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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

**SEQUOIA FORESTKEEPER,**  
  
**Plaintiff,**  
  
**v.**  
  
**ERIC LA PRICE, in his official capacity as  
District Ranger for the Western Divide of the  
Sequoia National Forest, ALFRED  
WATSON, in his official capacity as District  
Ranger for the Kern River Ranger District of  
the Sequoia National Forest, KEVIN  
ELLIOTT, in his official capacity as Forest  
Service Supervisor of the Sequoia National  
Forrest; and the UNITED STATES FOREST  
SERVICE,**  
  
**Defendants.**

**1:16-cv-0759 AWI JLT**  
  
**MEMORANDUM OPINION AND  
ORDER ON PLAINTIFF’S MOTION  
FOR PARTIAL SUMMARY JUDGMENT  
AND INJUNCTIVE RELIEF**  
  
**Doc. # 8**

This is an action for injunctive relief by plaintiff Sequoia ForestKeeper (“Plaintiff”) against the United States Forrest Service and the individual District Rangers and administrators responsible for Forrest Service decisions in Sequoia National Forrest (collectively, “Defendants”). In this action, Plaintiff, an environmental advocacy organization, seeks to prevent planned activities that it alleges will damage or disrupt the habitat of the Pacific fisher, a small mammal of the weasel family. The activities Plaintiff seeks to enjoin consist of logging and brush-clearing activities planned for two projects; the “Frog Project” which would thin trees on approximately 1,620 acres of land and the “Rancheria Project” which would thin trees on

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1 approximately 5,580 acres of land. Both projects are located within the Sequoia National  
2 Forrest. Planned Forrest Service activities on the Rancheria Project were the subject of a prior  
3 challenge by Plaintiff in this court. See Sequoia ForrestKeeper v. Elliott, E.D. Cal. Case  
4 Number 13cv1721. In this action, Plaintiff challenges both the Frog and Rancheria Projects on  
5 the ground Defendants violated the National Environmental Protection Act (“NEPA”) by failing  
6 to consider “new” information contained in two recent scientific works and failed to take into  
7 account the recently-quantified increase in tree mortality in the Sequoia National Forrest.  
8 Currently before the court is Plaintiff’s motion for injunction and/or partial summary judgment.  
9 For the reasons that follow, the court will deny Plaintiff’s motions without prejudice.

### 10 **PROCEDURAL HISTORY**

11 The complaint commencing this action was filed on June 1, 2016, and seeks a declaration  
12 that Defendants have violated NEPA with respect to both the Frog and Rancheria Projects, that  
13 Forest Service be required to “supplement their NEPA analyses and submit Environmental  
14 Impact Statements (“EIS’s”) for both Projects and that Forest Service be enjoined from further  
15 activity until the EIS’s are complete. On July 7, 2016, Plaintiff filed the instant motion for  
16 preliminary injunction, permanent injunction and summary judgment. On July 31, 2016,  
17 Plaintiff filed a notice of withdrawal of their motion for preliminary injunction in light of Forest  
18 Service’s decision to halt the Projects. The motions for permanent injunction and partial  
19 summary judgment remain. On July 7, 2016, Sierra Forest Products, Inc., the holder of the  
20 logging contracts for both the Frog and Rancheria Projects moved to intervene as plaintiff.  
21 Forest Product’s motion to intervene will be considered in a separate order.

### 22 **FACTUAL BACKGROUND**

23 Although there are no material facts in dispute that bear directly upon Plaintiff’s claims  
24 for relief and Defendants’ opposition, what is fundamentally in dispute is the considered  
25 opinions of the parties as to whether the treatment plan proposed by Defendants impinges so  
26 significantly on fisher habitat as to outweigh what Defendants assert will be the long term  
27

1 benefits of the proposed treatment. With this in mind, the court provides here a brief overview  
2 of the factual context as it pertains to Plaintiff’s claim for injunctive relief.

3  
4 **A. The Projects**

5 The two projects at issue are established projects that have previously been subject to  
6 environmental review by Forest Service. The Frog Project commenced in 2000 and included  
7 approximately 1,620 acres of forest in the Greenhorn Mountain Range of the Southern Sierra  
8 Nevada Mountains. It was approved by Forrest Service following an Environmental Assessment  
9 (“EA”) that concluded the issuance of a Finding of No Significant Impact (FONSI) was  
10 warranted. The originally planned operation on the Frog Project was altered when the 2001  
11 McNally Fire burned a portion of the Project area. Following some salvage logging on 190 acres  
12 of Project land, further work was enjoined by the District Court for the Northern District of  
13 California in response to concerns raised concerning the effect of planned activities on habitat  
14 used by the Pacific fisher. Following the 2006 injunction “Forest service convened an  
15 interdisciplinary team to complete an extensive review of scientific studies and literature and [to]  
16 further assess potential effects of the Frog Project on the fisher, culminating in a Biological  
17 Evaluation spanning rightly 100 pages.” Doc. # 18 at 8:9-11. Features of the Frog project were  
18 changed as guided by the information generated by multidisciplinary study and a supplemental  
19 EA was undertaken. Forrest Service issued a FONSI following the re-design of the Frog Project  
20 and the injunction was lifted by the Northern District on June 13, 2013. Of the 1,260 acres  
21 included in the Frog Project, Forest Service contracted with Sierra Forest Products to thin 780  
22 acres of which 603 acres have been completed. See Doc. 18 at 8-9.

23 The Rancheria Project commenced in 2013 and involves 5,580 acres which are also in  
24 the Greenhorn Mountains of the southern Sierra Nevada Range. As is the case with the Frog  
25 Project, the Rancheria Project consists of a number of “treatments” including tree thinning,  
26 harvest of commercial-sized trees within specified size parameters, brush removal, controlled  
27 burning and related activities. Forest Service’s stated objective in both Projects is to correct  
28 what Forest Service interprets as overcrowded, stunted and/or stressed stands of forest, to reduce

1 the probability of tree mortality due to disease and to reduce the probability severe “stand-  
2 replacing” fire by removing potential fuel. Forest service conducted an EA of the proposed  
3 Rancheria Project and issued a FONSI on July 15, 2013. Plaintiff and other environmental  
4 organization parties challenged the FONSI in this court in a suit filed in October 2013. The  
5 basis for Plaintiff’s earlier challenge was related to the current challenge in that Plaintiff alleged  
6 Forest Service failed to adequately consider published scientific opinion on the effect of the  
7 proposed Rancheria Project on fisher habitat. This court granted Forest Services’ motion for  
8 summary judgment and entered judgment against the plaintiff’s in the 2013 case on April 3,  
9 2015.

10 On July 20, 2016, Forest Service “elected to suspend operation on the Frog and  
11 Rancheria Projects while it collected and analyzed additional data on a recent spike in tree-  
12 mortality in the Sequoia National Forest.” Doc. # 18-1 at 17:12-14. Forest Service alleges that  
13 further study on tree mortality will inform its decision on whether to issue supplemental  
14 environmental assessments and/or to change other aspects of the planned Projects. See id. at 15-  
15 17. Forest Service further asserts that operations on either project will not commence before  
16 July 1, 2017, at the earliest for the Rancheria Project or before August 1, 2017, at the earliest for  
17 the Frog Project.

18 **B. The Scientific Studies**

19 Plaintiff avers that the Rancheria Project EA and the amended Frog Project EA both  
20 contain references to scientific publications relevant to the Pacific fisher, but neither contains  
21 any mention of the following two papers:

22 Garner, J.D., 2013. Selection of disturbed habitat by fishers (*Martes pennanti*) in the  
23 Sierra National Forest. MS Thesis, Humboldt State University, Arcata,  
24 California.

25 Zielinski, W.J., C.M. Thompson, K.L. Purcell, and J.D. Garner. An assessment of fisher  
26 (*Pekania pennanti*) tolerance to forest management intensity on the landscape.  
27 Forest Ecology and Management 310:821-826.  
28

1 Doc. # 8-2 at 5:18-21. Defendant do not dispute Plaintiff’s allegation that the environmental  
2 assessments of both the Frog and Rancheria Projects do not reference these papers.

3  
4 **C. Tree Mortality**

5 The parties do not dispute that there has been a marked increase in tree mortality between  
6 2013 and the present. The increase is both in the number of acres of forest experiencing higher  
7 tree mortality and in the frequency of tree mortality per acre. The increase in mortality appears  
8 related to a number of factors including drought and increase infestation by the pine bark beetle,  
9 which has spread in response to warming climatic conditions. The parties also do not dispute  
10 that the dramatic increase in tree mortality was not addressed in prior EAs for either the Frog or  
11 Rancheria Projects.

12 **LEGAL STANDARDS**

13 Summary judgment is appropriate when it is demonstrated that there exists no genuine  
14 issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.  
15 Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Poller v.  
16 Columbia Broadcast System, 368 U.S. 464, 467 (1962); Jung v. FMC Corp., 755 F.2d 708, 710  
17 (9th Cir. 1985); Loehr v. Ventura County Community College Dist., 743 F.2d 1310, 1313 (9th  
18 Cir. 1984).

19 Under summary judgment practice, the moving party always bears  
20 the initial responsibility of informing the district court of the basis for its  
21 motion, and identifying those portions of “the pleadings, depositions,  
22 answers to interrogatories, and admissions on file, together with the  
23 affidavits, if any,” which it believes demonstrate the absence of a genuine  
24 issue of material fact.

25 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

26 The relief Plaintiff seeks is injunctive in nature; that is, to enjoin Forest service from  
27 logging in the Frog and Rancheria projects and to require the production of an EIS for both  
28 projects. Because Plaintiff has withdrawn its motion for preliminary injunction, the standard for  
permanent injunctive relief is appropriately applied to the determination of whether injunctive  
relief is warranted. As Defendants correctly state, to obtain permanent injunctive relief a party  
must show “that (1) he has achieved ‘actual success’ on the merits of his substantive claims, (2)

1 he is likely to sufferer imminent, irreparable harm, (3) the balance of equities favors an  
2 injunction, and (4) an injunction is in the public interest.” Doc. # 18 at 13:19-21 (quoting Winter  
3 v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22 (2008)).

#### 4 **DISCUSSION**

5 As Defendants point out, “NEPA does not provide a private cause of action.’ Earth  
6 Island Institute v. U.S. Forest Serv., 697 F.3d 1010, 1013 (9th Cir. 2012). Instead, a court may  
7 review an agency’s compliance with NEPA under the Administrative Procedures Act.” Doc. #  
8 18 at 21:18-20. Under the APA, a party may compel an agency action that is “unlawfully  
9 withheld or unreasonably delayed,” or may restrain or set aside an action that is “arbitrary,  
10 capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. §§ 706(1),  
11 (2)(A). Plaintiff relies to a significant extent on Portland Audubon Soc. v. Babbitt, 705 709 (9th  
12 Cir. 1993) and related case authority for the proposition that under NEPA, an agency is under a  
13 continuing obligation to reexamine the significance of planned agency action in the face of new  
14 information or changing circumstances. See id. at 708 (citing Marsh v. Oregon Natural Res.  
15 Council, 490 U.S. 360, 370-374 (1989) for the proposition that, where the implementation of an  
16 agency plan (such as logging) is ongoing over a period of years, supplemental environmental  
17 statements are required where new information indicates continuing government action could be  
18 environmentally significant.)

19 Both the Frog and Rancheria projects were allowed to proceed following prior legal  
20 challenges to Forest Service findings of no significant environmental impact. In light of the fact  
21 that Defendants have suspended action on both projects for the purpose of doing more or less  
22 what Plaintiff contends they are obliged to do under NEPA – give consideration to later-  
23 published information concerning fisher tolerance for forest thinning and to consider the impact  
24 of widespread tree mortality – Defendants contend there is no NEPA violation and Plaintiff’s  
25 motion for partial summary judgment should be denied. Plaintiff addresses Defendants’  
26 contention in their reply brief by alleging (1) that Defendants violated NEPA by failing to *timely*  
27

1 consider the need for supplementation of their environmental review and (2) that Defendants’  
2 decision to not reconsider the 2013 Garner study was arbitrary and capricious.

3  
4 This action follows a series of three exchanges of letters between Rene Voss, attorney for  
5 Plaintiff and Defendant Elliott. Copies of these letters are included as exhibits to the Declaration  
6 of Kevin B. Elliott, Doc. # 18-2. These letters provide insight as to what information was  
7 available for consideration, when, and what consideration Defendants gave to the information.  
8 The first letter was sent by Voss to Elliott on March 27, 2014. The letter emphasized the effects  
9 of forest thinning on fisher habitation and constituted “new” information in the opinion of  
10 Plaintiff. Voss’s letter cites three studies:

- 11 Truex and Zielinski (2013) – Short-term effects of fuel treatment on fisher habitat in the  
12 Sierra Nevada, California; *Forest Ecology and Management* 293 (2013)<sup>1</sup>;  
13 Garner (2013) – Selection of Disturbed Habitat by Fishers (*Martes pennant*) in the Sierra  
14 National Forest; A [Master’s] Thesis Presented to the Faculty of Humboldt State  
15 University; and  
16 Hanson (2013) – Habitat Use of Pacific Fishers in a Heterogeneous Post-fire and  
17 Unburned Forest Landscape on the Kern Plateau, Sierra Nevada, *The Open Forest*  
18 *Science Journal* 6 (2013) 24-30.

19 Doc. # 18-3 at 2. Voss’s letter summarizes the findings of each of the studies which collectively  
20 highlight the tendency of fishers to avoid treated and/or thinned landscapes in favor of dense  
21 stands of forest with many snags and extensive forest cover. Collectively, Plaintiff’s first letter  
22 references the three listed scientific papers to support the basic contention behind this action as  
23 follows:

24 New information from [the] three recent scientific reports provides  
25 compelling evidence that a) thinning causes significant adverse effects on  
Pacific fisher resting habitat, finding that Pacific fisher avoid thinned

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26  
27 <sup>1</sup> This is a different publication than the above-referenced publication by Zielinski, W.J., C.M.  
28 Thompson, K.L. Purcell, and J.D. Garner, which is also dated 2013. For purposes of clarity, the parties  
and the court refer to the paper by Zielinski, W.J., C.M. Thompson, K.L. Purcell, and J.D. Garner as  
“Zielinski, et al. (2013b)” or as the “Fisher Tolerance” study.

1 areas, including treatments focused on fuel reduction, making these  
2 thinned areas unsuitable for Pacific fisher; and b) mixed-intensity  
3 wildland fire areas (that are not salvage logged after fire) provide suitable  
4 foraging habitat for fishers, contrary to previous assumptions upon which  
5 existing thinning are based.

6 Doc. # 18-3 at 2.

7 The second letter is Elliott's response, dated May 14, 2014, to Voss's first letter.  
8 Basically, Elliott's letter summarizes the history of Forrest Service consideration of each of the  
9 studies and summarizes the conclusions drawn with regard to the projects in which the studies  
10 were considered. In particular, Elliott's letter responds with respect to the Truex and Zielinski  
11 paper that the paper cited by Voss is the peer reviewed and published version a paper that was  
12 examined in connection with both the Frog and Rancheria projects. Elliott's letter opines that  
13 the version of the Truex and Zielinski paper cited by Voss "does not present any new research or  
14 information from what was previously examined." Doc. # 18-4 at 3. With regard to the Garner  
15 (2013) paper, Elliott's letter states that the information presented in by Garner's thesis "is not  
16 new and has been previously addressed in the Frog, Rancheria and Joey Projects. We  
17 acknowledged findings similar to those reported in Garner's thesis, specifically that  
18 implementing vegetation treatments may reduce habitat quality in the short term, and may cause  
19 fisher to temporarily leave treatment areas." Id. at 12. The Elliott letter goes on to point out  
20 features of the Rancheria and Frog projects that are designed in response to, and are intended to  
21 ameliorate, the negative effects of treatment projects on the suitability of fisher-occupied forest  
22 areas that are pointed out in the three papers cited by Plaintiff.

23 The final letter of the trio was sent to Elliott by Voss on January 11, 2016 (the "January  
24 11 Letter"). See Doc. # 18-5. This letter raises three issues. The first is Plaintiff's observation  
25 that two additional "large thinning, logging and burning projects . . . adjacent to the Frog and  
26 Rancheria projects" are being planned and, if carried out, may threaten the mobility of fishers  
27 living within the project areas and result in genetic isolation of small groups of fishers. Doc. #  
28 18-5 at1. The second issue raised by the January 11 Letter is Plaintiff's recent discovery of the  
existence of the Fisher Tolerance Study, Zielinski, et al. (2013b). The January 11 Letter  
summarizes the findings of the Fisher Tolerance Study and opines that the rate of treatment

1  
2 planned for both the Frog and Rancheria Projects (as expressed as percent of total project land  
3 area treated per year or as acres treated per square mile) exceeds the rate of treatment tolerated  
4 by fishers. The issue of increased tree mortality is not mentioned in the January 11 Letter, but a  
5 news release by Forest Service dated June 22, 2015, that announces Forest Service's findings  
6 regarding tree mortality is included at exhibit 4 of the Elliott declaration. The court notes that  
7 there is no allegation that Defendants failed to give consideration to the Hanson paper.

8 As previously noted Forest Service has suspended operations on the Frog and Rancheria  
9 Projects and Plaintiff's reply brief acknowledges this fact. Perhaps as a result, Plaintiff's reply  
10 brief reflects a shift the legal theory of Plaintiff's action from the allegation that Defendants *are*  
11 *now* in violation of NEPA because they *have not yet* updated their environmental assessments as  
12 required to the allegation that Defendants *did not* engage in the process of updating their  
13 environmental assessments as soon as they should have. The sequence of events that are  
14 relevant to Plaintiff's refocused allegations are: (1) Plaintiffs wrote their second request for re-  
15 evaluation on January 11, 2016, and stated that if a written response was not forthcoming by the  
16 end of February, 2016, they would consider the request denied; (2) Plaintiff filed this action on  
17 June 1, 2016, and the instant motion for partial summary judgment on July 7, 2016; (3) Forest  
18 Service suspended operations on the Frog and Rancheria Projects on July 20, 2016, and filed  
19 their opposition on August 1, 2016, (4) Plaintiff filed its reply on August 8, 2016. While the  
20 inclusion of the Forest Service's news release in the Elliott Declaration suggests that Forest  
21 Service was aware of the tree mortality sometime in mid-2016, Plaintiff alleges that they  
22 provided Forest Service with the results of a report dated July 13, 2015, that noted the increase in  
23 tree mortality. Plaintiff opines that, in any event, Forest Service was certainly aware of the  
24 increase in tree die-off well before the 2016 news release since it's their forest.

25 ***A. Defendants did not Unlawfully Deny or Unreasonably Delay Action***

26 Plaintiff advances two legal theories in their reply brief that argue for partial summary  
27 judgment and injunctive relief notwithstanding Forest Service's decision to halt the projects and  
28 to consider new developments. The second theory – that Defendants abused their discretion by

1 failing to give consideration to the Garner 2013 study – will be addressed *infra*. Plaintiff’s  
2 primary legal theory is that, in waiting until their “hand was forced” by the filing of Plaintiff’s  
3 action to commit to reevaluation of the environmental assessments, Defendants were in violation  
4 of the requirement of the continuing duty under NEPA to continuously “gather and evaluate new  
5 information relevant to the environmental impact of its actions.” Doc. # 21 at 5:24-25 (quoting  
6 Friends of the Clearwater v. Dombreck, 222 F.3d 552, 558-559 (9th Cir. 2000) (“FOC”). Put  
7 differently, Plaintiff avers it is entitled to partial summary judgment and injunctive relief because  
8 Defendants did not take action to reevaluate their environmental assessment at the “earliest  
9 possible time.”

10 Plaintiff relies on Idaho Sporting Congress, Inc. v. Alexander, 222 F.3d 562 (9th Cir  
11 2000) (“ISC”) for the proposition that Defendants are under a continuing obligation to review  
12 and evaluate new information and to revise prior conclusions regarding environmental impacts  
13 where it “determines that the new information is significant.” Id. at 566. Defendants do not  
14 dispute this point. Plaintiff’s substantial reliance on ISC, along with the Ninth Circuit’s decision  
15 in FOC are cited by Plaintiff to illustrate situations where courts have found agencies in violation  
16 of NEPA for failure to *timely* consider new information. For the reasons that follow, the court  
17 finds the legal authority cited by Plaintiff is insufficient to justify injunctive relief at this time on  
18 the current facts of this case.

19 Both ISC and FOC recognize and approve of the mechanics commonly employed by  
20 agencies to evaluate new information to determine if it is “significant” such that amendment or  
21 supplementation of prior NEPA documents is required. In both cases, the agency involved  
22 produced a Supplemental Information Report (“SIR”) that examined the new information and  
23 reached a conclusion as to whether the new information is “significant.” See ISC 222 F.3d at  
24 566 (noting several courts have upheld agency use of SIR’s for the purpose of determining  
25 whether a supplemented EA or EIS is required); FOC 222 F.3d at 555 (recognizing that SIR’s  
26 are Forest Services “formal instruments for documenting whether new information is sufficiently  
27 significant to trigger the need for [a supplemented EIS]”).  
28

1  
2 The ISC case is factually distinguishable from the case at bar to the extent it offers no  
3 support for Plaintiff's claims for injunctive relief. In ISC the NEPA documents originally  
4 prepared by the Forest Service were held deficient as a matter of law pursuant by the Ninth  
5 Circuit's ruling in a related case, Neighbors of Cuddy Mountain v. United States Forest Service,  
6 137 F.3d 1372 (9th Cir. 1998). The violation the ISC court found pertained only tangentially to  
7 the failure of the Forest Service to timely consider significant "new" information. In ISC the  
8 Forest Service attempted to use SIRs to *supplement* the original, deficient NEPA documents. In  
9 finding that an SIR is not a proper means for supplementing an EA or EIS the ISC court  
10 observed that an SIR is not a document recognized by NEPA regulations. ISC, 222 F.3d at 565-  
11 566. The court observed "NEPA is a procedural statute, and we have held that 'agency action  
12 taken without observance of the procedure required by law will be set aside.' [Citation.] Yet if  
13 the Forest Service were permitted to correct deficiencies in an EA or an EIS by means of an SIR  
14 or another non-NEPA procedure, the regulations governing the supplementation of NEPA  
15 documents promulgated by the CEQ, as well as the Forest Service's own rules on the issue,  
16 would be superfluous." Id. at 567.

17 While the obligation of agencies to be continuously alert for new information that could  
18 alter an original NEPA assessment is well established; see Marsh v. Oregon Natural Res.  
19 Council, 490 U.S. 377, 378 (1989), the "timing" issue criticized in ISC differs significantly from  
20 the facts of this case. In ISC the Forest Service issued inappropriate documents (SIR's) to  
21 supplement its previous deficient NEPA documents "in response to litigation, *years* after the  
22 original decisions to approve the timber sales were made. Furthermore, although the public was  
23 given an opportunity to comment on the SIRs, the Forest Service's decision making process was  
24 not formally reopened and no administrative appeal of the SIRs was permitted." Id. at 568  
25 (italics added).

26 Here, unlike the case in ISC, Forest Services original NEPA documents were found to be  
27 sufficient when challenged by Plaintiff. Arguably, Forest Service might have begun the process  
28 of formal evaluation of new information as much as a year prior to the time they did start.

1  
2 However, the underlying error charged to Forest Service in ISC – the refusal of Forest Service to  
3 correct the known legal deficiencies in its NEPA documents through NEPA-approved  
4 procedures – cannot be alleged in this case. As the court understands it, the major factual feature  
5 of concern to Plaintiff’s in this action is the marked increase in tree mortality in the Project  
6 regions. Unlike the situation in ISC where the original NEPA documents had been deemed  
7 insufficient as a matter of law, Defendants in this action faced (and continue to face) a dynamic  
8 situation (tree mortality) that has no currently-known endpoint that would clearly and  
9 unambiguously indicate a particular path of action. There is nothing in ISC to support the  
10 proposition that an agency is in violation of NEPA if it fails to address a changing factual  
11 situation in some particular amount of time. Rather, 5 U.S.C. § 706(1) permits a party to seek an  
12 order compelling agency action when the action is “unlawfully withheld or unreasonably  
13 delayed.” Id. The court finds that the Ninth Circuit’s decision in ISC does not lend support to  
14 the contention that the delay, if any, between the time Defendants conceivably *could have*  
15 undertaken review of new information and the time they actually did undertake review was  
16 unreasonable.

17 Friends of Clearwater also fails to support Plaintiff’s action for injunctive relief; albeit  
18 for a somewhat different reason. The factual context presented in FOC is closer to the case at  
19 bar but still distinguishable. In FOC the defendant Forest Service completed an EIS in 1987 in  
20 connection with a forest logging plan. About 10 years later, “individuals and environmental  
21 groups [. . .] wrote the Forest Service. They noted that it had been more than ten years since the  
22 Forest Service completed the original Wing Creek – Twentymile EIS, and that during that time  
23 the steelhead, chinook salmon, and bull trout had been listed under the Endangered Species Act,  
24 the lynx had be proposed for listing and endangered grey wolves had been reintroduced into  
25 central Idaho.” FOC, 222 F.3d at 555. In response to the letter, Forest Service prepared a total  
26 of three SIRs , the cumulative conclusion of which was that the new information did not require  
27 any supplementation of prior NEPA documents. The environmental groups then sued  
28 challenging Forest Services’ determination to not prepare a supplemental EIS. See Id.

1  
2 During the litigation in FOC, the plaintiffs shifted the focus of their challenge from the  
3 list of species noted in their prior letter to Forest Service to a separate list of seven species that  
4 had been designated as “sensitive by Forest Service in the years prior to the litigation but which  
5 had not been addressed in the original NEPA documents or in the SIRs prepared by Forest  
6 Service in advance of the litigation.” Id. Of particular relevance to Plaintiff’s reliance on FOC,  
7 the FOC court noted that, after the institution of the legal action, Forest Service did give  
8 consideration to the new information regarding the species that had not previously been  
9 examined and “prepared an additional SIR and several other analyses that specifically address  
10 the significance of the new information at issue.” Id. at 559.

11 The FOC court found that Forest Service *had* violated NEPA by failing to timely  
12 consider the impact of the projects on species that they had designated as “sensitive.” However,  
13 the FOC court noted the difference between an action brought to challenge an agency final  
14 decision pursuant to 5 U.S.C. § 706(2), and an action to compel agency action unlawfully  
15 withheld or unreasonably delayed” pursuant to § 706(1). In the former case, a reviewing court  
16 relies only on the information that was before the agency when the final action was taken;  
17 however, in the latter case a court reviewing an action to compel agency action the court may  
18 review and consider information that becomes available after the institution of legal proceedings.  
19 See FOC, 222 F.3d at 560. Based on this distinction, the FOC court concluded that, although  
20 Forest Service had violated NEPA in the first instance, the plaintiffs in that case were not  
21 entitled to injunctive relief because Forest Service subsequently rectified their error. See FOC at  
22 561 (concluding Forest Service’s conclusion following review during litigation that a  
23 supplemental EIS was not warranted was not an abuse of discretion and that plaintiffs were  
24 therefore not entitled to injunction).

25 The court concludes that Plaintiff has failed to allege facts to show that Defendants’  
26 delay in undertaking consideration of “new facts” was unreasonable, arbitrary or an abuse of  
27 discretion. The court also concludes that, even if the delay had been somehow unlawful,  
28 Plaintiff is not entitled to injunctive relief at this time because Defendants are currently in the

1 process of undertaking the consideration of new facts. The court interprets FOC to stand, in part,  
2 for the proposition that it is not appropriate for a reviewing court to compel an agencies' conduct  
3 by way of injunction when the agency is already engaged in the required conduct. Plaintiff's  
4 request for injunctive relief pursuant to 5 U.S.C. § 706(1) will therefore be denied.

5  
6 ***B. Refusal to Consider Garner 2013 Study is not Abuse of Discretion***

7 Plaintiff alternatively contends that Defendants violated NEPA by failing to give re-  
8 consideration to the 2013 Garner study; particularly to one of the conclusions of that study that  
9 was emphasized to Defendants in the first of the letters from Voss to Elliott. In that letter,  
10 Plaintiff cites what it considers Garner's primary finding as follows:

11 [Garner] found that 'when selecting microsites within their home ranges,  
12 fishers tend to avoid using sites within 200 meters of a treated (thinned)  
13 area.' [Citation.] Garner found that 'as fishers are selecting foraging and  
14 resting sites within their home ranges (third-order selection), they tend to  
avoid treated areas in favor of sites within untreated forest, corroborating  
previous findings (Truex and Zeilinski 2013).' [Citation.]"

15 Doc. # 18-3 at 4.

16 Defendants' (Forest Services') response to Voss's first letter is found at Document 18-4,  
17 pages 5-7. In their response letter, Defendants make it clear they have given the Garner (2013)  
18 letter a close read and careful consideration as a part of the original NEPA documents for the  
19 Frog and Rancheria Projects even though the paper was not specifically referenced in the  
20 original NEPA documents. As Defendants noted in their reply to Voss's letter, "[w]e  
21 acknowledge findings similar to those reported in Garner's thesis, specifically that implementing  
22 vegetation treatments may reduce habitat quality in the short term, and may cause fisher to  
23 temporarily leave areas." Doc. # 18-4 at 5. Of particular significance to this opinion,  
24 Defendants noted in their response letter:  
25

26  
27 We agree with Garner (2013) that short term negative impacts of  
28 management actions may affect habitat beyond the one year post  
treatment. In the fisher biological evaluations for the relevant projects

1 Forest Service personnel analyzed change in canopy closure and change in  
2 basal area of live trees >24" [diameter at breast height ("dbh")] and snags  
3 >24" dbh for 40-50 years to determine the length of recovery post  
treatment compared to post uncharacteristically severe wildfire.

4 Doc. # 18-4 at 7.

5  
6 It is important to understand that Plaintiff does not contend that Defendants did not give  
7 consideration to the Garner (2013) study in the first instance. Rather, Plaintiff contends that  
8 Defendants acted arbitrarily and capriciously by refusing to reexamine and reinterpret the Garner  
9 paper according to the interpretation and significance placed on it by Plaintiff. The above-  
10 quoted paragraph, considered along with Plaintiff's criticisms of it, illuminates the underlying  
11 conflict at the core of this action. Basically, the court interprets that underlying conflict thus:  
12 Defendants seek to carry out forest treatments aimed at promoting more resilient, less crowded  
13 forest stands that are less susceptible to catastrophic fire. It is implicit in Defendants' response  
14 to the first Voss letter and from their opposition that Defendants view some short-term sacrifice  
15 of quality of habitat vis-à-vis fishers as justifiable in light of what they anticipate are the long-  
16 term benefits. Plaintiffs, in contrast, have implicitly adopted a more short-term view of the need  
17 to maintain quality of fisher habitat and view the risk of "catastrophic stand-replacing fires" as  
18 acceptable when compared to what they understand are the benefits of untreated or minimally  
19 treated fisher habitat that is subject to the occasional "mixed-intensity" fire.  
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21  
22 Plaintiffs criticize Defendants' interpretation and evaluation of the Garner (2013) study  
23 as conclusory, as reliant on the unpublished anecdotal observation that fisher scat has been  
24 observed in previously treated areas and as failing to clearly define the parameters of long-term  
25 and short-term consideration. At the present time, the court finds that Defendants' response to  
26 the first Voss letter evinces adequate, if not thorough, consideration of the information contained  
27 in the Garner (2013) study and finds that Defendants' reliance on their own observation of  
28

1 evidence of fisher use of forest areas that have been previously treated is not an abuse of  
2 discretion. The court also finds that neither party has been completely clear about what time-  
3 frames are being referenced when the use or avoidance of fisher habitat is being alleged, but also  
4 finds that this lack of clarity does not amount to arbitrary decision making or to an abuse of  
5 discretion in light of Defendants’ apparent consideration of long-term benefits versus short term  
6 risks. The court finds Defendants’ interpretation of the information contained in the Garner  
7 (2013) study is not an abuse of discretion.  
8

9           The court concludes that Plaintiff has not demonstrated either success on the merits or a  
10 substantial likelihood of success on the merits under the facts of the case as they now stand.  
11 This court has previously opined “that differences of opinion on such technical matters such as  
12 the relative benefits or detriments of intense fire on Pacific fisher populations cannot be the basis  
13 of relief from a final agency decision.” Sierra ForestKeeper v. Elliott, 13-cv-1721, Docket No.  
14 43 at 7:19-21. The court remains of the opinion that the sort of controversy that appears to  
15 underlie this action – a controversy typified by differences in opinion on the values of mutually  
16 recognized long and short term goals and risks – is not proper subject matter for determination  
17 by a district court in an action under NEPA. That said, the court cannot be certain that Forest  
18 Service’s promised consideration of the significance of new information on current plans for the  
19 Frog and Rancheria projects will not give rise to a meritorious claim for injunctive relief. The  
20 court is certain, however, that no action by the court is appropriate in advance of a determination  
21 by Defendants as to whether the change of circumstances is significant so as to warrant a  
22 supplementation of prior NEPA documents. The court will therefore deny Plaintiff’s motion for  
23 partial summary judgment and injunctive relief without prejudice.  
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THEREFORE, for the reasons discussed above, it is hereby ORDERED that Plaintiff's motion for partial summary judgment and injunctive relief is DENIED without prejudice.

IT IS SO ORDERED.

Dated: September 21, 2016

  
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SENIOR DISTRICT JUDGE