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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 DEFENDANTS'
MOTION FOR A STAY OF THE
PRELIMINARY INJUNCTION**

This matter is before the Court on American Forest Resource Council's ("Intervenor Defendant") Motion for a Stay of the Preliminary Injunction Pending Appeal (ECF No. 64), and on Patricia A. Grantham and United States Forest Service's ("Federal Defendants") Motion for a Stay of the Preliminary Injunction Pending Appeal (ECF No. 66). Plaintiffs have filed a

1 response. (ECF No. 67.) Federal Defendants and Intervenor Defendant have filed replies. (ECF
2 Nos. 70, 71.) For the reasons set forth below, the Court GRANTS both Federal Defendant’s and
3 Intervenor Defendant’s motions.

4 **I. FACTUAL AND PROCEDURAL BACKGROUND**

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

10 On November 12, 2018, Plaintiffs filed a motion for temporary restraining order and
11 preliminary injunction blocking the implementation of the Project pending a resolution of the
12 merits of this case. (ECF No. 13.) This Court granted Plaintiffs’ motion, stating Plaintiffs had
13 shown “serious questions regarding their likelihood of success on the merits and of likely irreparable
14 harm,” and found that “the balance of equities and public interest tip sharply in favor of Plaintiffs as
15 any potential irreparable harm to Plaintiffs outweigh any harm a delay would cause Defendants.”
16 (ECF No. 52 at 15.) Intervenor Defendant and Federal Defendants filed timely notices of appeal
17 (ECF Nos. 55, 60), which are still under consideration by the Ninth Circuit.

18 Now, both Intervenor Defendant and Federal Defendants have filed motions to stay this
19 Court’s issuance of a preliminary injunction pending a decision by the Ninth Circuit. (ECF Nos.
20 64, 66.)

21 **II. STANDARD OF LAW**

22 A stay is “an exercise of judicial discretion, and the propriety of its issue is dependent
23 upon the circumstances of the particular case.” *Nken v. Holder*, 556 U.S. 418, 433 (2009)
24 (internal quotation marks and alterations omitted). “The party requesting a stay bears the burden
25 of showing that the circumstances justify an exercise of that discretion.” *Id.* at 433–34.
26 However, the standard for evaluating stays pending appeal is similar to that employed by district
27 courts in deciding whether to grant a preliminary injunction. *Lopez v. Heckler*, 713 F.2d 1432,
28 1435 (9th Cir. 1983). Here, four considerations govern the Court’s analysis in ruling on this

1 motion: (1) whether the stay applicant has made a strong showing that it is likely to succeed on
2 the merits; (2) whether the stay applicant will be irreparably injured absent a stay; (3) whether
3 issuance of the stay will substantially injure other interested parties; and (4) where the public
4 interest lies. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

5 In other words, the “factors [that] inform . . . the decision to stay pending appeal . . . are
6 essentially the same as [those] applicable to a motion for a preliminary injunction[.]” *Morgan
7 Tire of Sacramento, Inc. v. Goodyear Tire & Rubber Co.*, No. 2:15–CV–00133–KJM–AC, 2015
8 WL 3623369, at *1 (E.D. Cal. June 9, 2015). Consequently, the Court assumes the Ninth
9 Circuit’s so-called “serious question’ approach” also applies to a motion for a stay pending an
10 appeal in the same manner it now applies to preliminary injunctions. *See All. for the Wild
11 Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (explaining “the ‘serious questions’
12 approach survive[d] *Winter* when applied as part of the four-element *Winter* test”). That is, there
13 is an alternative ground upon which a court may issue a stay pending an appeal, even where the
14 movant has not shown it is likely to succeed on the merits of that appeal. It operates as follows:
15 “serious questions going to the merits and a balance of hardships that tips sharply towards the
16 [appellant] can support issuance of a [stay pending appeal], so long as the [appellant] also shows
17 that there is a likelihood of irreparable injury and that the injunction is in the public interest.” *Id.*
18 (internal quotation marks omitted).

19 III. ANALYSIS

20 Federal Defendants argue in their motion for a stay that (1) they are likely to succeed on
21 the merits of their appeal, (2) they will be irreparably harmed in the absence of a stay, (3)
22 Plaintiffs’ recreation interest in the forest will not be substantially harmed, and (4) a stay of the
23 preliminary injunction is in the public’s interest. (ECF No. 66-1.) Intervenor Defendant argues
24 (1) they, along with their members will be irreparably harmed if a stay is not granted, (2) they
25 have made a strong showing of success on appeal, (3) an injunction issued because of a presumed
26 balance of harms is subject to reversal, and (4) the public interest favors a stay. (ECF No. 64-1.)
27 In response, Plaintiffs state that the Court properly granted the motion for a preliminary
28 injunction and they have raised serious questions which are likely to prevail on the merits.

1 A. Likelihood of Success

2 Federal Defendants first argue that Plaintiffs did not raise serious questions as to the
3 merits of their claims. (ECF No. 66-1 at 13.)

4 *i. Whether the Project is Consistent with the Aquatic Conservation*
5 *Strategy*

6 Federal Defendants first state that the Court “conflated the terms ‘threshold of concern’
7 and [natural range of variability (“NRV”)] to conclude the Project violates the [Aquatic
8 Conservation Strategy (“ACS”)].” (ECF No. 66-1 at 14.) Federal Defendants argue that the
9 Project’s “short-term impacts are within the NRV.” (ECF No. 66-1 at 15.) Federal Defendants
10 continue to argue that the ACS does not prohibit short-term impacts, and the Forest Service
11 properly considered those impacts. (ECF No. 66-1 at 15.) Plaintiffs respond that the Project does
12 not comply with the ACS because the Project will increase turbidity of area waterways and will
13 increase cumulative watershed effects. (ECF No. 67 at 8.)

14 In demonstrating ACS compliance, the Forest Service “must manage the riparian-
15 dependent resources to maintain the existing condition or implement actions to restore conditions.
16 The baseline from which to assess maintaining or restoring the condition is developed through a
17 watershed analysis. Improvement relates to restoring biological and physical processes within
18 their ranges of natural variability.” (SHAR_E_2158.) “In order to make the finding that a project
19 or management action ‘meets’ or ‘does not prevent attainment’ of the Aquatic Conservation
20 Strategy objectives, the analysis must include a description of the existing condition, a description
21 of the range of natural variability of the important physical and biological components of a given
22 watershed, and how the proposed project or management action maintains the existing condition
23 *or* moves it within the range of natural variability.” (SHAR_E_2158 (emphasis added).)

24 The Court acknowledged that so long as the impacts of a Project are within the range of
25 natural variability, the actions would be permissible under the ACS. (*See* ECF No. 52;
26 SHAR_E_2158.) For Objective 4, the Forest service recognized turbidity will be increased in the
27 short term; however, the Forest Service concluded that the Project’s effects on water quality will
28 not be significant. (SHAR_A_00147–48.) And while Federal Defendants argue that Objective 4

1 describes the “NRV for water quality as having short-term bouts of turbidity,” the Court is not
2 convinced that the Environmental Assessment states that the outcomes of Objective 4 fall within
3 the NRV. For instance, the section cited by Federal Defendants outlining the outcomes of
4 Objective 4, under the “Range of natural variability” heading reads:

5 Historically, in the range of natural variability, before European
6 contact water temperature and turbidity would fluctuate in response
7 to wildfires, landslide events, and other stochastic events. Wildfires
8 would reduce shading to streams until canopy cover over streams
9 recovered. Landslide events would widen and shallow stream
channels, and remove riparian vegetation shading streams, resulting
in greater rate of stream heating and cooling. Landslide events would
cause acute bouts of turbidity that would generally be short in
duration.

10 (SHAR_A_00147.) Neither the “Action Influence on Objective 4” heading nor the
11 “Determination” heading directly addresses whether the outcomes of Objective 4 fall within the
12 NRV. Compare this with Objective 3, where the Environmental Assessment expressly states that
13 the outcomes “would not increase past natural range of variability at the seventh field scale and
14 beyond,” (SHAR_A_00147), the Objective 4 determination merely states that:

15 Project elements would maintain and restore ACS Objective 4
16 because: (1) While water temperature may be increased in the short
17 term at the site scale, stream shading will be improved by riparian
18 planting in the long term; and (2) While turbidity will be increased
19 in the short term and at the site scale during legacy sediment site
treatment and large wood placement it will be improved drastically
by these treatments in the long term. Legacy sediment site treatments
will also have a net sediment savings at the seventh through fifth field
watershed scale.

20 (SHAR_A_00148.) At no point does the determination for Objective 4 mention that the
21 outcomes, including the increased water temperature and increased turbidity, fall within the NRV.
22 Nothing within the NRV heading expressly states that the outcomes for the objective are within
23 the NRV. Thus, even if the Court’s reliance on the “threshold of concern” was inadequate, the
24 Court is still unconvinced by Federal Defendants’ present argument. Plaintiffs still raise
25 substantial questions regarding whether Objective 4 fails to comply with the ACS requirements.

26 *ii. Whether the Project is Consistent with the Northwest Forest Plan’s*
27 *Guidelines for Snag Retention*

28 Federal Defendants next argue that Plaintiff and the Court’s reliance on *Oregon Natural*

1 *Resources Council Fund v. Brong*, 492 F.3d 1120 (9th Cir. 2007), was misplaced. (ECF No. 66-1
2 at 15–16.)

3 Federal Defendants argue that the Forest Service properly used the Klamath Forest Plan’s
4 numerical standards when assessing the number and locations of snags to retain. (ECF No. 66-1
5 at 16.) Federal Defendants state that *Brong* is inapplicable because the agency at issue in *Brong*
6 “did not have any forest plan numerical standards for retaining snags and lacked a basis for
7 determining a proper snag-retention method.” (ECF No. 66-1 at 16 (emphasis added).) Federal
8 Defendants contend that the Klamath Forest Plan’s (“KFP”) numerical standards should have
9 been accorded substantial deference as expressed in *Lands Council v. McNair*, 537 F.3d 981, 993
10 (9th Cir. 2008).¹ (ECF No. 66-1 at 16.)

11 Plaintiffs respond stating that the KFP, which allows the Forest Service to retain or
12 average snags over 100 acres, only addresses the needs of “primary cavity-association species”
13 such as woodpeckers and that the Forest Service was required to comply with the NFP in
14 planning and implementing the Project. (ECF No. 67 at 11.) As this Court previously explained,

15 Defendants cite to the KFP’s snag retention guidelines, which they
16 argue are applicable forest-wide. (ECF No. 32 at 14.) While the
17 KFP does include a forest-wide standard that allows for the
18 averaging of snags per 100 acres, the standard in the KFP does not
19 take into account the impact snag retention will have on the northern
20 spotted owl. See Klamath Forest Plan, 4-30,
21 [https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb533
22 3203.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5333203.pdf) (listing the species as: downy woodpecker, red breasted
23 sapsucker, hairy woodpecker, black backed woodpecker, white-
24 headed woodpecker, pileated woodpecker, and vaux’s swift). The
25 NFP on the other hand established management requirements for all
26 Forest Service land within the range of the northern spotted owl.

27 (ECF No. 52 at 11–12.)

28 While the Court is required to defer to the Forest Service, it is clear that the KFP does not
expressly consider the Northern Spotted Owl (“NSO”) in terms of snag retention standards. And,
at issue in this case is the NSO. The NFP clearly states that “salvage operations should not
diminish habitat suitability [for the NSO] now or in the future.” (SHAR_E_02195.) Defendants’
contention that “[w]hether the KFP’s snag-retention standards contemplates impacts on NSO

¹ In *Lands Council*, the court stated that the “law [] requires us to defer to an agency’s determination in an area involving a ‘high level of technical expertise.’” *Lands Council*, 537 F.3d at 993.

1 habitat is irrelevant” (ECF No. 66-1 at 16) is misguided. As the Court stated in its prior order, the
2 NFP was incorporated into the KFP (ECF No. 52 at 11); thus, the Forest Service must
3 contemplate the “habitat suitability” of the NSO.

4 Federal Defendants acknowledge that the Project explicitly states that because of the
5 Project’s logging operation there will be short and long-term degradation of the NSO’s habitat
6 elements. (ECF No. 70 at 7.) Defendants, however, argue that no “suitable habitat” will be
7 removed and to the extent the Project does “‘degrade’ or ‘downgrade’ suitable habitat, that habitat
8 remains suitable.” (ECF No. 66-1 at 18.) Plaintiff, in response, concedes that the Project does
9 not degrade “suitable habitat” as used to reference unburned habitat. (ECF No. 67 at 13.)
10 Plaintiff instead states that the Project does not comply with the NFP’s understanding of “*habitat*
11 *suitability*,” which Plaintiff argues is different than “suitable habitat.” (ECF No. 67 at 13.)
12 Plaintiffs fail to provide the Court with any citation to support their contention that these terms
13 are different. Without persuasive evidence to the contrary, the Court must defer to the Forest
14 Service’s findings that no suitable habitat will be removed. In requesting a motion to stay the
15 injunction, Federal Defendants have demonstrated a likelihood of success on this claim.

16 *iii. Whether an Environmental Impact Statement Was Required*

17 Federal Defendants argue that, contrary to the Court’s prior finding, the Project does not
18 necessitate an Environmental Impact Statement (“EIS”). (ECF No. 66-1 at 19.) In their initial
19 motion, Plaintiffs argued that an EIS was required because the Project will have significant
20 environmental effects, and in particular, because the Project violated NEPA based on 3 of the 10
21 intensity factors set forth in the NEPA regulations: (1) proximity to ecologically critical areas, (2)
22 potential cumulative effects, and (3) a threatened violation of 40 C.F.R. § 1508.27(b)(10). (ECF
23 No. 22 at 18–23.) The Court stated that to prevail on a claim that the Forest Service violated its
24 statutory duty to prepare an EIS, a “plaintiff need not show that significant effects will in fact
25 occur.” *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998).
26 “It is enough for the plaintiff to raise substantial questions whether a project may have a
27 significant effect on the environment.” *Id.*

28 Federal Defendants state that the Court only found an NFMA violation, and argue this is

1 insufficient to conclude that an EIS is required. (ECF No. 66-1 at 19.) The Court stated that “the
2 Plaintiffs [] raised substantial questions about the environmental impacts of the Project such that
3 an EIS might have been required.” (ECF No. 52 at 13.) However, as Plaintiffs point out, the
4 Court, in its prior order, considered the cumulative effects factor and threatened violations of the
5 law which included a NEPA violation. (See ECF No. 52.) The Court does not find that Federal
6 Defendants have demonstrated a likelihood of success on the merits for this argument.

7 B. Irreparable Harm

8 Federal Defendants argue that delaying the Project will result in the burned timber losing
9 value. (ECF No. 66-1 at 20.) If this happens, Federal Defendants contend that the Forest Service
10 will lose the source of funds necessary to implement specific Project activities which will reduce
11 the likelihood of a future catastrophic fire. (ECF No. 66-1 at 20.) In its initial order, this Court
12 determined that the harm to Federal Defendants was not irreparable because the Forest Service
13 would not be barred from eventually implementing the Project if it succeeded at a later stage in
14 the litigation. (ECF No. 66-1 at 20.) But based on evidence subsequently provided by Federal
15 Defendants, it appears that if the injunction remains in place, non-enjoined portions of the Project
16 may actually become permanently futile if the enjoined salvage operations are precluded from
17 taking place immediately. (See ECF No. 67 at 6.)

18 Plaintiffs argue that Federal Defendants’ argument boils down to the contention that if the
19 injunction is not stayed, there will be economic harm to both the Forest Service and AFRC. (ECF
20 No. 67 at 15.) The Court is not persuaded by this argument. Federal Defendants explain that
21 “[t]he salvage harvest is necessary both to safely and effectively implement site-preparation and
22 reforestation and because it is the only source of funds for implementing the Project’s non-
23 enjoined treatments.” (ECF No. 66-1 at 6.) According to evidence provided by Federal
24 Defendants, the commercial value of the fire-killed trees to be salvaged is rapidly declining to
25 such an extent that if the injunction remains in effect through the summer months, the timber will
26 lose its remaining economic value. (ECF No. 66-1 at 6.) This economic harm cannot be
27 mitigated to any significant degree if the timber continues to lose value during the pendency of
28 the Court’s injunction. Federal Defendants’ evidence shows that dollars generated by the

1 enjoined portions of the Project make it possible for the non-enjoined portions of the Project to
2 proceed. (ECF No. 66-1 at 6.) Hence, while on its face it appears that Federal Defendants are
3 concerned about economic harm, the reality is that this economic harm is a proxy for the non-
4 enjoined aspects of the Project. Accordingly, the Court finds that Federal Defendants
5 demonstrated the potential that they will suffer irreparable harm if this Project remains enjoined.

6 C. Injury to Plaintiffs

7 As discussed in this Court's prior order, Plaintiffs argue they will suffer irreparable
8 and immediate injury if the Project is implemented. (ECF No. 22 at 23.) Plaintiffs contend their
9 enjoyment of the areas at issue will be diminished and there are no "substitute areas" where
10 Plaintiffs can go for the same experience. (ECF No. 22 at 24.) Further, Plaintiffs assert they
11 have demonstrated a real interest in the health and recovery of post-fire environments and intact
12 ecosystems recovering from natural disturbance, such as old-growth forests which "cannot grow
13 back within their lifetimes." (ECF No. 22 at 23.) There is clearly injury to Plaintiffs should the
14 Court grant this stay, and thus, this factor weighs in favor of Plaintiffs.

15 D. Public's Interest

16 Federal Defendants argue again that the Project will "reduce the risk of another
17 catastrophic and dangerous fire." (ECF No. 66-1 at 10.) Moreover, Federal Defendants argue
18 that the delay in implementation will prevent the Project, in its entirety, from ever being
19 implemented. In its prior order, the Court reasoned that "[s]hould Defendants prevail in this
20 litigation, they are not barred from eventually implementing the Project." (ECF No. 52 at 14.)
21 However, in their motion to stay, Federal Defendants explain that this is no longer the case, as
22 without a stay they will be barred from implementing the Project.

23 As this Court previously noted in a separate matter, the public has an interest in
24 "reduc[ing] the chance that a catastrophic fire will again threaten the community." *Ctr. for*
25 *Biological Diversity v. Hays*, 2:15-cv-01627-TLN-CMK, 2015 WL 5916739, at *12 (E.D. Cal.
26 Oct. 8, 2015). As evidenced in the declaration of Defendant Patricia Grantham, Klamath Forest
27 Supervisor, critical components of the Project will be "doomed" should the injunction remain in
28 place including: fuelbreaks to protect nearby communities from wildfire, salvage treatments to

1 reduce fuel loads abutting private property, and snag removal to ensure safety for future fire-
2 fighting and public access. (ECF No. 66-2 ¶ 2.) Moreover, the evidence states that the current
3 injunction will prevent “important roadside hazard reductions” which would allow for the safe
4 passage of fire suppression personnel and members of the public. (ECF No. 66-2 ¶ 13.)

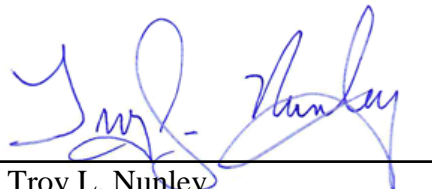
5 Weighing these four factors, the Court finds that the factors tip in favor of Defendants.
6 While Plaintiffs raised substantial questions regarding at least one of their claims, the Court must
7 defer to the Forest Service’s determination that without a stay the harm will become truly
8 irreparable. The crux of this Court’s first order was the fact that only Plaintiffs were in jeopardy
9 of irreparable harm. In light of Federal Defendant’s arguments in their newest motion, it is clear
10 that Federal Defendants will face irreparable harm that — most critically in the Court’s analysis
11 — will threaten the public safety should the injunction remain in place. Accordingly, the Court
12 must find in favor of Federal Defendants and stay the injunction pending appeal.

13 **IV. CONCLUSION**

14 Accordingly, it is HEREBY ORDERED that Federal Defendants and Intervenor
15 Defendant’s Motions to Stay (ECF Nos. 64 and 66) are GRANTED. The Court’s January 25,
16 2019 Order issuing a preliminary injunction (ECF No. 52) is STAYED pending appeal.

17 IT IS SO ORDERED.

18 Dated: May 31, 2019

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22 Troy L. Nunley
United States District Judge