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9 UNITED STATES DISTRICT COURT  
10 EASTERN DISTRICT OF CALIFORNIA

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12 EARTH ISLAND INSTITUTE,  
13 a non-profit organization,

14 Plaintiff,

15 v.

NO. CIV. S-09-2020 FCD/EFB

MEMORANDUM AND ORDER

16 ALICE B. CARLTON, in her  
17 official capacity as Forest  
18 Supervisor for Plumas National  
19 Forest, RANDY MOORE, in his  
20 official capacity as Regional  
21 Forester for Region 5 of the  
22 United States Forest Service,  
23 and the UNITED STATES FOREST  
24 SERVICE,

25 Defendants.

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27 This matter is before the court on plaintiff Earth Island  
28 Institute's ("plaintiff") motion for a stay and injunction  
pending appeal of this court's August 20, 2009 Order (Docket  
#53), denying plaintiff's motion for a preliminary injunction,  
which sought to enjoin the United States Forest Service's  
Moonlight-Wheeler Fire Recovery and Restoration Project (the

1 "Project").<sup>1</sup> The harvesting of dead and dying trees began on  
2 September 1, 2009. Pursuant to Federal Rule of Civil Procedure  
3 62(c), plaintiff now seeks to enjoin any further implementation  
4 of the Project pending resolution of plaintiff's appeal of the  
5 court's Order to the Ninth Circuit.

6 For the reasons set forth below, the court DENIES  
7 plaintiff's motion for an injunction pending its appeal.  
8 Plaintiff does not make the requisite showing under Rule 62(c).

9 Rule 62(c) provides in pertinent part: "While an appeal is  
10 pending from an interlocutory order or final judgment that  
11 grants, dissolves, or denies an injunction, the court may  
12 suspend, modify, restore, or grant an injunction on terms for  
13 bond or other terms that secure the opposing party's rights." In  
14 determining whether to issue an injunction pending appeal, the  
15 court must consider: (1) whether plaintiff has make a strong  
16 showing that it is likely to succeed on the merits of its appeal;  
17 (2) whether plaintiff will be irreparably injured absent issuance  
18 of an injunction; (3) whether issuance of an injunction will  
19 substantially injure the other parties interested in the

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21 <sup>1</sup> Plaintiff filed the instant motion on September 3,  
22 2009, requesting an "expedited ruling." Although plaintiff did  
23 not comply with the local rules for hearing motions on shortened  
24 time, the court nonetheless considered the motion in light of the  
25 urgent circumstances and permitted defendants an opportunity to  
26 respond to the motion (Docket #60). Having considered the  
27 parties' papers, the court now issues its decision on the motion.  
28 E.D. Cal. L.R. 78-230(h) (considering the extensive briefing on  
the underlying motion and the lengthy hearing held on August 7,  
2009, oral argument on this motion is not necessary).  
Preliminarily, the court notes that while plaintiff at times  
describes its motion as a request for a *stay* pending appeal, the  
motion is properly construed as a request for an *injunction*  
pending appeal as plaintiff seeks to enjoin further  
implementation of the Project pending its appeal of the court's  
order.

1 proceeding; and (4) where the public interest lies. Hilton v.  
2 Braunskill, 481 U.S. 770, 776 (1987); Cal. Pharmacists Ass'n v.  
3 Maxwell-Jolly, 563 F.3d 847, 849-50 (2009). This standard is  
4 essentially the same as that for issuance of a preliminary  
5 injunction.<sup>2</sup> See Nken v. Holder, 129 S. Ct. 1749 (2009).

6 Plaintiff's instant motion for an injunction pending its  
7 appeal raises the same arguments made in its moving papers on the  
8 underlying preliminary injunction motion. With respect to the  
9 merits, irreparable injury and the balance of equities and the  
10 public interest, plaintiff simply reiterates its prior arguments  
11 in favor of issuance of an injunction enjoining the Project.  
12 While plaintiff attempts to repackage those arguments herein, by  
13 asserting that the court made certain alleged factual errors,  
14 overlooked pertinent evidence and misapplied controlling legal  
15 standards, its arguments are not compelling. The court addressed  
16 each of plaintiff's arguments (made then and now) in its 66-page,  
17 August 20 Order, and it need not repeat that analysis here. For  
18 the reasons fully set forth in the August 20 Order, plaintiff has  
19 not shown a likelihood of success on the merits of its claims  
20 against defendants pursuant to NEPA, NFMA or the MBTA or a  
21 likelihood of irreparable harm nor that the balance of equities  
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23 <sup>2</sup> See Winter v. NRDC, 129 S. Ct. 365, 374-75 (2008)  
24 (holding that a plaintiff seeking a preliminary injunction must  
25 establish that: (1) it is likely to succeed on the merits of its  
26 claims; (2) it is likely to suffer irreparable harm in the  
27 absence of preliminary relief; (3) the balance of equities tips  
28 in its favor; and (4) an injunction is in the public interest).  
Contrary to plaintiff's *continued* protestations, Winter  
represents the sole, controlling standard for preliminary  
injunction relief. There is no longer a viable, alternative  
sliding-scale test, for the reasons thoroughly discussed by the  
court in its August 20 Order. (Docket #53 at 9-11.)

1 tip in its favor or that the public interest is best served by  
2 enjoining the Project. As such, plaintiff's motion for an  
3 injunction pending appeal is DENIED.

4 IT IS SO ORDERED.

5 DATED: September 4, 2009  
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A handwritten signature in black ink, appearing to read "Frank C. Damrell, Jr.", written in a cursive style.

7 FRANK C. DAMRELL, JR.  
8 UNITED STATES DISTRICT JUDGE  
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