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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL  
DIVERSITY, EARTH ISLAND  
INSTITUTE, and CALIFORNIA  
CHAPPARAL INSTITUTE,

Plaintiffs,

v.

SUSAN SKALSKI, in her  
official capacity as Forest  
Service Supervisor for the  
Stanislaus National Forest,  
and UNITED STATES FOREST  
SERVICE, an agency of the  
Department of Agriculture,

Defendants.

No. 1:14-cv-1382-GEB-GSA

**ORDER DENYING PLAINTIFFS' MOTION  
FOR PRELIMINARY INJUNCTION AND  
MOTION TO SUPPLEMENT THE  
ADMINISTRATIVE RECORD**

Plaintiffs Center for Biological Diversity, Earth  
Island Institute, and California Chapparral Institute  
(collectively "Plaintiffs") move for a preliminary injunction  
enjoining logging in a portion of what is called the Rim Fire  
Recovery Project ("the Project"); specifically Plaintiffs seek to  
prevent logging within 1.5 km of eight owl territory centers that  
are part of the Nevergreen, Double Fork, and Triple A timber  
sales in the Rim Fire area of the Stanislaus National Forest.  
(Pls.' Mot. Prelim. Inj. "Mot." 2:4-3:13, ECF No. 52.) Plaintiffs  
also move for an order requiring that three declarations  
supplement the administrative record ("AR"). (Mot. Supplement AR

1 ("Mot. Supp." ECF No. 32.) Defendants Skalski and the United  
2 States Forest Service ("Forest Service") (collectively  
3 "Defendants") oppose both motions. (Opp'n Mot. Prelim. Inj., ECF.  
4 No.61; Fed. Defs. Opp'n Mot. Supp. AR, ECF No. 49.)

5 **I. BACKGROUND**

6 **The Rim Fire and Rim Fire Recovery Project:**

7 The motions concern the following background  
8 information in the administrative record. The Rim Fire began in  
9 August 2013 in the Stanislaus National Forest near Yosemite  
10 National Park. AR A00011. The fire burned for several weeks and  
11 was "the third largest wildfire in California history and the  
12 largest wildfire in the recorded history of the Sierra Nevada."  
13 AR A00011, B00111. It burned more than 150,000 acres of National  
14 Forest and "resulted in areas of high, moderate and low  
15 vegetation burn severity." AR B00112-14; see also A00015.

16 The Forest Service states its proposed Rim Fire  
17 Recovery Project is its response to the fire and the fire's  
18 impact on Stanislaus National Forest. The Forest Service further  
19 states it designed the Project to "help[] restore the land  
20 impacted by the Rim Fire. . . while simultaneously providing for  
21 public safety, ecological integrity, scientific research, and  
22 socio-economic benefits." AR A00009. The "proposed action . . .  
23 includes: salvage of dead trees[and] removal of hazard trees  
24 along roads open to the public and roads used to access and  
25 implement proposed treatments." AR B00121.

26 The Forest Service's "public outreach began while the  
27 fire was still smoldering and continued up until the point of  
28 the" final decision to implement the Project. AR A00035.

1           In connection with the Project, the Forest Service,  
2 published a Notice of Intent on December 6, 2013 and sought  
3 "information, comments and assistance from federal, state and  
4 local agencies and individuals or organizations . . . affected by  
5 the proposed action." AR B00121, B00127. "Interested parties  
6 submitted 4,200 total letters during the comment period including  
7 174 unique individual letters and 4,026 form letters." AR B00128.

8           The 30-day public comment period on the Project DEIS  
9 [Draft Environmental Impact Statement ("EIS")] began on May 16,  
10 2014 with publication of the Notice of Availability in the  
11 Federal Register and during this period the Forest Service  
12 received 5,589 comment letters on the DEIS including "154 unique  
13 individual letters and 5,435 form letters from 8 different  
14 organized groups." AR B00129.

15           The Forest Service organized "public open houses,"  
16 "hosted Rim Fire Technical Workshops" and "organized 24 tours  
17 into the Rim Fire area" for government officials and interested  
18 parties" AR B00128. The Forest Service solicited public comments  
19 by "produc[ing] materials for social media outlets" and  
20 "distribut[ing] some 60,000 newspaper inserts through the region  
21 explaining many of the proposed activities." AR B00128-129.  
22 "Responses to public comments were finalized during the  
23 development of the FEIS [Final Environmental Impact Statement]"  
24 and Record of Decision ("ROD"). AR B00129. The FEIS and ROD were  
25 published in August 2014. Of the four alternative courses of  
26 action considered for the Project, the Forest Service ultimately  
27 "selected Modified Alternative 4." AR A00016.

28           Modified Alternative 4 "approves salvage logging and

1 fuel reduction on 15,383 acres including: 14,495 acres of ground  
2 based; 651 acres of helicopter; and 237 acres of skyline  
3 treatments." AR A00016. The Project covers around ten percent of  
4 the National Forest area impacted by the Rim Fire. AR A00016;  
5 B0013. Its "boundary is located within the Rim Fire perimeter  
6 within portions of the Mi-Wok and Groveland Ranger Districts on  
7 the Stanislaus National Forest." AR B00114. The "salvage harvest  
8 of trees initially killed by the Rim Fire" will be "accomplished  
9 through timbers sales" to occur "over the next 2 seasons,  
10 culminating in winter 2015." AR A00018.

11 **California Spotted Owl:**

12 "California spotted owls . . . have been at the  
13 forefront of Sierra Nevada management and conservation debates  
14 for 25 years . . . ." AR K12132. The owls are "a territorial  
15 species with each pair defending an exclusive territory." AR  
16 K12139. The Forest Service considers California spotted owls a  
17 "sensitive species" as they "have several characteristics that  
18 are broadly associated with increased species vulnerability." AR  
19 B00432, K12133. "The primary driver for [California spotted owl]  
20 nest habitat loss is . . . wildfire." AR B00448. The Rim fire  
21 "destroyed . . . one quarter of the areas where spotted  
22 owls . . . roost and nest" in the Stanislaus National Forest.  
23 AR A00013, A00025.

24 "The most recent estimate of population size for  
25 California spotted owls in the Sierra Nevada reported 1,895 owl  
26 sites, with 1,299 sites on National Forest System lands." AR  
27 B00445.

28 Their nests are typically located in areas with "70

1 percent or greater canopy cover," however the owls "use a broader  
2 range of vegetation conditions for foraging than they do for  
3 nesting . . . include[ing] post-fire habitats" like the high-  
4 severity burn areas found in the Rim Fire area. AR B00445; see  
5 also B00003, K12136, K45474, K43093. "Recent research indicates  
6 that prey species [for the California spotted owl such as gophers  
7 and flying squirrels] may be abundant and available in the post-  
8 fire environment." AR B00450.

9 "[A]pproximately 6,500 acres of salvage, and 8,500  
10 acres of roadside logging, [as part of the Project] are slated to  
11 occur within 1.5 km of [California spotted] owl sites" in the  
12 Stanislaus National forest. AR B00003.

13 The Forest Service addressed the likelihood that the  
14 Project would have a negative impact on individual spotted-owls  
15 in its ROD. Their discussion included the following:

16 In the short term, salvage logging and fuel  
17 reduction actions will undoubtedly affect  
18 individual animals and patches of habitat.  
19 However, in the long term, failing to reduce  
20 the extreme fuel load on the landscape  
21 increases the likelihood of having another  
22 extreme fire similar to the Rim Fire. The Rim  
23 Fire burned through forty six California  
24 spotted owl Protected Activity Centers (PACs)  
25 . . . destroying some of these Sensitive  
26 species' important old-forest habitat. And,  
27 this is just a small snapshot of the wildlife  
28 impacts from the Rim Fire. . . . So, being  
faced with the choice of causing minimal  
short-term adverse effects to wildlife or  
increasing the risk of serious long-term  
impacts to wildlife, [the Forest Service]  
opted for the former, with the strong  
conviction that doing so is better for  
wildlife.

AR A00025.

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1                   **II. MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD**

2                   Plaintiffs argue that a declaration from each of the  
3 following named individuals should supplement the administrative  
4 record because supplementation is necessary (1) for determining  
5 whether the Forest Service considered all relevant factors and  
6 explained its decision and (2) for the purpose of explaining  
7 technical terms or complex subject matter (Mot. to Supp. 4:8-  
8 10)<sup>1</sup>: Monica Bond (ECF No. 22-15), Derek Lee (ECF No. 22-16), and  
9 Dominick DellaSala (ECF No. 22-17).

10                   Each declarant discusses his or her qualifications and  
11 experience in wildlife biology, interprets his or her own  
12 research regarding California spotted owl populations and  
13 habitat, discusses other research in the field, and addresses  
14 conclusions reached by the Forest Service in the FEIS and the  
15 logic underpinning those conclusions.

16                   National Environmental Policy Act ("NEPA") claims are  
17 reviewed under the judicial review provision of the  
18 Administrative Procedure Act, which requires consideration of  
19 "the whole record or those parts of it cited by a party."  
20 5 U.S.C. § 706. "[T]he focal point for judicial review should be  
21 the administrative record already in existence, not some new  
22 record made initially in the reviewing court." Fla. Power & Light  
23 Co. v. Lorin, 470 U.S. 729, 743 (1985).

24                   The Ninth Circuit recognizes four exceptions where  
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26 <sup>1</sup> Defendants submitted their own declarations arguing "if the Court  
27 does consider [Plaintiffs'] declarations, it should review them alongside the  
28 accompanying Declarations of [Forest Service employees] Marcie Baumbach and  
Patricia Manley." (Fed. Defs. Opp'n Pls. Mot. Prelim. Inj. 2:18-21, ECF No.  
61.) Since Plaintiffs' motion to supplement the administrative record is  
denied, the government's motion is denied as moot.

1 supplementing an administrative record may be justified: "Courts  
2 may review . . . extra-record materials [like the Bond, Lee and  
3 DellaSala declarations] only when: (1) it is necessary to  
4 determine whether the agency has considered all relevant factors  
5 and explained its decision; (2) the agency has relied on  
6 documents not in the record, (3) supplementing the record is  
7 necessary to explain technical terms or complex subject matter,  
8 or (4) plaintiffs make a showing of bad faith." City of Las Vegas  
9 v. F.A.A., 570 F.3d 1109, 1116 (9th Cir. 2009). "Though widely  
10 accepted, these exceptions are narrowly construed and applied" to  
11 ensure they do not undermine the general rule limiting review to  
12 the administrative record. The Lands Council v. McNair, 537 F.3d  
13 981, 1030 (9th Cir. 2008).

14 Plaintiffs contend the Bond, Lee and DellaSala  
15 declarations are admissible under the first and third Lands  
16 Council exceptions. (Dkt. 61, 2:18-21.)

17 **A. Necessary to Determine Whether the Agency has**  
18 **Considered all the Relevant Factors and Explained its**  
19 **Decision**

20 The "relevant factors" exception only applies where  
21 supplementing the record is necessary. Where "[t]he record  
22 contains sufficient information to explain how the [agency used  
23 the information before it] and why it reached its decision," the  
24 exception does not apply. Cook Inletkeeper v. U.S. EPA, 400 F.  
25 App'x 239, 240-41 (9th Cir. 2010).

26 A court should supplement the record when the agency  
27 "fails[s] to consider a general subject matter . . . , not when  
28 specific hypotheses and/or conclusions are omitted from

1 consideration. To hold otherwise would allow Plaintiffs to drive  
2 a truck through what is supposed to be a narrow exception to the  
3 record review rule." In re Delta Smelt Consol. Cases, 1:09-CV-  
4 1053 OWW DLB, 2010 WL 2520946, at \*6 (E.D. Cal. June 21, 2010).  
5 Extra-record materials are not necessary where "the facts and  
6 documents referenced in the [extra-record material] are already  
7 in the administrative record." Quechan Tribe of the Ft. Yuma  
8 Indian Reservation v. U.S. Dep't of the Interior, 12CV1167-GPC  
9 PCL, 2012 WL 5512383, at \*2 (S.D. Cal. Nov. 14, 2012).

10 Here, the Bond, Lee and DellaSala declarations are not  
11 necessary to determine whether the Forest Service considered all  
12 the relevant factors and explained its decision since Plaintiffs  
13 have not identified any research they allege the Forest Service  
14 failed to consider that is not itself contained in the  
15 administrative record. Where the studies themselves are in the  
16 record, it is not necessary to rely on external declarations when  
17 determining whether the Forest Service properly considered the  
18 information. Therefore, this portion of the Plaintiffs' motion to  
19 supplement the administrative record is denied.

20 **B. Necessary to Explain Technical Terms or Complex Subject**  
21 **Matter**

22 Declarations may be admissible where they "aid a  
23 layperson's understanding of the basic concepts involved" in the  
24 motion, WildEarth Guardians v. Salazar, CV-09-00574PHXFJM, 2009  
25 WL 4270039 (D. Ariz. Nov. 25, 2009), and where the proponent  
26 identifies which issues "can [only] be explained by supplemental  
27 evidence." U.S. v. Iron Mountain Mines, Inc., 987 F. Supp. 1250,  
28 1262 (E.D. Cal. 1997). Supplementation is inappropriate if

1 offered to "suggest that [the federal agency] did not give [some  
2 information] sufficient weight." In re Delta Smelt Consol.  
3 Cases, 2010 WL 2520946, at \*6.

4 Here, Plaintiffs fail to identify which basic concepts  
5 or issues relevant to their motion cannot be understood through  
6 consideration of the administrative record alone. Rather than  
7 providing context, the declarations represent an attack on the  
8 Forest Service's conclusions. See Bond Decl. ¶ 4 ("I am  
9 presenting this declaration to . . . assist the court by  
10 illuminating where the Forest Service's ROD/FEIS fail to consider  
11 factors relevant to the impacts this project will likely have on  
12 the California spotted owl.") ¶16 ("When the Forest Service  
13 states that not all California spotted owls foraging habitat in  
14 the Rim Fire area will be logged, this is meaningless for two  
15 reasons"), ¶18 ("At every turn, the Forest Service has  
16 consistently misrepresented, minimized or improperly ignored the  
17 evidence submitted by myself . . . ."); Lee Decl. ¶ 14 ("The  
18 Forest Service notes . . . several measures that they characterize  
19 as mitigation for California spotted owls. However, none of these  
20 are meaningful . . . .").

21 Plaintiffs have not shown that any referenced  
22 declaration is necessary for understanding any complex or  
23 technical matter. Therefore, Plaintiffs' motion to supplement  
24 the administrative record is denied.

25 **III. MOTION FOR PRELIMINARY INJUNCTION**

26 **A. Legal Standard for Preliminary Injunction**

27 A preliminary injunction is "an extraordinary remedy  
28 that may only be awarded upon a clear showing that the plaintiff

1 is entitled to such relief.” Winter v. Natural Res. Def. Council,  
2 Inc., 555 U.S. 7, 22 (2008).

3 A plaintiff seeking a preliminary injunction  
4 must establish [1] that he is likely to  
5 succeed on the merits, [2] that he is likely  
6 to suffer irreparable harm in the absence of  
7 preliminary relief, [3] that the balance of  
8 equities tips in his favor, and [4] that an  
9 injunction is in the public interest.

10 Id. at 20.

11 Further, the Ninth Circuit’s “‘serious questions’ test”  
12 may be “applied as part of the four-element Winter test.”  
13 Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131-32  
14 (9th Cir. 2011). “[I]f a plaintiff can only show that there are  
15 serious questions going to the merits . . . then a preliminary  
16 injunction may still issue if the ‘balance of the hardships tips  
17 sharply in plaintiffs favor’ and the other two Winter factors are  
18 satisfied.” Shell Offshore Inc. v. Greenpeace Inc., 709 F.3d  
19 1281, 1291 (9th Cir. 2013) (quoting Cottrell, 632 F.3d at 1135.).  
20 Where a plaintiff fails to demonstrate even serious questions  
21 going to the merits of his or her claim, the court need not  
22 consider the remaining Winter factors. Association des Eleveurs  
23 de Canards et d’Oies du Quebec v. Harris, 729 F.3d 937, 944 (9th  
24 Cir. 2013).

25 **B. Likelihood of Success on the Merits**

26 Plaintiffs allege two NEPA claims: (1) Failure to  
27 Prepare Supplemental Environmental Analysis and (2) Failure to  
28 Take a “Hard Look,” to Adequately Explain Impacts, To Provide  
Necessary Information, and To Ensure Scientific Integrity.  
(Compl. ¶¶ 37-43, ECF No. 1.) Plaintiffs argue either claim  
justifies an injunction.

1 Plaintiffs' underlying NEPA claims are reviewed under  
2 the Administrative Procedures Act ("APA"), which allows the court  
3 to set aside an agency action only where the action was  
4 "arbitrary, capricious, an abuse of discretion, or otherwise not  
5 in accordance with the law." 5 U.S.C. § 706(2)(A). "Review under  
6 this standard is narrow, and the reviewing court may not  
7 substitute its judgment for that of the agency." Earth Island  
8 Inst. v. U.S. Forest Service ("Earth Island II"), 442 F.3d 1147,  
9 1156 (9th Cir. 2006) (citation omitted) abrogated on other  
10 grounds by Winter, 555 U.S. at 7.

11 However, when reviewing the "predominantly legal  
12 question[]" of whether new information is "a circumstance  
13 requiring public proceedings and supplemental EISs under NEPA. .  
14 . the applicable standard of review . . . is reasonableness."  
15 Alaska Wilderness Recreation & Tourism Ass'n. v Morrison, 67 F.3d  
16 723, 727 (9th Cir. 1995).

17 **1. Failure to Prepare a Supplemental Environmental**  
18 **Impact Statement (SEIS)**

19 Plaintiffs argue NEPA requires the Forest Service to  
20 prepare a SEIS before it proceeds with the Project since "the  
21 Forest Service has failed to meaningfully address [the Forest  
22 Service's 2014 spotted owl survey data] in relationship to the  
23 Project's impacts" on spotted owl habitat, notwithstanding that  
24 the survey data "unequivocally raises substantial questions  
25 regarding the Rim Project's impact on owls." (Mot. ISO Pls. Req.  
26 TRO "Mot. TRO" 19:12-13; 16:13-15, ECF No. 22.) Plaintiffs argue  
27 since the FEIS and ROD lack a discussion of "what surveys were  
28 done, where they were done, what the outcome was for all of the

1 owl sites (not just a minor subset), or what the results mean for  
2 owls on the Rim fire landscape, even though the information was  
3 available to the Forest Service before they issued the Final EIS  
4 for this project or signed the Record of Decision," NEPA requires  
5 the Forest Service to prepare a SEIS. (Reply Mem. ISO Pls. Mot.  
6 Prelim. Inj. "Reply" 2:20-25, ECF No. 63.)

7 Plaintiffs contend the Forest Service's references to  
8 the 2014 survey in the FEIS and ROD are insufficient because they  
9 "do not actually mention the entirety of the survey results[,]   
10 provide even the most basic information necessary for context" or  
11 "assess[] how much salvage logging will occur within . . . owl  
12 territories" and "[a]s a result, the public has no meaningful  
13 information with which to understand the very basics about actual  
14 owl presence in the Rim Fire area." (Reply 3:4-6, 12-16, 4:7-9.)

15 Plaintiffs consider the ROD's statement that "both the EIS and  
16 this [ROD] recognize that owls forage in burned forests, and the  
17 EIS analyzes the effects of the various alternatives based on  
18 that understanding," "hollow" "because when. . . site-specific  
19 data exists, the only appropriate way to analyze the effects of  
20 the proposed logging on owl foraging habitat is to examine the  
21 logging units in relationship to where the owls actually are."

22 (Reply 4:12-16.) Plaintiffs' argue the survey results call out  
23 for a SEIS even more strongly when viewed in connection with  
24 "several other factors," related to spotted owls, including the  
25 declining status of the owls in area where logging occurs, and  
26 the area's designation as an "Area of Concern" for the California  
27 spotted owl. (Reply 6:3-7.) In discussing the need for  
28 supplemental analysis in light of new information, the Supreme

1 Court has held:

2 It would be incongruous with [NEPA's]  
3 approach to environmental protection, and  
4 with the Act's manifest concern with  
5 preventing uninformed action, for blinders to  
6 adverse environmental effects, once  
7 unequivocally removed [through the notice and  
comment procedure], to be restored prior to  
the completion of agency action simply  
because the relevant proposal has received  
initial approval.

8 Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 371 (1989).

9 However, the Supreme Court also stated in Marsh "an agency need  
10 not supplement an EIS every time new information comes to light  
11 after the EIS is finalized. To require otherwise would render  
12 agency decision-making intractable . . ." Id. at 373. Instead,  
13 NEPA requires the Forest Service to create a SEIS if "[t]here are  
14 significant new circumstances or information relevant to  
15 environmental concerns and bearing on the proposed action or its  
16 impact." 40 C.F.R. § 1502.9(c)(1)(ii) (emphasis added).

17 Where an agency "provide[s] a reasoned evaluation . . .  
18 as to why a []SEIS [is] not necessary," it withstands scrutiny.  
19 Neighbors of Cuddy Mountain v. U.S. Forest Serv., 141 F.3d 1177  
20 (9th Cir. 1998).

21 Here, Plaintiffs have not raised serious questions  
22 concerning their argument that the 2014 survey data requires the  
23 Forest Service to prepare a SEIS. The Forest Service is only  
24 required to create a SEIS in light of the development of  
25 significant new information. 40 C.F.R. § 1502.9(c)(1)(ii).  
26 Plaintiffs cite no binding legal authority supporting their  
27 argument that "where, as here, site-specific data exists, the  
28 only appropriate way to analyze the effects of the proposed

1 logging on owl foraging habitat is to examine the logging units  
2 in relationship to where the owls actually are." (Reply 4:14-  
3 16.).

4 The Forest Service did not ignore the 2014 survey data.  
5 The agency reestablished six Protected Activity Centers ("PACs")  
6 in the forest based on the survey results. AR A0025, A0027,  
7 A00038, B00125, B00829. The decision to incorporate the results  
8 of the survey into the Project is evidence the Forest Service  
9 reviewed and understood the data in context before it ultimately  
10 determined that the survey was not significant new information.  
11 The Forest Service explained its reasoning in the administrative  
12 record where it responded to Bond's August 21, 2014 letter  
13 concerning the 2014 survey data as follows:

14 Both the EIS and [the ROD] recognize that  
15 owls forage in burned forests, and the EIS  
16 analyzes the effects of the various  
17 alternatives based on this understanding;  
18 therefore, the underlying point raised in  
19 [Bond's letter], that implementing the  
20 [Project] may adversely affect spotted owls  
21 in the area, was already addressed in the EIS  
22 and factored into this decision.

19 AR A00038.

20 Although the Forest Service's analysis of the survey data is  
21 different from Plaintiffs' analysis, what the Forest Service  
22 states about the survey data is reasonable and satisfies the  
23 relevant standard of review. "The mere presence of expert  
24 disagreement does not violate NEPA because 'experts in every  
25 scientific field routinely disagree.'" Sierra Forest Legacy v.  
26 Sherman, 646 F.3d 1161, 1182 (9th Cir. 2011) (citing Lands  
27 Council, 537 F.3d at 1101)).

28 Additionally, even though the 2014 survey data was not

1 significant enough to warrant an SEIS, the Forest Service did not  
2 ignore the survey. The agency reestablished six Protected  
3 Activity Centers ("PACs") in the forest based on the survey  
4 results. AR A0025, A0027, A00038, B00125, B00829. The decision to  
5 incorporate the results of the survey into the Project is  
6 evidence the Forest Service reviewed and understood the data in  
7 context before determining the results were not significant new  
8 information.

9 Therefore, Plaintiffs' motion for a preliminary  
10 injunction based on the Forest Service's failure to conduct a  
11 SEIS is denied.

## 12 **2. "Hard Look"**

13 Plaintiffs argue the Forest Service violated its NEPA  
14 obligations by failing to take a "hard look" at the comments and  
15 evidence submitted during the review period. Specifically,  
16 Plaintiffs argue the Forest Service's discussion of several  
17 studies concerning the California spotted owl's relationship with  
18 burned forest were either misinterpreted or ignored for arbitrary  
19 and capricious reasons and that the Forest Service failed to  
20 adequately justify its determination that while the Project would  
21 harm individual spotted owls, it would not result in a trend  
22 toward federal listing under the Endangered Species Act.

### 23 **a. Failure to Acknowledge or Disclose Important** 24 **Information and Misrepresentation of the** 25 **Relevant Science**

26 Plaintiffs argue the Forest Service did not assess the  
27 Project's impact "on resident California spotted owls based upon  
28 the findings of the scientific" evidence before them since the

1 agency used arbitrary and capricious reasons to disregard that  
2 evidence and the Forest Service's reference to the studies at  
3 issue "do[es] not represent an incorporation of the information  
4 on adverse effects of post-fire logging into the impact  
5 analysis." (Reply 7:5-8, 8:1-2) (emphasis omitted). They  
6 challenge the Forest Service's comments critical of Clark (2007),  
7 Lee et al. (2012), Clark et al. (2013), DellaSala et al. (2010)  
8 and Monica Bond's August 21, 2014 letter to the Forest Service.  
9 (Mot. 11:2-12:13.)

10 Plaintiffs also contend that the passages in the  
11 administrative record the Court used in support of its order  
12 denying Plaintiffs' temporary restraining order on this point  
13 show the Forest Service relying on "science which has studied the  
14 spotted owl's relationship with unburned forest, while  
15 systematically dismissing [on arbitrary and capricious grounds] .  
16 . . the main body of science which has investigated how owls use  
17 burned forests and the effects of logging high- and moderate-  
18 intensity burned areas within occupied owl territories." (Reply.  
19 7:11-19) (emphasis omitted).

20 Plaintiffs argue that "nowhere in any of [the pages  
21 where the Forest Service references the Project's impact on  
22 California spotted owl habitat] can the reader find an analysis  
23 of the effects of post-fire logging within 1.5 km of the 39  
24 spotted owl sites found to be occupied in 2014 in the Rim fire,  
25 on the occupancy of those sites, based upon the actual physical  
26 locations chosen by the owls themselves in 2014 relative to  
27 logging units." (Reply 8:24-9:1.)

28 Plaintiffs also take issue with the Forest Service's

1 characterization of Clark (2007) arguing that although the Forest  
2 Service claims the study "found that high-intensity fire areas in  
3 old/mature forest are 'poor habitat for spotted owls' because the  
4 level of use was relatively 'low,'" the study actually  
5 "indicat[es] that [high-intensity fire areas in old/mature  
6 forest] is high quality habitat, under the most basic scientific  
7 principles of wildlife biology." (Reply 9:14-21.)

8 Plaintiffs contend their claim does not amount to an  
9 impermissible "battle of the experts" between the Forest Service  
10 and the Bond, Clark, Lee and DellaSala studies because "there are  
11 no 'competing scientific analyses' here to weigh. . . ." (Reply  
12 10:12-13.)

13 "NEPA requires not that an agency engage in the most  
14 exhaustive environmental analysis theoretically possible, but  
15 that it take a 'hard look' at the relevant factors." N.W. Env'tl  
16 Advocates v. Nat'l Marine Fisheries Serv., 460 F.3d 1125, 1139  
17 (9th Cir. 2006). A "hard look" "includes 'considering all  
18 foreseeable direct and indirect impacts. Furthermore, a 'hard  
19 look' should involve a discussion of adverse impacts that does  
20 not improperly minimize negative side effects.'" League of  
21 Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S.  
22 Forest Serv., 689 F.3d 1060, 1075 (9th Cir. 2012) (citing N.  
23 Alaska Env'tl. Ctr. v. Kempthorne, 457 F.3d 969, 975 (9th Cir.  
24 2006)).

25 The standard of review under § 706 assesses "whether an  
26 EIS contains a reasonably thorough discussion of the significant  
27 aspects of the probable environmental consequences" of the  
28 action. Churchill Cnty. v. Norton, 276 F.3d 1060, 1071 (9th Cir.

1 2001). An agency action satisfies its obligations under §706 when  
2 its conclusions are “reasonably justified. . . based upon record  
3 evidence and additional analysis of site-specific factors.” Tri-  
4 Valley CAREs v. U.S. Dep’t of Energy, 671 F.3d 1113, 1126 (9th  
5 Cir. 2012).

6 “When specialists express conflicting views, an agency  
7 must have discretion to rely on the reasonable opinions of its  
8 own qualified experts even if, as an original matter, a court  
9 might find contrary views more persuasive.” Marsh, 490 U.S. at  
10 378; see also Price Rd. Neighborhood Ass’n, Inc. v. U.S. Dep’t of  
11 Transp., 113 F.3d 1505, 1511 (9th Cir. 1997) (quoting Greenpeace  
12 Action v. Franklin, 14 F.3d 1324, 1332 (9th Cir. 1992)); Native  
13 Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233, 1244 (9th  
14 Cir. 2005); Wetlands Action Network v. U.S. Army Corps of Eng’rs,  
15 222 F.3d 1105, 1120-21 (9th Cir. 2000), abrogated on other  
16 grounds by Wilderness Society v. U.S. Forest Serv., 630 F.3d 1173  
17 (9th Cir. 2011).

18 Here, the administrative record shows the agency did  
19 not “disregard” Lee (2012), Clark (2013), DellaSala (2010) and  
20 the August 21, 2014 Bond letter. The Forest Service discussed the  
21 application of these studies to the Project by reviewing their  
22 findings and acknowledging the limits of their conclusions. For  
23 example, the Forest Service relied on Lee et al. (2012) to state  
24 “Recent research indicates that California spotted owls will  
25 occupy landscapes that experience low-to moderate-severity  
26 wildfires, as well as areas with mixed-severity wildfire that  
27 include some proportion of high-severity fire,” that “[p]ost-fire  
28 logging may adversely affect rates of owl occupancy,” and that

1 "[a] growing body of evidence indicates that spotted owls persist  
2 within fire-affected landscapes." AR B00446, 451, 455. But the  
3 FEIS cautions against extrapolating too much from Lee et al.  
4 (2012) because "[a]t the very least, the small sample size of 8  
5 [owl] sites with significant habitat loss [in the Lee study] is  
6 too small to support a general blanket statement that the high  
7 severity fires that affect 80-100 percent of owl core habitat  
8 have not reduced owl occupancy in the Sierra Nevada." AR B00829.  
9 This caution—rather than showing an arbitrary and capricious  
10 review—demonstrates the agency's analysis of site-specific  
11 factors in compliance with § 706.

12 The same is true for Clark (2013). The Forest Service  
13 clearly reviewed and analyzed this research and the limits of its  
14 applicability. The FEIS states: "Clark et al. (2013) summarized  
15 the results provided by the few studies that have been conducted  
16 on spotted owls in burned landscapes and noted that the results  
17 were equivocal. Thus, uncertainties remain regarding long-term  
18 occupancy and demographic performance of spotted owls at burned  
19 sites." AR B00446. It also notes "Clark et al. (2013) were unable  
20 to separate the impacts of wildfire from land management  
21 activities" (AR B00451,) and "Clark et al. (2013) compared owl  
22 site occupancy in burned and salvaged landscapes to unburned  
23 landscapes. . . . [but] did not explicitly test the effects of  
24 salvage logging; rather it was combined with high severity fire  
25 as a source of habitat loss in treatment landscapes." AR B00829.  
26 The FEIS incorporated Clark et al. (2013) and applied its  
27 findings in context with the variables at play in the Rim fire  
28 area.

1           The Forest Service also adequately considered DellaSala  
2     (2010). DellaSala (2010) is not a peer-reviewed publication, but  
3     a two paragraph Letter to the Editor which argues "science shows  
4     that fire can enhance habitat for owls' small mammal prey" and  
5     that "spotted owls prefer dense, old forests with high canopy  
6     cover for nesting, and preferentially select unlogged severely  
7     burned forests for foraging." AR 000181-182. The only citation  
8     for this assertion in the Letter is to Bond et al. (2009), which  
9     is a study already considered and discussed in the FEIS. AR  
10    B00446, B00833-834 B00844. The Forest Service was not arbitrary  
11    or capricious when it determined DellaSala's Letter, "did not  
12    include analysis or qualitative evidence that could be used in  
13    the project analysis." AR B0837.

14           Finally, Bond's August 21, 2014 letter was similarly  
15    addressed in the administrative record. The letter is dated  
16    August 21, 2014, but was not received by the Forest Service until  
17    August 27, 2014, "after the FEIS had been completed and the  
18    Forest Service had issued a Proposed Record of Decision," which  
19    is why FEIS does not address it. AR B00001. Nevertheless, the  
20    Forest Service employee Maria Benech articulated reasons why the  
21    letter did not warrant changes to the proposed decision in the  
22    administrative record. AR B00001. The "FEIS and ROD recognize  
23    that owls remaining in the Rim Fire area may forage in the burned  
24    areas, including within 1.5 km of occupied sites. Therefore, this  
25    issue has been fully considered in the NEPA analysis and  
26    decision-making process." AR B00001. The Forest Service publicly  
27    presented this same analysis in the ROD, which was issued after  
28    it received Bond's letter, finding "the underlying point raised

1 in the August 21, 2014 comment letter, that implementing the Rim  
2 Recovery Project may adversely affect spotted owls in the area,  
3 was already addressed in the EIS and factored into this  
4 decision." AR A00038. In light of the administrative record,  
5 Plaintiffs have not raised serious questions as to whether this  
6 analysis is arbitrary or capricious.

7 Plaintiffs' allegations amount to a battle of the  
8 experts because the writings by Lee, Clark, DellaDala and Bond  
9 are not the complete universe of scientific inquiry into the  
10 California spotted owl's relationship with wildfire discussed in  
11 the FEIS. In discussing the California spotted owl, the Forest  
12 Service relied on Keane (2014) and incorporated that research  
13 into the FEIS by reference. AR B00431, B00445. Keane (2014) is an  
14 academic survey that "synthesize[s] scientific information on the  
15 California spotted owl that has been reported since [2001]." AR  
16 K12132-133. It references and discusses work related to spotted  
17 owls published by Bond, Clark, and Lee along with others in the  
18 field. AR K12153-157. In a section titled "Effects of Forest  
19 Management and Wildfire," Keane (2014) reviews more than a decade  
20 of published scientific research regarding the impact of wildfire  
21 on the California spotted owl and concludes "[c]urrent  
22 information indicates that California spotted owls will occupy  
23 landscapes that experience low- to moderate-severity wildfire, as  
24 well as areas with mixed-severity wildfire that includes some  
25 proportion of high-severity fire," which is the same conclusion  
26 advanced by the Forest Service in the FEIS. AR K12141-143; AR  
27 B00742.

28 Given the Forest Service's reliance on Keane (2014),

1 Plaintiffs' claim raises a quintessential "battle of the  
2 experts," which falls short of demonstrating a NEPA violation.  
3 Earth Island Institute v. Carlton, 626 F.3d 462, 473 (9th Cir.  
4 2010) ("The district court here found just such a 'battle of the  
5 experts' to exist, but concluded that this did not establish a  
6 violation of NEPA. It was within its authority to do so."); J.L.  
7 Mercer Island School Dist., 592 F.3d 938, 945 n.5 (9th Cir. 2009)  
8 ("The parties' arguments throughout this litigation have  
9 routinely bordered on the quintessential 'battle of the experts'  
10 concerning what educational policy and teaching method is most  
11 effective for learning-disabled students. The District is  
12 entitled to deference in deciding what programming is appropriate  
13 as a matter of educational policy."); Native Ecosystems Council  
14 v. U.S. Forest Serv., 428 F.3d 1233, 1244 (9th Cir. 2005) ("Nor  
15 will we 'take sides in a battle of the exerts,' as the Forest  
16 Service considered and applied the [evidence at issue] and  
17 provided a thorough and reasoned explanation for its rejection of  
18 [a third party's] position.").

19           Regarding Clark (2007), whose conclusions Plaintiffs  
20 claim the Forest Service misstated, Plaintiffs' argument is  
21 similarly insufficient to demonstrate substantial questions as to  
22 whether the Forest Service complied with its NEPA obligations.  
23 The FEIS describes Clark (2007) this way: "Clark (2007) found  
24 that while spotted owls did roost and forage within high severity  
25 burn areas, the use was very low. The results suggest that this  
26 cover type was poor habitat for spotted owls." AR B00446.  
27 Plaintiffs argue this description of Clark (2007) is untenable  
28 given Figure 6.2 in the study, which shows northern spotted owls

1 use highly burned habitat at a higher rate than it occurs in the  
2 environment. AR K04468. However, this figure does not address the  
3 rate at which the owls choose highly burned areas over other  
4 habitats. Therefore, it does not contradict the Forest Service's  
5 analysis—drawn from the entirety of the 218 page thesis—that the  
6 spotted owl's use of high severity burn areas was low. The figure  
7 does not demonstrate it would be arbitrary or capricious to read  
8 the entirety of Clark (2007) as suggesting that high severity  
9 burn areas are a poor habitat for spotted owls. Because  
10 Plaintiffs have not raised serious questions regarding the Forest  
11 Service's discussion of the relevant scientific literature, their  
12 motion for a preliminary injunction on this ground is denied.

13 **b. Failure to Make Proper Determination as to**  
14 **Whether the Rim Fire Logging Project Would**  
15 **Push Spotted Owls Below a Critical Viability**  
16 **Threshold**

17 Plaintiffs argue the Defendants "have not articulated a  
18 meaningful explanation why the [Project] would have a negative  
19 impact on the California spotted owl, but would not result in a  
20 trend toward federal listing" and have "also not determined the  
21 crucial threshold necessary to support this conclusion." (Reply  
22 12:2-5.) Plaintiffs contend the Forest Service's analysis is  
23 insufficient because of the "four indicators [the Forest Service]  
24 used to 'provide a relative measure of the direct and indirect  
25 effects' [of the Project] to spotted owls, . . . only one . . .  
26 mentions foraging habitat and it was dismissed out of hand."  
27 (Reply 13:6-11.) Plaintiffs support their argument by citing to  
28 Earth Island II, 442 F.3d at 1147 (9th Cir. 2006), arguing "the

1 relevant facts of Earth Island II . . . are the same as the  
2 facts in this case” and compel a finding that the Forest Service  
3 did not comply with its NEPA obligations.

4 The Forest Service must provide a “meaningful  
5 explanation” when it concludes a proposed action will have a  
6 negative impact on individual animals, but will not result in a  
7 trend toward federal listing for the species. Ecology Ctr. Inc.  
8 v. Austin, 430 F.3d 1057, 1067 (9th Cir. 2005). “A court’s  
9 inquiry, when reviewing whether an agency complied with NEPA, is  
10 whether the agency adequately considered a project’s potential  
11 impacts and whether the consideration given amounted to a ‘hard  
12 look’ at the environmental effects.” Kemphorne, 457 F.3d at 975.

13 Plaintiffs’ assertion that the relevant facts of Earth  
14 Island II are the same as the facts in this case is incorrect  
15 since the Forest Service’s conclusions regarding the project’s  
16 impact on spotted owl habitat in Earth Island II were the  
17 opposite of its conclusions here. 442 F.3d 1147, 1172-73. In  
18 Earth Island II, the Forest Service based its decision to permit  
19 logging on the “determination that because the[] areas were  
20 heavily burned they are not likely to be suitable owl habitat.”  
21 Id. at 1172. From that premise, the Forest Service concluded the  
22 proposed logging “may reduce the quality of owl habitat, but . .  
23 . would not reduce the overall amount of owl habitat.” Id. 1171.  
24 The agency reached this conclusion in spite of Bond’s research  
25 showing the logging “will have significant negative effects on  
26 the California spotted owl by substantially reducing the amount  
27 of potential foraging habitat within the project sites” because  
28 owls used the heavily burned areas to forage. Id. at 1170. The

1 Ninth Circuit determined that under the circumstances, the Forest  
2 Service had not taken a "hard look" since it did not "respond  
3 explicitly and directly to conflicting views in order to satisfy  
4 NEPA's procedural requirements" or "explain in any detail how  
5 their determinations that habitat was 'unsuitable' were made, and  
6 do[es] not investigate or analyze how [the action] might  
7 negatively impact the owls." Id. at 1172-73.

8 Here, unlike Earth Island II, the Forest Service  
9 directly confronted the science demonstrating owl's use of  
10 heavily burned areas, acknowledging the Project's potential to  
11 reduce the overall amount of owl habitat. AR B00445 ("Spotted  
12 owls use a broader range of vegetation conditions for foraging  
13 than they do for nesting and roosting. . . and this includes  
14 post-fire habitats . . . ;) AR B00446 ("Recent research indicates  
15 that California spotted owls will occupy landscapes that  
16 experience low-to moderate-severity wildfire, as well as areas  
17 with mixed-severity wildfire that includes some proportion of  
18 high-severity fire.") Therefore, although the Forest Service's  
19 analysis in Earth Island II violated NEPA's procedural  
20 requirements, its analysis here does not.

21 Neither the APA nor NEPA creates a requirement that the  
22 Forest Service must determine a critical viability threshold  
23 before concluding a project will have negative impacts on some  
24 individual animals, but will not result in a trend toward federal  
25 listing. As the Ninth Circuit held in Lands Council:

26 To always require a particular type of proof  
27 that a project would maintain a species'  
28 population in a specific area would inhibit  
the Forest Service from conducting projects  
in the National Forests. We decline to

