

United States District Court

For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, et al.,
Plaintiffs,

v.

DALE BOSWORTH et al.,
Defendants,

and

SIERRA FOREST PRODUCTS,
Defendant-Intervenor.

No. C 05-00397 CRB

Related Case No. C. 05-0898 CRB

MEMORANDUM AND ORDER

_____ /
This is one of two lawsuits filed against the United States Forest Service and other individuals challenging the validity of the programmatic environmental management plan conducted pursuant to a presidential proclamation creating the Grand Sequoia National Monument. Plaintiffs, a conglomerate of environmental organizations, make three claims for relief here under the National Environmental Policy Act (“NEPA”): (1) the Grand Sequoia National Monument Management Plan violated NEPA for a variety of reasons; (2) the Plan violated the 1990 Mediated Settlement Agreement (“MSA”), and defendants’ disregard for the MSA violated NEPA; and (3) four logging projects violate NEPA. Now pending before the Court are cross-motions for summary judgment on all claims, as well as defendant-

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1 intervenor’s motion to increase the bond. The Court previously preliminarily enjoined two of
2 the four logging projects at issue in the third claim for relief.

3 In a Memorandum and Order concurrently issued today in the related case, California
4 v. United States Forest Service, Case No. C 05-00898 CRB, the Court held that the purported
5 Monument Plan violated NEPA. The Court hereby adopts and incorporates the opinion in
6 the companion case and GRANTS plaintiffs’ motion for summary judgment on the first two
7 claims for relief in this action. This Memorandum and Order solely addresses plaintiffs’
8 third claim for relief regarding the timber sales. After carefully considering the lengthy
9 administrative record, the parties’ briefing on this motion and the two previous motions for
10 preliminary injunction, and with the benefit of oral argument, the Court hereby GRANTS
11 plaintiffs’ motion for summary judgment on the third claim for relief and DENIES
12 defendants’ and defendant-intervenor’s motions for summary judgment.

13 **BACKGROUND**

14 By Executive Proclamation 7295, President Clinton created the Grand Sequoia
15 National Monument. Administrative Record (“AR”) 1979-1983. As it applies to this
16 dispute, the Proclamation preserved valid existing rights. Moreover, it expressly stated that
17 timber sales under contract as of the date of the Proclamation or those with a decision notice
18 signed in 1999 “may be completed consistent with the terms of the decision notice and
19 contract.” AR 1982. The Proclamation further prohibited timber production within the
20 Monument, and “no part of the monument shall be used in a calculation or provision of a
21 sustained yield of timber from the Sequoia National Forest.” Id. The Proclamation also
22 prohibited the removal of trees other than for personal use unless it is “clearly needed for
23 ecological restoration and maintenance or public safety.” Id. Finally, the Proclamation
24 stated: “Laws, regulations, and policies pertaining to administration by the Department of
25 Agriculture of grazing permits and timber sales under contract as of the date of this
26 proclamation on National Forest System lands within the boundaries of the monument shall
27 continue to apply to lands within the monument.” AR 1983.

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1 Four timber sales are at issue in this litigation, two within the boundaries of the
2 Monument and two adjacent to the Monument. The two located within the Monument—the
3 Saddle Fuels Reduction Project (“Saddle Project”) and the Revised White River Project
4 (“White River Project”)—and the Revised Ice Timber Sale and Fuels Reduction Project (“Ice
5 Project”) were analyzed in Environmental Assessments (“EA”) and were the subject of
6 decision notices in 1999. These three projects were existing timber sales expressly permitted
7 by the Proclamation. The Frog Project Area Analysis (“Frog Project”) was analyzed through
8 an environmental assessment and received a decision notice in 2001. For each project, the
9 Forest Service reached a Finding of No Significant Impact (“FONSI”) as to the pacific fisher
10 or spotted owl, and therefore an EIS was not conducted. All of the EA’s relied on the 1993
11 CASPO Guidelines to limit any adverse impacts to the spotted owl and to the pacific fisher,
12 to the extent the mitigation measures also applied to the fisher. On October 26, 2005, the
13 Forest Service produced Supplemental Information Reports (“SIRs”) regarding the Saddle
14 Project and the Ice Project, concluding that a supplemental EIS was unnecessary because the
15 projects would have an “insignificant yet beneficial impact” on the pacific fisher. In all of
16 the environmental reviews of these projects, the Forest Service stated that they “may affect
17 individual” fisher but are not likely to “result in a trend toward federal listing or loss of
18 viability” of the species. See, e.g., Ice Project EA at *59.

19 PROCEDURAL HISTORY

20 Plaintiffs filed suit on January 27, 2005, and submitted a Second Amended Complaint
21 on November 2, 2005. On August 9, 2005, the Court permitted Sierra Forest Products to
22 intervene as to the third claim for relief. The Court entered preliminary injunctions against
23 the Saddle Fuels Reduction Project on September 9, 2005, and against the Ice Timber Sale on
24 November 14, 2005, temporarily halting any logging activities by intervenor. In both
25 decisions, the Court concluded that plaintiffs would likely succeed on the merits of their
26 claim because significant new information emerged regarding the fisher after the original
27 NEPA reviews, and because the Forest Service did not conduct a proper “hard look” at that
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1 information under NEPA. The Court now addresses cross-motions for summary judgment
2 and plaintiffs' request to enter a permanent injunction as to the four logging projects.

3 LEGAL STANDARD

4 The issue presently before the Court requires an inquiry into whether the Forest
5 Service properly considered and analyzed new information subsequent to the original
6 environmental reviews and approvals of the four timber projects. "[T]he Forest Service's
7 failure to evaluate in a timely manner the need to supplement the original EIS in light of ...
8 new information violate[s] NEPA." Friends of the Clearwater v. Dombeck, 222 F.3d 552,
9 559 (9th Cir. 2000). However, even where the agency has failed to satisfy NEPA in this
10 regard, it can rectify the violation after the onset of litigation by conducting an appropriate
11 analysis while the case is still pending. See id. at 560-61. Where this analysis amounts to a
12 "hard look," injunctive relief is inappropriate. See id. ("[I]t would serve no useful purpose ...
13 to order the Forest Service to prepare studies that the Forest Service has already completed
14 and that cannot be successfully challenged."). "A hard look should involve a discussion of
15 adverse impacts that does not improperly minimize negative side effects." Earth Island Inst.
16 v. United States Forest Serv., 442 F.3d 1147, 1159 (9th Cir. 2006). Thus, the Forest Service
17 must "undertake a thorough environmental analysis before concluding that no significant
18 environmental impact exists." Id. (citing Native Ecosystems Council v. United States Forest
19 Serv., 428 F.3d 1233, 1239 (9th Cir. 2005)).

20 "In reviewing an agency's decision not to prepare an EIS under NEPA, we employ an
21 arbitrary and capricious standard that requires us to determine whether the agency has taken a
22 'hard look' at the consequences of its actions, 'based [its decision] on a consideration of the
23 relevant factors,' and provided a 'convincing statement of reasons to explain why a project's
24 impacts are insignificant.'" Native Ecosystems, 428 F.3d at 1239 (quoting Nat'l Parks &
25 Conservation Ass'n v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001)). An agency cannot rest on
26 the conclusions made by an EIS or EA but instead maintains a continuing obligation to take a
27 "hard look at the environmental effects of its planned action, even after a proposal has
28 received initial approval." Marsh v. Oregon Nat. Res. Council, 490 U.S. 360, 374 (1989).

1 That continuing duty further requires a federal agency to gather and evaluate new
 2 information relevant to the environmental impact of its actions and then “make a reasoned
 3 determination whether it is of such significance as to require implementation of formal
 4 NEPA filing procedures.” Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1023,
 5 1024 (9th Cir. 1980).

6 The Ninth Circuit has held that an EIS “*must* be prepared if substantial questions are
 7 raised as to whether a project ... *may* cause significant degradation of some environmental
 8 factor.” Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1149 (9th Cir. 1998) (citations
 9 omitted) (emphasis in original). Yet “an agency need not supplement an EIS every time new
 10 information comes to light after the EIS is finalized.” Marsh, 490 U.S. at 374; see also
 11 Thomas, 137 F.3d at 1150 (noting that a plaintiff need not show that “significant effects *will*
 12 *in fact occur*,” but rather must show that there are “substantial questions whether a project
 13 may have a significant effect”) (emphasis added). “Whether a project is significant depends
 14 on both the project’s context and its intensity.” Native Ecosystems, 428 F.3d at 1239 (citing
 15 40 C.F.R. § 1508.27). The intensity of a project is evaluated on various factors and can
 16 include impacts that are both beneficial and adverse. 40 C.F.R. § 1508.27(b)(1). The
 17 following factors are relevant here: (1) “The degree to which the effects on the quality of the
 18 human environment are likely to be highly controversial,” id. § 1508.27(b)(4); “[t]he degree
 19 to which the possible effects on the human environment are highly uncertain or involve
 20 unique or unknown risks,” id. § 1508.27(b)(5); “[w]hether the action is related to other
 21 actions with individually insignificant but cumulatively significant impacts,” id. §
 22 1508.27(b)(7); and “[t]he degree to which the action may adversely an endangered or
 23 threatened species or its habitat that has been determined to be critical under the Endangered
 24 Species Act of 1973,” id. § 1508.27(b)(9).

25 Like the decision whether to prepare an EIS in the first instance, a supplemental EIS
 26 should be prepared if: (1) “there remains ‘major Federal actio[n]’ to occur,” and (2) “if the
 27 new information is sufficient to show that the remaining action will ‘affec[t] the quality of
 28 the human environment’ in a significant manner or to a significant extent not already

1 considered.” Marsh, 490 U.S. at 374. Under the arbitrary and capricious standard applied
 2 here, the Court uses a “rule of reason” to determine “whether the decision was based on a
 3 consideration of the relevant factors and whether there has been a clear error of judgment.”
 4 See Thomas, 137 F.3d at 1149 (quoting Marsh, 490 U.S. at 378). “Review under this
 5 standard is to be searching and careful, but remains narrow, and a court is not to substitute its
 6 judgment for that of the agency.” Id. (quoting Mt. Graham Red Squirrel v. Espy, 986 F.2d
 7 1568, 1571 (9th Cir. 1993)).

8 DISCUSSION

9 I. Failure to Exhaust Administrative Remedies

10 As a threshold matter, defendants argue that several of the plaintiffs failed to exhaust
 11 their administrative remedies on some or all of the claims prior to filing this lawsuit and they
 12 should therefore be dismissed from the lawsuit on those grounds. Defendants, however, do
 13 not dispute that the Sierra Club and Tule River Conservancy exhausted all the requisite
 14 administrative remedies, which thereby informed the Forest Service of the claims and
 15 arguments at issue here. As a result, the Court finds that plaintiffs have adequately exhausted
 16 the administrative remedies for two reasons.

17 First, there is no dispute that the Forest Service was put on notice of plaintiff’s claims
 18 and arguments. Since the purpose of the exhaustion requirement is to ensure that agency “be
 19 given first shot at resolving a claimant’s difficulties,” there is no question that the plaintiffs
 20 have met the underlying rationale supporting the exhaustion requirement. See Thomas, 305
 21 F.3d at 965. Second, it would be futile to require the additional plaintiffs to exhaust their
 22 administrative remedies where such exhaustion would not have any effect on the Forest
 23 Service’s response. See Northcoast Env’tl Ctr. v. Glickman, 1996 U.S. Dist. LEXIS 22845
 24 at *10-11, *aff’d*, 136 F.3d 660 (9th Cir. 1998) (holding that where at least one plaintiff
 25 satisfied the exhaustion requirements on all claims, “it would be futile to require the
 26 remaining defendants to do so as well”). Where, as here, the posture and substance of a
 27 litigation would not have been altered if all plaintiffs had exhausted their administrative
 28 remedies, and such exhaustion would be futile nonetheless, the Court finds that it is not

1 necessary for all plaintiffs to exhaust their administrative remedies insofar as at least one
2 plaintiff has put the Forest Service on notice of all of the arguments and issues relevant here.

3 **II. Timber Contracts**

4 **A. Saddle, Ice and White River Projects**

5 On September 9, 2005, the Court entered a preliminary injunction against a
6 commercial logging contract called the Saddle Fuels Reduction Project (“Saddle Project”).
7 See Sierra Club v. Bosworth, 2005 WL 2204986 (N.D. Cal. Sep. 09, 2005) (No. C 05-00397
8 CRB) (“Saddle Order”). On November 14, 2005, the Court also entered a preliminary
9 injunction against a similar logging contract called the Ice Timber Sale and Fuels Reduction
10 Project (“Ice Project”). See Sierra Club v. Bosworth, 2005 WL 3096149 (N.D. Cal. Nov. 14,
11 2005) (No. C 05-00397 CRB) (“Ice Order”). Both preliminary injunctions halted ongoing
12 logging activity by intervenor Sierra Forest Products. Plaintiffs now ask the Court to
13 permanently enjoin these projects until a proper NEPA review is conducted on the significant
14 new information that has developed since the decision notices and NEPA reviews regarding
15 these projects.

16 In addition, the parties do not dispute that the White River Project, though not subject
17 to a preliminary injunction, is a project similarly situated to the Saddle Project in that it
18 received a near-identical NEPA review and was subject to the provisions of the
19 Proclamation. Moreover, because the White River NEPA analysis directly related to the Ice
20 Project, and because the Ice Supplemental Information Report (“Ice SIR”) addressed the
21 White River Project, the Court had the occasion to review that project as part of the Ice
22 Order. Thus, the Court finds that the White River Project is subject to the same analysis as
23 the Saddle and Ice Projects.

24 **1. Major Federal Action**

25 Defendants contend that these projects are no longer ongoing major federal actions
26 because they have already been approved. To this end, defendants attempt to place this case
27 under Norton v. Southern Utah Wilderness Alliance (SUWA), 542 U.S. 55 (2004), as it
28 distinguishes Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989). In Marsh,

1 the Supreme Court cited the regulations of the Council on Environmental Quality, the
2 regulating agency under NEPA, in holding that federal agencies must supplement an EIS if
3 there “are *significant* new circumstances or information relevant to environmental concerns
4 and bearing on the *proposed action* or its impacts.” Marsh, 490 U.S. at 372 (quoting 40
5 C.F.R. § 1502.9(c)(1)(ii)) (emphasis added). The Court noted that NEPA requires agencies
6 to take a “hard look” “at the environmental effects of their planned action, even after a
7 proposal has received initial approval.” Id. at 374. Ultimately, the Court determined that
8 new information about the environmental impacts of a federally-funded dam yet to be
9 constructed must receive a supplemental hard look. Id. at 385. In that case, however, a hard
10 look was properly done without a supplemental EIS. Id.

11 In SUWA, the Court distinguished Marsh by noting that the dam at issue in Marsh had
12 yet to be completed, whereas a programmatic land use plan had already received final
13 approval from the Bureau of Land Management. SUWA, 542 U.S. at 73. As a result,
14 supplementation of the EIS was unnecessary because there was no longer a “proposed
15 action.” Id. The Ninth Circuit has had one opportunity to address the SUWA distinction.
16 See Cold Mountain v. Garber, 375 F.3d 884 (9th Cir. 2004). In that case, the Forest Service
17 issued a special use permit to the Montana Department of Livestock to operate a bison
18 capture facility. Environmental groups challenged the permit under NEPA in part because of
19 new information that emerged after the permit was issued regarding violations of restrictions
20 outlined in the permit. Id. at 891-892. The court determined without any analysis that the
21 permit had been approved and issued, and therefore there was “no ongoing ‘major Federal
22 action’ requiring supplementation.” Id. at 894.

23 Here, the Court must determine whether a timber sale contract that has been approved
24 by the Forest Service and awarded to a third party remains a “proposed action” that requires
25 supplementation if new significant information emerges. If not, and if the approval of the
26 contract “completes” the major federal action, then the Forest Service does not have an
27 obligation to supplement its EIS.

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1 The Court finds that the timber projects are major ongoing federal actions. First, the
2 timber projects, like the dam construction project, are site-specific projects. By contrast, the
3 major federal action in SUWA was a programmatic-level land use plan that was completed
4 upon initial approval. And in Cold Mountain, the court gave no indication that the Forest
5 Service maintained any ongoing oversight or involvement in the administration of the special
6 use permit once it was issued. Where an action has not yet been completed, the agency has
7 “a continuing duty to gather and evaluate new information relevant to the environmental
8 impacts of its actions.” Friends of the Clearwater v. Dombeck, 222 F.3d 552, 559 (9th Cir.
9 2000). Based on a close reading of these cases, the Court finds that the timber projects are
10 akin to the site-specific dam construction project at issue in Marsh rather than a
11 programmatic-level land use plan at issue in SUWA.

12 Second, unlike the special use permit in Cold Mountain, the timber sales contracts
13 permit the Forest Service to terminate the contracts if it determines that continuation of the
14 projects would, as relevant here: (1) “cause serious environmental degradation or resource
15 damage;” or (2) “adversely affect species listed as threatened or endangered under the
16 Endangered Species Act ... or a sensitive species” by the Forest Service. See Timber Sales
17 Contracts, ¶ Termination. This clause permits the Forest Service to unilaterally terminate the
18 contract if its original environmental analysis has been altered by, for example, significant
19 new information regarding its effects on a native species. As a result, approval of the
20 contracts is not effectively final if additional information would alter the environmental
21 analysis.

22 Third, all of the timber sale contracts required the Forest Service’s written approval of
23 the operating plan prior to the commencement of logging. See Decl. of Paul S. Miller, Exhs.
24 A-D (Timber Sale Contracts, Plan of Operation) (“Forest Service written approval of the plan
25 of operation is prerequisite to commencement of Purchaser’s Operations.”). In fact, just
26 prior to the commencement of the Saddle Project, the Forest Service approved such an
27 operating plan for the Project. See Decl. of Alex Kriegsman, Exh. C. This further
28 distinguishes this case from the special use permit at issue in Cold Mountain, which did not

1 require an operating plan approval following the initial approval. Here, the Court therefore
 2 finds that final approval of the project had yet to be executed at the time the Forest Service
 3 awarded the contract and completed its initial NEPA reviews. Moreover, “operating plans
 4 are considered to be major federal actions under NEPA, requiring preparation of an EIS.”
 5 City of Tenakee Springs v. Block, 778 F.2d 1402, 1404 (9th Cir. 1985). Therefore, Marsh
 6 controls and supplementation of the original NEPA documents is necessary if there is
 7 significant new information that might alter the environmental analysis.

8 2. **Significant New Information**

9 The Court has twice previously had an opportunity to review the record as it pertains
 10 to new information regarding the proposed timber projects and its effects on the Pacific
 11 fisher. In the Saddle and Ice Orders, the Court concluded that new information about the
 12 fisher—in particular, a 2004 Fish and Wildlife Service finding that the fisher meets the criteria
 13 to be listed as an endangered species, and that the southern Sierra fisher is a genetically
 14 distinct species in danger of extirpation; and defendants’ concession that as many as 23 of
 15 what may be as few as 50 living female fisher may be affected by the projects—constituted
 16 significant new information that requires a supplemental “hard look” at the environmental
 17 impacts of the logging projects. See Saddle Order at *6-10; Ice Order at *13-16 (analyzing
 18 factors under 40 CFR section 1508.27). Furthermore, the Court concluded that a
 19 Supplemental Information Report prepared after litigation commences can satisfy the Forest
 20 Service’s duty to take a “hard look” at significant new information. Nevertheless, those that
 21 were conducted here failed to take an appropriate “hard look.” See Ice Order at *8-11. The
 22 Court further concluded that a one-paragraph assessment of the cumulative impacts of the
 23 projects and an unsupported conclusion that the projects “may affect individual fisher but
 24 would not likely result in a trend toward federal listing or loss of viability of the fisher” was
 25 also insufficient to constitute a “hard look” at the additional information. See Ice Order 14,
 26 16-18 (quoting October Ice SIR at *19); see also Earth Island, 442 F.3d at 1172 (“FEISs
 27 must respond explicitly and directly to conflicting views in order to satisfy NEPA’s
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1 procedural requirements.”). In sum, the Court found that plaintiffs presented serious
2 questions as to the sufficiency and adequacy of the Forest Service’s conduct.

3 The Court is now asked to enter summary judgment in favor of plaintiffs and enter a
4 permanent injunction against the continuation (or commencement) of the logging projects.
5 Notably, the record before the Court has not changed since the Ice Order,¹ and the Forest
6 Service has apparently not made any additional efforts to conduct a supplemental
7 environmental review of the impacts of the logging projects. The Ninth Circuit, however,
8 has had two more occasions to address similar circumstances since the Ice Order. See Earth
9 Island, 442 F.3d at 1159 (holding that the Forest Service failed to take a hard look at the
10 effects of two logging projects on the California spotted owl); Ecology Ctr., Inc. v. Austin,
11 430 F.3d 1057, 1067 (9th Cir. 2005). In both instances, the Court of Appeals has further
12 strengthened the legal underpinnings of the Court’s decisions addressing the preliminary
13 injunctions.

14 In Ecology Center, the court addressed whether an EIS adequately addressed the
15 environmental effects on the black-backed woodpecker of a post-wildfire logging project in
16 the Lolo National Forest. 430 F.3d at 1067. The court concluded that “[t]he EIS fails to
17 adequately explain the basis for the Forest Service’s conclusion that eliminating a portion of
18 the newly-created habitat will not adversely affect the black-backed woodpeckers’ viability.”
19 Id. The EIS at issue there stated that “even though salvaging post-fire habitat may
20 negatively impact individual black-backed woodpeckers, it will ‘not likely result in a trend
21 towards federal listing.’” Id. The court stated that “[w]ithout more, this general statement
22 regarding the possible impact and risk involved do[es] not constitute a ‘hard look’ absent a
23 justification regarding why more definitive information could not be provided.” Id. (internal
24 citations and quotations omitted). The Forest Service’s conclusion here is eerily similar to
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26 ¹The Court notes that there is one minor addition to the record. Intervenor submitted a
27 letter from the Fish and Wildlife Service clarifying the August 31, 2005, letter regarding the
28 Saddle Project. While the Court appreciates the clarification efforts, it finds that this letter is
more appropriately suited to be included as part of a ‘hard look’ at the environmental impacts
of the project. Since the Forest Service did not consider this letter as part of its supplemental
review, it is therefore irrelevant to the inquiry here.

1 that which the Ecology Center court ruled to be insufficient to constitute a hard look. See
2 October Ice SIR at *19 (concluding that the Ice Project “may affect individual fisher but
3 would not likely result in a trend toward federal listing or loss of viability of the fisher”).

4 Moreover, the Ninth Circuit recently identified “a disturbing trend in the [Forest
5 Service’s] recent timber-harvesting and timber-sale activities.” Earth Island, 442 F.3d at
6 1177-78 (listing eight cases since 2002 where courts found the Forest Service to have
7 violated environmental laws relating to logging projects). Noting the “substantial financial
8 interest in the harvesting of timber,” the court stated: “We regret to say that in this case, like
9 the others just cited, the [Forest Service] appears to have been more interested in harvesting
10 timber than in complying with our environmental laws.” Id. at 1178. It appears from the
11 record before the Court that, like in Earth Island and the cases cited therein, the Forest
12 Service’s interest in harvesting timber has trampled the applicable environmental laws.

13 Based on a consistent line of Ninth Circuit case law, as more fully analyzed in the
14 Saddle and Ice Orders, and the extensive record here, the Court finds that the Forest Service
15 has failed to conduct a proper “hard look” at the significant new information regarding the
16 impacts of the timber projects on the Pacific fisher. Accordingly, the Court hereby GRANTS
17 plaintiffs’ motion for summary judgment and further ENTERS a permanent injunction
18 against the Saddle, Ice and White River Projects until a proper supplemental NEPA review
19 has been conducted.

20 **B. Frog Project**

21 There are several differences between the Frog Project and the other timber projects.
22 First, the Frog Project is located outside of the Monument. Moreover, the initial sales
23 contract, NEPA review and decision notice on the Frog Project were conducted *after* the
24 Presidential Proclamation was executed and therefore this project is not subject to the
25 provisions of the Proclamation. Second, because plaintiffs filed a Second Amended
26 Complaint after the parties established the briefing schedule for these cross-motions for
27 summary judgment, the administrative record relating to the Frog Project was not filed until
28 after plaintiffs’ were required to file their opening memorandum in support of their motion

1 for summary judgment. Third, the Court has not had a previous occasion to review the
2 NEPA documents relating to the Frog Project.

3 As a threshold matter, defendants argue that plaintiffs waived their arguments
4 regarding the Frog Project by not including them in their opening brief. The Court, however,
5 finds that plaintiffs did not waive their claims concerning the Frog Project by not including
6 arguments pertaining to the Frog Project in their opening memorandum. The Court granted
7 plaintiffs leave to file a Second Amended Complaint, which included a claim pertaining to
8 the Frog Project. Plaintiffs' reply brief was their first opportunity to address this claim on the
9 basis of a record before the Court. Moreover, defendants had an opportunity to respond to
10 plaintiffs' arguments and therefore suffered no prejudice as a result of the delayed argument.
11 Thus, it is appropriate for the Court to address the merits of plaintiffs' claim.

12 The Court further finds that the conclusions regarding the other three logging projects
13 apply equally to the Frog Project. Most importantly, the Court's ruling above rests on the
14 existence of significant new information regarding the Pacific fisher that has not been
15 appropriately analyzed by the Forest Service. That information, particularly the Fish and
16 Wildlife Service Finding that the southern Sierra fisher is a candidate for listing as an
17 endangered species and a genetically distinct species, and the supporting evidence thereof,
18 came to light after the Frog decision notice and NEPA review. Therefore, the Forest Service
19 is required to take a "hard look" at this new information in conjunction with the Frog Project.
20 There is no dispute that no supplemental NEPA review of the Frog Project has been
21 conducted yet. Accordingly, the Court hereby GRANTS plaintiffs' motion for summary
22 judgment and ENTERS a permanent injunction against execution of the Frog Project until a
23 satisfactory supplemental NEPA review has been conducted concerning the recent and
24 significant new information on the Pacific fisher.

25 **CONCLUSION**

26 For the foregoing reasons, the Court finds that the Forest Service has failed to conduct
27 an adequate and sufficient "hard look" at significant new information pertaining to the
28 Pacific fisher. Thus, the four timber projects at issue here are hereby permanently


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1 ENJOINED until the Forest Service conducts an adequate and sufficient supplemental NEPA
 2 review. Accordingly, intervenor’s motion to increase bond is DENIED. The parties shall
 3 meet and confer on a proposed form of judgment consistent with this opinion, which shall be
 4 filed no later than September 15, 2006, and which shall include interim guidance until the
 5 Forest Service conducts a proper NEPA analysis. If the parties are unable to agree, they shall
 6 each submit separate proposed forms of judgment by the same date for the Court’s
 7 consideration.

8 **IT IS SO ORDERED.**

11 Dated: August 22, 2006

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 11 _____
 CHARLES R. BREYER
 UNITED STATES DISTRICT JUDGE

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