– URGENT MOTION UNDER CIRCUIT RULE 27-3(b) –

DOCKET No. 05-15921

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA NEVADA FOREST PROTECTION CAMPAIGN, PLUMAS FOREST PROJECT, EARTH ISLAND INSTITUTE, and CENTER FOR BIOLOGICAL DIVERSITY, non-profit organizations,
Plaintiffs-Appellants,

v.

UNITED STATES FOREST SERVICE; JACK BLACKWELL, in his official capacity as Regional Forester, Region 5, United States Forest Service; and JAMES M. PEÑA, in his official capacity as Forest Supervisor, Plumas National Forest,
Defendants-Appellees,

and

QUINCY LIBRARY GROUP and PLUMAS COUNTY,
Intervenors-Defendants-Appellees.

On Appeal From a Judgment of the United States District Court
for the Eastern District of California
Civ. S-04-2023 MCE/GGH

URGENT MOTION FOR INJUNCTION PENDING APPEAL
ACTION NECESSARY BY JUNE 14, 2005

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, plaintiffs-appellants Sierra Nevada Forest Protection Campaign, Plumas Forest Project, Earth Island Institute, and Center for Biological Diversity certify that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States or abroad.

DATED: May ____, 2005

_____
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INTRODUCTION

By this urgent motion, the Sierra Nevada Forest Project Campaign, Plumas Forest Project, Earth Island Institute, and the Center for Biological Diversity (collectively, "plaintiffs") seek to enjoin logging in the Plumas National Forest pursuant to the Meadow Valley Defensible Fuel Profile Zone and Group Selection Project ("Meadow Valley Project" or "Project") pending this Court's disposition of plaintiffs' appeal on the merits.

Unless this Court acts, the logging may begin soon after June 14, 2005. If allowed, the logging will significantly adversely impact the California spotted owl, a declining and imperiled species, by rendering 4,281 acres of owl habitat unsuitable and negatively impacting 30 known owl nest sites at the height of the breeding season. It will also create conditions that increase fire risk to local communities.

Pursuant to Federal Rule of Appellate Procedure 8(a)(2), and in order to maintain the status quo pending the final disposition of plaintiffs' appeal, plaintiffs move to enjoin the Forest Service from awarding any timber sale contracts implementing the Meadow Valley Project, or otherwise allowing the commencement of logging or other activities pursuant to the Project, with the exception of legitimate fire risk reduction activities such as service contracts for undergrowth thinning (trees less than 10" in diameter) and/or prescribed burning.[1]

On May 11, 2005, the Forest Service advertised four timber sale contracts to

[1] Such activities are effective at reducing fire hazard and have been ongoing in the project area without objection from plaintiffs.

implement the Meadow Valley Project. Bids on two of the contracts are scheduled to be opened on June 14, 2005, and upon award of the contracts to the highest eligible bidder, logging may commence as soon as the contractor submits its harvest plan. *See* Declaration of Michael R. Sherwood In Support of Appellants' Urgent Motion ("Sherwood Dec.") , submitted herewith, at ¶ 2 and Exs. 1 and 2 thereto. Without action by this Court prior to June 14, 2005, contracts for the logging will be let, and logging — and the resulting irreparable harm — will soon occur. Therefore, plaintiffs bring this Motion as an "urgent" matter under Circuit Rule 27-3(b) and request that an injunction pending appeal be issued by June 14, 2005.

PROCEEDINGS IN THE DISTRICT COURT

On May 9, 2005, the district court filed its Memorandum and Order in this case denying plaintiffs' motion for summary judgment and request for injunction, and granting the Forest Service's motion for summary judgment. Sherwood Dec. Ex. 3.[2] Judgment against plaintiffs and in favor of the Forest Service was entered on the same date. Ex. 4. On May 13, 2005, plaintiffs filed a timely Notice of Appeal to this Court. Ex. 5. As required by FRAP 8(a)(1)(C), plaintiffs moved for an injunction pending appeal in the district court on May 13, 2005. Given the imminent implementation of the Meadow Valley Project, the parties, through a stipulation, requested expedited disposition of plaintiffs' motion without hearing. Ex. 6. Although the district court approved the stipulation on May 20, 2005, to

[2] All references herein to "Ex." are to exhibits attached to the Sherwood Dec.

date the district court has not yet ruled on the motion. *See* Sherwood Dec. ¶ 4.

Pursuant to Ninth Circuit Rule 27-3(b), May 24, 2005 is the last day that plaintiffs may file an "urgent" — rather than an "emergency" — motion in this Court to enjoin the first two timber sale contracts from being awarded on June 14, 2005, and logging from commencing soon thereafter. Since logging will cause irreparable harm to the California spotted owl and its habitat, and will increase fire risk to local communities, it is not practicable for plaintiffs to wait any longer for an order from the district court.

BACKGROUND

The Meadow Valley Project was approved on April 16, 2004 by the Forest Service as part of the Herger-Feinstein Quincy Library Group Forest Recovery Act ("QLG Act") pilot project, a program being implemented on approximately 1.5 million acres of national forest land within Plumas and Lassen National Forests and the Sierraville Ranger District of Tahoe National Forest. *See* Pub. L. 105-277, Div. A, § 101(e) [Title IV, § 401], Oct. 21, 1998, 112 Stat. 2681-305 (16 U.S.C. § 2104 note). The Project calls for the logging of about 40 million board feet of timber from approximately 6,400 acres within the Mt. Hough Ranger District of Plumas National Forest. Ex. 7 at 04755 (Meadow Valley Project Environmental Assessment ("EA") at 1). Active logging operations are expected to occur during spotted owl breeding season, every year, over a five-year period. Ex. 8 at 05502 (Meadow Valley Project Decision Notice ("Decision Notice") at 10).

The Project proposes 743 acres of group selection logging in 488 units, as well as approximately 5,700 acres of so-called "defensible fuel profile zone"

("DFPZ") logging in 37 units. Ex. 7 at 04760, 04763 (EA at 6, 9). In the group selection units, nearly all trees up to 30 inches in diameter at breast height ("dbh") will be removed, and there is no requirement to maintain any forest canopy cover. *Id.* at 04760 (EA at 6). In the DFPZ units, trees up to 30" dbh may be removed from the 950 acres within the defense zone land allocation (*i.e.*, the area closest to the community of Meadow Valley), and trees up to 20" dbh may be removed from approximately 4,320 acres outside of the defense zone. *Id.* at 04761-63, 04779 (EA at 7-9, 25). Approximately 83% of the DFPZ acreage will have no canopy cover retention requirements. Ex. 8. at 05498 (Decision Notice at 6). Combustible slash debris resulting from logging would remain in the project area for 5 to 7 years. Ex. 8 at 05502 (Decision Notice at 10).

The California spotted owl is a habitat specialist that selects and uses old forests characterized by large trees, dense and multi-storied canopies, dense canopy closure, large standing dead trees ("snags"), and downed logs and woody debris for nesting, roosting, and foraging — the very type of habitat that will be affected by Project logging. Ex. 9 at 04365-66 (Meadow Valley Project Biological Assessment/Biological Evaluation ("BA/BE") at 27-28). For nesting and roosting, the owl requires forests with canopy cover of 70% or greater, and requires 50% or greater canopy cover for foraging. *Id.* Due to concerns regarding its viability, the Forest Service has designated the owl as a "sensitive species." Ex. 7 at 04821-22 (EA at 67-68).

The Meadow Valley Project area contains 4,281 acres of suitable nesting and foraging habitat for the California spotted owl. Ex. 9 at 04367-68, 04439-40 (BA/BE at 29-30, 97-98). Logging pursuant to the Project will render unsuitable

every single acre of these 4,281 acres of suitable habitat, including 1,000 acres within critical owl home range core areas ("HRCAs").[3] Ex. 9 at 04439-40 (BA/BE at 97-98); Ex. 10 (Defs' Response to Pls' Statement of Fact ("Response to Fact")) at 18-19. The proposed logging would directly impact all 16 owl HRCAs in the Project area and indirectly impact at least 14 other HRCAs. Ex. 9 at 04431-33 (BA/BE at 89-91); Ex. 10 (Response to Fact) at 18-19.

In the Record of Decision that accompanied the final environmental impact statement for the QLG Act pilot project ("1999 QLG ROD"), the Forest Service acknowledged that the pilot project, which includes the Meadow Valley Project and hundreds of others like it, "could pose a serious risk to the viability of the California spotted owl in the planning area." Ex. 11 at 02384 (1999 QLG ROD at 7). Consequently, the Forest Service imposed as mitigation a condition that individual QLG projects such as the Meadow Valley Project "be designed and implemented *to completely avoid suitable California spotted owl habitat, including nesting habitat and foraging habitat*." *Id.* at 02383 (1999 QLG ROD at 6) (emphasis added). In the 2001 Sierra Nevada Forest Plan Amendment Record of Decision ("SNFPA 2001 ROD"), the Forest Service adopted a new California Spotted Owl Conservation Strategy which replaced the 1999 QLG ROD's mitigation measure with standards that provided substantial protection for most

[3] The owl is a territorial species that preferentially utilizes habitat near and around its nest tree. Ex. 10 (Response to Fact) at 8. The Forest Service designates the best available 300 acres of habitat around each owl nest or roost site as a protected activity center ("PAC"), and in Plumas National Forest characterizes 1,000 acres (including the 300-acre PAC) of the best available habitat where the most concentrated foraging activity is likely to occur as an HRCA. *Id.*

owl habitat. Ex. 12 at 00272-76 (SNFPA 2001 ROD at 37-41). However, the Forest Service reversed course in its 2004 Sierra Nevada Forest Plan Amendment Record of Decision ("SNFPA 2004 ROD") and decided that the QLG Act should be fully implemented, without the prior prohibitions on logging in suitable owl habitat. Ex. 13 at 01058, 01063-64 (SNFPA 2004 ROD at 6, 11-12).[4]

ARGUMENT

I. Standard For Injunction Pending Appeal.

Motions for injunctions pending appeal are granted under the same standard as motions for permanent injunctions. *See Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 551 (9th Cir. 1977). Specifically, "a party must demonstrate either (1) a likelihood of success on the merits and a possibility of irreparable injury, or (2) the existence of serious questions on the merits and a balance of hardships tipping in its favor." *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992). The two tests represent two points on a sliding scale wherein "the greater the relative hardship to [the party seeking the preliminary injunction,] the less probability of success must be shown." *Earth Island Institute v. U.S. Forest Serv.*, 351 F.3d 1291, 1298 (9th Cir. 2003) (brackets in original) (citations omitted).

"Serious questions" are those "questions which cannot be resolved one way or the other at the hearing on the injunction," and are "substantial and difficult and

[4] These programmatic documents do not discuss site-specific projects and explicitly require compliance with NEPA at the project level. *See, e.g.*, Ex. 11 at 02383 (1999 QLG ROD at 6); Ex. 13 at 01072 (SNFPA 2004 ROD at 20).

doubtful" enough to require more considered investigation. *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988). Such questions need not show a certainty of success, nor even demonstrate a probability of success, but rather "must involve a fair chance of success on the merits." *Id.* (internal quotation marks and citation omitted).

II. Plaintiffs Have a Strong Likelihood of Succeeding on the Merits of Their Claim that the Forest Service Violated NEPA by Failing in the EA to Take a Hard Look at the Cumulative Impacts of the Project on the California Spotted Owl.

A. Statutory Overview.

NEPA is "our basic national charter for protection of the environment." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1215-16 (9th Cir. 1998) (quoting 40 C.F.R. § 1500.1(a)). NEPA requires all agencies of the federal government to prepare a "detailed statement" that discusses the environmental impacts of, and reasonable alternatives to, all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). To determine whether the effects of an agency action may "significantly" affect the environment, thus requiring preparation of an Environmental Impact Statement ("EIS"), an agency may first prepare an environmental assessment ("EA"). 40 C.F.R. § 1501.4(b). If the EA indicates that the federal action "may" significantly affect the quality of the human environment, the agency must prepare an EIS. *Id.* at § 1501.4; 42 U.S.C. § 4332(2)(C). *See Kern v. United States Bureau of Land Mgmt.*, 284 F.3d 1062, 1067 (9th Cir. 2002); *LaFlamme v. F.E.R.C.*, 852 F.2d 389, 397 (9th Cir. 1988) ("The plaintiff need not show that significant effects *will in fact occur*, but if the plaintiff raises substantial

questions whether a project may have a significant effect, an EIS *must* be prepared.") (emphasis in original).[5]

B. The Forest Service Failed to Take a Hard Look at the Cumulative Impacts of the Meadow Valley Project.

In determining whether to prepare an EIS for the Project, the Forest Service was required to consider in the EA "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts." 40 C.F.R. § 1508.27(b)(7). A "cumulative impact" is defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . . ." *Id.* at § 1508.7. "Given that so many more EAs are prepared than EISs, *adequate consideration of cumulative effects requires that EAs address them fully*." *Kern*, 284 F.3d at 1076 (citation omitted) (emphasis in original).

The district court erroneously concluded that the Forest Service's discussion of cumulative effects in the EA, which failed even to mention several specific foreseeable future logging projects directly adjacent to the Meadow Valley Project, was acceptable under NEPA. Ex 3 (Memorandum and Order ("Opinion")) at 25.

The district court made this ruling based upon the erroneous conclusion that NEPA does not require an agency to consider projects outside of the analysis area delineated for a particular project. However, this Court has made clear that a proper cumulative effects analysis is not limited to the agency's designated

[5] Review of agency action compliance with NEPA is governed by the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *See Hells Canyon Alliance v. United States Forest Serv.*, 227 F.3d 1170, 1176-77 (9th Cir. 2000).

analysis area, but rather is triggered by the existence of reasonably foreseeable future projects, which when considered in conjunction with the proposed project, could result in cumulatively significant impacts to the environment. *See, e.g.*, *Kern*, 284 F.3d at 1075-79 (Sandy-Remote timber sale EA violated NEPA because it performed no "cumulative impact analysis of 'reasonably foreseeable future actions' outside the Sandy-Remote [Analysis] Area . . ."). *See also* Ex. 14 (*Center for Sierra Nevada Conservation v. Berry*, No. Civ S-02-325 LKK/JFM, slip op. at 38-40 (E.D. Cal. Feb. 15, 2005)) (agency's failure to consider other foreseeable activities outside the Rock Creek Analysis Area resulted in an inadequate cumulative effects analysis).

The district court also inappropriately relied on *Inland Empire Public Lands Council v. United States Forest Serv.*, 88 F.3d 754 (9th Cir. 1996) ("*Inland Empire*"), and *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944 (9th Cir. 2003) ("*Selkirk*"), to support its conclusion. *See* Ex. 3 (Opinion) at 25. In *Inland Empire*, plaintiffs challenged the scope of an EIS regarding the impacts of the proposed project; they did not bring a cumulative impacts claim involving foreseeable future actions. *Inland Empire*, 88 F.3d at 764. Therefore, *Inland Empire* is inapposite. *See also* Ex. 14 (*Center for Sierra Nevada Conservation*), slip op. at 38 (court distinguishes *Inland Empire*).

The district court also misapplied *Selkirk*. In *Selkirk* this Court held that an agency may exclude from its cumulative effects analysis a project that falls outside of the designated analysis area so long as the agency provides a reasoned discussion as to why the project was excluded. *Selkirk*, 336 F.3d at 958-60. In *Selkirk*, the agency painstakingly explained that it had excluded the Idaho

Panhandle National Forest project ("IPNF project") from the cumulative effects analysis because inclusion of the IPNF project, which was located on a different national forest in a different state, would artificially minimize the impacts of the challenged project. *Id.* at 951. Thus, the agency did not ignore the IPNF Project, but to the contrary provided a reasoned discussion as to why it was excluded.

In this case, plaintiffs have challenged the Meadow Valley Project EA on the grounds that it failed to adequately consider the cumulative effects of the Meadow Valley Project by completely ignoring reasonably foreseeable future actions identified by plaintiffs and planned for the same area. Two of these future projects, the Basin Group Selection Project ("Basin Project") and the Empire Vegetation Management Project ("Empire Project"), are directly adjacent to and abut the Meadow Valley Project analysis area. *See* Ex. 15 (map attached to Declaration of Richard Bednarski).[6] The Basin Project includes plans for group and individual tree selection logging on 1,295 acres on the Plumas National Forest (the vast majority of which is suitable owl habitat) directly southwest of, and abutting, the Meadow Valley Project.[7] Ex. 10 (Response to Fact) at 22-24. Similarly, the Empire Project includes a combination of group selection, DFPZ

[6] The Forest Service does not dispute that the specific projects identified by plaintiffs, including the Basin, Empire, and several other projects, were "reasonably foreseeable future actions" within the meaning of 40 C.F.R. § 1508.7. *See* Ex. 10 at 21-25 (Response to Fact).

[7] Indeed, certain units of the Basin Project originally were laid out *within* the Meadow Valley Project analysis area. *See* Ex. 16 (Jan. 24, 2004 Memo to File from James Peña).

construction, and individual tree selection on over 10,111 acres of suitable owl habitat directly northeast of, and abutting, the Meadow Valley Project. *Id.* Thus, the Meadow Valley, Basin, and Empire Projects, all of which have identical or very similar logging prescriptions, cumulatively will degrade over 15,000 acres of suitable California owl nesting and foraging habitat in the Plumas National Forest. Nowhere in the EA is this mentioned or discussed.

It is undisputed that spotted owl populations are particularly imperiled in the northern Sierra Nevada. *See* Ex. 17 (Declaration of Jennifer Blakesley In Support of Plaintiffs' Motion for Summary Judgment) ("Blakesley Dec.") ¶¶ 3-4.[8] Had the Forest Service prepared a proper cumulative effects analysis for the Project, it would have been apparent that its impacts, in conjunction with those of the Basin, Empire, and a number of other reasonably foreseeable future projects in the immediate area identified by plaintiffs, will result in cumulatively significant impacts to the California spotted owl. As is discussed below, these significant cumulative impacts require the preparation of an EIS.

III. Plaintiffs Have a Strong Likelihood of Succeeding on the Merits of Their Claim that the Forest Service's Failure to Prepare an EIS for the Project Violated NEPA and was Arbitrary and Capricious.

A. The Forest Service Failed to Take a Hard Look at Whether the Meadow Valley Project Significantly Affects Public Safety.

If a proposed project has the *potential* to significantly affect public health and safety, NEPA requires the preparation of an EIS. 40 C.F.R. 1508.27(b)(2).

[8] The district court admitted plaintiffs' declarations as admissible extra-record evidence. Ex. 10 (Opinion) at 16-18.

Combustible "slash debris" (branches, tops, and needles from felled trees) resulting from Meadow Valley Project logging will create a significant fire hazard. Ex. 17A (Declaration of Dr. Dennis Odion In Support of Motion for Sum. Judg.) ("First Odion Dec."). This will create a threat to the safety of the town and residents of Meadow Valley, as well as to the safety of firefighters charged with suppressing a wildfire near the community. *See* Declaration of Dr. Dennis Odion in Support of Motion for Injunction Pending Appeal ("Second Odion Dec."), submitted herewith. The fact that slash debris creates a fire hazard is undisputed in this case.

The district court's conclusion that the slash debris that will be generated by the Meadow Valley Project does not pose an "unacceptable risk triggering a need for an EIS" (Ex. 3 at 35) was based on numerous erroneous findings of fact. Specifically: (1) That there would be no slash debris left after logging, despite the undisputed fact that branches on the lowest 41 feet of the largest (20"-30" in diameter) logged trees will be cut from these trees and left in the logging units[9]; (2) That slash debris "within group selection units" will be piled and burned within one year (Ex. 3 at 33 (citing AR 15: 5470)), despite the fact that the passage cited by the court pertains only to piling and burning of slash at *landings* (*i.e.*, designated areas to which the trees are dragged, stacked and loaded on trucks), not to treatment of slash within the actual group selection units which is not required

[9] Photographs submitted by plaintiffs clearly show live and dead branches extending to within 10-15 feet of the ground on most of the larger trees. Ex. 19 (Hanson Supp. Decl., Exhibits A-G).

(*see* Ex. 8 at 5470) (Decision Notice at 18); and (3) That the "fire risk" portion of the Meadow Valley EA "passes muster" under NEPA (Ex. 3 at 35), despite the uncontested facts that fires occur regularly in and around the Meadow Valley Project Area (*see* Ex. 3 (Opinion) at 9, n.4; AR 11:4096-97; AR 13: 4865), and that the Forest Service conducted *no* analysis of the increased risk of fire from slash debris created during the five-to-seven year period, during which slash will be left untreated in the project area adjacent to the community. Ex. 7 at 4812 (EA at 58); Ex. 20 at 4869 (Meadow Valley Project Fire/Fuels Report at 6). Significantly, the slash debris generated by the Project would add to the already existing levels of small diameter woody fuels on the forest floor, which, according to the Forest Service, currently pose a fire threat to the community. Ex. 20 at 4866, 4868 (Meadow Valley Fire/Fuels report at 3, 5); *see also* Second Odion Dec. ¶ 3.

Ultimately, these erroneous findings of fact resulted in a decision that failed to address one of plaintiffs' main contentions, namely that the EA failed to acknowledge or analyze the increased fire risk to the Meadow Valley community from slash debris generated by the Project in the absence of any requirement that this slash be immediately removed. An EIS for the Meadow Valley Project is required in order to fully analyze and take a hard look at the risk posed by logging slash to the public safety of the Meadow Valley community. This is particularly important in this case since this project is being conducted ostensibly to protect the community from fire. Ex. 8 at 5532 (Decision Notice at 18).

B. An EIS Was Required for the Meadow Valley Project Because the Project Will Create Significant Impacts and Additional Highly Uncertain Risks to the California Spotted Owl.

In determining whether to prepare an EIS for the Project, the Forest Service was required to consider "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks." 40 C.F.R. § 1508.27(b)(5).

The record in this case demonstrates that the Meadow Valley Project poses significant and highly uncertain risks to the California spotted owl. The Forest Service itself admits that the Project:

> would introduce elements of uncertainty about future owl activity in the project area. Alternative C [the selected alternative] involves a higher risk of adversely affecting spotted owls because it deviates more from the owl management strategy in [the SNFPA 2001 ROD], and the more intensive treatments would create more structurally unsuitable habitat across the project area and within HRCAs . . . .

Ex. 7 at 04824 (EA at 70); *see also* Ex. 9 at 04440 (BA/BE at 98).

What is certain, however, is that the Meadow Valley Project's planned logging activity will render unsuitable *all* 4,281 acres of suitable owl nesting and foraging habitat in the Project area, including 1,000 acres of prime owl habitat within 16 HRCAs. Ex. 9 at 04428-31, 04439-40 (BA/BE at 86-89, 97-98). This loss of suitable habitat will make it more difficult for owls to obtain adequate food supplies, establish new territories, maintain existing territories, produce young, and disperse across the landscape. Ex. 18 at ¶¶ 18-28 (Declaration of Monica L. Bond in Support of plaintiffs' Motion for Summary Judgment ("First Bond Dec.")); Ex. 17 at ¶¶ 16, 18 (Blakesley Dec.). Indeed, three occupied owl PACs (nest sites)

have a "moderate" risk of becoming non-viable and losing their ability to support owls due to this project. Ex. 9 at 04431 (BA/BE at 89, Table 28). These negative impacts are compounded by the timing of planned logging at the height of the owl breeding season.

C. An EIS for the Meadow Valley Project was Required Because the Project, in Conjunction with Other Reasonably Foreseeable Future Projects, Will Result in Significant Cumulative Impacts to the California Spotted Owl.

Not only are the impacts to the owl of the Meadow Valley Project by itself significant, so are the cumulative impacts of the Project and other similar projects planned for the immediate area. These too require preparation of an EIS.

As discussed above, the Forest Service completely failed to assess the cumulative impacts on the spotted owl of the Meadow Valley Project, together with the impacts of other reasonably foreseeable future projects planned for the immediate area. These cumulative impacts are significant and required an EIS.

The only evidence before the district court regarding cumulative effects of this Project and other future planned QLG Act projects on the spotted owl is in the declarations of Dr. Jennifer Blakesley and Monica Bond (Exs. 17 and 18 to Sherwood Dec.). Both owl biologists visited the Meadow Valley analysis area and determined that, based upon the owl's biology, behavior, and population status, the Meadow Valley Project, together with future projects such as Basin and Empire, could have a significant effect on the owl's viability in this region. *See, e.g.*, Ex. 17 (Blakesley Dec.) at ¶¶ 12-15; Ex. 18 (First Bond Dec.) at ¶¶ 39-42. Thus, the Forest Service should have prepared an EIS for this project, and its failure to do so violated NEPA and was arbitrary and capricious.

IV. Plaintiffs Will Suffer Irreparable Harm if this Court Does Not Enjoin Implementation of the Project Pending Disposition of the Appeal.

To obtain an injunction in the Ninth Circuit, a party need not prove that irreparable harm will in fact occur — it must show only that injury or harm *may* occur in the absence of the requested injunction. *National Parks and Conservation Ass'n v. Babbitt*, 241 F.3d 722, 737 (9th Cir. 2001). Although there is no presumption of irreparable injury when an agency fails to evaluate the environmental impact of a proposed action, the Supreme Court has held that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 545 (1987). In NEPA cases, "absent 'unusual circumstances,' an injunction is the appropriate remedy for a violation of NEPA's procedural requirements." *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) (internal citation omitted).

In this case, plaintiffs' interests will be irreparably harmed if the Forest Service is allowed to proceed with the Meadow Valley Project in violation of the procedural requirements of NEPA, due to the environmental harm from the loss and degradation of suitable spotted owl habitat and the increased risk of fire. The Ninth Circuit has "often held that a Forest Service logging plan may, in some circumstances, fulfill the irreparable injury criterion because of the long term environmental consequences." *Earth Island Institute*, 351 F.3d at 1299.

The Meadow Valley Project, if implemented, will result in the loss of 4,281 acres of spotted owl suitable nesting and foraging habitat, and would result in disturbance to owls during the summer breeding season for five consecutive years.

Ex. 18 at ¶¶ 14-15 (First Bond Dec.). If logging is allowed to begin shortly after June 14, 2005 when the first timber sale contracts are let, immediate irreparable injury will occur. *See* Declaration of Monica Bond in Support of Motion for Injunction Pending Appeal ("Second Bond Dec.") submitted herewith at ¶¶ 8-12. As Ms. Bond points out, "[u]nfortunately, this timing coincides with the fledgling stage for California spotted owls." Second Bond Dec. ¶ 8. Young owl fledglings are weak flyers and often fall to the ground, where they are particularly vulnerable to harm. *Id.* at 9. In addition, by rendering foraging habitat unsuitable, any logging within owl home ranges prior to September "could cause serious immediate harm to fledgling owlets by impairing the ability of parents to forage efficiently." *Id.* at ¶ 12. Such logging "could also have serious long-term impacts on the California spotted owl population within the Project site — particularly when considered cumulatively with other nearby logging projects which similarly remove and degrade suitable spotted owl habitat." *Id.*

V. The Balance of the Hardships Tips Decidedly in Plaintiffs' Favor.

When balancing the hardships in a case where environmental harm is likely, the balance "will usually favor the issuance of an injunction to protect the environment." *See Amoco Production Co.*, 480 U.S. at 545. Given this Court's mandate to give "due weight to the public's interest in conservation of natural resources," *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1126 (9th Cir. 2002), an injunction is appropriate here to prevent environmental harm pending compliance by defendants with NEPA.

As discussed above, plaintiffs will suffer irreparable injury if logging is

allowed to commence in the absence of an EIS. On the other hand, the Forest Service will not suffer any harm if the Court enjoins the Meadow Valley Project until it has complied with the law. As this Court recently stated:

> because we ask only that the Forest Service conduct the type of analysis that it is required to conduct by law, an analysis it should have done in the first instance, it is difficult to ascertain how the Forest Service can suffer prejudice by having to do so now.

Idaho Sporting Congress, Inc. v. Rittenhouse, 305 F.3d 957, 974 (9th Cir. 2002) (citation omitted). Moreover, no contracts have yet been awarded for the Project, so no private timber company has acquired any contractual interest.

VI. The Public Interest Favors the Issuance of an Injunction.

Ultimately, this case is about compliance by the Forest Service with the law. As the court stated in *Seattle Audubon Soc'y v. Evans*, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991), *aff'd*, 952 F.2d 297 (9th Cir. 1991), "[t]his invokes a public interest of the *highest order*: the interest in having government officials act in accordance with the law." (emphasis added).

Moreover, an injunction would serve the public interest because increasing the risk of severe fire in and around communities is not in the public interest. *See Sierra Club v. Eubanks*, 335 F. Supp. 2d 1070, 1083 (E.D. Cal. 2004) ("[t]o the extent plaintiffs have demonstrated that [the project] may increase the likelihood of severe fire, such an increased risk is clearly not in the public interest."). *See also* Second Odion Dec. ¶¶ 2, 3.

Indeed, the community would be better protected by no action than by the Forest Service's decision to leave heavy logging slash next to the community for five to seven years.

CONCLUSION

As this Court stated in *Kettle Range Conservation Group v. U.S. Bureau of Land Mgmt.*, 150 F.3d 1083, 1087-88 (9th Cir. 1998) (Reinhardt, J., concurring opinion):

> This is one of those cases in which the trial court's and the court of appeals' preliminary decisions as to whether to grant injunctive relief pendente lite . . . is determinative of the ultimate outcome of the litigation. In such cases judges must be particularly sensitive to the practical consequences of their initial action or inaction, not only because of the effect on the transactions involved, but because of the need to ensure that the court does not inadvertently lose its ability to enforce an important Congressional mandate . . . .

This is also such a case. To prevent plaintiffs' appeal from becoming moot and irreparable harm from occurring, the Court should enjoin the Forest Service from awarding any timber sale contracts implementing the Meadow Valley Project, or otherwise allowing the commencement of logging or other activities pursuant to the Project, pending the final disposition of this appeal.[10]

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[10] Plaintiffs have never objected to legitimate fire risk reduction activities such as prescribed burning and undergrowth thinning (*i.e.*, the removal of brush and small trees under 10 inches in diameter), which the Forest Service itself identifies as the biggest contributors to fire behavior. Ex. 20 at 04884 (Fire/Fuels Report at 21). Consequently, plaintiffs respectfully request that the order of this Court allow such activities to proceed.

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Respectfully submitted,

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