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

KLAMATH-SISKIYOU WILDLANDS)	
CENTER, ENVIRONMENTAL)	2:10-cv-02350-GEB-CMK
PROTECTION INFORMATION CENTER,)	
KLAMATH FOREST ALLIANCE, and)	
CENTER FOR BIOLOGICAL DIVERSITY,)	<u>ORDER DENYING PLAINTIFFS'</u>
)	<u>MOTION FOR PRELIMINARY</u>
Plaintiffs,)	<u>INJUNCTION</u>
)	
v.)	
)	
PATRICIA A. GRANTHAM, Klamath)	
National Forest Supervisor, and)	
UNITED STATES FOREST SERVICE,)	
)	
Defendants,)	
)	
and)	
)	
SOUTH BAY TIMBER, LLC and ROUGH)	
AND READY TIMBER, LLC)	
)	
Defendant)	
Intervenors.)	
)	

Plaintiffs seek a preliminary injunction enjoining implementation of the United States Forest Service ("Forest Service")'s Panther Fire Salvage and Reforestation Project (the "Project") in the Klamath National Forest, "excluding timber harvest units 205, 206, 207, and 208, pending a resolution of the merits of this case." (Pls.' Mot. for Prelim. Inj. 2:17-19.) Plaintiffs argue a preliminary injunction is required because "the Forest Service did not take the requisite 'hard look' at the foreseeable environmental consequences of logging the

1 burned area Consequently, Defendants' decision to move ahead
2 with the [Project] is arbitrary and capricious, and should be enjoined
3 until the agency prepares an adequate environmental analysis." (Pls.
4 Mem. in Supp. of Mot. for Prelim. Inj. ("Mot.") 1:6-11.) Defendants
5 oppose the motion. Argument on the motion was heard on September 27,
6 2010.

7 **I. LEGAL STANDARD**

8 **A. Preliminary Injunctions**

9 A preliminary injunction is "an extraordinary remedy that may
10 only be awarded upon a clear showing that the plaintiff is entitled to
11 such relief." Winter v. Natural Res. Def. Council, Inc., --- U.S.
12 ----, 129 S. Ct. 365, 376 (2008). Plaintiffs seeking a preliminary
13 injunction must establish that "(1) they are likely to succeed on the
14 merits; (2) they are likely to suffer irreparable harm in the absence of
15 preliminary relief; (3) the balance of equities tips in their favor; and
16 (4) a preliminary injunction is in the public interest." Sierra Forest
17 Legacy v. Rey, 577 F.3d 1015, 1021 (9th Cir. 2009) (citing Winter, 129
18 S. Ct. at 374).

19 Further, the Ninth Circuit's "'serious questions' approach
20 survives Winter when applied as part of the four-element Winter test."
21 Alliance for the Wild Rockies v. Cottrell, --- F.3d ----, 2010 WL
22 3665149, at *5 (9th Cir. 2010). "In other words, 'serious questions
23 going to the merits' and a hardship balance that tips sharply toward the
24 plaintiff can support issuance of an injunction, assuming the other two
25 elements of the Winter test are also met." Id.

26 **B. Review of Federal Agency Decisions under the APA**

27 Plaintiffs' motion is based on three claims: violation of the
28 National Environmental Policy Act ("NEPA"); violation of the Appeals

1 Reform Act ("ARA"); and violation of the National Forest Management Act
2 ("NFMA"). These claims are reviewable on the administrative record
3 under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701-706. The
4 Lands Council v. McNair, 537 F.3d 981, 987 (9th Cir. 2008) (en banc).

5 Under the APA, a reviewing court may set aside an agency
6 action only if it is "arbitrary, capricious, an abuse of discretion, or
7 otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Review
8 under this standard is narrow, and the reviewing court may not
9 substitute its judgment for that of the agency." Earth Island Institute
10 v. U.S. Forest Service, 442 F.3d 1147, 1156 (9th Cir. 2006) (citation
11 omitted). Rather, the reviewing court should reverse an agency decision
12 as arbitrary and capricious "only if the agency relied on factors
13 Congress did not intend it to consider, entirely failed to consider an
14 important aspect of the problem, or offered an explanation that runs
15 counter to the evidence before the agency or is so implausible that it
16 could not be ascribed to a difference in view or the product of agency
17 expertise." The Lands Council v. McNair, 537 F.3d at 987 (quotation and
18 citation omitted). "This deference is highest when reviewing an agency's
19 technical analyses and judgments involving the evaluation of complex
20 scientific data within the agency's technical expertise." League of
21 Wilderness Defenders Blue Mountains Biodiversity Project v. Allen, ---
22 F.3d ----, 2010 WL 3194619, at *5 (9th Cir. 2010).

23 **II. BACKGROUND**

24 **A. The Panther Fire**

25 The Panther Fire was started by a lightning storm on July 22,
26 2008. (Administrative Record ("AR") 7 at 1; AR 19 at 3.) Despite
27 suppression actions, the Panther Fire and other nearby fires consumed
28 approximately 63,000 acres of the Klamath National Forest by the fall of

1 2008. Id. The Panther Fire made its final and most intense run on
2 October 1, 2008, burning 13,000 acres before rain stopped its advance.
3 Id. A combination of topography, fuel loading, and unfavorable weather
4 caused intense fire activity, resulting in considerable tree mortality,
5 particularly in and around the Project area. (AR 19 at 3-4, and Photo
6 1-1.) The intensity of the Panther Fire also reduced the conifer seed
7 source needed to naturally reforest the landscape. Id. at 4. "[H]eavy
8 fuel loadings and overhead snag hazards in stands and along roads in the
9 project present unsafe conditions for the public and for forest
10 workers." Id. "Roadside hazards in particular jeopardize safe ingress
11 and egress in future wildfire events." Id.

12 **B. The Project's Purpose and Scope**

13 The Project is located within the Elk Creek watershed on the
14 Happy Camp Ranger District of the Klamath National Forest. (AR 7 at 2.)
15 The Project's stated purposes are to 1) facilitate conifer revegetation,
16 2) provide for public and forest worker safety, and 3) recover economic
17 value from timber lost to the Panther Fire. (AR 7 at 1; AR 19 at 6-7.)

18 The Project involves the salvage harvest of dead and dying
19 trees on approximately 214 acres of burned forest lands with treatment
20 of small fuels left after harvest and reforestation with conifer
21 seedlings, as well as the removal of "hazard" roadside dead and dying
22 trees along approximately 12 miles of road encompassing 322 acres. (AR
23 7 at 1-3; AR 19 at 8-9, 21-23, 127.)

24 The salvaged timber will be predominantly logged by suspended
25 cable methods to avoid disturbance of sensitive soils. (AR 19 at 8, 21.)
26 No new access roads will be constructed except for "[a]pproximately 200
27 feet of temporary landing access road . . . , which would be
28 decommissioned following completion of harvest activities." Id. at 21.

1 In addition, the Project will incorporate mitigation measures and
2 utilize Best Management Practices to minimize any environmental impact
3 from the logging contemplated by the Project, including retention of
4 large snags to preserve habitat values. See AR 7 at 3; AR 19 at 28-43,
5 and App. B. Further, the Project includes protective measures designed
6 to minimize impacts to the Project acreage located in Riparian Reserves.
7 (AR 19 at 8, 28-30.)

8 **C. The Project's History**

9 The Forest Service developed "the Panther Fire Salvage and
10 Reforestation [Environmental Assessment] to incorporate both the
11 salvage/reforestation activities and roadside hazard treatments
12 previously analyzed [under two prior environmental assessments]." (AR
13 7 at 1.) "These activities were combined with additional fuels
14 treatments to meet project purposes." Id.

15 The Forest Service announced the availability of the Project's
16 Environmental Assessment on May 19, 2010, and accepted public comments
17 until September 18th, 2010. (AR 17.) The Decision Notice and Finding of
18 No Significant Impact was issued for the Project on August 23rd, 2010.
19 (AR 7.)

20 The Forest Service requested an Emergency Situation
21 Determination ("ESD") for the Project based upon an alleged "immediate
22 threat to human health and safety posed by the rapidly deteriorating
23 snags within stands and along Forest access roads in the project area"
24 and "a substantial loss of economic value to the Federal Government" if
25 the Project were stayed pending an administrative appeal. (AR 503 at 1,
26 see also AR 502 and 504.) The Chief of the Forest Service found that the
27 Project qualifies as an "emergency situation" under 36 C.F.R. § 215.2
28 and granted the ESD on August 23, 2010. (AR 501.) The ESD states a delay

1 in implementing the Project until after any administrative appeal would
2 likely result in a no-bid sale of the salvage timber due to the further
3 deterioration of the wood, resulting in an estimated monetary loss of
4 \$565,000. Id. at 1. Without a commercial salvage, federal funding would
5 be necessary to accomplish the Project's hazard tree removal and fuel
6 treatment objectives. Id. at 1-2; see also AR 504 and 505.

7 **III. DISCUSSION**

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

9 **1. NFMA Claim**

10 Plaintiffs argue the Project violates the National Forest
11 Management Act by proposing to conduct salvage logging within Riparian
12 Reserves without first demonstrating that the harvesting is necessary to
13 attain Aquatic Conservation Strategy ("ACS") Objectives, and "that
14 future coarse woody debris needs are presently met." (Mot. 14:13-17.)
15 Defendants counter the AR "amply supports" that the Project is designed
16 to further ACS objectives. (Defs.' Mem. in Opp'n to Mot. for Injun.
17 ("Opp'n") 10:26-27.)

18 The NFMA, 16 U.S.C. § 1600 et seq., governs the Forest
19 Service's management of National Forests. NFMA and its implementing
20 regulations provide for forest planning and management at two levels:
21 the forest level and the individual project level. See generally 16
22 U.S.C. § 1604; see also Ohio Forestry Ass'n v. Sierra Club, 523 U.S.
23 726, 729-30 (1998).

24 At the forest level, the Forest Service develops a Land and
25 Resource Management Plan ("LRMP" or "Forest Plan"), which is a broad,
26 long-term planning document for the entire forest. "These plans operate
27 like zoning ordinances, defining broadly the uses allowed in various
28 forest regions, setting goals and limits on various uses . . . but do

1 not directly compel specific actions." Citizens for Better Forestry v.
2 U.S. Dep't of Agric., 341 F.3d 961, 966 (9th Cir. 2003).

3 At the project level, site-specific projects are to be
4 consistent with the governing LRMP. Id.; see also Inland Empire Pub.
5 Lands Council v. U.S. Forest Serv., 88 F.3d 754, 757 (9th Cir. 1996);
6 see generally 16 U.S.C. § 1604(I). Once the Forest Plan is approved,
7 the Forest Service implements the Plan by approving or denying
8 site-specific actions. Forest Guardians v. U.S. Forest Serv., 329 F.3d
9 1089, 1092 (9th Cir. 2003).

10 The Klamath National Forest Land and Resource Management Plan
11 is the governing Forest Plan for Klamath National Forest. (AR 518.) That
12 plan also incorporates direction from the Northwest Forest Plan
13 ("NWFP"), which was adopted in 1994 to provide a regional strategy for
14 managing the National Forests of Northern California, Oregon, and
15 Washington. Id. at 1-1.

16 The NWFP established a system of land "allocations," which
17 govern the activities that may or may not be conducted in each
18 allocation. (AR 529 at A-4, A-5.) One of those allocations, "Riparian
19 Reserves," designates areas "along streams, wetlands, ponds, lakes and
20 unstable or potentially unstable areas where the conservation of aquatic
21 and riparian-dependent terrestrial resources receives primary emphasis."
22 (AR 528 at 7.)

23 "Recognizing that riparian terrain 'offer[s] core areas of
24 high quality stream habitat,' and that watersheds 'are crucial to
25 at-risk fish species . . . and provide high quality water,' the [NWFP]
26 'prohibit[s] or regulate[s] activities in Riparian Reserves that retard
27 or prevent attainment of the Aquatic Conservation Strategy objectives.'" Oregon Natural Resources Council Fund v. Goodman, 505 F.3d 884, 893-94

1 (9th Cir. 2007) (quoting Pac. Coast Fed'n of Fishermen's Ass'ns, Inc. v.
2 Nat'l Marine Fisheries Serv., 265 F.3d 1028, 1031-32 (9th Cir. 2001)).

3 Accordingly, timber harvest is prohibited within Riparian Reserves under
4 the NWFP except as follows:

5 a) "Where catastrophic events such as fire . . . result in
6 degraded riparian conditions," salvage and fuelwood cutting is permitted
7 if "required to attain Aquatic Conservation Strategy objectives."

8 b) Trees may be salvaged "only when watershed analysis
9 determines that present and future coarse woody debris needs are met and
10 other ACS objectives are not adversely affected."

11 c) Silvicultural practices may be applied to "control
12 stocking, reestablish and manage stands, and acquire desired vegetation
13 characteristics needed to attain ACS objectives." (AR 529, at
14 C-31-C-32.)

15 The NWFP sets forth nine ACS objectives, which include:

16 3. Maintain and restore the physical integrity of
17 the aquatic system, including shorelines,
banks, and bottom configurations.

18 4. Maintain and restore water quality necessary
19 to support healthy riparian, aquatic, and
wetland ecosystems

20

21 5. Maintain and restore the sediment regime under
22 which aquatic ecosystems evolved

23 (AR 529 at B-11.)

24 Discussion of Plaintiffs' arguments supporting their NFMA
25 claim follows.

26 **a) Widths of Riparian Reserves**

27 Plaintiffs argue the Forest Service has improperly altered the
28 widths of Riparian Reserves within the Project area contrary to the NWFP

1 and the Elk Creek Ecosystem Analysis. (Mot. 10:23-11:9.) Defendants
2 counter "the Forest Service has not proposed any modification of
3 Riparian Reserve widths. In fact, the Project maintains the recommended
4 widths." (Opp'n 11:26-12:1.)

5 Plaintiffs do not cite any portion of the AR in support of
6 their argument that the Project alters Riparian Reserve widths. Further,
7 the Hydrology Report indicates the Project maintains the recommended
8 widths. (AR 29 at 6.) Therefore, Plaintiffs have not shown that the
9 Project improperly changes the Riparian Reserve widths established in
10 the NWFP.

11 **b) Scientific Studies concerning Post-Fire Logging in**
12 **Riparian areas**

13 Plaintiffs also argue "[e]xpert researchers have . . .
14 concluded that post-fire logging in riparian areas causes irreparable
15 harm" to the environment, including a decrease in coarse woody debris
16 and accelerated surface erosion. (Mot. 11:10-11, 12:11-12.)

17 Defendants rejoin,

18 Plaintiffs cite various articles that discuss
19 riparian issues generally as well as snippets from
20 the administrative record taken out of context,
21 while ignoring the larger picture. That larger
22 picture . . . reveals that the Panther Project,
23 with its site-specific treatments and design
24 features, will have a beneficial effect on Riparian
25 Reserves, ameliorating the ill effects that
26 Plaintiffs describe (which are largely the
27 after-effects of the fire itself), while avoiding
28 any further impacts. Plaintiffs' discussion of the
general potential for adverse effects to riparian
areas fails to account for the specifics of the
project they are challenging. Because the Panther
Project's treatments in Riparian Reserves,
including fuels reduction and reforestation, will
accelerate the development of a conifer overstory
and will stabilize streambanks, Plaintiffs' generic
concerns are off the mark and fail to establish a
violation of NFMA.

1 (Opp'n 12:6-15) (citation omitted).

2 Plaintiffs rely upon two scientific studies in support of
3 their position that post-fire logging will have a significant impact on
4 riparian areas. (AR 401, 411.) The studies do not concern this Project's
5 effects on the Riparian Reserves within the Project area, however.
6 Further, the Project's Environmental Assessment and its component
7 specialist reports indicate the Project will actually benefit Riparian
8 Reserves by promoting rapid conifer regeneration. (AR 19 at 6, 64, 78;
9 AR 28 at 4, 21-23; AR 29 at 10-11, 21-22.) For example, the Project's
10 "Decision Notice and Finding of No Significant Impact" states:

11 **Cumulative Watershed Effects**

12

13 With the resource protection measures
14 integrated in the Selected Alternative,
15 implementation will not increase the potential for
landsliding or debris flows, nor negatively affect
water or soils.

16 The Selected Alternative will decrease the
17 likelihood of high severity fire through fuels
18 treatments - thus further decreasing the risk of
19 landsliding - and would have a long-term positive
20 effect on hillslope stability through rapid conifer
reforestation. Design features such as retention of
large logs in steep burned channels would maintain
natural debris flow processes.

21 The Selected Alternative would have negligible
22 to minor direct, indirect and cumulative effects on
23 water quality and land stability within the project
24 area. Risks to the watersheds from the proposed
25 action are low. By quickly effecting conifer
26 regeneration, the net root reinforcement would
27 remain high enough to prevent failures. There would
28 be a long-term increase in stream shading as
riparian vegetation recovers. The functioning of
project area riparian reserves would continue to
improve over the current post-fire condition. Rapid
conifer reforestation in riparian reserves would
augment naturally recovering riparian vegetation
and ground cover, thereby improving the riparian
reserves' efficiency as a sediment filter.

1 (AR 7 at 15-16 (emphasis in original).)

2 **c) Aquatic Conservation Strategy Objectives**

3 Plaintiffs further argue:

4 Defendants have failed to demonstrate that salvage
5 logging and cable and ground-based yarding within
6 Riparian Reserves is required to meet ACSOs, and
7 that the watershed analysis for the Elk Creek
8 Watershed concluded that future woody debris needs
are presently met Consequently, the
decision to permit salvage logging within Riparian
Reserves is . . . not in accordance with NFMA.

9 (Mot. 14:14-17 (emphasis in original).)

10 Defendants counter the Project is designed to promote ACS
11 objectives, and meets coarse woody debris needs. (Opp'n 10:26-27, 11:17-
12 18.) Defendants explain with citation to the administrative record:

13 In this case, the reforestation component of the
14 Panther Project is anticipated to promote rapid
15 conifer regeneration, which in turn will augment
16 naturally occurring riparian vegetation and ground
17 cover, thereby improving stream shading and
18 sediment filtration, as well as reestablishing
19 soil-binding root mass, which will increase bank
20 stability. [AR 19 at 6, 64.] These effects,
21 together with the increase in fire resiliency from
22 fuels treatments, will therefore assist in the
attainment of ACS objectives. [AR 19, at 78; AR 29
at 21-22] In addition, the Project calls
for mitigation measures to avoid adversely
affecting ACS objectives and thus avoid any
significant adverse impacts to Riparian Reserves,
such as sediment input or bank destabilization. [AR
19 at 29-30, 128-29; AR 24 at 1; AR 28 at 5-8; AR
29 at 5-6; AR 35 at 4-6].

23 Id. at 11:12-23.

24 Plaintiffs' counsel provided additional argument on this issue
25 at the September 27, 2010 hearing, contending Defendants' citations to
26 the AR suggest only that the fuel treatment and reforestation components
27 of the Project promote ACS objectives; nothing in the AR suggests that
28 the salvage harvest is necessary to attain them. Plaintiffs' counsel

1 also argued that without information in the AR specifically explaining
2 why logging is required to attain ACS objectives, the Project's proposed
3 salvage harvesting in Riparian Reserves violates the NWFP, and thus, the
4 NFMA.

5 However, the AR indicates both that coarse woody debris needs
6 are being met and the Project is necessary to attain the following ACS
7 objectives: improving hillside stability, increasing stream shading, and
8 improving sediment filtration efficiency. (AR 19 at 29-30, 64, 133, 138;
9 AR 28 at 7; AR 29 at 10, 21.) Further, information in the AR indicates
10 logging is needed to implement the reforestation and fuel treatment
11 portions of the Project. (AR 29 at 11.) Regarding this, the Hydrology
12 Report states:

13 The Panther Fire has denuded all Riparian Reserves
14 in the project area. For this reason it is
15 imperative that site preparation and planting occur
in the Riparian Reserve areas.

16 For effective site prep to occur, the riparian
17 areas need to be slashed with handpiling of
18 non-commercial material. Commercial timber needs to
19 be harvested to open up the ground for planting. At
this point there is no conifer stream shading, and
no remaining riparian buffer to act as a sediment
filter.

20 Id.

21 Therefore, Plaintiffs have not shown a likelihood of success,
22 nor raised serious questions, on the merits of their NFMA claim.

23 **2. NEPA Claim**

24 Plaintiffs argue Defendants violated NEPA by failing to
25 prepare an Environmental Impact Statement ("EIS") for the Project. (Mot.
26 16:5-11.) Defendants rejoin an EIS was not required because the
27 Environmental Assessment prepared for the Project demonstrated that it
28

1 will not significantly affect the human environment. (Opp'n 13:4, 13:11-
2 12.)

3 NEPA is a procedural statute enacted to ensure the federal
4 government makes major decisions significantly affecting the environment
5 only after considering the impacts of those decisions and exploring
6 possible alternatives. 42 U.S.C. §§ 4321, 4331; 40 C.F.R. § 1501.1. Its
7 primary purpose is to ensure that federal agencies take a "hard look"
8 at the environmental consequences of their proposed actions before
9 making a final decision to proceed. Robertson v. Methow Valley Citizens
10 Council, 490 U.S. 332, 350-51 (1989). Although NEPA establishes
11 procedures by which federal agencies must consider the environmental
12 impacts of their actions, it does not dictate the substantive results
13 of agency decision making. Robertson, 490 U.S. at 350; High Sierra
14 Hikers Ass'n v. Blackwell, 390 F.3d 630, 639 (9th Cir. 2004).

15 NEPA requires federal agencies to prepare a detailed EIS for
16 all "major Federal actions significantly affecting the quality of the
17 human environment." 42 U.S.C. § 4332(2)(c). "Where an agency is unsure
18 whether an action is likely to have 'significant' environmental effects,
19 it may prepare an [Environmental Assessment ("EA")]: a 'concise public
20 document' designed to '[b]riefly provide sufficient evidence and
21 analysis for determining whether to prepare an environmental impact
22 statement'" Klamath-Siskiyou Wildlands Center v. Bureau of Land
23 Mgmt., 387 F.3d 989, 993 (9th Cir. 2004) (quoting 40 C.F.R. § 1508.9).
24 If, after preparing an EA, "the agency concludes . . . there is no
25 significant effect from the proposed project," the federal agency may
26 issue a Finding of No Significant Impact ("FONSI") in lieu of preparing
27 an EIS. Native Ecosystems Council v. U.S. Forest Service, 428 F.3d 1233,
28 1239 (9th Cir. 2005); 40 C.F.R. § 1508.13. The FONSI must include "a

1 convincing statement of reasons" to explain why a project's impacts are
2 not significant. Blue Mountains Biodiversity Project v. Blackwood, 161
3 F.3d at 1212 (quotation omitted).

4 Two broad factors must be considered in determining whether
5 a project will significantly affect the environment: context and
6 intensity. 40 C.F.R. § 1508.27. "Context simply delimits the scope of
7 the agency's action, including the interests affected." National Parks
8 & Conservation Ass'n v. Babbitt, 241 F.3d 722, 731 (9th Cir. 2001).
9 "Intensity relates to the degree to which the agency action affects the
10 locale and interests identified in the context part of the inquiry." Id.
11 In evaluating a project's intensity, NEPA regulations require the agency
12 to consider a number of "intensity factors" including:

13 (2) The degree to which the proposed action
14 affects public health or safety.

15 (3) Unique characteristics of the geographic
16 area such as proximity to historic or cultural
17 resources, park lands, prime farmlands, wetlands,
18 wild and scenic rivers, or ecologically critical
19 areas.

20

21 (10) Whether the action threatens a violation
22 of Federal, State, or local law or requirements
23 imposed for the protection of the environment.

24 40 C.F.R. § 1508.27(b). "One of these factors may be sufficient to
25 require preparation of an EIS in appropriate circumstances." Oceans
26 Advocates v. U.S. Army Corps of Engineers, 402 F.3d 846, 865 (9th Cir.
27 2005) (citation omitted).

28 To prevail on a NEPA claim that an agency improperly failed
to prepare an EIS, "a plaintiff need not show that significant effects
will in fact occur. It is enough for the plaintiff to raise substantial
questions whether a project may have a significant effect on the

1 environment.” Blue Mountains Biodiversity Project v. Blackwood, 161
2 F.3d 1208, 1212 (9th Cir. 1998) (quotation omitted).

3 Plaintiffs argue an EIS was required for the Project because
4 of the presence of several “significance factors,” including the
5 Project’s implementation in “ecologically critical areas;” its
6 threatened violation of federal law; and its affect on public health and
7 safety. (Mot. 16:5-8, 16:13-15, 16:25-26, 17:11-12; 18:4-6, 18:25-27.)

8 **a) Ecologically Critical Areas**

9 Plaintiffs argue an EIS was required because the Project is
10 located “within a Tier 1 watershed, . . . proposes salvage logging
11 within Riparian Reserves, . . . is partially located within a late-
12 successional reserve . . . [and] is partially located within the Johnson
13 Inventoried Roadless Area.” (Mot. 16:13-14, 16:25, 17:11-12.)

14 Defendants counter “Plaintiffs do no more than observe that
15 certain types of land allocations . . . exist within or near the Project
16 area and then jump to the conclusion that the Project may have
17 ‘significant’ environmental effects. The Panther Project will not have
18 any significant effect on Riparian Reserves . . . LSRs or IRAs”
19 (Opp’n 14:13-19.) Defendants further argue Plaintiffs have waived any
20 argument concerning the Project’s potential impact on late-successional
21 reserves (LSRs) because they did not raise any issues concerning LSRs
22 in their comments on the Project’s Environmental Assessment. (Opp’n
23 14:20-22.)¹

24 Plaintiffs do not cite to any portion of the AR that supports
25 their argument that there is a risk of environmental harm to
26

27 ¹ Defendants’ waiver argument need not be decided since it is
28 clear Plaintiffs have not shown that this issue presents a serious
question or that they are likely to succeed on the merits of this issue.

1 "ecologically critical areas;" they simply cite to portions of the AR,
2 which discuss that ecologically sensitive areas are within or near the
3 Project area. However, Plaintiffs have not shown that the mere presence
4 of these ecologically sensitive areas within or near the Project area
5 raises a substantial question that the Project may have a significant
6 effect on the environment. See Indiana Forest Alliance, Inc. v. United
7 States Forest Service, No. NA 99-214-C-H/G, 2001 WL 912751, at *13 (S.D.
8 Ind. July 5, 2001) ("The mere presence of unique features does not
9 require the Forest Service to prepare an EIS.") aff'd, 325 F.3d 851 (7th
10 Cir. 2003); see also Presidio Golf Club v. National Park Service, 155
11 F.3d 1153, 1162 (9th Cir. 1998) (holding the Park Service did take the
12 Project's proximity to historical resources into account, and the EA
13 adequately considered the unique characteristics of the Presidio and its
14 ecological resources).

15 Further, the Environmental Assessment specifically considered
16 the Project's effects on these areas and indicates they will not be
17 significantly affected. (AR 19 at 1, 6, 28-30, 60-61, 64, 74, 78, 128-
18 129.) Only six acres of proposed treatment (hazard tree removal and
19 fuels treatment) lie within LSRs, which the EA concludes "[will] not
20 substantially change the character of the LSR or its current or future
21 potential habitat for northern spotted owls." Id. at 1, 74. The EA
22 similarly explains for the Project's proposed hazard tree removal and
23 fuel treatment within the Johnson Inventoried Roadless Area ("IRA"), the
24 activities affect only 0.002% of its 9,300 acres, and are consistent
25 with all applicable regulations. (AR 19 at 60, 61.) "No timber harvest
26 (other than the removal of roadside hazard trees) or road construction
27 is proposed." Id. at 60. The Environmental Assessment further states:
28

1 Implementation of [the Project] would not change
2 the roadless character or affect the area's
3 potential for inclusion in the Wilderness System at
4 a later date The area proposed for activity
5 is small and project design would minimize
6 potential adverse resource effects. Proposed
7 management is consistent with Forest Plan direction
8 for the respective management areas.

9 (AR 19 at 61.) Lastly, the Project's effects on Riparian Reserves are
10 discussed above under section III(A) (1).

11 Therefore, Plaintiffs have not shown that the Project's
12 proposed activities in or near these "ecologically critical areas"
13 require the preparation of an EIS.

14 **b) A Threatened Violation of Federal Law.**

15 Plaintiffs also argue the Project threatens the violation of
16 federal law, i.e. the Northwest Forest Plan, by "salvage logging within
17 Riparian Reserves," which requires preparation of an EIS. (Mot. 18:5-
18 6.)

19 Defendants rejoin, there is no threatened violation of the
20 Northwest Forest Plan because both the NWFP and the Klamath National
21 Forest LRMP "allow timber harvest and other forest management activities
22 in Riparian Reserves when implementing such actions will advance and not
23 otherwise harm ACS objectives." (Opp'n 16:12-14.)

24 Plaintiffs' argument has already been addressed in the
25 discussion above on their NFMA claim. Plaintiffs have not raised a
26 serious question on the merits that the Project violates the NFMA.
27 Therefore, this factor does not weigh in favor of requiring an EIS.

28 **c) Effect on Public Health & Safety.**

29 Lastly, Plaintiffs argue the Project's EA, DN/FONSI and
30 Emergency Situation Determination state the Project is necessary to
31 protect public and firefighter safety; which is a "[factor] that

1 trigger[s] the preparation of an EIS." Plaintiffs conceded at the
2 September 27, 2010 hearing that this argument is "counterintuitive"
3 since the record indicates the Project will have a positive, rather than
4 negative, effect on public safety. However, Plaintiffs argue an EIS is
5 required whenever a project will significantly affect public safety,
6 regardless of whether the effect is beneficial or harmful.

7 The issue, however, is whether an EIS is required because the
8 proposed action "'may cause significant degradation of some human
9 environmental factor.'" Ocean Advocates v. U.S. Army Corp of Engineers,
10 402 F.3d 846, 864 (quoting Idaho Sporting Cong. v. Thomas, 137 F.3d
11 1146, 1149 (9th Cir. 1998)). Plaintiffs' argument is disconnected from
12 this issue. Therefore, the Project's expected positive effect on public
13 safety does not require preparation of an EIS.

14 For the above reasons, Plaintiffs have not shown a likelihood
15 of success, nor raised serious questions, on the merits of their NEPA
16 claim.

17 3. ARA Claim

18 Plaintiffs argue Defendants violated the ARA by issuing an
19 Emergency Situation Determination, which obviates the usual stay of a
20 proposed action pending resolution of an administrative appeal, without
21 the required showing. (Mot. 19:6-13.) Defendants counter the ESD was
22 properly issued both to address hazards threatening human health and
23 safety as well as to avoid substantial loss of economic value to the
24 federal government. (Opp'n 18:17-22.)

25 Under the ARA, Forest Service decisions subject to
26 administrative appeal are automatically stayed pending appeal. 16 U.S.C.
27 § 1612, Note (e). However, no stay of the decision is imposed if "the
28 Chief of the Forest Service determines that an emergency situation

1 exists” Id. Regulations establishing the appeal procedures
2 state an “emergency situation” includes:

3 A situation on National Forest System (NFS) lands
4 for which immediate implementation of all or part
5 of a decision is necessary for relief from hazards
6 threatening human health and safety or natural
7 resources on those NFS or adjacent lands; or that
8 would result in substantial loss of economic value
9 to the Federal Government if implementation of the
10 decision were delayed.

11 36 C.F.R. § 215.2 (2010).

12 Plaintiffs raise five primary arguments in support of their
13 ARA claim, which are addressed in turn below.

14 **a) Failure to Use an Economic Expert**

15 Plaintiffs argue the Forest Service was required to use an
16 economist to perform the Project’s economic analysis since the ESD was
17 based on economic reasons. (Mot. 19:14-15, 19:23-26.) Plaintiffs rely
18 on a NEPA regulation and the Forest Service Handbook to support this
19 argument. Id. The NEPA regulation Plaintiffs cite, 40 C.F.R. 1502.6,
20 requires the use of “an inter-disciplinary approach” in preparing
21 Environmental Impact Statements. Similarly, the portions of the Forest
22 Service Handbook cited by Plaintiffs require use of an interdisciplinary
23 approach in planning and decisionmaking, which may have an impact on the
24 environment. FSH 1909.15.12.

25 Defendants counter that 36 C.F.R. § 215.10(b) sets forth the
26 standard for issuing an ESD, not the authorities cited by Plaintiffs,
27 and § 215.10(b) requires only that the Forest Service base its
28 determination “upon examination of the relevant information.” (Opp’n
21:10-15.) Defendants further argue, even if the law upon which
Plaintiffs rely applies to the issuance of an ESD, it does not require
the specific use of an economist because 40 C.F.R. § 1502.6 commands

1 only that the “disciplines of the preparers shall be appropriate to the
2 scope and issues identified” Id. at 22:9-11. Defendants contend
3 special expertise in economics was not required to support the ESD in
4 this case because the person who prepared the Project’s economic
5 analysis is trained in forest management and is qualified to analyze
6 salvage timber’s loss in value over time. (Opp’n 22:9-15; AR 19 at 80.)

7 Defendants’ arguments are persuasive. Plaintiffs have not
8 shown that the Forest Service was required to use an economist to
9 support issuance of the ESD, nor that the Project’s economic analysis
10 was flawed.

11 **b) The Project Is a Net Financial Loss to the**
12 **Government**

13 Plaintiffs further argue the Project “will result in negative
14 income[;]” therefore, there is no information to support “the agency’s
15 conclusion that the proposed project would result in a substantial loss
16 of economic value to the government if it [is] not implemented
17 immediately.” (Mot. 20:2-7.)

18 Defendants counter “[i]t is irrelevant that . . . total costs
19 would exceed total receipts Economic loss occurs ‘even if sale-
20 preparation costs outstrip the expected revenue derived from the salvage
21 sale.’” (Opp’n 20:6-7 (quoting League of Wilderness Defenders-Blue
22 Mountains Biodiversity Project v. U.S. Forest Service, No. Civ. 04-488-
23 HA, 2004 WL 2642705, at *14 (D. Or. Nov. 19, 2004).)

24 Plaintiffs have not shown that a net loss to the government
25 renders the ESD invalid. The relevant inquiry in determining whether or
26 not the delay in implementing a project will result in a substantial
27 financial loss to the government is the difference in economic value to
28 the government in implementing the plan under the normal time line

1 versus on an expedited basis. The AR indicates the federal government
2 will lose a substantial amount of money if the Project is delayed
3 pending an administrative appeal. As documented in the "Panther Fire
4 Salvage Emergency Situation Analysis" prepared in support of the ESD
5 request:

6 The Final Environmental Assessment and Decision
7 Notice are scheduled to be approved on July 30,
8 2010. Implementation could begin on August 11,
9 2010. By October 15, wet weather operating
10 restriction will be in effect and operations will
11 be limited depending upon the weather patterns. All
12 of the volume in the salvage project could be
13 harvested if the sale is not appealed. Several
14 interest groups have expressed strong indications
15 that they will appeal a decision to salvage timber.
16 The appeal process timelines of 105 days would
17 extend the time until award of the sale from August
18 11 to November 24. Since wet weather operating
19 restrictions go into effect on October 15, it is
20 likely that little or no volume would be harvested
21 at this late date. Delay of implementation will
22 result in the timber deteriorating substantially
23 before it can be removed, impacting the revenue
24 that can be derived from the sale of sawtimber.
25 Given current market conditions, the additional
26 deterioration resulting from the delay greatly
27 increases the risk that the timber may not sell at
28 all. The ability of the Klamath National Forest to
accomplish the purpose and need for the project is
therefore strongly tied to the timing of the
salvage harvest treatments, which in turn is
dependent upon the NEPA timeline and obtaining an
Emergency Situation Determination.

21

22 Value loss (stumpage receipts) would be
23 approximately \$278,062 dollars for the project, or
24 approximately 34% of the total timber value. It is
25 likely that the losses would be much higher because
26 contractors would most likely not bid on the timber
27 sales due to costly logging systems and a high risk
28 of timber deterioration, particularly under current
market conditions. The total value lost would in
that case match the total value of approximately
\$565,000. In California, there are numerous
examples where delay has caused no bid sales: the
Gap Fire discussed above, Blue Fire on the Modoc,
and Manter Fire on the Sequoia, among others.

1 (AR 504 at 3, 9.)

2 **c) Two Year Delay in Issuing the ESD**

3 Plaintiffs also argue:

4 [T]he Forest Service declared an identical
5 "emergency" in 2009 [when it developed the earlier
6 Panther project], and then, in the face of
7 litigation, withdrew [it]. The agency waited an
8 entire year before moving forward with the project
again in August 2010 [T]hese facts do not
support the need for an emergency situation
determination.

9 (Mot. 20:12-17.)

10 Plaintiffs rely on the Ninth Circuit's recent ruling in
11 Alliance for the Wild Rockies v. Cottrell in support of their argument
12 that the two year delay in implementing the project post-fire belies the
13 determination that there was an "emergency situation." Alliance for the
14 Wild Rockies v. Cottrell, --- F.3d ----, 2010 WL 3665149, at *11 (9th
15 Cir. 2010), amended by --- F3d. ----, 2010 WL 3665149 (9th Cir. 2010).
16 In Cottrell, the Ninth Circuit held the plaintiffs raised "serious
17 questions" on the merits of their ARA claim, which challenged an ESD
18 determination, noting "the Forest Service has not been able to make
19 clear to us, either in its briefing or at oral argument, why it waited
20 so long to request an ESD. The Rat Creek fire occurred in August and
21 September of 2007. The ESD was requested, and then issued, almost two
22 years later." Id.

23 Defendants counter, Plaintiffs' argument "is off the mark"
24 because an ESD was requested and issued in connection with the 2009
25 iteration of the Panther project. (Opp'n 20:15-21.) Defendants state:

26 [T]he Agency withdrew the 2009 ESD and DN/FONSI
27 because it determined that it was necessary to
perform additional NEPA analysis on the hazard tree
28 portion of the Project. That decision was certainly
no concession that there was no public safety
threat at the time, that the timber was not

1 deteriorating, or that the Project could ultimately
2 fail to obtain bids.

3 (Opp'n 20:19-21.)

4 The Project is distinguishable from the ESD challenged in
5 Cottrell because here Defendants provide a reasonable explanation for
6 the delay in implementing the project and seeking the ESD. As described
7 in the "Panther Fire Salvage Emergency Situation Analysis,"

8 The Interdisciplinary Team (IDT) has analyzed the
9 potential environmental effects of this proposed
10 action under the National Environmental Policy Act.
11 Project scoping was initiated to prepare an
12 Environmental Assessment in December 2009. The IDT
13 published the Draft Environmental Assessment (EA)
14 on June 16, 2009 for the Panther Fire Salvage
15 Project (2009). A Decision Notice was issued on
16 August 10, 2009. On August 21, 2009 that decision
17 was withdrawn. Scoping for a new project, Panther
18 Fire Salvage and Reforestation (2010), began in
19 January 2010. The IDT developed a new purpose and
20 need as well as a new proposed action and published
21 an EA for the Panther Fire Salvage and
22 Reforestation project on May 19, 2010. A decision
23 on this project is expected on July 30, 2010.

24 (AR 505 at 1.)

25 Cottrell is distinguishable from this case in other respects
26 as well. First, the ESD at issue in Cottrell was based only upon
27 threatened economic loss to the federal government, whereas here, the
28 ESD is based upon both threatened economic loss and a danger to human
health and safety. Second, in Cottrell the economic loss was valued
between \$16,000 - \$70,000. Here the threatened loss is upwards of
\$250,000. (AR 505 at 9.) Third, the ESD in Cottrell, was improperly
based, in part, on a local economy argument, which was not a basis for
the ESD in this case. (AR 501 at 2.)

1 **d) Delay's Impact on Local Economy**

2 Plaintiffs next argue the Forest Service improperly relied
3 upon the Project's impact on the local economy in issuing the ESD. (Mot.
4 21.) Plaintiffs rely on language in the Pacific Southwest Region's
5 August 11, 2010 ESD request as support for this argument, which
6 references the effect a delay in Project implementation would have on
7 the local economy. (AR 502 at 1.)

8 Although the August 11, 2010 request does discuss the delay's
9 impact on the local economy, the Emergency Situation Determination was
10 not based on this part of the request. The ESD specifically states that
11 the delay's impact on the local economy "is not part of what
12 defines an emergency situation . . . and is not a basis for [the]
13 determination." (AR 501 at 2.) Therefore, the delay's impact on the
14 local economy was not included as a basis for issuance of the ESD.

15 **e) The 2009 ESD**

16 Lastly, Plaintiffs argue the economic analysis included in the
17 2009 ESD proved to be untrue, and therefore undermines the economic
18 justification in the current ESD. (Mot. 21:25-22:11.) Plaintiffs state:

19 In 2009, the Forest Service alleged that immediate
20 implementation of the Panther project was necessary
21 in order to implement the project that year, or
22 else the government could loose as much as \$312,000
23 because there was a significant risk of the project
24 drawing no bids. Now, in 2010, the Forest Service
25 now maintains that those estimates were all
26 incorrect, and that implementation in 2010 would
27 still capture the economic value of the timber . .
28 . . This acknowledgment casts serious doubt on the
veracity of the agency's 2009 claim that an ESD was
necessary to expedite implementation of the Panther
project. . . . [I]ts claim, now, that an ESD is
still necessary in 2010 and that implementation in
2011 would result in no bids, is questionable at
best.

(Mot. 21:25-22:16.)

1 Defendants counter the economic analysis contained within the
2 2009 ESD does not undermine the current ESD, arguing:

3 [T]he fact that the timber in the Project Area has
4 retained some value is consistent with the
5 principles the Agency properly relied upon in its
6 ESD analysis: fire-damaged timber deteriorates over
7 time, with the biggest losses occurring within the
8 first two years. Moreover, as time goes on, it is
9 increasingly likely that no salvageable value will
10 be left. The Forest Service's ESD and supporting
11 analysis is more than sufficient to withstand
12 scrutiny.

13 (Opp'n 20:23-21:7 (citations omitted).)

14 Defendants' arguments are persuasive. The 2009 ESD did not
15 state that no commercial bids would be possible if the project were
16 delayed. (Mot., Ex. B at 1.) Instead, it indicated the delay would
17 result in a loss of timber value and "significantly increase the
18 likelihood of receiving no bids." Since the timber's value has further
19 decreased since the 2009 ESD was issued, the 2009 ESD's underlying
20 analysis, i.e. that fire-killed trees deteriorate in value over time,
21 proved to be true. Id.

22 Therefore, Plaintiffs have not raised a substantial question
23 on whether the ESD was properly issued. Furthermore, Plaintiffs did not
24 challenge the second, independent basis for the ESD in this case - that
25 immediate implementation is necessary for relief from hazards
26 threatening human health and safety. (AR 501 at 1 (stating "this project
27 qualifies as an emergency situation as defined at 36 CFR 215.2 because
28 its immediate implementation is necessary for relief from hazards
threatening human health and safety, and to avoid substantial loss of
economic value to the government").)

As explained in the Panther Fire Salvage Emergency Situation
Analysis:

1 Forest roads in the project area provide access for
2 forest management and public use. . . . Unstable
3 snags along these roads present a safety hazard to
4 all who use the roads. Safe public ingress and
5 egress is, therefore, a major concern. Unstable
6 snags along the roads and in stands also present a
7 hazard to the public, to forest workers in general
8 and to firefighters in particular. Current Forest
9 Service Wildland Fire Use policy has led to less
10 immediate suppression of many wildfires (USDA
11 Forest Service 2004a) For wildland
12 firefighters to initiate suppression actions, they
13 need safe access to the area. In the Panther Fire
14 area, the current heavy fuel loadings and overhead
15 snag hazards present unsafe conditions. Salvage
16 harvest followed by treatment of natural and
17 activity fuels would reduce existing and future
18 fuel loads while reducing the overhead snag hazard.
19 While salvage harvest would reduce heavy fuel
20 loads, subsequent fuel treatments would reduce
21 future fire behavior within the treated areas, thus
22 providing suppression forces an opportunity to
23 initiate suppression actions. With the history of
24 frequent wildfires in and adjacent to the project
25 area, the existing roads provide an opportunity for
26 firefighters to safely access the area and engage
27 in suppression actions. Effective suppression
28 actions are important in reducing the risk of
unwanted wildfires exiting the Marble Mountain
wilderness and threatening more populated areas
near Happy Camp. In addition, forest visitors,
firefighters and other forest workers need safe
egress from the area in the event of a wildfire.
For the roads to be effective avenues of egress in
the event of a wildfire, activity and natural fuels
need to be treated following the removal of hazard
trees.

20 (AR 505 at 3.)

21 For the stated reasons, Plaintiffs have not shown a likelihood
22 of success, nor raised serious questions, on the merits of their ARA
23 claim.

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

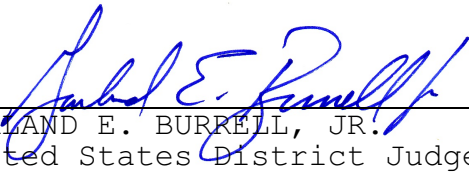
25 Since Plaintiffs have failed to show a likelihood of success,
26 or raise a serious question, on the merits of any of their claims, the
27 Court need not address the three remaining Winter factors, i.e. whether
28 Plaintiffs are likely to suffer irreparable harm in the absence of

1 preliminary relief, the balance of equities tips in their favor, and
2 a preliminary injunction is in the public interest. See Doe v. Reed, 586
3 F.3d 671, 681 n.14 (9th Cir. 2009).

4 **IV. CONCLUSION**

5 For the reasons stated above, Plaintiffs' motion for a
6 preliminary injunction is DENIED.

7 Dated: October 8, 2010

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11 GARLAND E. BURRELL, JR.
12 United States District Judge
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