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Attorneys for Plaintiffs

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

EARTH ISLAND INSTITUTE and CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiffs,

v.

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

Defendants.

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

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

Hearing date: August 15, 2014
Time: 10:00 a.m.
Courtroom: 3

In accordance with the Minute Order issued on August 1, 2014 (ECF Doc. No. 60), Plaintiffs herein supply this supplemental memorandum in support of their motion for preliminary injunction in brief reply to the Defendants' (ECF Doc. No. 68 [hereafter "Doc. ___"]), and Intervenors' (Doc. 66) supplemental response briefs, which were filed on August 8, 2014. Due to the limited nature of this brief, Plaintiffs herein incorporate by reference all previous arguments made in their opening brief (Doc. 47-2) and their reply on TRO (Doc. 58).

ARGUMENT

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

Both Defendants and Intervenors spend significant of portions of their briefs trying to shroud Defendants' decision in the general canons of administrative law which, if true, would dictate a result in their favor (Doc. 68 at 1, 5, 7-8, 12, 14; Doc. 66 at 1-3 and 4-8), insisting that Defendants' decision is due deference, that this Court does not have the authority to act as a panel of scientists, that Plaintiffs are asking the Court to substitute their judgment for that of the agency, and that logging is one of the multiple uses that is authorized by NFMA. *Id.* However, Plaintiffs never argue that logging is prohibited by the NFMA. Rather, Plaintiffs are simply challenging this one project because, at the end of the day, Defendants failed to meet the requirements of NEPA to present a fully informed decision and to faithfully disclose to the public the impacts of their proposed action. Nor does Plaintiffs' case involve a battle of the experts, or a circumstance wherein agency expertise should be deferred to simply because it involves a discussion of relevant science. For, as discussed herein and previously, how can discretion be informed when the agency flatly refuses to look at studies submitted which call into question their conclusions regarding the impacts of the project? How can "professional judgment" be exercised when there is nothing in the record that indicates that the agency ever looked at this evidence, and because of this, now employ their attorney to create post-hoc justifications for the project that were never articulated by the agency itself? How can a decision, which on the one hand acknowledges that habitat exists (AR 207 [high/moderately burned habitat "would be foraging habitat" for owls]; *see also* Doc. 66 page 10 citing the same), and then simultaneously finds, in the course of their effects analysis, that no

habitat would be removed by the proposed logging (*see e.g.,* AR 10, 365 and 433), be seen as articulating a rational connection between the facts found and the decision made?

This Court plays a very important and vital role in reviewing agency action as part of our Nation's tripartite system of government, ensuring that the executive branch administrative agencies comply with the laws passed by Congress. Judicial review is meaningless, however, unless the courts carefully review the record upon which an agency bases its decision to "ensure that agency decisions are founded on a reasoned evaluation of the relevant factors." *Marsh v. Ore. Natural Res. Council*, 490 U.S. 360, 378 (1989). In the Ninth Circuit courts are to:

> engage in a searching and careful inquiry, the keystone of which is to ensure that the [agency] engaged in reasoned decisionmaking. This formulation points to an acknowledged disparity between the depth of our review and the ultimate scope of that review: Although the ultimate scope may be narrow, the depth must be sufficient for us to be able to comprehend the agency's handling of the evidence cited or relied upon. . . . [A]lthough data interpretation and analysis are functions that often lie within an agency's realm of expertise, it is our duty to review those functions to ascertain whether the agency's actions were complete, reasoned, and adequately explained. The mere fact that an agency is operating in a field of its expertise does not excuse us from our customary review responsibilities . . . [W]here the agency's reasoning is irrational, unclear, or not supported by the data it purports to interpret, we must disapprove the agency's action.

NW Coalition for Alternatives to Pesticides v. U.S. Envtl. Prot. Agency, 544 F.3d 1043, 1052 n.7 (9th Cir. 2008) (internal quotations and citations omitted).

While "expert discretion is the lifeblood of the administrative process", unless the Courts "make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167, 83 S. Ct. 239, 245 (1962), *citing New York v. United States*, 342 U.S. 882, 884, 72 S.Ct. 152, 153 (dissenting opinion) (internal quotations omitted).

In the present case, Defendants have abused their discretion, and issuance of a preliminary injunction is necessary to preserve the status quo and guard against irreparable harm while the merits of Plaintiffs' case are determined.

1. Defendants Failed to Take a Hard Look the Impacts of the Aspen Project.

California Spotted Owl: Defendants claim that this Court must defer to the Forest Service's discretion and judgment with regard to impacts to California Spotted Owls (Doc. 68 at 8), yet

Defendants never exercised their judgment with regard to the evidence which demonstrates that post-fire logging of moderate/high-intensity fire areas (*i.e.*, removing the Spotted Owl's preferred foraging habitat) extirpates, or causes Spotted Owls to abandon, these areas; thus there is nothing to defer to. Defendants now attempt to overcome their abject failure to fully analyze an important aspect of the problem through the improper testimony of Defense counsel, who claims that the Forest Service actually made *findings* (Doc. 68 at 9 ["The Service found…"]) in relation to the multiple lines of evidence (*e.g.*, DellaSala et al. 2010, Bond 2011, Lee et al. 2012, and Clark et al. 2013) which demonstrate that removal of preferred Spotted Owl foraging habitat through post-fire salvage logging negatively affects Spotted Owls and causes a loss of occupancy—i.e., extirpates the owls from these areas (Doc. 68 at 9). While Defense counsel does cite to the record, a review of these citations (*e.g.*, AR433, 28339, 28868, 29248) reveals that all of them pertain to the evidence submitted by Plaintiffs, *not* to any analysis by Defendants in response to this evidence. Put simply, these post-hoc rationalizations for agency action, advanced for the first time in a reviewing court by counsel, are not entitled to deference. *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) (*citations omitted).* As Defendants well know, this is because the explanation for the agency's action must come from the agency itself as articulated in its decision documents. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-69, 83 S. Ct. 239, 245-46 (1962), citing *Securities & Exchange Comm'n v. Chenery Corp*., 332 U.S. 194, 196, 67 S.Ct. 1575, 1577 (1947). Here, the Defendants did not articulate any rationale for ignoring this evidence, which shows potentially significant negative effects from the logging of moderate- and high-intensity burned forest in or near Spotted Owl sites, as is proposed in the Aspen project.

In addition to not being a "sufficient predicate for agency action", Defendants' counsel's arguments are simply inaccurate. *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 539-540, 101 S. Ct. 2478, 2505-06 (1981). Defendants' counsel erroneously argues that Lee et al. (2012) "lacks data pertaining to the question of owl occupancy as related to post-fire timber harvest", citing AR433, which does not say anything of the sort, and AR29248, which is simply the first page of Lee et al. (2012). ECF Doc. 68 at 9. In fact, Lee et al. (2012), specifically concludes the following: "Seven of the eight sites that were later logged were occupied by California Spotted Owls after the fire but none of the eight sites was occupied after logging. Thus postfire logging may have adversely

affected rates of occupancy of the burned sites…" AR29256. Defendants' counsel next testifies that scientific evidence of lost Spotted Owl occupancy, due to post-fire logging, can be ignored ostensibly because it is not completely conclusive, or is preliminary (*e.g.*, claiming that Bond 2011 is not published, and that DellaSala et al. 2010 is not yet published in a peer-reviewed scientific journal). ECF Doc. 68 at 9. However, this is precisely the argument that the Ninth Circuit previously rejected in the very same circumstance. *Earth Island Institute v. U.S. Forest Service*, 442 F.3d 1147, 1172-73 (9th Cir. 2006) (holding that, in a post-fire logging project, the Forest Service violated NEPA's hard look requirement by improperly dismissing from its effects analysis unpublished and preliminary data indicating adverse impacts of post-fire logging on Spotted Owls).[1] As such, Defendants failed to consider an important aspect of the problem, and violated NEPA's hard look requirement. *Nw. Coal. for Alternatives to Pesticides v. U.S. E.P.A.*, 544 F.3d 1043, 1047-48 and 1052 n.7 (9th Cir. 2008) (citations omitted).

Pacific Fisher: Defendants insist that they fully considered Hanson (2013). Doc. No. 68 at 11. But how could full consideration occur when Defendants utterly fail to articulate and contemplate the actual findings of the study?

Hanson (2013) directly investigated the Forest Service's long-held *assumption* that moderate- and high-intensity fire areas (*i.e.,* areas with higher levels of tree mortality than low-intensity fire areas) are not suitable fisher habitat and found, unequivocally, that the agency's untested hypothesis is incorrect. AR29132 ("…the results of this initial investigation cannot be reconciled with the hypothesis that moderate- or higher- severity fire simply represents a loss of suitable fisher habitat…Indeed, detection rates were approximately the same between dense, mature/old mixed-conifer forest with moderate/higher-severity fire and unburned dense, mature/old mixed-conifer, indicating that such post-fire areas represent suitable fisher habitat…"). Defendants erroneously suggest that Hanson (2013) can be ignored ostensibly because it is at odds with the "overwhelming scientific evidence" upon which the

[1] Defendants' counsel also testifies that Clark et al. (2013) "is not part of the Aspen Project record", and implies that this study can also be ignored ostensibly because it too was inconclusive. ECF Doc. 68 at 9 (Defense counsel claiming that the authors of the study "could not explicitly determine the cause of the decline in owl occupancy."). However, neither is true. Plaintiffs raised this study in their comments, and it is part of the record (AR28218 ["…Clark et al. (2013)…found that post-fire salvage logging in high-severity fire areas significantly increased territory extinction of northern spotted owls in southwestern Oregon"]).

Forest Service relied, citing to a number of pages in the record. Doc. 68 at 10. However, as Defendants know, none of these previous studies ever investigated the relationship between fishers and post-fire habitat; rather, they investigated the relationship between fishers and unburned forest and merely articulated the Forest Service's *hypothesis* that fishers would avoid moderate/high-intensity fire areas. Hanson (2013) is the first and only study to investigate this relationship, and found that the Forest Service's hypothesis is clearly incorrect. AR29129 ("…the relationship between fishers and mixed-severity fire has not been tested previously.").[2]

Further, Defendants' claim of confusion about the moderate- and high-intensity fire categories used in Hanson (2013) ring hollow. Doc. 68 at 10. First, Hanson (2013) combined moderate- and high-intensity fire areas into one category for the purposes of analyzing the Forest Service's hypothesis that both moderate- and high-intensity fire render habitat unsuitable for fishers (AR292132, Table 4), so the specific definition used for high*er*-intensity fire in Hanson (2013) (*i.e.*, over 50% tree mortality) is irrelevant. Second, Defendants did precisely the same thing in the Aspen EA, combining moderate- and high-intensity fire categories for the fisher analysis, and asserting that the combined moderate/high fire category is not fisher habitat and, therefore, no adverse effects could result from logging such areas. AR209 ("…30 percent of the Project area is no longer suitable habitat for fisher because it burned at high/moderate mortality categories."). Third, Defendants attempt to respond to Plaintiffs' argument that Defendants buried the core finding of Hanson (2013) (*i.e.*, that fishers are using moderate/high-intensity fire areas as much or more than unburned, dense, mature forest) by claiming that the Forest Service "gave serious consideration to [Hanson's] findings", citing AR4108. Doc. 68 at 11. However, this page from the Wildlife Biological Evaluation simply articulates the same claim of confusion about a finding that could not be more basic: Pacific fishers do not avoid areas of higher tree mortality from fire, and the Forest Service's hypothesis that fishers will use combined moderate/high-intensity fire areas significantly less than low-intensity fire areas was not supported by the empirical evidence analyzed in Hanson (2013). Here, Defendants' refusal to analyze adverse impacts to fishers *in light of these findings*

[2] The Forest Service also misleads by stating that Hanson (2013) only pertained to areas "10 years after a fire event" (Doc. 68 at 10). In fact, the study included "several" large fires that occurred "since 2000" (AR9622), with some being much more recent, including the Lion and Granite fires of 2009, which were three years old when Hanson's data were gathered. AR29131 (Fig. 1); compare AR13311 (Fig. 7), AR13306 (Table 2, Sequoia National Forest).

was arbitrary and capricious. If Defendants want to dismiss this science, they need to do so based upon what the study actually found, not on irrelevant nit-picking and mischaracterizations.

Black-backed Woodpecker: With regard to Plaintiffs' argument that Defendants failed to analyze the compounded, magnified impacts to Black-backed Woodpeckers from logging in nesting season, Defendants claim that "Plaintiffs are wrong" (ECF Doc. 68 at 11), and then spend four pages (Doc. 68 at 11-14) misdirecting and attempting to re-write the record, while failing to identify a *single page* in the record that analyzes the adverse impacts to Black-backed Woodpeckers from logging in nesting season, contrary to the unequivocal recommendations of the scientists hired and commissioned by the Forest Service itself to write the Conservation Strategy[3] for this species in the Sierra Nevada. In other words, Plaintiffs are right: Defendants failed to analyze this key impact.

Defendants apparently realize this, as the bulk of their brief on this subject attempts to minimize adverse impacts to this species, either by omission or outright misrepresentation. First, Defendants admit that logging of occupied Black-backed Woodpecker habitat would occur in nesting season under the Aspen project (at this point, in 2015, and possibly 2016), but suggest that they should be given a pass under NEPA because logging does not begin until July 1st in a given year under the decision, and "most" Black-backed Woodpecker chicks would not be directly killed by logging by this date—meaning that some would. Doc. 68 at 12.

Second, Defendants suggest that their violation of NEPA on this critical issue should be overlooked ostensibly because there is no basis for any concern about Black-backed Woodpecker populations in the Sierra Nevada. Doc. 68 at 11 and ftnt. 9. Though Defendants are well aware of this fact, they fail to mention that the U.S. Fish and Wildlife Service concluded in 2013 that, in large part due to post-fire logging on national forest lands, listing this species under the Endangered Species Act "may be warranted". AR13843. Further, Defendants' reference to the California Fish and Game Commission's decision not to list this species under the California ESA is unpersuasive. Doc. 68 at ftnt. 9. That decision is under litigation currently precisely because it was so fraught with factual errors and

[3] Defendants refer to the "Institute for Bird Populations' Woodpecker Conservation Strategy" (Doc. 68 at 11), apparently implying that it is the product solely of an outside organization. In fact, the Strategy was specifically commissioned by the U.S. Forest Service (AR1625), and Diana Craig of the Forest Service is a co-author. AR12073, 12075.

arbitrary, highly politicized conclusions. *Center for Biological Diversity v. California Fish and Game Commission*, Case No. 14CEGC02332 (Fresno County Superior Court, August 11, 2014).

Third, Defendants suggest that this Court should overlook its violation of NEPA with regard to the analysis of impacts from logging in nesting season because "burned forest in general" is not "the sole source of [Black-backed Woodpecker] habitat." Doc. 68 at 12. Defendants offer no citation to the record for this proposition, and this was not a reason articulated by the agency for their finding of no significant impact. The Aspen EA itself makes perfectly clear that, while this species can occasionally, though rarely, be found outside of mixed-intensity fire areas, moderate- and high-quality suitable habitat for the Black-backed Woodpeckers is comprised of recent (less than 8 years old), unlogged moderate/high-intensity fire areas in dense, mature conifer forest because this is where the food they need to survive (native wood-boring beetle larvae) is predominantly found, and where it is found in sufficient quantities to support survival and reproduction. AR223-25.

Fourth, Defendants state that post-fire logging only eliminates Black-backed Woodpecker habitat "to the extent that it reduces snag basal area". Doc. 68 at 11. Plaintiffs agree. Theoretically, removal of only one snag per acre, for example, may not have much impact. However, that is not what Defendants are proposing to do in the Aspen project. The Aspen EA mentions that, within current suitable Black-backed Woodpecker habitat in the Aspen fire area, there are about 29.6 snags per acre of a size most relevant to this species (over 15 inches in diameter). AR230. The EA states that snag retention in logging units would be only "four large [over 15 inches in diameter] snags/acre" (AR226)—an 86% reduction in snags. In areas of higher-quality habitat, with more than 50 snags per acre (AR129, Fig. 9), the reduction in snags would be well over 90%. In this context, Defendants' citation to Siegel et al. (2011) for the proposition that post-fire logging "does not necessarily negatively affect" Black-backed Woodpeckers is highly misleading. Doc. 68 at 14. The authors of Siegel et al. (2011) clarified that the effect of post-fire logging is dependent upon whether the impact on "snag basal area" is "taken into account" (*i.e.*, if removal of snags is very minimal within logging units, impacts on Black-backeds may be similarly small), and cautioned that the ability of the method used in that study to determine impacts of post-fire logging "may be limited". AR13328. Two years later, the same authors, using a more precise method (radio-telemetry, wherein tiny radio transmitters are affixed to the birds, and locations

are monitored electronically), found that post-fire logging clearly adversely affects Black-backed Woodpecker use of an area, and that the Black-backeds heavily avoid post-fire logged areas. AR13511, Fig. 13 ("Note the general absence of foraging locations within the post-fire harvest areas."); AR13525 ("Usage was negatively related to the portions of home ranges where post-fire snag removal had occurred…").

Fifth, Defendants point to several other fires, totaling 30,330 acres, on the Sierra National Forest (plus one fire, El Portal, just north of the Sierra National Forest boundary) (Doc. 68 at 13), implying that these acres comprise suitable Black-backed Woodpecker habitat. However, the record shows that suitable habitat for this species is very narrow, and only occurs in certain forest types (middle [generally over 5,000 feet] and upper [generally over 8,000 feet] elevation conifer forests—not foothill woodlands), in recent fires (less than 8 years old), where large moderate/high-intensity fire patches occur in dense, mature/old forest. AR223-25. For this reason, the "total acreage of suitable [Black-backed Woodpecker] habitat within the Project area is 3,439 acres…" (AR225), or less than 15% of the total Aspen fire area of 22,350 acres. AR32. Even if the majority of these other fires were comprised of suitable Black-backed Woodpecker habitat, which is highly unlikely (the Forest Service provides no data on this),[4] they, in combination with the suitable habitat in the Aspen fire, would still comprise less than 2% of the 1.3-million-acre Sierra National Forest—and that is only if no post-fire logging in the Aspen fire area, or in the French fire area occurred. Which begs the question, exactly how little of this habitat would have to exist for Defendants to agree that it is extremely rare?

2. Preparation of an EIS was Required

Highly Uncertain Effects to the California Spotted Owl: Defendants' response on whether an EIS was required to assess potentially significant impacts to the California Spotted Owl from post-fire logging of moderate- and high-intensity burned forest (owl suitable foraging habitat) is as disjointed as their EA. On the one hand they claim that the project minimizes or eliminates impacts to owls and discuss design criteria which seems to recognize the importance of snag forest habitat for this species

[4] We know, for example, that much of the French Fire of 2014, which is immediately adjacent to the Aspen fire, is in low elevation (approximately 3000 feet) shrub vegetation in a canyon bottom by the San Joaquin River (see http://inciweb.nwcg.gov/incident/4013/). Nothing is yet known about the extent of moderate/high-intensity fire in dense, mature conifer forest at mid/upper elevations in that fire.

(Doc 68 at 3-4), while, on the other hand, they recite the reason for their "no significant effects" determination for the Owl, which is entirely based upon unburned forest criteria (Doc. 68 at 5), and while never actually assessing the impacts to the Spotted Owl from the removal of the foraging habitat created by moderate- and high-intensity fire effects. Defendants then go onto claim that these scientific sources regarding adverse impacts of post-fire logging on Spotted Owls "do not disprove years of well-established science". Doc. 68 at 3. But Plaintiffs are not offering this evidence to disprove scientific findings about how Spotted Owls use unburned forest; rather, Plaintiffs are citing this evidence to demonstrate how Spotted Owls use moderate- and high-intensity fire areas, and the harm to this species from post-fire logging in, near and around occupied owl sites. Defendants cite to not a single page in the record to support this statement, nor can they do so, since there are no scientific studies—published or otherwise—that have investigated this question and concluded that post-fire logging does not adversely affect the owls. The only sources in existence find that post-fire logging strongly tends to extirpate Spotted Owls, as discussed *supra* in the "Hard Look" section, and these are the sources which Defendants ignored.

Defendants next suggest that the Aspen EA did acknowledge some adverse impacts of post-fire logging, citing the reduction in perches and habitat for flying squirrels (a prey species), and citing AR204. Doc. 68 at 4. However, those references on that page pertain only to nesting and roosting habitat (*i.e.,* the only habitat the Forest Service acknowledges, in its effects analyses, is "suitable"), not to foraging habitat. AR204. As discussed numerous times in previous briefs, Defendants completely failed to include impacts to owls from removal of foraging habitat in the effects analyses/conclusions of the EA and its supporting documents, even though they admit that moderate- and high-intensity fire areas "would be foraging habitat" for owls. AR 207. Similarly, Defendants claim that, after planned logging, Spotted Owls would "still have *adequate* areas of *suitable foraging habitat*", citing AR596. Doc. 68 at 4-5 (emphasis added). While Plaintiffs appreciate this belated (post-litigation) acknowledgement that moderate/high-intensity fire areas provide "suitable foraging habitat" for Spotted Owls, Plaintiffs note that nowhere on page AR596, or on any other page in the record, does the Forest Service conclude, or otherwise make a determination, that the remaining, unlogged moderate/high-intensity fire areas would be "adequate" for Spotted Owl foraging. This is because the Forest Service

did not acknowledge, let alone assess, the impacts of this project on Spotted Owls due to the removal of suitable Spotted Owl foraging habitat. Where an agency ignores or brushes aside evidence that, if fully considered, indicates the potential for significant adverse impacts, an EA is inadequate under NEPA and an EIS is required to be prepared. *Found. for N. Am. Wild Sheep v. U.S. Dep't of Agr.*, 681 F.2d 1172, 1178-80 (9th Cir. 1982). Here, Defendants violated NEPA by refusing to address the multiple data sources indicating that removal of the Spotted Owl's preferred foraging habitat, created by moderate- and high-intensity fire, leads to loss of territory occupancy. Because Defendants entirely failed to address a crucial factor, and an important aspect of the problem, the consideration of which was necessary for a reasoned determination of whether significant impacts may occur, an EA was insufficient, and an EIS was required. *Id.*

In addition, Defendants' insistence on relying upon the outdated 2004 Framework (Doc. 68 at 4, ftnts. 2 and 3), and studies regarding the Spotted Owls' use of unburned forest, to assess impacts to the owl in a burned area, was not reasonable given the ever increasing body of knowledge related to Spotted Owl use of burned forest, and the effects of post-fire logging on owl occupancy. Their decision to forgo a full consideration of impacts has created a circumstance where the effects of this project on the Spotted Owl are "highly uncertain", thus an EIS was required.

Highly Uncertain Effects to the Pacific Fisher: As discussed *supra* in the "Hard Look" section, the one and only scientific study to ever investigate the relationship between Pacific fishers and post-fire habitat (Hanson 2013) unequivocally and explicitly calls into question the Forest Service's assumption—expressed repeatedly in the Aspen EA and supporting documents—that moderate/high-intensity fire areas render fisher habitat unsuitable. Defendants simply refuse—both in the EA and in their brief (Doc. 68 at 6) to acknowledge that only one study has addressed this question, and that study, Hanson (2013), firmly calls into question the Forest Service's long-held *assumptions* that fishers do not use or benefit from moderate- and high-intensity fire areas. However, NEPA does not allow the Forest Service to ignore inconvenient scientific evidence, or to feign confusion about such evidence, in order to dodge a finding of potentially significant impact, which is exactly what Defendants did here.

With regard to both the Spotted Owl and the Fisher, Defendants rely heavily on their determination that, based on their incomplete analysis, the project may affect individuals but is not

likely to cause a trend toward Federal listing (Doc. 68 at 5 and 6), in an effort to avoid a "significance" finding under NEPA, which would trigger the requirement to prepare an EIS. However, the "may affect but not likely to cause a trend toward federal listing" is an ESA requirement, not a NEPA significance requirement and, as this Court has previously found, "[a] project need not jeopardize the continued existence of a threatened or endangered species to have a 'significant' effect on the environment." *Klamath–Siskiyou Wildlands Ctr. v. U.S. Forest Serv.*, 373 F.Supp.2d 1069, 1080 (E.D.Ca.2004) (citation and internal quotations omitted).

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

After reminding this Court that balancing of the harms is a case by case, fact-based inquiry (Doc. 53 at 17, ftnt. 10), and after insisting that this case is so dissimilar to the case with which it was originally filed (*Earth Island Institute v. Quinn*) that the two cases should be severed and heard by different courts (Doc. No. 9), and refusing to request that, at the very least, the cases should be related, Defendants start their limited response brief insisting that the present case has already been resolved via the recent decision in *Earth Island Institute v. Quinn*, 2:14-cv-01723-GEB-EFB (E.D. Cal. July 31, 2014). However, the circumstances of this case do not tip the balance of harms against issuance of an injunction. Relevant to both public health and safety, and recovery of economic gain, as well as to supporting the local economy, Defendants and Intervenors have been logging in this project area since November of 2013 (Doc. 53-1, ¶13; Doc. 67, ¶¶3-7), removing thousands of hazard trees along all of the roads in the project area (*id.*), to the point that, even after the hearing on TRO, Intervenor had to withdraw two of its conventional logging crews because there was a lack of remaining hazard trees to remove. Doc. 66 at 10-11. This is consistent with Plaintiffs' recent visit to the project area wherein every road they drove on had been extensively logged (Hanson Supplemental Declaration, ¶¶3-4) and, in the only area in which trees had been marked as hazards, Plaintiffs consented to permit Intervenors to remove those trees. Doc. 71.

Therefore, unlike the pronouncements in the recent decision in *Quinn*, here abatement of immediate hazards along roads and campgrounds has been completed, and thus such work is not

dependent upon the full implementation of the Aspen post-fire logging project.[5] Also, the removal of these hazard trees, as well as the other post-fire logging currently being permitted in plantations within the Aspen project area through stipulation (Doc. No. 62, and Doc. No. 71), has created jobs, and has enriched both the timber company and the Forest Service. Thus, economic gain will not be lost by an injunction but merely reduced or delayed. Finally, as previously discussed (Doc. 58 at 10; Doc. 48, ¶6; Doc. 69 at 12-13; and Doc. 70 at 12 including Docs. 70-1 thru 70-3 (photos)), "restoration" through replanting is neither necessary, nor will it be covered by the funds generated from further implementation of this project. And, as recently as July 22, 2014 when the contract was signed, both the Forest Service and the timber contractor were in agreement that the project would be implemented into the spring of 2016. Exhibit 1 (attached hereto) (Aspen Timber Sale Contract, p. 1).

Defendants next assert that their logging project is in the public interest because, they claim, it would reduce future fire intensity. Doc. 68 at 15. However, the record pages cited by Defendants to support this statement are either to mere conclusory statements in the EA and other project documents to this effect (*e.g.*, AR14, 37), or pertain to the simplistic *assumption* made by the Forest Service (including hypothetical modeling assumptions with outputs/conclusions under the exclusive control of the Forest Service itself) that all trees are "fuel" and removal of fuel equates to a reduction in fire intensity. What Defendants refuse to disclose is the fact that every single scientific study that has actually tested this assumption has found that post-fire logging does not effectively reduce future fire intensity, and often increases it. AR28199-00. Nor are Defendants' citations to the Gould Declaration persuasive (Doc. 68 at 15), as Mr. Gould is not a fire scientist and is not an expert on this issue in any

[5] Defendants and Intervenors finally acknowledge the bulk of hazard tree removal has in fact already been accomplished and then insist that more hazard tree removal pursuant to updated guidelines is still necessary. Doc 68-1 (Gould Decl.,) at 31, ¶13; Doc. 66 at 10-11. However, Defendants and Intervenors refuse to identify any specific roads which are still in need of hazard tree abatement. *Id.* This is further evidenced by the fact that the parties' second stipulation only included the one identified area of marked hazards. Doc. 71. Defendants also do not inform the Court that these new guidelines are all about "predicted" mortality, meaning it is the Forest Service's best guess as to what trees *may die in the future*. AR47. Thus, these trees are not immediate hazards, but potential future hazards, and thus are not relevant to a discussion of harms during the pendency of a preliminary injunction. Defendants have also demonstrated a practice of proceeding with hazard tree removal without such activity being tied to an underlying site-specific EA or decision, or a larger timber sale.

manner. Defendants also mention that the predominant way that they will deal with logging "slash" debris (combustible branches and tree tops from felled trees) will be to "scatter" it. Doc. 68 at 15, ftnt. 10. They do not mention what this really means, in actual implementation. The timber sale contract for the Aspen project states that slash debris would be scattered to an 18-inch depth—*i.e.*, *knee-high* (Exhibit 1 (attached hereto) [Aspen Timber Sale Contract, p. 161])—bonfire-type conditions at odds with the EA's repeated implication of a post-logging landscape with little to burn.[6]

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 the merits of Plaintiffs' case are resolved.

Dated: August 13, 2014

Respectfully submitted,

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[6] Defendants also state that 57 firefighters have died since 2000 due to snags falling during fires, citing AR173 (ECF Doc. 68 at 15), but the source for this statement on that record page is a website to an obscure organization that does not guarantee its content (see disclaimer at the bottom of all pages), and the web address provided leads to no such assertion about firefighter fatalities. Nowhere do Defendants mention the risk to firefighters from knee-deep logging slash debris, or the added fire intensity that it can cause; nor does the agency contemplate that the best way to protect firefighters may be to refrain from sending ground crews into steep, backcountry areas, as opposed to letting some remote fires burn for resource benefit, or using aerial drops of water. Moreover, Defendants appear to forget that 14,133 acres of the 23,350-acre Aspen fire are either treeless areas or are low/very-low intensity fire areas with few snags (AR34 [Table 1]), leaving firefighters an abundance of areas throughout the Aspen fire to stage their operations, including, as discussed above, 69+ miles of roads which have been cleared of snags, should a subsequent fire enter the area.

CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2014, I electronically filed the foregoing **Supplemental 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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