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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

No. 1:14-cv-1382-GEB-GSA

**ORDER DENYING PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION AND
MOTION TO SUPPLEMENT THE
ADMINISTRATIVE RECORD**

Plaintiffs Center for Biological Diversity, Earth
Island Institute, and California Chapparral Institute
(collectively "Plaintiffs") move for a preliminary injunction
enjoining logging in a portion of what is called the Rim Fire
Recovery Project ("the Project"); specifically Plaintiffs seek to
prevent logging within 1.5 km of eight owl territory centers that
are part of the Nevergreen, Double Fork, and Triple A timber
sales in the Rim Fire area of the Stanislaus National Forest.
(Pls.' Mot. Prelim. Inj. "Mot." 2:4-3:13, ECF No. 52.) Plaintiffs
also move for an order requiring that three declarations
supplement the administrative record ("AR"). (Mot. Supplement AR

1 ("Mot. Supp." ECF No. 32.) Defendants Skalski and the United
2 States Forest Service ("Forest Service") (collectively
3 "Defendants") oppose both motions. (Opp'n Mot. Prelim. Inj., ECF.
4 No.61; Fed. Defs. Opp'n Mot. Supp. AR, ECF No. 49.)

5 I. BACKGROUND

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

7 The motions concern the following background
8 information in the administrative record. The Rim Fire began in
9 August 2013 in the Stanislaus National Forest near Yosemite
10 National Park. AR A00011. The fire burned for several weeks and
11 was "the third largest wildfire in California history and the
12 largest wildfire in the recorded history of the Sierra Nevada."
13 AR A00011, B00111. It burned more than 150,000 acres of National
14 Forest and "resulted in areas of high, moderate and low
15 vegetation burn severity." AR B00112-14; see also A00015.

16 The Forest Service states its proposed Rim Fire
17 Recovery Project is its response to the fire and the fire's
18 impact on Stanislaus National Forest. The Forest Service further
19 states it designed the Project to "help[] restore the land
20 impacted by the Rim Fire. . . while simultaneously providing for
21 public safety, ecological integrity, scientific research, and
22 socio-economic benefits." AR A00009. The "proposed action . . .
23 includes: salvage of dead trees[and] removal of hazard trees
24 along roads open to the public and roads used to access and
25 implement proposed treatments." AR B00121.

26 The Forest Service's "public outreach began while the
27 fire was still smoldering and continued up until the point of
28 the" final decision to implement the Project. AR A00035.

1 In connection with the Project, the Forest Service,
2 published a Notice of Intent on December 6, 2013 and sought
3 "information, comments and assistance from federal, state and
4 local agencies and individuals or organizations . . . affected by
5 the proposed action." AR B00121, B00127. "Interested parties
6 submitted 4,200 total letters during the comment period including
7 174 unique individual letters and 4,026 form letters." AR B00128.

8 The 30-day public comment period on the Project DEIS
9 [Draft Environmental Impact Statement ("EIS")] began on May 16,
10 2014 with publication of the Notice of Availability in the
11 Federal Register and during this period the Forest Service
12 received 5,589 comment letters on the DEIS including "154 unique
13 individual letters and 5,435 form letters from 8 different
14 organized groups." AR B00129.

15 The Forest Service organized "public open houses,"
16 "hosted Rim Fire Technical Workshops" and "organized 24 tours
17 into the Rim Fire area" for government officials and interested
18 parties" AR B00128. The Forest Service solicited public comments
19 by "produc[ing] materials for social media outlets" and
20 "distribut[ing] some 60,000 newspaper inserts through the region
21 explaining many of the proposed activities." AR B00128-129.
22 "Responses to public comments were finalized during the
23 development of the FEIS [Final Environmental Impact Statement]"
24 and Record of Decision ("ROD"). AR B00129. The FEIS and ROD were
25 published in August 2014. Of the four alternative courses of
26 action considered for the Project, the Forest Service ultimately
27 "selected Modified Alternative 4." AR A00016.

28 Modified Alternative 4 "approves salvage logging and

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

11 **California Spotted Owl:**

12 "California spotted owls . . . have been at the
13 forefront of Sierra Nevada management and conservation debates
14 for 25 years" AR K12132. The owls are "a territorial
15 species with each pair defending an exclusive territory." AR
16 K12139. The Forest Service considers California spotted owls a
17 "sensitive species" as they "have several characteristics that
18 are broadly associated with increased species vulnerability." AR
19 B00432, K12133. "The primary driver for [California spotted owl]
20 nest habitat loss is . . . wildfire." AR B00448. The Rim fire
21 "destroyed . . . one quarter of the areas where spotted
22 owls . . . roost and nest" in the Stanislaus National Forest.
23 AR A00013, A00025.

24 "The most recent estimate of population size for
25 California spotted owls in the Sierra Nevada reported 1,895 owl
26 sites, with 1,299 sites on National Forest System lands." AR
27 B00445.

28 Their nests are typically located in areas with "70

1 percent or greater canopy cover," however the owls "use a broader
2 range of vegetation conditions for foraging than they do for
3 nesting . . . include[ing] post-fire habitats" like the high-
4 severity burn areas found in the Rim Fire area. AR B00445; see
5 also B00003, K12136, K45474, K43093. "Recent research indicates
6 that prey species [for the California spotted owl such as gophers
7 and flying squirrels] may be abundant and available in the post-
8 fire environment." AR B00450.

9 "[A]pproximately 6,500 acres of salvage, and 8,500
10 acres of roadside logging, [as part of the Project] are slated to
11 occur within 1.5 km of [California spotted] owl sites" in the
12 Stanislaus National forest. AR B00003.

13 The Forest Service addressed the likelihood that the
14 Project would have a negative impact on individual spotted-owls
15 in its ROD. Their discussion included the following:

16 In the short term, salvage logging and fuel
17 reduction actions will undoubtedly affect
18 individual animals and patches of habitat.
19 However, in the long term, failing to reduce
20 the extreme fuel load on the landscape
21 increases the likelihood of having another
22 extreme fire similar to the Rim Fire. The Rim
23 Fire burned through forty six California
24 spotted owl Protected Activity Centers (PACs)
25 . . . destroying some of these Sensitive
26 species' important old-forest habitat. And,
27 this is just a small snapshot of the wildlife
28 impacts from the Rim Fire. . . . So, being
faced with the choice of causing minimal
short-term adverse effects to wildlife or
increasing the risk of serious long-term
impacts to wildlife, [the Forest Service]
opted for the former, with the strong
conviction that doing so is better for
wildlife.

AR A00025.

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1 **II. MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD**

2 Plaintiffs argue that a declaration from each of the
3 following named individuals should supplement the administrative
4 record because supplementation is necessary (1) for determining
5 whether the Forest Service considered all relevant factors and
6 explained its decision and (2) for the purpose of explaining
7 technical terms or complex subject matter (Mot. to Supp. 4:8-
8 10)¹: Monica Bond (ECF No. 22-15), Derek Lee (ECF No. 22-16), and
9 Dominick DellaSala (ECF No. 22-17).

10 Each declarant discusses his or her qualifications and
11 experience in wildlife biology, interprets his or her own
12 research regarding California spotted owl populations and
13 habitat, discusses other research in the field, and addresses
14 conclusions reached by the Forest Service in the FEIS and the
15 logic underpinning those conclusions.

16 National Environmental Policy Act ("NEPA") claims are
17 reviewed under the judicial review provision of the
18 Administrative Procedure Act, which requires consideration of
19 "the whole record or those parts of it cited by a party."
20 5 U.S.C. § 706. "[T]he focal point for judicial review should be
21 the administrative record already in existence, not some new
22 record made initially in the reviewing court." Fla. Power & Light
23 Co. v. Lorin, 470 U.S. 729, 743 (1985).

24 The Ninth Circuit recognizes four exceptions where
25

26 ¹ Defendants submitted their own declarations arguing "if the Court
27 does consider [Plaintiffs'] declarations, it should review them alongside the
28 accompanying Declarations of [Forest Service employees] Marcie Baumbach and
Patricia Manley." (Fed. Defs. Opp'n Pls. Mot. Prelim. Inj. 2:18-21, ECF No.
61.) Since Plaintiffs' motion to supplement the administrative record is
denied, the government's motion is denied as moot.

1 supplementing an administrative record may be justified: "Courts
2 may review . . . extra-record materials [like the Bond, Lee and
3 DellaSala declarations] only when: (1) it is necessary to
4 determine whether the agency has considered all relevant factors
5 and explained its decision; (2) the agency has relied on
6 documents not in the record, (3) supplementing the record is
7 necessary to explain technical terms or complex subject matter,
8 or (4) plaintiffs make a showing of bad faith." City of Las Vegas
9 v. F.A.A., 570 F.3d 1109, 1116 (9th Cir. 2009). "Though widely
10 accepted, these exceptions are narrowly construed and applied" to
11 ensure they do not undermine the general rule limiting review to
12 the administrative record. The Lands Council v. McNair, 537 F.3d
13 981, 1030 (9th Cir. 2008).

14 Plaintiffs contend the Bond, Lee and DellaSala
15 declarations are admissible under the first and third Lands
16 Council exceptions. (Dkt. 61, 2:18-21.)

17 **A. Necessary to Determine Whether the Agency has**
18 **Considered all the Relevant Factors and Explained its**
19 **Decision**

20 The "relevant factors" exception only applies where
21 supplementing the record is necessary. Where "[t]he record
22 contains sufficient information to explain how the [agency used
23 the information before it] and why it reached its decision," the
24 exception does not apply. Cook Inletkeeper v. U.S. EPA, 400 F.
25 App'x 239, 240-41 (9th Cir. 2010).

26 A court should supplement the record when the agency
27 "fails[s] to consider a general subject matter . . . , not when
28 specific hypotheses and/or conclusions are omitted from

1 consideration. To hold otherwise would allow Plaintiffs to drive
2 a truck through what is supposed to be a narrow exception to the
3 record review rule." In re Delta Smelt Consol. Cases, 1:09-CV-
4 1053 OWW DLB, 2010 WL 2520946, at *6 (E.D. Cal. June 21, 2010).
5 Extra-record materials are not necessary where "the facts and
6 documents referenced in the [extra-record material] are already
7 in the administrative record." Quechan Tribe of the Ft. Yuma
8 Indian Reservation v. U.S. Dep't of the Interior, 12CV1167-GPC
9 PCL, 2012 WL 5512383, at *2 (S.D. Cal. Nov. 14, 2012).

10 Here, the Bond, Lee and DellaSala declarations are not
11 necessary to determine whether the Forest Service considered all
12 the relevant factors and explained its decision since Plaintiffs
13 have not identified any research they allege the Forest Service
14 failed to consider that is not itself contained in the
15 administrative record. Where the studies themselves are in the
16 record, it is not necessary to rely on external declarations when
17 determining whether the Forest Service properly considered the
18 information. Therefore, this portion of the Plaintiffs' motion to
19 supplement the administrative record is denied.

20 **B. Necessary to Explain Technical Terms or Complex Subject**
21 **Matter**

22 Declarations may be admissible where they "aid a
23 layperson's understanding of the basic concepts involved" in the
24 motion, WildEarth Guardians v. Salazar, CV-09-00574PHXFJM, 2009
25 WL 4270039 (D. Ariz. Nov. 25, 2009), and where the proponent
26 identifies which issues "can [only] be explained by supplemental
27 evidence." U.S. v. Iron Mountain Mines, Inc., 987 F. Supp. 1250,
28 1262 (E.D. Cal. 1997). Supplementation is inappropriate if

1 offered to "suggest that [the federal agency] did not give [some
2 information] sufficient weight." In re Delta Smelt Consol.
3 Cases, 2010 WL 2520946, at *6.

4 Here, Plaintiffs fail to identify which basic concepts
5 or issues relevant to their motion cannot be understood through
6 consideration of the administrative record alone. Rather than
7 providing context, the declarations represent an attack on the
8 Forest Service's conclusions. See Bond Decl. ¶ 4 ("I am
9 presenting this declaration to . . . assist the court by
10 illuminating where the Forest Service's ROD/FEIS fail to consider
11 factors relevant to the impacts this project will likely have on
12 the California spotted owl.") ¶16 ("When the Forest Service
13 states that not all California spotted owls foraging habitat in
14 the Rim Fire area will be logged, this is meaningless for two
15 reasons"), ¶18 ("At every turn, the Forest Service has
16 consistently misrepresented, minimized or improperly ignored the
17 evidence submitted by myself"); Lee Decl. ¶ 14 ("The
18 Forest Service notes. . . several measures that they characterize
19 as mitigation for California spotted owls. However, none of these
20 are meaningful").

21 Plaintiffs have not shown that any referenced
22 declaration is necessary for understanding any complex or
23 technical matter. Therefore, Plaintiffs' motion to supplement
24 the administrative record is denied.

25 III. MOTION FOR PRELIMINARY INJUNCTION

26 A. Legal Standard for Preliminary Injunction

27 A preliminary injunction is "an extraordinary remedy
28 that may only be awarded upon a clear showing that the plaintiff

1 is entitled to such relief.” Winter v. Natural Res. Def. Council,
2 Inc., 555 U.S. 7, 22 (2008).

3 A plaintiff seeking a preliminary injunction
4 must establish [1] that he is likely to
5 succeed on the merits, [2] that he is likely
6 to suffer irreparable harm in the absence of
preliminary relief, [3] that the balance of
equities tips in his favor, and [4] that an
injunction is in the public interest.

7 Id. at 20.

8 Further, the Ninth Circuit’s “‘serious questions’ test”
9 may be “applied as part of the four-element Winter test.”
10 Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131-32
11 (9th Cir. 2011). “[I]f a plaintiff can only show that there are
12 serious questions going to the merits . . . then a preliminary
13 injunction may still issue if the ‘balance of the hardships tips
14 sharply in plaintiffs favor’ and the other two Winter factors are
15 satisfied.” Shell Offshore Inc. v. Greenpeace Inc., 709 F.3d
16 1281, 1291 (9th Cir. 2013) (quoting Cottrell, 632 F.3d at 1135.).
17 Where a plaintiff fails to demonstrate even serious questions
18 going to the merits of his or her claim, the court need not
19 consider the remaining Winter factors. Association des Eleveurs
20 de Canards et d’Oies du Quebec v. Harris, 729 F.3d 937, 944 (9th
21 Cir. 2013).

22 **B. Likelihood of Success on the Merits**

23 Plaintiffs allege two NEPA claims: (1) Failure to
24 Prepare Supplemental Environmental Analysis and (2) Failure to
25 Take a “Hard Look,” to Adequately Explain Impacts, To Provide
26 Necessary Information, and To Ensure Scientific Integrity.
27 (Compl. ¶¶ 37-43, ECF No. 1.) Plaintiffs argue either claim
28 justifies an injunction.

1 Plaintiffs' underlying NEPA claims are reviewed under
2 the Administrative Procedures Act ("APA"), which allows the court
3 to set aside an agency action only where the action was
4 "arbitrary, capricious, an abuse of discretion, or otherwise not
5 in accordance with the law." 5 U.S.C. § 706(2)(A). "Review under
6 this standard is narrow, and the reviewing court may not
7 substitute its judgment for that of the agency." Earth Island
8 Inst. v. U.S. Forest Service ("Earth Island II"), 442 F.3d 1147,
9 1156 (9th Cir. 2006) (citation omitted) abrogated on other
10 grounds by Winter, 555 U.S. at 7.

11 However, when reviewing the "predominantly legal
12 question[]" of whether new information is "a circumstance
13 requiring public proceedings and supplemental EISs under NEPA. .
14 . the applicable standard of review . . . is reasonableness."
15 Alaska Wilderness Recreation & Tourism Ass'n. v Morrison, 67 F.3d
16 723, 727 (9th Cir. 1995).

17 **1. Failure to Prepare a Supplemental Environmental**
18 **Impact Statement (SEIS)**

19 Plaintiffs argue NEPA requires the Forest Service to
20 prepare a SEIS before it proceeds with the Project since "the
21 Forest Service has failed to meaningfully address [the Forest
22 Service's 2014 spotted owl survey data] in relationship to the
23 Project's impacts" on spotted owl habitat, notwithstanding that
24 the survey data "unequivocally raises substantial questions
25 regarding the Rim Project's impact on owls." (Mot. ISO Pls. Req.
26 TRO "Mot. TRO" 19:12-13; 16:13-15, ECF No. 22.) Plaintiffs argue
27 since the FEIS and ROD lack a discussion of "what surveys were
28 done, where they were done, what the outcome was for all of the

1 owl sites (not just a minor subset), or what the results mean for
2 owls on the Rim fire landscape, even though the information was
3 available to the Forest Service before they issued the Final EIS
4 for this project or signed the Record of Decision," NEPA requires
5 the Forest Service to prepare a SEIS. (Reply Mem. ISO Pls. Mot.
6 Prelim. Inj. "Reply" 2:20-25, ECF No. 63.)

7 Plaintiffs contend the Forest Service's references to
8 the 2014 survey in the FEIS and ROD are insufficient because they
9 "do not actually mention the entirety of the survey results[,]
10 provide even the most basic information necessary for context" or
11 "assess[] how much salvage logging will occur within . . . owl
12 territories" and "[a]s a result, the public has no meaningful
13 information with which to understand the very basics about actual
14 owl presence in the Rim Fire area." (Reply 3:4-6, 12-16, 4:7-9.)
15 Plaintiffs consider the ROD's statement that "both the EIS and
16 this [ROD] recognize that owls forage in burned forests, and the
17 EIS analyzes the effects of the various alternatives based on
18 that understanding," "hollow" "because when. . . site-specific
19 data exists, the only appropriate way to analyze the effects of
20 the proposed logging on owl foraging habitat is to examine the
21 logging units in relationship to where the owls actually are."
22 (Reply 4:12-16.) Plaintiffs' argue the survey results call out
23 for a SEIS even more strongly when viewed in connection with
24 "several other factors," related to spotted owls, including the
25 declining status of the owls in area where logging occurs, and
26 the area's designation as an "Area of Concern" for the California
27 spotted owl. (Reply 6:3-7.) In discussing the need for
28 supplemental analysis in light of new information, the Supreme

1 Court has held:

2 It would be incongruous with [NEPA's]
3 approach to environmental protection, and
4 with the Act's manifest concern with
5 preventing uninformed action, for blinders to
6 adverse environmental effects, once
7 unequivocally removed [through the notice and
comment procedure], to be restored prior to
the completion of agency action simply
because the relevant proposal has received
initial approval.

8 Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 371 (1989).

9 However, the Supreme Court also stated in Marsh "an agency need
10 not supplement an EIS every time new information comes to light
11 after the EIS is finalized. To require otherwise would render
12 agency decision-making intractable . . ." Id. at 373. Instead,
13 NEPA requires the Forest Service to create a SEIS if "[t]here are
14 significant new circumstances or information relevant to
15 environmental concerns and bearing on the proposed action or its
16 impact." 40 C.F.R. § 1502.9(c)(1)(ii) (emphasis added).

17 Where an agency "provide[s] a reasoned evaluation . . .
18 as to why a [SEIS [is] not necessary," it withstands scrutiny.
19 Neighbors of Cuddy Mountain v. U.S. Forest Serv., 141 F.3d 1177
20 (9th Cir. 1998).

21 Here, Plaintiffs have not raised serious questions
22 concerning their argument that the 2014 survey data requires the
23 Forest Service to prepare a SEIS. The Forest Service is only
24 required to create a SEIS in light of the development of
25 significant new information. 40 C.F.R. § 1502.9(c)(1)(ii).
26 Plaintiffs cite no binding legal authority supporting their
27 argument that "where, as here, site-specific data exists, the
28 only appropriate way to analyze the effects of the proposed

1 logging on owl foraging habitat is to examine the logging units
2 in relationship to where the owls actually are." (Reply 4:14-
3 16.).

4 The Forest Service did not ignore the 2014 survey data.
5 The agency reestablished six Protected Activity Centers ("PACs")
6 in the forest based on the survey results. AR A0025, A0027,
7 A00038, B00125, B00829. The decision to incorporate the results
8 of the survey into the Project is evidence the Forest Service
9 reviewed and understood the data in context before it ultimately
10 determined that the survey was not significant new information.
11 The Forest Service explained its reasoning in the administrative
12 record where it responded to Bond's August 21, 2014 letter
13 concerning the 2014 survey data as follows:

14 Both the EIS and [the ROD] recognize that
15 owls forage in burned forests, and the EIS
16 analyzes the effects of the various
17 alternatives based on this understanding;
18 therefore, the underlying point raised in
19 [Bond's letter], that implementing the
20 [Project] may adversely affect spotted owls
21 in the area, was already addressed in the EIS
22 and factored into this decision.

19 AR A00038.

20 Although the Forest Service's analysis of the survey data is
21 different from Plaintiffs' analysis, what the Forest Service
22 states about the survey data is reasonable and satisfies the
23 relevant standard of review. "The mere presence of expert
24 disagreement does not violate NEPA because 'experts in every
25 scientific field routinely disagree.'" Sierra Forest Legacy v.
26 Sherman, 646 F.3d 1161, 1182 (9th Cir. 2011) (citing Lands
27 Council, 537 F.3d at 1101)).

28 Additionally, even though the 2014 survey data was not

1 significant enough to warrant an SEIS, the Forest Service did not
2 ignore the survey. The agency reestablished six Protected
3 Activity Centers ("PACs") in the forest based on the survey
4 results. AR A0025, A0027, A00038, B00125, B00829. The decision to
5 incorporate the results of the survey into the Project is
6 evidence the Forest Service reviewed and understood the data in
7 context before determining the results were not significant new
8 information.

9 Therefore, Plaintiffs' motion for a preliminary
10 injunction based on the Forest Service's failure to conduct a
11 SEIS is denied.

12 **2. "Hard Look"**

13 Plaintiffs argue the Forest Service violated its NEPA
14 obligations by failing to take a "hard look" at the comments and
15 evidence submitted during the review period. Specifically,
16 Plaintiffs argue the Forest Service's discussion of several
17 studies concerning the California spotted owl's relationship with
18 burned forest were either misinterpreted or ignored for arbitrary
19 and capricious reasons and that the Forest Service failed to
20 adequately justify its determination that while the Project would
21 harm individual spotted owls, it would not result in a trend
22 toward federal listing under the Endangered Species Act.

23 **a. Failure to Acknowledge or Disclose Important** 24 **Information and Misrepresentation of the** 25 **Relevant Science**

26 Plaintiffs argue the Forest Service did not assess the
27 Project's impact "on resident California spotted owls based upon
28 the findings of the scientific" evidence before them since the

1 agency used arbitrary and capricious reasons to disregard that
2 evidence and the Forest Service's reference to the studies at
3 issue "do[es] not represent an incorporation of the information
4 on adverse effects of post-fire logging into the impact
5 analysis." (Reply 7:5-8, 8:1-2) (emphasis omitted). They
6 challenge the Forest Service's comments critical of Clark (2007),
7 Lee et al. (2012), Clark et al. (2013), DellaSala et al. (2010)
8 and Monica Bond's August 21, 2014 letter to the Forest Service.
9 (Mot. 11:2-12:13.)

10 Plaintiffs also contend that the passages in the
11 administrative record the Court used in support of its order
12 denying Plaintiffs' temporary restraining order on this point
13 show the Forest Service relying on "science which has studied the
14 spotted owl's relationship with unburned forest, while
15 systematically dismissing [on arbitrary and capricious grounds] .
16 . . the main body of science which has investigated how owls use
17 burned forests and the effects of logging high- and moderate-
18 intensity burned areas within occupied owl territories." (Reply.
19 7:11-19) (emphasis omitted).

20 Plaintiffs argue that "nowhere in any of [the pages
21 where the Forest Service references the Project's impact on
22 California spotted owl habitat] can the reader find an analysis
23 of the effects of post-fire logging within 1.5 km of the 39
24 spotted owl sites found to be occupied in 2014 in the Rim fire,
25 on the occupancy of those sites, based upon the actual physical
26 locations chosen by the owls themselves in 2014 relative to
27 logging units." (Reply 8:24-9:1.)

28 Plaintiffs also take issue with the Forest Service's

1 characterization of Clark (2007) arguing that although the Forest
2 Service claims the study "found that high-intensity fire areas in
3 old/mature forest are 'poor habitat for spotted owls' because the
4 level of use was relatively 'low,'" the study actually
5 "indicat[es] that [high-intensity fire areas in old/mature
6 forest] is high quality habitat, under the most basic scientific
7 principles of wildlife biology." (Reply 9:14-21.)

8 Plaintiffs contend their claim does not amount to an
9 impermissible "battle of the experts" between the Forest Service
10 and the Bond, Clark, Lee and DellaSala studies because "there are
11 no 'competing scientific analyses' here to weigh. . . ." (Reply
12 10:12-13.)

13 "NEPA requires not that an agency engage in the most
14 exhaustive environmental analysis theoretically possible, but
15 that it take a 'hard look' at the relevant factors." N.W. Env'tl
16 Advocates v. Nat'l Marine Fisheries Serv., 460 F.3d 1125, 1139
17 (9th Cir. 2006). A "hard look" "includes 'considering all
18 foreseeable direct and indirect impacts. Furthermore, a 'hard
19 look' should involve a discussion of adverse impacts that does
20 not improperly minimize negative side effects.'" League of
21 Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S.
22 Forest Serv., 689 F.3d 1060, 1075 (9th Cir. 2012) (citing N.
23 Alaska Env'tl. Ctr. v. Kempthorne, 457 F.3d 969, 975 (9th Cir.
24 2006)).

25 The standard of review under § 706 assesses "whether an
26 EIS contains a reasonably thorough discussion of the significant
27 aspects of the probable environmental consequences" of the
28 action. Churchill Cnty. v. Norton, 276 F.3d 1060, 1071 (9th Cir.

1 2001). An agency action satisfies its obligations under §706 when
2 its conclusions are "reasonably justified. . . based upon record
3 evidence and additional analysis of site-specific factors." Tri-
4 Valley CAREs v. U.S. Dep't of Energy, 671 F.3d 1113, 1126 (9th
5 Cir. 2012).

6 "When specialists express conflicting views, an agency
7 must have discretion to rely on the reasonable opinions of its
8 own qualified experts even if, as an original matter, a court
9 might find contrary views more persuasive." Marsh, 490 U.S. at
10 378; see also Price Rd. Neighborhood Ass'n, Inc. v. U.S. Dep't of
11 Transp., 113 F.3d 1505, 1511 (9th Cir. 1997) (quoting Greenpeace
12 Action v. Franklin, 14 F.3d 1324, 1332 (9th Cir. 1992)); Native
13 Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233, 1244 (9th
14 Cir. 2005); Wetlands Action Network v. U.S. Army Corps of Eng'rs,
15 222 F.3d 1105, 1120-21 (9th Cir. 2000), abrogated on other
16 grounds by Wilderness Society v. U.S. Forest Serv., 630 F.3d 1173
17 (9th Cir. 2011).

18 Here, the administrative record shows the agency did
19 not "disregard" Lee (2012), Clark (2013), DellaSala (2010) and
20 the August 21, 2014 Bond letter. The Forest Service discussed the
21 application of these studies to the Project by reviewing their
22 findings and acknowledging the limits of their conclusions. For
23 example, the Forest Service relied on Lee et al. (2012) to state
24 "Recent research indicates that California spotted owls will
25 occupy landscapes that experience low-to moderate-severity
26 wildfires, as well as areas with mixed-severity wildfire that
27 include some proportion of high-severity fire," that "[p]ost-fire
28 logging may adversely affect rates of owl occupancy," and that

1 "[a] growing body of evidence indicates that spotted owls persist
2 within fire-affected landscapes." AR B00446, 451, 455. But the
3 FEIS cautions against extrapolating too much from Lee et al.
4 (2012) because "[a]t the very least, the small sample size of 8
5 [owl] sites with significant habitat loss [in the Lee study] is
6 too small to support a general blanket statement that the high
7 severity fires that affect 80-100 percent of owl core habitat
8 have not reduced owl occupancy in the Sierra Nevada." AR B00829.
9 This caution—rather than showing an arbitrary and capricious
10 review—demonstrates the agency's analysis of site-specific
11 factors in compliance with § 706.

12 The same is true for Clark (2013). The Forest Service
13 clearly reviewed and analyzed this research and the limits of its
14 applicability. The FEIS states: "Clark et al. (2013) summarized
15 the results provided by the few studies that have been conducted
16 on spotted owls in burned landscapes and noted that the results
17 were equivocal. Thus, uncertainties remain regarding long-term
18 occupancy and demographic performance of spotted owls at burned
19 sites." AR B00446. It also notes "Clark et al. (2013) were unable
20 to separate the impacts of wildfire from land management
21 activities" (AR B00451,) and "Clark et al. (2013) compared owl
22 site occupancy in burned and salvaged landscapes to unburned
23 landscapes. . . . [but] did not explicitly test the effects of
24 salvage logging; rather it was combined with high severity fire
25 as a source of habitat loss in treatment landscapes." AR B00829.
26 The FEIS incorporated Clark et al. (2013) and applied its
27 findings in context with the variables at play in the Rim fire
28 area.

1 The Forest Service also adequately considered DellaSala
2 (2010). DellaSala (2010) is not a peer-reviewed publication, but
3 a two paragraph Letter to the Editor which argues "science shows
4 that fire can enhance habitat for owls' small mammal prey" and
5 that "spotted owls prefer dense, old forests with high canopy
6 cover for nesting, and preferentially select unlogged severely
7 burned forests for foraging." AR 000181-182. The only citation
8 for this assertion in the Letter is to Bond et al. (2009), which
9 is a study already considered and discussed in the FEIS. AR
10 B00446, B00833-834 B00844. The Forest Service was not arbitrary
11 or capricious when it determined DellaSala's Letter, "did not
12 include analysis or qualitative evidence that could be used in
13 the project analysis." AR B0837.

14 Finally, Bond's August 21, 2014 letter was similarly
15 addressed in the administrative record. The letter is dated
16 August 21, 2014, but was not received by the Forest Service until
17 August 27, 2014, "after the FEIS had been completed and the
18 Forest Service had issued a Proposed Record of Decision," which
19 is why FEIS does not address it. AR B00001. Nevertheless, the
20 Forest Service employee Maria Benech articulated reasons why the
21 letter did not warrant changes to the proposed decision in the
22 administrative record. AR B00001. The "FEIS and ROD recognize
23 that owls remaining in the Rim Fire area may forage in the burned
24 areas, including within 1.5 km of occupied sites. Therefore, this
25 issue has been fully considered in the NEPA analysis and
26 decision-making process." AR B00001. The Forest Service publicly
27 presented this same analysis in the ROD, which was issued after
28 it received Bond's letter, finding "the underlying point raised

1 in the August 21, 2014 comment letter, that implementing the Rim
2 Recovery Project may adversely affect spotted owls in the area,
3 was already addressed in the EIS and factored into this
4 decision." AR A00038. In light of the administrative record,
5 Plaintiffs have not raised serious questions as to whether this
6 analysis is arbitrary or capricious.

7 Plaintiffs' allegations amount to a battle of the
8 experts because the writings by Lee, Clark, DellaDala and Bond
9 are not the complete universe of scientific inquiry into the
10 California spotted owl's relationship with wildfire discussed in
11 the FEIS. In discussing the California spotted owl, the Forest
12 Service relied on Keane (2014) and incorporated that research
13 into the FEIS by reference. AR B00431, B00445. Keane (2014) is an
14 academic survey that "synthesize[s] scientific information on the
15 California spotted owl that has been reported since [2001]." AR
16 K12132-133. It references and discusses work related to spotted
17 owls published by Bond, Clark, and Lee along with others in the
18 field. AR K12153-157. In a section titled "Effects of Forest
19 Management and Wildfire," Keane (2014) reviews more than a decade
20 of published scientific research regarding the impact of wildfire
21 on the California spotted owl and concludes "[c]urrent
22 information indicates that California spotted owls will occupy
23 landscapes that experience low- to moderate-severity wildfire, as
24 well as areas with mixed-severity wildfire that includes some
25 proportion of high-severity fire," which is the same conclusion
26 advanced by the Forest Service in the FEIS. AR K12141-143; AR
27 B00742.

28 Given the Forest Service's reliance on Keane (2014),

1 Plaintiffs' claim raises a quintessential "battle of the
2 experts," which falls short of demonstrating a NEPA violation.
3 Earth Island Institute v. Carlton, 626 F.3d 462, 473 (9th Cir.
4 2010) ("The district court here found just such a 'battle of the
5 experts' to exist, but concluded that this did not establish a
6 violation of NEPA. It was within its authority to do so."); J.L.
7 Mercer Island School Dist., 592 F.3d 938, 945 n.5 (9th Cir. 2009)
8 ("The parties' arguments throughout this litigation have
9 routinely bordered on the quintessential 'battle of the experts'
10 concerning what educational policy and teaching method is most
11 effective for learning-disabled students. The District is
12 entitled to deference in deciding what programming is appropriate
13 as a matter of educational policy."); Native Ecosystems Council
14 v. U.S. Forest Serv., 428 F.3d 1233, 1244 (9th Cir. 2005) ("Nor
15 will we 'take sides in a battle of the exerts,' as the Forest
16 Service considered and applied the [evidence at issue] and
17 provided a thorough and reasoned explanation for its rejection of
18 [a third party's] position.").

19 Regarding Clark (2007), whose conclusions Plaintiffs
20 claim the Forest Service misstated, Plaintiffs' argument is
21 similarly insufficient to demonstrate substantial questions as to
22 whether the Forest Service complied with its NEPA obligations.
23 The FEIS describes Clark (2007) this way: "Clark (2007) found
24 that while spotted owls did roost and forage within high severity
25 burn areas, the use was very low. The results suggest that this
26 cover type was poor habitat for spotted owls." AR B00446.
27 Plaintiffs argue this description of Clark (2007) is untenable
28 given Figure 6.2 in the study, which shows northern spotted owls

1 use highly burned habitat at a higher rate than it occurs in the
2 environment. AR K04468. However, this figure does not address the
3 rate at which the owls choose highly burned areas over other
4 habitats. Therefore, it does not contradict the Forest Service's
5 analysis—drawn from the entirety of the 218 page thesis—that the
6 spotted owl's use of high severity burn areas was low. The figure
7 does not demonstrate it would be arbitrary or capricious to read
8 the entirety of Clark (2007) as suggesting that high severity
9 burn areas are a poor habitat for spotted owls. Because
10 Plaintiffs have not raised serious questions regarding the Forest
11 Service's discussion of the relevant scientific literature, their
12 motion for a preliminary injunction on this ground is denied.

13 **b. Failure to Make Proper Determination as to**
14 **Whether the Rim Fire Logging Project Would**
15 **Push Spotted Owls Below a Critical Viability**
16 **Threshold**

17 Plaintiffs argue the Defendants "have not articulated a
18 meaningful explanation why the [Project] would have a negative
19 impact on the California spotted owl, but would not result in a
20 trend toward federal listing" and have "also not determined the
21 crucial threshold necessary to support this conclusion." (Reply
22 12:2-5.) Plaintiffs contend the Forest Service's analysis is
23 insufficient because of the "four indicators [the Forest Service]
24 used to 'provide a relative measure of the direct and indirect
25 effects' [of the Project] to spotted owls, . . . only one . . .
26 mentions foraging habitat and it was dismissed out of hand."
27 (Reply 13:6-11.) Plaintiffs support their argument by citing to
28 Earth Island II, 442 F.3d at 1147 (9th Cir. 2006), arguing "the

1 relevant facts of Earth Island II . . . are the same as the
2 facts in this case” and compel a finding that the Forest Service
3 did not comply with its NEPA obligations.

4 The Forest Service must provide a “meaningful
5 explanation” when it concludes a proposed action will have a
6 negative impact on individual animals, but will not result in a
7 trend toward federal listing for the species. Ecology Ctr. Inc.
8 v. Austin, 430 F.3d 1057, 1067 (9th Cir. 2005). “A court’s
9 inquiry, when reviewing whether an agency complied with NEPA, is
10 whether the agency adequately considered a project’s potential
11 impacts and whether the consideration given amounted to a ‘hard
12 look’ at the environmental effects.” Kemphorne, 457 F.3d at 975.

13 Plaintiffs’ assertion that the relevant facts of Earth
14 Island II are the same as the facts in this case is incorrect
15 since the Forest Service’s conclusions regarding the project’s
16 impact on spotted owl habitat in Earth Island II were the
17 opposite of its conclusions here. 442 F.3d 1147, 1172-73. In
18 Earth Island II, the Forest Service based its decision to permit
19 logging on the “determination that because the[] areas were
20 heavily burned they are not likely to be suitable owl habitat.”
21 Id. at 1172. From that premise, the Forest Service concluded the
22 proposed logging “may reduce the quality of owl habitat, but . .
23 . would not reduce the overall amount of owl habitat.” Id. 1171.
24 The agency reached this conclusion in spite of Bond’s research
25 showing the logging “will have significant negative effects on
26 the California spotted owl by substantially reducing the amount
27 of potential foraging habitat within the project sites” because
28 owls used the heavily burned areas to forage. Id. at 1170. The

1 Ninth Circuit determined that under the circumstances, the Forest
2 Service had not taken a "hard look" since it did not "respond
3 explicitly and directly to conflicting views in order to satisfy
4 NEPA's procedural requirements" or "explain in any detail how
5 their determinations that habitat was 'unsuitable' were made, and
6 do[es] not investigate or analyze how [the action] might
7 negatively impact the owls." Id. at 1172-73.

8 Here, unlike Earth Island II, the Forest Service
9 directly confronted the science demonstrating owl's use of
10 heavily burned areas, acknowledging the Project's potential to
11 reduce the overall amount of owl habitat. AR B00445 ("Spotted
12 owls use a broader range of vegetation conditions for foraging
13 than they do for nesting and roosting. . . and this includes
14 post-fire habitats . . . ;) AR B00446 ("Recent research indicates
15 that California spotted owls will occupy landscapes that
16 experience low-to moderate-severity wildfire, as well as areas
17 with mixed-severity wildfire that includes some proportion of
18 high-severity fire.") Therefore, although the Forest Service's
19 analysis in Earth Island II violated NEPA's procedural
20 requirements, its analysis here does not.

21 Neither the APA nor NEPA creates a requirement that the
22 Forest Service must determine a critical viability threshold
23 before concluding a project will have negative impacts on some
24 individual animals, but will not result in a trend toward federal
25 listing. As the Ninth Circuit held in Lands Council:

26 To always require a particular type of proof
27 that a project would maintain a species'
28 population in a specific area would inhibit
the Forest Service from conducting projects
in the National Forests. We decline to

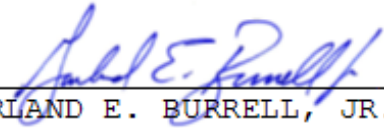
1 constrain the Forest Service in this fashion.
2 Were we to do so, we may well be complicit in
3 frustrating one or more of the other
4 objectives the Forest Service must also try
5 to achieve as it manages the National Forest
6 System lands.

7 537 F.3d at 997. The Forest Service adequately explained the
8 rationale behind its conclusion that the Project may affect
9 individuals but is not likely to results in a trend toward
10 Federal listing or loss of viability for the California spotted
11 owl. AR B00460-461. Table 3.15-3 shows a summary of the
12 indicators considered and the metrics used in the Forest
13 Service's analysis. AR B00459. This analysis is shows the agency
14 adequately considered the project's potential impacts on the
15 California spotted owl as NEPA requires. Therefore, Plaintiffs
16 motion for a preliminary injunction based on the Forest Service's
17 failure to determine the California spotted owl's critical
18 viability threshold is denied.

19 IV. CONCLUSION

20 For the reasons stated above, both of Plaintiffs'
21 motions are DENIED.

22 Dated: October 6, 2014

23 
24 _____
25 GARLAND E. BURRELL, JR.
26 Senior United States District Judge
27
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