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

CENTER FOR BIOLOGICAL DIVERSITY, EARTH ISLAND INSTITUTE, and CALIFORNIA CHAPARRAL INSTITUTE

Plaintiffs,

v.

SUSAN SKALSKI, 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.

Case No. 1:14-cv-01382 GEB-GSA

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

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

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MEMORANDUM OF POINTS AND AUTHORITIES

REQUEST FOR RELIEF

for a preliminary injunction in order to avoid irreparable harm to the environment and Plaintiffs' members from the removal of the preferred foraging habitat for resident California spotted owls within their identified territories *(i.e.*, within 1.5 km of territory centers) that would be subject to logging, road building and hazard tree removal on non-public roads, or all of the above, pursuant to the Nevergreen, Double Fork and Triple A timber sales. The identified territories wherein logging and associated activities have been approved include the following California spotted owl territories for the Nevergreen and Triple A timber sales:

0027 North Bear Mountain: single owl, territory to lose 75% of core habitat through logging (Dkt. No. 23-1(Exhibit B, pg. 000003); Dkt. No. 23-3 (Exhibit C, pg. 000006);

040B Mather: owl pair, territory to lose 29% of core habitat through logging (Dkt. No. 23-1(Exhibit B, pg.000002); Dkt. No. 23-3 (Exhibit C, pg. 000004);

0040 Middle Fork Tuolumne: owl pair; territory to lose 37% of core habitat through logging (Dkt. No. 23-1 (Exhibit B, pg. 000001); Dkt. No. 23-3 (Exhibit C, pg. 000004);

0177 Ascension Mountain West: owl pair, territory to lose 46% of core habitat through logging (Dkt. No. 23-1(Exhibit B, pg. 000004); Dkt. No. 23-3 (Exhibit C, pg. 000005); and

0039 Ackerson Mountain: owl pair, territory to lose 47% of core habitat through logging. (Dkt. No. 23-1 (Exhibit B, pg. 000005); Dkt. No. 23-3 (Exhibit C, pg. 000005).

The following owl territories will be subjected to logging pursuant to the Double Fork timber sale:

0028 Bear Mountain: single owl, 71% of core habitat in this territory will be removed through logging (Dkt. No. 23-1 (Exhibit B, pg. 000006); Dkt. No. 23-3 (Exhibit C, pg. 000006);

0025 Middle Fork: owl pair; territory to have 58% of core habitat removed through logging (Dkt. No. 23-1 (Exhibit B, pg. 000007); Dkt. No. 23-3 Exhibit C, pg. 000006); and

0085 Harden Flat NW: owl pair, 51% of core habitat will be lost to logging (Dkt. No. 23-1 (Exhibit B, pg. 000008; Dkt. No. 23-3 (Exhibit C, pg. 000005).

These territories and the logging associated with them are delineated on three different maps/map sets filed herewith. *See* Declaration of Justin Augustine, Ex. D (Dkt. No. 24); Declaration of Curt Bradley (Dkt. No. 23); Exhibit A and B (Dkt. No. 23-1).[1]

ARGUMENT

I. Plaintiffs Raise Serious Questions and Are Likely To Succeed On The Merits

A. Significant New Information Requires Preparation of Supplemental Analysis to Assess Impacts to the California Spotted Owl Before Logging In Occupied Owl Territories is Allowed to Proceed

As an initial matter, Plaintiffs are not asking the Court "to determine the correctness or wisdom of the agency's decision." Rather, Plaintiffs are asking the Court to compel the Forest Service to conduct necessary supplemental analysis in light of important new information – the 2014 California spotted owl survey data. What ultimate decision is rendered after such an analysis is performed is not at issue at this time, but an injunction is necessary to protect spotted owls while the Forest Service complies with the law.

Plaintiffs' Opening Brief points out that the Forest Service did "not mention, let alone analyze, the 2014 Rim fire survey data." Dkt. No. 22 at 18. This is because nowhere does the Forest Service provide a statement and discussion in the FEIS or ROD about what surveys were done, where they were done, what the outcome was for all of the owl sites (not just a minor subset), or what the results mean for owls on the Rim fire landscape, even though the information was available to the Forest Service before they issued the Final EIS for this project or signed the Record of Decision. In its September 16, 2014 Order, this Court points to instances in the Record where the Forest Service arguably "mentions"

[1] In Defendants opening brief they claim that injunctive relief should be withheld because Plaintiffs unduly delayed their filing. It is unclear whether this assertion is carried forward to the Court's review of Plaintiffs' Motion for Preliminary Injunction, however there was no undue delay and Plaintiffs submit the Supplemental Declaration of Justin Augustine to controvert Defendants' claims in this regard.

the survey data. Dkt. No. 48 at 10 *citing, e.g.*, AR B00839 ("[Six] PACs . . . were retired and then reestablished based on the 2014 survey results"); AR B00714 ("Survey coverage has been extensive and includes known protected activity centers (PACs) and areas outside of PACs as per protocol. Based on those surveys, six PACs have been re-established.") These statements, however, do not actually mention the entirety of the survey results nor do they provide even the most basic information necessary for context such as a) where the surveys were conducted, b) what the results of the surveys were, or c) how the location of owls relates to the proposed logging units. There is not even a single map in the FEIS or ROD illustrating the survey results or the proximity of logging to the 39 occupied sites. Instead, only because Plaintiffs submitted a letter to the Forest Service on August 21, 2014 does the Record contain any meaningful information at all about the survey results. Moreover, Defendants themselves are unable to point to any divulgence or mention of the survey results in the FEIS or ROD other than the generic references to the 6 re-established PACs (see Dkt. No. 44 at 22-23). And, even with regard to these 6 re-established PACs, there is no assessment of how much salvage logging will occur within these owl territories, especially within a 1.5 kilometer radius of the best known owl location (nest, roost or detection sites), the area which has been documented as being the distance at which owls preferentially select high intensity burned forest for foraging. (AR K01310, K01315). Such an effort – one that fails to disclose and discuss all 39 occupied territories, and analyze the impacts to these territories and their current resident owls in relation to the proposed logging – is not sufficient for purposes of NEPA analysis.[2]

In *Headwaters, Inc. v. Bureau of Land Management*, the Ninth Circuit explained that an SEIS was not necessary in a situation where, after a general EIS was performed, an "EA considered the threat in site-specific terms . . . ." 914 F.2d 1174, 1178 (9th Cir. 1990); *see also id*. ("A reasoned evaluation of

[2] Defendants' assertions regarding their failure to conduct supplemental NEPA analysis only confirm Plaintiffs' point – that Defendants nowhere in the FEIS actually presented, and then analyzed, the 2014 owl survey data which shows extremely high occupancy levels in the Rim Area. Defendants' citations to the record are largely not to the FEIS and the only one that is – AR B00713-14 (EIS at 603-04) – r*eveals no analysis or even any presentation* of the 2014 owl information. Moreover, Defendants' citing to the data sheets and summary data ("AR E00987-1004 (2014 survey data); AR E01032-76 (visit summary datasheets); AR I01255-2160 (detailed datasheets and maps") obviously fails to reveal any actual public presentation of that data let alone any analysis of it. In fact, this information only came to light at all because Plaintiffs repeatedly asked the Forest Service for it.

the Duck Creek timber sale was provided in general terms by the EIS . . . and in terms more specific to the Duck Creek area by the EA.") Here, however, there does not exist a general EIS and then a more site-specific EA; rather, there is an EIS, and it has never performed a site-specific analysis of the new information at issue, the 2014 survey data. There is nothing in the FEIS/ROD divulging the entirety of the results of the surveys, and there is no discussion of what the survey results mean as to owl conservation (such as an analysis of where the owl territories are in relationship to logging and what that means for owl survival). As a result, the public has no meaningful information with which to understand the very basics about actual owl presence in the Rim Fire area, let alone what that means for owl survival and conservation in this critical area. Thus, because no site-specific analysis of the 2014 survey data has actually occurred in this instance, and instead, Defendants have actively avoided such analysis, *Headwaters* provides no shelter for Defendants' lack of supplemental analysis.

The Court's September Order also points to the following statement in the ROD: "both the EIS and this [ROD] recognize that owls forage in burned forests, and the EIS analyzes the effects of the various alternatives based on this understanding." This is a hollow statement, however, because when, as here, site-specific data exists, the only appropriate way to analyze the effects of the proposed logging on owl foraging habitat is to examine the logging units in relationship to where the owls actually are. To do otherwise means turning a blind eye to the actual places where logging could cause harm. This is especially true given that a) prior to the fire, owl presence in the Rim Fire area was largely unknown due to lack of surveys (*see* AR EO1030-31; EO3388-90), and b) after a fire, owls may shift their nests/roosts, thus rendering pre-fire information unhelpful. Moreover, owls focus their foraging within 1.5 km of their core use sites; thus, in light of the survey data which shows where the owls now actually are in 2014, it can be determined with precision where those owls will likely forage. In turn, it can then be determined whether logging units overlap with that foraging habitat and to what extent. The Forest Service has the site-specific data to do the necessary supplemental analysis and cannot pretend otherwise. Again, any meaningful analysis of logging impacts to an occupied owl area must start first with where the owls are on the landscape, and then must examine where logging units are in terms of their proximity to those sites. This is why Plaintiffs submitted numerous maps to the Forest Service – to

demonstrate that the issue was not at all theoretical and that in fact substantial amounts of logging areas existed within close proximity to owl sites and the Project is therefore in need of supplemental analysis.

Here, the Forest Service must acknowledge and address the potential impacts of logging intensely burned forest within the 39 occupied owl territories, must provide that analysis to the public, and must render a new decision after doing so. What that decision ultimately looks like is not for the Court to say, but this Court should find the current situation untenable given the failure of the Forest Service to analyze logging impacts as to the site-specific owl survey data that is in the agency's possession. This is especially so in light of the best available science demonstrating owl preference for high-severity fire areas when foraging for food within 1.5 km of their core sites. While the Forest Service apparently dislikes the results of Bond et al. 2009, that is irrelevant because they have nothing in the record to counter it with in terms of actual data of their own. *Conservation Cong. v. United States Forest Serv.*, No. CIV. S-13-0832 LKK/DAD, 2013 U.S. Dist. LEXIS 127671, *20 (E.D. Cal. Sept. 6, 2013) ("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."); *see also Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998) ("Allowing the Forest Service to rely on expert opinion without hard data either vitiates a plaintiff's ability to challenge an agency action or results in the courts second guessing an agency's scientific conclusions. As both of these results are unacceptable, we conclude that NEPA requires that the public receive the underlying environmental data from which a Forest Service expert derived her opinion.").

In reaching its decision, this Court must also keep in mind that "the bar for whether significant effects may occur is a low standard." *League of Wilderness Defenders/Blue Mts. Biodiversity Project v. Connaughton*, 752 F.3d 755, 760 (9th Cir. 2014) (internal quotation marks and citations omitted). If the new circumstances or information "raise substantial questions regarding [the project's] impact [that is] enough to require further analysis before allowing the project to proceed." *Id.* Here, the 2014 California spotted owl survey data unequivocally demonstrates widespread occupation of the Rim fire area by California spotted owls. When examined in relationship to the Project's logging units, and to the actual findings of the body of science regarding the relationship between owls, burned areas and post-fire

salvage logging, the new information undeniably raises substantial questions regarding the Rim Project's site specific impacts on owls and therefore requires further analysis by the Forest Service before logging proceeds in the occupied owl territories. Furthermore, the spotted owl survey data results for the Rim Fire area do not exist in a vacuum and therefore their importance must be analyzed in light of several other factors, namely, the current declining status of spotted owls in the Sierras in areas where logging occurs, and the fact that the Rim fire area is within an "Area of Concern" for California spotted owls (meaning that maintaining populations in this area is of the utmost importance). (AR B00448).

This Court must also keep in mind that the Forest Service cannot meet its NEPA duties when, as here, it simply acknowledges the existence of new information but then fails to analyze and divulge it for the public. "Informed public participation in reviewing environmental impacts is essential to the proper functioning of NEPA. Without supplemental analysis of impacts . . . the public would be at risk of proceeding on mistaken assumptions." *League of Wilderness Defenders*, 752 F.3d at 761. "When the public reviews an EIS to assess the environmental harms a project will cause and weighs them against the benefits of that project, the public should not be required to parse the agency's statements to determine how an area will be impacted, and particularly to determine which portions of the agency's analysis rely on accurate and up-to-date information, and which portions are no longer relevant." *Id*. Here, that is exactly the situation – the Forest Service is attempting to rely on vague mentions of the 6 re-established PACs when, to meet NEPA's requirements, it must acknowledge and discuss in a meaningful way all 39[3] occupied owl territories and their relationship to the Project's proposed logging units. Thus far, it is painfully clear that he Forest Service has not evaluated and analyzed the impacts of the Rim Project as to the many resident owls that inconveniently established their territories within the boundaries of the Rim Fire logging project, and therefore is in violation of NEPA.

[3] It is unclear why Defendants' Baumbach Declaration (Dkt. No. 61-4) refers only to 37 territories. Based upon Forest Service data Plaintiffs' delineated and mapped 39 of them (Docket 23-1, Exhibit B, 000001-000039). But this discrepancy only illuminates yet another reason why supplemental analysis is needed – to accurately portray the situation. How can you know what the harm will be, when you don't even know what's going on on-the-ground?

B. The Forest Service Did Not Take a Hard Look at Impacts of the Rim Fire Project on California Spotted Owls Residing in the Rim Fire Area

1. The Forest Service's Dismissal of Scientific Studies Relevant to Assessing the Impacts to Spotted Owls from Planned Logging was not Reasonable

Did the Forest Service assess the impacts of the Rim Fire logging project on resident California spotted owls based upon the findings of the scientific evidence which has actually investigated how spotted owls use burned forests and the impacts of salvage logging on spotted owl occupancy? The clear answer is no, they did not.

In this Court's order denying temporary restraining order (Dkt. No. 48 at 12-15), the Court relied upon numerous pages in the EIS regarding impacts to California spotted owls to determine that Defendants had taken a hard look at the impacts to this species. However, the sum total of Defendants' analysis on those pages amounted to referencing and relying upon the body of science which has studied the spotted owl's relationship with unburned forest, while systematically dismissing, on any grounds possible, no matter how arbitrary (*e.g.*, dismissing Clark 2007 by irrelevantly discussing use of low-intensity areas: Dkt. 22 at 11), illegal (*e.g.*, dismissing DellaSala et al. 2010 on the basis that it is preliminary data: Dkt. 22 at 12), or just plain wrong (e.g., mistakenly claiming that Clark et al. 2013 did not conclude that post-fire logging leads to a loss of spotted owl occupancy: Dkt. 22 at 11-12), the main body of science which has investigated how owls use burned forest and the effects of logging high- and moderate-intensity burned areas within occupied owl territories. Defendants then used this **un**burned-forest-based analysis to make their determination that the Rim Fire logging project, which exclusively involves the logging of burned forest, a substantial portion of which will be removed within occupied California spotted owl territories, to reach its desired conclusion that the logging may affect individual owls but will not cause a trend towards listing of this species. This is the very definition of arbitrary (not based on reason or evidence) and capricious (not logical or reasonable) decision-making--using information regarding unburned/green forest to assess the potential impacts to a declining, sensitive species from a project that focuses on the salvage logging of high-intensity burned forest.

In this Court's ruling on TRO, the Court cited to pages in the record to suggest that Defendants' analysis was sufficient under NEPA's hard look standard. Dkt. 48 at 13-15. However, the cited pages

do not represent an incorporation of the information on adverse effects of post-fire logging into the impacts analysis; rather, the cited pages simply show the Forest Service arbitrarily, illegally, and erroneously dismissing relevant scientific sources in order to justify their decision to *refuse to* incorporate this information into the analysis of impacts to California spotted owls, which NEPA prohibits. *Earth Island Institute v. U.S. Forest Service* ("*Earth Island II")*, 442 F.3d 1147, 1172-73 (9th Cir. 2006); *Blue Mountains v. Blackwood*, 161 F.3d 1208, 1212-16 (9th Cir. 1998). For example, the Court stated that Defendants had "adequately addressed comments and concerns regarding the 1.5 km radius surrounding a known owl site", citing AR B00001, B00827-830, B00836-837, and E00973. Dkt. 48 at 13. However, B00001 is a two-page note, issued after the decision was signed, which was not made available to the public (including Plaintiffs), and which—in terms of addressing impacts of post-fire logging—does nothing more than erroneously claim that Plaintiffs "have not provided any evidence" that post-fire logging adversely affects spotted owl occupancy. This secret document, with its unsupported conclusory statements, cannot possibly satisfy the public disclosure and participation requirements of NEPA's hard look standard. *Blue Mountains*, 161 F.3d at 1212-16.

On pages B00827-830 and B00836-837 the Forest Service improperly dismisses the multiple sources of scientific evidence regarding loss of spotted owl occupancy from post-fire logging, based upon mischaracterizations of the studies or arbitrary/illegal reasons (*e.g.*, because the data is preliminary). Dkt. 22 at 11-12. These pages, on which the Forest Service states its refusal to analyze adverse impacts to owls in light of these data, exemplify the Forest Service's erroneous legal position: that Plaintiffs must demonstrate "scientific certainty" (Dkt. 61 at 7) in order to trigger NEPA's hard look requirement—a position already flatly rejected by the Ninth Circuit. *Earth Island II*, 442 F.3d at 1172-73. Page E00973 is an email message to Plaintiffs from the Forest Service that simply says: "For AR—Rob".

The Court also stated that Defendants "clearly and repeatedly acknowledge[] the potential for the Project to impact the California spotted owl habitat", citing a string of pages from the administrative record. Dkt. 48 at 13. Yet nowhere on any of these pages can the reader find an analysis of the effects of post-fire logging, within 1.5-km of the 39 spotted owl sites found to be occupied in 2014 in the Rim fire, on the occupancy of those sites, based upon the actual physical locations chosen

by the owls themselves in 2014 relative to logging units. Rather, at most these pages once again show the Forest Service unreasonably minimizing, misrepresenting and ultimately improperly dismissing multiple lines of evidence about serious adverse effects on spotted owl occupancy (Dkt. 22 at 11-12), and repeatedly applying an erroneous, and impossible, standard of scientific certainty.

The Court also cites AR B00445 for the proposition that the Forest Service did "not ignore or dismiss the entire body of science on the subject" of adverse impacts on spotted owl occupancy from post-fire logging, but this page, and the four studies referenced by the Court (Keane 2014, Conner et al. 2013, Tempel and Gutiérrez 2013, Tempel et al. 2014), pertains to the owl's declining population trend—it is not an analysis of adverse impacts on occupancy from post-fire logging within 1.5 km of the 39 known owl sites. Moreover, the following page, AR B00446, does precisely what the Court acknowledges is improper under NEPA (Dkt. No. 48 at 14)—it ignores, misrepresents, dismisses, and sweeps under the rug, relevant information that indicates major adverse effects to the owls (Dkt. 22 at 11-12), and again applies the impossible scientific certainty standard to avoid divulging to the public just how badly the project would likely affect the owls. For example, on AR B00446, Defendants claim that Clark (2007) found that high-intensity fire areas in mature/old forest are "poor habitat for spotted owls" because the level of use was relatively "low"—a notion that the Court countenanced in the TRO order. Dkt. 48 at 15. However, this blatantly misrepresents the central finding of Clark (2007), Figure 6.2 (AR K04468), which is that the owls used mature forest (NRF) that experienced high-intensity fire more than it was available on the landscape—*i.e.*, the owls selected this habitat, indicating that it is high quality habitat, under the most basic scientific principles of wildlife biology. Bond Dec., ¶18

And, the owls avoided post-fire logged areas (*i.e.*, used them less than such areas were available). *Id*. The fact that the owls used low-intensity fire areas most is irrelevant to the question of impacts from logging high-intensity fire areas, and is doubly irrelevant in light of the fact that most of the landscape was low-intensity fire. AR K04468. Similarly, on AR B00446, Defendants claim that the Clark et al. (2013) results were "equivocal", and not completely "[]certain[]", improperly sidestepping the central conclusion from the authors themselves:

> "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 (the median home range size in this portion of the spotted owl's range) to limit the negative impacts of salvage logging." AR K04583.

Hiding conclusions such as this from the public, and refusing to analyze impacts of post-fire logging on occupancy in the 39 known occupied owl territories in light of such information, cannot satisfy NEPA's hard look requirement to candidly disclose adverse impacts to the public.

Defendants insist that they have met their obligation under NEPA because they relied on some body of evidence to support their position (Dkt. 61 at 5-6, n. 5). The fact that this body of evidence is not relevant to the proposed logging activities at issue here does not seem to trouble them in the least. Defendants go on to insist that there is a battle of the experts here (Dkt. 61 at 5). However they concede that they have no scientific evidence which counters the studies by Bond, Clark, Lee and DellaSalla regarding the California spotted owl's use of moderate and high intensity burned areas and adverse effects of salvage logging. Dkt. 61 at 5-6, n. 5. Thus, there are no "competing scientific analyses" here to weigh, and no battle to resolve in Defendants' favor. Additionally, Defendants are only due deference to the *reasonable* opinions of their experts, and as discussed briefly herein, in Plaintiffs opening brief, and in the Declarations of Monica Bond, Derek Lee and Dominick DellaSalla, Defendants' refusal to discuss the central findings related to these studies, which investigated how spotted owls use burned forest and the effects of salvage logging within occupied owl territories, was not reasonable. See Dkt. No. 22 at 11-12; Dkt. No. 22-14; Dkt. No. 22-15; Dkt. No. 22-16. It is clear from the EIS and Defendants' briefing that they intend to avoid the findings of these studies at all costs, and they certainly do not want to disclose this information to the public, let alone actually assess their proposed logging in light of these findings. This has resulted in a violation of NEPA's hard look requirement.

Defendants' Brief continues what the FEIS did – it arbitrarily misrepresents what Bond et al. (2009) states and means in order to avoid the central findings of the study. Dkt. 44 at 19. Defendants assert that:

> [D]espite what Ms. Bond may espouse now in her post-hoc declaration, Bond Decl. ¶¶ 13-14 (ECF No. 22-14), the 2009 Bond study explicitly cautions against extrapolating from its findings to any conclusions about what owls need: "habitat conditions identified by our modeling should not necessarily be considered definitive indicators of population *requirements*." AR K01316 (emphasis added). Plaintiffs have made the very leap that the

> authors cautioned against: claiming that the areas to be treated are essential to the survival of owls in the project area, even though there is no such evidence in the study."

This statement misrepresents basic tenets of science in addition to misrepresenting Bond et al. (2009). Bond et al. (2009), like virtually any wildlife study, cannot attain absolute certainty. Indeed, this is why, after over 20 years of research on spotted owls, we can still learn about this species. What Bond et al. (2009) does tell us, and what the Forest Service has no information to contradict in the record, is that *the only spotted owls that have been studied in a post-fire landscape showed a preference for finding their food in areas that a) burned at high-intensity, and b) were within 1.5 km of the owl sites.* That is the best available science on what owls use in a post-fire landscape and therefore it is not reasonable for the Forest Service to pretend that the owls in the Rim Fire area will not need that type of habitat for finding their food.

Further, directly after the statement that Defendants point to, Bond et al. (2009) states: "Longer term studies should be conducted to quantify vital rates of spotted owls in burned versus unburned landscapes over multiple years in conjunction with prey studies and without the confounding effect of postfire salvage-logging." This merely reflects that in an ideal world, more study would be conducted to even better understand owls and their habitat. But what it most definitely does not mean is that the study itself can be discarded as the Forest Service is doing here. Defendants claim that Plaintiffs must establish to a scientific certainty any likely impacts. (Dkt. 61 at 7). Defendants offer no legal authority to support this position, for the simple reason that this is not a legal requirement under NEPA. NEPA is about taking a hard look at potential impacts, not impacts that are 100% certain to occur, which is precisely why the Ninth Circuit has previously rejected this type of justification for ignoring relevant information regarding potential impacts in an analogous circumstance. *Earth Island II*, 442 F.3d at 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).

2. The Forest Service Failed to Articulate a Meaningful Explanation for their Conclusion that the Rim Fire Logging Project Would Not Push Spotted Owls Below a Critical Viability Threshold

Contrary to Ninth Circuit case law, Defendants here have not articulated a meaningful explanation why the proposed salvage logging would have a negative impact on the California spotted owl, but would not result in a trend toward federal listing. They have also not determined the critical threshold necessary to support this conclusion. This Court, in its order denying Plaintiffs' request for Temporary Restraining Order (Dkt. No. 48), found that *Austin* was distinguishable. However, the facts of *Austin*, while interesting and distinctive, were not the same as the facts for *Earth Island II*, and yet the Ninth Circuit determined that fundamentally the same requirement was necessary. *Earth Island II*, 442 F.3d at 1172-73. The relevant facts of *Earth Island II* are the same as the facts in this case, thus *Earth Island II* is controlling law and must be followed here.

Here we have the California Spotted Owl, a sensitive species (continued viability is in question) in substantial decline on lands where logging is permitted (such as the Stanislaus National Forest), in an "area of concern"; a body of science which has determined that owls go out of their way to forage in high intensity burned forest, that spotted owl occupancy is eliminated by salvage logging, and that loss of occupancy is equated to a further reduction in overall population; and the Rim Fire Project, which has been approved to remove substantial portions of 39 occupied spotted owl territories (8 implicated in this request for preliminary injunction) through salvage logging.

In *Earth Island II*, like here, Defendants argued that they "considered the information concerning the owl's use of post-fire habitat and determined that the findings were too inconclusive to affect its impact analysis." The *Earth Island II* Court, however, rejected this approach finding:

> [I]t is likely that the projects will substantially reduce potential foraging habitat because the FEISs' designation of non-core areas, where logging will occur, is based upon the USFS's determination that because these areas were heavily burned they are not likely to be suitable owl habitat. According to Bond - both in her declaration and in her published work - the California spotted owl uses burned areas for foraging in the short-term, and these areas may also provide important benefits in the long-term.
>
> …
> . We therefore conclude that the FEISs do not satisfy the requirement under NEPA that the agency take a "hard look" and that there be a "full and fair discussion" allowing informed public participation and informed decision-making.

Here too, in light of Defendants' refusal to actually analyze the impact of logging foraging habitat within 1.5 km of the 39 occupied owl sites, the FEIS did not take a "hard look" and there has not been a "full and fair discussion" allowing informed public participation and informed decision-making. At a bare minimum, the Forest Service must analyze what it could mean for spotted owls to lose occupancy as a result of losing core foraging habitat.

This Court, in its Order denying Plaintiffs' request for Temporary Restraining Order, relied on the four indicators used to "provide a relative measure of the direct and indirect effects" to spotted owls (Dkt. No. 48 at 17-18), but only one of these even mentions foraging habitat and it dismisses it out of hand, suggesting that planned logging would not affect foraging habitat: "The only areas proposed for salvage treatments, other than hazard removal, are those that burned at high severity; abundant foraging habitat will remain in the project area." B00460. This is not the hard look required by NEPA. This conclusory statement assumes that the owls' most preferred foraging habitat in a post-fire landscape – areas that burned at high intensity which are within 1.5 kilometers surrounding their best known detection site– are somehow irrelevant to the owls, or are not actually foraging habitat, and can be logged because other foraging habitat will remain somewhere in the Project area. This "analysis", which is actually just a conclusory assertion, is meaningless because it fails to acknowledge that owls prefer the habitat type being logged, fails to address the fact that *where* on the landscape foraging habitat exists is central to how owls use it (proximity of foraging habitat to owl sites significantly affects its use), and fails to assess the simple fact that with any reduction of such foraging habitat within the Rim Fire area, the owls in the Rim Fire area have less overall habitat to use and share, and multiple lines of evidence show that this leads to loss of occupancy. These issues must be addressed, not ignored as is currently the situation in the FEIS.

3. Defendants Post-Hoc Litigation Declarations Cannot Cure the Legal Deficiencies of their NEPA Analysis

Defendants have submitted two Declarations to the Court. Not only are these declarations illegal *post-hoc* efforts to dismiss issues that should have been discussed in the DEIS and FEIS (and

should therefore be stricken), they do not address the actual issues at stake in the preliminary injunction briefing – i.e., whether supplemental NEPA analysis is necessary or whether the Forest Service has met its NEPA "hard look" obligations.[4] Instead, both declarations wrongfully attack important owl research, and further illuminate what the Forest Service did *not* consider in their underlying NEPA documents. Thus, if anything, Defendants' declarations support a ruling in favor of both of Plaintiffs' legal claims, and support a finding of irreparable harm.

The first declaration is from a Forest Service biologist (Pat Manley) who has not authored any studies on spotted owls. Dr. Manley uses her declaration to attack Plaintiffs' Declarations and to bring up information which is not in the record (nor attached to her declaration), was never disclosed to the public, and did not inform Defendants' decision (and thus does not provide a basis for explaining the Forest Service's reasoning). The remainder of her declaration simply parrots what the FEIS already said, and continues her employer's wrongful trend of misquoting Plaintiffs' declarants and misstating what the studies at issue actually found.

The Manley Declaration broadly attempts to dismiss Ms. Bond's declaration, and the Bond et al. 2009 findings (AR K01310-19), by setting an impossibly high standard that no science or scientist could ever meet. Dr. Manley is using the same tactics as the tobacco industry once did by claiming that Ms. Bond's work can be ignored because the results are not "definitive" or "certain[]" (Dkt. 61-3, ¶¶4-8, 12-14), which is not the standard under NEPA, nor anything else. *See 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 data indicating adverse impacts of post-fire logging on spotted owls). Dr. Manley is highlighting uncertainty about spotted owl use of burned forests when the preponderance of evidence shows that owls, in a post-fire landscape, preferentially use severely burned forest within 1.5 km of their core nests and roosts for foraging (Bond et al. 2009, the only published study examining foraging use of high-severity burned forests by California spotted owls). The definitiveness that Dr. Manley

[4] By comparison the declarations submitted by Plaintiffs are proffered, not just to assist the Court with understanding technical information related to scientific studies, but also to illuminate relevant issues which the Forest Service swept under the rug. This includes pointing out where Defendants have misrepresented, minimized and/or ignored relevant information in scientific publications which bear directly on the potential impacts of the proposed logging.

demands is impossible unless we were to study every owl that exists in the Sierras and do so under every possible condition. Needless to say, that will not happen. This is why Ms. Bond and Mr. Lee must make their conclusions *in light of the best available data*. For example, Ms. Bond declared that "my research demonstrates that in post-fire landscapes such as the one created by the Rim Fire, California spotted owls rely on severely burned forest to find the food they need to survive." Dkt. 22-14, Bond Dec., ¶ 5. This is the only reasonable conclusion given that the owls in her study preferentially selected severely burned forest for foraging. There do not exist any published studies, nor any Forest Service data, demonstrating that owls, in a post-fire landscape, do otherwise. Thus, it is not credible for Dr. Manley to claim that Ms. Bond makes "conclusions that are not supported." Ms. Bond is the only one that has actually studied the issue at hand and the only one who has any data on this issue. Consequently, to the extent that Defendants are attempting to manufacture an expert versus expert setup, that fails because Dr. Manley is not only not an owl biologist (Dkt. 61-3, ¶¶1-3), she has no relevant data to offer that supports her conclusion while Ms. Bond is and does.

Dr. Manley further states that "[w]hile I do not dispute that owls are central-place foragers and generally focus their foraging efforts closer to their activity centers during the breeding season, the literature does not indicate that owls are strictly dependent on foraging areas within 1.5 km of their activity centers, as Ms. Bond argues." Dkt. 61-3, ¶11. Ms. Bond, however, actually agrees with Dr. Manley's point. It would be much better for owls if no logging occurred anywhere within the Rim fire area so as to protect all foraging habitat. The reason Ms. Bond used a 1.5 km area, however, rather than something larger, was because her data did not strongly demonstrate substantial owl foraging beyond 1.5 km. As shown in Figure 1 of Bond et al. 2009 (AR K01315), while use did not cease beyond 1.5 km, that is where it flattened out – in other words, while owls do use areas beyond 1.5 km (and Plaintiffs would certainly support an outcome in which areas beyond 1.5 km are protected), Ms. Bond's data shows that that areas beyond 1.5 km are comparatively less important than areas within 1.5 km.

Thus, to the extent Dr. Manley is pointing out that all owl habitat is important, Plaintiffs agree; however, her employer refuses thus far to even protect areas *within* 1.5 km, let alone to protect a broader area. To the extent Dr. Manley is arguing that areas within 1.5 km of an owl site are somehow *not* important because owls sometimes use areas beyond 1.5 km (her declaration is too ambiguous to

know what in fact she is saying), that is wrong. Again, Bond et al. 2009 is the only published study regarding post-fire owl foraging habitat and it shows that owls preferentially selected severely burned areas within 1.5 km of their sites. This is why Ms. Bond did not actually state what Dr. Manley claims. Instead, Ms. Bond actually said that "the owls *primarily* find their food within 1.5 kilometers (km) of their nests or roosts during the breeding season," (Dkt. 22-14, ¶ 5, emphasis added), and she said that because that is unequivocally what Figure 1 in Bond et al. 2009 shows and what Bond et al. 2009 states: "For 5 of 7 owls, strongest selection for foraging areas was in high-severity burned forest within 1.5 km from the center of their foraging ranges." (AR K01315.) Thus, Dr. Manley is not only wrong as to the Bond Declaration, her overall point is something that Ms. Bond would actually agree with—it is very much true that owls will sometimes forage beyond 1.5 km from their sites and those areas would benefit from protection as well. But it is also true that, as found in Bond et al. 2009, the owls *primarily* forage within 1.5 km of their nest/roost, and therefore Plaintiffs' request in this case – to protect a 1.5 km area – is essential.[5]

Dr. Manley further asserts that "presence and reliance are very different concepts, and the former does not equate to or imply the latter." Dkt. 61-3, ¶10. But this is not relevant to Bond et al. 2009 because Bond et al. 2009 did not find mere presence, it found significant preferential selection of severely burned forest. Preferential selection generally equates with reliance, and therefore if an owl is preferentially using an area within its territory, then it is relying on that area because it is going out of its way to use it. Any assumption to the contrary is not supportable. Indeed, what Dr. Manley refers to as "nominal" use is anything but – in Bond et al. 2009, the selection of high-severity areas was the highest and was statistically significant. Disproportionately high use relative to abundance/availability is one of the most central metrics in wildlife biology to determine what species "rely" on for their habitat needs. AR K01310-18.

[5] Dr. Manley further attempts to dismiss Bond et al. 2009 by claiming that spotted owl use of high-intensity fire areas was "nominal". Dkt. 61-3, ¶10. But this is unequivocally false. Bond et al. (2009) found that, when distance from the nest/roost site was taken into account, the owls selected high-intensity fire areas for foraging far more than lower-intensity areas or unburned forests, and did so at least through 1.5 kilometers from the nest/roost site, as Figure 1 from Bond et al. (2009) clearly demonstrates (see AR: K01315).

Dr. Manley also claims that the Bond et al. 2009 paper is not relevant to the Rim Fire situation because the Bond et al. 2009 study was conducted in an area "that has a much lower proportion of high-intensity fire . . . as compared to the Rim Fire." Dkt. 61-3, ¶10. This statement, if anything, supports Plaintiffs. The fact that in an area with 14% high-severity fire the owls went out of their way to select severely burned forest suggests that owls will, in an area like the Rim Fire, where more severely burned forest is available, also go out of their way to use it. But the real problem with Dr. Manley's point is its argument that for a published study to be relevant to a situation, it must be exactly like that situation. But that is not required by science or by NEPA because it is rarely possible. Rather, in science, as with NEPA, it is the best available science that matters, and here, Bond et al. 2009 is the most analogous available information to the Rim fire situation because it is the only published study to explicitly examine owl foraging in a post-fire landscape shortly after the fire occurred (4 years post fire).

Dr. Manley further claims that there is "nothing" in "any" literature or body of evidence that "demonstrates" that post-fire logging "will result in site abandonment." Dkt. 61-3, ¶12. In ¶5, however, she admits that current evidence indicates that post-fire "salvage logging within 1.5 km of an owl activity center may result in territory abandonment . . . ." Regardless, Dr. Manley's declaration is not on point. It is not Plaintiffs' obligation to demonstrate that there will in fact be site abandonment of every owl territory if logging proceeds. Rather, it is Plaintiffs' obligation to show that there could be a significant impact in light of the situation, and to show a likelihood of harm. Here, that is unequivocally true because as Plaintiffs show, and as Ms. Bond explains, the best available science demonstrates that in a post-fire landscape owls have been found to preferentially select high-severity areas for foraging when those areas are within 1.5 km of owl sites. The best available site-specific information also shows, and there is no dispute, that the Forest Service will conduct substantial logging in severely burned areas within 1.5 km of 39 occupied owl sites. Thus, the Forest Service is obligated to analyze this information in a meaningful way to comport with NEPA, and should be enjoined from logging to allow that to first occur. *Earth Island II*, 442 F.3d at 1172.

It is also of import that Dr. Manley herself, despite seemingly wanting to justify the salvage logging at issue in this case, does not and cannot. Instead, she admits that owls "have been detected foraging in burned forests; and that salvage logging in high-intensity burned forests has the potential to

impact the value of burned forests in situations where they have some value." Dkt. 61-3, ¶12. She likewise admits that "it has been observed that California spotted owls can use burned forests for foraging, that owl territories in severely burned landscapes may persist over time, and that salvage logging within 1.5 km of an owl activity center may result in territory abandonment." Dkt. 61-3, ¶5. These admissions are significant because they further demonstrate that the standard for supplemental analysis has been met. Again, if the new circumstances or information "raise substantial questions regarding [the project's] impact [that is] enough to require further analysis before allowing the project to proceed." *League of Wilderness Defenders/Blue Mts. Biodiversity Project v. Connaughton*, 752 F.3d 755, 760 (9th Cir. 2014).

Dr. Manley's claim that it is "improper for Ms. Bond to isolate salvage logging as being responsible for reductions in occupancy in the Clark studies" (Dkt. 61-3, ¶15) is wrong because Ms. Bond did not in fact isolate salvage logging. Ms. Bond states that "Clark et al. (2013) concluded, very clearly, that the loss of occupancy was due to the 'combined effects of 'wildfire *and subsequent salvage logging*…'" Dkt. 22-14, ¶18d. But unlike Dr. Manley, Ms. Bond also noted that "[t]he authors [of Clark et al. 2013] further concluded the following: '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 [kilometers] of spotted owl territories (the median home range size in this portion of the spotted owl's range) to limit the negative impacts of salvage logging.'" *Id.* This clear, and central, conclusion in Clark et al. 2013 is assiduously avoided in the Manley declaration, just as it was in Defendants' EIS and ROD. Dr. Manley misconstrues Ms. Bond's actual point and when the Bond declaration is read for what it is, it shows that supplemental analysis is necessary. Thus, once again, Dr. Manley's assertion only reinforces Plaintiffs' position – that salvage logging must be analyzed under the circumstances present.

Dr. Manley also attacks statements in the Lee Declaration as being unsupported by the data. Dkt. 61-3, ¶13. The lack of spatially explicit data and low number of salvage-logged territories in Lee et al. 2012, however, only meant the authors could not include it in their larger analysis. But this does not change the actual facts – that 7 of 8 salvage-logged sites were occupied after the fire, but none were occupied after logging. Dr. Manley has no data to contradict this as no study has found owls to

continue to reside in salvage logged territories whereas, as Plaintiffs point out in their letter and briefs, every instance that has examined this did find abandonment.

Finally, Dr. Manley's reliance on Eyes (unpublished thesis 2014) to criticize the work of Bond et al. (2009), and Lee et al. (2012, 2013) is flawed. Not only is this unpublished paper not part of the record in this case, and not provided to the Court or Parties, the Eyes thesis does not actually contradict Bond et al. 2009 or Lee et al. 2012. In fact, the Eyes thesis is irrelevant because the study did not actually examine owl foraging preferences specifically and instead lumped foraging, roosting, and nesting together. (Eyes 2014, p. 27) Moreover, Dr. Manley misrepresents the conditions in the Eyes study, claiming that there was 50% high-intensity fire in the study area (which she also incorrectly argues is similar to the Rim fire) (Dkt. 61-3, ¶16), while the study itself states there was only 4% high-intensity fire. (Eyes 2014, pp. 27-28). Dr. Manley further neglects to mention that one of the central findings of Eyes (2014) is that spotted owls preferentially selected "high contrast edges", which are defined as areas with "patches of high severity fire". (Eyes 2014, pp. 18, 31).

The declaration of Marcie Baumbach (Dkt. 61-4), relied upon by Defendants (Dkt. 61, pp. 7-9) is also inaccurate and misleading. Ms. Baumbach asserts that the Forest Service's administrative practice is to record a territory as being "occupied" by spotted owls only if the Forest Service subjectively characterizes the owls in that territory as being "territorial", while otherwise the agency pretends that the territory is not occupied. Dkt. 61-4. What Ms. Baumbach fails to mention is that this administrative practice is not followed in the scientific literature that assesses spotted owl occupancy. *See, e.g.*, AR: K04873-04882; K25430-25448.

Ms. Baumbach also assumes that all territories which are occupied now, were occupied before the fire, misleadingly implying that immediately prior to the fire all of the territories were in fact occupied. However, this is not established by any citation in her declaration, nor is it reflected in any document in the Record. Instead, the pre-fire occupancy data sent to Plaintiffs (*see* AR EO1030-31; EO3388-90) clearly indicates that only 10 owl territories were surveyed the year prior to the fire, and therefore the pre-fire occupancy status of the area is unknown outside of those 10 sites.

Ms. Baumbach appears to be contrasting Ms. Bond's methods with in-house protocols for how the Forest Service defines a new PAC, requiring location of a nest to denote 'territoriality'. However,

Ms. Bond analyzed the USFS surveys according to the generally 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. While Ms. Baumbach discounts detections that could have been dispersers or migrants, somehow reasoning that those types of birds don't need habitat, that is wrong biologically. Ms. Bond's analysis was comprehensive and appropriate and found very high occupancy relative to all other published studies and also found no effect on occupancy due to the amount of territory burned at high severity. Ms. Baumbach offers no data to contradict this.

In sum, the Declarations proffered by Defendants do not in any way change the fundamental legal violations that have occurred here. Nor do they accurately reflect what Ms. Bond and Mr. Lee stated in their Declarations, and if anything, only further demonstrate Plaintiffs' points as well as the fact the Forest Service continually seeks to wrongly sweep the best available science under the rug.

II. Harm to Plaintiffs Will Be Irreparable Absent Preliminary Relief

The irreparable harm present in this case is straightforward, and fully described in Plaintiffs Opening Brief (Dkt. No. 22 at 23-25). Forest that California spotted owls have been found to prefer when foraging – severely burned mature forest within 1.5 km of their core site – will be cut down absent an injunction. In *League of Wilderness Defenders/Blue Mts. Biodiversity Project v. Connaughton*, 752 F.3d at 764, the Ninth Circuit explained that "plaintiffs have shown that the . . . project will lead to the logging of thousands of mature trees. The logging of mature trees, if indeed incorrect in law, cannot be remedied easily if at all. . . . The harm here, as with many instances of this kind of harm, is irreparable for the purposes of the preliminary injunction analysis." Moreover, in this particular situation, it is burned mature forest that is being logged which is even more difficult to replace than unburned mature forest.

Defendants nonetheless assert that "none of Plaintiffs' declarations have identified specific concrete interests in viewing or studying the California spotted owl in the areas over which they seek injunctive relief—the Nevergreen or Double Fork timber sales. For this reason alone, their demand for injunctive relief must be rejected." Dkt. No. 44 at 25. However, in fact, Plaintiffs' declarants address their concrete interests in viewing or studying California spotted owls in the entirety of the Project area.

Dkt. No. 22-1 at ¶¶7-12; Dkt. No. 22-2 at ¶¶7-9; and Dkt. No. 22-4 at ¶¶5-7. This necessarily includes the Triple A, Double Fork, and Nevergreen sale areas which are extensive, covering eight owl territories. Dkt. No. 23-1, Exhibit B at 1-8. Furthermore, Defendants' argument is off-base because as Brian Nowicki points out his harm extends beyond the areas being logged, including into Yosemite National Park which is adjacent to the Nevergreen Timber Sale (Dkt. No. 22-2 at ¶ 10):

> My loss of enjoyment will not just be limited to the areas that are logged, because this type of near clear-cut logging can have impacts on wildlife populations far beyond the boundaries of the harvest activities. The massive post-fire logging that has been approved for the Stanislaus National Forest will likely have impacts on wildlife throughout the forest, and onto neighboring Yosemite National Park, increasing competition for the remaining limited habitat which is available, and overall reducing populations of the rare animals I am interested in.

Thus, there is no basis to assume that Plaintiffs will not be harmed by the logging from the Triple A, Double Fork, and Nevergreen sales.

Defendants further argue that "Plaintiffs fail to demonstrate species-level harm." Dkt. No. 44 at 25. But there is no such requirement: "Although Defendants argue that harm to the species as a whole is required, Ninth Circuit case law does not support this proposition." *Ctr. for Biological Diversity v. United States Fish & Wildlife Serv.*, 2011 U.S. Dist. LEXIS 148794 (N.D. Cal. Dec. 28, 2011). Regardless, species level harm is likely in this case because so many owls are impacted by the Project – 39 occupied territories will be logged (8 of which will be substantially logged absent the injunction requested here) – at a time when the species is declining rapidly. AR E00975-77; Dkt. No. 22- 14 (Bond Dec.) at ¶ 6. This is especially so given that the Rim fire area is an "area of concern" for owl conservation, meaning it is disproportionately important for owl viability in the Sierras. AR B00448.[6]

[6] In a footnote (Dkt. No. 44 at 25), Defendants claim that there can be no harm at this point in time because "the 2009 Bond study applies to the owl's breeding and rearing season which runs from *March to mid-August*." (emphasis in original). But, as Defendants well know, the fact that owls might temporarily leave an area means nothing given that owls have high site fidelity and return to their core habitat year after year. AR B00447; AR C00338; AR K22220; *see also*, Dkt. 22-16, ¶¶4-6**.** Thus the harm to this habitat, habitat these spotted owls will need during the next breeding season, and the next one after that and so on, will occur as soon as the logging of Nevergreen, Triple A and DoubleFork commences within these occupied territories. Since the logging is both imminent and the effects of the removal of habitat will be of long duration the requirement of establishing likely irreparable harm for purposes of securing a preliminary injunction has been satisfied.

Intervenor-Defendants generically claim that Plaintiffs have failed to show a likelihood of harm. Dkt. No. 58 at 2. This has no scientific credibility, however, because if owls do not have sufficient foraging habitat, they cannot survive, and here, the available information indicates that foraging habitat within 1.5 km of owl core sites will be logged to a significant degree thus making it likely that owls will not be able to survive in the logged territory. See Dkt. No. 23-3, Exhibit C, 1-6 (showing amounts of logging in the 39 owl territories); Dkt. No. 22-14 (Bond Dec.) at ¶ 4-23. Intervenors also pretend that owls will be fine because there exist areas of the Rim fire that will not be logged. Dkt. No. 37 at 4-5. But this too has no basis in reality or science. California spotted owls forage close to their core locations, so it is the foraging habitat nearby them that matters most, not foraging habitat just anywhere on the landscape. Here, the evidence makes plain that foraging habitat nearby owl sites (within 1.5 km surrounding the best known owl location) will in fact be substantially logged. No science or law supports Intervenors' destructive view, and it must therefore be rejected.

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

Neither Defendants nor Intervenors have established that the Balance of Harms and Public Interest weigh against issuance of the tailored preliminary injunction requested in this case. The relevant time frame for assessment of balancing interests is the timeframe that a preliminary injunction would be in place. *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 765 (9th Cir. 2014) ("Under *Sierra Forest*, we must consider only the portion of the harm that would occur while the preliminary injunction is in place, and proportionally diminish total harms to reflect only the time when a preliminary injunction would be in place.") While Defendants and Intervenors attempt to imply that halting the logging within 1.5 kilometers of owl sites could somehow scuttle all logging this fall (Dkt. No. 61 at 1, 3), they stop short of saying that because it is not true.

Defendants' declarant, Maria Benech, admits that the Forest Service could avoid the 1.5-km spotted owl territories if a preliminary injunction was issued, but claims without any explanation or evidence, that it would be time-consuming. Dkt. No. 44-4, ¶6, n. 2. The primary source of Ms. Benech's claims of difficulty stem from her assertion that it would be "extremely difficult to tell what

portion of a unit is within one of Plaintiffs' circles". Dkt. No. 44-4, ¶8; see also Dkt. No. 61-2, ¶6 (Ms. Benech stating that avoiding the 1.5-km circles "would require somehow identifying the circles on the ground…"). Ms. Benech's confusion is baffling, given that Plaintiffs have provided maps and all digital data needed for the Forest Service to determine the location of the 1.5-km owl territories, and given that this is precisely the same information used by the Forest Service, and timber sale contractors, to determine the boundaries of timber sale units. Is Ms. Benech claiming that the Forest Service is incapable of logging within the boundaries of authorized logging units? If not, there is no legitimate reason the Forest Service could not avoid the owl territories. Ms. Benech also admits (after initially stating it is "not possible") that logging could simply be conducted outside of the 1.5-km owl territories during the preliminary injunction timeline, and notes that it would take mere "weeks" for the Forest Service to make such arrangements. Dkt. No. 44-4, ¶15. Further, while Ms. Benech, throughout her declarations, claims that hauling through the 1.5-km owl territories would be required pervasively, she fails to cite a single example of a single road to support her claim, and she fails to disclose that the public roads snake throughout the logging units, and hazard tree cutting has already occurred on these public roads (Dkt. No. 42, ¶¶13-15), which are not challenged in this litigation.

Moreover, Intervenors do not dispute the fact that, if a preliminary injunction is granted, they could still conduct their planned logging next year. Dkt. No. 42. Even if an injunction did result in the halting of all operations on the three current timber sales (even though that is not what Plaintiffs are requesting) during the pendency of a preliminary injunction, as explained in Plaintiffs' opening brief (Dkt. No. 22 at 23-24), and as the Record of Decision and final EIS make clear (AR A00020, B00136), the vast majority of logging is scheduled to occur next year (2015) and in 2016, including the logging associated with these timber sales. In fact, the timber sale contract for Nevergreen expires on March 31, 2016 (See Exhibit A attached hereto) and the contracts for Triple A and Double Fork run through March of 2017 (See Exhibit B & C attached hereto). Defendants and Intervenors conveniently avoid the fact that the logging of these timber sales was always planned to be a multi-year endeavor in an effort to misleadingly enlarge their claims of harm during the pendency of any preliminary injunction. See *e.g.*, Dkt. No. 44 at 28-29; Dkt. No. 61; Dkt. No. 58.

In addition, Defendants had full knowledge of the importance of the core foraging grounds of

the California spotted owl (1.5-km radius surrounding known owl sites) since as far back as December 2013 and up through and including the filing of Plaintiffs' Complaint. Dkt. No. 22 at 23. There are **over 8,000 acres** proposed for salvage logging or roadside hazard tree removal approved under the Record of Decision (see map attached as Exhibit A to Supplemental Declaration of Curt Bradley filed herewith)**, with an additional 4,535 acres of deer emphasis cutting and fuels treatments,** none of which intersects with any of the occupied owl territories and thus are not the subject of this requested injunction. These areas were fully available for planning the initial timber sales for logging this fall – but without explanation Defendants purposefully chose to place their initial timber sales in areas of contention involving the substantial logging of eight occupied owl territories. *See* Dkt. No. 52 (PI Motion); Dkt. No. 23; 23-1 at Ex A 000001 and Ex B 000001-8; 23-3 Exhibit C. Even by Defendants' own admission there are 1,600 acres of logging available outside of occupied owl territories within the Triple A timber sale alone, which is available to log over the next month. Dkt. No. 61-2, ¶6. However, if Defendants and their contractor (Intervenor SPI) can't figure out how to work around the owl territories in Nevergreen, Triple A and Double Fork, they could simply suspend or modify the current contracts and shift activities to these other areas. And, logging on Nevergreen, Triple A and Double Fork could potentially proceed next year (fully in line with the timber sale contracts) after the merits of Plaintiffs' claims have been reviewed. Shifting operations neither increases nor decreases the natural processes of decay, which Defendants do not dispute.

Given these facts, most of the arguments that Defendants and Intervenors promote regarding the balancing of harms and public interest exceed the scope of what the Court must focus on here. Indeed, the majority of the arguments presented on these issues (*see e.g.* Dkt. No. 44 at 30-37; Dkt. No. 42 at 4-7) would only be potentially relevant if Plaintiffs' preliminary injunction were requesting to halt all logging everywhere in the project area, rather than logging within occupied spotted owl territories contained within three timber sales. *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1022 (9th Cir. 2009) ("When deciding whether to issue a narrowly tailored injunction, district courts must assess the harms pertaining to injunctive relief in the context of that narrow injunction."). For instance, there is no risk of "future fire" during the brief pendency of a preliminary injunction (AR: B00275 [Table 3.05-8]; compare B00273 [Table 3.05-7] at 5 years post-fire: same low fire potential as no logging), thus there

is no risk to infrastructure or fire fighter safety. Similarly, there is no risk to SPI's mills, which have been widely reported in the media to be at or near capacity; and SPI acknowledges that it has already been enriched by logging 34 million board feet of timber on national forest lands in the Rim fire along public roads through a separate decision—logging that is ongoing and is not challenged in this litigation. Dkt. No. 42, ¶¶13-15. Nor would the proposed injunction harm the Mule deer as Defendants claim (Dkt. No. 44 at 33) for the simple reason that Plaintiffs are not challenging the 4,087 acres of deer emphasis cutting units in the winter range of the mule deer. AR: A00017.

In addition, Defendants' and Intervenors' assertions regarding hazard trees (Dkt. No. 44 at 29-31) are also misleading in the context of the requested injunction. As explained in Plaintiffs' Opening Brief (Dkt. No. 22 at 24) and admitted by Defendants (Dkt. No. 44 at 31, Dkt. 42, ¶¶13-14), hazard tree logging on public roads in the project area was approved under a prior decision, has been largely completed, and is not the subject of the injunction requested here. In addition, the Forest Service is in no way prioritizing the removal of additional hazard trees in the project area. As is clear from the maps submitted by Plaintiffs, the Forest Service is only focusing on hazard tree removal as it relates to logging units in the three current timber sales. (Dkt. No. 23-1, Exhibit A at 000001) (roads for hazard tree removal as approved in the ROD are shown in pink, the vast majority of which are not located in the three timber sale areas); and Dkt. No. 24 (Ex. D, map)(roads where hazard tree removal may occur are shown in yellow and are within the sale area boundaries shown on the map). Thus, any hazard trees that are discussed in their briefs pertain only to trees that might affect logging crews and Forest Service administrative staff associated with the currently scheduled logging. However, if they are not logging in particular areas during the pendency of an injunction, then removal of hazard trees in that particular area during the pendency of an injunction is not necessary to protect their safety. In addition, if there are areas which Defendants can specifically identify (which they have not done so far) wherein true hazard trees (trees that are damaged and imminently at risk of falling) exist which will endanger agency personnel who must be in that area during the pendency of a preliminary injunction, Plaintiffs would be more than willing to meet with Defendants and reach an agreement regarding the felling of such trees, as has been Plaintiffs' demonstrated practice in the past. Such a provision could easily be written into any preliminary injunction. *Weinberger v. Romero–Barcelo,* 456 U.S. 305, 312, 102 S.Ct. 1798 (1982)

(quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329, 64 S.Ct. 587 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.")

At best, during the pendency of the requested preliminary injunction, all Defendants or Intervenors can claim is that their currently scheduled logging activities would be delayed and that this delay could result in some reduction in the amount of money they can make from the proposed logging. Dkt. No. 42 at 4-5. As recently determined by the Ninth Circuit, such a temporary delay and partial reduction in revenue does not tip the balance of harms against the issuance of an injunction where irreparable harm to Plaintiffs, their members and the environment are likely. *League of Wilderness Defenders/Blue Mountains Biodiversity Project*, 752 at 764-68; *see also Earth Island II*, 442 F.3d at 1177 ("loss of anticipated revenues … does not outweigh the potential irreparable damage to the environment.").

Based upon the facts in this case, as well as the tailored nature of the preliminary injunction requested herein and its limited timeframe, the public interest clearly favors issuance of an injunction. Fire, including patches of high-intensity fire, is a natural part of the ecosystem and is necessary to maintain and restore forest health. AR: O00254-69. Ecologically, there is nothing worse that can be done in a burn area than the salvage logging proposed by the Rim Fire logging project. AR: O00254-69, O00341-57. In fact, hundreds of scientists wrote Congress to urge them not to pass legislation to allow post-fire logging in the Rim Fire area (AR E01283-97), and over 150 scientists sent a letter to the Forest Service explaining the irreversible harm to the environment that would result from logging high intensity burned areas in the Rim fire. AR: E01270-82. All scientific studies which have evaluated whether logging reduces future fire severity have found that it does not – contrary to Defendants' theoretical modeling for this project. AR: E03313-16. Native wildlife is fully capable of existing and thriving in burned areas, as is clear from the fact that owl occupancy in the Rim fire area is off-the-charts high, higher even than is typically found in unburned old forest. AR: E00980-81. And, the Rim Fire did not burn with uncharacteristic severity, contrary to Defendants' claims (Dkt. No. 44 at 30); in fact, in conifer forest, 55% burned at low-intensity, 13% at moderate, and only 32% at high-intensity.

AR: C00889 (Table 6); see also AR: B00397 (Rim fire FEIS, stating: "In summary, the Rim fire was a classic mixed severity fire…").

Finally, Defendants' reliance on their claimed broad base of support for this project (Dkt. No. 44 at 37-39) to argue that the public interest favors their massive clearcutting project, and thus would weigh against an injunction, is unavailing for the simple reason that due to the analytical deficiencies of the environmental impact statement, these persons and entities have no idea of the likely irreparable harm that the California spotted owl will be subjected to from this logging project. Such a disclosure would certainly alter the support which Defendants now claim. In addition, because 60% of the project could proceed even under a permanent injunction, the public interest factors which Defendants discuss would, at the end of the day, all still be served and occupied spotted owl territories would be protected, reducing the likelihood that California spotted owls would abandon their territories, an outcome that would add to an already substantial decline in this rare and sensitive population.

IV. No Bond or a Nominal Bond Should Be Required

As has been established by the Declarations submitted by Plaintiffs, neither Earth Island Institute, Center for Biological Diversity, nor California Chaparral Institute could afford to post a substantial bond in this case to secure an injunction. Thus, imposition of a substantial bond would thwart their ability to secure meaningful relief in this case as well as preclude their ability to continue to pursue litigation to enforce environmental laws. Dkt. No. 22-4 (Hanson Dec.) ¶¶9-18; Dkt. No. 22-3 (Halsey Dec.) ¶5; Dkt. No. 22---11 (Declaration of Kieran Suckling) ¶¶7-12; Dkt. No. 22-7 (Declaration of Dave Phillips and Corrected version of Declaration attached hereto)[7] ¶¶4-6; and Dkt. No. 22-8 (Declaration of Michael Sowle). Intervenors[8] focus only on one Plaintiff (CBD) and the amount of money disclosed on CBD's IRS Form 990, the fact that a posted bond could be returned if a preliminary injunction proves proper, and that CBD has filed hundreds of citizen action suits over the years. Dkt. No. 37 at 10-11. However, the amount of money an organization reports as income and assets to the IRS is not the test. In fact some of the first cases where no, or nominal bonds were imposed involved

[7] Plaintiffs herein file as an Exhibit to this brief the Corrected Declaration of David Phillips. In the original filing two lines which began paragraph No. 5 were inadvertently omitted from page number 2, that omission has been corrected in the present filing.

[8] Only those parties who might be wrongly enjoined have the ability to request a bond. Thus out of Intervenors only SPI is legally permitted to request the posting of a bond.

some of the largest environmental organizations with the most substantial budgets. *See e.g.*, *Friends of the Earth v. Brinegar*, 518 F.2d 322 (9th Cir. 1975); *National Resources Defense Council v. Morton*, 337 F.Supp. 167 (D.D.C. 1971); *Environmental Defense Fund v. Corps of Engineers*, 331 F.Supp. 925 (D.D.C. 1971); *Wilderness Society v. Hickel*, 325 F.Supp. 422 (D.D.C. 1970) and *Sierra Club v. Block*, 614 F.Supp.488 (D.D.C. 1985).

Additionally, Intervenors fundamentally misunderstand the nature of a non-profit organization. Plaintiffs are only able to pursue litigation to preserve rare natural environments and species in accordance with federal environmental laws because posting a substantial bond is not required to secure a preliminary injunction in public interest lawsuits. The fact that such a bond could be returned if the injunction proves proper, months or years down the road, in no way reverses the statements by Plaintiffs regarding the inability to post such a bond in the first place and the hardship such a surety bond would create. Based on the facts presented herein imposition of more than a nominal bond (not to exceed $1000) in this case would thwart citizen action and would not be consistent with Ninth Circuit precedent.

It is unclear whether Defendants are asking for a bond to be imposed for issuance of a preliminary injunction in this case. See Dkt. No. 44 at 39-40. But they do not dispute Plaintiffs' filings attesting to their inability to post a substantial bond and the chilling affect such a bond would have on Plaintiffs' ability to pursue litigation to meaningfully enforce environmental laws. Defendants only addition to the discussion of a bond is to cite to an Eastern District decision wherein a $55,000.00 bond was imposed to secure a temporary restraining order. Dkt. No. 44 at 39 and ftnt. 50. However, the Court in *Klamath-Siskiyou Wildlands Ctr. v. Heywood*, No. 2:09-cv-02252-JAM-GGH (E.D. Cal. Aug. 28, 2009) did not articulate any reason for imposing such a bond, and similar to *Save our Sonorans v. Flowers*, 408 F.3d 1113 (9th Cir. 2005), plaintiffs in that case had failed to provide the Court with any information regarding their inability to post a bond and/or whether such a bond would thwart their ability to seek meaningful judicial review prior to the Court's ruling on their motion for temporary restraining order. These are decidedly not the facts in the case at hand.

CONCLUSION

Plaintiffs have met the requirements for issuance of a Preliminary Injunction in this case, have

requested an injunction which is tailored to address the analytical failings of the Forest Service's NEPA analysis while permitting the majority of the Rim Fire logging project to proceed, and thus respectfully request that the Court enjoin logging as specified above while Defendants comply with the law.

Dated: September 26, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2014, I caused the foregoing to be served upon counsel of record through the Court's electronic service system.

/s/ Rachel Fazio

Rachel Fazio