to a severe scarcity of—and lack
3 of protections for—habitat (see Facts above, p. 8), these areas of unique habitat are “ecologically
4 critical” to the survival of this species on these forests. Because Defendants’ Big Hope and Aspen
5 projects approve the removal of such a large portion of these unique and ecologically critical fire areas
6 (41% on the Aspen Project and 57% on the Big Hope Project) the third significance factor of the NEPA
7 regulations, 40 C.F.R. §1508.27(b)(3), is implicated, and an EIS for each Project was required to be
8 prepared.

9 Defendants’ refusal to recognize that California Spotted Owls preferentially select high-intensity
10 burned areas, have higher levels of reproduction in burned areas, and are experiencing a documented
11 population decline, creates a circumstance wherein implementation of the Big Hope and Aspen projects,
12 which will each remove thousands of acres of suitable owl habitat, created by moderate- and high-
13 intensity fire in mature forest (see Facts section above, p. 4-6), presents risks to this Sensitive Species—
14 risks which are “highly uncertain, unique or unknown”. 40 C.F.R. 1508.27(b)(5). Because further study
15 in an EIS can help to resolve the highly uncertain, unique and/or unknown risks of each Project, EISs are
16 required to be prepared. *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 731 (9th Cir. 2001).

17 The Aspen Project will likely adversely affect the Pacific Fisher, a candidate for listing under the
18 Endangered Species Act (AR198), with only 125-250 adults remaining in the entire southern Sierra
19 Nevada subspecies (AR9621). The newest science, and the only study which has empirically
20 investigated how the Pacific Fisher uses burned areas, found that there was no appreciable difference in
21 this animal’s use of green mature and old forest versus its use of mature and old forest that has burned at
22 moderate to high severity (see Facts section above, p. 6-7). The Forest Service misread this study and in
23 so doing ignored its relevant findings, leading them to erroneously conclude that no suitable Fisher
24 habitat would be removed from the project area. AR222, 581. Interestingly, the Pacific Fisher has
25 already been observed using the Aspen fire area. AR200. The Aspen Project proposes to remove about
26 2,000 acres of suitable Fisher foraging habitat. AR222. This raises substantial questions about the
27 significance of the impacts the Aspen project will have on this imperiled species, thus preparation of an
28 EIS was required for the Aspen Project to determine the degree to which this logging will adversely

1 affect this species. 40 C.F.R. §1508.27(b)(9). Additionally, Defendants’ refusal to assess the impacts of
2 removing approximately 2,000 acres of suitable Fisher habitat from the Aspen project area on the
3 Pacific Fisher, creates highly uncertain, unique or unknown risks to this species triggering significance
4 factor 40 C.F.R. §1508.27(b)(5) which also requires preparation of an EIS for this project.

5 **2. The Forest Service Did Not Take a Hard Look at the Impacts of the Big Hope**
6 **and Aspen Projects on the California Spotted Owl, Black-Backed Woodpecker**
7 **or Pacific Fisher**

8 NEPA establishes procedural requirements to ensure that agencies take a “hard look” at the
9 environmental impacts of their actions. *See Ocean Advocates*, 361 F.3d at 1125. Agencies must
10 consider all foreseeable direct, indirect, and cumulative impacts and include a candid discussion of
11 adverse impacts – one that does not improperly minimize negative side effects. *Earth Island Inst. v.*
12 *U.S. Forest Service*, 442 F.3d at 1154, 1159 (9th Cir. 2006) (“*Earth Island II*”) (citations omitted). In
13 reviewing the adequacy of an EIS or EA, the Ninth Circuit applies the “rule of reason” standard,
14 “which requires ‘a pragmatic judgment whether the EIS’s [or EA’s] form, content and preparation
15 foster both informed decision-making and informed public participation.’” *Native Ecosystem Counsel*
16 *v. U.S. Forest Service*, 418 F.3d 953, 960 (9th Cir. 2005); *see also Klamath-Siskiyou Wildlands Ctr. v.*
17 *Bureau of Land Mgmt.*, 387 F.3d 989, 993 (9th Cir. 2004) (applying “hard look” requirement to EAs).
18 Furthermore, “[i]f an agency decides not to prepare an [environmental impact statement], it must
19 supply a convincing statement of reasons to explain why a project’s impacts are insignificant. The
20 statement of reasons is crucial to determining whether the agency took a hard look at the potential
21 environmental impact of a project.” *Blue Mts.*, 161 F.3d at 1212 (citing 42 U.S.C. § 4332(2)(C)).

22 Here, Defendants failed to take the required “hard look” at the adverse impacts of planned post-
23 fire logging because, as described in the Facts section above (pp. 4-7), they based their ultimate impacts
24 analysis, and FONSI for the Big Hope and Aspen projects, on the outdated and scientifically incorrect
25 conclusion that moderate and high-intensity fire areas do not create suitable habitat for California
26 spotted owls or Pacific fishers, and thereby improperly minimized the adverse impacts of post-fire
27 logging on these species. Put simply, it was not possible for the Forest Service to take a “hard look”
28 because they were unwilling to incorporate into their analysis the most up to date information that

1 shows that California spotted owls and Pacific fishers do in fact use intensely burned forest, and with
2 regard to the owls, preferentially select such forest. Further evidence of the Forest Service’s failure to
3 take a “hard look” is the fact that neither the Big Hope nor the Aspen EAs discuss the impacts to
4 Spotted owls from these Projects in the context of a declining owl population on Forest Service lands.

5 Defendants also failed to take the required hard look at the impacts of the proposed Projects
6 because, as discussed in the Facts section above (pp. 7-9), they failed to disclose adverse impacts from
7 logging in suitable Black-backed Woodpecker habitat during the 2015 nesting season, and failed to
8 provide a rational basis or convincing statement of reasons for their conclusion that removal of such a
9 large proportion of suitable Black-backed Woodpecker habitat – 57% on the Big Hope Project and 41%
10 on the Aspen Project – had no potential to significantly affect this species. Indeed, the agency’s
11 findings and conclusions were explicitly found to be scientifically deficient by wildlife biologist
12 Monica Bond, the lead author of the Black-backed Woodpecker Conservation Strategy. Ms. Bond, in
13 her comments to the Forest Service, explained that both the scale and proportion of suitable habitat that
14 would be removed at the very least potentially threatens the viability of the Black-backed Woodpecker
15 in the Sierras and could push the species toward extinction, necessitating ESA listing. This is especially
16 so given the fact that the Black-backed Woodpecker is currently being considered for federal ESA
17 listing.

18 Defendants’ decision to implement the Projects without taking the requisite “hard look” at the
19 Projects’ impacts to California Spotted Owls, Black-backed Woodpeckers, and Pacific Fishers, violates
20 NEPA. *Blue Mts.*, 161 F.3d at 1216.

21 **3. The Forest Service Failed to Consider the Best Available Science on the**
22 **Relationship between California Spotted Owls and Pacific Fishers, and Fire,**
23 **when Developing the Big Hope and Aspen Projects**

24 The new 2012 NFMA Planning Rule provides that all Forest Plans must consider best available
25 science. 36 CFR § 219.3. Due to the consistency requirements of the NFMA statute, this creates a
26 circumstance wherein all projects associated with plans revised under the new rule will necessarily be
27 informed by the best available science. 16 USC §1604(i). Unfortunately, it may take up to 15 years for
28 all of the Forest Plans in the country to be revised (2012 NFMA Rule Final EIS, p. 275). Thus, in order
to ensure continuity of management until the forest plan revision process has been completed “for each

1 unit of the National Forest System, the responsible official must consider the best available science in
2 implementing and if appropriate, amending the plan.” 36 CFR §219.35 (2011); *Alliance for the Wild*
3 *Rockies v. Bradford*, 2014 U.S. Dist. LEXIS 89590 (D. Mont. June 30, 2014).

4 The Ninth Circuit has determined that an agency violates the best available science requirement
5 for projects implementing a forest plan, such as the Big Hope and Aspen projects, when the science
6 provided to the agency demonstrates that the agency’s positions/studies are outdated or flawed, or
7 where the agency refuses to carefully consider scientific evidence which directly undermines their
8 conclusions. *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 658-660 (9th Cir. 2009), citing *Oregon Trollers*
9 *Ass'n v. Gutierrez*, 452 F.3d 1104, 1120 (9th Cir.2006); *N.C. Fisheries Ass'n*, 518 F.Supp.2d at 85
10 (citing *Building Indus. Ass'n of Superior Cal. v. Norton*, 247 F.3d 1241, 1246-47 (D.C. Cir.
11 2001)) (“Defendants fail to meet the best available science requirement where there is evidence
12 that superior or contrary data was available and that the [Department] ignored such information.”).
13 Here, this is exactly what has occurred.

14 Specifically, the evidence provided by Plaintiffs through comments on both the Big Hope and
15 Aspen projects, as discussed in the Facts section above (pp. 4-6), with regard to California spotted
16 owls, demonstrate that the agency’s position that fire renders suitable spotted owl habitat unsuitable is
17 outdated and flawed, because the most recent science shows that not only do spotted owls use
18 moderate- and high-intensity fire areas, they actually prefer such areas for foraging, even when mature
19 and old green forest is more abundant on the landscape. (Bond et al. 2009 [AR28469]; Bond comments
20 on EAs [BHAR 1725], [AR27973-75]). Similarly, Defendants’ position that post-fire logging has no
21 adverse impact on spotted owls is directly undermined by the studies previously mentioned which show
22 that owls prefer such habitat, and that is why one of the studies, Bond et al. 2009, specifically
23 recommended that no salvage logging occur in burned areas within 1.5 km of an owl nest or roost. The
24 Forest Service also failed to consider the best available science with regard to the current status of the
25 California Spotted Owl, because their conclusion that California Spotted Owls are not declining is
26 directly contradicted by the most recent demographic data showing just the opposite (Conner et al.
27 2013 [AR 28847], Tempel and Gutiérrez 2013 [AR30649], Tempel 2014 [AR30521]).

28 Furthermore, in regard to the Aspen Project, Defendants failed to consider the best available

1 science when they improperly and inaccurately dismissed the findings of Hanson (2013), which,
2 contrary to the Forest Service's conclusions, found that moderate/high-intensity fire areas are suitable
3 habitat for Pacific fishers, and that post-fire logging will likely remove the structural features that make
4 these post-fire areas suitable, thereby eliminating suitability. Hanson 2013 [AR 1688] and AR 419.

5 **4. Significant New Information, Including Best Available Science, Requires**
6 **Rejection of the FONSI, and Supplementation of the 2004 Framework**

7 Rather than incorporate and adhere to the best available science regarding wildlife use of post-
8 fire forest, the Forest Service continues to attempt to justify its actions by pointing to the 2004
9 Framework forest plan amendment that applies to all National Forests in the Sierra Nevada, including
10 the Tahoe and Sierra National Forests. However, as discussed *supra* in the Facts section, the 2004
11 Framework offers no scientific support for the Big Hope or Aspen EAs' conclusions regarding the
12 relationship between California spotted owls or Pacific fishers and burned forest. Quite simply, the
13 2004 Framework predates the scientific studies that investigated this relationship. As a result, the
14 Framework's assumption that moderate- and high-intensity fire areas are not suitable habitat for these
15 species is outdated, as is the Framework's related assumption that logging such areas will not adversely
16 affect spotted owls or fishers. Because the Findings of No Significant Impact (FONSI) in this case tier
17 to and implement the 2004 Framework, and because the 2004 Framework is no longer lawful under
18 NEPA due to significant new information, the Forest Service must prepare a supplemental EIS to
19 amend the 2004 Framework and align it with the best available science. 40 CFR 1502.9(c),

20 The new science at issue here establishes that a) high-intensity fire within spotted owl core
21 areas (200-hectares surrounding nests and roosts) does not reduce site-occupancy (Lee et al. 2012), b)
22 California spotted owls, within 1.5 kilometers (km) of their nests or roosts, *prefer* to forage in *high-*
23 *intensity* burned areas over lower-intensity and unburned areas, and post-fire logging should therefore
24 be avoided in this zone (Bond et al. 2009 [AR 28469]), c) spotted owl home range size in burned forest
25 is similar to spotted owl home range size in unburned forest (Bond et al. 2013), and d) post-fire logged
26 areas have strongly tended to reduce spotted owl occupancy (*see, e.g.*, Bond 2011, Lee et al. 2012,
27 Clark et al. 2013). See Facts section, p. 4-6. Thus, not only does the best available science
28 demonstrate that spotted owls use intensely burned forest as part of their home range, it shows they in

1 fact *prefer* it as suitable foraging habitat, if it is not logged. That is why Bond et al. (2009) explicitly
2 recommended that post-fire logging not occur within 1.5 km of a nest or roost site. *See also*
3 *Conservation Cong. v. United States Forest Serv.*, No. CIV. S-13-0832 LKK/DAD, 2013 U.S. Dist.
4 LEXIS 127671, *20 (E.D. Cal. Sept. 6, 2013) (“Bond, in the cited papers, specifically recommended
5 that ‘post-fire logging be avoided within 1.5 kilometers (at least) of Spotted Owl nest sites.’ . . . Also,
6 defendant identifies no literature that indicates that it would be appropriate to log within 1.5 km from
7 the nest site.”).

8 The 2004 Framework, on the other hand, assumes that intensely burned forest is *non-habitat* for
9 California spotted owls (2004 Framework, AR 7968-9), and in so doing, *facilitates* post-fire logging
10 within 1.5 km of owl sites in burned forest areas that would otherwise serve as crucial habitat for what
11 is currently a declining owl population² (2004 Framework, p. 37 [AR 7966]). Consequently, the 2004
12 Framework is not only scientifically invalid, but is acting in a way that serves to destroy preferred owl
13 habitat at a time when spotted owls are in decline, facilitating the retirement or redrawing of owl PACs
14 and HRCAs simply because they contain areas which burned at moderate and high intensity allowing
15 suitable habitat that was previously protected to be opened to post-fire logging.

16 The 2004 Framework’s assumptions about Pacific fishers and Black-backed woodpeckers and
17 fire are similarly contradicted by new science, as discussed above in the Facts section (p. 6-9). In 2004,
18 very little was known about the Black-backed Woodpecker, and the 2004 Framework did not even
19 recognize any conservation issues with regard to this species or include provisions to protect its habitat.
20 Now, however, this Woodpecker is being considered for listing under the ESA due to threats in large
21 part from the post-fire logging encouraged, with no meaningful limits, under the 2004 Framework
22 (2004 Framework, [AR 7981-2]). In fact, as discussed in the Facts section above (pp. 2-10), since 2004
23 there has been a dramatic transformation in our scientific understanding of the ecological value and
24 importance of post-fire habitat created by high-intensity fire.

25
26
27 ² The 2004 Framework FEIS (AR 920-921) also stated that, at the time, the data indicated “a stable
28 population” for all of the Sierra Nevada spotted owl study areas. The best available science in 2014,
however, establishes that California spotted owl populations are, and have been, *declining*. (Conner et
al. 2013 [AR28847], Tempel and Gutiérrez 2014 [AR30649], Tempel 2014 [AR30521]).

1 Because the 2004 Framework is outdated and is directly contradicted by new science, a
2 supplemental environmental impact statement (SEIS) must be prepared. 40 C.F.R. section 1502.9(c)(1)
3 states that agencies must prepare an SEIS when “[t]here are significant new circumstances or
4 information relevant to environmental concerns and bearing on the proposed action or its impacts.”
5 Here, the new science that post-dates the 2004 Framework EIS is plainly “significant new
6 circumstances or information relevant to environmental concerns.” Moreover, because the Framework
7 is “more than 5 years old,” it already should have been “carefully reexamined . . . so that the agency has
8 the best possible information to make any necessary substantive changes in its decisions”³ Yet,
9 instead, the Forest Service continues to point to, and hide behind, the 2004 Framework’s scientifically
10 invalid assumptions. This is especially egregious given that Plaintiffs submitted the new information to
11 Defendants in the fall of 2013, during scoping comments on the Aspen and Big Hope projects (and
12 submitted it months earlier than that on other projects), so Defendants have had plenty of time to
13 evaluate this information and make appropriate changes. *See Native Songbird Care & Conservation v.*
14 *Lahood*, No. 13-cv-02265-JST, 2013 U.S. Dist. LEXIS 93120, *25 (N.D. Cal. July 2, 2013) (“If an
15 agency has had time to respond to new information, and declines to make any expert determination, it
16 foregoes any claim of deference and must submit to a court’s *de novo* determination of whether a
17 Supplemental EIS is required.”). Defendants have not done so. In fact, Defendants do not dispute the
18 new science, and their response to it includes no expert determination whatsoever; rather, they merely
19 state that they do not have to reconsider the 2004 Framework, regardless of the new science (Big Hope
20 Response to Comments, BHAR 309; Aspen Response to Comments, AR 456).

21 The Forest Service appears to believe it can ignore its duty to conduct an SEIS based on their
22 assertion that the “2004 Framework is not an ongoing, agency action.” (*See, e.g.*, BHAR 309). No
23

24 ³ *See* Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations,
25 46 Fed. Reg. 18,026, 18,036 (Mar. 23, 1981) (“As a rule of thumb, if the proposal has not yet been
26 implemented, or if the EIS concerns an ongoing program, EISs that are more than 5 years old should be
27 carefully reexamined to determine if the criteria in Section 1502.9 compel preparation of an EIS
28 supplement. If . . . there are significant new circumstances - or information relevant to environmental
concerns and bearing on the proposed action or its impacts, a supplemental EIS must be prepared for an
old EIS so that the agency has the best possible information to make any necessary substantive changes
in its decisions regarding the proposal.”).

1 legal citation is provided for this claim, but it is likely that the Forest Service will attempt to argue that
2 *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 73 (U.S. 2004) (SUWA), supports their
3 position. As explained below, it does not.

4 The Ninth Circuit, in *Center for Biological Diversity v. Salazar*, 706 F.3d 1085, 1094-95 (9th
5 Cir. 2013) (citing *SUWA*, 542 U.S. at 73), explained that post-*SUWA*, “[s]upplementation of a prior
6 NEPA environmental analysis is only required where ‘there remains major Federal action to occur.’”
7 In *SUWA*, the plaintiff environmental groups sought to force the BLM to prepare an SEIS because of an
8 increase in off-road vehicle use on public lands. 542 U.S. at 60-61. These plaintiffs, however, could
9 not point to any ongoing major federal action regarding off-road vehicle use, and the Supreme Court
10 determined that BLM therefore did not have to prepare an SEIS. *Id.* at 73.

11 Here, on the other hand, there is no question that “there remains major Federal action to occur.”
12 The existence of the two Projects at issue in this case, and the fact that they tier directly to, and
13 implement, the 2004 Framework for their choice of actions, demonstrates that the 2004 Framework is
14 ongoing.⁴ Further, in *SUWA*, the Plaintiffs did not challenge any projects and could not show that the
15 land management plan at issue was itself explicitly promoting harmful environmental impacts. In this
16 case, though, not only are ongoing projects being challenged, but the 2004 Framework is directly
17 producing environmentally harmful actions via those projects. The timber Projects at issue must
18 comply with the 2004 Framework (*see* 16 USC 1604(i)), and the 2004 Framework explicitly promotes
19 the destruction of, rather than the protection of, burned forest areas now known to be suitable habitat
20 for spotted owls, Pacific fishers, and Black-backed Woodpeckers. Moreover, in *SUWA*, the Plaintiffs
21 were trying to compel the agency to undertake an action that was not in the management plan. 542 U.S.
22 at 55. Here, in contrast, Plaintiffs are seeking to compel the agency to *stop* taking actions that are a
23 direct result of the 2004 Framework so that those actions do not degrade the environment.

24 The situation in this case is most analogous to another Supreme Court case, *Marsh v. Oregon*
25 *Natural Resources Council*, 490 U.S. 360 (1989), where the agency was constructing a dam, and
26

27 ⁴ *See, e.g.*, Aspen Project Response AR 370, AR 436: “According to the forest plan harvest activities
28 may occur in PACs that have been rendered unsuitable”; “salvage is only proposed in areas where
habitat has been rendered unsuitable”

1 supplemental NEPA documentation was being considered even though the dam was one-third
2 completed. Here, the projects at issue are not only incomplete, they have yet to begin. As discussed in
3 *Marsh*, 490 U.S. at 371-72, supplemental analysis is therefore necessary because

4 NEPA ensures that the agency will not act on incomplete information, only to regret its
5 decision after it is too late to correct. . . . It would be incongruous with [NEPA's]
6 approach to environmental protection, and with the Act's manifest concern with
7 preventing uninformed action, for the blinders to adverse environmental effects, once
unequivocally removed, to be restored prior to the completion of agency action simply
because the relevant proposal has received initial approval.

8 The Supreme Court explained that “[i]f there remains ‘major Federal actio[n]’ to occur, and if the new
9 information is sufficient to show that the remaining action will ‘affec[t] the quality of the human
10 environment’ in a significant manner or to a significant extent not already considered, a supplemental
11 EIS must be prepared.” *Id.* at 374; *see also id.* at 372.

12 At base, “major federal action” remains to occur in this case because the Forest Service is
13 seeking to implement the logging projects at issue and these projects implement and tier to the 2004
14 Framework, as discussed above. No EIS has ever been prepared that would justify or mitigate the
15 environmentally harmful activity promoted by the 2004 Framework because, when the 2004
16 Framework was written, its assumptions as to owl, fisher, and Black-backed Woodpecker habitat were
17 assumed *not* to be harmful. The Forest Service cannot hide behind *SUWA*, or any other case, to shirk
18 its duty to conduct supplemental NEPA analysis as to the 2004 Framework.

19 This case is also similar to *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 555 (9th Cir.
20 2000), in which more than ten years had elapsed since the Forest Service completed a forest
21 management EIS. During those 10 years, the Forest Service designated as “sensitive” seven species
22 “whose viability [was] of concern,” and had itself acknowledged that the Forest Plan’s standards for old
23 growth and snags—on which the EIS had relied—were inadequate. *Id.* at 555-56. The court held that
24 the Forest Service violated NEPA by “fail[ing] timely to prepare, or even sufficiently to consider and
25 evaluate the need for, an SEIS” in light of the new information. *Id.* at 558.

26 Here, too, ten years has elapsed, and the California spotted owl is a designated “sensitive”
27 species. And, as in *Friends of the Clearwater*, where the “standards on which the original . . . EIS
28 relied were inadequate,” here too the information on which the original EIS relied is inadequate as to

1 spotted owl, fisher, and woodpecker habitat because the best available science directly contradicts that
2 information. *See also Portland Audubon Soc’y v. Lujan*, 795 F.Supp. 1489, 1492, 1502 (D. Or. 1992)
3 (“Within that decade, new information developed as to the effects of the planned actions . . . on the
4 long-range survival of the [species]. . . . The situation that the [agency] is in is precisely the situation in
5 which a Supplemental Environmental Impact Statement is necessary.”)

6 The new information at issue in this case plainly shows that the environment (burned forest or
7 CESH) will be affected in a significant manner or to a significant extent not already considered by the
8 2004 Framework, and because the two projects at issue in this case are bound by, tier to and implement
9 the 2004 Framework a Supplemental EIS of the 2004 Framework is required. If not, the 2004
10 Framework will simply be used to perpetrate the same harmful, misinformed, on-the-ground decisions
11 in contravention of the twin aims of NEPA, informed decisions and an informed public.

12 **B. Harm to Plaintiffs Will Be Irreparable Absent Preliminary Relief**

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

18 The Big Hope and Aspen projects would each involve the logging of several thousand acres of
19 post-fire habitat, removing and degrading thousands of acres of rare and biodiverse complex early seral
20 forest (see Facts section above, p. 2-3), removing a substantial and significant amount of all the suitable
21 Black-backed Woodpecker habitat which currently exists on the Tahoe and Sierra National Forest. (*Id.*,
22 at 7-9). These Projects also involve removal of thousands of acres of suitable habitat for the imperiled
23 California spotted owl and Pacific fisher. (*Id.*, at 4-7). If planned logging is permitted, thousands of
24 acres of rare and precious habitat would be irreparably removed, and Plaintiffs’ ability to view, enjoy,
25 photograph, and study these unlogged areas and the rare species which inhabit them in an
26 unlogged/natural state would be lost for generations, as would Plaintiffs’ ability to enjoy nature’s
27 renaissance on display, observing unmanaged complex early seral forest on these acres as it changes
28 through the years. *See* Declarations of Dr. Chad Hanson and Christina Sherr.

1 These irreparable harms outlined above—to both the Plaintiffs’ members and the wildlife that
2 currently inhabit this burned forest ecosystem which is proposed for logging—are likely because they
3 would occur as soon as the trees are felled, which according to Defendants will begin on August 1,
4 2014. As described herein, these are exactly the type of harms the Ninth Circuit has found to be
5 irreparable. *See, e.g., Cottrell*, 632 F.3d at 1053; *Earth Island II*, 442 F. 3d at 1169-73 (logging of
6 several thousand acres of post-fire California spotted owl habitat constitutes irreparable harm); *Envtl.*
7 *Prot. Info. Ctr. v. Blackwell*, 389 F.Supp.2d 1174, 1221 (N.D. Cal. 2004) (injunction issued as no
8 “means to replace such trees in any meaningful fashion since it takes years for such trees to mature”).

9 In addition, “[i]n the NEPA context, irreparable injury flows from the failure to evaluate the
10 environmental impact of a major federal action.” *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th
11 Cir. 2007) (citations omitted); *see also Nat’l Parks*, 241 F.3d at 737 n.18 (“[B]ecause NEPA is a purely
12 procedural statute, the requisite harm is the failure to follow the appropriate procedures.”). Allowing a
13 project to proceed absent compliance with NEPA forever eliminates the potential that NEPA
14 procedures will be adhered to or will result in fostering better decision-making by the agency *before*
15 they implement an action. *See, e.g., Vermont Yankee Nuclear Power Corp. v. Natural Res. Def.*
16 *Council*, 435 U.S. 519, 558 (1978).

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

19 In contrast with the definite irreparable harm to Plaintiffs and their members (see section
20 above), there will be no irreparable harm to the Forest Service from issuance of a preliminary
21 injunction. “[I]f environmental injury is sufficiently likely, the balance of harms will usually favor the
22 issuance of an injunction to protect the environment.” *Sierra Club*, 510 F.3d at 1033 (quoting *Amoco*
23 *Prod. Co.*, 480 U.S. 531, 545 (1987)); *Earth Island Inst. v. U.S. Forest Service*, 351 F.3d 1291, 1299
24 (9th Cir. 2003). Here logging is scheduled to proceed as early as August 1, 2014, and once the trees are
25 cut down, Plaintiffs’ harm, and the harm to wildlife is realized. In such a situation, the balance of
26 harms tips strongly in favor of plaintiffs. *Forest Serv. Emp. for Env’tl. Ethics v. U.S. Forest Serv.*, 2005
27 WL 1514071, *2 (N.D. Cal. June 27, 2005) (in suit where vegetation removal may harm the spotted
28 owl and other birds, “the Court finds that the balance of hardships tips strongly in favor of plaintiffs”).

1 The only hardship the Forest Service may claim is that their revenue will be reduced if
2 Plaintiffs' request is granted, but the "loss of anticipated revenues ... does not outweigh the potential
3 irreparable damage to the environment." *Earth Island II*, 442 F. 3d at 1177. The Forest Service's
4 interest in selling timber for the sake of revenue is not compelling. *Sierra Forest Legacy v Rey*, 577
5 F.3d 1015, 1026 (9th Cir. 2009) (Noonan, J., concurring) ("Can an agency which has announced its
6 strong financial interest in the outcome proceed objectively?")

7 Plaintiffs' request for injunctive relief also serves the public interest. In reviewing the public
8 interest, a court must primarily address the "impact on non-parties rather than parties," particularly
9 "where the impact of an injunction reaches beyond the parties, carrying with it a potential for public
10 consequences." *Inst. of Cetacean Res. v. Sea Shepherd Conservation Soc'y*, 708 F.3d 1099, 1104 (9th
11 Cir. 2013) (other citations omitted). The Ninth Circuit has found that there is a "public interest in
12 preserving nature and avoiding irreparable environmental injury," and that ensuring "careful
13 consideration of environmental impacts before major federal projects go forward," and "suspending
14 such projects until that consideration occurs 'comports with the public interest.'" *Cotrell*, 632 F. 3d at
15 1138 (citations omitted). Further, the forests Plaintiffs' seek to protect "will be enjoyed not principally
16 by plaintiffs and their members but by many generations of the public." *Neighbors of Cuddy Mtn. v.*
17 *U.S. Forest Service*, 137 F.3d 1372, 1382 (9th Cir. 1998).

18 Wholesale removal of a large proportion of this rare habitat type in the Tahoe and Sierra
19 National Forests is not in the public interest because we now know how ecologically-important this
20 post-fire habitat is, including to the California Spotted Owl, a Forest Service Sensitive Species, the
21 Black-backed Woodpecker, a species under ESA consideration, and the Pacific fisher, an ESA
22 candidate species. Removing this habitat prevents enjoyment of these areas not only by Plaintiffs'
23 members, but also members of the public, and it prohibits or seriously impedes continued scientific
24 discovery of the ecological value of this moderate and high-intensity burned forest habitat overtime.
25 Self-imposed ignorance of the natural world is not, and has never been, in the public's interest. *Dep't of*
26 *Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004) (quoting 42 U.S.C. § 4321) (NEPA's procedural
27 safeguards are "intended to reduce or eliminate environmental damage and to promote 'the
28 understanding of the ecological systems and natural resources important to' the United States").

1 An injunction also serves the public interest because this case “invokes a public interest of the
2 highest order: the interest in having government officials act in accordance with law.” *Seattle Audubon*
3 *Society v. Evans*, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991), *aff’d* 952 F.2d 297 (9th Cir. 1991). To
4 countenance the Forest Service’s disregard for NEPA’s procedures and the agency’s failure to consider
5 the best available science does not serve the interests of the public, as such an action would necessarily
6 contravene the intentions of Congress, who passed the laws in the first place.

7 Defendants may argue that public health and safety weigh in favor of rejecting Plaintiffs’
8 motion; however this would be an argument devoid of substance, considering that Defendants have
9 already completed hazard tree removal on the main roads through the fire areas. Hanson Decl. ¶9.
10 Moreover, neither fire area is under a closure order (*Id.*) and Plaintiffs are not requesting to enjoin
11 hazard tree felling on roads maintained for public use (maintenance level 3,4 and 5 roads) within the
12 project areas beyond August 31, 2014.

13 CONCLUSION

14 Plaintiffs have met the requirements for issuance of a Preliminary Injunction in this case, and
15 respectfully request that the Court issue appropriate relief to protect these areas while Defendants
16 comply with the law.

17
18 Dated: July 15, 2014

Respectfully submitted,

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