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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 STAY AND</u>
Plaintiffs,)	<u>INJUNCTION PENDING APPEAL</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 move under Federal Rule of Civil Procedure ("Rule") 62(c) for a stay and injunction enjoining "additional post-fire logging activities in the Panther Project area" pending appeal of the order denying their motion for preliminary injunction. (Pls.' Mem. in Supp. of Mot. for Stay ("Mot.") 1:14-17.) Plaintiffs argue "irreparable harm is occurring, and will continue to occur, in absence of a stay and injunction pending appeal." Id. at 1:11-12. Defendants and Defendant Intervenors filed oppositions to the motion on October 19, 2010.

1 **I. LEGAL STANDARD**

2 Rule 62(c) prescribes: “[w]hile an appeal is pending from an
3 interlocutory order or final judgment that grants, dissolves or denies
4 an injunction, the court may suspend, modify, restore, or grant an
5 injunction” However, a stay pending appeal “is not a matter of
6 right, even if irreparable injury might otherwise result.” Nken v.
7 Holder, 129 S. Ct. 1749, 1760 (2009). “It is instead an exercise of
8 judicial discretion, and the propriety of its issue is dependent upon
9 the circumstances of the particular case. The party requesting a stay
10 bears the burden of showing that the circumstances justify an exercise
11 of that discretion.” Id. at 1761 (quotation, citations and internal
12 brackets omitted).

13 The following factors should be considered in deciding whether
14 to issue a stay pending appeal:

15 “(1) [W]hether the stay applicant has made a strong
16 showing that he is likely to succeed on the merits;
17 (2) whether the applicant will be irreparably
18 injured absent a stay; (3) whether issuance of the
19 stay will substantially injure the other parties
20 interested in the proceeding; and (4) where the
21 public interest lies.”

22 Golden Gate Restaurant Ass’n v. City and County of San Francisco, 512
23 F.3d 1112, 1115 (9th Cir. 2008) (quoting Hilton v. Braunskill, 481 U.S.
24 770, 776 (1987)). The Ninth Circuit applies these factors by
25 “employ[ing] two interrelated legal tests that represent the outer
26 reaches of a single continuum.” Id. at 1115 (quotation omitted).

27 At one end of the continuum, the moving party is
28 required to show both a probability of success on
the merits and the possibility of irreparable
injury. . . . At the other end of the continuum,
the moving party must demonstrate that serious
legal questions are raised and that the balance of
hardships tips sharply in its favor. These two
formulations represent two points on a sliding
scale in which the required degree of irreparable

1 harm increases as the probability of success
2 decreases.

3 Id. at 1115-16 (quotations omitted). For purposes of injunctive relief,
4 “[s]erious questions need not promise a certainty of success, nor even
5 present a probability of success, but must involve a fair chance of
6 success on the merits.” Gilder v. PGA Tour, Inc., 936 F.2d 417, 422 (9th
7 Cir. 1991) (quotations and citations omitted).

8 “There is substantial overlap between these and the factors
9 governing preliminary injunctions . . . because similar concerns arise
10 whenever a court order may allow or disallow anticipated action before
11 the legality of that action has been conclusively determined.” Nken v.
12 Holder, 129 S. Ct. at 1761.

13 **II. DISCUSSION**

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

15 Plaintiffs’ motion to stay is based on the same three claims
16 on which their preliminary injunction motion was premised: violation of
17 the National Forest Management Act (“NFMA”); violation of the National
18 Environmental Policy Act (“NEPA”); and violation of the Appeals Reform
19 Act (“ARA”). (Mot. 1:14-19.) This ruling on Plaintiffs’ Rule 62 motion
20 only addresses Plaintiffs’ arguments or citations to the Administrative
21 Record (“AR” or “record”) that have been made for the first time in the
22 motion sub judice, and does not repeat discussion of issues specifically
23 addressed in the preliminary injunction order.

24 **1. NFMA Claim**

25 Plaintiffs contend “the Forest Service overlooks the fact that
26 natural regeneration is already occurring in the planning area and
27 within Riparian Reserves,” as support for their argument that the
28 Project violates the National Forest Management Act by logging within
Riparian Reserves when not required to meet Aquatic Conservation

1 Strategy ("ACS") Objectives. (Mot. 4:6-7.) Plaintiffs explain,
2 "[c]onsequently, even if the Forest Service could lawfully focus on
3 conifer regeneration as a means to attain ACS Objectives, natural
4 regeneration and the successional process of restoring riparian
5 conditions is already underway." Id. at 4:8-10.

6 However, the record evidences the Forest Service's recognition
7 that natural regeneration is occurring in a manner that will delay
8 conifer regeneration. (AR 19 at 6, 46, 50-51, 126.) The Environmental
9 Assessment states:

10 **Conifer Revegetation**

11

12 **Alternative 1 - No Action**

13 Under this alternative no change from current
14 management actions would occur in the project area.
15 Sprouting hardwoods and highly competitive
16 sclerophyllous brush species would quickly occupy
17 most of project area. Reforestation will occur
18 naturally but may take many decades to replace
19 brushfields. . . . Given the high residual fuel
20 loading, probable length of time required for site
21 dominance by conifers and the fire history of the
22 Klamath Province, it is likely that the area would
23 reburn before trees with some degree of fire
24 resistance were established, so the area may go
25 through extended cycles of dominance by hardwoods
26 and sclerophyllous brush. . . . [delaying] site
27 occupancy by conifers for decades

21 The project silviculturist determined that the
22 No Action alternative may meet the purpose and need
23 in that conifer re-establishment would not be
24 precluded. However, given the current lack of a
25 viable seed source in and surrounding the project
26 area, and the current and predicted future fuel
27 loads, site dominance by conifers could take
28 decades and would likely be interrupted by periodic
reburns that set back natural conifer regeneration.

27 **Alternative 2 - [The Project]**

28 The proposed action would regenerate stands in
the project area by salvaging merchantable trees

1 where appropriate on approximately 214 acres;
2 treating fuels by yarding unmerchantable material,
3 handpiling and pile burning; and planting
appropriate conifer species with follow-up manual
brush control. . . .

4 Reforestation has a high probability of
5 successfully re-establishing conifers on site
6 within five years. . . . With active reforestation
7 the site would likely reach the stage where
8 conifers dominate the site several decades sooner
9 than with no management. While natural regeneration
has been successful following fires in the Klamath
Province, long regeneration periods and highly
variable stocking have characterized unplanted
sites.

10 Under the proposed action, it is likely that
11 214 acres would meet minimum stocking requirements
12 within five years following project activities. The
13 project silviculturist concluded that
14 implementation of the proposed action would meet
Forest Plan direction related to reforestation of
conifer species, and that adequate stocking by
conifers would likely be achieved much sooner than
under no action.

15 Id. at 50-51 (citations omitted).

16 Plaintiffs also argue "the Forest Service acknowledges that
17 coarse woody debris needs are not being met," citing a portion of the
18 notes taken during the Project's January 21, 2010, Interdisciplinary
19 Team Meeting. (Mot. 4, n.2.)

20 The portion of the record Plaintiffs cite states, "Leslie - we
21 are in deficit with the 5 trees per 200 feet, so we will probably be
22 okay fuels-wise." (AR 427, at 3.) It is unclear what the cited portion
23 of the record means since it is only a part of the "Panther IDT Meeting"
24 notes. Additional notes from the same meeting provide context for the
25 attendees' discussion of coarse woody debris:

26
27 Big sugar pine in Riparian Reserves (RRs) may
28 be cut, but will they be felled and left or will
they be removed? Bill Snavely reiterated the design
features for commercial "sticks", hazard trees in

1 RRs felled can serve as CWD and be left on site to
2 meet other resource needs. Treatment of fuels
3 within RRs is more important along the road system
4 than within the units. Betsy asked if CWD
5 requirements have to be met on every acre; Bill
6 Snavely says they need to be met on a watershed
7 level. Nick thinks that we won't get public support
8 if we remove all fuels from RRs as part of the
9 roadside hazard treatment. While the CWD discussion
10 will be at the watershed level, implementation of
11 CWD retention will be on the RR level.

12 The downed trees in RRs are at least in some
13 places trapping granitic debris flow and keeping it
14 from washing down the entire RR. Joe - hazard trees
15 can be felled into streamcourses to provide CWD.
16 Hazard trees leaning away from the streamcourses
17 can be removed. Leslie - there are so many downed
18 trees that overall there is not an overwhelming
19 need for directional felling. . . .

20 Leslie - we are in deficit with the 5 trees
21 per 200 feet, so we will probably be okay
22 fuels-wise. Hazard trees in RRs adjacent to streams
23 will be felled into the streamcourse when needed to
24 meet the 5 trees/200 feet of streamcourse.

25 (AR 427 at 3.) Further, regardless of its meaning, the cited notation
26 was made at the Project's first interdisciplinary team meeting, before
27 the Project's Hydrology Report, Geology Report, Soil Report and
28 Biological Evaluation/Assessment documented that coarse woody debris
needs are being met within the Project area. (AR 6 at 7; AR 7 at 21; AR
35 at 3-4 and Table 5; AR 39 at 28.) As stated in the Soil Report,

Coarse woody debris (CWD) or downed logs are an
important component of coniferous forest
ecosystems. They can account for up to 50% of the
organic matter on the forest floor in Douglas fir
forests. Existing levels of CWD are an interaction
between past fires, past management activities and
the age of the existing vegetation. The existing
coarse woody debris ranged from 2.9 to 7.8 logs per
acre and averaged 5.4 logs per acre (Table 5). Some
units had a high number of logs due to the
directional felling of trees in the bottoms of
numerous steep sided swales that took place in
November 2008 as part of the BAER project to reduce
the flow of sediment and debris in stream channels.

1 (AR 35 at 3-4.)

2 For these reasons, and the reasons set forth on pages 6 to 12
3 of the October 8, 2010, Order Denying Plaintiffs' Motion for Preliminary
4 Injunction ("Order"), Plaintiffs have not shown a likelihood of success,
5 nor raised serious questions, on the merits of their NFMA claim.

6 **2. NEPA Claim**

7 Plaintiffs cite additional portions of the record as support
8 for their argument that the Project required an Environmental Impact
9 Statement because of its implementation within Late-Successional
10 Reserves ("LSR") and the Johnson Inventoried Roadless Area ("IRA").
11 (Mot. 9:11-10:9.) However, Plaintiffs' additional citations do not
12 demonstrate that the Project will significantly affect these land
13 allocations. (AR 19 at 69; AR 339 at 36-37.) For example, Plaintiffs
14 cite to the following portion of the Environmental Assessment as support
15 for their argument that the Project may significantly affect LSR's:

16 Postfire timber harvest can compound the original
17 impacts to the habitat from the fire, whether they
18 are negative or positive (Hutto 1995, Hutto and
19 Gallo 2006, Caton 1996, Saab and Dudley 1998,
20 Hanson and North 2008). *Post-fire salvage logging
21 and harvest of hazard trees alongside roads removes
22 snags that provide breeding, roosting, and foraging
23 habitat for many snag-associated species. Salvage
24 logging influences densities and relative
25 abundances of some non-cavity nesting birds and
26 cavity-nesting birds directly within the impacted
27 areas.*

23 (Mot. 9:15-20 (citing AR 19 at 69) (emphasis in original).) The cited
24 language is found within the Environmental Assessment's discussion of
25 the Project's potential cumulative effects on wildlife. Id. It concerns
26 post-fire logging's effects on management indicator species generally,
27 not this Project's effects within LSR's. Id. Further, the paragraphs
28 which follow the cited section indicate:

1 [The Project's salvage harvest] . . . may impact
2 some individuals, but the small area affected
3 likely would have no impact on populations or
4 population trends across the larger area[, and
5 roadside hazard tree removal . . . would have a
6 negligible impact on snag numbers across the
7 landscape. The threshold at which post-fire removal
8 of trees, in addition to fire-caused mortality, has
9 no limiting effects on overall availability of post
10 fire habitat is unknown but is unlikely to be met
11 by [the Project] due to the abundance of severely
12 burned habitat outside of proposed treatment units
13 that will remain unharvested.

14 (AR 19 at 69.)

15 The portion of the record on which Plaintiffs rely in support
16 of their contention that the Project may significantly impact the
17 Johnson IRA is similarly misplaced. Plaintiffs cite a quotation from
18 their own June 14, 2010, Comments on the Project's Environmental
19 Assessment. (Mot. 9:24-10:5 (citing AR 339 at 36-37).) The cited
20 quotation appears to have been taken from the Appendix to the
21 Environmental Impact Statement associated with the Klamath National
22 Forest LRMP. (AR 339 36-37.) The Klamath National Forest LRMP
23 Environmental Impact Statement was prepared in the 1990's and is not
24 part of the record. (AR 517 at 7.) Moreover, the quotation does not
25 concern this Project's effects within the Johnson IRA.

26 Plaintiffs also argue an Environmental Impact Statement is
27 required because "short-term visible disturbances" created by the
28 project are "inconsistent with visual quality requirements." (Mot.
10:10-17.) However, the Project's Environmental Assessment analyzed the
anticipated effects on scenery and recreation, and found neither would
be significantly affected. (AR 19 at 139-140; AR 33 at 2, Table 2.) For
example, the Environmental Assessment states:

[The Project] would result in a temporary closure
of project area recreation trails and their road
access, in order to protect public visitors from
safety hazards associated with the existing

1 post-wildfire condition and project activities.
2 This alternative would create numerous short-term,
3 strong to moderate-intensity scenery disturbances,
4 but the proposed fuels activities would more
5 rapidly achieve a conifer-dominant scenic character
6 (about 100 years) than [the no action alternative].
7 The proposed treatments would reduce the intensity
8 of future wildfires and their scenery effects in
9 the treated areas, thus allowing the scenic conifer
10 canopy to promptly re-establish. The removal of
11 existing and imminent fuels would also benefit
12 viewshed scenery through more historic, mosaic-like
13 burn patterns expected from future wildfires.
14 However, [the Project] would also create and expand
15 upon existing strong viewshed disturbances lasting
16 10-25 years. Scenery, Recreation and WSR effects of
17 Alternative 2 are not considered significant. While
18 they may be moderately adverse in the short term,
19 they are also moderately beneficial in the long
20 term.

21 (AR 19 at 139-140.)

22 For these reasons, and the reasons on pages 12-18 of the
23 October 8, 2010 Order, Plaintiffs have not shown a likelihood of
24 success, nor raised serious questions, on the merits of their claim that
25 an Environmental Impact Statement was required for the Project.

26 **3. ARA Claim**

27 Plaintiffs present further argument analogizing the Project's
28 Emergency Situation Determination ("ESD") to the ESD at issue in
29 Alliance for the Wild Rockies v. Cottrell as support for their position
30 that "the Forest Service has provided no explanation for why it could
31 not have provided the public with a stay pending administrative appeal.
32 . . ." (Mot. 14:9-18 (citing Alliance for the Wild Rockies v. Cottrell,
33 613 F.3d 960 (9th Cir. 2010).) Specifically, Plaintiffs argue "[a]s in
34 Cottrell, the Forest Service issued an ESD for the Panther fire two
35 years after the wildfire. There is no information that suggests that a
36 two-year lag between the wildfire and the ESD constitutes an
37 "emergency." Id. at 14:14-16. Plaintiffs explain:

1 The Panther fire was declared out in Fall 2008. By
2 August 2009 - almost a year later - the Forest
3 Service had made a decision to log the Panther
4 fire, and, in response to litigation, withdrew its
5 decision later that month. The administrative
6 record in the present case indicates that the
7 agency held no meetings or correspondences or
8 discussions of any kind about proceeding with the
9 Panther project until January 21, 2010. There is
10 nothing in the record explaining why the agency
11 waited for more than 5 months to resurrect the
12 Panther project.

13 Once the agency did begin work on the revised
14 Panther project, the Forest Service noted that
15 changes to specialists reports should be minimal,
16 so presumably not much new analysis was required. .
17 . . [T]he Forest Service held its last internal
18 meeting about the Panther project in February 2010.
19 After February 2010, there is no indication in the
20 administrative record that agency staff met to
21 discuss the project.

22 Plaintiffs are cognizant that agency timelines
23 can slip, due to a variety of factors. However, in
24 this case, the Forest Service waited 5 months to
25 begin repackaging the Panther project (August 2009
26 to January 2010), and then appears to have waited
27 another 6 months (February 2010 to August 2010) to
28 issue a decision on the revised project. There is
nothing in the record explaining this delay.

17 (Mot. 12:19-13:14 (quotations, citations and internal brackets
18 omitted).)

19 The five and six month gaps in Project activity Plaintiff
20 describes are not reflected in the record. The record demonstrates that
21 the 2009 Panther Project was withdrawn on August 31, 2009. (AR 505.) The
22 current iteration of the Project was discussed at a "Klamath monitoring
23 meeting" on November 10, 2009, less than three months later. (AR 471.)
24 The Project's Interdisciplinary Team held its first meeting on January
25 21, 2010, and Project specialists prepared their reports from February
26 26, 2010 to May 17, 2010. (AR 20-40; AR 427.) The Environmental
27 Assessment was made available for public comment on May 17, 2010, and
28 the Klamath National Forest Supervisor requested an ESD on July 23,

1 2010. (AR 3, 504.) The Decision Notice/Finding of No Significant Impact
2 and ESD were both issued on August 23, 2010. (AR 7, 501.)

3 Further, the Panther Fire Salvage Emergency Situation Analysis
4 prepared in support of the ESD request explains why an ESD was not
5 requested earlier for this Project:

6 Requesting an ESD in 2010 for the Panther Fire
7 Salvage and Reforestation Project was not initially
8 planned due to the anticipated loss of timber
9 volume and value due to two years of deterioration.
10 In May 2010, a local timber sale purchaser examined
11 the timber in the project, however, and indicated
12 that, while significant deterioration had occurred,
there was still value to be recovered in the
material and requested the Happy Camp/Oak Knoll
Ranger District sell the material via a timber sale
contract versus paying for its disposal using a
service contract.

13 (AR 505 at 8.) Therefore, unlike the ESD in Cottrell, this Project did
14 not involve an unexplained two year delay in issuing an ESD post-fire.
15 Alliance for the Wild Rockies v. Cottrell, --- F3d. ----, 2010 WL
16 3665149, at *11 (9th Cir. 2010).

17 Plaintiffs also argue the ESD was improperly issued in this
18 case because "the administrative record does not support the agency's
19 contention that [a projected loss] of \$278,000 is significant, given the
20 overall budget of the Forest Service or the federal government as a
21 whole." (Mot. 22-25.) Plaintiffs state the Forest Services' budget for
22 Fiscal Year ("FY") 2011 is approximately \$5.37 billion dollars, citing
23 a federal government website. (Mot. 16:20-21.)

24 Defendants counter that the Forest Service FY 2011 budget is
25 irrelevant to the Project's ESD since "the Klamath National Forest must
26 make do with only those appropriations that are allocated to it. It does
27 not matter that the entire Forest Service . . . may have other funds."
28

1 (Defs.' Mem. of Law in Opp'n to Mot. for Stay and Inj. 5:12-15 (citation
2 omitted).)

3 Plaintiffs present a single figure, the FY 2011 appropriation
4 to the National Forest Service, in support of their argument that a
5 projected loss of \$278,000 is not "significant." However, they have not
6 shown that this is the relevant budgetary consideration in evaluating
7 the financial impact of a project's delay on the federal government.
8 Therefore, Plaintiffs have not demonstrated that Thomas Tidwell, Chief
9 of the Forest Service, was arbitrary in finding that "[d]elay would also
10 result in a loss of timber value estimated at \$278,000 and likely loss
11 of the total sale revenue of \$565,000 a substantial loss of economic
12 value to the Federal Government." (AR 501 at 2.)

13 For these reasons, and the reasons on pages 18-26 of the
14 October 8, 2010 Order, Plaintiffs have not shown a likelihood of
15 success, nor raised serious questions, on the merits of claim that the
16 Project's ESD was improperly issued.


17 **B. Irreparable Injury / Comparison of Hardships / Public Interest**

18 Since Plaintiffs have failed to show a likelihood of success,
19 or raise a serious question, on the merits of any of their claims, the
20 Court need not address the remaining factors. See Mount Graham Coalition
21 v. Thomas, 89 F.3d 554, 558 (9th Cir. 1996).

22 **III. CONCLUSION**

23 For the stated reasons, Plaintiffs' motion for a stay and
24 injunction pending appeal is DENIED.

25 Dated: October 19, 2010

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GARLAND E. BURRELL, JR.
United States District Judge

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