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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

CASCADIA WILDLANDS, **OREGON WILD**; and **BENTON FOREST COALITION**,

Plaintiffs,

vs.

ALICE CARLTON, in her official capacity as Umpqua National Forest Supervisor; and **UNITED STATES FOREST SERVICE**, an administrative agency of the United States Department of Agriculture,

Defendants,

and

SWANSON GROUP MFG., LLC, an Oregon limited liability company; and **ROSBORO CO., LLC**, a Delaware limited liability company.

Defendant-Intervenors.

Civil No. 6:18-cv-00858-TC

DEFENDANT-INTERVENORS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION [Dkt. 16]

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GLOSSARY OF ACRONYMS

AR	Administrative Record
BLM	Bureau of Land Management
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FWS	U.S. Fish and Wildife Service
NHP	Non-high Priority
NWFP	Northwest Forest Plan
RMP	Resource Management Plan
ROD	Record of Decision

I. INTRODUCTION

Plaintiffs' motion for preliminary injunction involves the Quartz Integrated Project (Quartz Project) located on the Umpqua National Forest.

Plaintiffs have waited a year since the award of both the White Timber Sale (purchased by Rosboro) and the Puddin Timber Sale (purchased by Swanson Group) to move for preliminary injunctive relief. Road work for the White Timber Sale has already been completed and road work for the Puddin Timber Sale will be completed by early November. In order to avoid a temporary restraining order, Rosboro had agreed to log and fall trees within units 1, 9, and 7 of the White Timber Sale, units without red tree vole nests, during the month of September. During the development of the briefing schedule, Rosboro planned to begin operations in unit 4, a unit implicated by plaintiffs' motion, by the end of September. However, Rosboro now plans to move into unit 8 (another unit implicated by plaintiffs' motion) after unit 1 is completed, which will occur on or around October 15. In addition, Swanson Group will begin harvesting in helicopter units by mid-October, starting from higher elevation units and working downward.

As explained in more detail below, plaintiffs have failed to demonstrate a serious question on the merits of the NEPA public comment claim or EA supplementation claim. Nor have plaintiffs demonstrated a likelihood of irreparable harm, that the balance of the equities tips sharply in their favor, or that the public interest favors an injunction. In light of the fact that project implementation is already underway, the strong need to improve forest health conditions and prevent wildfire occurrences, and the desire to provide a sustainable supply of timber to maintain local economies, the Court should deny plaintiffs' motion for preliminary injunction.

II. LEGAL STANDARD

A preliminary injunction "is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). A plaintiff seeking this equitable remedy bears the burden of justifying its request for such extraordinary relief. *Granny Goose Foods, Inc. v. Bhd. of Teamsters*, 415 U.S. 423, 441-43 (1974). To satisfy its burden, a plaintiff must demonstrate four elements: "that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. There must be a "sufficient causal connection" between the alleged irreparable harm and the activity to be enjoined, and showing that "the requested injunction would forestall" the irreparable harm qualifies as such a connection. *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 981-82 (9th Cir. 2011).

The Ninth Circuit recognizes that an alternative "sliding scale" approach to injunctive relief survived *Winter*, at least as to the "serious questions" element of that approach. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011). Under the "sliding scale" approach, "'if a plaintiff can only show that there are "serious questions going to the merits"—a lesser showing than likelihood of success on the merits—then a preliminary injunction may still issue if the 'balance of hardships tips sharply in the plaintiff's favor,' and the other two *Winter* factors are satisfied.'" *All. for the Wild Rockies v. Peña*, 865 F.3d 1211, 1217 (9th Cir. 2017) (citations omitted). Thus, the extraordinary remedy of an injunction may issue if a plaintiff establishes serious questions as to the merits coupled with a balance of hardships that tips sharply in the plaintiff's favor, but only so long as the other two elements are satisfied, namely a demonstrated likelihood of irreparable harm and a showing that the public interest supports an

injunction. *Cottrell*, 632 F.3d at 1131-32. In addition, injunctions must be narrowly "tailored to remedy the specific harm alleged." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009) (internal quotation marks omitted).

III. ARGUMENT

Plaintiffs do not meet any of the four factors necessary to obtain an injunction. With regard to the non-merits factors, plaintiffs' showing is conclusory at best. Moreover, each factor weighs against an injunction. The public interest is well-served by the project's planned treatment of densely-stocked and fire-prone stands, while also providing economic benefits to local rural communities. The project is designed to benefit, rather than harm, the forest ecosystem, so any threatened irreparable harm weighs against an injunction.

Nor do plaintiffs raise serious questions on the merits. Plaintiffs participated in two substantial rounds of public comment but allege that the inability to comment on nine later-identified nest sites is fatal to the project. However, plaintiffs neither challenge the merits of the site designations nor present information that justifies further public comment by presenting a seriously different picture than originally considered by the Forest Service. Further, the Forest Service properly concluded that a supplement EA was unnecessary in light of the 2016 BLM ROD. The Forest Service carefully considered the information, evaluated its potential impacts, and reasonably concluded that the changes in BLM policy lacked the requisite significance to require further NEPA analysis.

Accordingly, plaintiffs' motion for preliminary injunction should be denied.

A. Plaintiffs Have Not Raised Serious Questions on the Merits.

1. The Forest Service gave adequate opportunity for public comment on red tree vole site designations.

Plaintiffs allege the project violates NEPA because the Forest Service identified nine new nest sites after the completion of the public comment period and objection process and failed to take public comment on its classifications of those nine new sites. Pls.' Mot. at 20. The agency already conducted two significant rounds of public participation by circulating the draft EA for comment and then working through the objection process. The Forest Service had no obligation to conduct additional comment on the additional sites. The public had ample opportunity to raise the issue of red tree vole impacts, of which opportunities plaintiffs availed themselves.

Nor do plaintiffs meet their burden to identify significant information they would have submitted with an additional comment period. They mention the new BLM plan and potential impacts on the vole site classifications, but there is nothing to indicate how, if at all, plaintiffs would have disputed the Forest Service's site determinations for the additional nine sites. *See* Dkt. 17, Heiken Decl. ¶¶ 12, 13 (stating declarant was denied opportunity to comment without any mention of what those comments would have been). Accordingly, plaintiffs fail to show serious questions on their NEPA or NFMA claims.[1]

Starting in 2013, the Forest Service conducted survey efforts for red tree voles in the project area. The Forest Service found that these efforts complied with the Survey and Manage requirements as well as the present red tree vole survey protocol. AR 12976. Ultimately, the agency conducted three separate survey efforts, as well as evaluating six public data

[1] Plaintiffs' motion refers to NFMA and asserts that the Quartz Project is inconsistent with the 2001 ROD because it failed to provide public review of all non-high priority designations. Pls.' Mot. at 22. This NFMA claim, however, is not included in plaintiffs' complaint. *See generally* Compl. (Dkt. 1). Given plaintiffs' representation that they lack an intent to amend their complaint, the Court should reject their NFMA claim.

submissions. AR 13386.

The Forest Service's third survey effort was undertaken after the objection resolution meeting, in apparent response to Benton Forest Coalition's contention that survey effort had been inadequate. *See* AR 12976. As plaintiffs state, the objection focused extensively on vole issues, which is reflected in the objection response document. AR 12976-83. The objection response document instructed the Forest to re-assess stands based on citizen input, conduct additional surveys if needed, and then "any additional nests found would either be managed as a known site or would be identified and included as part of the non-high priority site designation process." AR 12982. The Forest Service went through that process and classified the sites as non-high priority because in each case there was little or no concern for the vole's persistence in the Row River Watershed. AR 13372-73. In fact, the Forest Service concluded there was "very high likelihood that the red tree vole will continue to persist within the watershed . . . ." AR 13373. It obtained concurrence from the BLM, which jointly administers the NWFP/Survey and Manage. AR 13384. The Fish and Wildlife Service also agreed. AR 13376.

Plaintiffs do not challenge the NHP designations on their merits, but insist only that the failure to give public comment regarding designation of nine NHP sites is fatal to the entire project. Plaintiffs' objection *did* challenge some NHP designations, AR 12981, but they bring no such challenge now and offer no suggestion that the NHP designations here were in error. In such instances, an injunction against project implementation would be an abuse of discretion.

CEQ regulations provide that "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b). Because this project involved the issuance of an EA, not an EIS, the public participation requirements are somewhat less onerous. Specifically, 40

C.F.R. § 1501.4 directs that the agency "shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments . . . ." 40 C.F.R. § 1501.4(b). The word "practicable" is "open-ended" and "suggests agency discretion." *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1220 (9th Cir. 2015).

Under this flexible, discretionary standard, an agency preparing an EA "must provide the public with sufficient environmental information, considered in the totality of circumstances, to permit members of the public to weigh in with their views and thus inform the agency decision-making process." *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 953 (9th Cir. 2008). Although the Ninth Circuit has not "unequivocally defined what sort of public participation is required to meet NEPA's amorphous standards," it has recognized that "the level of participation required by NEPA's implementing regulations is not substantial." *California Trout v. FERC*, 572 F.3d 1003, 1017 (9th Cir. 2009). Though the Forest Service here circulated its draft EA and invited public comment, even that step is not uniformly required. *Bering*, 524 F.3d at 952 (holding that "circulation of a draft EA is not required in every case"); *NRDC v. U.S. Forest Serv.*, 634 F.Supp.2d 1045, 1067 (E.D. Cal. 2007). Determining whether the public was adequately involved "'is a fact-intensive inquiry made on a case-by-case basis.'" *Center for Biological Diversity v. Gould*, 150 F.Supp.3d 1170, 1181 (E.D. Cal. 2015) (quoting *NRDC*, 634 F.Supp.2d at 1067).

A public comment claim must be reviewed in light of the purpose of the public participation requirements, which is to facilitate informed decisionmaking. Therefore, "a court reviewing an agency decision under NEPA can only provide relief to a challenging party if it can be shown that information that was not before the agency would, if properly considered, present a 'seriously different picture of the environmental landscape.'" *Sequoia ForestKeeper v. Elliott*,

50 F.Supp.3d 1371, 1387 (E.D. Cal. 2014) (quoting *Nat'l Cmte. for the New River, Inc. v. F.E.R.C.*, 373 F.3d 1323, 1330 (D.C. Cir. 2004)). Plaintiffs have not met this burden—they have not identified any information that was not before the agency, much less any information that would give a "seriously different" picture. Instead, as in *Alliance for the Wild Rockies v. Farnsworth*, No. 2:16-CV-433-BLW, 2017 WL 1591840 (D. Idaho May 1, 2017), *aff'd*, 709 F. App'x 461 (9th Cir. 2018), plaintiffs "filed comments during the public comment period and those comments cover the same issues [they] now raise[]," which shows they "had enough information to flag these issues for the Forest Service." *Id.*, 2017 WL 1591840 at *6. By contrast, the court in *Gould*, 150 F.Supp.3d at 1182, noted that the plaintiffs "specifically identify several important pieces of information they would have presented to the Forest Service . . . ." Plaintiffs make no such showing here.

The Second Circuit's decision in *Town of Rye v. Skinner*, 907 F.2d 23, 24 (2d Cir. 1990), quoted with approval in *Citizens for Better Forestry v. USDA*, 341 F.3d 961, 970 (9th Cir. 2003), is on point and shows that the Forest Service complied with the public participation requirements. In *Town of Rye*, the FAA complied with section 1501.4 when it "'conducted public hearings and received written comments on every draft environmental assessment [and] circulated for comment its Preliminary Analysis of the environmental assessment,' even though it did not circulate for public comment a follow-up independent analysis it prepared in response to public comments." 341 F.3d at 970 (quoting *Town of Rye*, 907 F.2d at 24). The Second Circuit found it significant that "the FAA's independent analysis itself was done in response to comments of petitioners." *Town of Rye*, 907 F.2d at 24. That is the situation here. The Forest Service twice sought public comment, and then conducted additional analysis in response to plaintiffs' comments. NEPA requires no more. To the contrary, requiring additional public

comment would essentially trap the agency in an endless loop of commenting, to no discernible benefit.

Plaintiffs rely on *Sierra Nevada Forest Prot. Campaign v. Weingardt*, 376 F.Supp.2d 984 (E.D. Cal. 2005), but that case is readily distinguishable. The agency in *Weingardt* did not circulate a draft EA; it only released a thirteen-page scoping notice for public comment and then issued the final EA. 376 F.Supp. 2d at 992. The court held that the agency "failed to give the public an adequate pre-decisional opportunity for informed comment." *Id.* Most strikingly, the agency withheld from the public analysis documents that were completed before the end of the public comment period. *Id.* at 992. But here the documents at issue were prepared after the close of the objection period, so there is no issue like that in *Weingardt*. *Cf. Elliott*, 50 F.Supp.3d at 1387 (finding public participation requirement fulfilled and distinguishing *Weingardt* as studies in question were not available during the comment period). As in *Elliot,* the agency "gave consideration to information that included at least the substance of the information relied upon by Plaintiffs. The procedural requirements of NEPA demand no more than that." *Elliott*, 50 F.Supp.3d at 1388.

2. The Forest Service reasonably concluded that a supplemental EA was unnecessary after sufficient consideration of the new information.

Plaintiffs assert that the Forest Service did not adequately consider the effects of the BLM 2016 ROD. Pls.' Mot. at 34. Consequently, plaintiffs argue that the Forest Service must supplement its previous EA. *Id*. Plaintiffs are incorrect on both accounts, and the Court should defer to the Forest Service's determination that the ROD does not warrant further NEPA analysis.

Plaintiffs argue that the Forest Service is under a legal obligation to supplement its EA. Pls.' Mot. at 34. Under the relevant NEPA regulation, supplementation will only be required if

"[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii); *see also Idaho Sporting Congress v Thomas*, 137 F.3d 1146, 1152 (9th Cir. 1998), *overruled on other grounds by Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008) (applying 40 C.F.R. § 1502.9(c)(1)(ii) as the standard for determining when to supplement an EA). Further, "NEPA requires agencies to take a 'hard look' at the environmental consequences of proposed agency actions before those actions are undertaken." *Peña*, 865 F.3d at 1215. However, courts should apply a high threshold of significance to prevent the hard look and supplementation requirements from becoming overly burdensome. The Ninth Circuit acknowledges that requiring a supplement every time new information is presented "would render agency decision making intractable." *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 373 (1989). Therefore, the change must be so significant so that it presents a "seriously different picture of the likely environmental harms stemming from the proposed project." *TRI-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1130 (9th Cir. 2012).

Plaintiffs propose that "at the very least, the agency must take the time to evaluate the information to determine whether or not it is of such significance as to require supplementation." Pls.' Mot. at 34. In fact, because new information does not automatically require a supplemental analysis, an agency can satisfy the duty to supplement if it "carefully consider[s] the information, evaluate[s] its impact, and support[s] its decision not to supplement . . . with a statement of explanation." *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1439-40 (9th Cir. 1988), *amended,* 867 F.2d 1244 (9th Cir. 1989). When an agency shows that the new information would not show a "seriously different picture" of the potential harms, the court "must defer to the [agency]'s finding that a supplement [EA] was not required. *TRI-Valley CAREs*, 671 F.3d at 1130.

Ultimately, an agency's determination that a supplemental NEPA analysis was not required is "a factual dispute . . . which implicates substantial agency expertise" and is judicially reviewed under the arbitrary and capricious standard. *Marsh*, 490 U.S. at 376; *see also Japanese Vill., LLC v. Fed. Transit Admin.*, 843 F.3d 445, 472 (9th Cir. 2016) (citing *Marsh* and reviewing an agency's decision on whether to supplement a NEPA analysis under the arbitrary and capricious standard).

The Forest Service adequately reviewed the information presented by the 2016 BLM ROD and reasonably concluded that no supplemental NEPA analysis was necessary. This review culminated with a report on the impacts of the BLM RMP revision to the non-high priority site designations in the Row River Watershed. AR 13453. Plaintiffs take little note of this report in their argument for a supplemental EA. *See* Pls.' Mot. at 34-35. Instead, plaintiffs incorrectly assert that the action of the Forest Service, in light of the BLM change in policy, "undermines [the] entire regulatory framework that previously ensured vole persistence." Pls.' Mot. at 35. The Forest Service's report rebuts such a conclusion. The report concludes that the BLM policy change does not affect the application of two of the four factors used to determine a non-high priority site designation. AR 13453-54. Additionally, the Forest Service acknowledges that the number of red tree vole sites in reserves will be reduced from 27 to 19 by the changes in the BLM policy. AR 13453. However, those 19 sites are "still reasonably defined as a limited number of sites" and thus the designation is unaffected. *Id.* The Forest Service reports that the BLM change "is less likely to contribute toward species persistence" but that the change will only apply to 8% of the federally owned land in the watershed. AR 13455. Importantly, the Forest Service partially rests its decision to forgo further NEPA analysis on the

fact that Northwest Forest Plan's protections are still available on Forest Service lands, which cover the majority of the watershed.

These facts are readily distinguishable from the case law relied upon by plaintiffs. Plaintiffs argue that the "Ninth Circuit has specifically held that changes surrounding the red tree vole's classification under the Survey and Manage program are significant." Pls.' Mot. at 34 (citing *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 561 (9th Cir. 2006)) (internal quotations omitted). In that case, the Ninth Circuit found that because 80% of data on the issue was unavailable at the time of the initial analysis, the new information was "nothing short of significant." *Boody*, 468 F.3d at 561. In the instant case, however, the Forest Service concluded that nothing changed at scale as a result of the 2016 BLM ROD, except "an increase of BLM LSR/suitable habitat in reserves." AR 13455. Therefore, the Forest Service reasonably concluded that no further analysis was needed. The Forest Service took a hard look through careful consideration of the new information, evaluation of its potential impacts, and then supported its decision with factual evidence. Accordingly, this Court should defer to the agency's determination that further NEPA analysis was unnecessary.

B. Plaintiffs Have Not Demonstrated that Irreparable Harm is Likely.

Plaintiffs claim that they will suffer "immediate and irreparable harm," identifying three types of harm if implementation of the remaining timber sale units proceed: (1) harm to plaintiffs' interest in compliance under NEPA; (2) harm to plaintiffs' interest in "mature, and old-growth forests" and (3) harm to plaintiffs' interest in the red tree voles and the project area. Pls.' Mot. at 36-38.

The essential requirement for injunctive relief is demonstrating that irreparable harm is likely in the absence of an injunction. *Winter*, 555 U.S. at 22. To obtain injunctive relief,

"plaintiffs must establish that irreparable harm is *likely*, not just *possible*." *Cottrell*, 632 F.3d at 1131. There is "no presumption of irreparable injury" in environmental cases. *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv*., 789 F.3d 1075, 1091 (9th Cir. 2015). Nor is there any such presumption where endangered or threatened species or Survey and Manage species are involved. *Id.* Plaintiffs have not met their burden to show, rather than presume, irreparable harm. Instead, they have submitted a litany of speculation.

1. Plaintiffs' year-long delay in moving for injunctive relief demonstrates a lack of urgency.

As an initial matter, in assessing plaintiffs' claims of irreparable harm, it is relevant how long plaintiffs waited before seeking relief. Plaintiffs did not seek preliminary injunctive relief until a year after the White and Puddin Timber Sales were both awarded. Dkt. 9, Dudley Decl. ¶ 10 (Puddin Timber Sale awarded on September 13, 2017); Dkt. 8, Hardwick Decl. ¶ 11 (White Timber Sale awarded on September 19, 2017). Swanson Group has hired Brude Stanley to perform road construction work and that work has been underway for months and should be completed by mid-October. Second Dudley Decl. ¶ 3. For the White Timber Sale, all road work was completed on August 24, before plaintiffs filed their motion for preliminary injunction. Second Hardwick Decl. ¶ 2. Plaintiffs' year long delay concedes that no irreparable harm has occurred to date and begs the question how continued project implementation for a similar time would cause irreparable harm. Under these circumstances, plaintiffs' allegation of the need for an injunction rings hollow. *Oakland Tribune, Inc. v. Chronicle Pub. Co.,* 762 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm."); *accord Kobell v. Suburban Lines, Inc.,* 731 F.2d 1076, 1092 n. 27 (3rd Cir. 1984) ("[T]he district court may legitimately think it suspicious that the party who

asks to preserve the status quo through interim relief has allowed the status quo to change through unexplained delay.").

2. An alleged procedural violation of NEPA is not irreparable harm.

Plaintiffs argue that its allegations of procedural NEPA violations suffice to show irreparable harm. Pls.' Mot. at 35-36. This improperly presumes that injunctive relief is the automatic remedy in a NEPA case. An "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). *Monsanto*, reversing the Ninth Circuit, cautioned that an "injunction should issue only if the traditional four-factor test is satisfied." *Id.* at 157.

Plaintiff relies on *S. Fork Band Council Of W. Shoshone Of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718, 728 (9th Cir. 2009) (*S. Fork Band*); *Portland Audubon Soc. v. Lujan*, 795 F. Supp. 1489, 1509 (D. Or. 1992); and *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985), in support of the proposition that "irreparable harm follows from a NEPA violation." Pls.' Mot. at 35. Plaintiffs' reliance on *S. Fork Band* and *Thomas v. Peterson* to argue that a claimed NEPA violation is irreparable injury is misplaced. Cases that applied a "thumb on the scales" of that type were disapproved by *Monsanto*. 390 F.3d at 642 (stating presence of NEPA claims gives rise to more liberal standard for an injunction). As Judge Nunley recognized this presumption was "effectively overruled" by *Monsanto* and *Winter*. *Conservation Cong. v. United States Forest Serv.*, No. 2:13-CV-01922-TLN-CMK, 2016 WL 6524860, at *5 (E.D. Cal. Nov. 3, 2016). Further, *Thomas v. Peterson* was expressly abrogated by *Cottonwood*. 789 F.3d at 1088-89. Thus, the underpinnings of cases which have held that irreparable harm follows a NEPA violation have been washed away. *See also Sierra Forest Legacy v. Sherman*, 951 F. Supp. 2d 1100, 1111 (E.D. Cal. 2013) (holding that procedural NEPA violation did not equal

irreparable harm).

In addition, plaintiffs fail to acknowledge that the decision in *Lujan*, 795 F. Supp. at 1509, was later modified to allow the removal of timber. The court later found that although it declined to conclude that the timber sales will have no effect on the survival of the northern spotted owl, "there is no evidence or argument that the downed timber has any special significance to the survivability of the northern spotted owl" allowed the removal of the downed timber and an additional 750,000 board feet that must be felled to accommodate the removal of the downed timber. *Portland Audubon Soc. v. Lujan*, No. CIV. 87-1160-FR, 1992 WL 176353, at *2 (D. Or. July 16, 1992).

In evaluating the likelihood of irreparable harm, courts must be mindful of the "significant overlap" with the merits in a NEPA case but "the likelihood of injury depends, at least in part, on the implicit assumption that further review may cause the agency to change its decision." *W. Watersheds Project v. Salazar*, No. CV 11-00492 DMG (EX), 2011 WL 13124018, at *18 (C.D. Cal. Aug. 10, 2011). As explained above, it is not reasonable to assume that public commenting would change the Forest Service's decision since plaintiffs offer no suggestion on how the designation of non-high priority sites was in error. *See supra* at III.A.1.

3. Plaintiffs Cannot Show Irreparable Harm on the Basis of Removal of "Mature" or "Old-Growth" Trees.

Plaintiffs next claim the project removes "mature" or "old-growth" trees so any implementation is irreparable harm to their interests in the area. Pl.'s Mot. at 36. This argument fails on facts and law. On the facts, the stands at issue are not mature or old growth. The commercial thinning units are in "mid-seral closed forest" stage, AR 10308, 10358, and therefore are not "mature stands." Although some stands are 90 to 130 years old, which are primarily even-aged and dominated by Douglas fir in the overstory, AR 10308-09, 10358, those stands are

not considered old-growth forest. Old-growth forests are stands that are 150 years old or older, AR 10356-57, and the Forest Service specifically determined that these stands are not old-growth. *See* AR 10271.

It is important to recognize the context and specifics of this project's commercial harvest. The commercial units are in Matrix lands not Late Successional Reserves. Under the Northwest Forest Plan, Matrix lands is the area where "most timber harvest and other silvicultural activities will be conducted." AR 4100. Therefore, plaintiffs fail to show irreparable harm for the harvest stands that are neither mature nor old-growth and have been specifically designated for timber harvest.

Plaintiffs also misstate the law. Plaintiffs rely heavily on *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 765 (9th Cir. 2014), for the proposition that logging mature trees equates to irreparable injury. Pls.' Mot. at 36. However, the Ninth Circuit determined that the "argument that logging is *per se* enough to warrant an injunction because it constituted irreparable environmental harm was squarely rejected by *McNair* where we declined 'to adopt a rule that *any* potential environmental injury *automatically* merits an injunction.'" *Earth Island Inst. v. Carlton*, 626 F.3d 462, 474 (9th Cir. 2010) (quoting *The Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008)). To the extent *League of Wilderness Defs* conflicts with *Carlton*, *Carlton* must control as the earlier case.

4. Plaintiffs' interest in the red tree vole or the project area is not sufficient for injunctive relief.

Finally, plaintiffs argue that it has an interest in observing the red tree vole and revisiting red tree vole sites would be irreparably harmed. Speculative injury is not the "clear showing" required for an injunction. Specifically, "[s]peculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction. A plaintiff must do more than

merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief." *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1022 (9th Cir. 2016) (quoting *Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988); *see also All. for the Wild Rockies v. Peña*, No. 2:16-CV-294-RMP, 2016 WL 6123236, at *3 (E.D. Wash. Oct. 19, 2016), *aff'd*, 865 F.3d 1211 (9th Cir. 2017) (rejecting harm allegations as "too speculative"); *All. for the Wild Rockies v. United States Forest Serv.*, No. 1:15-CV-00193-EJL, 2016 WL 3349221, at *4 (D. Idaho June 14, 2016) (holding allegations regarding project were "too general in nature to make a clear showing of a likelihood of irreparable injury"). Plaintiffs have failed to demonstrate that the designation of non-high priority sites would impair the persistence of red tree voles in the area. Instead, they only take issue with the lack of public participation in the designation of those sites.

Plaintiffs also claim that "their present and future interests in recreation, hiking, nature appreciation, photography and personal renewal, as well as the diverse mature forests and the habitat they provide for red tree voles" will be affected by harvesting the commercial units. Pls.' Mot. at 37-38. However, the project would improve forest health and diversity. The stands in their current state are "dense, slow growing, lack diversity" and "provide poor growing conditions for existing sugar and western white pine (species in need of restoration)." AR 10307. Sugar and western white pine "are in decline due to heavy competition" from other trees and due to the occurrence of the "mountain pine beetle and white pine blister rust." AR 10308. The upper portion of the watershed is also considered to be a "fire-prone landscape." AR 10308. The presence of an "abundance of mid-seral closed forest" and "large areas of contiguous high canopy" could result "in long fetches of running crown fires across the area affecting resources at risk that include critical habitat for the Northern spotted owl." AR 10308-09. The Forest

Service determined that the "desired condition is to strategically provide more fire resilient stands across the watershed where a) ground and ladder fuel treatments would help reduce flame lengths and b) canopy fuel treatments would reduce the likelihood of sustaining crown fires." AR 10309. Plaintiffs' desire to keep the forest in an untouched state, despite the fact that treatment is needed in the project area, does not equate to irreparable harm.

C. Public Interest Supports Project Implementation of the Remaining Units and Against an Injunction.

The public interest is always an important consideration in determining whether to issue an injunction. *See Nat. Res. Def. Council, Inc. v. Winter*, 502 F.3d 859, 862 (9th Cir. 2007). Plaintiffs make no argument why an injunction would be in the public interest other than to cite the public interest in having the government follow the law. Pls.' Mot. at 38. While that is undoubtedly important, the agencies' actions are entitled to a presumption of regularity, *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 807 F.3d 1031, 1043 (9th Cir. 2015), which plaintiffs do not rebut. Plaintiffs argue that an injunction is in the public interest because it would give the public an opportunity to comment on the Quartz Project. Pls.' Mot. at 38. That arguments misses the mark because until this Court rules on the merits of plaintiffs' NEPA claims, the administrative process would not be re-opened to allow for public participation.

Despite plaintiffs' claims to the contrary, the public interest strongly disfavors an injunction. As the Ninth Circuit emphasized in its seminal *en banc McNair* opinion, just because an environmental injury is alleged, the "law does not . . . allow [the Court] to abandon a balance of the harms analysis . . . ." 537 F.3d at 1005. Here, both "economic and environmental interests are relevant factors, and both carry weight in this analysis." *League of Wilderness Defs./Blue Mountains Biodiversity Project*, 752 F.3d at 765. First, mitigating fire risk is a particularly "valid public interest" to consider in the analysis. *Id.* at 766. In an area that is fire-

prone, the Quartz Project seeks to "strategically provide more fire resilient stands across the watershed" and would result in "increased barriers to wildfire spread across the landscape improving firefighter effectiveness and providing opportunities to protect resources at risk." AR 10309.

Second, an injunction would result in economic harm to local communities. The Northwest Forest Plan recognizes the need to "maintain a sustainable supply of timber and other forest products that will help maintain the stability of local and regional economics on a predictable and long-term basis." AR 10309. The implementation of the remaining units will provide private and public economic benefits. Rosboro and Swanson Group, collectively, provide 985 jobs throughout the Glendale, Roseburg, and Springfield areas. Hardwick Decl. ¶ 6 (Rosboro currently employs 260 full-time employees); Dudley Decl. ¶ 5 (Swanson Group employees 725 employees throughout its various facilities). In addition, Rosboro and Swanson Group have hired various contractors to perform road work and the logging and hauling operations. Second Hardwick Decl. ¶¶ 2, 3 (hiring Tome Boreland, Inc. and John Parazoo Trucking to perform all road work and Harvey's Selective Logging to perform falling operations); Second Dudley Decl. ¶ 3 (hiring Bruce Stanley and his crew of 35 employees to perform the road construction work, a logging crew of 20 to perform the helicopter logging, and 10 log truck drivers to perform the log hauling). Defendant-intervenors depend on the timber sales from the Quartz Project to keep their mills operating and maintain their employment and production at current levels. Second Dudley Decl. ¶ 6; Second Hardwick Decl. ¶ 8.

In an area facing double-digit unemployment rates, the Quartz Project helps sustain the local economy through direct and indirect jobs. *See* AR 07290 (noting that the unemployment rate for Douglas County, where the Quartz Project is located, was 10.10 percent in February

2014); AR 10545 (noting that "the sale of timber from the National Forest would result in sustained or increased employment in the logging and wood products manufacturing sectors, in the forestry services (slash treatment, planting, etc.) and indirect and induced employment in many other sectors"). Maintaining the economic health of the local community is a public interest that must be considered carefully in evaluating plaintiffs' request for the extraordinary remedy of an injunction. *McNair*, 537 F.3d at 1005 (acknowledging implementation of a national forest project benefitted the public interest in a variety of ways, including by "aiding the struggling local economy and preventing job loss"). Moreover, an injunction would interfere with the much-needed restoration work on the landscape, since all the restoration activities are funded through stumpage funds. AR 10545. The revenue from the sales would generate $446,212, of which 25% would go to counties and 10% to road and trail fund. AR 10545 n. 31.

D. The Balance of the Equities Does Not Tip Sharply in Favor of an Injunction.

When plaintiffs rely on only demonstrating a serious question on the merits, then a preliminary injunction will issue if "the balance of the hardships tips *sharply* in plaintiff's favor." *Peña*, 865 F.3d at 1217 (emphasis added). Here, the actual harm to defendant-intervenors, Federal defendants, and others interested in effective forest management far outweighs the speculative harm to plaintiffs.

Plaintiffs assert that any harm to the Forest Service and defendant-intervenors would be purely economic. Pls.' Mot. at 39. As an initial matter, plaintiffs ignore the risk to the landscape if the project is not implemented. As stated above, the project area is fire-prone with overly dense stands. AR 10305, 10307-08. Given that wildfires have become common occurrences, there is an urgent need to treat the landscape and prevent "long fetches of running crown fires across the area," which could affect critical habitat for the northern spotted owl. AR 10309.

Such hardships "must be balanced" against "claims of potential environmental injury." *McNair*, 537 F.3d at 1005. These real harms to the Forest Service and defendant-intervenors outweigh the abstract and speculative harms that plaintiffs allege but fail to substantiate. Plaintiffs speak of harms to mature, old growth forests, Pls.' Mot. 39, despite the fact that the stands implicated by commercial units are neither mature nor old-growth. *See* AR 10271. Plaintiffs also fail to provide any evidence that red tree voles will be threatened by the Quartz Project. For that reason, plaintiffs' claims do not measure up.

E. Environmental Organizations Are Not Exempt from the Bond Requirement.

In the unlikely event plaintiffs are entitled to injunctive relief, this Court should impose a bond as necessary security for the contract rights of defendant-intervenors. A court "may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." FRCP 65(c). The Ninth Circuit has emphasized that "each case is fact-specific" and where "a district court does not set such a high bond that it serves to thwart citizen actions, it does not abuse its discretion." *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005) (affirming imposition of $50,000 bond against environmental organization); *see also Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453, 459-60 (7th Cir. 2010) (the Seventh Circuit rejecting both the proposed exemption of nonprofit entities from the bond requirement and, in the alternative, a proposal that would allow courts to exempt entities based on their likely contribution "to the overall public welfare").

Although federal courts have a great deal of discretion in imposing a bond, the Ninth Circuit has refused to provide a blanket rule requiring merely nominal bonds in cases seeking injunctions under NEPA. *Friends of the Earth, Inc. v. Brinegar*, 518 F.2d 322, 322-23 (9th Cir. 1975) (declining to address the "question of whether no more than a nominal bond may be required in any NEPA case in which environmental groups or individuals procure an injunction pending appeal"). Instead, the Ninth Circuit deems it appropriate to waive or otherwise reduce a

bond if imposing it "would effectively deny access to judicial review." *People of State of Cal. ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985) *amended*, 775 F.2d 998 (9th Cir. 1985). In that case, the Ninth Circuit ruled that a bond would effectuate such a denial because the plaintiff—a non-profit environmental group—had demonstrated to the court an inability to post a substantial bond. *Id.* Federal courts have consistently required evidence of an inability to post a substantial bond before waiving the requirement altogether. *See, e.g.*, *Save Strawberry Canyon v. Dep't of Energy*, 613 F.Supp.2d 1177, 1190-91 (N.D. Cal. 2009), *adhered to*, No. C 08-03494 WHA, 2009 WL 1098888 (N.D. Cal. Apr. 22, 2009) (waiving requirement after small, non-profit organization demonstrated difficulty with posting the bond); *Ctr. For Food Safety v. Vilsack*, 753 F.Supp.2d 1051, 1061-62 (N.D. Cal. 2010), *vacated and remanded*, 636 F.3d 1166 (9th Cir. 2011) (waiving requirement because a substantial bond would have required the non-profit organization to eliminate programs and reduce its staff); *Colorado Wild Inc. v. U.S. Forest Serv.*, 523 F.Supp.2d 1213, 1230-31 (D. Colo. 2007) (waiving requirement after non-profit environmental groups demonstrated they would not be able to proceed with the case if a bond was required).

In this case, plaintiffs argue that no bond is required because they "are non-profit organizations and the case concerns the matters of public interest." Pls.' Mot. at 40. This assertion does not adequately invoke a waiver of the bond requirement because plaintiffs fail to offer information as to their financial capabilities to post a bond. In contrast, defendant-intervenors will sustain costs and damages if the temporary injunction is later dissolved. defendant-intervenors rely on this source of timber to keep their facilities running at current levels. For example, the timber available under the Puddin Timber Sale will generate roughly one and one-half months' of mill work for Swanson Group. Dudley Decl. ¶ 10. Plaintiffs should be required to fully inform the Court with documentation as to their financial capacity to post a bond so that they can be held responsible for the harm that would flow from their requested injunction. This is a necessary component of securing the rights affected by plaintiff's requested relief.

IV. CONCLUSION

For the reasons stated above, the Court should deny plaintiffs' motion for preliminary injunction.

Dated this 25th day of September, 2018.

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CERTIFICATE OF SERVICE

I, Sara Ghafouri, hereby certify that I, on September 25, 2018, I caused the foregoing to be served upon counsel of record through the Court's electronic service system.

Dated this 25th day of September, 2018.

/s/ Sara Ghafouri
Sara Ghafouri