No. 14-16948

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY, a non-profit organization; EARTH ISLAND INSTITUTE, a non-profit organization; and CALIFORNIA CHAPARRAL INSTITUTE, a non-profit organization,

Plaintiffs and Appellants

vs.

JEANNE HIGGINS, in her official capacity as Forest Supervisor for the Stanislaus National Forest, and UNITED STATES FOREST SERVICE, an agency of the Department of Agriculture,

Defendants and Appellees,

And

TUOLUMNE COUNTY, et al.,

Defendant-Intervenors and Appellee-Intervenors

APPEAL FROM DENIAL OF MOTION FOR PRELIMINARY INJUNCTION BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA
Honorable Garland E. Burrell Jr., U.S. District Court Judge

REPLY BRIEF OF APPELLANTS

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I. DEFENDANTS FAILED TO TAKE THE REQUIRED HARD LOOK AT SPOTTED OWL IMPACTS

Both Plaintiffs and Defendants agree that: a) the territories California spotted owls depend upon for their habitat needs are 2,500--4,700 acres in size (Excerpt of Record, Volume IV, at 684: "ER.IV:684"), and therefore protecting the 300-acre Protected Activity Centers (PACs), which comprise a small central portion of spotted owl territories, "alone [is] not an adequate conservation strategy for maintaining a viable population of owls" (ER.IV:686); b) logging of high-severity fire areas outside the 300-acre "remapp[ed]" PACs is a "Significant Issue[]" because such logging would "damage" "important owl habitat" (ER.III:542); c) "[w]ork by Bond et al. (2009) indicates that owls preferentially select high-severity fire areas for foraging" habitat within 1.5 kilometers of nest/roost sites because of the rich small mammal prey base in such areas (Defendants' Brief at 31:"D.Br.31"; SER:83, 111); and d) current scientific evidence indicates that "[p]ost-fire salvage logging" of high-severity fire areas in California spotted owl territories can "adversely affect rates of owl occupancy." ER.III:554. It is thus undisputed that what happens to high-severity fire areas in California spotted owl territories, outside of PACs, is a relevant factor which must be considered when evaluating impacts to owls.

Nonetheless, Defendants backpedal from these facts and try to justify their failure to disclose and analyze the impacts of removing thousands of acres of foraging habitat from occupied owl territories. First, in response to Plaintiffs' argument (Plaintiffs' Opening Brief at 29: "P.Br.29") that Defendants violated NEPA's "hard look" requirement by failing to acknowledge, let alone address, the recommendation by two scientific studies that post-fire logging be avoided within *at least* 1.5 kilometers of nest/roost sites to conserve spotted owls (Bond et al. 2009 [ER.II:187-88]; Clark et al. 2013 [ER.II:223]), Defendants falsely claim, without Record citation, that the "Forest Service concluded Plaintiffs' recommendation of a 1.5-km buffer zone around known owl sites was not supported by available science, nor was it necessary to ensure the viability of the California spotted owl . . . ." D.Br.23, 46. Defendants' failure to cite a single page in the Record that includes any analysis supporting such a conclusion is not surprising given this analysis was not prepared. The 1.5 km radius exists in the established literature, such as Bond et al. (2009) (ER.II:186 [concluding that, the "strongest selection for foraging areas [by spotted owls] was in high-severity burned forest within 1.5 km from the center of their foraging ranges"][1], and no data exist supporting an assertion that salvage logging within 1.5 km around known owl sites will not harm owls. *See e.g., Conservation Cong. v. United States Forest Serv.*, No. CIV.

[1] Even Defendants' improper declarant Patricia Manley (see discussion *infra* pp. 19 & 26) recognizes that "salvage logging within 1.5 km of an owl activity center may result in territory abandonment". SER.II:325, ¶5.

S-13-0832 LKK/DAD, 2013 U.S. Dist. LEXIS 127671, *20 (E.D. Cal. Sept. 6, 2013) ("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, [the Forest Service] identifies no literature that indicates that it would be appropriate to log within 1.5 km from the nest site."). Defendants suggest they are entitled to blanket deference. D.Br.32, 39. But here, Defendants did not choose, nor justify, any other distance to meaningfully analyze loss of preferred spotted owl foraging habitat (high-severity fire areas) outside PACs. Rather, they simply refused to perform this analysis, committing the same legal violation this Circuit identified in *Earth Island II*. *Earth Island Institute v. U.S. Forest Service ("Earth Island II")*, 442 F.3d 1147, 1159-60, 1169-73 (9th Cir. 2006).

Defendants relied on their MIS Report when analyzing impacts to spotted owls (ER.III:551 ["An analysis of how changes to habitat in each alternative relates to the distribution of the California spotted owl can be found in MIS policy and the MIS Report written for this project."]). The MIS Report, however, did not analyze impacts to the owl's *preferred foraging* habitat, created by high-intensity fire, and instead based its analysis of impacts only on effects to "late seral closed canopy coniferous forest" and removal of trees within this spotted owl *nesting/roosting* habitat (PSER:1, 3, 7, 9-10 [2014 Rim fire MIS Report]), concluding on this basis there would be *zero* loss of suitable spotted owl habitat acres from the Rim Fire Project. PSER:1 (Table 2 [12,574 acres post-fire, and 12,574 acres "post-action" after each logging alternative]); 9-10

("acres of late seral closed canopy coniferous habitat would not change [after logging] from the existing post-fire condition"). In precisely this same type of circumstance, the Ninth Circuit found the Forest Service violated NEPA's hard look requirement when it concluded that two post-fire logging projects "would not reduce the overall amount of [spotted] owl habitat" (defined by the agency as late seral conifer forest in PACs), but then refused to incorporate into the impacts analysis the extent to which the logging projects would "reduce potential foraging habitat" found in "heavily burned" areas outside PACs. *Earth Island II*, 442 F.3d at 1170-1173.

As discussed previously (P.Br.30-32), it is not reasonable, and is instead contradictory, for Defendants to rely on the fact that the Project is almost exclusively logging areas which "burned at high-severity" – the very habitat owls select for foraging (ER.III:563-64) – to conclude that the Project is not likely to cause harm to owls, nor can it serve as a meaningful explanation for Defendants' conclusion that the Project would not result in a trend toward federal listing of this species. *Earth Island Institute II*, 442 F.3d at 1172-73; *see also Ecology Center v. Austin*, 430 F.3d 1057, 1067 (9th Cir. 2005).[2] It is also unreasonable for Defendants to attempt to evade *Earth Island II* by suggesting, without citation, that NEPA's "hard look" requirement is not triggered unless there is "scientific certainty" (D.Br.18) that yields "definitive

[2] *Lands Council v. McNair*, 537 F.3d 981, 991-93 (9th Cir. 2008), did not "reverse[]" the NEPA holding in *Ecology Center v. Austin*, as Defendants claim. D.Br.31. The cited pages from *McNair* (*Id.*) pertain only to the portion of *Ecology Center v. Austin* regarding

conclusion[s]." D.Br.21. Rather, "NEPA aims to establish procedural mechanisms that compel agencies . . . to take seriously the ***potential*** environmental consequences of a proposed action." *Ocean Advocates v. United States Army Corps of Eng'rs*, 402 F.3d 846, 864 (9th Cir. 2005) (emphasis added). Nowhere in Ninth Circuit case law is a "certainty" or "definitive" standard applied to trigger NEPA analysis, and the Ninth Circuit rejected fundamentally this same argument from the Forest Service in *Earth Island II*. 442 F.3d at 1172-73 (holding the agency could not avoid analyzing adverse impacts to California spotted owls, from post-fire logging of high-severity fire areas outside PACs, on the basis of uncertainty about the data, or whether the data were "preliminary").

Contrary to Defendants' counsels' assertions (D.Br.19), the studies cited by Plaintiffs do not "disclaim[] any finding that 'post-fire logging may have adversely affected rates of occupancy.'" D.Br.21. In fact, Lee et al. (2012) found that every single California spotted owl territory in which post-fire logging occurred lost occupancy, and lost occupancy is what leads to population decline. ER.II:262. The passage quoted by Defendants is a conclusion from Lee et al. (2012) that explicitly identifies post-fire logging as the likely cause of the lost occupancy, rather than "disclaim[ing]" such an effect. ER.II:262 ("*Thus* postfire logging may have adversely affected rates of occupancy of the burned sites . . . .") (emphasis added). Defendants'

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the National Forest Management Act, not NEPA; thus the NEPA holding of *Ecology Center v. Austin* remains good law.

counsel, in a post-hoc attempt to rationalize Defendants' behavior, also misrepresents Bond et al. (2009) and Bond et al. (2013), falsely claiming that the authors concluded the results of their studies were "equivocal", and that "little is known" about the relationship between California spotted owls and fire. D.Br.22. In both instances, the quotes are taken from the Introduction section of the studies, where the authors were describing the state of affairs *before* they conducted their research and empirically addressed questions about foraging habitat selection, and diet, after fire. ER.II:181, 191.

With regard to Clark et al. (2013), Defendants and Intervenors misleadingly suggest that the study's authors did not conclude that "salvage logging itself, as opposed to the more general effects of wildfire, reduced owl occupancy." D.Br.29; Intervenors' Brief at 18-19 ("Int.Br.18-19"). Though neither Defendants nor Intervenors acknowledge the central conclusion of Clark et al. (2013) in their briefs (nor does the EIS for that matter), the authors were clear that post-fire logging itself is a major factor in lost territory occupancy: "Our results also indicated a negative impact of salvage logging on site occupancy by spotted owls. We recommend restricting salvage logging after fires on public lands within 2.2 km of spotted owl territories . . . to limit the negative impacts of salvage logging."[3] ER.II:223. Whether

[3] With regard to Clark (2007), Defendants (D.Br.30) and Intervenors (Int.Br.20, footnote 3) simply cherry-pick quotes from the Discussion section. However, the actual results from Clark (2007) speak for themselves—the owls preferentially selected unlogged high-severity fire areas for foraging. P.Br.27-29. The fact that the overall

other factors have a combined effect with post-fire logging is irrelevant given this conclusion about the harms to spotted owls from post-fire logging. Moreover, Clark et al. (2013) did multiple analyses, and some of them identified post-fire logging alone as a major cause of lost spotted owl occupancy in fire areas. P.Br.26.

Defendants next disingenuously cite to the outdated 2006 finding by the U.S. Fish and Wildlife Service, which, in denying listing of the California spotted owl under the Endangered Species Act *eight years ago*, made the assumption that fire was the "primary threat"—an assumption that pre-dated *all* of the scientific studies on spotted owls and fire at issue in this case. D.Br.14, 16. Since that decision, the California spotted owl population has been plummeting on lands where logging is allowed, P.Br.5-6, 31-32, and in December a new Petition to list the California spotted owl under the ESA was filed, based upon scientific evidence that has accumulated since 2006 which concludes that fire, including high-intensity fire, benefits spotted owls and does not reduce occupancy, while logging, including post-fire logging, poses a major threat to this species. (http://www.wildnatureinstitute.org/spotted-owl.html).

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use of high-severity areas was lower than unburned/low-severity forest is irrelevant, given there was far more unburned/low-severity forest available for use, than forest that burned at high-severity, in the study area. In addition, it is no coincidence that, in the published version of Clark (2007), Clark and his co-authors (in Clark et al. (2013)) found that post-fire logging of high-severity fire areas is a major factor in causing reduced spotted owl occupancy (ER.II:223). If high-severity fire areas were unimportant to the owls, removal of such habitat by logging would not harm them, and Clark et al. (2013) would not have recommended against such logging. *Id.*

Similarly, Intervenors cling to the past by referencing statements about harm to spotted owls from fire in the Forest Service's 22 year old spotted owl technical report, Verner et al. (1992)(Int.Br.15-16). These general statements were based upon a mere assumption that had not been scientifically tested then—an assumption subsequently contradicted by the newest science. Intervenors' attempt to minimize the importance of the Area of Concern (Int. Br.15-16), by insisting it was only fire that Verner et al. (1992) was concerned about, must fail because, although Verner makes assumptions about fire and references the 1987 Stanislaus Complex Fire, this fire area was extensively post-fire logged (PSER:11), resulting in habitat fragmentation which formed the basis for the establishment of this Area of Concern. P.Br.11-12. One look at the maps of owl territories to be logged by the Nevergreen, Triple A and DoubleFork salvage sales clearly shows the habitat fragmentation that will result if logging here is not enjoined. ER.IV:826; ER.IV:773.[4]

Finally, Defendants do not deny Plaintiffs' allegation that the FEIS and ROD fail to disclose the results of the 2014 surveys or take a hard look at the August 21, 2014 letter and analysis submitted by Monica Bond. They instead argue this failure

[4] Intervenors' citation to Verner et al. (1992) for the proposition that retention of 30 square feet per acre of snag basal area mitigates harm to spotted owls from post-fire logging is misplaced. Int.Br.14. No scientific data had been collected in 1992 with regard to spotted owls, wildland fire, and post-fire logging. Based on current data, we now know that 30 square feet per acre of snag basal area is far too little, given that the high-severity fire areas most selected by the owls for foraging have an average of 211 square feet per acre (48.4 square meters per hectare) of snag basal area. ER.II:186 (Table 2).

does not matter, ostensibly because the FEIS effectively assumed all territories were occupied.[5] D.Br.37. However, whether Defendants assumed occupancy or not, they still failed to analyze the impacts of the logging of suitable owl foraging habitat on resident spotted owls. P.Br.12-14, 18, 22-25. The hard look standard simply does not allow a federal agency to simultaneously exclude information relevant to the assessment of impacts from their analysis and still comply with the intent of NEPA and its procedural requirements. *Earth Island II*, 442 F.3d at 1160-67.

II. SIGNIFICANT NEW INFORMATION REQUIRES SUPPLEMENTAL NEPA ANALYSIS

Defendants open their opposition on this legal issue by arguing that "the agency evaluated the [2014 owl] survey results . . . and it incorporated the new data into its analysis for the final EIS and the ROD." D.Br.40. Intervenors make a similar argument, that the DEIS assumed some owl presence in the Rim Fire area, and the FEIS adequately addressed the 2014 data. Int.Br.23-24.[6] Defendants' and Intervenors' assertions, however, are belied by the Record and do not actually address

[5] Defendants claim (D.Br.37) that the 2014 survey data results were "incorporated into the EIS", and "shaped the final decision", citing ER.IV:635. However, neither the cited page, nor any other page in the FEIS or ROD, actually divulges the results of the 2014 surveys.

[6] Intervenors also assert that "CBD argues for the first time on appeal that it should prevail on its NEPA supplementation claim because in addition to the 2014 spotted owl surveys, an August 21, 2014 letter from Monica Bond also is significant new information . . . ." Not so. Plaintiffs repeatedly included the Bond letter as part of their significant new information argument at the district court. Dkt. 22:14-16.

the problem at hand – the failure of the FEIS/ROD to divulge, and explain, to the public, the actual results of the new data, and its implications for the California spotted owl, a "Sensitive Species" that the Record shows is in a steep decline in the Sierra Nevada and consequently in need of careful attention. Defendants and Intervenors are unable to cite any page in the FEIS that actually shows this because none exist.

Defendants and Intervenors also ignore what NEPA requires – "[i]nformed public participation." *League of Wilderness Defenders/Blue Mts. Biodiversity Project v. Connaughton*, 752 F.3d 755, 761 (9th Cir. 2014). Here, absent supplemental analysis, essential information will never be divulged to the public as part of the NEPA process. Just the simple fact that there exist 39 occupied owl territories in 2014, approximately a year after the fire, could heavily influence the public's understanding and perception of the Rim fire's ecological impacts. The 2014 data and analysis by Monica Bond (ER.III:399-400) provide much more than that, however, such as establishing the extremely high rate of owl occupancy in the post-fire landscape – over 90 percent, even in territories with mostly high-severity fire. This rate of occupancy is much higher than Defendants believed possible. ER.II:113 (DEIS asserting that "10 sites burned primarily at high severity . . . . It is clear that these sites have very low to no probability of continued occupancy . . . ", and noting an additional 9 sites as having questionable occupancy potential); ER.III:550 (FEIS repeating same assertions). The 2014 data, if properly divulged to the public, would

reveal at least two important features: 1) a much different picture than what was presented in the DEIS and FEIS, and 2) the actual site-specific conditions (as opposed to assumptions) as to owl presence in the Rim Fire area, including the owls' specific nest and roost locations relative to planned logging, which, as explained below, are the starting point for a meaningful analysis of the proposed logging's impacts.

The FEIS and ROD nowhere explain the relationship, spatially, of the proposed logging units to the 39 occupied owl territories, outside the PACs.[7] This is no small matter. *Where and to what extent* logging occurs in relationship to occupied owl nests or roosts is the most important determinant as to how harmful the logging will be to the owls. This is because the published scientific literature (ER.II:181-89) shows that, in a post-fire landscape, owls rely most heavily (for finding their food) on the area within a 1.5 km radius of their nest/roost sites, and preferentially select, within that radius, the very habitat the Project targets with its logging – severely burned forest (ER.II:186). Until an analysis of the relationship between the 39 occupied territories and the logging units is divulged in NEPA documentation, the

[7] Defendants assert that there exist 28, not 39, occupied territories. D.Br.37, ftnt. 9. However, Defendants are not actually saying the owls do not exist in these other 11 territories, where they were detected by the 2014 surveys; rather, they are subjectively choosing to ignore those detections. SER:344-47. Biologist Monica Bond analyzed the data according to the accepted standards of scientific occupancy studies, whereby all records of detections are analyzed in a statistical framework to account for variation in detectability and generate unbiased estimates of site occupancy. ER.III:398-99.

public will not meaningfully understand the potential impacts of the Project to the owls occupying those territories and will not have the opportunity to address it/comment on it. Such an outcome not only violates NEPA's objective of informed public participation, it also violates NEPA's requirement of a "full and fair" discussion of the situation. *League of Wilderness Defenders,* 752 F.3d at 762 ("Federal agencies must undertake a full and fair analysis of the environmental impacts of their activities. This is a crucial cornerstone of NEPA.")

Defendants attempt to sidestep their NEPA obligations by arguing that because "Plaintiffs had 'actual notice'" of the 2014 survey information, supplemental analysis is not required. D.Br.41. But the case Defendants cite says nothing of that sort. *Kootenai Tribe* explained that "actual notice [to plaintiffs] *supplements* notice from the maps provided to the public," but does not supplant it. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1117 (9th Cir. 2002) (emphasis added). As *Kootenai* further explained: "Most importantly, the maps *within the DEIS and FEIS* in context gave reasonable notice of the roadless areas that would be affected . . . ." *Id.* (emphasis added). For *that* reason, the *Kootenai* Court determined it could not find "the Forest Service's decision not to provide maps *during the scoping period* or that the alleged deficiencies in the maps provided *prior to the DEIS* demonstrate probable success on the merits of plaintiffs' NEPA claim." *Id.* (emphasis added).

Here, unlike in *Kootenai*, there are no "maps within the DEIS and FEIS," nor anything else, to give "reasonable notice" of the 2014 owl survey results and their

implications. Neither Defendants nor Intervenors can cite to a single page in the FEIS where the 2014 owl data is actually revealed, and then analyzed, regarding the Project's logging units. Thus, here, *Kootenai's* findings support Plaintiffs' position that supplemental analysis is needed to ensure informed public participation.[8]

Further, while Plaintiffs were given the 2014 survey data (but only after multiple requests), they had to do their own analysis because Defendants refused to do so. And, even after Plaintiffs provided the Forest Service with this in-depth analysis (the August 21, 2014 letter and its attachments) – including a map by a GIS expert, of the 39 occupied territories showing each territory's relationship to proposed logging units (ER.III:497-535) – the agency still refused to divulge the results of the 2014 data, or provide any analysis regarding it, in the FEIS/ROD. NEPA provides assurance to the public, not just Plaintiffs, and here, the FEIS/ROD do not provide anything that can be termed "reasonable notice" to the public as to the occupied territories and the impacts to them from the Project. *See also League of Wilderness Defenders*, 752 F.3d at 762, citing *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (describing one of the purposes of NEPA as ensuring "that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision").

[8] The other case Defendants cite to – *Westlands Water Dist. v. Dep't of Interior*, 376 F.3d 853, 873 (9th Cir. 2004) – merely stands for the following: "When new information emerges after the circulation and public comment period of the DEIS, it may be

Defendants next argue the Forest Service "reasonably concluded that it did not need to supplement its NEPA analysis" because "[t]he EIS analyzed all known owl territories that it believed could support occupancy, *see* EIS at 337 (SER 79), and the newly-available survey data confirmed additional occupancy only in areas that did not meaningfully overlap with the Project area, *see* ROD at 19 (ER.IV at 624)." D.Br.42. This statement is false and highly misleading. What page ER.IV:624 actually says is that owl *PACs* do not "overlap to any meaningful degree with treatment units included in Modified Alternative 4." ER.IV:624. Plaintiffs, however, have never disputed that the logging units largely avoid PACs. What Plaintiffs have explained, and what the science and Record show, is that PACs, as acknowledged by the Forest Service's quote below, cannot be the sole focus of owl conservation:

> PACs alone are not an adequate conservation strategy for maintaining a viable population of [spotted] owls. They are important because they do provide protection to nest sites. However, the distribution and abundance of owl habitat around PACs and across the landscape are critical considerations that will determine the ultimate adequacy of a PAC-based conservation strategy for maintaining owl viability in the Sierra Nevada.

ER.IV:686. Thus, it is not reasonable for the Forest Service to only examine whether the Project's logging Units overlapped with PACs, and it is especially wrong for Defendants to mislead this Court by implying they examined the overlap between the logging units and *all* owl habitat when they did not. The public has a right to know

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validly included in the FEIS without recirculation." Here, however, the new information is *not* divulged or analyzed in the FEIS.

how logging will potentially impact the ability of owls to find food and survive, especially since this species is seriously declining already. Because a full and fair discussion of the Project's impacts to owl foraging habitat in the 39 occupied owl territories does not exist in the FEIS, a supplemental EIS is required to comply with NEPA. *League of Wilderness Defenders,* 752 F.3d at 762 ("Without supplemental analysis of impacts . . ., the public would be at risk of proceeding on mistaken assumptions.").

Defendants' attempt to dismiss the *Warm Springs* case, and avoid responding to the bulk of Plaintiffs' argument (P.Br.36-41), further reveals a lack of consideration for meaningful compliance with NEPA. D.Br.42-43. Indeed, if Defendants' argument – that the administrative need for an "expedited decision" trumps statutorily-required supplemental NEPA analysis – were accepted, then supplemental analysis could never be required for post-fire logging projects, where the Forest Service always seeks expedited review.[9] Fortunately, that is not the law (P.Br.33-36), and cannot be, because it would foreclose supplemental analysis where it can be most needed – when an agency is rushing ahead and only giving consideration to its own goals and economic outcomes despite potential for serious harm in light of new information. Here, Plaintiffs' analysis of the 2014 survey data shows that owls in the 39 occupied territories will lose substantial portions of their foraging habitat to logging. P.Br.16-17;

[9] Neither the CEQ letter approving an expedited NEPA schedule, nor the Emergency Situation Determination, create any exception to full compliance with NEPA's analytical/disclosure requirements. Plaintiffs' Supplemental Excerpt of Record Volume II ("PSERII:___") at 40-44.

ER.IV:815-820 (showing amount of acreage lost to logging within 1.5 km of owl nests/roosts). All the scientific research on post-fire logging within owl territories indicates the likely outcome of such activity is loss of occupancy (*i.e.*, owls abandoning their territories) (P.Br.6), which contributes to population declines. ER.IV:763, 768. Thus, here, Defendants' failure to conduct supplemental NEPA analysis must be corrected.

Finally, Defendants' effort to distinguish *League of Wilderness Defenders* is a red herring. D.Br.44. The principles established in *League of Wilderness Defenders* that Plaintiffs discuss in their briefing are fundamental to NEPA, and not just to the facts in that case. Here, just like in *League of Wilderness Defenders,* Defendants have violated these principles, and just like in that case, Defendants should be required to conduct supplemental NEPA analysis prior to proceeding with logging.

III. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT REJECTED CONSIDERATION OF PLAINTIFFS' EXTRA-RECORD DECLARATIONS

The Declarations of Monica Bond, Derek Lee, and Dominick DellaSalla – all experts in spotted owl biology – are necessary to explain highly technical and complex evidence before this Court. P.Br.41-42.

The case Defendants rely upon to support rejection of these declarations, *San Luis & Delta-Mendota Water Authority v. Jewell*, acknowledges record supplementation is permissible. 747 F.3d 581, 603 (9th Cir. 2014). Moreover, the *San Luis* Court

explicitly found that it could "see no reasonable objection to the use of experts to explain the highly technical material . . . ." *Id.* Thus, *San Luis* supports Plaintiffs' position that expert declarations can be important in administrative record cases to assist the Court with difficult material, and the proffered declarations fit within that exception. P.Br.42-47. Moreover, Plaintiffs are not asking the Court to accept new studies or data not already part of the record. Instead, in the Declarations offered, Plaintiffs focus solely on studies already in the record, many of which were authored by the Declarants.

There can also be no meaningful dispute whether the studies at issue contain technical/complex matter. Nonetheless, Defendants assert that the material can be understood by "a layperson," D.Br.46, but offer nothing to support this notion. Just one example of the complex nature of the studies is Defendants' attempt to dismiss Bond et al. (2009) based on "small sample size." D.Br.31. This Court would not be expected to understand on its own what to make of the study's sample size (7 owls). Ms. Bond therefore explains in her Declaration that her "study's results were statistically significant even with the small sample. Small sample size does not negate results, it only reduces our ability to detect selection—but because [the] study *did* detect selection, this means spotted owl foraging in severely burned forests was unequivocal." ER.IV750. Technical matters are at issue, and therefore the Declarations are admissible to help the Court understand them.

As discussed at length (P.Br.42-47), supplementation is also necessary here "to determine if the agency has considered all factors and explained its decision." *San Luis,* 747 F.3d at 603. While Defendants attempt to portray Plaintiffs as wrongly challenging Defendants' conclusions, the Declarations show that Defendants wrongly concealed or dismissed important scientific recommendations and information, or misrepresented science, in reaching their conclusion of no real harm to owls from logging, meaning that irrespective of any conclusions, the Declarations reveal that Defendants did not properly consider all relevant factors or explain themselves.

For example, Ms. Bond explains why Defendant's generic assumptions about foraging habitat, such as the assumption that owls can find foraging habitat outside the logged areas, are misrepresentations of the relationship between owls and their foraging habitat. ER.IV:752. The Bond Declaration provides several other examples where Defendants failed to consider all factors and explain their decision— ER.IV:753-58. As discussed in Plaintiffs' Opening Brief, both the Lee and DellaSalla Declarations also provide such information. P.Br.43-47.

Defendants further argue that "[i]f extrarecord material were allowed here, the district court would likely have considered the declaration of Patricia Manley, a Ph.D. wildlife ecologist for the Forest Service." However, the Manley Declaration is simply a post-hoc litigation declaration rife with inaccuracies and improper attempts to assert new rationalizations for Defendants' refusal to assess the impacts of the Rim logging project on thousands of acres of preferred California spotted owl foraging habitat in

39 owl territories. *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 539 (1981) ("the post hoc rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action"); *see also discussion* of Manley Dec. *infra* at 26. This declaration was challenged by Plaintiffs (ER.IV:870 (Dkt.No.63 at 13-20)), and was not accepted or considered by the District Court (ER.I:6, footnote 1), a disposition which (unlike Plaintiffs) Defendants did not challenge on appeal. Further, Defendants do not explain why the Manley Declaration fits within the exceptions to the record review rule or should be considered here on appeal when it was not considered below. D.Br.47; *see Kirshner v. Uniden Corp of America*, 842 F.2d 1074 (9th Cir. 1988), *citing Panaview Door & Window Co. v. ReynoldsMetals Co.*, 255 F.2d 920, 922 (9th Cir. 1958).

IV. PLAINTIFFS HAVE ESTABLISHED LIKELY IRREPARABLE HARM TO THEIR MEMBERS, THE ENVIRONMENT, AND THE CALIFORNIA SPOTTED OWL FROM THE LOGGING OF THOUSANDS OF ACRES OF COMPLEX EARLY SERAL FOREST WITHIN OCCUPIED OWL TERRITORIES

Defendants are duplicitous in their argument regarding likely irreparable harm to Plaintiffs' members from extensive post-fire logging of complex early seral forest created when the Rim Fire burned at high intensity in conifer forests within occupied spotted owl territories. On the one hand, Defendants acknowledge the Ninth Circuit, in *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011), found that logging in just a minor portion of an area burned by fire (1,652 acres or only 6% of the fire area) establishes likely irreparable harm to Plaintiffs' members for the

purposes of the preliminary injunction test (D.Br.49), but then argues that Plaintiffs' established harm should essentially be disregarded because Defendants are only logging a minor portion of the Rim fire area. D.Br.49-50. In addition, Defendants are completely wrong on the facts. The habitat of great value to Plaintiffs is complex early seral forest: conifer forest which has burned at high intensity. In the Rim Fire, only approximately 25,000 acres of conifer forest burned at high intensity (P.Br.3 and 9), not 100,000 acres as erroneously claimed by Defendants (D.Br.49-50).[10] The Rim Fire logging project is overwhelmingly focused on removing this habitat and, through the logging units alone, would remove over 60% (approx. 15,000 acres) of all of this habitat type created by the Rim fire. P.Br.9; ER.III:536. About 9,100 acres of this complex early seral forest habitat would be salvage logged from within occupied spotted owl territories, where owls preferentially use it for foraging. ER.IV:814-821. In relation to the Triple A, DoubleFork and Nevergreen timber sales, this amounts to a loss of over 5,000 acres through the salvage logging units alone (ER.IV:826, 818-820), which is "hardly a de minimus injury". *Cottrell*, 632 F.3d at 1135.

[10] In addition Defendants' claim that over 100,000 acres or 40% of all vegetative types burned at high severity is also wrong. In October 2014, the final vegetation fire severity results for the Rim fire area, produced jointly by the U.S. Geological Survey and the Forest Service, concluded that the Rim fire had only 19.9% high-severity fire effects overall, not 40% (D.Br.50), and the high-severity fire patches are much smaller than Defendants claimed in their initial assessment. *See map at* (file:///C:Users/Owner/Downloads/CA3785712008620130817_map%20(1).pdf)

Intervenors take a slightly different tack, attempting to use Plaintiffs' request for a tailored injunction to deny the irreparable harm Plaintiffs' members will suffer if the logging of complex early seral forest within occupied owl territories is not enjoined. Int. Br.29-30. However, this contention, like Defendants' above, is nowhere supported by Ninth Circuit precedent, and this Circuit has "never made a rule that a plaintiff must challenge all related harms to maintain an ability to challenge harm that it views as the most serious." *League of Wilderness Defenders*, 752 F.3d at 764-765 (finding no precedent to support similar arguments). Here, as detailed in Plaintiffs' Opening Brief (P.Br.47-50), Plaintiffs have shown that the near clear-cut logging of over 5,000 acres of complex early seral forests within occupied owl territories in the Triple A, DoubleFork and Nevergreen timber sale areas is likely to irreparably harm their members' ability to enjoy, recreate and research complex early seral forest and to view and study California spotted owls where this habitat would be removed. P.Br.49.

Next, Defendants and Intervenors completely ignore the fact that complex early seral forest habitat is typically the most biologically diverse, and ecologically rich, forest habitat type, supporting an abundance of native wildlife equal to or greater than old growth forest. P.Br.3-4; ER.II:89-90; ER.II:229-244; ER.II:249-250; ER.III:353-365. In fact, a recent study by Point Blue Conservation Science conducted in the Rim Fire area in May-June 2014 has found that less than one year post-fire the unlogged

moderate to high severity fire areas represent a "rich habitat" that is home to an abundance of rare bird species in the Sierra Nevada.[11]

Defendants likewise fail to acknowledge that post-fire logging is the most ecologically damaging management activity that can be done in these areas because it removes the dead trees (snags) necessary for wildlife, eliminates most ground cover (including flowering native shrubs that many species rely upon), damages and degrades soil productivity (causing chronic erosion and sedimentation which lasts for many years), and kills the great majority of naturally regenerating conifer seedlings, all of which contributes to a substantial reduction in, or elimination of, the naturally abundant biodiversity of plants and animals in these areas. ER.II:76-88 (letter from 150 scientists to Defendants opposing post-fire logging in the Rim Fire); ER.II:247 (Figure 6); ER.II:229-244; ER.III:330; ER.III:384-390. There is simply no credible scientific debate about the fact that irreparable harm to the environment is likely from this Project's removal of thousands of acres of complex early seral forest.

Regarding the California spotted owl, Defendants and Intervenors insist there is no likely irreparable harm to the owls from the removal of thousands of acres of foraging habitat from within occupied spotted owl territories. D.Br.48-49; Int.Br.27-29. They are wrong. The only data sets that exist in the Record regarding California spotted owls and post-fire logging found 100% loss of occupancy in post-fire logged

[11] http://wildlifeprofessional.org/western/tws_abstract_detail.php?abstractID=918).

territories, and no reduction in occupancy in territories which were not post-fire logged. Specifically, Lee et al. (2012), in a comprehensive analysis of 41 California spotted owl territories in fire areas in the Sierra Nevada, found no reduction in occupancy from fire (ER.II:260), while they found that all 7 of the territories with post-fire logging lost occupancy. ER.II:262. Similarly, in a separate data set, DellaSala et al. (2010) found that all 8 of the California spotted owl territories with post-fire logging lost occupancy; the only one that retained occupancy was the one territory with no post-fire logging within 1.5 kilometers of the nest/roost site. ER.II:227-28; ER.IV:767. The prescriptions and claimed mitigations[12] used for post-fire logging here are the same as those used in other Sierra Nevada post-fire logging projects implemented under the 2004 Framework and reviewed in Lee et al. (2012) and DellaSala et al. (2010), where abandonment of owl territories followed post-fire logging. ER.IV:763-64. Defendants' claim, that they can implement the same prescriptions here[13] but expect a different result in this circumstance is, at the very

[12] Intervenors attempt to distinguish the findings in Clark (2007) by insisting the post-fire logging in the Biscuit and Timbered Rock projects did not leave as many snags as the 4-6 which will be left in Rim Fire area. Int. Br.18-19. This is simply not true. *See e.g., Or. Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1128-1129 (9th Cir. 2007) ("between eight and twelve [snags] per acre" would be left in the non-research units of Timbered Rock); *Klamath-Siskiyou Wildlands Ctr. v. Medford Dist. of the BLM*, 400 F.Supp.2d 1234, 1240 (D. Or. 2005) (up to 13.5 snags per acre were retained in the Biscuit fire area).

[13] This is much more than removing "some dead trees", as Defendants misleadingly suggest. D.Br.48. Here Defendants plan to remove thousands of acres of complex early seral forest from within occupied owl territories through "salvage" logging units

least, unreasonable. Here, the Record contains no evidence demonstrating that post-fire logging does not negatively affect owls; in fact, Defendants themselves link it to an "adverse[] affect" on "rates of owl occupancy" (ER.III:554).

Contrary to Intervenors' assertions, Plaintiffs are under no obligation to demonstrate irreparable harm to the entire species is likely in order to establish irreparable harm to spotted owls from the Project to secure injunctive relief. *Ctr. for Biological Diversity v. United States Fish & Wildlife Serv.*, 2011 U.S. Dist. LEXIS 148794 (N.D. Cal. Dec. 28, 2011) ("Although Defendants argue that harm to the species as a whole is required, Ninth Circuit case law does not support this proposition.") However, as discussed in Plaintiffs' Opening Brief (P.Br.10-12, 48), given the precipitous decline this species is experiencing (something neither Intervenors nor Defendants wish to discuss), coupled with this being a designated Area of Concern, any negative effects to individual owls from this Project will likely have a disproportionately severe and adverse effect on the entire population.[14]

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alone (ER.III:536; ER.IV:814-821), reducing snag basal area from an average of 190 square feet per acre (PSER:12 [Table 5]) to only 12 to 30 square feet per acre in the high severity fire areas planned for logging (ER.III:562, Table 3.15-3). This is essentially a clearcut and, as the science shows, is extremely detrimental to owl occupancy.

[14] As the Rim fire FEIS states, this Area of Concern was established due to fragmentation and "gaps in habitat", exacerbated by a "bottleneck" in habitat that threatens to genetically sever the northern Sierra owls from the southern Sierra owls—all of which lead to "disproportionate" adverse effects from further habitat loss. ER.III:551. Post-fire logging which removes thousands of acres of forest within

Defendants, in a final attempt to argue against irreparable harm to owls, reference the *post-hoc* litigation declaration of Pat Manley, which simply conveys Ms. Manley's belief that for her, personally, the data are not "certain" or "definitive" (SER:325, 329), a point which is not relevant to the issue of whether irreparable harm is likely. In addition, information in the Manley Declaration is not accurate, and is not accurately represented by Defendants. First, Defendants claim that a student's unpublished thesis cited by Manley, Eyes (2014), a document which was not considered by Defendants in making their decision, and is not a part of the administrative record, somehow contradicts evidence cited by Plaintiffs regarding likely harm to owls from post-fire logging. D.Br.49. But not only is the Eyes thesis not part of the record here, its study area did not have any post-fire logging, so the thesis did not (and could not) address the question of likely irreparable harm to spotted owls from post-fire logging. SER:331-33. Next, Manley claims that the Eyes thesis had a larger sample size (13 owls) to study spotted owl use of high-severity fire, relative to the 7 owls studied in Bond et al. (2009)(SER:331) and thus was "more robust", but Eyes (2014) only had 3 owls with high-severity fire in their territories, as opposed to the 7 owls studied by Bond, and those 3 owls selected, rather than avoided, the areas where high-severity fire was present, further corroborating the findings of Bond et al. (2009)

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occupied owl territories more than qualifies as a management action that further reduces, and fragments, spotted owl habitat. ER.IV:826.

(http://www.wildnatureinstitute.org/uploads/5/5/7/7/5577192/cso_fesa_petition_dec_22_2014.pdf [see page 69]). Neither the Eyes thesis nor any scientific study actually in the record contradicts the results of Bond et al (2009), nor have any studies found that post-fire logging within owl territories does not negatively affect owl occupancy.

Finally, cases cited by Defendants and Intervenors are inapplicable here. In *Friends of the Wild Swan*, the Court refused to issue an injunction because of the low probability that the convergences of events necessary to cause irreparable harm would occur. *Friends of the Wild Swan v. Weber*, 767 F.3d 936, 946 (9th Cir. 2014). This is not the case here, where, as soon as the logging occurs, the preferred foraging habitat is removed from within the owl territories, likely resulting in a loss of occupancy of those territories. Similarly, *Humane Soc'y v. Gutierrez* does not favor Intervenors' position. There, the Ninth Circuit determined the balance of harms tipped in favor of preventing the lethal take of up to 85 California sea lions, finding "the lethal taking of California Sea Lions is by definition irreparable", even though this species is not declining and NFMS issued a permit to allow the killing. *Humane Soc'y v. Gutierrez*, 523 F.3d 990, 991 (9th Cir. 2008). Here, the California spotted owl is a Sensitive Species, with a declining population in an Area of Concern, and the challenged logging will likely cause abandonment of occupied territories, exacerbating their already steep population decline. Likely irreparable harm to California spotted owls from the implementation of the Rim Fire Project has been established.

V. THE BALANCE OF HARMS AND PUBLIC INTEREST WEIGH IN FAVOR OF ISSUANCE OF AN INJUNCTION IN THIS CASE

While acknowledging that 60% of the Rim Fire Project could proceed under Plaintiffs' requested injunction (D.Br.54; P.Br.15-17, 51-52; ER.IV:855), Defendants make the incredible claim that enjoining the remainder of logging in only 8 (of 39) spotted owl territories threatens implementation of the entire Project. D.Br.51, 54-55. This nonsensical statement is made even more so by the facts that: roadside hazard tree logging is largely completed within the Nevergreen and Triple A timber sales and along all main roads in the entire Project area (P.Br.53-54; ISER:30-31, 181); the required roadwork on Triple A and Nevergreen is finished; Plaintiffs don't object to "hauling" (the driving of log trucks) through owl territories; and Intervenors (specifically the timber sale purchaser, SPI) do not indicate that they would abandon these sales if such an injunction were put in place. Int.Br.30-40. Additionally, Defendants' claim that there is no "practical way to administer contract operations for units that straddle the 1.5 km boundary" is, simply put, ridiculous. Defendants are more than capable of taking GIS data, overlaying it on a map, and replicating such boundaries on the ground – this is exactly how they layout each timber sale unit. In fact, Defendants have already created a map which shows the intersection of the 1.5 km radiuses surrounding owl sites and existing timber sale units. ER.IV:826. Though it might take several days of effort, Defendants could easily mark off areas within existing timber sale units where no cutting would be allowed. The limited injunction

requested will not prevent Defendants and Intervenors from continuing to implement these timber sales outside of owl territories.

Next, Intervenors and Defendants focus on potential loss of revenue (D.Br.52-53, 55; Int.Opp.35-38), Defendants' number one stated purpose for pursing this project. ER.III:541. Defendants insist they can only perform certain unnamed "restoration" activities with revenue from timber sales (D.Br.9, 55) and Amicus claim the revenue is necessary for artificial replanting (Amicus Brief at 8-9: "A.Br.8-9"). However, these arguments do not weigh against an injunction here because Plaintiffs are not requesting that all logging in the Project area be enjoined, and the vast majority of the money raised from these "salvage" logging sales (where the Forest Service is selling off this habitat at about two cents per board foot [ER.IV:827-37]) will be restricted for planning future salvage sales and is not available for so-called restoration activities. U.S. Forest Service Handbook, 2409.19, Chapter 70-75 (www.fs.fed.us/im/...19/wo_2409.19_70.doc). In addition, artificial replanting is not necessary to "regrow" the forest as Amicus and Intervenors erroneously claim. A.Br.6-7; Int.Br.34. Vigorous natural conifer regeneration and ground cover currently exist in high-intensity areas scheduled to be logged. ER.IV:695-701; PSER:14-19; PSERII:45-52. The vast majority of these conifer seedlings will be destroyed by the proposed "restoration" logging (ER.III:330), unnecessarily creating the "need" for artificial reforestation expenditures and wasting millions of tax payer dollars in the process, and most current ground cover would be removed by logging, leading to

increased, and chronic, erosion and sedimentation (PSERII:53-61). This is not in the public interest.

Intervenors focus on lost timber value, from natural deterioration of dead trees due to the passage of time. However, given the tailored nature of the requested injunction, this only represents a potential reduction in the amount of money they will make off these timber sales and not a total loss. P.Br. At 51-53. SPI, and the communities near the Rim fire, including Tuolumne County, and Amicus Curiae County Tulare[15], have been, and will continue to be, enriched by the logging that has already occurred in the Rim Fire Project area (*see e.g.* ISER:30-31), is ongoing, and would continue even under the injunction requested here.

Defendants' and Intervenors' other arguments include: the baseless notion that they must remove the amazing wildlife habitat created by high intensity fire (P.Br.3-4, 47) ostensibly to enhance wildlife habitat [16] (D.Br.5, 51; Int. Br.34-35); and their assertion that the Project has broad public support. D.Br.53-54; Int.Br.31-32. Defendants completely ignore that the vast majority of comments were against the proposed logging (PSER:13; ER.II:76-88 (150 independent scientists urging the

[15] All other Amicus Curiae Counties are not in the vicinity of the Rim Fire area and will not actually be affected by whether an injunction issues in this case.

[16] Defendants claim that, without logging, "piles of dead trees" will affect a key deer migration area. D.Br.6, 51. While no sound scientific data supports this assumption, it is academic because Plaintiffs' requested injunction explicitly does not include a single acre of Defendants' proposed "deer enhancement" tree cutting areas. ER.IV:614; P.Br.52; ER.IV:851-855.

Forest Service not to log the Rim fire area); ER.II:40-59; ER.II:60-67; ER.II:134-171), and that their "supporters" were never actually informed of the likely impacts of this project on California spotted owls.

Next, because owls use and benefit from high-intensity fire, and post-fire logging in occupied territory core areas likely results in the owls abandoning these territories, as discussed in sections above, logging to reduce fuels to prevent another fire is not a future benefit to owls, it is a detriment now and in the future. P.Br.4-14. Furthermore, the actual scientific research (not Forest Service theoretical modeling) has consistently found that post-fire logging does not reduce the potential for future severe fire. P.Br.54; *see also* ER.III:330 (post-fire logging increased fire potential), ER.III:345-50 ("Areas that were salvage-logged and planted after the initial fire burned more severely than comparable unmanaged areas"). Post-fire logging supposedly for "fuel reduction" will not prevent another fire, a point brought home by the fact that the Stanislaus Complex Fire of 1987 was intensively post-fire/salvage logged (PSER:11), and still the Rim Fire burned. *See also* Int. Br.4, 15 and 39 (portions of Crooks ranch burned in both 1987 and 2013 even though they logged their land in 1987). Similarly, post-fire logging does not reduce "soil movement" or "mitigate erosion", as erroneously claimed by Amicus (A.Br.3-4), but rather does the opposite. Amicus, relying on nothing in the record, cite the Hayman fire in Colorado as an example of a large fire which resulted in post-fire erosion, but fail to mention that the Hayman fire area was extensively post-fire logged (just as planned in the Rim Fire

Area is here). *See e.g.*, http://forests.org/shared/reader/welcome.aspx?linkid=21356. Amicus also fail to disclose that the scientific evidence overwhelmingly shows that post-fire logging – particularly ground-based logging which comprises 94% of the planned logging in the Rim fire area (ER.IV:613) – increases sedimentation and erosion relative to no post-fire logging. ER.III:384-390; PSERII:53-61; *see also* Wagenbrenner et al. (2015) (finding that in the Hayman fire area specifically, by the end of the study period (at 7 years post-fire), the "logged swale produced 2.3 times more sediment than the [unlogged] control")[17].

Additionally, the Rim fire is now open to the public (http://www.fs.usda.gov/alerts/stanislaus/alerts-notices [no closure order for Rim Fire Area])), and has been generally since mid-November. Thus, there is no hindrance to public access or use of the Rim Fire area. Finally, there exists only minimal intersection between where post-fire logging is scheduled to occur in owl territories and private land inholdings. ER.IV:773-782. Intervenors' claims of harm from an injunction on this basis are unfounded. Int. Br.38, ("Crook family ranch is . . . 3 to 4 miles" away from Triple A and DoubleFork sales, and the trees on the border of the Crook's property [Int. Br.38-39] are not even scheduled to be cut, injunction or no injunction.).

[17] See: http://www.nrel.colostate.edu/assets/nrel_files/labs/macdonald-lab/pubs/Salvage-logging-Wagenbrenner%20et%20al-ForEcolMgmt-2015.pdf.

In light of the foregoing, the balance of harms and public interest tip sharply in favor of the requested tailored injunction.

VI. NO BOND, OR ONLY A NOMINAL BOND (LESS THAN $1000), SHOULD ISSUE TO SECURE AN INJUNCTION IN THIS CASE

Plaintiffs have provided all the information necessary to establish that a substantial bond in this case is not warranted and would be inconsistent with this Court's precedent. P.Br.55-56; ER.IV:708, ¶9; 712-715, ¶¶9-18; 720-744; 838-845. Further, Intervenors' misimpressions about nonprofit operations and CBD's prosperity aside, CBD, just like the other two Plaintiffs in this case, cannot post a substantial bond and still meet its day to day obligations while continuing to pursue environmental enforcement actions. ER.IV:738-739.

Here, the Ninth Circuit stands in exactly the same position as the District Court to rule that no bond should be required. Remand of this issue is not only unnecessary, but the delay it would cause would be detrimental to avoiding irreparable harm to both Plaintiffs and the environment should this Court determine an injunction is warranted.

CONCLUSION

Having met the test for injunctive relief either under the traditional test or the sliding scale, Plaintiffs request that this Court instruct the District Court to enjoin logging activities within the eight owl territories scheduled to be logged under the Nevergreen, Triple A and Doublefork timber sales.

Dated: February 4, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to the Clerk's Order issued on January 21, 2015 [DktEntry: 43] that this Reply brief is proportionately spaced, has a typeface of 14 points, and contains 8,357 words.

s/ Justin Augustine
Justin Augustine
Counsel for Plaintiff-Appellants

PROOF OF SERVICE

I hereby certify that on February 4, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Justin Augustine