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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CONSERVATION CONGRESS, a non-
profit organization,

Plaintiff,

v.

UNITED STATES FOREST SERVICE,

Defendant.

No. 2:14-CV-02228-GEB-AC

**ORDER DENYING PLAINTIFF'S MOTION
FOR A STAY PENDING APPEAL AND
GRANTING DEFENDANT'S MOTION TO
STRIKE**

Plaintiff seeks to stay implementation of the Porcupine Vegetation and Road Management Project ("the Project") in the Shasta-Trinity National Forest ("the Forest"), pending the outcome of its appeal of an order granting Defendant's motion for summary judgment. Defendant opposes the motion and moves to strike evidence Plaintiff submitted in support of its stay motion.

**I. MOTION TO STRIKE EVIDENCE SUBMITTED IN SUPPORT OF
PLAINTIFF'S STAY MOTION**

Defendant moves to strike "(1) paragraphs 7-9 of the Boggs Declaration, (2) the impermissible lay opinion regarding landscape fragmentation and impacts to owl habitat from paragraph 10 of the Boggs Declaration; (3) both exhibits to the Boggs

1 Declaration; and (4) the Declaration of Tonja Chi in its
2 entirety.” (Def. MTS Reply 1:26-28, ECF No. 60.) Defendant argues
3 the evidence should be stricken since “Plaintiff [impermissibly]
4 seeks, under the guise of ‘harm declarations,’ to attack the
5 merits of the . . . Project decision, . . . to offer untimely
6 expert critiques of the merits of the . . . Project decision, and
7 to submit inadmissible post-decision documents.” (Def. MTS 1:19-
8 25, ECF No. 52.)

9 Plaintiff responds that it “submitted both
10 declarations and accompanying exhibits to demonstrate [that it is
11 likely to suffer irreparable harm in the absence of an
12 injunction,]” and “only cited to these declarations in portions
13 of [its motion] that addressed irreparable harm,” and therefore,
14 “the declarations are properly before the Court.” (Pl. Opp’n MTS
15 1:5-10, ECF No. 57.)

16 Defendant replies that it “does not dispute that
17 extra-record declaration testimony may be used to demonstrate
18 [the] irreparable harm needed to justify injunctive relief,” but
19 “[t]he defect in the declarations submitted by Plaintiff . . . is
20 that[,] regardless of where they are cited in Plaintiff’s
21 briefing[,] . . . [they] plainly attempt a new attack on the
22 merits of the [Project] decision.” (Def. MTS Reply 1:11-16, ECF
23 No. 60.) Specifically, Defendant argues paragraphs 7-9 of the
24 Boggs declaration contain Boggs’ opinion that Defendant “failed
25 to appropriately consider the threats posed by the barred owl and
26 failed to comply with the U.S. Fish and Wildfire Service’s 2011
27 Revised Recovery Plan for the northern spotted owl,” which is
28 “not directed toward establishing harms, but instead [is] an

1 attempt to impute 'the correctness of the agency's decision."
2 (Def. MTS 3:9-14.) Defendant argues paragraph 10 of the Boggs
3 declaration includes "an impermissible attempt to proffer expert
4 testimony and new evidence in support of Plaintiff's . . .
5 [underlying] claim, alleging [that] the owl habitat in the
6 Project area is 'highly fragmented' and 'impair[s]
7 connectivity,'" and that the two exhibits attached to the Boggs
8 declaration, a google earth image of the Forest (Ex. A), and
9 Defendant's March 31, 2014 Annual Progress Report (Ex. B), are
10 offered to attack the merits of Defendant's decision to approve
11 the Project. (Def. MTS 5:6-8; 5:9-11; 4:11-13.) Defendant also
12 argues that through the Chi declaration, Plaintiff "asks this
13 Court to revisit the merits of the conclusions reached by
14 [Defendant] with regard to the impacts of the Project on the
15 northern spotted owl," since Chi "devotes the majority of her
16 declaration to developing an argument that [Defendant] failed to
17 take adequate account of the competitive pressures the barred owl
18 places on the spotted owl." (Def. Mot. 5:25-26; 6:1-4.)

19 "A plaintiff seeking a [stay pending appeal] must
20 establish that [1] [it] is likely to succeed on the merits, [2]
21 that [it] is likely to suffer irreparable harm in the absence of
22 preliminary relief, [3] that the balance of equities tips in
23 [its] favor, and [4] that an injunction is in the public
24 interest." Winter v. Natural Res. Def. Council, 555 U.S. 7, 20
25 (2008)) The Ninth Circuit has repeatedly considered declarations
26 in its analysis of whether the plaintiff has demonstrated the
27 likelihood that it will suffer irreparable harm without a stay.
28 See e.g. Johnson v. Couturier, 572 F.3d 1067, 1083 (9th Cir.

1 2009) (relying on declarations to show harm prong of the
2 injunction analysis); City of Sausalito v. O'Neil, 386 F.3d 1186,
3 1198 (9th Cir. 2004) (same); Idaho Watersheds Project v. Hahn,
4 307 F.3d 815, 833-34 (9th Cir. 2002) abrogated on other grounds
5 by Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139 (2010)
6 (same). However, declarations may only be considered to
7 supplement the administrative record to show the movant's
8 likelihood of the success on the merits in four circumstances:

9 (1) if necessary to determine "whether the
10 agency has considered all relevant factors
11 and has explained its decision," (2) "when
12 the agency has relied on documents not in the
13 record," [] (3) "when supplementing the
14 record is necessary to explain technical
15 terms of complex subject matter,"
16 [or] [4] "when plaintiffs make a showing of
17 agency bad faith."

18 S.W. Ctr. for Biological Diversity v. U.S. Forest Serv., 100 F.3d
19 1443, 1450 (9th Cir. 1996) (quoting Inland Empire Pub. Lands
20 Council v. Glickman, 88 F.3d 697, 703-04 (9th Cir. 1996)).
21 Regardless, it is the movant's burden to show the declarations
22 should be considered. Animal Def. Council v. Hodel, 840 F.2d
23 1432, 1437 (9th Cir. 1988) (denying movants argument that
24 district court should have gone beyond the record since the
25 movant "makes no showing that the district court needed to go
26 outside the administrative record.").

27 Plaintiff does not argue that the relevant portions of
28 the Boggs declaration and the Chi declaration are admissible to
show its likelihood of success on the merits of its underlying
claims and does not cite the declarations in the portion of its
motion concerning likelihood of success on the merits. However,
the contents of the declarations evince that they are an

1 impermissible attempt to demonstrate Plaintiff is likely to
2 succeed on the merits of its underlying claims since their
3 content challenges Defendant's decision to approve the Project,
4 which is the argument Plaintiff advances in its underlying
5 claims.

6 Paragraphs 7-9 of the Boggs declaration offer opinions
7 criticizing Defendant's approval of the Project for "fail[ing] to
8 utilize diameter limits," "claim[ing] there have not been barred
9 owls identified in the Project area," "rely[ing] on outdated
10 methodology," and "refus[ing] to utilize the best available
11 scientific survey protocol;" Exhibit B attached to the Boggs
12 Declaration, Defendant's March 31, 2014 Annual Progress Report,
13 cited in paragraph 8, is offered to support this impermissible
14 argument. (Boggs Decl. ¶¶ 7-9, ECF No. 43.) Therefore,
15 Defendant's motion to strike paragraphs 7-9 of the Boggs
16 declaration and Exhibit B attached to the declaration is granted.

17 Defendant has not identified which portion of
18 paragraph 10 of the Boggs Declaration it seeks to strike beyond
19 its reference to the phrases "highly fragmented," and "impair[s]
20 connectivity," which appear in a sentence where Boggs declares,
21 "This portion of designated critical habitat in the sale is the
22 only remaining good habitat in the area as it is entirely
23 surrounded by logging units that have resulted in a highly
24 fragmented landscape impairing connectivity, as is evidenced in a
25 google earth image." (Def. MTS 5:8; Boggs Decl. ¶ 10.) This
26 sentence, and google earth image it references, attached as
27 Exhibit A to the Boggs declaration, are part of Plaintiff's
28 impermissible attempt to use extrinsic evidence to attack the

1 merits of the Defendant's decision to approve the Project.
2 Therefore, Defendant's motion is granted and the portion of
3 paragraph 10 of the Boggs declaration on page 4 lines 1-4 as well
4 as Exhibit A attached to the Boggs declaration are stricken.

5 Chi declares in her declaration that the "Project will
6 result in harm to the [northern spotted owl]" and directly
7 challenges Defendant's decision to approve the Project, stating
8 "[i]n my professional opinion, the emphasis on potential threats
9 to the [northern spotted owl] within the 2011 Revised Recovery
10 Plan understates the true magnitude of threat by the barred owl
11 on the [northern spotted owl] and overstates the threat by
12 wildfire to [northern spotted owl]." (Chi Declaration ¶¶ 10, 19,
13 ECF No. 44.) Therefore, Defendant's motion to strike the Chi
14 declaration is granted.

15 II. MOTION FOR STAY PENDING APPEAL

16 A motion to stay pending appeal is reviewed under the
17 same standard as a preliminary injunction. Human Soc. of U.S. v.
18 Gutierrez, 558 F.3d 896, 897 (9th Cir. 2009) (citing Winter, 555
19 U.S. at 20). A plaintiff seeking a [stay pending appeal] must
20 establish, inter alia, "that an injunction is in the public
21 interest." Winter, 555 U.S. at 20 (emphasis added). A court "must
22 consider only the portion of the harm that would occur while the
23 [stay] is in place." League of Wilderness Defenders/Blue
24 Mountains Biodiversity Project v. Connaughton, 752 F.3d 755, 765
25 (9th Cir. 2014).

26 A. Public Interest

27 Plaintiff argues a stay "would . . . protect the
28 public's interest in preventing federal agencies from acting in a

1 manner inconsistent with applicable law” and “[t]he public’s
2 interest in ensuring that federal agencies manage public lands in
3 compliance with environmental laws ‘invokes a public interest of
4 the highest order.’” (Pl. Mot. 7:26-27; 8:3-5, ECF No. 42.)

5 Defendant responds that “Plaintiff has not met its
6 burden of showing that . . . the public interest favor[s] an
7 injunction” since the Project will manage the risk of severe
8 wildfire, which threatens human life, property, and the Forest’s
9 health. (Def. Opp’n 12:11-18, ECF No. 53.) Defendant supports its
10 position citing to the Project Administrative Record (“PAR”),
11 where it states the Project will reduce the risk of severe
12 wildfires by thinning dead trees that would otherwise allow the
13 Forest to burn with an uncharacteristic severity. See PAR 323
14 (stating that the Project is designed to “reduce the risk of
15 uncharacteristic fire effects”); PAR 12 (stating that if the
16 Project does not proceed, “[f]orest stands would be left in an
17 overly dense, stressed state leaving them less resilient to . . .
18 wildfire”); PAR 126 (“The treatment areas are highly susceptible
19 to high fire intensity torching . . . under 90th percentile
20 weather conditions.”). Defendant also cites to the Forest
21 Supervisor Myers’ Declaration where he declares that the Project
22 area “has been classified as in ‘extreme’ drought,” and the
23 “[e]xtreme drought is expected to have several consequences with
24 respect to . . . the Project” since the area “typically receives
25 relatively intense lightning activity . . . and ranks high in
26 terms of acres burned in historical fires.” (Myers Decl. ¶¶ 9,
27 10, ECF No. 53-1.) Myers further declares:

28 extremely dry local conditions have already

1 manifested in unusual pre-fire season
2 wildfires, [including] [t]he Stephens
3 fire[, that] burned 209 acres approximately
4 14 miles from the [P]roject area in
5 late February The Stephens fire,
6 which occurred in an area typically under
7 several feet of snow in February, is unusual
8 and is an indicator of the high risk for
9 wildfire severity that exists and is
10 worsening in the vicinity [of the Project
11 area.]

12 (Myers Decl. ¶ 11.) Myers also declares that lightning strikes
13 caused several fires in the forest on April 21. (Id.) Myers
14 declares:

15 the high fire hazard conditions anticipated
16 this summer will likely require greater
17 constraints on operations [to implement the
18 Project], including restricting operations to
19 the cooler parts of the morning and evening
20 and even halting operations altogether if the
21 risk of a fire is too high. Consequently, it
22 is beneficial to have the operators complete
23 as much of the Project as soon as possible
24 while conditions are favorable.

25 (Myers Decl. ¶ 15.)

26 Plaintiff replies that Defendant's evidence does not
27 show that staying the Project "will result in imminent harm from
28 . . . wildfire." (Pl. Reply 5:19-21, ECF No. 58.)

The evidence evinces that a stay poses the risk of
uncharacteristically severe wildfires in the Forest, that the
Project reduces this risk, and that even a short delay in
implementing the Project could interfere with the public's
interest in preventing wildfire. Plaintiff has not countered this
evidence. Therefore, Plaintiff's motion is denied. See e.g.
Wildwest Inst. v. Bull, 472 F.3d 587, 592 (weighing "the
possibility of a severe wildfire in the area" when assessing the
public interest in an injunction).

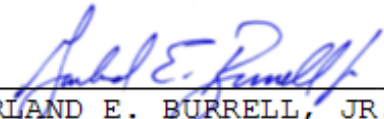
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III. CONCLUSION

For the stated reasons, Defendant's motion to strike is GRANTED and Plaintiff's motion for a stay pending appeal is DENIED.

Dated: May 29, 2015



GARLAND E. BURRELL, JR.
Senior United States District Judge