

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

CONSERVATION CONGRESS, a  
nonprofit organization,

Plaintiff,

v.

UNITED STATES FOREST SERVICE;  
UNITED STATES FISH AND WILDLIFE  
SERVICE,

Defendants.

No. 2:13-cv-01922-TLN-CMK

**ORDER**

This matter is before the Court pursuant to a motion for a temporary restraining order and/or preliminary injunction filed by Plaintiff Conservation Congress (“Plaintiff”). (ECF No. 50.) Defendants United States Forest Service (“Forest Service”) and United States Fish and Wildlife Service (“FWS”) oppose the motion. (ECF No. 56.)

The instant case involves a forestry project, the Bagley Hazard Tree Abatement Project (“Bagley Project”) following a large fire in the Shasta-Trinity National Forest. In the underlying complaint, Plaintiff alleges that Defendants unlawfully approved the Bagley Project in violation of several federal environmental laws. (Compl. ¶¶ 1, 2, ECF No. 1.) Felling operations associated with a small subset of the Bagley Project began on October 19, 2016. Plaintiff seeks a temporary restraining order and/or preliminary injunction to halt some of the felling. (Pl.’s Mot.

1 for TRO and/or Prelim. Inj. (“Mot.”) 1–2, ECF No. 50-2.) The Court has carefully considered the  
2 arguments the parties set forth in their briefing. For the reasons discussed below, Plaintiff’s  
3 motion (ECF No. 50) is DENIED.

4 **I. FACTUAL BACKGROUND**

5 In August 2012, lightning strikes ignited a forest fire in the Shasta-Trinity National Forest  
6 that came to be known as the “Bagley Fire” (hereinafter “Bagley Fire”). (Environmental  
7 Assessment: Bagley Hazard Tree Abatement Project (“EA”), FS-BAR-30, ECF No. 32.)<sup>1</sup> The  
8 Bagley Fire eventually burned over 46,000 acres of public and private land in Shasta County,  
9 roughly 70% of which is located in the Shasta Lake and McCloud Ranger Districts of the  
10 National Forest. (EA, FS-BAR-30, ECF No. 32.) The remaining 30% of the fire area is private  
11 land. (EA, FS-BAR-30, ECF No. 32.) Private land in the fire area is interspersed throughout the  
12 public lands, and the fire area resembles a checkerboard of public and private ownership. (See  
13 EA, FS-BAR-32, ECF No. 32.) The fire burned more severely in some places than others and it  
14 left behind a patchwork arrangement of burn severities—a “mosaic of fire-killed and defective  
15 trees” spread across the landscape. (EA, FS-BAR-30, ECF No. 32; Hamilton Decl. ¶5, ECF No.  
16 57.)

17 Ninety-five miles of National Forest System (NFS) roads, open to the public, crisscross  
18 the fire area. (EA, FS-BAR-30, ECF No. 32.) The NFS roads within the fire area are classified  
19 as Operation Maintenance Level 2 and Level 3, which means the Forest Service maintains the  
20 roads for access by high-clearance vehicles and standard passenger cars, respectively. (EA, FS-  
21 BAR-24, ECF No. 32; Malone Decl. Ex. 7, at 19–39, ECF No. 52-7.) Like the rest of the fire  
22 area, the areas around the NFS roads burned at varying levels of severity. (EA, FS-BAR-30, ECF  
23 No. 32.) These roadside areas now have a mosaic of fire-killed and defective trees comparable to  
24 the fire area at large. (EA, FS-BAR-30, ECF No. 32.) In some places, the roadside damage is  
25 limited to intermittent fire-killed trees. In others, high-severity fire damage and dead trees sprawl  
26 across acre after acre. (EA, FS-BAR-30, ECF No. 32.) Some of these burned roadside trees have

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<sup>1</sup> The Court cites the Forest Service Bagley Administrative Record (ECF No. 32) as FS-BAR-[Bates page  
number] and the FWS Bagley Administrative Record (ECF No. 38) as FWS-BAR-[Bates page number].

1 become hazard trees. (EA, FS-BAR-24, ECF No. 32.) According to the *Hazard Tree Guidelines*  
2 for Forest Service Facilities and Roads in the Pacific Southwest Region, hazard trees are:

3 dead or dying trees, dead parts of live trees, or unstable live trees  
4 (due to structural defects or other factors) that are within striking  
5 distance of people or property (a target). Hazard trees have the  
6 potential to cause property damage, personal injury or fatality in the  
7 event of a failure.

8 (EA, FS-BAR-228, ECF No. 32.)

9 In the name of public safety, the Forest Service closed almost all of the NFS roads in the  
10 fire area immediately after the Bagley Fire.<sup>2</sup> The closure order is still in place, and has been  
11 continuously since the fire. *Id.* (See also Hamilton Decl. ¶ 8, ECF No. 57.) Nevertheless, the  
12 affected NFS roads are traveled with some frequency. Many state and federal employees—Forest  
13 Service personnel, firefighters, and the like—must use the roads to perform their jobs. (Hamilton  
14 Decl. ¶ 9, ECF No. 57.) In addition, the NFS roads are burdened by easements allowing private  
15 landowners to access their inholdings within the fire area. (Hamilton Decl. ¶ 9, ECF No. 57.)  
These users are all exempted from the closure order, *see* FS Bagley Closure Order, *supra*, and  
must all rely on the roads in spite of the ongoing presence of hazard trees.

16 The Bagley Project was designed to mitigate the risks associated with those hazard trees.  
17 As originally planned, the Bagley Project would do three things:

18

- 19 • Along 95 miles of open NFS roads, identify and fell hazard trees  
that have lost their structural integrity and are likely to fall  
uncontrolled, jeopardizing public safety and the transportation  
system (5,430 acres).
- 20
- 21 • Salvage higher concentrations of felled trees along 19 segmented  
miles of NFS roads (776 acres).
- 22
- 23 • Treat activity-created fuels in excess of 10 tons per acre (woody  
material less than or equal to 9-inches in diameter).

24 (EA, FS-BAR-38, ECF No. 32 (footnotes omitted).) According to the Forest Service, the Bagley  
25 Project would serve three purposes. First, the project would remove hazard trees and retain open,  
26 safe NFS roads for management and recreational uses. (Decision Notice and Finding of No

27 <sup>2</sup> FS Closure Order 14-12-02, Shasta-Trinity National Forest Bagley Fire Emergency Closure (U.S.D.A.  
28 2012), <http://www.fs.usda.gov/detailfull/stnf/alerts-notices/?cid=stelprdb5443633&width=full> (“FS Bagley Closure  
Order”).

1 Significant Impact: Bagley Hazard Tree Abatement Project (“DN/FONSI”), FS-BAR-3, ECF No.  
2 32.) Second, the project would allow the Forest Service to meet its legal and contractual  
3 obligations to share NFS road maintenance and repair costs with private users.<sup>3</sup> (DN/FONSI, FS-  
4 BAR-03, ECF No. 32.) Third, the project would allow the Forest Service to recover the monetary  
5 value of the wood through salvage and sale, offsetting the cost to the public. (DN/FONSI, FS-  
6 BAR-04, ECF No. 32.)

7 In the spring of 2013, the Forest Service began the regulatory approval process for the  
8 Bagley Project, as required by the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§  
9 4321 *et seq.*, and the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.* The Forest  
10 Service prepared a preliminary Environmental Assessment to comply with NEPA, and also went  
11 through informal consultation with FWS to analyze the effect the Bagley Project would have on  
12 species protected by the ESA. (DN/FONSI, FS-BAR-5–6, ECF No. 32.) On August 29, 2013,  
13 the Forest Service issued a final Environmental Assessment and a Finding of No Significant  
14 Impact, concluding the approval process. (EA, FS-BAR-20–253, ECF No. 32; DN/FONSI, FS-  
15 BAR-2–19, ECF No. 32.) The Bagley Project was approved the same day. (DN/FONSI, FS-  
16 BAR-4, ECF No. 32.)

17 But the Bagley Project was not implemented after it was approved. The Forest Service  
18 initially attempted to find contractors who would bid for the right to harvest the salvage timber  
19 from the hazard trees. (Hamilton Decl. ¶ 10, ECF No. 57.) Despite several rounds of advertising,  
20 the Forest Service received no bids, and no timber felling or salvage logging occurred. (Hamilton  
21 Decl. ¶ 10, ECF No. 57.) In fact, it appears highly unlikely that salvage logging will ever occur.  
22 “Because the quality of fire-killed trees depreciates rapidly following a fire, it is no longer  
23 possible to obtain commercial value from any of the fire-killed hazard trees.” (Hamilton Decl. ¶  
24 10, ECF No. 57.)

25 In the summer of 2016, the Forest Service, still concerned about the hazard trees and  
26 attendant road closures, decided to try again. The Forest Service solicited bids to pay a contractor

27 <sup>3</sup> Pursuant to agreements it entered under the Forest Roads and Trails Act of 1964, 15 U.S.C. §§ 532 *et seq.*,  
28 the Forest Service shares with private landowners the maintenance and repair costs for over 40 miles of roads in the  
fire area. (EA, FS-BAR-37–38, ECF No. 32.)

1 to fell the hazard trees in place along 22 miles of a “priority loop” that receives more traffic than  
2 the other affected NFS roads. (Wood Decl. Ex. A. at 22, ECF No. 60-1.) Most of the work under  
3 that contract was focused on 6.4 segmented miles of road that received high burn severity and  
4 consequently had lots of hazard trees. (Wood Decl. Ex. A. at 22, ECF No. 60-1.) On September  
5 22, 2016, a portion of that contract was awarded to Pacific Ridgeline Forestry, LLC (“Pacific  
6 Ridgeline”). (Wood Decl. Ex. A. at 5, ECF No. 60-1.) Pacific Ridgeline will fell hazard trees  
7 along roughly 4.8 miles of the priority loop. (Wood Decl. Ex. A. at 5, ECF No. 60-1.) The trees  
8 will not be salvage logged; they will simply be felled away from the road and left in place.  
9 (Wood Decl. Ex. A. at 27, ECF No. 60-1.)

10 Plaintiff brought this lawsuit in September 2013, shortly after the Bagley Project was first  
11 approved. (Compl., ECF No. 1) Plaintiff alleges that the Bagley Project was approved in  
12 violation of NEPA, the ESA, the National Forest Management Act (“NFMA”), 16 U.S.C.  
13 §§ 1601 *et seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701–706. (Compl.  
14 ¶¶ 67–111, ECF No. 1.) When Plaintiff learned that Pacific Ridgeline would begin limited felling  
15 operations in the fire area, it brought this motion seeking a temporary restraining order and/or  
16 preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure and Local  
17 Rule 231. (Notice of Mot. 1, ECF No. 50.) Plaintiff requests an injunction to halt logging along  
18 all Maintenance Level 2 roads in the fire area, except those roads for which the Forest Service has  
19 a maintenance cost-share obligation. (Mot. 2, ECF No. 50-2; Pl.’s Reply (“Reply”) 2–3, ECF No.  
20 63.)

21 **II. LEGAL STANDARD**

22 The same legal standard applies to both preliminary injunctions and temporary restraining  
23 orders. *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n. 7 (9th Cir. 2001),  
24 *overruled on other grounds*, *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008).  
25 Preliminary injunctive relief is “an extraordinary remedy that may only be awarded upon a clear  
26 showing that the plaintiff is entitled to such relief.” *Winter*, 555 U.S. at 22 (citing *Mazurek v.*  
27 *Armstrong*, 520 U.S. 968, 972 (1997) (per curiam)).

28 Plaintiff must show four things to receive a preliminary injunction or temporary

1 restraining order. *Winter*, 555 U.S. at 20. First, Plaintiff must show that it is likely to suffer  
2 irreparable harm in the absence of preliminary relief. *Id.* Second, Plaintiff must show that it is  
3 likely to succeed on the merits. *Id.* Third, Plaintiff must show that the balance of equities tips in  
4 its favor. *Id.* Finally, Plaintiff must show that an injunction is in the public interest. *Id.* Plaintiff  
5 must “make a showing on all four prongs” of *Winter* to obtain a preliminary injunction. *Alliance*  
6 *for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). In the Ninth Circuit, courts  
7 apply a sliding-scale approach. *Id.* Under this approach, a preliminary injunction may issue  
8 where the plaintiff has raised “serious questions on the merits”—rather than a more complete  
9 showing that it is likely to succeed on the merits—so long as the balance of hardships tips sharply  
10 in the plaintiff’s favor and the plaintiff satisfies the other two *Winter* prongs. *Id.*

11 **III. DISCUSSION**

12 At the outset, the Court must clarify a basic point about the basis for the instant Order.  
13 According to Plaintiff, the now-circumscribed nature of the ongoing hazard tree felling operations  
14 is not relevant to the Court’s decision on this motion. (Reply 1–2, ECF No. 63.) That argument  
15 misunderstands the nature of a preliminary injunction. True, it is a fundamental rule of  
16 administrative law that a reviewing court weighs the propriety of an agency action solely on the  
17 grounds invoked by the agency. *Sec. & Exch. Comm’n v. Chenery Corp.*, 318 U.S. 80, 87–88  
18 (1943). Thus, the merits questions in this case—whether Defendants violated NEPA and the  
19 ESA—must be resolved solely by reference to the original project documents from 2013. *See*  
20 *Chenery*, 318 U.S. at 87–88. *See also Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44  
21 (1985) (“The task of the reviewing court is to apply the appropriate APA standard of  
22 review . . . to the agency decision based on the record the agency presents to the reviewing  
23 court.”). But the relief Plaintiff now seeks is a temporary restraining order or preliminary  
24 injunction. That “extraordinary remedy” will only issue if irreparable injury is likely to occur  
25 absent an injunction. *Winter*, 555 U.S. at 22. The Court “must balance the competing claims of  
26 injury and must consider the effect on each party of the granting or withholding of the requested  
27 relief.” *Id.* at 24 (quoting *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 542 (1987)).  
28 Those equitable considerations necessarily require the Court to account for the situation that is

1 actually occurring—namely, limited felling operations along a segment of the priority loop rather  
2 than full-scale implementation of the Bagley Project as it was originally approved.

3 With that consideration in mind, the Court now turns to Plaintiff's motion. Because the  
4 Court concludes that a preliminary injunction would not be warranted even if Plaintiff had shown  
5 a likelihood of success on the merits, the Court does not address that factor. *See Winter*, 555 U.S.  
6 at 23–24 (not reaching the merits because the irreparable injury, balance of equities, and public  
7 interest factors all weighed against an injunction).

8       A. Likelihood of Irreparable Harm

9       Plaintiff may not obtain a preliminary injunction unless it can show that irreparable harm  
10 is likely to result if the injunction does not issue. *Winter*, 555 U.S. at 22; *Alliance for the Wild  
11 Rockies*, 632 F.3d at 1135. Plaintiff identifies four harms that it claims are irreparable. (Mot. 6–  
12 8, ECF No. 50-2.) The Court concludes that none of Plaintiff's identified irreparable harms are  
13 likely to occur in the absence of a preliminary injunction.

14       First, Plaintiff argues that the logging of old growth trees is an irreparable injury. (Mot. 6,  
15 ECF No. 50-2 (citing *Lands Council v. Martin*, 479 F.3d 636, 643 (2007).) As Plaintiff points  
16 out, the Bagley Project does not impose an upward diameter on the trees and snags to be salvage  
17 logged, so it is possible that old growth trees would be felled and removed. (Mot. 6, ECF No. 50-  
18 2.) For example, when the Environmental Assessment describes the conifer trees that will be  
19 salvage logged under the Project, it identifies those trees that are “generally greater than or equal  
20 to 16-inches diameter at breast height (dbh),” but does not impose an upward limitation. (EA,  
21 FS-BAR-45, ECF No. 32.) But for now there is no indication that old growth trees will be logged  
22 in the absence of an injunction. Logging and felling are terms of art in forestry. Logging means  
23 “[t]he felling, skidding, on-site processing, and loading of trees or logs on to trucks” and is  
24 synonymous with harvesting. *Logging*, THE SOC'Y OF AM. FORESTERS, THE DICTIONARY OF  
25 FORESTRY (John A. Helms ed. 1998) (original emphasis omitted). Felling, on the other hand, is  
26 simply the “cutting down of trees” irrespective of whether the trees are ultimately removed.  
27 *Felling*, THE SOC'Y OF AM. FORESTERS, THE DICTIONARY OF FORESTRY (John A. Helms ed.  
28 1998). Logging would have occurred under the original Bagley Project, but the ongoing hazard

1 tree abatement calls only for felling. (Wood Decl. Ex. A at 22, ECF No. 60-1 (“It is the intent of  
 2 this contract to secure services for chainsaw felling of roadside hazard trees that were fire-killed  
 3 in the 2012 Bagley Complex.”).) *Lands Council* is thus distinguishable because it involved a  
 4 post-fire timber sale and actual logging, rather than roadside felling. *Lands Council*, 479 F.3d at  
 5 638–39. In any event, *Lands Council* is distinguishable for another reason: that case involved a  
 6 proposed post-fire timber sale that would log dying *but not yet dead* trees even though the  
 7 applicable NFMA Forest Plan prohibited the logging of “live trees [greater than or equal to]  
 8 21[inches] dbh.” *Id.* at 641. In the instant case, “virtually all of the hazard trees [to be felled] are  
 9 *entirely fire killed.*” (Hamilton Decl. ¶ 17, ECF No. 57 (emphasis added).) The contract for the  
 10 ongoing felling operations indicates that there are roughly 75 hazard trees per acre, approximately  
 11 25 of which are greater than or equal to 16 inches dbh. (Wood Decl. Ex. A at 22, ECF No. 60-1.)  
 12 Plaintiff must show that an irreparable injury is *likely* in the absence of a preliminary injunction.  
 13 *Winter*, 555 U.S. at 22. Plaintiff has not demonstrated that live, old-growth trees of the kind at  
 14 issue in *Lands Council* will be affected by the ongoing felling.

15 Second, Plaintiff argues that its members will be irreparably harmed by the Bagley Project  
 16 because they will be unable to view the project area in a natural post-fire state. (Mot. 7, ECF No.  
 17 50-2 (citing *Alliance for the Wild Rockies*, 632 F.3d at 1135).) But the project area is currently  
 18 subject to a closure order and violators may face fines or imprisonment. *See* FS Bagley Closure  
 19 Order, *supra*. Defendants represent that the closure order will remain in place until the hazard  
 20 trees are felled. (Opp’n 12:5, ECF No. 56.) Legally speaking, Plaintiff’s members already find  
 21 themselves in the position of the *Alliance for the Wild Rockies* plaintiffs—unable to “view  
 22 experience and utilize” the project area in any state because of the closure order. *Alliance for the*  
 23 *Wild Rockies*, 632 F.3d at 1135. The ongoing felling operations aim to restore safety and obviate  
 24 the need for the closure order, which would allow Plaintiff’s members to return to the area—most  
 25 of it unaffected—lawfully.<sup>4</sup>

26 Third, Plaintiff argues that the Bagley Project will intrude upon three special land

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27 <sup>4</sup> *Alliance for the Wild Rockies* can be read to suggest a *de minimis* exception to the type of irreparable harm  
 28 that Plaintiff alleges its members are suffering, 632 F.3d at 1135, but the Court does not rely on that concept in  
 concluding that Plaintiff will not be irreparably harmed by the ongoing felling operations.

1 management designations that provide support and refuge for the northern spotted owl. (Mot. 8,  
2 ECF No. 50-2.) According to Plaintiff, the northern spotted owl will not use a stand of trees once  
3 it has been burned and logged. (Mot. 8, ECF No. 50-2.) As discussed above, there is no risk of  
4 any imminent logging because the ongoing hazard tree abatement work only involves felling.  
5 (Wood Decl. Ex. A at 22, ECF No. 60-1.) Moreover, the relationship between the northern  
6 spotted owl and tree stands that have been very severely burned is more nuanced than Plaintiff  
7 suggests. According to the *Revised Recovery Plan for the Northern Spotted Owl*, “spotted owls  
8 can make use of some post-fire landscapes, [but] fire also reduces the function of some habitat  
9 and likely removes some from immediate usability, particularly in areas of high-severity fire.”  
10 (Recovery Plan, FS-BAR-4268, ECF No. 32.) The ongoing felling operations are essentially  
11 confined to high-severity burn areas. (Wood Decl. Ex. A at 22, ECF No. 60-1.) Felling is also  
12 subject to limited operating periods (LOPs) that account for the northern spotted owl. (Wood  
13 Decl. Ex. A at 28, ECF No. 60-1.) Even the original Bagley Project imposed restrictions to leave  
14 the northern spotted owl undisturbed:

15 The LOPs included in the Integrated Design Features minimize  
16 direct effects to the spotted owl by avoiding disturbances during  
17 critical periods of the breeding season or when young owls are not  
mobile enough to readily move from a disturbance.

18 The Bagley Project would not create any new openings as  
19 temporary storage of logs will be restricted to existing landings and  
the road prism.

20 (EA, FS-BAR-78, ECF No. 32.) In short, Plaintiff alleges that the Bagley Project will cause  
21 northern spotted owls to leave the area and never return. At this juncture, that risk appears highly  
22 speculative and, at a minimum, it does not appear likely to occur in the absence of a preliminary  
23 injunction. *Winter*, 555 U.S. at 22.

24 Finally, Plaintiff argues that it is currently suffering irreparable harm because the Forest  
25 Service did not properly comply with NEPA. (Mot. 8, ECF No. 50-2.) Plaintiff relies on *High*  
26 *Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630 (9th Cir. 2004), for the proposition that  
27 “irreparable injury flows from the failure to evaluate the environmental impact of a major federal  
28 action.” (Mot. 8, ECF No. 50-2 (quoting *High Sierra Hikers*, 390 F.3d at 642).) That

1 presumption was effectively overruled by the Supreme Court in two recent NEPA cases: *Winter*  
 2 and *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010). In *Winter*, the Supreme Court  
 3 made clear that, even in NEPA cases, “plaintiffs seeking preliminary relief [must] demonstrate  
 4 that irreparable injury is *likely* in the absence of an injunction.” *Winter*, 555 U.S. at 22 (emphasis  
 5 in original). In *Monsanto*, the Supreme Court faced a question about a permanent rather than a  
 6 preliminary injunction in the context of NEPA. There, the Supreme Court again reinforced that  
 7 an injunction should issue only if the traditional four-factor test is satisfied. *Monsanto*, 561 U.S.  
 8 at 157. Nothing in NEPA allows a court considering an injunction to put a “thumb on the scales.”  
 9 *Id.* See also *Cottonwood Environmental Law Center v. U.S. Forest Serv.*, 789 F.3d 1075, 1089  
 10 (9th Cir. 2015) (recognizing *Winter* and *Monsanto* as overruling the more lenient standard for an  
 11 injunction in NEPA cases). A NEPA violation, without more, does not establish the requisite  
 12 likelihood of irreparable harm.

13                   B. Balance of Hardships

14                   Even if Plaintiff had raised serious questions on the merits, the Court finds that the  
 15 balance of equities and the public interest both weigh against an injunction here. The Court must  
 16 consider the “effect on each party of the granting or withholding of the requested relief.” *Amoco*  
 17 *Prod.*, 480 U.S. at 542. Although cases presenting a likelihood of environmental injury often  
 18 involve a hardship balance that tips in favor of an injunction, the Court may not abandon the  
 19 balance of harms analysis just because a potential exists for environmental injury. “Injunctive  
 20 relief is an equitable remedy, requiring the court to engage in the traditional balance of harms  
 21 analysis, even in the context of environmental litigation.” *Forest Conservation Council v. U.S.*  
 22 *Forest Serv.*, 66 F.3d 1489, 1496 (9th Cir. 1995) *abrogated on other grounds by* *Wilderness Soc.*  
 23 *v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011).

24                   In the instant case, the balancing act comes down to environmental injury versus safety  
 25 concerns.<sup>5</sup> The Court finds that the safety risks posed by hazard trees along the NFS roads

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26                   <sup>5</sup> In its opposition, the Forest Service argued that the ongoing felling operations are necessary to fulfill road  
 27 maintenance obligations that the Forest Service shares with private landowners. (Opp’n 16:17–23, ECF No. 56.) In  
 28 response, Plaintiff modified its proposed injunction to exclude any roads for which the Forest Service has a cost-  
 share obligation, effectively mooting the argument. (Reply 4–6, ECF No. 63.)

1 outweigh the potential for environmental harm, particularly because the ongoing felling  
2 operations are so circumscribed in scope compared to the original Bagley Project. There are  
3 currently thousands of hazard trees along the priority loop NFS roads. (Hamilton Decl. ¶ 15, ECF  
4 No. 57.) By their very definition, these hazard trees pose a risk of falling and striking the road,  
5 ultimately causing property damage or personal injury. (*Hazard Tree Guidelines for Forest*  
6 *Service Facilities and Roads in the Pacific Southwest Region*, EA Appendix H, FS-BAR-228,  
7 ECF No. 32.) In spite of that risk, and the closure order, many public and private workers must  
8 use the roads. (Hamilton Decl. ¶ 9, ECF No. 57.)

9 Plaintiff tries to sidestep the safety issue in two ways. First, Plaintiff argues that any trees  
10 that once posed a threat of falling have either fallen already or no longer pose a threat because the  
11 Bagley Fire occurred four years ago. (Mot. 10, ECF No. 50-2.) Plaintiff submits declarations  
12 from Denise Boggs, the executive director of Conservation Congress, in which Ms. Boggs avers  
13 that “there certainly is not an emergency in my opinion” and “[i]n my opinion, the trees marked  
14 for cut meeting this criteria were not hazard trees that would fall on the road.” (Boggs Decl. ¶ 16,  
15 ECF No. 51; Boggs Decl. ¶ 6, ECF No. 55.) Whatever weight Ms. Boggs’ opinions may have,  
16 they are undermined by the following empirical data: as of July 29, 2016, approximately 166 trees  
17 had fallen across the priority loop alone, and two new trees fell between the first and second  
18 weeks of October 2016. (Hamilton Decl. Ex. C, ECF No. 57-3; Hamilton Decl. ¶¶ 15–16, ECF  
19 No. 57.)

20 Second, Plaintiff argues that any safety concerns are obviated by the narrow nature of the  
21 injunction Plaintiff requests. (Mot. 10, ECF No. 50-2.) Plaintiff seeks a “narrowly tailored”  
22 injunction that will halt any felling or cutting along all Maintenance Level 2 roads, except those  
23 roads for which the Forest Service has a cost-share obligation. (Mot 2, ECF No. 50-2; Reply 5–6,  
24 ECF No. 63.) Although this request appears narrowly tailored at first blush, its narrowness is  
25 ultimately illusory. The vast majority of the NFS roads in the project area are Maintenance Level  
26 2, and *the entire priority loop* is Maintenance Level 2. (EA, FS-BAR-174, ECF No. 32;  
27 Hamilton Decl. ¶ 11, ECF No. 57.) Plaintiff initially sought to enjoin all felling along  
28 Maintenance Level 2 roads, which would have the practical effect of halting all ongoing hazard

1 tree abatement. (Mot. 2, ECF No. 50-2.) In its reply brief, Plaintiff further narrowed its request  
2 for injunctive relief to exclude from its proposed injunction the 40 miles of roads for which the  
3 Forest Service has cost-share obligations. (Reply 5–6, ECF No. 63.) But the parties did not  
4 provide the Court with any information about whether the cost-share roads and the priority loop  
5 roads are in fact the same roads. If they are the same roads, the proposed injunction will do  
6 nothing because it will not apply to the only places where felling is actually occurring. If they are  
7 not the same roads, Plaintiff’s narrower proposal offers an empty concession. In either case, the  
8 “narrowly tailored” nature of Plaintiff’s proposed injunction cannot alleviate the safety concerns  
9 posed by hazard trees along the priority loop roads.

10 Weighing against those safety concerns is the potential for environmental injury.  
11 However, the threat of environmental injury is very limited in the instant case. Ongoing felling  
12 operations are limited to roughly 4.8 miles of the priority loop, and the felled trees will not be  
13 removed. (Wood Decl. Ex. A. at 5, 27, ECF No. 60-1.) Indeed, as discussed in § III.A, the Court  
14 concludes that Plaintiff has not shown a likelihood of irreparable environmental harm in the  
15 absence of an injunction. Although many hazard trees will be felled, that without more is not a  
16 sufficient environmental injury to outweigh the safety risk those same hazard trees pose. *See*  
17 *Earth Island Inst. v. Carlton*, 626 F.3d 462, 475–76 (9th Cir. 2010) (affirming the denial of a  
18 preliminary injunction based on the district court’s weighing of the dangers posed by hazard  
19 trees). To be clear, the Court holds that the safety risk posed by the hazard trees outweighs any  
20 environmental injury that is actually occurring as part of the ongoing felling operations. The  
21 Court expresses no opinion on how this analysis would change if the Forest Service sought to go  
22 forward with the Bagley Project as it was originally conceived.

23 **C. Public Interest**

24 Finally, Plaintiff must also show that an injunction is in the public interest. *Winter*, 555  
25 U.S. at 20. The Court finds that a preliminary injunction here would not be in the public interest,  
26 and may actually harm the public interest. The NFS roads in the fire area are currently closed  
27 because of the risk posed by the hazard trees. *See* FS Bagley Closure Order, *supra*. Nevertheless,  
28 the public faces some of the same safety threats that other road users face. As Ms. Boggs’

1 declaration illustrates, at least some members of the public travel through the fire area despite the  
2 closure order, even if unwittingly. (Boggs Decl. ¶¶ 8, 9, ECF No. 51.) Ms. Boggs avers that she  
3 has never seen signs or barriers indicating that the fire area was closed to recreational users.  
4 (Boggs Decl. ¶ 8, ECF No. 64.) Other members of the public, many of whom will invariably  
5 have less experience with Forest Service road closures, may also find themselves in the closed  
6 area—unaware that the area is closed because of the risks posed by hazard trees. Their safety  
7 also weighs against a preliminary injunction. *See Earth Island Inst.*, 626 F.3d at 475–76. In  
8 addition, many would-be users of public lands in the fire area, who *are* aware that the area is  
9 closed, are currently unable to visit or recreate in the fire area.

10 Plaintiff, relying on *Seattle Audubon Soc'y. v. Evans*, 771 F. Supp. 1081 (W.D. Wash.  
11 1991), argues that the “public’s interest in ensuring that federal agencies manage public lands in  
12 compliance with environmental laws ‘invokes a public interest of the highest order: the interest in  
13 having government officials act in accordance with the law.’” (Mot. 11, ECF No. 50-2 (quoting  
14 *Seattle Audubon Soc'y*, 771 F. Supp. At 1096).) The Court agrees that the public has a strong  
15 interest in ensuring that government officials act in accordance with the law. But the Court  
16 concludes that the public’s interest in holding government officials accountable does not justify a  
17 preliminary injunction in the instant case for three reasons. First, *Winter* belies the argument that  
18 a statutory violation by the federal government, by its nature, creates an overriding public interest  
19 justifying a preliminary injunction. Each factor of the four-factor test must be satisfied before a  
20 preliminary injunction will issue. *Winter*, 555 U.S. at 20. Second, Plaintiff’s reliance on *Seattle*  
21 *Audubon Soc'y* is unpersuasive in the instant case. *Seattle Audubon Soc'y* involved a sweeping  
22 abdication of responsibility by high-level government officials. *Seattle Audubon Soc'y*, 771 F.  
23 Supp. at 1090 (“More is involved here than a simple failure by an agency to comply with its  
24 governing statute. The most recent violation of NFMA exemplifies a deliberate and systematic  
25 refusal by the Forest Service and the FWS to comply with the laws protecting wildlife. This is not  
26 the doing of the scientists, foresters, rangers, and others at the working levels of these agencies.”).  
27 Moreover, *Seattle Audubon Soc'y* concerned a permanent injunction after the court had granted  
28 summary judgment in the plaintiffs’ favor on their NFMA claims, not, as here, a request for a

1 preliminary injunction where the resolution of the merits remains uncertain. *Seattle Audubon*  
2 *Soc'y*, 771 F. Supp. at 1082–83. Finally, the Court finds that the public interest in returning safe,  
3 lawful access to public lands simply outweighs any other interest alleged in the instant case and  
4 supports the argument against a preliminary injunction.

5 **IV. CONCLUSION**

6 The narrow nature of the ongoing felling operations along the priority loop is fatal to  
7 Plaintiff's motion for a preliminary injunction. In the face of a project so focused on alleviating  
8 the worst safety risks posed by hazard trees along the most frequented NFS roads, Plaintiff has  
9 not shown that it is entitled to the "extraordinary remedy" of a preliminary injunction. *Winter*,  
10 555 U.S. at 22. The Court makes clear that this Order depends on the narrow scope of the hazard  
11 tree felling that is actually occurring in the Bagley fire area. For the reasons discussed above,  
12 Plaintiff's motion for a temporary restraining order and/or preliminary injunction is hereby  
13 DENIED.

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15 Dated: November 2, 2016



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Troy L. Nunley  
United States District Judge