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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CONSERVATION CONGRESS and
KLAMATH FOREST ALLIANCE,

NO. CIV. S-11-2605 LKK/EFB

Plaintiffs,

v.

UNITED STATES FOREST
SERVICE,

Defendant,

O R D E R

and

SIERRA PACIFIC INDUSTRIES,

Proposed Defendant
Intervenor.

_____ /

On June 19, 2012, this court denied Plaintiff's motion for a preliminary injunction. Order, ECF No. 53. On June 21, 2012, Plaintiff filed a notice of appeal of this court's order denying the preliminary injunction. Notice of Interlocutory Appeal, ECF No. 54. Pending before the court is Plaintiff's motion for an

1 injunction pending appeal. Pl's Mot., ECF No. 57.

2 **I. STANDARD FOR AN INJUNCTION PENDING APPEAL**

3 Injunctions pending appeal are governed by Fed. R. Civ. P.
4 62(c), which provides that: "While an appeal is pending from an
5 interlocutory order or final judgment that grants, dissolves, or
6 denies an injunction, the court may suspend, modify, restore, or
7 grant an injunction in terms for bond or other terms that secure
8 the opposing party's rights."

9 Under Rule 62(c), the factors regulating the issuance of
10 the injunction or stay are "(1) whether the stay applicant has
11 made a strong showing that he is likely to succeed on the
12 merits; (2) whether the applicant will be irreparably injured
13 absent a stay; (3) whether issuance of the stay will
14 substantially injure the other parties interested in the
15 proceeding; and (4) where the public interest lies." Hilton v.
16 Braunskill, 481 U.S. 770, 776 (1987); Humane Society of U.S. v.
17 Gutierrez, 527 F.3d 788, 789-90 (9th Cir. 2008). The Ninth
18 Circuit has recognized that the issues of likelihood of success
19 on the merits and irreparable injury represent two points on a
20 sliding scale in which the required degree of irreparable harm
21 increases as the probability of success decreases. Humane
22 Society of U.S., 527 F.3d at 790 (citing Golden Gate Restaurant
23 Ass'n v. City and County of San Francisco, 512 F.3d 1112, 1115
24 (9th Cir. 2008)).

25 Rule 62(c) creates an exception to the principle that the
26 filing of a notice of appeal confers jurisdiction on the

1 appellate court and divests the district court of jurisdiction
2 over the matters at issue on appeal. "This Rule grants the
3 district court no broader power than it has always inherently
4 possessed to preserve the status quo during the pendency of an
5 appeal; it 'does not restore jurisdiction to the district court
6 to adjudicate anew the merits of the case.'" Natural Res. Def.
7 Council, Inc. v. Southwest Marine, Inc., 242 F.3d 1163, 1166
8 (9th Cir. 2001) (internal citations omitted); see also Small ex.
9 rel. NLRB v. Operative Plasterers' & Cement Masons' Int'l Ass'n
10 Local 200, AFL-CIO, 611 F.3d 483, 495 (9th Cir. 2010). Thus,
11 any action taken pursuant to Rule 62(c) "may not materially
12 alter the status of the case on appeal"--that is, the court can
13 only issue an injunction pending appeal that preserves the
14 status quo. Natural Res. Def. Council, Inc., 242 F.3d at 1166.

15 **II. ANALYSIS**

16 As provided in this court's June 19, 2012 order denying
17 Plaintiff's motion for a preliminary injunction, this court has
18 determined that Plaintiff has failed to establish a probability
19 of success, or "fair chance of success," on the merits of its
20 claim that the Federal Defendants violated the ESA consultation
21 requirements. See Order, ECF No. 53, at 30-31; see also Sports
22 Form, Inc. v. United Press Intern., Inc., 686 F.2d 750, 753 (9th
23 Cir. 1982) ("The 'irreducible minimum' . . . is that the moving
24 party demonstrate 'a fair chance of success on the merits' . . .
25 . 'No chance of success at all . . . will not suffice.'")
26 (internal citations omitted). Because the court finds that

1 Plaintiff fails to show a fair chance of success on the merits,
2 the court also finds that Plaintiff fails to meet the
3 requirements for a Rule 62(c) injunction pending appeal.

4 However, the court grants Plaintiff a limited injunction of
5 twenty-one (21) days to seek an injunction pending appeal from
6 the Ninth Circuit, pursuant to Federal Rule of Appellate
7 Procedure 8(a)(2). During the pendency of this limited
8 injunction, Defendants are enjoined from logging in critical
9 habitat.


10 **III. CONCLUSION**

11 For the foregoing reasons, Plaintiff's motion for an
12 injunction pending appeal is DENIED. Plaintiff is, however,
13 GRANTED a limited injunction of twenty-one (21) days from the
14 date of issuance of this order to seek an injunction pending
15 appeal from the Ninth Circuit, pursuant to Federal Rule of
16 Appellate Procedure 8(a)(2).

17 IT IS SO ORDERED.

18 DATED: July 31, 2012.

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LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT