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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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.

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

**ORDER DENYING PLAINTIFFS' MOTION  
FOR TEMPORARY RESTRAINING ORDER\***

Plaintiffs seek a temporary restraining order enjoining  
implementation of the United States Forest Service ("Forest  
Service")'s Rim Fire Recovery Project ("the Project") in the  
Stanislaus National Forest.<sup>1</sup> Plaintiffs specifically seek to  
"enjoin logging and logging associated activities"<sup>2</sup> related to

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\* Pursuant to E.D. Cal. R. 230(g), this matter is suitable for decision  
without oral argument.

<sup>1</sup> Plaintiffs argue logging for the Nevergreen Timber Sale is set to begin "as  
early as Thursday, September 18 2014" and the Double Fork timber sale, "which  
may be awarded on Monday, September 15, 2014 and operations within occupied  
owl territories could commence on Thursday, September 18, 2014." (Mot. 2:8-  
11.)

<sup>2</sup> Plaintiffs define "logging and logging related activities" as "tractor,  
skyline and or helicopter logging, as well as, roadside logging on roads not  
maintained for public use (maintenance Level 1 and 2 roads), and any other  
activities associated with the planned logging, within occupied California

1 the Forest Service's upcoming Nevergreen Timber Sale and Double  
2 Fork Timber Sale "within 1.5 km of occupied California spotted  
3 owl territories. . . ." (Pls. Mot. for Prelim. Inj. ("Mot.")  
4 6:14-16, ECF No. 22.)

5 Plaintiffs argue a preliminary injunction is required  
6 since the Forest Service "violated NEPA's hard look requirement .  
7 . . by: a) misrepresenting and sidestepping crucial scientific  
8 evidence about serious adverse impacts [of the logging] to [the]  
9 California spotted owl. . . [and] b) concluding that the Rim fire  
10 logging project would not threaten the population viability of .  
11 . . the California spotted owl, without first determining whether  
12 the logging plan would push the owl's population below a critical  
13 threshold." (Mot. 9:23-10:2.) Plaintiffs' also argue the Forest  
14 Service violated NEPA when they "failed to meaningfully address  
15 [2014 California spotted owl survey data] in relationship to the  
16 Project's impact[. . . ." (Mot. 19:12-14.)

17 **I. BACKGROUND**

18 **The Rim Fire and Rim Fire Recovery Project:**

19 The motion concerns the following allegations.<sup>3</sup> "The  
20 Rim Fire [was] the third largest wildfire in California history  
21

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22 spotted owl territories." (Mot. 2:2-7.)

23 <sup>3</sup> Plaintiffs move "to supplement the administrative record in this case  
24 with the declarations of Monica Bond, Derek Lee, and Dominick DellaSalla."  
25 (Pls.' Mot. to Supplement the AR 2:7-8, ECF No. 32.) However, "[e]ven  
26 considering the declarations, the [TRO] is denied at this time. Therefore, the  
27 Court [need not decide the motion to supplement the administrative record when  
28 deciding whether to issue a TRO.]" Willis v. Buffalo Pumps Inc., No. 12cv744  
BTM (DHB), 2014 WL 1028437, at \*3 n.1 (S.D. Cal. Mar. 17, 2014) (declining to  
reach evidentiary objections raised in connection with motion for summary  
judgment); accord Hernandez v. City of Oakley, No. C-11-02415 JCS , 2012 WL  
5411781, at \*3 n.4 (N.D. Cal. Nov. 6, 2012) ("The Court need not reach this  
[evidentiary] objection because, even assuming these [deposition] excerpts are  
admissible, it finds in favor of Defendants as to all of the remaining claims  
in this action.").

1 and the largest wildfire in the recorded history of the Sierra  
2 Nevada." AR B00111. In the summer of 2013, it burned more than  
3 150,000 acres of National Forest including parts of the  
4 Stanislaus National Forest. AR B0013. The Rim Fire "resulted in  
5 areas of high, moderate and low vegetation burn severity." AR  
6 B00112-14. In response to the fire, the Forest Service proposed  
7 the Rim Fire Recovery Project. The Forest Service designed the  
8 Project to "help[] restore the land impacted by the Rim Fire. . .  
9 while simultaneously providing for public safety, ecological  
10 integrity, scientific research, and socio-economic benefits." AR  
11 0009. The "proposed action . . . includes: salvage of dead  
12 trees[and] removal of hazard trees along roads open to the public  
13 and roads used to access and implement proposed treatments." AR  
14 B00121.

15 In connection with the Project, the Forest Service,  
16 published a Notice of Intent on December 6, 2013. AR B00121.  
17 "Interested parties submitted 4,200 total letters during the  
18 comment period including 174 unique individual letters and 4,026  
19 form letters." AR B00128. The Forest Service's "public outreach  
20 began while the fire was still smoldering and continued up until  
21 the point of the" final decision. AR A00035.

22 The Forest Service organized "public open houses,"  
23 "hosted Rim Fire Technical Workshops to share the development of  
24 alternatives status," "organized 24 tours into the Rim Fire  
25 area" for government officials and interested parties, and held a  
26 "30-day comment period." AR B00128. The Forest Service "asked for  
27 public comment on the DEIS [Draft Environmental Impact  
28 Statement]" and solicited public comments by "produc[ing]

1 materials for social media outlets" and "distribut[ing] some  
2 60,000 newspaper inserts through the region explaining many of  
3 the proposed activities." AR B00128-129. "Responses to public  
4 comments were finalized during the development of the FEIS [Final  
5 Environmental Impact Statement ("EIS")] and Record of Decision  
6 ("ROD"). AR B00129. The FEIS and ROD were published in August  
7 2014. Of the four alternative courses of action considered for  
8 the Project, the Forest Service ultimately "selected Modified  
9 Alternative 4." AR A00016.

10 Modified Alternative 4 "approves salvage logging and  
11 fuel reduction on 15,383 acres including: 14,495 acres of ground  
12 based; 651 acres of helicopter; and 237 acres of skyline  
13 treatments." AR A00016. The Project covers around ten percent of  
14 the National Forest area impacted by the Rim Fire. AR A00016;  
15 B0013. Its "boundary is located within the Rim Fire perimeter  
16 within portions of the Mi-Wok and Groveland Ranger Districts on  
17 the Stanislaus National Forest." AR B00114. The "salvage harvest  
18 of trees initially killed by the Rim Fire" will be "accomplished  
19 through timbers sales" to occur "over the next 2 seasons,  
20 culminating in winter 2015." AR A00018.

21 **California Spotted Owl:**

22 "Forest fire is one of the most important issues  
23 affecting the [California] Spotted Owl's habitat." AR K01464.  
24 "California spotted owls will occupy landscapes that experience  
25 low- to moderate-severity wildfire, as well as areas with mixed-  
26 severity wildfire that includes some proportion of high-severity  
27 fire." AR K12141. They can "occupy territories and continue to  
28 reproduce in burned habitats, including those with severely

1 burned patches." AR K01464; see also B00449. However post-fire  
2 logging of burned trees within the California spotted owl's  
3 habitat, may result in "occupancy declines." AR K13093.

4           These raptors nest, roost and forage in parts of the  
5 Stanislaus National Forest impacted by the Rim Fire. AR B00003.  
6 The Forest Service considers California spotted owls a "sensitive  
7 species." AR B00432. They "have several characteristics that are  
8 broadly associated with increased species vulnerability." AR  
9 K12133." [A]pproximately 6,500 acres of salvage, and 8,500 acres  
10 of roadside logging, [as part of the Project] are slated to occur  
11 within 1.5 km of [California spotted] owl sites." AR B00003.

## 12           **II. LEGAL STANDARD**

### 13           **A. Preliminary Injunction**

14           A preliminary injunction is "an extraordinary remedy  
15 that may only be awarded upon a clear showing that the  
16 plaintiff[s are] entitled to such relief." Winter v. Natural Res.  
17 Def. Council, Inc., 555 U.S. 7, 22 (2008). "A plaintiff seeking a  
18 preliminary injunction must establish [1] that he is likely to  
19 succeed on the merits, [2] that he is likely to suffer  
20 irreparable harm in the absence of preliminary relief, [3] that  
21 the balance of equities tips in his favor, and [4] that an  
22 injunction is in the public interest." Id. at 20.

23           Further, the Ninth Circuit's "'serious questions' test"  
24 may be "applied as part of the four-element Winter test."  
25 Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131-32  
26 (9th Cir. 2011). Under this test test, "serious questions going  
27 to the merits and a hardship balance that tips sharply toward the  
28 plaintiff can support issuance of an injunction, assuming the

1 other two elements of the Winter test are also met. Id. at 1132.

## 2 **B. Review of Federal Agency Decisions Under the APA**

3 Plaintiffs argue the Forest Service violated the  
4 National Environmental Policy Act ("NEPA") when issuing the FEIS  
5 for the Project. (Compl. ¶¶ 37-43, ECF No. 1.) "NEPA aims to  
6 establish procedural mechanisms that compel agencies. . . to take  
7 seriously the potential environmental consequences of a proposed  
8 action." Ocean Advocates v. U.S. Army Corps of Eng'rs, 402 F.3d  
9 846, 864 (9th Cir. 2004). "NEPA imposes only procedural  
10 requirements, it does not dictate a substantive result." Salmon  
11 River Concerned Citizens v. Robertson, 32 F.3d 1346, 1355-56 (9th  
12 Cir. 1994).

13 "Judicial review of agency decisions under NEPA. . . is  
14 provided by the APA, which maintains that an agency action may be  
15 overturned only when it is 'arbitrary, capricious, an abuse of  
16 discretion, or otherwise not in accordance with law.'" Pit River  
17 Tribe v. U.S. Forest Service, 469 F.3d 768, 778 (9th Cir. 2006)  
18 (quoting 5 U.S.C. § 706 (2)(A)). "Review under this standard is  
19 narrow, and the reviewing court may not substitute its judgment  
20 for that of the agency." Earth Island Inst. v. U.S. Forest  
21 Service, 442 F.3d 1147, 1156 (9th Cir. 2006) (citation omitted)  
22 abrogated on other grounds by Winter, 555 U.S. 7.

23 Agencies must "[t]ak[e] a 'hard look'" when creating an  
24 EIS, which "includes 'considering all foreseeable direct and  
25 indirect impacts. Furthermore, a 'hard look' should involve a  
26 discussion of adverse impacts that does not improperly minimize  
27 negative side effects.'" League of Wilderness Defenders-Blue  
28 Mountains Biodiversity Project v. U.S. Forest Service, 689 F.3d

1 1060, 1075 (9th Cir. 2012) (citing N. Alaska Env'tl. Ctr. v.  
2 Kempthorne, 457 F.3d 969, 975 (9th Cir. 2006)). An agency has not  
3 taken a "hard look" where its decision was not "based on a  
4 consideration of the relevant factors, or [where] its actions  
5 were arbitrary, capricious, an abuse of discretion, or otherwise  
6 not in accordance with the law." Blue Mountains Biodiversity  
7 Project v. Blackwood, 161 F.3d 1208, 1211 (9th Cir. 1998) (citing  
8 5 U.S.C. § 706(2)(A)).

9 "Review under the arbitrary and capricious standard is  
10 narrow and [we do] not substitute [our] judgment for that of the  
11 agency. Rather, we will reverse a decision as arbitrary and  
12 capricious only if the agency relied on factors Congress did not  
13 intend it to consider, entirely failed to consider an important  
14 aspect of the problem, or offered an explanation that runs  
15 counter to the evidence before the agency or is so implausible  
16 that it could not be ascribed to a difference in view or the  
17 product of agency expertise." League of Wilderness Defenders, 615  
18 F.3d at 1130 (citing Lands Council v. McNair, 537 F.3d 981, 987  
19 (9th Cir. 2008) (en banc). Deference to agency decision-making "is  
20 highest when reviewing an agency's technical analyses and  
21 judgments involving the evaluation of complex scientific data  
22 within the agency's technical expertise." League of Wilderness  
23 Defenders Blue Mountains Biodiversity Project v. Allen, 615 F.3d  
24 1122, 1130 (9th Cir. 2010). "Deference to an agency's technical  
25 expertise and experience is particularly warranted with respect  
26 to questions involving. . . scientific matters." United States  
27 v. Alpine Land & Reservoir Co., 887 F.2d 207, 213 (9th Cir.  
28 1989).

1       **III. Discussion**

2       **A. Likelihood of Success on the Merits**

3               Plaintiffs' Complaint is comprised of two claims that  
4 Defendants violated NEPA: (1) "Failure to Prepare Supplemental  
5 Environmental Analysis" and (2) "Failure to Take a 'Hard Look,'  
6 to Adequately Explain Impacts, To Provide Necessary Information,  
7 and To Ensure Scientific Integrity." (Compl. ¶¶ 37-43.)  
8 Plaintiffs argue either of these claims independently justify an  
9 injunction.

10               **1. Claim 1: Failure to Prepare Supplemental**  
11               **Environmental Analysis**

12               Plaintiffs argue a Supplemental EIS ("SEIS") is  
13 required before the Project proceeds since "the Forest Service  
14 has failed to meaningfully address [] new information in  
15 relationship to the Project's impacts where the new information"  
16 "unequivocally raises substantial questions regarding the Rim  
17 Project's impact on owls." (Mot. 19:12-13; 16:13-15.)

18               Plaintiffs argue the results of the Forest Service's  
19 2014 owl survey "demonstrates widespread occupation of the Rim  
20 fire area by California spotted owls, which was not anticipated  
21 by the Forest Service," and indicates "the burned forest within  
22 the Rim fire area contains adequate amounts of suitable habitat  
23 for continued California spotted owl occupancy." (Mot. 14:21-24;  
24 16:5-8.) Plaintiffs argue the FEIS does "not mention, let alone  
25 analyze, the 2014 Rim fire survey data and thus did not analyze  
26 what the impacts of the Project's logging would mean as to the 39  
27 occupied owl territories. . . ." (Mot. 18:24-19:2; see also 18:5-  
28 11.)



1           The U.S. Forest Service must “prepare supplements  
2 to either draft or final environmental impact statements if there  
3 are significant new circumstances or information relevant to  
4 environmental concerns and bearing on the proposed action or its  
5 impacts.” 40 C.F.R. § 1502.9(c)(1)(ii). “When determining whether  
6 to issue a supplemental EIS, an agency must ‘apply a rule of  
7 reason,’ not supplementing ‘every time new information comes to  
8 light’ but continuing to maintain a ‘hard look’ at the impact of  
9 agency action when the ‘new information is sufficient to show  
10 that the remaining action will affect the quality of the human  
11 environment in a significant manner or to a significant extent  
12 not already considered.’” League of Wilderness Defenders/Blue  
13 Mountains Biodiversity Project v. Connaughton, 752 F.3d 755, 760  
14 (9th Cir. 2014) (citing Marsh v. Ore. Natural Res. Council, 490  
15 U.S. 360, 373-74 (1989)).

16           Agency determinations regarding the necessity of a  
17 supplemental EIS are only to be set aside if arbitrary and  
18 capricious. N. Idaho Community Action Network v. U.S. Dep’t of  
19 Transp., 545 F.3d 1147, 1154-55 (9th Cir. 2008). Where an agency  
20 documents a “reasoned decision” regarding “whether an SEIS is  
21 required,” it withstands scrutiny. Great Old Broads for  
22 Wilderness v. Kimbell, 709 F.3d 836, 855 (9th Cir. 2013); see  
23 also Tri-Valley, 671 F.3d at 1130 (“because the [agency]  
24 determined in its supplemental report that the SA did not show a  
25 ‘seriously different picture of the likely environmental harms  
26 stemming from the proposed project,’ we must defer to the  
27 [agency’s] finding that a supplemental REA was not required”);  
28 cf. Friends of the Clearwater v. Dombeck, 222 F.3d 552, 558 (9th

1 Cir. 2000) (finding the Forest Service failed to comply with its  
2 NEPA obligations where there was "no evidence in the record that,  
3 before this action, the Forest Service ever considered whether  
4 the [new data] were sufficiently significant to require  
5 preparation of an SEIS."). "Whether new information requires  
6 supplemental analysis is a 'classic example of a factual dispute  
7 the resolution of which implicates substantial agency  
8 expertise.'" Tri-Valley, 671 F.3d at 1130 (citing Marsh, 490 U.S.  
9 at 376).

10 Here, Plaintiffs are mistaken in their argument that  
11 the FEIS does "not mention, let alone analyze, the 2014 Rim fire  
12 survey data." (Mot. 18:24-19:2.) The Administrative Record  
13 includes the following information: "PACs . . . were . . .  
14 reestablished based on the 2014 survey results (EIS Chapter  
15 3.15/California Spotted Owl: Affected Environment) [and] were  
16 redrawn to include the best available green habitat around the  
17 detections," (AR B00839) and "the recent spotted owl survey data  
18 . . . is information generated by the Forest Service,  
19 incorporated in the EIS, and shaped the final decision;  
20 therefore, the Forest Service considered this 'new information.'"   
21 AR A00038; see also AR B00713-714; A00027; A00038. The 2014  
22 survey was completed, considered and incorporated into the EIS by  
23 the Forest Service; this information was integrated into the FEIS  
24 and there was no need for the agency to create a SEIS. See  
25 Headwaters, Inc. v. Bureau of Land Mgmt., 914 F.2d 1174, 1178  
26 (9th Cir. 1990) (rejecting argument for SEIS where the "new"  
27 information was "encompassed by the terms of the [original] EIS"  
28 since the agency "specifically averted to the possibility that

1 there might be northern spotted owls in the [area]" and  
2 "discussed the impact of cutting upon the owl habitat, and  
3 adopted various measures recommended in the EIS to mitigate the  
4 impact upon any owls in the area."). The same is true of Bond's  
5 letter interpreting the survey data. AR A00038.

6 Additionally, the Forest Service explained in the ROD  
7 that the 2014 owl survey did not produce significant new  
8 information warranting a SEIS since "both the EIS and this  
9 decision recognize that owls forage in burned forests, and the  
10 EIS analyzes the effects of the various alternatives based on  
11 this understanding; therefore the underlying point raised in the  
12 August 21, 2014 comment letter, that implementing the Rim  
13 Recovery Project may adversely affect spotted owls in the area,  
14 was already addressed in the EIS and factored into this  
15 decision." JA A00038. Neither the 2014 owl survey results nor  
16 Bond's subsequent analysis produced data rising to the level of  
17 significant new information. The Forest Service's reasoned  
18 evaluation of the 2014 owl survey data is sufficient.

19 **2. Claim 2: Failure to Take a Hard Look, To Adequately**  
20 **Explain Impacts, To Provide Necessary Information,**  
21 **And To Ensure Scientific Integrity**

22 Defendants argue the Forreast Service "carefully  
23 considered the science proffered by Plaintiffs and simply reached  
24 different conclusion." Federal Defs. Opp'n to Pls. Appl. For TRO,  
25 17:1-3, ECF No. 44.) Plaintiffs contend the Forest Service's  
26 argument is insufficient to satisfy the Forest Service's NEPA  
27 obligations since "justifications for not incorporating. . .  
28 information into [an] assessment of impacts must be reasonable

1 and demonstrate a rational connection between the facts found and  
2 the decision made," which the Forest Service did not do. (Mot.  
3 10:5-16.) Plaintiffs specifically argue the Forest Service  
4 "failed to . . . acknowledge the importance of the 1.5 km radius  
5 surrounding a known owl site in meeting the foraging requirements  
6 of resident owls[,]" failed to "disclose to the public the . . .  
7 occupancy rate of resident spotted owls in the project area. . .  
8 [and] the location of the 30 owl territories which were  
9 discovered"; and "misrepresented the body of science [submitted]  
10 regarding owls and fire" by mischaracterizing or refusing to rely  
11 on some of the scientific evidence. (Mot. 10:20-11:2.)

12 Plaintiffs separately argue the Forest Service failed  
13 to comply with its NEPA obligations when it "concluded that the  
14 Rim Fire logging project would harm individual members of a  
15 Sensitive Species. . . but would not result in a trend toward  
16 federal listing under the Endangered Species Act" without "first  
17 determining whether the project would push the species below a  
18 critical population viability threshold." (Mot. 13:19-23.)

19 **i. Failed to Acknowledge or Disclose Important**  
20 **Information**

21 Plaintiffs also argue the Forest Service "failed to . . .  
22 . acknowledge the importance of the 1.5 km radius surrounding a  
23 known owl site in meeting the foraging requirements of resident  
24 owls" and failed to "disclose to the public the . . . occupancy  
25 rate of resident spotted owls in the project area. . . [and] the  
26 location of the 30 owl territories which were discovered" (Mot.  
27 10:20-25.)

28 A court "may not 'flyspeck' and EIS . . . ." Half Moon

1 Bay Fishermans' Mktg. Ass'n v. Carlucci, 857 F.2d 505, 508 (9th  
2 Cir. 1988). Instead, it "make[s] a pragmatic judgment about  
3 whether the EIS's form, content and preparation foster both  
4 informed decision-making and informed public participation." Id.

5 The Forest Service adequately addressed in the  
6 Administrative Record comments and concerns regarding the 1.5 km  
7 radius surrounding a known owl site. AR B00001; B00827-830;  
8 B00836-837; E00973. Additionally, Plaintiffs fail to show how the  
9 failure to "disclose to the public the . . . occupancy rate of  
10 resident spotted owls in the project area" and "the location of  
11 the 39 owl territories which were discovered in the Rim Fire area  
12 and their special relationship to the planned logging," undermine  
13 the comprehensiveness of the report. The report clearly and  
14 repeatedly acknowledges the potential for the Project to impact  
15 the California spotted owl habitat. AR A00026-027; A00032-33; B  
16 00001-002; B00109; B00130; B00165; B00445-461; B00741-742;  
17 B00824; B00839; B00842-844; C00336-360.

18 **ii. Misrepresented the Body of Science Regarding Owls**  
19 **and Fire**

20 Plaintiffs argue the Forest Service also  
21 "misrepresented the body of science regarding owls and fire" by  
22 mischaracterizing or refusing to rely some of the scientific  
23 evidence submitted. (Mot. 11:1-2.) Plaintiffs contend the  
24 agency's decision does not amount to a "battle of the experts"  
25 since "aside from ignoring or improperly dismissing the entire  
26 body of science related to owls use of burned areas . . . the  
27 Forest Service has no science of its own related to the  
28 relationship of California spotted owls and burned forests . . .

1 ." (Mot. 12:24-28.) Plaintiffs challenge the Forest Service's  
2 comments critical of Clark (2007), Lee et al. (2012), Clark et  
3 al. (2013), DellaSala et al. (2010) and Monica Bond's August 21,  
4 2014 letter to the Forest Service. (Mot. 11:2-12:13.)

5           The Ninth Circuit consistently holds "when specialists  
6 express conflicting views, an agency must have discretion to rely  
7 on the reasonable opinions of its own qualified experts even if,  
8 as an original matter, a court might find contrary views more  
9 persuasive. Price Rd. Neighborhood Ass'n, Inc. v. U.S. Dep't of  
10 Transp., 113 F.3d 1505, 1511 (9th Cir. 1997) (quoting Greenpeace  
11 Action v. Franklin, 14 F.3d 1324, 1332 (9th Cir. 1992)); Native  
12 Ecosystems Council v. U.S. Forest Service, 428 F.3d 1233, 1244  
13 (9th Cir. 2005); Wetlands Action Network v. U.S. Army Corps of  
14 Eng'rs, 222 F.3d 1105, 1120-21 (9th Cir. 2000), abrogated on  
15 other grounds by Wilderness Soc'y v. U.S. Forest Service, 630  
16 F.3d 1173 (9th Cir. 2011).

17           Here, Plaintiffs misstate the Forest Service's reliance  
18 on expert data since the Forest Service does not ignore or  
19 dismiss the entire body of science on the subject. The  
20 Administrative Record shows the agency's careful consideration of  
21 and reliance on recent expert publications related to the  
22 California spotted owl. AR B00445 (citing "Keane 2014, Conner et  
23 al. 2013, Tempel and Gutiérrez 2013, and Tempel et al. 2014" as  
24 well as the Forest Service's "own recent estimates."). The Forest  
25 Service acknowledged the findings of Clark, Lee, Della Sala and  
26 Bond referenced by Plaintiffs and provided articulate and  
27 reasoned rationales for the weight they assigned to each report's  
28 conclusions. AR B00001; B00446; B00451 B00741-742; B00829-830;

1 B00836-838; A00038. Plaintiffs' arguments are insufficient show  
2 the agency's action fell outside the bounds of discretion  
3 afforded in 5 U.S.C. § 706(2)(A).

4           Regarding Clark (2007), which Plaintiffs argue the  
5 Forest Service mischaracterizes: although Plaintiffs' have a  
6 different interpretation than the Forest Service, the Clark  
7 (2007) report found "[o]wls residing inside the fire used all the  
8 available habitat including moderate and high severity burns  
9 (Figure 6.2), although habitat use was dominated by low severity  
10 burns in NRF habitat," which is consistent with the Forest  
11 Service's characterization of the report. AR K04467 (emphasis  
12 added); B00446. Given the high degree of deference afforded to an  
13 agency concerning matters within its expertise, Plaintiffs have  
14 not demonstrated either the likelihood of success on the merits  
15 or raised "serious questions" going to the merits.

16           **iii. Failed to Make a Proper Determination as to**  
17           **Whether the Rim Fire Logging Project Would Push**  
18           **Spotted Owls Below a Critical Viability Threshold**

19           Plaintiffs also argue the FEIS departs from NEPA  
20 requirements since "Defendants concluded that the Rim Fire  
21 logging project would harm individual members of a Sensitive  
22 Species. . . but would not result in a trend toward federal  
23 listing under the Endangered Species Act; yet the agency did so  
24 without first determining whether the project would push the  
25 species below a critical population viability threshold." (Mot.  
26 13:19-23.)

27           An agency EIS stating the proposed project "would have  
28 a negative impact" on a sensitive species "but would not result

1 in a trend toward federal listing” without providing a meaningful  
2 explanation, is insufficient evidence the agency took a “hard  
3 look.” Earth Island Inst., 442 F.3d at 1172 abrogated on other  
4 grounds by Winters, 555 U.S. at 7.

5 Plaintiffs cite as evidence of the Forest Service’s  
6 duty to determine whether the Project “would push spotted owls  
7 below a critical viability threshold,” the Ninth Circuit’s  
8 decision in Ecology Ctr. v. Austin, 430 F.3d 1057, 1067-68 (9th  
9 Cir. 2005). (Mot. 13:12-18.)

10 In Austin, the parties agreed “prior to [the fires at  
11 issue] there was a critical shortage of [the bird’s] habitat” and  
12 the agency “considered the [birds] . . . to be ‘at extreme  
13 risk.’” 430 F.3d at 1066. The agency determined the project “may  
14 contribute to a trend towards federal listing or cause a loss of  
15 viability to the population or species.” Id. at 1066. Yet, the  
16 EIS “state[d] without meaningful explanation—that even though  
17 [the project] may negatively impact individual [birds], it will  
18 not likely result in a trend towards federal listing.’’ Id. at  
19 1067. Since further explanation was not provided in Austin, the  
20 Ninth Circuit stated: the EIS “fail[ed] to adequately explain the  
21 basis for the Forest Service’s conclusion,” and therefore the  
22 court “cannot even be certain that the [agency] determined and  
23 considered” all relevant factors. Id. at 1067.

24 Here, the situation is different since it has not been  
25 shown that the Forest Service previously determined the logging  
26 involved may contribute to a trend towards federal listing or  
27 cause a loss of viability to the California spotted owl  
28 population. Additionally, the Forest Service did more than state



1 without meaningful explanation that even though the Project may  
2 negatively impact individual birds, it will not likely result in  
3 a trend towards federal listing. AR B00460-461. The Forest  
4 Service recognized the "[p]roposed activities may affect spotted  
5 owls" since the land at issue is "still [a] viable and important  
6 owl habitat" and "[b]ecause the fire burned through 46 California  
7 spotted owl PACs, as well as thousands of acres of other critical  
8 habitat, retaining old forest structures (large snags and downed  
9 logs) is important at this time since future recruitment of these  
10 old forest features is not expected to occur until decades to  
11 centuries into the future." AR B00104; B00120; B00130.

12           The Forest Service demonstrated its appreciation of the  
13 Project's impact on the California spotted owl by identifying the  
14 indicators it used to "provide a relative measure of the direct  
15 and indirect effects [of the Project] to the spotted owl and to  
16 determine how well project alternatives comply with the Forest  
17 Plan Direction and species conservation strategies." AR B00452.  
18 Then, for each of the four proposed alternatives, the Forest  
19 Service carefully considered each indicator. AR B00453-458. After  
20 analyzing the data, the Forest Service gave a recommendation that  
21 each of the four alternatives "may affect individuals but is not  
22 likely to result in a trend toward Federal listing or loss of  
23 viability for the California spotted owl." AR B00460-461. Under  
24 each determination the Forest Service directly and methodically  
25 disclosed the rationale for its conclusion. AR B00460-461.

26           This review satisfies the Forest Service's obligations  
27 to provide a meaningful explanation in support of its decision  
28 and Plaintiffs fail to meet their burden of showing to show the

1 agency omitted a meaningful explanation for its decision or that  
2 the decision was "arbitrary, capricious, an abuse of discretion,  
3 or otherwise not in accordance with law."

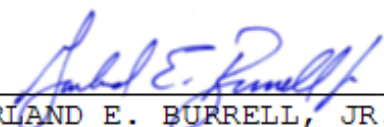
4 **B. Irreparable Harm / Balance of the Equities / Public Interest**

5 Plaintiffs fail to either show a likelihood of success  
6 or raise a serious question on the merits regarding any of their  
7 claims. Therefore, no discussion of the remaining three Winter  
8 factors is required. Ass'n des Eleveurs de Canards et d'Oies du  
9 Quebec v. Harris, 729 F.3d 937, 944 (9th Cir. 2013) ("When "a  
10 plaintiff has failed to show the likelihood of success on the  
11 merits," the court "'need not consider the remaining three Winter  
12 elements.'" (citing DISH Network Corp., v. F.C.C., 653 F.3d 771,  
13 776-77 (9th Cir. 2011); Haskell v. Harris, 669 F.3d 1040, 1053  
14 (9th Cir. 2012); Advertise.com, Inc. v. AOL Advertising, Inc.,  
15 616 F.3d 974, 982 (9th Cir. 2010); Doe v. Reed, 586 F.3d 681 n.14  
16 (9th Cir. 2009) aff'd on other grounds, 561 U.S. 186 (2010).

17 **III. CONCLUSION**

18 For the reasons stated above, Plaintiffs' motion for a  
19 temporary restraining order is DENIED.

20 Dated: September 16, 2014

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23 \_\_\_\_\_  
24 GARIAND E. BURRELL, JR.  
25 Senior United States District Judge  
26  
27  
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