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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO 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-01723 GEB-EFB

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

Hearing date: August 1, 2014
Time: 11:00 a.m.
Courtroom: 10

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INTRODUCTION

The core problem with Defendants' Opposition is that it fails to address what Plaintiffs' case is actually about – the logging of complex early seral forest in the *limited* areas of the American Fire which experienced moderate and high intensity effects from fire. This is a small subset of the 22,000 acres which burned overall in the American Fire. Thus, when Defendants claim they are proposing "limited" logging operations, or that only 15% of the Fire area will be logged, they are doing what they have been doing throughout this process – inappropriately minimizing the potential effects of the logging activities on this rare wildlife habitat. Moreover, it is Defendants, not Plaintiffs, duty to demonstrate they have taken a "hard look", relied on the best available science, and otherwise met NEPA's mandates. They have not met that duty and their effort to obfuscate these core failures must be rejected.

ARGUMENT

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

Making the bald statement that "salvage logging is not inherently damaging to forests" (Doc. No. 39.at 23, ln.23-24), Defendants offer us a trip back in time as they assert that the intense logging of moderate and high intensity burned areas (e.g., 57% removal of suitable Black-backed Woodpecker habitat [BHAR297]) causes no potentially significant harm to the environment. However, here in the present, nothing could be further from the truth.

An overwhelming consensus of current scientific literature concludes that post-fire logging is ecologically damaging to an area that has recently experienced fire. 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]); BHAR7786-88 (Donato et al. 2006 finding that post-fire logging kills natural forest regeneration]); BHAR7845-57 (Donato et al. 2009 [habitat created by high-intensity fire has highest biodiversity]); BHAR8485-86 (Lindenmayer et al. 2004 [post-fire logging destroys wildlife habitat]); BHAR7325-41 (Clark et al. 2013 [post-fire logging reduces spotted owl occupancy]); BHAR8455-65 (Lee et al. 2012 [all spotted owl territories with post-fire logging lost occupancy, whereas fire alone did not reduce occupancy); BHAR8187-92 (Hanson and North 2008 [post-fire logging extirpates Black-

backed Woodpeckers]); BHAR8393-8402 (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, but such truth is not convenient to the fable they are trying to tell in this case. *See, e.g.*, AR28533 (finding that the habitat created by high-intensity fire can support 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 . . . .

While it is true that irreparable harm cannot be assumed from Defendants' logging,"the Supreme Court has instructed us that [e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Lands Council v. McNair,* 537 F.3d 981, 1004 (9th Cir. 2008) (en banc). As demonstrated herein, the case-specific, fact-bound inquiry, which this Court must engage in, demonstrates the irreparable nature of Plaintiffs' injury as well as its likelihood.[1]

[1] 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 at issue in *Carlton* was issued. That being said, enough information did exist at that time for the Ninth Circuit to determine 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

Here, as previously stated (Docket No. 20, p. 23), logging is scheduled to begin on or about August 1, 2014. AR20 (logging can begin right away, since there is no further administrative process). 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 gone, removed from the landscape. This makes the harm imminent (*i.e.,* impending, fast approaching, near at hand) and thus likely to occur. The rich and diverse habitat which provides food and shelter to myriad wildlife species, including the imperiled Black-backed Woodpecker and the declining and Sensitive California Spotted Owl, will cease to exist where logging occurs and with it the ability of these species to utilize and benefit from this habitat, and the ability of Plaintiffs' members to utilize and enjoy these areas for recreating, bird watching and scientific inquiry. Hanson Dec. ¶8, Sherr Dec. ¶11. In order for this habitat to once again exist for the use of wildlife and enjoyment of Plaintiffs' members, not only would the forest have to reach full maturity, it would then need to burn in a fire wherein several thousand acres would need to burn at moderate and high intensity, thus creating the complex early seral forest (a.k.a., "snag forest habitat") from which Plaintiffs' members derive enjoyment, and upon which the Black-backed Woodpecker and Spotted Owl depend. This process will take decades, if it happens at all (*i.e.,* will be of long duration), and during that time Plaintiffs' members' excursions to these areas will be plagued by stump fields, denuded ground (as the logging will initially remove/destroy ground-cover and follow up treatments with herbicides will remove ecologically vital shrub habitat), and eventually an artificial tree plantation – none of which is natural, and none of which supports the burned-forest-dependent Black-backed Woodpecker; nor does it create highly suitable California spotted owl foraging habitat. As described in Plaintiffs' declarations, such an experience is an affront to their enjoyment of these areas and prevents scientific study of the natural ecosystem. Hanson Dec. ¶8; Sherr Dec. ¶11**.** This harm cannot be remedied by money damages or some other legal remedy, thus under the test articulated in *Amoco*, and most recently applied in *League of Wilderness Defenders/Blue Mountains Biodiversity Project v.*

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.

Connaughton, 752 F.3d 755, 764-65 (9th Cir. 2014), the harm to Plaintiffs' members from this project would be irreparable.

Defendants' and Intervenors' argument to the contrary is disingenuous, and is based upon an irrelevant statistic – one that has already been rejected by the Ninth Circuit, namely their assertion that the majority of area burned in the American fire will not be logged. Doc. No. 39 at 23-24; Doc. 29 at 8. This is once again an attempt to improperly minimize the effects of these projects. As described in Plaintiffs' declarations, it is the moderate and high intensity burn areas that are so rich in biodiversity which Plaintiffs' members study and enjoy **(**Hanson Dec. ¶¶4-7**;** Sherr Dec. ¶¶7-9), and these are exactly the areas targeted by Defendants' proposed logging. In fact, over half (57%) of this habitat is proposed for removal from the landscape in the American fire area. BHAR142, Table 44. The Ninth Circuit has already rejected such an argument, finding in *Cottrell* that the logging at issue would result in irreparable harm because it would prevent the "use and enjoyment of 1,652 acres of forest" by AWR members, even though it would only affect 6% of the fire area. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Here, those numbers are much higher in the project area, as the Big Hope project would prevent the use and enjoyment of 3,443 acres scheduled to be logged in salvage units, which equates to 15% of the fire area but, more importantly, is 57% of the habitat that Plaintiffs' members use and enjoy in this area. 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.

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

With regard to the balance of harms and public interest, Defendants improperly minimize the adverse effects of their proposed logging projects, just as they did in the Environmental Assessment and Response to Comments. Defendants assert that only 15% of the American fire area would be logged (Doc. No. 39 at 27), implying that it's of no consequence. However, as discussed above, in this circumstance the irreparable harm to Plaintiffs pertains to the proposed logging of a narrow *subset* of the fire area which is far and away the most environmentally sensitive and rare: the complex early

seral forest/snag forest created by moderate- and high-intensity fire in mature forest. Defendants claim, without any citation, that this habitat is not rare (Doc. No. 39 at 27) but fail to mention that, as discussed above, there is an now an overwhelming consensus of scientific literature and opinion finding that this unique habitat is even rarer and more threatened than old-growth forest, and supports levels of biodiversity and wildlife abundance that are comparable to or higher than those in old-growth forest. E.g., AR1701-02 (letter from 250 scientists to Congress); BHAR7751-7785 (DellaSala et al. 2014, in press). Nor do Defendants deny the fact that only a tiny fraction of the Tahoe National Forest is comprised of this habitat type – can you really get much rarer than 1% of the forested landscape? Doc. No. 20 at 9. Again, once this habitat is removed, it is irreplaceable in our lifetimes. Thus, it is against the likely, irreparable harm from this habitat loss to the species that use, benefit from and depend upon it, and to Plaintiffs' members that use, appreciate and study it, that the harms and public interests articulated by Defendants and Intervenors must be weighed.

Defendants also claim that they need to address a safety risk to the public along public roads (Doc. No. 39 at 26), but Defendants fail to acknowledge that they have already cut down hazard trees along the main recreation roads[2] traveled by the public, or the fact that these fire areas are not closed to the public currently (Hanson Decl., ¶9). Moreover, as Plaintiffs specifically state in the complaint and opening brief, they are not requesting an injunction on felling of genuine hazard trees along public roads (Doc. No. 25). Both Defendants and Intervenors overstate the threat to the public, with Intervenors going so far as to insist that Plaintiffs themselves are in grave danger if all the proposed logging is not completed, and that logging will protect them. These arguments are nothing more than self-serving scare tactics. Burned areas are part of nature and nature is inherently unpredictable, creating circumstances wherein people may get injured, by a falling tree, branch or Sugar Pine cone, possibly a rattlesnake bite, slipping on rocks or in a swift current in a river, or getting in between a mother black-bear and her cub—all of which can happen in any unburned forest too. Plaintiffs' tailored injunction request takes into consideration the threats that may exist to the public during the pendency of a preliminary injunction; as such this factor does not weigh against issuance of an injunction here.

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

League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton, 752 F.3d 755, 764-68 (9th Cir. 2014) ("Under *Sierra Forest,* we must consider only the portion of the harm that would occur while the preliminary injunction is in place, and proportionally diminish total harms to reflect only the time when a preliminary injunction would be in place."). Defendants and Intervenors 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. 39 at 24. Given that they failed to tell the Court that they had already removed hazard trees along the main roadways, it is entirely possible that if such hazard tree abatement were necessary the work has already been done. That being said, should such circumstances exist during the pendency of an injunction, Plaintiffs would be more than willing to agree to the felling of such hazards.

Defendants' final arguments on public safety are that not abating hazard trees would impede those seeking emergency egress from the area and could present a hazard to firefighters (Doc. No. 39, p. 32). However, as already stated, these are remote areas, with no human residents (Doc. No. 20, p. 3). In addition, again, hazard tree removal along the main roads through these fire areas has already taken place (Hanson Dec. ¶9), so there is no impediment to emergency egress; and, to the extent that there are other roads maintained for public use which have not had hazard trees removed, Plaintiffs' injunction would allow such logging to commence after August 31, 2014. With regard to firefighter safety, it is pure speculation that a fire would begin in this same fire area, and is a particularly unrealistic suggestion just one year after a fire already burned there, especially during the timeframe that the preliminary injunction would be in place. Also, if such a remote and speculative thing were to occur, the Forest Service could easily keep firefighters out of harm's way by utilizing water-dropping aircraft to fight the fire, or building fire-lines in the low severity burned areas, which make up 64% of the American Fire area (BHAR7), rather than the much smaller percentage of the landscape that experienced high-intensity fire where the logging is planned.

Nor are Defendants' or Intervenors' claims that these projects are in the public interest because they will reduce future wildfire risk (Doc. No. 39, p. 26) credible, given the following admission in the Response to Comments for the Big Hope project: "Diminished (short term) rates of fire spread, fireline intensity and soil heating impacts through postfire (salvage) logging via fuel reduction <u>are *not*</u>

expected or stated effects of the proposed action. While future fire severity potential (represented in predictions of flame length) are initially *higher* under the proposed action, most notably under extreme fire weather conditions, they become *statistically equal* to the No Action Alternative over time." BHAR312-313 (emphasis added). In other words, the proposed action (*i.e.*, the logging challenged here) simply was not designed to, nor does it, reduce the risk of future fire.

Further, Defendants assert that, if the project does not proceed, "the public will lose the benefits of reforestation efforts . . . ." (Doc. No. 39, p. 26), which is an odd claim given that Defendants admit that "[d]amage and/or mortality of natural regeneration may occur during harvesting operations particularly in ground-based harvesting treatments (Donato 2006)." BHAR46. In other words, Defendants' planned logging, if implemented, would roll over and kill the existing natural regeneration of conifers—regeneration that is already abundant and vigorous at just one year post-fire. BHAR1740 (Plaintiffs' comments), 1781-85 (photos of natural conifer regeneration in large high-intensity fire patches proposed for logging in the Big Hope project area); BHAR7786-88 (Donato et al. 2006, finding that post-fire logging reduces natural conifer regeneration by 71%); see also Hanson Decl., ¶7. Essentially, Defendants are claiming that the public interest is served by cutting down and removing tens of thousands of trees to generate revenue to artificially replant in areas where the logging conducted to generate that revenue would kill the forest that is already naturally regenerating (and is naturally regenerating with no expenditure of federal funds). There is no legitimate public interest here for Defendants, only misleading justifications to avoid having their logging project enjoined while they comply with the requirements of the law.[3]

Finally, Defendants truthfully state that they will lose a portion of the projected revenue for their budget if they do not sell and cut the timber right away (Doc. 39, p. 26), but the financial self-

[3] In his declaration, Tahoe National Forest Supervisor, Tom Quinn, claims that artificial planting is necessary ostensibly to ensure a mix of conifer species, claiming that pines were disappearing, and citing AR38 to support this statement. Quinn Decl., ¶21. However, while that page does make such a claim, it provides no citation to any data source whatsoever to support this self-serving assertion. Mr. Quinn states (¶22) that he wants to control the planting to have consistent, unvarying density and composition so the area will not be mostly white fir (which he personally doesn't like much), but admits (¶21) that the pre-fire stand was mostly white fir, and provides not a shred of evidence that this was not also the case a century or more ago in this particular area.

interest of a federal agency is not a public interest,[4] especially where it is the proposed action which creates the purported need for the revenue to replant the area in the first place. Intervenors also claim economic loss, and both assert a potential loss of economic benefit to the community if the logging is enjoined. However, as recently discussed by the Ninth Circuit, 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/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766-67 (9th Cir. 2014). Here, as in *League of Wilderness Defenders/Blue Mountains Biodiversity Project*, the likely irreparable injury to Black-backed Woodpecker and to the California Spotted Owl habitat and Plaintiffs' use and enjoyment of that habitat outweighs the economic interests of the private logging companies and the local communities. *Id.* Here, this is true even if an injunction impedes the full implementation of the project.[5]

For the reasons stated herein, the balance of harms and public interest weigh in favor of the issuance of an injunction in this case.

C. Plaintiffs Raise Serious Questions And Are Likely To Succeed On The Merits Because The Forest Service's Big Hope And Aspen Projects Violate NEPA and NFMA

1. Failure to Prepare an EIS

a) Highly Uncertain or Unknown Risks: California Spotted Owl

Defendants claim that they were not required to prepare an EIS to assess impacts of logging moderate- and high-intensity fire areas on Spotted Owls because 1) they "considered" the scientific studies which show than this species selects such post-fire habitat for foraging habitat, 2) such areas are

[4] The Ninth Circuit has observed that, especially in post-fire logging cases, the Forest Service has a serious "financial conflict of interest" which undermines the agency's decisions and objectivity. *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1178 (9th Cir. 2006) *abrogated on other grounds* ("It has not escaped our notice that the USFS has a substantial financial interest in the harvesting of timber in the National Forest. We regret to say that in this case, like the others just cited, the USFS appears to have been more interested in harvesting timber than in complying with our environmental laws.")

[5] And, while counsel allude to the fact that the project might not get done at all if enjoined (Doc. No. 39 at 32), and declarants certainly believe that the project will be hard to sell if delayed, both projects envision that logging activities will continue for more than one year. AR52 (project implementation schedule showing "hazard and salvage removal" would occur from 2014-2017); and BHAR 16 (project implementation will occur up to 5 years after the decision is signed).

not "nesting and roosting" habitat, and 3) the California Spotted Owl population is supposedly "stable". Doc. No. 39 at 14-15. Defendants' arguments fail. First, while Defendants admitted that moderate/high-intensity fire areas create suitable foraging habitat for the owls, in their impacts analyses/conclusions they—without explanation—excluded impacts from removal of *foraging* habitat. Defendants are simply trying to game the system here, on the one hand acknowledging the studies that conclude moderate/high-intensity fire areas are suitable foraging habitat while, on the other hand, bizarrely claiming that no suitable habitat would be affected when they log moderate/high-intensity fire areas.

For example, Defendants admit that "California Spotted Owls typically nest and roost in unburned lightly burned or moderately burned patches while patches burned at high severity provide *preferred foraging habitat* (Bond et al. 2009)", and admit that planned logging may cause "adverse effects" to Spotted Owl "foraging habitat". BHAR 96 (emphasis added). However, when it came time to assess adverse impacts of logging and determine whether potential significant effects may occur, Defendants categorically eliminated loss of foraging habitat from the impacts assessment, restricting the discussion of "suitable habitat" to only nesting/roosting habitat, which is dominated by live trees and moderate/high canopy cover (low-intensity fire areas) (BHAR 92), and identifying 8,637 acres of such nesting/roosting habitat. BHAR 92 (Table 27). This enabled Defendants to assert that only 381 acres, or 4.4%, of the "suitable habitat" would be subjected to logging (BHAR 96) which, in turn, led to Defendants arbitrarily and capriciously concluding that "effects to *suitable habitat*…would be *relatively minor* because salvage is proposed in 4.4 percent of the existing suitable habitat…" (BHAR 96) (emphasis added).

The bottom line is that this too-clever-by-half tactic was used by Defendants to sidestep acknowledging, in the actual impacts conclusions, that significant, or potentially significant, adverse impacts to California Spotted Owls would occur, due to highly uncertain or unknown risks from logging a substantial amount of suitable *foraging* habitat (*i.e.*, the habitat that the owls depend upon most to obtain the food they need to survive), which would require an EIS.

Second, as discussed in Plaintiffs' opening brief (Doc. No. 20 at 4-6), Plaintiffs submitted, during comments, numerous scientific sources documenting that post-fire logging of moderate/high-

intensity fire areas (suitable Spotted Owl foraging habitat) frequently causes the extirpation of the owls, and Defendants ignored or improperly sidestepped this evidence in order to avoid acknowledging, in the impacts conclusions, the potential for significant adverse impacts to the owls. Doc. No. 20 at 4-6, 13. Just as in their EA, Defendants do not address or deny this in their response (Doc. No. 20 at 14-16) and, as such, Defendants fail to address highly uncertain and unknown risks from logging to the owl.

Third, as discussed in Plaintiffs' opening brief (Doc. No. 20. at 5, 13), Plaintiffs submitted, during comments, three recent studies (Conner et al. 2013, Tempel and Gutiérrez 2013, Tempel 2014) which conclude that California Spotted Owl populations are indeed now declining, and that the decline is linked to logging. In response, Defendants (Doc 39 at 15) state that the "[Forest] Service concluded that the owl population is stable and the projects' effects on owls would not be significant", citing BHAR 97-98. However, BHAR 97-98 says nothing whatsoever about the declining owl populations. Thus, here again, Defendants completely ignored highly uncertain and unknown risks to owls.

Because the Forest Service entirely failed to consider important aspects of the problem, or offered explanations for its decision that runs counter to the evidence before the agency, *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), its EA and conclusions cannot stand.

b) Unique Characteristics and Ecologically Critical Areas

Defendants claim that the "[Forest] Service's determination that the project areas do not contain unique characteristics, including ecologically-critical areas, was well supported" (Doc No. 39 at 12), but do not provide <u>any</u> citation to back up this statement. In fact, the entirety of the Forest Service's "support" for its conclusion that no ecologically critical areas or areas of unique characteristics are involved is three short sentences (AR 17), which fail to mention or discuss the unique, extremely rare, and ecologically critical nature of complex early seral forest/snag forest created by high-intensity fire, despite an abundance of scientific evidence submitted by Plaintiffs in this regard.[6]

[6] *See, e.g.,* 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]); AR1701-02 (letter to Congress from 250 scientists stating that complex early seral forest created by high-intensity fire is rarer and more threatened than old-growth forest, supports levels of native biodiversity and wildlife abundance that are

Next, Defendants claim that "burned forest is not rare" (Doc. No. 39 at 13), providing no citation, and similarly claim that "burned forest is not in short supply in the Sierra Nevada" (Doc. No. 39 at 13), again providing no citation to support this assertion. As such, this amounts to nothing more than Defense Counsel testifying. 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 about 1% of the forest on the Tahoe National Forest. Doc. No. 20 at 9; *see also Earth Island v. Carlton*, 626 F.3d at 467 (Where the court recognized that "snag forest habitat is extremely scarce in the Sierra Nevadas due to fire suppression and post-fire logging.")

Defendants also claim that complex early seral forest is not "unique" ostensibly because "both projects are retaining the majority of burned landscape in the project areas." Doc. No. 39 at 12. Nothing in this statement is logically germane to the question of uniqueness, especially considering that the vast majority of the area burned did not create complex early seral forest BHAR 7 (only 36% of the project area experienced over 50% mortality).

Defendants next assert that these areas are not unique or ecologically critical because Black-backed Woodpeckers forage in unburned forest. Doc. No. 39 at 13. However, this misleading statement, is contradicted by the fact that Defendants specifically identify the amount of suitable Black-backed Woodpecker habitat in the project area, and it does not include unburned forest, likely because Black-backed Woodpecker's food source comes from snags, and on average there are only 2-4 snags per acre in unburned forest. As the record establishes, 57% of suitable Black-backed Woodpecker habitat would be removed by the Big Hope logging project. BHAR297.

Further attempting to minimize adverse impacts of this project, Defendants misleading claim that only 21% of suitable Black-backed Woodpecker habitat "*will* be harvested" throughout California, citing BHAR 361. Doc. No. 39 at 13 (emphasis added). Not so. What the cited page actually says is that, over the *past* several years, about 21% of suitable Black-backed Woodpecker habitat has been logged (BHAR 361), which means this current proposal to remove over half of the Black-backed Woodpecker habitat from this fire area represents a huge increase in logging intensity, and in impacts to

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as high as, or higher than, old-growth forest, and is severely threatened by ongoing fire suppression and post-fire logging); *see also* P.Br. at 2-3.

this already imperiled species. This, in fact, is precisely why Monica Bond, the scientist who was chosen by the Forest Service itself to be the lead author of the Forest Service's Conservation Strategy for the Black-backed Woodpecker, concluded that the Big Hope and Aspen logging projects represent a serious threat to the viability of Black-backed Woodpecker populations. BHAR 359-60; Doc. No.20 at 8-9.

In yet another attempt to minimize adverse impacts, Defendants claim that Black-backed Woodpecker populations are "stable" in the Sierra Nevada (Doc. No. 39 at 13), citing to several pages in the record. However, Defendants wholly misrepresent the cited pages, which do not conclude or claim that there is a stable trend in Black-backed population numbers but, rather, merely make the "stable" comment in the context of noting that the Black-backed Woodpecker "distribution" has not changed in the sense that at least one bird still exists on each national forest in the Sierra Nevada. Defendants, of course, ignore the fact that the U.S. Fish and Wildlife Service has determined that, biologically, the evidence indicates that listing the Black-backed under the Endangered Species Act "may be warranted", due to habitat loss from fire suppression and post-fire logging. 78 Fed. Reg. 21086, 21096-97; Doc. No. 20 at 7. Again, a recognition by a federal agency of an increased state of imperilment of a species rises to the level of significance under NEPA. *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 558-59, and footnote 5 (9th Cir. 2000).

Finally, Defendants' citation to *Earth Island Institute v. U.S. Forest Service* and *Earth Island Institute v. Carlton* (Doc. No. 39 at 14, footnote 9) is misplaced here, as those cases dealt with distinctly different facts, and claims (in neither case was there a claim against the Forest Service for failure to prepare an EIS), and notably both predated much of the science that is being ignored in this case. Defendants also misapply *Native Ecosystems Council v. U.S. Forest Service*, 428 F.3d 1233, 1243-44 (9th Cir. 2005) and *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv. ("EPIC")*, 451 F.3d 1005, 1011 (9th Cir. 2006). DBr. at 16. In *Native Ecosystems*, NEPA was not violated because the Forest Service thoroughly and candidly incorporated the potentially negative effects into its impacts analysis and conclusions. 428 F.3d at 1243-44. Here they did not. In *EPIC*, the Ninth Circuit held that there were not highly uncertain effects because the watershed effects at issue "would be so negligible that they

could not be measured". *EPIC*, 451 F.3d at 1011. Here, over half of this rare habitat is going to be removed; this is not a negligible effect.

2. The Forest Service Did Not Take a Hard Look at the Impacts of the Big Hope Project on the California Spotted Owl or Black-Backed Woodpecker

For the reasons stated in the "EIS" section above, the Forest Service did not provide the required convincing statement of reasons as to why an EIS was not required with regard to the California Spotted Owl and Black-backed Woodpecker and, therefore, the agency failed to take the "hard look" required by NEPA. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998). Nor have they articulated a rational connection between the facts found and the decision made with regard to impacts to these imperiled species, in violation of the APA. *Ocean Advocates v. United States Army Corps of Engineers*, 361 F.3d 846, 865 (9th Cir. 2003).

With regard to logging of Black-backed Woodpecker habitat during nesting season, contrary to the Forest Service's own Black-backed Woodpecker Conservation Strategy and the admonishment of the Strategy's lead author, Monica Bond (P.Br. at 15), Defendants claim that the Biological Evaluation for the Big Hope logging project analyzes the adverse impacts, but cites no page from that document, or from any other Big Hope document. Doc. No. 39 at 19. Finally, Defendants claim that they responded to Monica Bond's expert conclusion that the exponential increase in logging of Black-backed habitat, and timing of the logging (in nesting season, when chicks can potentially be directly killed), planned by the Big Hope project could push this species towards extinction (Doc. No. 20 at 15), citing BHAR35-60. Doc No. 39 at 19. However, Plaintiffs have carefully reviewed each of these pages and they do not discuss this relevant factor.

3. Failure to Consider the Best Available Science

For the reasons discussed in greater detail in the "EIS" section above and Plaintiffs' Opening Brief, Defendants also failed to meaningfully "consider" the "best available science", in violation of NFMA regulations. 36 C.F.R. § 219.35 (2011). Defendants claim that this rule was eliminated by 36 C.F.R. § 219.17(c), which states that prior "planning regulation[]" are superseded. Doc. No. 39. at 20. 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 it is obvious from their Summary Judgment Motion that Plaintiffs were challenging a site specific project and claiming 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 this requirement as they are doing here. *See* Exhibit B attached hereto. Thus the holding of the *Bradford* case regarding best available science stems from the requirement found in 36 C.F.R. § 219.35.

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 *recited* their findings, and then pretended like the findings didn't exist when they prepared their effects analysis. *See* discussion in EIS section supra and Doc. 20 at 4-6, 13-15. This explains Defendants' desperate and improper attempt to rely on the *post-hoc* declaration of non-expert Mr. Tom Quinn in an effort to fix this legal violation after-the-fact. S*ee* Plaintiffs' Motion to Strike.

Here, Defendants were presented with new scientific information that clearly demonstrated that the agency's assumptions about, for example, the suitability of high intensity fire areas for California spotted owl foraging and the harm that occurs from logging these areas, were outdated and flawed 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 not only the best available science requirement, but also demonstrates that Defendants did not take a hard look at the impacts of this project.

Overall, Defendants position here is disturbing. On the one hand they claim that they are not required to consider the best available science in site specific project documents, while on the other hand they claim that 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 make an end run around 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 thus not entitled to deference.

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

When the Forest Service adopted the 2004 Framework, the agency based its analysis solely on *assumptions* about how wildlife would respond to severe fire. While these assumptions were not grounded in any meaningful scientific data, at least in 2004 the Forest Service could more validly state that very few studies had been conducted in the Sierras as to wildlife use of severely burned forest.

That is no longer the case. Time and again the scientific literature has demonstrated not only that severely burned forest is important for many wildlife species, but essential to their survival (*see* Irreparable harm section above, and Doc. 20, pp. 2-4 & 7). Therefore it is not scientifically credible for the Forest Service to continue relying on outdated, invalid assumptions in its 2004 Framework, especially when those assumptions are working directly against the well-being of the wildlife species at issue in this case. In fact, the 2004 Framework itself acknowledges the importance of maintaining scientific credibility, noting that "throughout the development of the Final SEIS and the formulation of this decision, [the Forest Service] insisted that this amendment be scientifically credible." (BHAR 5458). The Framework also acknowledges that "there is a degree of uncertainty in a number of areas, especially related to the relationship between management activities and their effects on wildlife habitat and populations." (*Id.*)

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). Yet, as illustrated by this case, the Forest Service has shown an extreme unwillingness to be "scientifically credible" by refusing to update the Framework via a supplemental EIS that analyzes and incorporates the significant new information, information that explicitly addresses "the relationship between management activities and their effects on wildlife habitat and populations." (BHAR 5458).

As explained in Plaintiffs' Opening Brief, scientists have in fact tested the Forest Service's 2004 assumptions and have found them to be wrong. For example, not only does the available science (*e.g.*, Bond et al. (2009)) now demonstrate that California spotted owls use intensely burned forest as part of their home range, it shows the owls in fact *prefer* it as suitable foraging habitat, if it is not logged. Bond et al. (2009) explicitly recommended that post-fire logging not occur within 1.5 km of a

California spotted owl nest or roost site, and a Court in this District has already acknowledged the import of this research as well as the fact that the Forest Service has no countervailing data: "Bond, in the cited papers, specifically recommended that 'post-fire logging be avoided within 1.5 kilometers (at least) of Spotted Owl nest sites.' . . . Also, defendant identifies no literature that indicates that it would be appropriate to log within 1.5 km from the nest site." *Conservation Cong. v. United States Forest Serv.*, No. CIV. S-13-0832 LKK/DAD, 2013 U.S. Dist. LEXIS 127671, *20 (E.D. Cal. Sept. 6, 2013).

Defendants' Opposition contains no substantive response to this new scientific information, which clearly demonstrates unaddressed environmental concerns with post-fire logging as to owls and other fire-dependent species; thus Defendants implicitly admit "significant . . . new information" exists. 40 C.F.R. § 1502.9(c)(1). But instead of responsibly dealing with the problem pursuant to their NEPA obligations, Defendants seek to avoid the issue entirely, arguing that they are not legally bound to correct their invalid assumptions. As anticipated in Plaintiffs' Opening Brief, 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 no longer scientifically credible due to significant new information.

Defendants' Opposition acknowledges the Forest Service has a mandatory duty to supplement an EIS any time there remains major Federal action to occur. (Doc. No. 39 at 21.) But it does not follow, as Defendants assert, that simply because the Framework was "issued in 2004," "there is no major federal action left to occur." (Doc. No. 39 at 21.) The two Projects being challenged directly tier to and implement the 2004 Framework, and therefore, through these Projects the Framework is a live "ongoing major Federal action that could require supplementation." *SUWA*, 542 U.S. at 73.

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. The Court ultimately refused to address the plaintiffs' claims because:

> [R]eview of the Sierra Club's claims regarding logging and clearcutting now would require time-consuming judicial consideration of the details of an elaborate, technically based plan, which predicts consequences that may affect many different parcels of land in a variety of ways, and which effects themselves may change over time. That review would have to take place without benefit of the focus that a particular logging proposal could provide.

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. 39 at 22 [emphasis added]), that has never been Plaintiffs' argument. Here, because there are projects, and because those projects are bound by, implement, and tier to the 2004 Framework, the 2004 Framework is in fact "ongoing major Federal action."

The Projects themselves explicitly state that they are "implementing" the Framework: "Alternative 1 *implements* the Tahoe National Forest Plan standards and guidelines consistent with the Tahoe National Forest Land and Resource Management Plan 1990 as *amended by the Sierra Nevada Forest Plan Amendment 2004*." BHAR 296 (emphasis added). Further, the Projects at issue would not do what they are doing *but for* the 2004 Framework. The Big Hope EA is very explicit that it proposed what it did *because of the 2004 Framework*. For example, in explaining its actions regarding salvage logging and the California spotted owl, the EA repeatedly cites to the 2004 Framework (also known as "SNFPA") to justify its decisions, stating:

- "The Sierra Nevada Forest Plan Amendment Record of Decision (SNFPA ROD) provides direction for salvage logging" BHAR 9;
- "[Project] action would be consistent with desired conditions and management intents for . . . California spotted owl home range core areas that burned in the American Fire (SNFPA ROD pp 46 and 48)." BHAR 9;
- "Management proposals by the TNF are guided by direction contained in the Tahoe National Forest Land and Resource Management Plan TNF LRMP 1990 *as amended by the SNFPA ROD USDA 2004*. These documents are herein referred to as the "Forest Plan." The purpose of the Big Hope Project is to design the project *in a manner that is consistent with Forest Plan direction* . . . ." BHAR 10 (emphasis added);

- "The Forest Plan has standards and guidelines pertaining to salvage activities following large disturbance events such as the American Fire (SNFPA ROD pp 52 and 53)." BHAR 10;

- "There was insufficient suitable habitat for designating these two [California Spotted Owl] PACs [Protected Activity Centers] *within the criteria set forth in the TNF LRMP as amended by the Sierra Nevada Forest Plan Amendment Record of Decision (SNFPA ROD 2004), therefore these two PACs were removed from the spotted owl PAC network . . . .*" BHAR 92;

What this means legally as well as practically is that the Forest Service will remain in a time warp unless and until it is ordered to conduct supplemental NEPA analysis. The Forest Service is compelled to follow the 2004 Framework, and will therefore do so every time it implements a project, thus ensuring the ongoing nature of the 2004 Framework every time there is a project. Consequently, *SUWA* should not be interpreted, as Defendants propose, in a way that allows agencies to continually implement projects by direction of the 2004 Framework, while conveniently ignoring relevant but contrary significant new information because that information is not included the "closed" 2004 Framework. When, as here, the Plan at issue is indeed ongoing via the Projects implementing it, that Plan must be required to update itself pursuant to NEPA if there exists significant new information as is the situation here. *See Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1053 (9th Cir. 1994) ("because the [Forest Plans] have an ongoing and long-lasting effect even after adoption, we hold that the [Plans] represent ongoing agency action")

Defendants' point that the 2004 Framework does not mandate any particular level of salvage logging is irrelevant, as Defendants admit "the Framework sets guidelines or sideboards for subsequent actions." (Doc. No. 39 at 22.) The Framework, for example, defines what is suitable habitat for spotted owls (BH AR 5485-86), and it dictates what is allowed to happen to designated owl areas (called PACs and HRCAs) following a fire (BH AR 5499). This is key, because while it is true as Defendants state, that "nothing in the 2004 Framework requires the salvage of burned timber and nothing in the 2004 Framework would prevent the agency from deciding based on site-specific analysis to conduct less salvage harvest or none at all," the fact of the matter here is that the Forest Service decided to salvage log and once it did, it was *required* to follow the Framework in so doing. This is why there is ongoing action—because the Framework was triggered by the Forest Service's decision to salvage log in the first place. This will happen every time there is a project and therefore, as occurred here, decisions will

be made that rely on an outdated and scientifically untenable definition of suitable habitat for spotted owls thus resulting in the destruction of crucial habitat because of the 2004 Framework.

Defendants also argue that "[t]o the extent the information cited by Plaintiffs is new and significant the proper venue for addressing that information is the NEPA evaluation of site-specific decisions not by attempting to reopen the land-use planning process." (Doc.No. 39 at 23.) But that is what Plaintiffs are doing. Plaintiffs specifically challenged the Framework through site-specific decisions because that is when the Framework is ongoing. Plaintiffs therefore respectfully urge this Court to avoid an absurd outcome in which Defendants are allowed to affirmatively hide behind an outdated and scientifically invalid Plan. This case is not *SUWA*, and for the reasons provided above and in Plaintiffs' Opening Brief, a Supplemental EIS of the 2004 Framework is in fact necessary and required.

CONCLUSION

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

Dated: July 24, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 24 2014, I electronically filed the foregoing **Reply Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction** 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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