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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SIERRA NEVADA FOREST PROTECTION
CAMPAIGN,¹ CENTER FOR BIOLOGICAL
DIVERSITY, NATURAL RESOURCES
DEFENSE COUNCIL, SIERRA CLUB,
and THE WILDERNESS SOCIETY,
non-profit organizations,

No. 2:05-cv-0205-MCE-GGH

Plaintiffs,

v.

MEMORANDUM AND ORDER

MARK REY, in his official
capacity as Under Secretary of
Agriculture, DALE BOSWORTH, in
his official capacity as Chief
of the 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.

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¹ The Court is advised that on March 1, 2007, Plaintiff
Sierra Nevada Forest Protection Campaign changed its name to
Sierra Forest Legacy.

1 Plaintiffs Sierra Forest Legacy, et al., seek a preliminary
2 injunction on grounds that the Slapjack, Basin and Empire
3 Projects (all within the Plumas National Forest) risk irreparable
4 harm to old forest habitat and imperiled wildlife including
5 California spotted owls, Pacific fishers and American martens.
6 Because certain timber contracts associated with these projects
7 were due to be awarded on or about October 1, 2007, the Court
8 entered an order shortening time permitting the injunction
9 request to be heard on September 21, 2007. The Court denied
10 Plaintiffs' Motion for Preliminary Injunction from the bench at
11 the conclusion of the September 21, 2007 hearing. This written
12 order expands upon that ruling.

13
14 **BACKGROUND**

15
16 The Sierra Nevada region comprises some eleven million acres
17 of National Forest Service land, approximately eight million of
18 which are in a state of unnatural forest density, creating a risk
19 of catastrophic wildfire. SNFPA 3198-99.² At the same time,
20 however, the overgrown areas provide desired habitat for certain
21 old-growth species like the California Spotted Owl ("owl") and
22 the Pacific Fisher and American Marten ("fisher" and "marten"),
23 both of which are small forest carnivores.

24 ///

25
26 ² Citations to the eight-volume administrative record for
27 the 2001 and 2004 Sierra Nevada Framework are referenced by the
28 bates-stamped number of the referenced page. Citations to the
administrative records of the Basin, Slapjack and Empire projects
are similarly denoted by the project name followed by a bates-
stamped number.

1 The Forest Service is confronted with a vexing problem in
2 attempting to simultaneously balance fire danger while at the
3 same time protecting habitat preferred by the owl, fisher and
4 marten.

5 In the late 1980s, the Forest Service began developing a
6 comprehensive strategy for managing the myriad resources found
7 within the overall Sierra Nevada region. In 1995, the Regional
8 Forester for the Pacific Southwest Region of the Forest Service
9 issued a draft Environmental Impact Statement ("EIS") outlining
10 its management proposal. SNFPA 229.³ After extensive public
11 participation and the preparation of a Final EIS responding to
12 public concerns, the Regional Forester issued, in 2001, a Record
13 of Decision ("ROD") which adopted management objectives in five
14 major areas: old forest ecosystems, aquatic, riparian, and meadow
15 ecosystems, fire and fuels, noxious weeds, and hardwood
16 ecosystems on the lower westside of the Sierras. Id. at 231-35.
17 As indicated above, among the thorniest issues confronted by the
18 ROD was striking the appropriate balance between balancing the
19 excessive fuel buildups occasioned by decades of fire repression
20 and conserving key habitat for wildlife species dependent on old
21 forest environments. The 2001 Framework included a network of
22 "old forest emphasis areas" across about 40 percent of all
23 national forest land in the Sierra Nevada that was designed to
24 provide a contiguous network of old forest ecosystems conducive
25 to old-growth species preferring such habitat. SNFPA 236.

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28 ³ Documents found within the first eight-volume record are
cited as SNFPA, followed by the Bates-stamp number.

1 In order to protect old forest conditions within its specific
2 areas of emphasis, the 2001 Framework generally prohibited
3 logging that would remove trees over 12 inches in diameter or
4 logging that would reduce canopy cover by more than 10 percent.
5 SNFPA 328. Even within the "general forest" areas, the 2001
6 Framework prohibited logging of trees over 20 inches in diameter.
7 SNFPA 336. It was only within the intermix zones that no canopy
8 restrictions were imposed and logging of trees up to 30 inches
9 was permitted. SNFPA 333, 315.

10 Although the Forest Service ultimately affirmed adoption of
11 the 2001 ROD despite receipt of approximately 200 administrative
12 appeals, it nonetheless directed the Regional Forester to conduct
13 an additional review with respect to specific concerns like
14 wildfire risk and the Forest Service's responsibilities under the
15 Herger-Feinstein Quincy Library Group Forest Recovery Act ("HFQLG
16 Act"), a congressional mandate which established a pilot program
17 for fire suppression through a combination of fire breaks, group
18 selection logging and individual logging. SNFPA 1918. A
19 management review team was assembled by the Regional Forester for
20 this purpose.

21 In March 2003, the team concluded that the 2001 ROD's
22 "cautious approach" to active fuels management had limited its
23 effectiveness in many treatment areas, and that revisions to
24 vegetation management rules would decrease flammable fuels while
25 protecting critical wildlife habitat by guarding against the risk
26 of stand-replacing wildfire. See SNFPA 1918, 1926.

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1 Moreover, with respect to the California Spotted Owl, the team
2 felt that the 2001 ROD had unnecessarily "took a worst case
3 approach to estimating effects" on the owl. SNFPA 1968.⁴ In
4 addition to citing recent research indicating that habitat losses
5 resulting from fuel treatments were less than previously
6 believed, the team further found that the 2001 ROD's extensive
7 reliance on maintaining extensive canopy cover was impracticable
8 to implement.

9 Following receipt of the team's findings, the Regional
10 Forester ordered that management strategy alternatives in
11 addition to those considered in the 2001 FEIS be considered. A
12 draft supplemental environmental impact statement ("DSEIS") was
13 thereafter released to the public in January 2004. While the
14 same five areas of concern were targeted in the DSEIS as in its
15 2001 predecessor, in 2004 a new action alternative was identified
16 (Alternative S2), in addition to the alternative selected by the
17 2001 Framework (Alternative S1) and the seven alternatives that
18 had previously been considered before adoption of the 2001
19 Framework (Alternatives F2-F8).⁵

20 Following the public comment period after dissemination of the

21
22 ⁴ The 2001 Framework's California Spotted Owl analysis was
23 largely predicated on a July 1992 report (the "CASPO Report")
24 that recommended establishment of a 300-acre Protected Activity
25 Center ("PAC") around all known owl nest sites, a complete
26 prohibition of logging within the PACs, more limited logging
prohibition of trees over 30 inches in diameter in all habitat
suitable for owl nesting and foraging, and a prohibition on
logging that would reduce canopy cover below 40 percent in owl
nesting habitat. SNFPA 1037-40.

27 ⁵ The DSEIS also considered seven additional alternatives in
28 addition to those considered in detail but eliminated the seven
from extensive consideration because they were found to be
inconsistent with the purpose and need of the DSEIS. SNFPA 3163-65.

1 DSEIS, the SEIS in final form also included response to various
2 issues raised, including comments by the United States Fish and
3 Wildlife Service, by the United States Environmental Protection
4 Agency, by California resources protection agencies, and by the
5 Science Consistency Review ("SCR") team.⁶

6 By adopting the SEIS on January 21, 2004, the Regional
7 Forester replaced the 2001 ROD with its 2004 successor and
8 amended the forest plans for all eleven national forests situated
9 in the Sierra Nevada. SNFPA 2987-3061. The 2004 ROD reasoned
10 that the 2001 Framework "prescribed technical solutions that do
11 not produce needed results, or offered methods we often dare not
12 attempt in the current Sierra Nevada." SNFPA 2995. The 2004
13 Framework reasoned that the methods as adopted in 2001 fail to
14 reverse the damage, and growing threat, of catastrophic fires
15 quickly enough. Id.

16 Through the present lawsuit, Plaintiffs allege that the 2004
17 Framework as ultimately adopted runs afoul of both the NFMA and
18 NEPA on a programmatic basis. Specifically, Plaintiffs contend
19 that the 2004 Framework violates the NFMA both because it fails
20 to maintain viable populations of owls, as well as fishers and
21 martens. Moreover, Plaintiffs also argue that the 2004 Framework
22 runs afoul of NEPA because it was adopted without either adequate
23 disclosure of its significant environmental impacts or
24 consideration of reasonable alternatives to the selected
25 approach.

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27 ⁶ The SCR consisted of eleven scientists convened by the
28 Pacific Southwest Research Station in Davis, California, and
included experts in fire and fuels management, forest ecology,
and species viability. SNFPA 3503.

1 The merits of Plaintiffs' overall programmatic challenge has
2 not yet been adjudicated. Cross-motions for summary judgment
3 remain pending. During the pendency of those motions, however,
4 Plaintiffs now request a preliminary injunction to stop three
5 site-specific projects within the Plumas National Forest (the so-
6 called Basin, Slapjack and Empire Projects), all of which are
7 part of the HFQLG Act, a pilot program involving 1.5 million
8 acres within the Plumas, Lassen, and Tahoe National Forests. By
9 combining various vegetation management techniques, that Act
10 represents an attempt to 1) determine the efficacy of measures
11 protecting the landscape from high intensity wildfires;
12 2) encourage the development of a more fire resilient ecosystem by
13 promoting the growth of larger and more fire-resistant tree
14 species; and 3) facilitate the economic stability of local
15 communities dependent on harvesting activities. Litigation
16 challenging logging has reduced compliance with the HFQLG Act.
17 During fiscal year 2007, for example, only fifteen percent of
18 HFQLG Act objectives have achieved within the Plumas National
19 Forest. See Second Decl. of Nancy Francine, ¶ 4.

20 Consistent with the mandates of the HFQLG Act, the Basin,
21 Empire and Slapjack projects entail a combination of fuel
22 management techniques. Defensive Fuel Profile Zones (DFPZs)
23 entail removal of trees in small narrow strips, mainly along
24 ridgelines, in an effort to stop the spread of high intensity
25 crown fires and control fire spread by reducing ladder fuels.
26 See Slapjack EIS at 3-4. In addition, the projects at issue
27 employ two uneven-aged methods of timber harvest: group selection
28 and the harvest by selection of individual trees.

1 Group selection techniques remove certain larger, generally shade
2 tolerant trees in an effort to promote the growth of more fire
3 resilient species like douglas fir and ponderosa pine. Id.
4 Group selection mimics forest openings caused by natural
5 disturbances. Both group and individual tree selection is
6 intended to promote more fire resiliency by removing ladder fuels
7 and increasing spacing between tree crowns. The goal is to
8 create a vigorous, healthy, all-aged, multistory, fire resilient
9 forest while contributing to the local community as mandated by
10 HFQLG.

11 In attempting to halt the Basin, Slapjack and Empire
12 projects through their request for a preliminary injunction,
13 Plaintiffs primarily argue that implementation of the projects
14 will reduce canopy cover to 40 percent or less, remove many large
15 trees between 20 and 30 inches in diameter, and create widespread
16 forest openings that will degrade old forest areas currently
17 providing suitable habitat for owls, martens and fishers.
18 Plaintiffs also contend that each of the challenged projects
19 will, both independently and cumulatively, result in irreparable
20 harm to these species. (See Pls.' Opening Mem., 4:3-8). The
21 viability of Plaintiffs' present Motion rests on the strength of
22 these assertions.

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1 The site-specific areas proposed for treatment appear to be
2 at significant danger of stand-replacing catastrophic fire.
3 Approximately 70 percent of the project areas for the Slapjack
4 and Empire proposals, for example, are comprised of forest
5 acreage categorized as Fire Condition Class 3, which denotes the
6 highest possible danger rating and means that the natural fire
7 regime has been significantly altered from its historic range,
8 with a high risk of losing key ecosystem components in the event
9 of fire. Slapjack EIS 3-61 to 3-65; Empire SEIS at 3-71.

10 Treatment planned for the 34,725 acre Slapjack area, however,
11 includes only 3,671 acres of DFPZs, 219 acres of group selection,
12 and 148 acres of individual tree selection. Slapjack FEIS at 2-
13 4. Eighty-nine percent of existing owl habitat is undisturbed.
14 Of 19,905 acres of suitable fisher denning and roosting habitat,
15 only 1,597 acres will be affected. Slapjack FEIS at 3-285.

16 The Basin and Empire Projects also entail relatively little
17 disturbance to the projects areas as a whole. Contemplated
18 treatments in Basin include only 1,215 acres of group selection
19 and 80 acres of individual tree selection, with the total area of
20 affected habitat being only 3.6 percent of the total project
21 area. Basin 3669. Similarly, in Empire 90 percent of existing
22 owl foraging habitat and 88 percent of existing nesting habitat
23 is unaffected. Empire ROD at 11.

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1 None of the three projects permits logging within the owl
2 Protected Activity Centers ("PACs") or Spotted Owl Home Areas
3 ("SOHAs").⁷ Logging within the buffer Home Range Core Areas
4 ("HRCAs") which surround the PACS is less than 2,500 acres for
5 all three site-specific projects.⁸ For the fisher and marten,
6 impacts appear to be even less. As stated above, Slapjack is
7 estimated to affect only 1,597 acres of fisher denning and
8 roosting habitat. The 38,893 acre Basin area impacts only 400
9 acres involving movement habitat for fishers and martens. Basin
10 3575.

11 These effects must be analyzed in the context of overall
12 species data. The 2004 Framework analyzed owl population data
13 from five different demographic studies conducted over the past
14 seven to twelve years. SNFPA 3152, 3214-3215. In addition, with
15 regard to the Plumas National Forest where all three site-
16 specific projects at issue herein are located, survey data was
17 collected in 2004 which contained information concerning 40 owl
18 sites within the study area. This data was "thoroughly reviewed
19 with rigorous standards for protocol compliance and data
20 quality." Basin 4577.

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25 ⁷ Confirmed owl nesting sites are surrounded by a 300-acre
26 PAC, which in turn is surrounded by an additional 700-acre Home
27 Range Core Area (HRCA). SOHAs (Spotted Owl Habitat Areas) are
28 areas delineated in forest plans for providing nesting and
foraging habitat for spotted owls.

⁸ HRCAs affected by the projects include 1,621 acres for
Slapjack, 405 for Basin and 353 for Empire.

1 A Meta analysis⁹ was also prepared in April 2003 based on an
2 additional ten years of study and review following the 1992 CASPO
3 report discussed above. This demographic data (assessed by
4 sixteen scientists using information gathered by five different
5 owl studies) showed that the owl is, within a 95 percent
6 confidence level, a stable population, and not declining as
7 previously believed. Basin 3720, SNFPA 3213. Significantly,
8 post-1992 research indicated that owls utilize a wider variety of
9 foraging habitats than previously thought. SNFPA 3099.

10 Perhaps even more importantly, in May of 2006 the United
11 States Fish and Wildlife Service ("USFWS") considered a more
12 recent 2006 Meta analysis and concluded, based on that analysis
13 as well as all other relevant evidence, that owl populations in
14 the Sierra Nevada are stable or increasing and that adult
15 survival rates show an increasing trend. See 71 Fed. Reg. 29886,
16 29894 (May 24, 2006). The USFWS study opined that the vegetation
17 management treatments envisioned by the HFQLG Act (which include
18 the three projects presently at issue) would not adversely affect
19 the owl, and stated unequivocally 1) that catastrophic wildfire
20 appears to be the greatest potential threat to the owl, with
21 fuel-reduction treatments being necessary to reduce that threat;
22 and 2) that the contemplated treatments will not threaten the
23 continued existence of the owl. Id. at 29897.

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26 ⁹ A Meta analysis is an analytic tool to evaluate population
27 status and trend over time. SNFPA 3213. Its power lies in the
28 "ability to combine information from several studies to achieve
greater sample size" and perhaps investigate sources of variation
and potential correlations otherwise unavailable from a single
study.

1 Significantly, too, the spotted owl population within the Plumas
2 National Forest appears particularly strong, with the 2005
3 estimated numbers, at 218 pairs, 49 unconfirmed pairs and 29
4 single birds, well above the numbers projected by the Plumas
5 National Forest Long Range Management Plan during the time period
6 in question. See QLG Opp'n, 9:12-10:10.

7 Any impact on either the Pacific Fisher or the American
8 Marten by the site specific plans is even more attenuated than
9 potential effects regarding the owl. While Plaintiffs appear to
10 argue that logging would increase fragmentation and create
11 barriers to the movement of these forest carnivores, the simple
12 fact is that neither species appears to be present within the
13 project areas.¹⁰ No marten sightings have ever been reported
14 within any of the three project locations; in fact, marten
15 generally prefer habitat at higher elevations than the lands at
16 issue here. In addition, no scientifically validated sightings
17 of fisher within 200 miles of any of the projects has occurred
18 within the last 40 years. Numerous surveys have failed to find
19 any fisher on Forest Service lands in the area between Mount
20 Shasta and Yosemite National Park. SNFPA 3011, 3313.

21 Despite this apparent lack of presence within the project
22 area, a 17,000-acre carnivore habitat network has been
23 established within the Plumas National Forest. Basin 3575, 3699.

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27 ¹⁰ Approximately half of the Plumas National Forest has been
28 surveyed according to agency protocols for forest carnivores, and
protocol level surveys of the Basin Project area in the winter of
2003-04 found no sign of their presence. Basin 3554, 3694.

1 The projects sought to be enjoined have only a minimal impact on
2 that network; the Basin project, for instance, affects only 400
3 acres of the carnivore movement habitat corridor. In addition,
4 the plans call for surveys to be conducted prior to logging
5 operations, and if a den is discovered, the agency would develop
6 a plan of action and determine whether to delay or interrupt
7 operations. Id.

8 In sum, then, available data shows that habitat effects upon
9 owls are minimal, with the vast majority of habitat being
10 unaffected by the projects in question and with the owl
11 comprising a stable population in any event. Protections
12 affecting potential forest carnivore habitat are also largely
13 unaffected by the projects even though virtually no individual
14 carnivore specimens have been detected. Plaintiffs' key concern
15 is that the 2004 Framework, and the specific projects currently
16 at issue in this request for preliminary injunction, may decrease
17 canopy cover within DFPZs to 40 percent as opposed to the 50
18 percent levels envisioned by its 2001 predecessor, which
19 disallowed any logging of trees in excess of twenty inches in
20 diameter, whereas the 2004 Framework allows trees up to thirty
21 inches to be taken in some instances. See SNFPA 336-337. The
22 Forest Service argues that the logging of larger diameter trees
23 is necessary both to reduce fire risk (either directly through
24 construction of DFPZs or indirectly through the promotion of more
25 fire-resilient forest species requiring more sunlight and less
26 shady undergrowth) and to permit the economic viability of
27 vegetation management efforts.

28 ///

1 It argues that relatively few larger trees will be logged in any
2 event, with the vast majority of timber coming from smaller
3 diameter trees. Only six percent of group selection in the Basin
4 Project, for instance, would involve trees more than 24 inches in
5 diameter. Second Decl. Of Nancy Francine, ¶ 17a.

6 Plaintiffs, on the other hand, argue that economic
7 considerations cannot supplant the public interest in protecting
8 the environment. They contend that the loss of potential habitat
9 alone constitutes an irreparable injury justifying the cessation
10 of any project activities by way of a preliminary injunction.

11 The fire danger in the Plumas National Forest remains clear
12 despite the respective validity of these two opposing viewpoints.
13 This summer's Antelope Fire burned 23,000 acres, impacted six owl
14 PACs and completely burned three. Observation following the
15 Antelope Fire showed that fire activity slowed and moderated when
16 reaching a DFPZ. See Second Francine Decl., ¶ 14. DFPZs have
17 hence been proven effective in reducing fire intensity,
18 controlling fire spread, and protecting ecological resources like
19 habitat. In addition, the Moonlight Fire, which has only
20 recently been contained, has burned 65,000 acres and impacted at
21 least 21 owl PACs and HRCAs on over 21,000 acres. The blaze has
22 threatened 2500 homes and came within six miles of town of
23 Taylorsville and within eight miles of the nearest treatment unit
24 contemplated by the Empire Project.

25 Fire protection through vegetation management in these areas
26 is therefore important both from the standpoint of wildlife and
27 humans. For wildlife, unchecked wildfire may completely destroy
28 habitat. For humans, both lives and property are at stake.

1 Both the Slapjack and Empire Projects squarely address that risk.
2 Ninety-eight percent of the Slapjack Projects is situated within
3 Wildfire Urban Interface zones ("WUIs") that are home to between
4 5,000 and 7,000 people. Second Francine Decl. at ¶ 12a. Empire
5 similarly treats some 2,500 acres within WUIs immediately
6 adjacent to five communities, including the town of Quincy.
7 Empire SEIS at 3-67; Second Francine Decl., ¶12b-c.

8
9 **STANDARD**

10
11 A preliminary injunction is an extraordinary remedy, the
12 entitlement to which the moving party must prove by clear and
13 convincing evidence. See Granny Goose Foods, Inc. v. Teamsters,
14 415 U.S. 423, 442 (1974).

15 Certain prerequisites must be satisfied prior to issuance
16 of a preliminary injunction. Under the so-called "traditional"
17 standard, an injunction may be had if the court determines that
18 (1) the moving party will suffer the possibility of irreparable
19 injury if the relief is denied; (2) there is a strong likelihood
20 that the moving party will prevail on the merits at trial;
21 (3) the balance of potential harm favors the moving party; and
22 (4) the public interest favors granting relief. Johnson v. Cal.
23 State Bd. of Accountancy, 72 F.3d 1427, 1430 (9th Cir. 1995).

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1 Under the "alternative" standard, an injunction properly issues
2 when a party demonstrates either: (1) a combination of probable
3 success on the merits and the possibility of irreparable injury
4 if relief is not granted; or (2) the existence of serious
5 questions going to the merits combined with a balancing of
6 hardships tipping sharply in favor of the moving party. Id., see
7 also Idaho Sporting Congress, Inc. v. Alexander, 222 F.3d 562,
8 565 (9th Cir. 2000); Earth Island Institute v. U.S. Forest
9 Service, 442 F.3d 1147, 1158 (9th Cir. 2006). The requirement
10 for showing a likelihood of irreparable harm increases or
11 decreases in inverse correlation to the probability of success on
12 the merits, with these factors representing two points on a
13 sliding scale. United States v. Nutri-cology, Inc., 982 F.2d
14 394, 397 (9th Cir. 1992).

15 No presumption for issuance of a preliminary injunction
16 solely on grounds that environmental statutes have been violated.
17 Amoco, 480 U.S. 531, 545. A NEPA violation is subject to
18 traditional standards in equity for injunctive relief and does
19 not require an automatic blanket injunction against all
20 development. Northern Cheyenne Tribe v. Norton, 2007 WL 1595476
21 at *3 (9th Cir. Sept. 11, 2007).

22 23 ANALYSIS

24
25 The underlying lawsuit challenges the 2004 Framework through
26 the prism of site-specific projects, initially Basin and, through
27 recent amendments to the complaint in this matter, now also
28 Empire and Slapjack.

1 The cross-motions for summary judgment filed by the parties with
2 respect to the overall legality of the 2004 Framework remain
3 under submission. During the course of that briefing, that
4 parties agreed that issues pertaining to remedy should be
5 reserved until after an underlying decision on the merits,
6 through summary judgment, had been made. The relief now sought
7 through Plaintiffs' preliminary injunction requests as to the
8 three site-specific projects unquestionably relates to remedy as
9 opposed to liability. Therefore, in analyzing the propriety of
10 injunctive relief at this point, the Court will focus on the
11 site-specific issues rather than risk being drawn into any
12 wholesale decision addressing the overall merits of the
13 underlying Framework.

14
15 **A. Probability of Success on the Merits**
16

17 Under any formulation assessing the merits of preliminary
18 injunctive relief a consideration of the requesting party's
19 probability of success must be addressed. Plaintiffs claim here
20 that there is a likelihood of success on the merits because the
21 2004 Framework, on which the projects are modeled, violates the
22 NFMA by failing to ensure species survival and failing to
23 implement required monitoring data for management indicator
24 species ("MIS"). Plaintiffs further assert NEPA violations on
25 grounds that the Forest Service, in adopting the 2004 Framework,
26 failed to take a hard look at environmental impacts, failed to
27 adequately respond to opposing scientific viewpoints, and failed
28 to adequately assess other alternatives as required by NEPA.

1 Turning first to the alleged NFMA violations, Plaintiffs
2 argue that 36 C.F.R § 219.19(a)(6), a regulation enacted in 1982,
3 requires that population trends of management indicator species
4 will be monitored and relationships to habitat changes
5 determined." Section 219.26 goes on to require that "inventories
6 shall include quantitative data...." Plaintiffs contend that
7 this regulation requires that population monitoring be performed.

8 The 1982 regulations upon which Plaintiffs rely were deleted
9 from the Code of Federal Regulations in November of 2000. Under
10 the discretion conferred by § 219.35 of the interim rules, the
11 Forest Service elected to prepare the 2004 Framework under the
12 provisions of the 1982 regulations. See Earth Island Inst. v.
13 U.S. Forest Serv., supra, 442 F.3d at 1173. Once those interim
14 rules were superseded by new planning rules in January of 2005,
15 however, the 1982 rules ceased to have legal force and effect and
16 cannot be presently enforced by the Court in the context of these
17 site-specific projects. See 70 Fed. Reg. 1023, 1052 (Jan. 5,
18 2005). Under Landgraf v. USI Film Products, 511 U.S. 244 (1994),
19 courts are directed to apply the rules in effect at the time of
20 judicial review, because application of the current 2005 rules to
21 the site-specific plans would not impair vested rights, increase
22 the liability for past conduct, or impose new duties on the
23 Federal Defendants. See Southwest Center for Biological
24 Diversity v. USDA, 314 F.3d 1060, 1062 (9th Cir. 2002). Here,
25 Plaintiffs had no vested rights under the old regulations, since
26 even an expectation of success in litigation does not constitute
27 the sort of settled expectation subject to exception under
28 Landgraf. Id. at 1062 n.1.

1 The 2005 rules state that, for forest plans "developed,
2 amended, or revised" under the 1982 rules:

3 The Responsible Official may comply with any
4 obligations relating to management indicator species by
5 considering data and analysis relating to habitat
6 unless the plan specifically requires population
7 monitoring or population surveys for the species. Site
8 specific monitoring or surveying of a proposed project
9 area are not required.

10 36 C.F.R. 219.14(f) (2005). "Monitoring populations at the site
11 of individual projects is not part of this requirement.

12 Therefore, the transition language in § 219.14 clarifies that MIS
13 monitoring... is not required within individual project or
14 activity areas." 70 Fed. Reg. 1052 (Jan. 5, 2005). Thus,
15 Section 219.14, and not deleted Section 219.19, applies to these
16 site specific projects and it: 1) does not require wildlife
17 monitoring before commencement of a site-specific project; and
18 2) does allow reliance on existing "habitat" data instead of
19 attempting to count secretive wildlife.

20 In this case, habitat data with respect to all three species
21 targeted by this preliminary injunction supports a finding that
22 the provisions of the NFMA have not violated with respect to
23 species viability. All three projects leave the vast majority of
24 (upwards of 90 percent) of owl habitat undisturbed. Moreover,
25 the most recent Meta analysis of spotted owl populations in the
26 Sierra Nevada indicate, as discussed above, that the species is
27 stable. In addition, with regard to the fisher and the marten,
28 as stated above both species are virtually unknown within the
Plumas National Forest where these projects are slated to occur.

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1 Nonetheless, large amounts of suitable habitat for these forest
2 carnivores will be maintained, including a habitat connectivity
3 corridor which will be only minimally affected by the projects.
4 Under those circumstances, none of the three site-specific
5 projects is likely to have any impact on the fisher and marten
6 whatsoever, let alone an impact triggering the protections of the
7 NFMA.

8 The Court is similarly unpersuaded that Plaintiffs can
9 demonstrate any likelihood of success with regard to their NEPA
10 claims. The NEPA challenges primarily revolve around the claim
11 that adverse environmental impacts were not adequately disclosed
12 so that the requisite "hard look" was taken, either in the 2004
13 Framework or in the individual site-specific projects. First,
14 the Forest Service took a "hard look" at the available data
15 concerning the impact of its proposal on the owl, recognized
16 opposing opinions, and provided a reasoned discussion of its
17 findings. See Seattle Audubon Soc'y v. Lyons, 871 F. Supp. 1291
18 (W.D. Wash. 1994) (the agency having engaged in numerous studies
19 and analyses of the owl satisfied NEPA's requirement to take a
20 "hard look" at available data). The Forest Service assessed the
21 most recent owl meta analysis (SNFPA 2086-89), assessed published
22 research (SNFPA 2638-57), and evaluated the Scientific
23 Consistency Review Team's findings (SNFPA 2578-2589). In
24 addition, although the 2004 Framework concluded that its fuels
25 treatment prescriptions would benefit both the fisher and the
26 marten in the long run, it also assessed short-term impacts to
27 both species (SNFPA 3314 (marten); SNFPA 3323-3330 (fisher)).
28 ///

1 Moreover, at the project level, which is the most cogent
2 consideration in evaluating Plaintiffs' request for preliminary
3 injunction, detailed environmental impact statements ("EISs")
4 were prepared for both the Slapjack and Empire projects that also
5 considered available habitat for all three species and the impact
6 any recommended logging would have on that habitat. See Slapjack
7 EIS at 3-1 to 3-304. Moreover an environment assessment ("EA")
8 was prepared by the Basin project. Basin 3657-3749.

9 Plaintiffs would also appear unsuccessful in arguing that
10 the cumulative effects of the three projects at issue have not
11 been properly considered. The cumulative effect of all HFQLG
12 vegetation management projects, including the projects at issue
13 here, were assessed in the 2004 Framework, to which the
14 individual projects may tier. See Basin 3720. Moreover, the
15 fact that so little habitat is slated to be affected in any event
16 would appear to make any cumulative effects improbable on their
17 face.

18 Plaintiffs' NEPA claim that the Forest Service failed to
19 consider a reasonable range of alternatives is also not
20 compelling. While the 2004 SEIS specifically considered only the
21 new treatment option that was ultimately adopted in conjunction
22 with the plan adopted by its 2001 predecessor, the 2004 SEIS by
23 definition was, by definition, supplemental to the 2001
24 Framework, which considered and analyzed seven different
25 treatment variants (Options F2-F8) in depth. With respect to the
26 site-specific projects themselves, the Slapjack EIS considered
27 six action alternatives and one no-action alternative. Slapjack
28 EIS at 2-1 to 2-18.

1 In addition, the final SEIS issued for the Empire project
2 analyzed in detail the no action alternative, a proposed action
3 and four other alternatives. See Empire SEIS at 2-10 to 2-14.

4 Finally, with respect to the Basin EA, Plaintiffs make the
5 argument that Plaintiffs contend that because the draft EA for
6 the Basin Project was not specifically disseminated for public
7 consideration and comment, the approval of the EA violates the
8 public disclosure mandate of NEPA. EAs, however, are by
9 definition simpler documents not subject to the same rigorous
10 scrutiny as an EIS. EAs are designed to reduce government costs,
11 paperwork and delay through a "concise" public document. 40
12 C.F.R. § 1500.4(q), 1500.5(1), 1508.9. While the EA itself was
13 not circulated, it appears undisputed that a summary plan
14 description was provided to the public for comment. Public
15 meetings concerning the Basin Plan were also conducted. This
16 satisfies NEPA. See, e.g., Sierra Nevada Forest Prot. Campaign
17 v. Weingardt, 376 F. Supp. 984, 991 (E.D. Cal. 2005) (draft EA,
18 in contrast to EIS, need not be expressly circulated to the
19 public for comment as long as information provided is otherwise
20 disseminated).

21
22 **B. Irreparable Harm**

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24 As indicated above, the projects at issue impact relatively
25 little owl habitat, and virtually no fishers or martens have been
26 observed within any of the targeted areas.

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1 Nonetheless the projects preserve core owl habitat, as well as
2 habitat connectivity for the forest carnivores should they return
3 to the Northern Sierra. With respect to the owl, which is the
4 only species realistically present in the project areas at issue
5 in this Motion, there is no solid evidence of population impact
6 within the Plumas National Forest, where the owl appears to be
7 thriving. Even if individual birds could be affected by
8 selective logging, that does not amount to irreparable harm since
9 irreparable harm in this context depends on a demonstrable impact
10 to the species as a whole. See, e.g., Water Keeper Alliance v.
11 U.S. Dep't of Def., 271 F.3d 21, 34 (1st Cir. 2001).

12 On the evidence of the evidence before it, the Court
13 believes that a greater danger of irreparable harm exists in not
14 vigorously addressing the overforested conditions that are
15 present within the Plumas National Forest. This danger is not
16 speculative but very real, as evidenced by the large wildfires
17 that ravaged the Plumas this very summer. As discussed above,
18 the 2007 Antelope and Moonlight fire together burned some 88,000
19 acres and either impacted or destroyed at least 27 owl PACS and
20 HRCAs. In sum, according to Nancy Francine, the Plumas National
21 Forest Ecosystem Staff Officer, during 2007 to date there have
22 been almost 628 fires impacting some 123,000 acres of Forest
23 Service land in Northern California. Second Francine Decl. at
24 ¶ 8. The long-term benefit of preventing stand replacing fires
25 which completely destroy habitat is preferable over any short-
26 term benefits derived from retaining dense forest structure
27 preferred by old growth species. Native Ecosystems Council v.
28 U.S. Forest Service, 428 F.3d 1233, 1251 (9th Cir. 2005).

1 Courts can and should take account of the short and long terms
2 effects of both action and inaction. Wildwest Inst. v. Bull, 472
3 F.3d 587, 592 (9th Cir. 2006). As already indicated, the 2006
4 USFWS study concluded that catastrophic wildfire is a far greater
5 risk to spotted owl viability than any short-term effects of fuel
6 management activities on owl habitat, which is minimal in
7 comparison to overall habitat area remaining available. See 36
8 Fed. Reg. 29897 (May 24, 2006). Similarly, the greatest concern
9 for forest carnivores is the danger of further habitat
10 fragmentation due to large, stand-replacing fires like those that
11 are likely to result if overforested conditions are ignored.
12 See, e.g., Empire SEIS at 3-162; Slapjack EIS at 3-284. In Bull,
13 the Ninth Circuit held that the district court did not abuse its
14 discretion in denying a preliminary injunction on grounds that
15 fuel reduction project would reduce the risk of severe wildfire
16 in the next 10-15 years. Wildwest Inst. v. Bull, supra, 472 F.3d
17 at 592.

18

19 **C. Balancing of Hardships**

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21 As indicated above, the imminent danger of catastrophic
22 wildfire which has completely destroyed large swaths of old
23 forest habitat this very year must be balanced against the
24 immediate risk of eliminating some suitable habitat in the short
25 term.

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1 With respect to the three projects at issue, this balancing does
2 not tip in Plaintiffs' favor, let alone strongly favor Plaintiffs
3 as required under the "alternative" test for granting a
4 preliminary injunction where serious questions on the merits have
5 been raised. This conclusion is even more compelling when the
6 human component of not addressing overloaded forest conditions is
7 considered. As indicated above, fires in the area at issue
8 during the Summer of 2007 threatened numerous homes and entire
9 communities. The Empire Project will treat 2,500 acres in the
10 Wildland Urban Interface "immediately adjacent to five
11 "communities at risk": Quincy, Massack, Greenhorn, Keddie and
12 Butterfly Valley. Second Francine Decl. at ¶ 12b and 12c.
13 Similarly, some 98 percent of the Slapjack project is within the
14 Wildland Urban Interface surrounding the communities of
15 Brownsville, Challenge, Clipper Mills, Dobbins, Feather Fall,
16 Forbestown, and Strawberry Valley, which collectively are home to
17 between 5,000 and 7,0000 people. Id. at 12a. The
18 congressionally mandated HFQLG Act directs that fire suppression
19 measures, including DFPZs, group selection, and individual
20 logging, be implemented to mitigate these risks. Observation
21 following recent fires appear to indicate that DFPZs are useful
22 in reducing fire speed and intensity. Id. at ¶ 14. While
23 Plaintiffs argue that any fuel reduction projects must be
24 modified to reduce the logging of larger diameter trees, the
25 number of such large trees appears to be minimal. As noted
26 above, only 6 percent of group selection for the Basin Project
27 involves trees more than 24 inches in diameter. Id. at ¶ 17a.
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1 Additionally, Table 3-56 of the Slapjack EIS shows that very few
2 trees of that size will be taken, with the majority of logging
3 involving smaller trees, particularly poles between six and
4 eleven inches in diameter at breast height. Slapjack EIS at 3-
5 200. Important too is the fact that without the inclusion of
6 larger diameter trees the proposed logging efforts would not be
7 commercially viable and the important fuel reduction purposes
8 they serve could not be undertaken by the Forest Service. See,
9 e.g., Empire ROD at 2 ("without the sale of commercial wood
10 products, it is not currently possible to accomplish enough fuels
11 reduction to achieve our objectives").

12 Significant too is the fact that the HFQLG Act further
13 directs that the economic stability of local communities be
14 considered. The NFMA directs the Forest Service to develop a
15 land and resource management plan for each unit of the system to
16 provide for multiple uses and sustained yield of various forest
17 resources, including timber and wildlife. See 16 U.S.C.
18 § 1604(a)(e); Forest Guardians v. Dombeck, 131 F.3d 1309, 1312
19 (9th Cir. 1997). Not only are there economic benefits to logging
20 in this area, but halting further logging may also weaken the
21 local infrastructure necessary for vegetation management
22 activities in the future. See Second Francine Decl. at ¶ 6-7.

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1 While the Court realizes that avoiding irreparable environmental
2 injury outweighs mere economic concerns (Lands Council v. McNair,
3 494 F.3d 771, 780 (9th Cir. 2007), here economic considerations
4 are not the decisive factor but instead, when considered in
5 conjunction with the irreparable harm associated with taking no
6 action, simply tip the scales further in favor of not granting
7 the requested injunctive relief. In this case the risk of
8 catastrophic, stand-replacing fire is both proven and palpable,
9 and goes beyond the circumstances confronted by the McNair court,
10 which examined a project designed to ameliorate general tree
11 stand health and vigor decline by attempting to return the forest
12 towards "historic conditions". Id. at 774-75. The overwhelming
13 fire risk involved here goes beyond any "speculative harm"
14 rejected as inadequate by McNair.

15
16 **D. Public Interest**

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18 In cases where the public interest is affected, that element
19 should also be addressed in determining whether to grant
20 injunctive relief, even though the inquiry is often subsumed into
21 the balance of relative hardships. See, e.g., Caribbean Marine
22 Servs. Co. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988).

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1 Here, the public interest in accomplishing the fuel management
2 envisioned by the Slapjack, Basin and Empire projects, which are
3 designed to both immediately reduce fire risk and promote the
4 long-term development of more fire-resilient forests, together
5 with the public interest in providing protection and economic
6 stability to local communities, outweigh any short-term impact to
7 the owl, fisher and marten as discussed above.

8

9

CONCLUSION

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11 For all the foregoing reasons, Plaintiffs' Motion for
12 Preliminary Injunction is hereby DENIED.

13 IT IS SO ORDERED.

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15 Dated: October 15, 2007

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MORRISON C. ENGLAND, JR.
UNITED STATES DISTRICT JUDGE

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