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16 UNITED STATES DISTRICT COURT
17 FOR THE EASTERN DISTRICT OF CALIFORNIA
18 SACRAMENTO DIVISION

19 SIERRA NEVADA FOREST PROTECTION)
20 CAMPAIGN, PLUMAS FOREST PROJECT,)
21 EARTH ISLAND INSTITUTE, and CENTER)
22 FOR BIOLOGICAL DIVERSITY, non-profit)
23 organizations,)

24 Plaintiffs,)

25 vs.)

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

29 Defendants,)

30 and)

31 QUINCY LIBRARY GROUP, an unincorporated)
32 citizens group; and PLUMAS COUNTY,)

33 Intervenor/Defendants.)

Case No. Civ. S-04-2023 MCE/GGH

PLAINTIFFS' MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
MOTION FOR INJUNCTION PENDING
APPEAL

Date: June 20, 2005

Time: 9:00 a.m.

Judge: Hon. Morrison C. England, Jr.

1 **INTRODUCTION**

2 On May 9, 2005, this Court issued its Memorandum and Order denying the Motion for
3 Summary Judgment filed by plaintiffs Sierra Nevada Forest Protection Campaign, *et al.*
4 (“plaintiffs”), and granting the Motion for Summary Judgment filed by defendants United States
5 Forest Service, *et al.* (“Forest Service”). The Court also found that plaintiffs failed to show that
6 environmental injury was sufficiently likely, and denied plaintiffs’ request for permanent injunctive
7 relief prohibiting the implementation of the Meadow Valley Defensible Fuel Profile Zone and Group
8 Selection Project (“Meadow Valley Project” or “Project”). On the same date, the Court entered
9 Judgment against plaintiffs and in favor of the Forest Service.

10 On May 12, 2005, plaintiffs filed a Notice of Appeal to the United States Court of Appeals
11 for the Ninth Circuit from the Judgment against them. Plaintiffs hereby move for an injunction
12 pending appeal pursuant to Rule 8(a)(1)(C) of the Federal Rules of Appellate Procedure. Plaintiffs
13 seek to enjoin the Forest Service from awarding any timber sale contracts implementing the Meadow
14 Valley Project, or in any way authorizing the commencement of logging or other activities pursuant
15 to the Project, except for prescribed burning and undergrowth thinning activities, until the Forest
16 Service has prepared an environmental impact statement (“EIS”) on the Project pursuant to the
17 National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.*

18 **BACKGROUND**

19 The facts of this case are set forth in the Court’s Memorandum and Order at pp. 2-11.
20 Briefly, the Meadow Valley Project, approved by the Forest Service on April 16, 2004, would allow
21 the logging of approximately 40 million board feet of timber from 6,440 acres in Plumas National
22 Forest. As part of the Herger-Feinstein Quincy Library Group Forest Recovery Act (“QLG Act”),
23 Pub. L. 105-277, Div. A, § 101(e) [Title IV, § 401], Oct. 21, 1998, 112 Stat. 2681-305 (16 U.S.C. §
24 2104 note), the Project involves 743 acres of group selection logging in 488 units and 5,700 acres of
25 defensible fuel profile zone (“DFPZ”) logging in 37 units. The group selection units allow the
26 removal of trees up to 30 inches in diameter at breast height (“dbh”), while the DFPZ units allow
27 trees up to 20” dbh to be removed on approximately 4,320 acres and trees up to 30” on
28 approximately 950 acres. All 4,281 acres of suitable habitat for the California spotted owl in the

1 Project area will be rendered unsuitable as a result of the logging, including at least 1,000 acres in
2 home range core areas (“HRCAs”).

3 Plaintiffs filed their Complaint on September 28, 2004, alleging violations of NEPA, the
4 QLG Act, and the National Forest Management Act (“NFMA”), and sought declaratory and
5 injunctive relief including a permanent injunction enjoining implementation of the Meadow Valley
6 Project until the Forest Service prepared an adequate EIS for the Project pursuant to NEPA.
7 Complaint at 20. In a Stipulation and Joint Request Regarding Expedited Summary Judgment
8 Briefing and Hearing filed on October 18, 2004, plaintiffs and the Forest Service agreed that the
9 Forest Service would withdraw the four pending advertisements for timber sale contracts that
10 implement the Meadow Valley Project, and postpone the awarding of those contracts until spring
11 2005. Plaintiffs and the Forest Service also agreed that the Forest Service would promptly notify
12 plaintiffs when any of the four timber sale contracts for the Project are advertised, provide plaintiffs
13 with copies of the advertisements, and provide plaintiffs with 10 days written notice prior to
14 awarding any of the four timber sale contracts.

15 On December 17, 2004, plaintiffs filed their Motion for Summary Judgment on the claims
16 raised in their Complaint, along with a Memorandum of Points and Authorities in Support of
17 Plaintiffs’ Motion for Summary Judgment (“Pls.’ Br.”). Plaintiffs specifically addressed the
18 standards for injunctive relief and the appropriateness of the Court’s issuance of a permanent
19 injunction in this matter until the Forest Service prepares an EIS for the Meadow Valley Project
20 pursuant to NEPA. Pls.’ Br. at 43-48; *see also* Plaintiffs’ Opposition to Defendants’ Cross Motion
21 for Summary Judgment and Reply in Support of Motion for Summary Judgment (“Pls. Reply Br.”)
22 at 40-47. That discussion is hereby incorporated by reference.

23 On May 9, 2005, the Court filed its Memorandum and Order denying plaintiffs’ Motion for
24 Summary Judgment and denying plaintiffs’ request for a permanent injunction enjoining the
25 implementation of the Meadow Valley Project.

26 On May 10, 2005, the Forest Service notified plaintiffs that four timber sale contracts
27 implementing the Meadow Valley Project would be advertised on May 11, 2005. The
28 advertisements indicate that the Forest Service will receive bids for two of the timber sale contracts

1 on June 14, 2005, and bids for the other two contracts on June 16, 2005. The contracts may be
2 awarded at that time, and logging pursuant to the contracts could begin immediately thereafter.

3 On May 12, 2005, plaintiffs filed their Notice of Appeal to the United States Court of
4 Appeals for the Ninth Circuit from this Court’s Judgment. In their appeal, plaintiffs intend to focus
5 on whether this Court erred in ruling that the Forest Service need not prepare an EIS for the Meadow
6 Valley Project pursuant to NEPA.

7 Until the Court of Appeals has an opportunity to rule on the appeal, there is a substantial risk
8 of irreparable injury to plaintiffs and the environment if the advertised timber sale contracts
9 implementing the Meadow Valley Project are awarded and logging is permitted to begin. Plaintiffs
10 therefore respectfully request that this Court enjoin the Forest Service from awarding the timber sale
11 contracts implementing the Meadow Valley Project, or in any way authorizing the commencement
12 of logging or other activities pursuant to the Project, except for legitimate fire risk reduction
13 activities such as prescribed burning and undergrowth thinning, until the Court of Appeals decides
14 plaintiffs’ appeal.

15 ARGUMENT

16 I. Standard of Review for a Motion for Injunction Pending Appeal

17 Rule 8(a)(1)(C) of the Federal Rules of Appellate Procedure provides that “[a] party must
18 ordinarily move first in the district court for the following relief: . . . (C) an order . . . granting an
19 injunction while an appeal is pending.” Fed. R. App. P. 8(a)(1)(C); *see also* Fed. R. Civ. P. 62(c)
20 (district court in its discretion may grant injunction during the pendency of an appeal). In the Ninth
21 Circuit, the standard for evaluating a motion for injunction pending appeal is essentially the same as
22 the standard for a motion for a permanent injunction. *See, e.g., Warm Springs Dam Task Force v.*
23 *Gribble*, 565 F.2d 549, 551 (9th Cir. 1977). In *Warm Springs*, the Ninth Circuit stated that:

24 The considerations in determining whether to grant or deny the
25 requested relief are three-fold: (1) Have the movants established a
26 strong likelihood of success on the merits? (2) Does the balance of
27 irreparable harm favor the movants? (3) Does the public interest favor
28 granting the injunction? . . . [T]he latter criteria merge into a single
equitable judgment in which the environmental concerns of the
movants must be weighed against the societal interests which will be
adversely affected by granting the relief requested, a process which
must be significantly affected by the realities of the situation.

1 *Id.* (internal citations omitted). Accordingly, this Court should apply “the traditional balance of
2 harms analysis,” *National Parks & Conservation Association v. Babbitt*, 241 F.3d 722, 737 (9th Cir.
3 2001), and consider “irreparable injury and inadequacy of legal remedies.” *Amoco Production Co.*
4 *v. Village of Gambell, Alaska*, 480 U.S. 531, 542 (1987). “In cases where the public interest is
5 involved, the district court must also examine whether the public interest favors the plaintiffs.”
6 *Fund for Animals v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992).

7 **II. Plaintiffs are Likely to Succeed on their Appeal.**

8 For the reasons set forth in Pls.’ Br. at 18-41 and Pls.’ Reply Br. at 13-38, plaintiffs
9 respectfully submit that this Court was mistaken in its rulings on plaintiffs’ NEPA claims, and that
10 they are likely to succeed in their appeal of these issues. Plaintiffs hereby incorporate that
11 discussion by reference.

12 **III. Plaintiffs Will Suffer Irreparable Harm with No Adequate Legal Remedy if this**
13 **Court Does Not Enjoin Implementation of the Project Pending Preparation of an**
14 **Adequate EIS.**

15 To obtain an injunction in the Ninth Circuit, a party need not prove that irreparable harm will
16 in fact occur — it must show only that injury or harm *may* occur in the absence of the requested
17 injunction. *National Parks*, 241 F.3d at 737 (enjoining ongoing cruise ship operations pending
18 preparation of an EIS because they “might” cause irreparable harm); *accord Idaho Sporting*
19 *Congress, Inc. v. Alexander*, 222 F.3d 562, 569 (9th Cir. 2000) (holding that the “possibility” of
20 irreparable harm from logging justifies an injunction).

21 Although there is no presumption of irreparable injury when an agency fails to evaluate the
22 environmental impact of a proposed action, the Supreme Court has held that “[e]nvironmental
23 injury, by its nature, can seldom be adequately remedied by money damages and is often permanent
24 or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, *the*
25 *balance of harms will usually favor the issuance of an injunction to protect the environment.*”
26 *Amoco Production Co.*, 480 U.S. at 545 (emphasis added). *See also Idaho Sporting Congress, Inc.*
27 *v. Alexander*, 222 F.3d at 569. “When the proposed project may significantly degrade some human
28 environmental factor, injunctive relief is appropriate.” *National Parks*, 241 F.3d at 737 (internal

1 quotation omitted).

2 In this case, plaintiffs’ interests will be irreparably harmed if the Forest Service is allowed to
3 proceed with the Meadow Valley Project in violation of the procedural requirements of NEPA, due
4 to the environmental harm from the loss and degradation of old forest areas, including suitable
5 spotted owl habitat, as well as the immediate and near-term increase of the risk of severe wildfire in
6 the Project area. As noted in the decision of this Court, the Meadow Valley Project, if implemented,
7 will result in the loss of 3,336 acres of suitable spotted owl foraging habitat and 945 acres of suitable
8 nesting habitat. Memorandum and Order at 9. Furthermore, plaintiffs will also be irreparably
9 injured if the logging commences as planned because it will increase the risk of severe wildfire. As
10 this Court previously concluded in *Sierra Club v. Eubanks*, 335 F. Supp. 2d 1070 (E.D. Cal. 2004),
11 “[t]he increased risk and intensity of fire that may be caused by such logging may both elevate the
12 likelihood of extreme fire and damage critical habitat for certain [species] whose population, in the
13 absence of proper monitoring, remains unknown.” 335 F. Supp. 2d at 1083.

14 The Ninth Circuit has “often held that a Forest Service logging plan may, in some
15 circumstances, fulfill the irreparable injury criterion because of the long term environmental
16 consequences.” *Earth Island Institute v. United States Forest Serv.*, 351 F.3d 1291, 1299 (9th Cir.
17 2003). *See also Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1382
18 (9th Cir. 1998) (noting that “[t]he old growth forests plaintiffs seek to protect would, if cut, take
19 hundreds of years to reproduce”); *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1314 (9th Cir.
20 1990) (finding that the balance of hardships tips sharply in favor of plaintiffs since “[t]he
21 environmental consequences on the old growth forest in the enjoined areas, were they to be opened
22 up in a manner contemplated by the proposed action, would be irreversible for the foreseeable
23 future”); *Sierra Club v. United States Forest Serv.*, 843 F.2d 1190, 1195 (9th Cir. 1988) (granting
24 preliminary injunction to prevent further irreparable harm to the environment where logging was
25 underway without preparation of environmental impact statement); *Eubanks*, 335 F. Supp. 2d at
26 1082-84 (holding that proposed logging “is enough in and of itself to satisfy the irreparable harm
27 component of Plaintiffs’ preliminary injunction request” because “once trees are removed from the
28 landscape, they cannot be replaced”).

1 Finally, it is clear that legal remedies for defendants’ violations of NEPA will not be
2 adequate. *See Amoco Production Co.*, 480 U.S. at 545 (holding that “[e]nvironmental injury, by its
3 nature, can seldom be adequately remedied by money damages”); *Environmental Protection*
4 *Information Center v. Blackwell*, 2004 WL 2324190 at *40 (N.D. Cal. Oct. 13, 2004) (“EPIC does
5 not seek money damages, for example, and, even if EPIC did, it would be virtually impossible to
6 value the harm resulting from the violations found herein”).

7 **IV. The Balance of Hardships Tips Decidedly in Plaintiffs’ Favor**

8 When balancing the hardships in a case where environmental harm is likely, the balance will
9 favor issuance of an injunction to protect the environment. *See, e.g., Amoco Production Co.*, 480
10 U.S. at 545; *Earth Island Institute*, 351 F.3d at 1299; *Idaho Sporting Congress, Inc. v. Alexander*,
11 222 F.3d at 569 (“Consequently, when environmental injury is sufficiently likely, the balance of
12 harms will usually favor the issuance of an injunction to protect the environment”). Where a party
13 demonstrates the possibility of irreparable harm to the environment and requests an injunction to
14 prevent such harm, an opposing party bears the burden of demonstrating that “unusual
15 circumstances” exist that weigh against the request. *See Thomas v. Peterson*, 753 F.2d 754, 764 (9th
16 Cir. 1985) (“[A]bsent ‘unusual circumstances,’ an injunction is the appropriate remedy for a
17 violation of NEPA’s procedural requirements”); *EPIC*, 2004 WL 2324190 at *5 (“Absent
18 documentation of such ‘unusual circumstances,’ injunctive relief typically follows from a finding of
19 a violation of NEPA or NFMA in a case such as this”). Given the Ninth Circuit’s mandate to give
20 “due weight to the public’s interest in conservation of natural resources,” *Kootenai Tribe of Idaho v.*
21 *Veneman*, 313 F.3d 1094, 1126 (9th Cir. 2002), an injunction is appropriate here to prevent
22 environmental harm pending compliance by defendants with NEPA.

23 As discussed above, plaintiffs will suffer irreparable injury if logging is allowed to
24 commence in the absence of an EIS. On the other hand, the Forest Service will not suffer any harm
25 if the Court enjoins implementation of the Meadow Valley Project until the Forest Service has
26 complied with the law. After all, the Forest Service has no valid interest in violating the law by
27 failing to comply with NEPA. As the Ninth Circuit recently stated in a NEPA case:
28

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

5 *Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957, 974 (9th Cir. 2002) (citation omitted).
6 The Forest Service’s proper interest is in carrying out its statutory duties in full compliance with the
7 law. Moreover, no contracts have yet been awarded for the Project, so no private timber company
8 has acquired any contractual expectations or expended any money in reliance upon such
9 expectations.

10 **V. The Public Interest Favors the Issuance of an Injunction in this Case.**

11 The issuance of an injunction until the Forest Service prepares an EIS and otherwise
12 complies with the law is necessary in order to prevent the unlawful destruction of publicly-owned
13 natural resources, prevent further violations of NEPA, and to further the important national policies
14 embodied in that statute. In actions to protect the environment, “the public’s interest in preserving
15 precious, unreplenishable resources must be taken into account in balancing the hardships.”
16 *Kootenai Tribe*, 313 F.3d at 1125. *See also Neighbors of Cuddy Mountain*, 137 F.3d at 1382 (noting
17 that the old growth forests plaintiffs seek to protect “will be enjoyed not principally by plaintiffs and
18 their members but by many generations of the public”).

19 Ultimately, this case is about compliance by the Forest Service with the law. As the court
20 stated in *Seattle Audubon Society v. Evans*, 771 F. Supp. 1081 (W.D. Wash. 1991), *aff’d*, 952 F.2d
21 297 (9th Cir. 1991), “[t]his invokes a public interest *of the highest order*: the interest in having
22 government officials act in accordance with the law.” 771 F. Supp. at 1096 (emphasis added).

23 Finally, an injunction would serve the public interest in this case because increasing the risk
24 of severe fire in and around communities is not in the public interest, and plaintiffs submit that the
25 Meadow Valley Project, as currently planned, will do just that. *See Eubanks*, 335 F. Supp. 2d at
26 1083 (“[t]o the extent Plaintiffs have demonstrated that implementation of the . . . Project may
27 increase the likelihood of severe fire, such an increased risk is clearly not in the public interest”).
28

1 **VI. The Injunction Should Not Preclude Legitimate Actions by the Forest Service to**
2 **Reduce the Risk of Severe Fire.**

3 As previously stated, plaintiffs are well aware that in some areas of the Project site
4 accumulations of surface and ladder fuels exist that present a risk of severe fire. Plaintiffs have
5 never objected to legitimate fire risk reduction activities such as prescribed burning and undergrowth
6 thinning, including removal of brush and small trees under 10-12 inches in diameter, which the
7 Forest Service identifies as “the biggest contributors to fire behavior.” *See* Complaint at 20; Pls.’ Br.
8 at 48. Consequently, plaintiffs respectfully request that the order of this Court allow such activities
9 to proceed.

10 **CONCLUSION**

11 Plaintiffs respectfully request that this Court enjoin the Forest Service from awarding any
12 timber sale contracts that implement the Meadow Valley Project, or otherwise allow commencement
13 of logging or any other activities pursuant to the Project, with the exception of prescribed burning
14 and undergrowth thinning activities for purposes of fire risk reduction as described above, pending
15 the appeal of this Court’s Memorandum and Order and Judgment.

16 DATED: May 12, 2005

Respectfully submitted,

17
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