

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KLAMATH-SISKIYOU WILDLANDS
CENTER, ENVIRONMENTAL
PROTECTION INFORMATION
CENTER, and KLAMATH FOREST
ALLIANCE,

Plaintiffs,

v.

PATRICIA A. GRANTHAM, Klamath
National Forest Supervisor, and UNITED
STATES FOREST SERVICE,

Defendants,

and

AMERICAN FOREST RESOURCE
COUNCIL, an Oregon non-profit
corporation,

Intervenor Defendant.

No. 2:18-cv-02785-TLN-DMC

**ORDER GRANTING MOTION FOR
INJUNCTIVE RELIEF**

This matter is before the Court pursuant to Plaintiffs Klamath-Siskiyou Wildlands Center, Environmental Protection Information Center, and Klamath Forest Alliance’s (“Plaintiffs”) motion for temporary restraining order and/or preliminary injunction. (ECF No. 13; Mem. Support Mot. Temporary Restraining Order/Prelim. Inj., ECF No. 22.) Federal Defendants Patricia A. Grantham and the United States Forest Service (“Defendants”) oppose Plaintiffs’

1 motion. (ECF No. 32.) Intervenor Defendant American Forest Resource Council (“Intervenor
2 Defendant”) also opposes this motion. (ECF No. 33.) Plaintiffs filed a reply. (ECF No. 34.) A
3 hearing on the matter was held on January 10, 2019. The Court has carefully considered the
4 arguments raised by the parties’ briefing and oral arguments. For the reasons stated below,
5 Plaintiffs’ motion for temporary restraining order and/or preliminary injunction (ECF No. 13) is
6 GRANTED.

7 **I. STATUTORY BACKGROUND**

8 *i. National Forest Management Act (“NFMA”)*

9 The NFMA and its implementing regulations provide for forest planning and management
10 by the Forest Service at two levels: the forest level and the site-specific project level. 16 U.S.C. §
11 1604; *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 729–30 (1998). On the forest level, the
12 Forest Service develops a Land and Resource Management Plan (“LRMP”) which consists of
13 broad, long-term plans and objectives for the entire forest. In this case the applicable LRMP is
14 the Klamath National Forest LRMP, which is part of the Northwest Forest Plan (“NFP”).¹ At the
15 project level, the project must be consistent with LRMP and NFP standards. 16 U.S.C. § 1604(i).

16 *ii. National Environmental Policy Act (“NEPA”)*

17 The NEPA “is a purely procedural statute.” *Neighbors of Cuddy Mountain v. Alexander*,
18 303 F.3d 1059, 1070 (9th Cir. 2002). NEPA does not dictate particular results or require that
19 agencies elevate environmental impacts over other concerns. Instead, NEPA provides a process
20 to ensure that agencies take a “hard look” at the environmental consequences of their actions. *Id.*
21 NEPA serves the dual purpose of informing agency decision-makers of the environmental effects
22 of proposed federal actions and ensuring that relevant information is made available to the public.
23 *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

24 As part of the required “hard look,” NEPA and its implementing regulations require
25 federal agencies to prepare a “detailed statement” concerning “every recommendation or report

26 _____
27 ¹ The Northwest Forest Plan was put into place by the Bureau of Land Management in 1994. (ECF No. 22 at
28 9.) The Northwest Forest Plan established management requirements for all Forest Service land within the range of
the northern spotted owl and amended all National Forest LRMPs within the range of the owl, including the Klamath
National Forest LRMP. (ECF No. 22 at 9.)

1 on proposals for legislation and other major Federal actions significantly affecting the quality of
2 the human environment.” 42 U.S.C. § 4332(2)(C). The statement must consider the impact of
3 the proposed action, any adverse environmental effects, alternatives to the proposed action, the
4 relationship between short-term uses and the “maintenance and enhancement of long-term
5 productivity,” and any irreversible commitments of resources which would result from
6 implementing the action. *Id.* This statement may take the form of an environmental assessment
7 (“EA”), or a longer and more thorough environmental impact statement (“EIS”), which includes a
8 longer public comment period. *See* 40 C.F.R. §§ 1508.9, 1508.11.

9 In determining whether to prepare an EIS, the agency shall determine: (1) whether the
10 proposed project normally requires an EIS, or (2) if the project is categorically excluded from the
11 preparation of both an EA and an EIS because the action does not individually or cumulatively
12 have a significant effect on the human environment. 40 C.F.R. §§ 1501.4, 1508.4. In making this
13 determination, absent a categorical exclusion of an EA and an EIS, the agency shall prepare an
14 EA to determine whether an additional EIS is needed. 40 C.F.R. 1501.4(c). An EA “[s]hall
15 include brief discussions of the need for the proposal, of alternatives as required by [NEPA]
16 section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a
17 listing of agencies and persons consulted.” 40 C.F.R. § 1508.9(b). If the agency concludes based
18 on the EA that no additional EIS is required, the agency must prepare a “finding of no significant
19 impact” (“FONSI”). 40 C.F.R. 1501.4(e). In this case, Defendants prepared an EA which
20 culminated in a FONSI. An EIS was not prepared.

21 The agency must also consider the “cumulative impact” of a proposed project, which the
22 federal regulations define as the result of “the incremental impact of the action when added to
23 other past, present, and reasonably foreseeable future actions . . .” 40 C.F.R. § 1508.7.
24 Cumulative impacts may result from “individually minor but collectively significant actions
25 taking place over a period of time.” *Id.* In determining whether a project will have a
26 “significant” impact on the environment, an agency must consider “[w]hether the action is related
27 to other actions with individually insignificant but cumulatively significant impacts.” 40 C.F.R. §
28 1508.27(b)(7); *see Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th

1 Cir. 1998).

2 **II. FACTUAL AND PROCEDURAL BACKGROUND**

3 On October 16, 2018, Plaintiffs filed a complaint for declaratory and injunctive relief.
4 (ECF No. 1.) Plaintiffs brought three causes of action, arguing that Defendants violated the
5 National Forest Management Act, National Environmental Policy Act, and Administrative
6 Procedure Act when they approved the Seiad-Horse Reduction Project (“Project”) in the Klamath
7 National Forest. (ECF No. 1 ¶ 1.)

8 The Project was put into place in response to the August 2017 Abney Fire, which burned
9 approximately 90,000 acres on the Rogue River-Siskiyou and Klamath National Forests.
10 (Environmental Assessment (“EA”) at 1.) Roughly 10,000 acres of the fire were on the Klamath
11 National forest and most of the land burned at moderate to high severity. (EA at 1.) This resulted
12 in about 40 miles of roads lined with fire-killed trees and large pockets of fire-killed trees. (EA at
13 1.) According to Defendant U.S. Forest Service, as snags continue to decay, break, and fall
14 because of the Abney Fire, the severity and intensity of future fires will increase. (EA at 1.) The
15 increased fire intensities and fallen snags will result in difficulty controlling future fires, putting
16 fire suppression crews at risk, and blocking roadways which will further put suppression crews at
17 increased risk. (EA at 1.)

18 According to Plaintiffs, the Project is comprised of several components involving the
19 logging of timber from land in the Johnny O’Neil Successional Old Growth Forest Reserve.
20 (ECF No. 1 ¶ 10.) Intervenor Defendant states that the Project was designed to respond to the
21 2017 Abney Fire, which destroyed roughly 5,000 acres of late-successional forest. (ECF No. 25-
22 1 at 2.) Plaintiffs are challenging two specific actions of the Project: proposed hazard tree
23 removal and post-fire “salvage” logging. (ECF No. 1 ¶ 72.) The Project aims to remove
24 hazardous tree and fuel conditions, especially within one quarter mile of private properties in
25 burned areas. (EA at 1.) According to the U.S. Forest Service, “[t]here is a need to remove this
26 material as quickly as possible to address public and worker safety and maintain the economic
27 viability of the project.” (EA at 1.)

28 On September 28, 2018, based on a review of the EA, Defendants issued a Decision

1 Notice approving the Project. (Decision Notice, ECF No. 32-2.) The Decision Notice found that:

2 By removing dead and dying trees along roadways, the project
3 improves safety conditions for the public, forest workers, and for
4 current and future firefighters using roads to respond to new fires.
5 By removing dead and dying trees and smaller live trees from
6 National Forest System lands adjacent to private property, the project
7 helps protect neighboring landowners in the event of inevitable
8 future fires.

9 (ECF No. 32-2 at 4.) The Decision Notice further took into consideration “what will happen
10 should risk reduction treatments not be undertaken,” and determined that:

11 about 60 percent of the project area will be subject to high fire
12 intensity in the future under this scenario, a marked expansion of the
13 high severity impacts created by 2017’s Abney Fire. This is
14 attributable to trees killed by the Abney Fire, left unabated,
15 weakening and falling to the ground over time, mixing with re-
16 sprouting shrubs, hardwoods, grasses and small naturally reseeded
17 trees, to create a fuel load that will reburn at high severity when fire
18 returns. The resultant high severity burn will not only remove any
19 slowly reestablishing forest, but has the high potential to convert the
20 area to a non-forested brush field condition for a long term period.

21 (ECF No. 32-2 at 4.) Moreover, noting the importance of burned areas to the habitat and
22 ecosystem diversity, the Decision Notice explains that over 88% of the Project area will have no
23 risk reduction salvage undertaken, and 74% of the Project area will have no trees planted for
24 restoration. (ECF No. 32-2 at 6.)

25 According to Plaintiffs, on October 30, 2018, Plaintiffs learned that Defendant United
26 States Forest Service had identified a bidder for the “Low Gap” timber sale, the first of three sales
27 authorized by the Project. (ECF No. 13 at 2.) On November 7, 2018, Defendants informed
28 Plaintiffs that the Forest Service intended to authorize the implementation of the Low Gap timber
sale. (ECF No. 13 at 2.)

Intervenor Defendant is a regional trade association representing over 50 forest product
businesses and forest landowners, including the purchaser of the Low Gap timber sale. (ECF No.
13 at 2; ECF No. 25-1 at 3.) Intervenor Defendant states they are interested in the Project
because the Project will supply timber to its members. (ECF No. 25-1 at 3.) Intervenor
Defendant is further concerned about “the economic, environmental, and safety benefits of the
project, which are threatened by this litigation.” (ECF No. 25-1 at 2.)

1 **III. STANDARD OF LAW**

2 A. Injunctive Relief

3 A temporary restraining order is an extraordinary and temporary “fix” that the court may
4 issue without notice to the adverse party if, in an affidavit or verified complaint, the movant
5 “clearly show[s] that immediate and irreparable injury, loss, or damage will result to the movant
6 before the adverse party can be heard in opposition.” Fed. R. Civ. P. 65(b)(1)(A). The purpose
7 of a temporary restraining order is to preserve the status quo pending a fuller hearing. *See* Fed. R.
8 Civ. P. 65. It is the practice of this district to construe a motion for temporary restraining order as
9 a motion for preliminary injunction. Local Rule 231(a); *see also Aiello v. One West Bank*, No.
10 2:10-cv-0227- GEB-EFB, 2010 WL 406092 at *1 (E.D. Cal. Jan. 29, 2010) (“Temporary
11 restraining orders are governed by the same standard applicable to preliminary injunctions.”)
12 (internal quotation and citations omitted).

13 Injunctive relief is “an extraordinary remedy that may only be awarded upon a clear
14 showing that the plaintiff is entitled to such relief.” *Winter v. Natural Res. Def. Council, Inc.*, 555
15 U.S. 7, 22 (2008) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam)). “The
16 purpose of a preliminary injunction is merely to preserve the relative positions of the parties until
17 a trial on the merits can be held.” *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)
18 (emphasis added); *see also Costa Mesa City Employee’s Assn. v. City of Costa Mesa*, 209 Cal.
19 App. 4th 298, 305 (2012) (“The purpose of such an order is to preserve the status quo until a final
20 determination following a trial.”) (internal quotation marks omitted); *GoTo.com, Inc. v. Walt*
21 *Disney, Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000) (“The status quo ante litem refers not simply to
22 any situation before the filing of a lawsuit, but instead to the last uncontested status which
23 preceded the pending controversy.”) (internal quotation marks omitted). In cases where the
24 movant seeks to alter the status quo, preliminary injunction is disfavored and a higher level of
25 scrutiny must apply. *Schrier v. University of Co.*, 427 F.3d 1253, 1259 (10th Cir. 2005).
26 Preliminary injunction is not automatically denied simply because the movant seeks to alter the
27 status quo, but instead the movant must meet heightened scrutiny. *Tom Doherty Associates, Inc.*
28 *v. Saban Entertainment, Inc.*, 60 F.3d 27, 33–34 (2d Cir. 1995).

1 “A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed
2 on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief,
3 [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.”
4 *Winter*, 555 U.S. at 20. A plaintiff must “make a showing on all four prongs” of the *Winter* test
5 to obtain a preliminary injunction. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135
6 (9th Cir. 2011). In evaluating a plaintiff’s motion for preliminary injunction, a district court may
7 weigh the plaintiff’s showings on the *Winter* elements using a sliding-scale approach. *Id.* A
8 stronger showing on the balance of the hardships may support issuing a preliminary injunction
9 even where the plaintiff shows that there are “serious questions on the merits...so long as the
10 plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the
11 public interest.” *Id.* Simply put, “[a] preliminary injunction is appropriate when a plaintiff
12 demonstrates . . . that serious question going to the merits were raised and the balance of
13 hardships tips sharply in the plaintiff’s favor. *Id.* at 1134–35.

14 B. Administrative Procedure Act (“APA”)

15 Agency compliance with NEPA is reviewed under the APA. 5 U.S.C. §§ 701–706; *Grand*
16 *Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1016 (9th Cir. 2012). Review is
17 generally limited to the administrative record that was before the agency at the time of its
18 decision. *Grand Canyon Trust*, 691 F.3d at 1016 n.10; *Sw. Ctr. for Biological Diversity v. U.S.*
19 *Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996). A court may set aside an agency action only if
20 it determines that the action was “arbitrary, capricious, an abuse of discretion, or otherwise not in
21 accordance with law.” 5 U.S.C. § 706(2)(A). This standard of review is “highly deferential,
22 presuming the agency action to be valid and affirming the agency action if a reasonable basis
23 exists for its decision.” *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136,
24 1140 (9th Cir.2007) (quotation and citation omitted).

25 Courts must uphold a reasonable agency action “even if the administrative record contains
26 evidence for and against its decision.” *Modesto Irrigation Dist. v. Gutierrez*, 619 F.3d 1024,
27 1036 (9th Cir. 2010) (quotation and citation omitted). “The court’s task is not to make its own
28 judgment,” because “Congress has delegated that responsibility to the [agency].” *River Runners*

1 *for Wilderness v. Martin*, 593 F.3d 1064, 1070 (9th Cir. 2010). Instead, “[t]he court’s
2 responsibility is narrower: to determine whether the [agency’s action] comports with the
3 requirements of the APA. . . .” *Id.* The Ninth Circuit has held that “[t]he [agency’s] action . . .
4 need only be a reasonable, not the best or most reasonable, decision.” *Id.* (quotation and citations
5 omitted).

6 The APA does not allow a reviewing court to overturn an agency decision because it
7 disagrees with the decision or with the agency’s conclusions about environmental impacts. *Id.*
8 This is especially true in the context of management of Service lands, for Congress has
9 consistently acknowledged that the Forest Service must balance competing demands in managing
10 National Forest System lands. *See United States v. New Mexico*, 438 U.S. 696, 716 n.23 (1978).

11 **IV. ANALYSIS**

12 To succeed on their motion, Plaintiffs must make a showing on all four elements of the
13 *Winters* test. *Alliance for the Wild Rockies*, 632 F.3d at 1135. The Court therefore addresses
14 each prong of the injunctive relief analysis in turn.

15 **A. Likelihood of Success on the Merits**

16 For a preliminary injunction to issue, it is Plaintiffs’ burden to show a likelihood of
17 success on the merits of their claims. Plaintiffs’ bring three arguments in this regard: (1) the
18 Project violates the NFMA by failing to comply with the Aquatic Conservation Strategy (“ACS”)
19 (ECF No. 22 at 10); (2) the authorization of large snag removal from the Johnny O’Neil LSR
20 violates NFMA; and (3) the Forest Service was required to prepare an EIS in addition to an EA.

21 *i. Whether the Project Violates NFMA by Failing to Comply With the ACS*

22 Plaintiffs argue that the Project fails to comply with three of the ACS objectives
23 (Objectives 4, 5, and 6) which require projects to “maintain and restore water quality, sediment
24 regimes, and in-stream flow regimes.” (ECF No. 22 at 10 (quotations and citations omitted).)
25 Defendants respond that the Forest Service “carefully evaluated the Project and reached the well-
26 founded conclusion that the Project is consistent with ACS objectives.” (ECF No. 32 at 10.)

27 The ACS of the Northwest Forest Plan “was developed to restore and maintain the
28 ecological health of watersheds and aquatic ecosystems contained within them . . . [and to]

1 protect salmon and steelhead habitat on federal lands.” (Nw. Forest Plan’s Standards and
2 Guidelines for Mgmt. of Habitat for Late-Successional and Old-Growth Forest Related Species
3 Within Range of N. Spotted Owl, ECF No. 32-7 at 26; ECF No. 22 at 9.) “The purpose of ACS is
4 to maintain and restore ecosystem health at watershed and landscape scales to protect habitat for
5 fish and other riparian-dependent species and resources and restore currently degraded habitats.”
6 *Pac. Coast Fed’n of Fishermen’s Ass’n, Inc. v. Nat’l Marine Fisheries Serv.*, 265 F.3d 1028,
7 1035–36 (9th Cir. 2001).

8 To satisfy ACS objectives, the Forest Service’s analysis must describe the existing
9 condition at the Project site, describe the affected watershed’s range of natural variability, and
10 explain how the proposed project maintains or restores conditions. *Id.* at 1036. The Court must
11 afford the Forest Service “substantial deference” in their interpretation and implementation of its
12 plan unless the determination that the Project was consistent with ACS objectives was “arbitrary
13 and capricious.” *Bark v. Northrop*, 607 F. App’x 652, 655 (9th Cir. 2015).

14 Objective 4 of the ACS requires maintaining and restoring water quality.² (Aquatic
15 Conservation Strategy Objectives, Northwest Forest Plan, Standards and Guidelines, B-11,
16 <https://www.blm.gov/or/plans/nwfpnepa/FSEIS-1994/newsandga.pdf>. (“ACS Objectives”))
17 Plaintiffs contend that the Project violates ACS Objective 4 because the Project’s effects of
18 sedimentation violate the ACS requirement to maintain and restore water quality. (ECF No. 22 at
19 11–12.) Defendants respond that the “EA explains how the Forest Service carefully evaluated the
20 Project’s cumulative effects with other activities and found both that short-term effects will fall
21 within the natural range of variability and that over the longer term, the Project will lead to a
22 cumulative improvement in water quality by reducing sedimentation.” (ECF No. 32 at 11.)

23 The EA states that “[i]n the short term (two to ten years), ground-disturbing project
24 elements that would slightly increase sediment delivery to streams would be adversely cumulative
25 with current high cumulative watershed effects and excessive sedimentation in the Horse Creek
26 and Seiad Creek watershed[s].” (EA at 90.) The EA explains that “any additional impact, no

27
28 ² Because Plaintiffs’ argument with respect to Objective 4 is well taken, the Court declines to address the parties’ arguments as to Objectives 5 and 6.

1 matter how slight, would result in adverse effects.” (EA at 90.) The EA looked at the impact of
2 the Project on existing watersheds. (EA at 82–83.) Despite Defendants’ contention that the
3 short-term impacts are within the natural range of variability, and the long-term results will be
4 beneficial (ECF No. 32 at 11), it is clear that for at least some of the watersheds, the increase in
5 sedimentation is well above the threshold for the natural range of variability. (See EA at 82
6 (recognizing a 33% “[i]ncrease above [t]hreshold” in the Salt Gulch Watershed).) “Given that
7 overall protection of forest and water resources is the concern of both NFP and ACS, it does not
8 follow that [the agency] is free to ignore site degradations because they are too small to affect the
9 accomplishment of that goal at the watershed scale.” *Pac. Coast Fed’n of Fishermen’s Ass’n,*
10 *Inc.*, 265 F.3d at 1035.³

11 As in *Cascadia Wildlands Project v. U.S. Fish & Wildlife Serv.*, “other than a conclusion
12 that in the long-term there may be some restorative benefit from the reconstruction, there is no
13 analysis of the extent of the short-term degradation in the context of ACS objectives.” 219 F.
14 Supp. 2d 1142, 1149 (D. Or. 2002). Similarly, Plaintiffs here have raised serious questions as to
15 whether Defendants acted arbitrarily and capriciously in failing to take into consideration the
16 short-term impacts as required by the ACS.

17 *ii. Whether the authorization of large snag removal from the Johnny O’Neil LSR*
18 *violates NFMA*

19 Plaintiffs claim Defendants violated the NFP by permitting large diameter snag removal in
20 the Johnny O’Neil LSR in two ways: (1) they drew boundaries larger than the harvest unit,
21 essentially diluting the effect of the some-is-enough standard; and (2) the Forest Service failed to
22 consider how the salvage operations would diminish habitat suitability now or in the future.
23 (ECF No. 22 at 14-15.) In response, Defendants argue that: (1) the boundaries are permissible
24 under the KFP; and (2) the habitat suitability will be maintained in the long-term (ECF No. 32 at
25 17).

26 ³ At the motion hearing on January 10, 2019, Defendants argued that *Pacific Coast Federation of Fisherman*
27 *Associations Inc.* is inapplicable because the agency in that case “wholly disregarded evaluation short-term impacts .
28 . . . and that is not the situation here.” Defendants, however, failed to respond to Plaintiffs’ argument that here, while
there were tables explaining the short-term impacts, Defendants have not cited to any evidence or analysis other than
the tables themselves that show that the *short-term* impacts are within the range or variation.

1 a. Snag Removal Boundaries

2 Plaintiffs, citing *Oregon Nat. Res. Council Fund v. Brong*, 492 F.3d 1120 (9th Cir. 2007),
3 assert that “most of the snags the Forest Service are retaining are not located within harvest
4 units,” which they contend is exactly what the court in *Brong* determined violated the NFP. (ECF
5 No. 22 at 14.) Plaintiffs claim the Forest Service has “drawn harvest unit boundaries larger than
6 the footprint of the harvested acres, such that the unharvested areas will be where snags, if any,
7 will be retained.” (ECF No. 22 at 14.) Plaintiffs argue that Defendants’ boundaries are “different
8 than the requirements of the NFP and [do] not address the wildlife needs of . . . [the] northern
9 spotted owls” (ECF No. 34 at 8.)

10 Defendants argue that *Brong* is inapplicable because (1) unlike in *Brong*, here the snag
11 removal is conducted under the KFP and is consistent under the NFP, (2) the Project includes a
12 mix of snag retention both within and around treatment units, and (3) economic factors were not
13 at issue here as they were in *Brong*. (ECF No. 32 at 15.) The Court rejects Defendants’
14 arguments, as discussed below, and finds *Brong* is on point here.

15 Defendants first argue that “Plaintiffs err in directing the Court’s attention to the broad
16 standards and guidelines in the NFP,” because the activities are governed by the “KFP, which was
17 adopted after the NFP was issued.” (ECF No. 32 at 13.) According to Defendants, the KFP
18 incorporates applicable direction from the NFP, but is specifically tailored to the Klamath
19 National Forest. (ECF No. 32 at 13.) Plaintiffs, however, point out that the NFP was
20 incorporated into the KFP. (ECF No. 34 at 8.) As Plaintiffs assert, the NFP specifically states
21 that the NFP applies to the Klamath National Forest and “will be incorporated into Forest Plans as
22 they are developed.” Northwest Forest Plan, Standards and Guidelines, A2,
23 <https://www.blm.gov/or/plans/nwfpnepa/FSEIS-1994/newsandga.pdf>.

24 Defendants’ second argument, that the NFP only requires that the agency focus on
25 retaining, not retain all, snags likely to persist is unpersuasive for similar reasons. (ECF No. 32 at
26 14.) Defendants cite to the KFP’s snag retention guidelines, which they argue are applicable
27 forest-wide. (ECF No. 32 at 14.) While the KFP does include a forest-wide standard that allows
28 for the averaging of snags per 100 acres, the standard in the KFP does not take into account the

1 impact snag retention will have on the northern spotted owl. *See* Klamath Forest Plan, 4-30,
2 https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5333203.pdf (listing the species
3 as: downy woodpecker, red breasted sapsucker, hairy woodpecker, black backed woodpecker,
4 white-headed woodpecker, pileated woodpecker, and vaux’s swift). The NFP on the other hand
5 established management requirements for all Forest Service land within the range of the northern
6 spotted owl. (ECF No. 22 at 9.) Plaintiffs argue—and the Court agrees—that the NFP is
7 operative because the habitat suitability for the northern spotted owl is specifically at issue here.
8 (ECF No. 34 at 8.)

9 The Court finds Defendants’ third argument, that *Brong* is inapplicable because economic
10 factors are not at issue here as they were in *Brong*, similarly unconvincing. (*See* ECF No. 32 at
11 15.) It is clear from the record that economic factors were at issue here. While the purpose and
12 need statement for the Project does not mention economic factors, it is apparent that economic
13 factors were central to the agency’s decision-making. Defendant Grantham’s declaration lists
14 numerous statements indicating the economic value of the Project. (*See, e.g.*, ECF No. 32-3 at ¶
15 8 (“[It is essential that the Project be implemented without delay, so that the timber value of
16 burned trees can help off-set the costs of treatment.”); ECF No. 32-3 at ¶ 9 (“[M]uch of timber in
17 the Project area has already experienced significant value and volume loss. As timber volume and
18 value decline, the ability to leverage the commercial value of dead trees to pay for their removal
19 and for hazardous fuel reduction treatments becomes increasingly less likely.”); ECF No. 32-3 ¶
20 10 (“The sooner timber sale contractors begin operations, the higher the chance that sound,
21 merchantable timber will be harvested.”).)

22 As such, the Court finds *Brong* illustrative. Accordingly, Plaintiffs have raised serious
23 questions as to whether the boundaries of the Project were in compliance with the NFP.

24 b. Habitat Suitability

25 The instant action similarly calls into question whether the Project will decrease the
26 habitat suitability for the threatened northern spotted owl. Defendants emphasize the Project’s
27 effects on the “*long-term*” maintenance of the habitat, (ECF No. 32 at 16,) but fail to address the
28 short-term impacts of the Project.

1 In *Brong*, the plaintiffs challenged the project at issue arguing it violated the NFP because
2 it proposed the “excessive removal of large diameter dead or dying trees, impermissible research
3 logging, and timber removal in ‘non-suitable woodlands.’” *Id.* at 1124. The court determined
4 that the BLM’s practice averaging “salvaged and non-salvaged areas together across all the acres
5 included in the logging” to claim the snag retention was “enough” under the NFP was misleading.
6 *Id.* at 1129–30. The court further reasoned that the BLM “neglect[ed] to explain why the snag
7 removal it d[id] authorize, which indisputably harm[ed] late successional habitat in the short term,
8 w[ould] somehow maintain overall habitat suitability now or in the future as expressly required
9 by the NFP.” *Id.* at 1131.

10 Here, the EA on its face states that “substantial amounts of habitat are projected to be
11 degraded by the proposed actions.” (EC at 113.) While the EA explains that this will not affect
12 the viability of the northern spotted owl in the long-term, it does not appear to explain whether
13 the current habitat suitability will be maintained, as required by the NFP, other than stating that
14 the viability of the species as a whole will be maintained. (EA at 113.) This analysis of the
15 short-term impacts of the Project is insufficient under *Brong*. 492 F.3d at 1131 (“The BLM’s
16 decision to preserve a baseline number of snags is insufficient in a fundamental way: it neglects
17 to explain why the snag removal it *does* authorize, which [i]ndisputably harms late-successional
18 habitat in the short term, will somehow maintain overall habitat suitability now or in the future, as
19 expressly required by the NFP.”) Accordingly, Plaintiffs have raised serious questions as to
20 whether the short-term habitat suitability of the northern spotted owl will be impaired.

21 *iii. Whether NEPA requires the preparation of an EIS*

22 To prevail on a claim that the Forest Service violated its statutory duty to prepare an EIS,
23 a “plaintiff need not show that significant effects will in fact occur.” *Blue Mountains Biodiversity*
24 *Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998). “It is enough for the plaintiff to raise
25 substantial questions whether a project may have a significant effect on the environment.” *Id.* As
26 discussed above, the Court concludes that Plaintiffs have raised substantial questions about the
27 environmental impacts of the Project such that an EIS might have been required.⁴

28 ⁴ The Court need not and does not address Plaintiffs’ argument that proximity of the Project to ecologically

1 Accordingly, Plaintiffs arguments have raised serious questions regarding the merits of
2 their claims. *See All. for the Wild Rockies*, 632 F.3d at 1134–35 (“A preliminary injunction is
3 appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were
4 raised.”).

5 B. Irreparable Injury

6 Plaintiffs must prove that absent an injunction, irreparable injury is likely. *Winter*, 555
7 U.S. at 22. “[T]he Supreme Court has instructed us that ‘[e]nvironmental injury, by its nature,
8 can seldom be adequately remedied by money damages and is often permanent or at least of long
9 duration, i.e., irreparable.’” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir.
10 2011) (citing *Lands Council*, 537 F.3d at 1004). Plaintiffs argue they will suffer irreparable and
11 immediate injury if the Project is implemented. (ECF No. 22 at 23.) Plaintiffs contend their
12 enjoyment of the areas at issue will be diminished and there are no “substitute areas” where
13 Plaintiffs can go for the same experience. (ECF No. 22 at 24.) Further, Plaintiffs assert they have
14 demonstrated a real interest in the health and recovery of post-fire environments and intact
15 ecosystems recovering from natural disturbance, such as old-growth forests which “cannot grow
16 back within their lifetimes.” (ECF No. 22 at 23.) Defendants respond that delay of the Project
17 will cause both economic injury to Defendants as well as elevated fire risks. (ECF No. 32 at 23.)
18 Defendants further contend that any harm Plaintiffs allege ignores the overall improvement of the
19 area habitat. (ECF No. 32 at 21–22.)

20 Plaintiffs have satisfied their burden. As this Court previously noted, “[t]he very nature of
21 logging is that its completion is irreparable.” (ECF No. 43 at 3.) Further, as Plaintiffs point out,
22 any economic harm suffered by Defendants is not similarly irreparable. (*See* ECF No. 22 at 24.)
23 Should Defendants prevail in this litigation, they are not barred from eventually implementing the
24 Project. Plaintiffs, on the other hand, would have no available recourse. This factor weighs in
25 their favor.

26 C. Balance of the Equities and Public Interest

27 “The purpose of preliminary injunctive relief is to preserve the status quo if the balance of
28 _____
critical areas requires the preparation of an EIS. (ECF No. 22 at 18.)

1 equities so heavily favors the moving party that justice requires the court to intervene to secure
2 the positions until the merits of the action are ultimately determined.” *Heflebower v. U.S. Bank*
3 *Nat. Ass’n*, 2013 WL 3864214, at *18 (E.D. Cal. July 23, 2013) (citing *Univ. of Tex. v.*
4 *Camenisch*, 451 U.S. 390, 395 (1981)). “In exercising their sound discretion, courts of equity
5 should pay particular regard for the public consequences in employing the extraordinary remedy
6 of injunction.” *Winter*, 555 U.S. at 376–77 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S.
7 305, 312 (1982)).

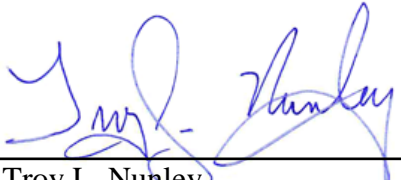
8 In light of Plaintiffs’ showing of serious questions regarding their likelihood of success on
9 the merits and of likely irreparable harm, the balance of equities and public interest tip sharply in
10 favor of Plaintiffs as any potential irreparable harm to Plaintiffs outweigh any harm a delay would
11 cause Defendants. *See All. for the Wild Rockies*, 632 F.3d at 1134–35 (9th Cir. 2011) (“A
12 preliminary injunction is appropriate when a plaintiff demonstrates . . . that serious questions
13 going to the merits were raised and the balance of hardships tips sharply in the plaintiff’s favor.”);
14 *see also South Fork Band Council of Western Shoshone of Nevada v. United States Dep’t of*
15 *Interior*, 588 F.3d 718, 728 (9th Cir. 2009) (holding that issuance of an injunction pending
16 consideration of environmental impacts under NEPA comported with the public interest).

17 These factors weigh in favor of granting Plaintiffs’ request for injunctive relief.

18 **V. CONCLUSION**

19 Accordingly, the Court GRANTS Plaintiffs’ Motion for Preliminary
20 Injunction/Temporary Restraining Order. (ECF No. 13.)

21 Dated: January 25, 2019

22
23
24 
25 Troy L. Nunley
26 United States District Judge
27
28