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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CONSERVATION CONGRESS,

Plaintiff,

v.

UNITED STATES FOREST SERVICE,

Defendant.

No. 2:18-cv-02404-JAM-CKD

**ORDER ON CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

I. INTRODUCTION

Plaintiff Conservation Congress sued Defendant United States Forest Service ("the Forest Service") after the Forest Service approved the Cove Fire Salvage and Restoration Project (the "Project"). Presently before the Court are cross-motions for summary judgment, a request for judicial notice, and two motions to strike. For the reasons set forth below, the Court GRANTS IN PART and DENIES IN PART Plaintiff's Request for Judicial Notice, GRANTS Defendant's Motion to Strike, GRANTS Plaintiff's Motion to Strike, DENIES Plaintiff's Motion for Summary Judgment, and GRANTS Defendant's Motion for Summary Judgment.¹

¹ This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for July 30, 2019.

1 II. STATUTORY AND FACTUAL BACKGROUND

2 A. National Environmental Policy Act

3 The National Environmental Policy Act (NEPA) "is a
4 procedural statute that requires the federal government to
5 carefully consider the impacts of and alternatives to major
6 environmental decisions." Native Ecosystems Council v. Weldon,
7 697 F.3d 1043, 1051 (9th Cir. 2012) (citing 42 U.S.C. §§ 4321,
8 4331). NEPA requires that federal agencies take a "hard look" at
9 the environmental consequences of their proposed actions and then
10 inform the public about the agency's decision-making process.
11 Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1066 (9th Cir.
12 2002).

13 While agencies must carefully consider significant
14 environmental impacts through the NEPA process, they are "not
15 required to do the impractical." Klamath-Siskiyou Wildlands Ctr.
16 v. Bureau of Land Mgmt., 387 F.3d 989, 992-93 (9th Cir. 2004)
17 (internal citations, alterations, and quotation marks omitted).
18 "Although an agency's actions under NEPA are subject to careful
19 judicial scrutiny, courts must also be mindful to defer to agency
20 expertise, particularly with respect to scientific matters within
21 the purview of the agency." Id. at 993.

22 B. National Forest Management Act

23 The National Forest Management Act (NFMA) "charges the
24 Forest Service with the management of national forest land,
25 including planning for the protection and use of the land and its
26 natural resources." All. for the Wild Rockies v. United States
27 Forest Serv., 907 F.3d 1105, 1109 (9th Cir. 2018). The Forest
28 Service develops land and resource management plans ("forest

1 plans”), 16 U.S.C. § 1604, that summarize the “broad, long-term
2 plans and objectives for the entire forest.” Weldon, 697 F.3d at
3 1056. Forest plans include guidelines to help achieve the NFMA’s
4 goals, including consideration of both economic and environmental
5 concerns, preservation of diversity in plant and animal
6 communities, and research on the effects of forest management.
7 16 U.S.C. § 1604(g) (3).

8 “After a forest plan is approved, the Forest Service
9 implements the forest plan when approving or denying site-
10 specific projects.” Weldon, 697 F.3d at 1056. Courts must defer
11 to the Forest Service’s reasonable interpretation of its own
12 guidelines, overturning the agency’s decision only if it is
13 plainly erroneous or inconsistent with the forest plan. Forest
14 Guardians v. U.S. Forest Serv., 329 F.3d 1089, 1098 (9th Cir.
15 2003). “A project is consistent if it conforms to the applicable
16 ‘components’ of the forest plan, including the standards,
17 guidelines, and desired conditions that are set forth in the
18 forest plan and that collectively establish the details of forest
19 management.” All. for the Wild Rockies, 907 F.3d at 1109-10.

20 Although a forest plan’s “standards” require strict adherence,
21 the Forest Service may deviate from the plan’s “guidelines” if
22 the agency documents the rationale for the deviation. Id.

23 C. The Modoc Land and Resource Management Plan

24 The Forest Service adopted the Modoc National Forest Land
25 and Resource Management Plan (“Modoc LRMP”) in 1991, Admin. R.
26 (“AR”) 10331-10402, which governs management of the Modoc
27 National Forest. In 2004, the Forest Service incorporated the
28 Sierra Nevada Forest Plan Amendment (SNFPA)’s management

1 direction, AR 10119-94, into the existing Modoc LRMP, AR 10136.
2 The changes adopted in SNFPA do not apply to certain plans and
3 projects, including the Big Valley Federal Sustained Yield Unit
4 ("the Big Valley Unit"). Id.

5 The Big Valley Unit aims to "provide the maximum feasible
6 permanent support to the Big Valley community from the timber
7 industry" by employing local residents to harvest timber and
8 manufacturing timber products within the unit. AR 10329-30.

9 D. The Cove Fire Salvage and Restoration Project

10 In July 2017, the Cove Fire burned over 30,000 acres of
11 grass, brush, and timberlands. AR 1. Over half of the National
12 Forest Service lands impacted by the fire experienced high to
13 very high burn severity. AR 45. Following the Cove Fire, the
14 Forest Service designed and implemented the Project to recover
15 the economic value of killed or damaged trees; reduce safety
16 hazards along roads; improve the forest's ability to withstand
17 future wildfires; and accelerate habitat development in areas
18 deforested by the fire. AR 46. All Project activities are
19 within the boundaries of the Cove Fire, in the Big Valley Ranger
20 District of the Modoc National Forest and within the Big Valley
21 Unit. AR 43. Although the Project is exempt from the SNFPA
22 because it is within the Big Valley Unit, the Project
23 incorporated goals from the SNFPA in addition to the Standards
24 and Guidelines from the Modoc LRMP.

25 The Forest Service issued a Decision Notice and Finding of
26 No Significant Impact ("FONSI") on July 12, 2018. AR 1-9. Based
27 on review of the record, including the Environmental Assessment,
28 AR 35-122, and public comments, AR 10584-10643, the Forest

1 Service decided to implement the Project. AR 2. The Forest
2 Service approved the Project under an Emergency Situation
3 Determination ("ESD"), AR 10-11, which allows project
4 implementation without being subject to the predecisional
5 objection process. 36 C.F.R. § 218.21(d). As of March 2019, 67%
6 of the sawlog volume authorized for removal under the Project had
7 been scaled and hauled to mills. Def.'s Status Report, ECF No.
8 69.

9 E. Procedural Posture

10 Conservation Congress filed suit on August 31, 2018.
11 Compl., ECF No. 1. A month later, the organization filed a
12 Motion for Preliminary Injunction, ECF No. 11, to enjoin the
13 Project's implementation. Following the Court's denial of the
14 Motion for a Preliminary Injunction, ECF No. 26, Conservation
15 Congress appealed and sought an injunction pending appeal, ECF
16 No. 28. The Court denied an injunction pending appeal, ECF No.
17 43, and granted Conservation Congress's motion to amend the
18 complaint, ECF No. 47. The Ninth Circuit affirmed the Court's
19 denial of a preliminary injunction on May 21, 2019. Mem. Order,
20 ECF No. 80.

21 Conservation Congress filed its First Amended Complaint,
22 containing nine claims, on December 19, 2018. Am. Compl., ECF
23 No. 48. In April 2019, Conservation Congress filed its Motion
24 for Summary Judgment, Pl.'s Mot. Summ. J., ECF No. 75; Pl.'s Mem.
25 in Supp. of Mot. Summ. J. ("Pl.'s Mem."), ECF No. 75-1, and a
26 Request for Judicial Notice, Req. Judicial Notice ("RJN"), ECF
27 No. 74. The Forest Service filed its Motion for Summary Judgment
28 on May 31, 2019, Def.'s Mot. Summ. J, ECF No. 82; Def.'s Mem. in

1 Supp. of Mot. Summ. J. ("Def.'s Mem."), ECF No. 82-1; moved to
2 strike portions of Conservation Congress's declarations, Def.'s
3 Mot. Strike, ECF No. 83; and opposed the request for judicial
4 notice, RJN Opp., ECF No. 85. Conservation Congress then moved
5 to strike portions of a declaration filed by the Forest Service,
6 Pl.'s Mot. Strike, ECF No. 87, in response to the Forest
7 Service's opposition to its Request for Judicial Notice.

8
9 III. STANDARD OF REVIEW

10 Courts review alleged violations of the NFMA and NEPA under
11 the Administrative Procedure Act (APA). All. for the Wild
12 Rockies, 907 F.3d at 1112. The APA directs reviewing courts to
13 "hold unlawful and set aside agency action, findings, and
14 conclusions found to be . . . arbitrary, capricious, an abuse of
15 discretion, or otherwise not in accordance with law." 5 U.S.C.
16 § 706(2) (A).

17 Judicial review under the "arbitrary and capricious"
18 standard is narrow and deferential. Motor Vehicle Mfrs. Assn of
19 U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43
20 (1983). A court may not "substitute its judgment for that of the
21 agency." Id. "This deference is highest when reviewing an
22 agency's technical analyses and judgments involving the
23 evaluation of complex scientific data within the agency's
24 technical expertise." League Of Wilderness Defs. Blue Mountains
25 Biodiversity Project v. Allen, 615 F.3d 1122, 1130 (9th Cir.
26 2010) (citing Lands Council v. McNair, 537 F.3d 981, 993 (9th
27 Cir. 2008) (en banc), overruled on other grounds by Winter v.
28 Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008)).

1 Agencies are required to “examine the relevant data and
2 articulate a satisfactory explanation for its action.” Turtle
3 Island Restoration Network v. U.S. Dep’t of Commerce, 878 F.3d
4 725, 732 (9th Cir. 2017) (internal quotation marks and citation
5 omitted). An action is arbitrary and capricious where “the
6 agency has relied on factors which Congress has not intended it
7 to consider, entirely failed to consider an important aspect of
8 the problem, offered an explanation for its decision that runs
9 counter to the evidence before the agency, or if the agency’s
10 decision is so implausible that it could not be ascribed to a
11 difference in view or the product of agency expertise.” Turtle
12 Island, 878 F.3d at 732-33 (internal quotation marks and citation
13 omitted).

14 IV. OPINION

15 A. Evidentiary Objections

16 Section 706 of the APA provides for judicial review of
17 federal administrative actions based upon “the whole record or
18 those parts of it cited by the party.” 5 U.S.C. § 706. Thus,
19 APA review is generally limited to the administrative record
20 before the agency at the time it made the decision. Citizens to
21 Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971);
22 Lands Council v. Powell, 395 F.3d 1019, 1029 (9th Cir. 2005).

23 There are, however, narrow exceptions to this general rule.
24 Powell, 395 F.3d at 1030. “In limited circumstances, district
25 courts are permitted to admit extra-record evidence: (1) if
26 admission is necessary to determine whether the agency has
27 considered all relevant factors and has explained its decision,
28

1 (2) if the agency has relied on documents not in the record,
2 (3) when supplementing the record is necessary to explain
3 technical terms or complex subject matter, or (4) when
4 plaintiffs make a showing of agency bad faith.” Id. (internal
5 quotation marks omitted). Courts narrowly construe and apply
6 these exceptions. Id. (“Were the federal courts routinely or
7 liberally to admit new evidence when reviewing agency decisions,
8 it would be obvious that the federal courts would be proceeding,
9 in effect, de novo rather than with the proper deference to
10 agency processes, expertise, and decision-making.”).

11 1. Plaintiff’s Request for Judicial Notice

12 Conservation Congress requests that the Court take judicial
13 notice of seven exhibits pursuant to Federal Rule of Evidence
14 201. RJN at 1-4. Those exhibits are (1) the Modoc National
15 Forest, Schedule of Proposed Action (SOPA) for January 1, 2018
16 to March 31, 2018 and April 1, 2018 to June 30, 2018, ECF No. 74-
17 2; (2) a printout of the Project webpage, dated April 4, 2019,
18 ECF No. 74-3; (3) a printout of the Modoc National Forest’s
19 advertised timber sales, dated March 14, 2019, ECF No. 74-4;
20 (4) a Report of Timber Sale, dated July 26, 2018, ECF No. 74-5;
21 (5) a Forest Service press release lifting fire-area closure
22 orders, dated September 5, 2017, ECF No. 74-6; (6) a Request for
23 Bid by the Pit Resource Conservation District, issued July 12,
24 2018, ECF No. 74-7; and (7) a Request for Bid Response Packet
25 from Tubit Enterprises, dated July 20, 2018, ECF No. 74-8. The
26 Forest Service opposes the RJN with respect to most of the
27 exhibits, arguing that the documents were either post-decisional
28 or not otherwise before the agency at the time of the Project’s

1 approval. RJN Opp'n at 2.

2 "A judicially noticed fact must be one not subject to
3 reasonable dispute in that it is either (1) generally known
4 within the territorial jurisdiction of the trial court or
5 (2) capable of accurate and ready determination by resort to
6 sources whose accuracy cannot reasonably be questioned." Fed.
7 R. Evid. 201(b). "A court shall take judicial notice if
8 requested by a party and supplied with the necessary
9 information." Fed. R. Evid. 201(d).

10 The Forest Service does not oppose the April to June 2018
11 SOPA, which lists the Cove Project and is a pre-decisional
12 record. Id. at 5 n.3. Accordingly, the Court will take
13 judicial notice of the page of Exhibit 1 that lists the Project,
14 ECF No. 74-2, p. 8. The other portions of Exhibit 1 are not
15 relevant, and the Court will not consider them.

16 The Court denies Conservation Congress's RJN as to the six
17 other exhibits because they are either inappropriate for
18 judicial notice under Federal Rule of Evidence 201 and/or
19 irrelevant under Rule 401. Exhibit 2 of the RJN is already part
20 of the record. AR 10645. Exhibits 3, 4, and 7 are post-
21 decisional documents, which the agency could not have relied
22 upon at the time of the decision. Much like how agencies may
23 not supply post-hoc rationalizations for their actions, "post-
24 decision information . . . may not be advanced as a new
25 rationalization either for sustaining or attacking an agency's
26 decision." San Luis & Delta-Mendota Water Auth. v. Jewell, 747
27 F.3d 581, 603 (9th Cir. 2014).

28 Finally, Exhibit 5 and Exhibit 6 both fail the narrow

1 criteria for admission of extra record evidence. Exhibit 5,
2 which states that road closures are lifted and warns of
3 continued danger due to wildfire, was not relied upon by the
4 Forest Service in approving the Project. Exhibit 6 is a record
5 from a different entity that similarly was not relied upon in
6 the Forest Service's approval of the Project. There are no
7 allegations of bad faith or technical subject matter that
8 Exhibits 5 and 6 could explain, and the exhibits' are not
9 necessary to determine if the Forest Service considered relevant
10 factors in its decision.

11 Conservation Congress's RJN is granted as to page 8 of
12 Exhibit 1 and denied as to all other exhibits.

13 2. Defendant's Motion to Strike

14 The Forest Service moves to strike portions of Conservation
15 Congress's Declarations, ECF Nos. 65-68, 73, 77, 79, on the
16 grounds that the declarations go beyond standing assertions and
17 improperly include legal argument and extra-record photos and
18 documents. Def.'s Mot. Strike, ECF No. 83. Conservation
19 Congress opposes the motion, arguing that the declarations were
20 submitted for the sole purpose of establishing the standing of
21 Conservation Congress and its members. Pl.'s Opp'n Strike, ECF
22 No. 85, p. 4.

23 The Court agrees with the Forest Service that portions of
24 Conservation Congress's declarations exceed the permissible
25 boundaries of establishing standing. The declarations contain
26 legal conclusions about the arbitrariness or capriciousness of
27 agency actions, extra-record information and photos not
28 considered by the agency, and disputes about the scientific

1 methodology employed by the agency in evaluating species'
2 habitat needs. Such information is not relevant to the members'
3 standing and will not be considered by the Court. The Forest
4 Service does not dispute that Conservation Congress and its
5 members have standing to challenge the Project's approval.

6 For the reasons articulated in the Forest Service's motion
7 and reply, the Court will strike the following portions of the
8 declarations that are irrelevant to Conservation Congress's
9 standing: Declaration of Lyle Lewis, ECF No. 65 ¶¶ 9, 11-20, 23-
10 30; Declaration of Denise Boggs ECF No. 66 ¶¶ 21-105 and Exs. 1-
11 5; Declaration of Douglas Bevington ECF No. 67 ¶¶ 14, 16, 23-26
12 and Ex. 1; Declaration of Chad Hanson, ECF No. 68 ¶¶ 9-11, 15-19
13 and Ex. 2; Original Declaration of Kyle Haines, ECF No. 73
14 ¶¶ 21-25, 27-30, 32-33, 39; Unsigned Supplemental Declaration of
15 Kyle Haines, ECF No. 77 ¶¶ 1-10 and Exs. 1-12; Signed
16 Supplemental Declaration of Kyle Haines, ECF No. 79 ¶¶ 1-10 and
17 Exs. 1-12.

18 3. Plaintiff's Motion to Strike

19 Conservation Congress moves to strike portions of the
20 Supplemental Declaration of Chris Christofferson, ECF No. 82-2,
21 for offering post-decisional rationalizations, legal
22 conclusions, and statements unsupported by the administrative
23 record. Pl.'s Mot. Strike, ECF No. 87, p. 2. Conservation
24 Congress argues that it would be prejudiced should the Court
25 deny its RJN but allow the Forest Service to rely on
26 Christofferson's Supplemental Declaration. Id. It seeks to
27 exclude the following paragraphs from Christofferson's
28 Supplemental Declaration: ¶¶ 3, 5, 7, 11-23.

1 The Court has reviewed Christofferson's Supplemental
2 Declaration and does not find admission of the extra-record
3 facts within it are necessary to determine whether the agency
4 has considered all relevant factors and explained its decision.
5 See Powell, 395 F.3d at 1030. As the Court will not be
6 considering post-decisional arguments as a basis upon which to
7 challenge the agency's decision, admission of Christofferson's
8 post-decisional explanations is not necessary.

9 The Court grants Plaintiff's Motion to Strike and excludes
10 the identified portions of Christofferson's Supplemental
11 Declaration.

12 B. Cross-Motions for Summary Judgment

13 1. Standing

14 To fulfil the case-or-controversy requirement of Article
15 III, a plaintiff must satisfy three elements of standing. Lujan
16 v. Defs. of Wildlife, 504 U.S. 555, 560 (1992). First, the
17 plaintiff must have suffered an "injury in fact," which is
18 concrete and particularized, as well as actual and imminent.
19 Id. Second, the injury must be caused by the defendant's
20 conduct, such that it can be fairly traced to the challenged
21 action. Id. Third, it must be likely that a favorable decision
22 will redress the injury. Id. at 561.

23 "An organization has standing to bring suit on behalf of
24 its members when: (a) its members would otherwise have standing
25 to sue in their own right; (b) the interests it seeks to protect
26 are germane to the organization's purposes; and (c) neither the
27 claim asserted nor the relief requested requires the
28 participation of individual members in the lawsuit." Ecological

1 Rights Found. v. Pac. Lumber Co., 230 F.3d 1141, 1147 (9th Cir.
2 2000) (internal quotation marks omitted). A plaintiff satisfies
3 the "injury in fact" in an environmental case where an
4 individual shows "an aesthetic or recreational interest in a
5 particular place, or animal, or plant species and that that
6 interest is impaired by a defendant's conduct." Id.

7 Conservation Congress's declarations are sufficient to
8 demonstrate standing on most of its claims. The organization's
9 members have a protected interest in the area of the Modoc
10 forest where the Project is taking place, and that the Project,
11 a final agency action, may impair their interests. The Court
12 has not considered the stricken portions of the declarations in
13 arriving at that conclusion.

14 Some of Conservation Congress's claims expand beyond the
15 grounds upon which the organization has standing. The Forest
16 Service has challenged Conservation Congress's standing on its
17 appraisal and contract modification arguments, which appear to
18 be part of its seventh and ninth claims. Def.'s Mem. at 26.
19 The Forest Service argues that Conservation Congress may not
20 challenge the sales agreement on several grounds, including that
21 the organization lacks a personal injury because it was not a
22 bidder and because the contract is not a final agency action
23 reviewable under the APA. Id. at 26-28.

24 The most factually analogous case is Alliance for the Wild
25 Rockies v. Pena, No. 2:16-CV-294-RMP, 2018 WL 4760503 (E.D.
26 Wash. Oct. 2, 2018), cited by the Forest Service. In Pena, an
27 environmental organization challenged the Forest Service's
28 bidding contract and contract award on a logging project under

1 the NFMA and NEPA. Id. at *3-6. The district court held that
2 the organization lacked standing because it did not suffer an
3 injury-in-fact and lacked a procedural right to challenge the
4 bidding process. Id. Conservation Congress has not provided
5 any contrasting precedent or statutory support for their
6 standing argument on these issues.

7 Cases challenging Forest Service timber appraisals and sale
8 contracts been brought by bidders pleading an injury from the
9 alleged irregularity. See, e.g., Capital Dev. Co. v. United
10 States, 49 Fed. Cl. 178 (2001), aff'd sub nom. Seaboard Lumber
11 Co. v. United States, 308 F.3d 1283 (Fed. Cir. 2002) (denying a
12 timber purchaser's challenge to the Forest Service's appraisal
13 method); Roseburg Lumber Co. v. Madigan, 978 F.2d 660 (Fed. Cir.
14 1992) (affirming a decision of the United States Department of
15 Agriculture Board of Contract Appeals that disputed the accuracy
16 of timber appraisal); Prineville Sawmill Co. v. United States,
17 859 F.2d 905 (Fed. Cir. 1988) (reversing a decision of the
18 United States Claims Court in a pre-award bid protest action
19 against the Forest Service regarding sale of salvage timber).
20 Conservation Congress has not shown such an injury or procedural
21 right, and accordingly it lacks standing to challenge the Forest
22 Service's appraisal of the Project value and its stewardship
23 agreement with the Pit River Conservation District.

24 2. Claim I: Notice of Environmental Review Documents and
25 Bidding Sale

26 In its first claim, Conservation Congress alleges that the
27 Forest Service violated NEPA and the APA by failing to follow
28 the regulations regarding public notification of timber sales

1 and environmental review documents. Am. Compl. at 23 ¶¶ 110-17.
2 First, it alleges that the Forest Service advertised for less
3 than seven days about the emergency removal of timber, in
4 violation of 36 C.F.R. § 223.81. Am. Compl. at 23 ¶ 111.
5 Second, it alleges that the Forest Service failed to advertise
6 its timber sale contracts for at least 30 days, in violation of
7 36 C.F.R. § 223.302 and § 223.80. Id. ¶ 113. Third, it alleges
8 that the Forest Service failed to properly notify the public of
9 the Environmental Assessment, Notice of Decision and FONSI, and
10 the bidding process and sale.

11 i. Applicable Requirements

12 Regulation requires “[t]he responsible official . . . [to]
13 promptly make available the final EIS or the EA, and a draft
14 Record of Decision (ROD) or draft Decision Notice (DN) and
15 Finding of No Significant Impact (FONSI)” to eligible parties.
16 36 C.F.R. § 218.7(b). Then the agency must post a digital image
17 of the legal notice or Federal Register publication within four
18 calendar days of the publication. 36 C.F.R. § 218.7(d).

19 The regulations differ slightly for circumstances like
20 those present here, where the Project was approved under an ESD
21 and as part of a stewardship agreement. The Forest Service may
22 “enter into stewardship contracting projects with private
23 persons or other public or private entities to perform services
24 to achieve land management goals for the national forests and
25 the public lands that meet local and rural community needs.” 16
26 U.S.C. § 6591c(b). Within a stewardship agreement, “the value
27 of timber or other forest products [may be] removed as an offset
28 against the cost of services received under the agreement,” with

1 the value of the timber determined "using appropriate methods of
2 appraisal." 16 U.S.C. §§ 6591c(d)(4)(A), (d)(4)(B)(i). "In
3 emergency situations where prompt removal of timber included in
4 a sale is essential to avoid deterioration or to minimize the
5 likelihood of the spread of insects, the approving officer may
6 authorize shortening the formal advertising period to not less
7 than 7 days." 36 C.F.R. § 223.81.

8 For projects approved under an ESD, regulations require
9 "[t]he responsible official . . . [to] notify interested and
10 affected parties of the availability of the EA, FONSI and
11 decision notice, as soon as practicable after the decision
12 notice is signed." 36 C.F.R. § 220.7(d). ESD Projects may
13 proceed immediately after this notification, without being
14 subject to the predecisional objection process. 36 C.F.R.
15 § 218.21(d)(1).

16 ii. Timber Sale Advertising

17 Conservation Congress's arguments premised on the
18 advertisement of the timber sale fail. Pit Resource
19 Conservation District published a notice of timber for sale on
20 May 10, 2018, AR 10441, cancelled it for May 17, 24, and 31, AR
21 10440, and then published another notice on July 5, 2018. AR
22 10439. Bids were listed as being due by July 11, 2018. Id.
23 The Forest Service approved the Project on July 12, 2018. AR 9.
24 No public bids were accepted or sales contracts awarded prior to
25 the Project's approval, and thus they are not part of the
26 administrative record.

27 As an initial matter, the Court notes the parties'
28 disagreement about whether the stewardship agreement exempts the

1 Project from the timber sales advertising requirements that
2 would otherwise apply. Compare Def.'s Mem. at 4-5 (arguing that
3 16 U.S.C. § 6591c(d) (5) exempts contracts from the requirements
4 of 16 U.S.C. § 472a(d) and 36 C.F.R. § 223.81) with Pl.'s Reply,
5 ECF No. 88, p. 7 n.3 (arguing that the sale advertisement
6 requirement still applies). Nevertheless, the Court need not
7 resolve these cursory arguments because even if the requirement
8 applies, the record supports that Pit Resource Conservation
9 District advertised the bid for a sufficient length of time.
10 The Forest Service and its stewardship partner need not have
11 advertised the contract for 30 days, 36 C.F.R. § 223.80, because
12 a shortened seven-day period applies in emergency situations "to
13 avoid deterioration or to minimize the likelihood of the spread
14 of insects." 36 C.F.R. § 223.81. Pit Resource Conservation
15 District advertised the timber for sale publicly in the Modoc
16 County Record at least seven days. AR 10439.

17 Although it appears that the advertisement began prior to
18 when the Forest Service approved the Project, there is no
19 evidence that bids were accepted or that a sale took place prior
20 to Project approval. As the record does not indicate that the
21 early advertisement rendered the bidding process anything other
22 than open and fair to the bidding public, the premature
23 advertisement was an "inconsequential, technical deficienc[y]."
24 Cf. Oregon Env'tl. Council v. Kunzman, 817 F.2d 484, 492 (9th
25 Cir. 1987) (stating that reviewing courts should not find NEPA
26 documents to be insufficient on the basis of immaterial
27 deficiencies).

28 As detailed in the standing analysis above, Conservation

1 Congress lacks the standing to challenge the bidding process and
2 sale conducted by the Pit River Conservation District because,
3 as a non-bidder, it suffered no injury-in-fact from the alleged
4 violation. See, e.g., Pena, 2018 WL 4760503, at *5 (“[A] mere
5 violation of a statutory duty by an agency does not cause an
6 injury to a plaintiff without some showing that the particular
7 plaintiff had a procedural right under the specific statute in
8 question.”).

9 iii. Public Notification of Environmental Documents

10 Conservation Congress’s improper notice argument as to the
11 environmental review documents is similarly without merit. The
12 Forest Service engaged in an early and open scoping process, 40
13 C.F.R. § 1501.7, including public notices seeking scoping
14 comment on the Project in early February 2018. AR 10560-62.
15 The February Scoping Letter to the Public, AR 10563-66,
16 disclosed that the Forest Service was seeking an ESD, as
17 required by 36 C.F.R. § 218.24(b) (3).

18 The Forest Service listed the Project in its April 1, 2018
19 to June 30, 2018 Schedule of Proposed Action (SOPA), ECF No. 74-
20 2, p. 8, as required by 36 C.F.R. § 220.4(d) and published
21 notice of the Project’s draft Environmental Assessment in April
22 2018, AR 10579-81. Interested parties had until May 26, 2018,
23 30 calendar days of the publication, to submit comments. AR
24 10580-81. The Forest Service received the ESD and signed the
25 Project’s Decision Notice and FONSI on July 12, 2018. AR 9.
26 The Decision Notice identified that the Project was granted an
27 ESD, AR 7-8, as required by 36 C.F.R. § 218.21(e). Two weeks
28 later, on July 26, 2018, the Forest Service posted the

1 notification on its website. AR 10645-46. Conservation
2 Congress takes issue with that two-week delay. Pl.'s Reply at
3 7.

4 Regulations require the Forest Service to notify interested
5 and affected parties "as soon as practicable after the decision
6 notice [was] signed." 36 C.F.R. § 220.7(d). While a two-week
7 delay is less than ideal, Conservation Congress has not provided
8 precedent demonstrating that this delay was contrary to law.
9 Therefore, the Court grants summary judgment to the Forest
10 Service on Conservation Congress's first claim.

11 3. Claim II: ESD Notice

12 In its second claim, Conservation Congress alleges the
13 Forest Service violated the APA by failing to timely notify the
14 public about the ESD. Am. Compl. at 23-24 ¶¶ 118-128. This
15 claim fails on two grounds.

16 First, the regulation Conservation Congress relies upon, 36
17 C.F.R. § 220.7(d), does not include ESDs in its list of required
18 documents that must be shared "as soon as practicable after the
19 decision notice is signed." Id. (listing "the EA, FONSI and
20 decision notice"). The Forest Service complied with the
21 regulations that do pertain to ESDs by disclosing it in the
22 February 2018 Scoping Letter, AR 10563-66, and notifying the
23 public it was granted in the Project's approval, AR 7-8. See 36
24 C.F.R. § 218.24(b)(3); 36 C.F.R. § 218.21(e).

25 Second, as stated above, Conservation Congress has not
26 provided any legal support for its argument that a two-week
27 delay between the documents' signing and when the Forest Service
28 posted them on its website was unlawful. The regulations do not

1 define "as soon as practicable" and Conservation Congress has
2 not provided binding or persuasive precedent that the two-week
3 delay is arbitrary, capricious, an abuse of discretion, or
4 otherwise not in accordance with law.

5 The Court grants summary judgment to the Forest Service on
6 Conservation Congress's second claim.

7 4. Claim III: Satisfaction of ESD Criteria

8 In its third claim, Conservation Congress alleges the
9 Forest Service's designation of the Project as an emergency
10 situation was unlawful because it failed to consider relevant
11 information. Am. Compl. at 25 ¶¶ 130-34.

12
13 Regulations define an "emergency situation" as:

14
15 A situation on National Forest System (NFS) lands for
16 which immediate implementation of a decision is
17 necessary to achieve one or more of the following:

18 [a.] Relief from hazards threatening human health
19 and safety;

20 [b.] [M]itigation of threats to natural resources on
21 NFS or adjacent lands;

22 [c.] [A]voiding a loss of commodity value sufficient
23 to jeopardize the agency's ability to
24 accomplish project objectives directly related
25 to resource protection or restoration.

26 36 C.F.R. § 218.21(b) (formatting added). The Chief and the
27 Associate Chief of the Forest Service make the determination
28 that an emergency situation exists based on an examination of
the relevant evidence. 36 C.F.R. § 218.21(c).

There was not a lengthy delay in requesting the ESD. See
All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1137 (9th

1 Cir. 2011) (disapproving of an unexplained two-year delay in
2 requesting an ESD). The Forest Service began gathering
3 information to request an ESD within approximately six months of
4 the Cove Fire, AR 10509, and submitted the request in June 2018.
5 AR 23-34. The Project's objectives overlap with the aims of
6 regulatory definition of an emergency situation: to "reduce
7 safety hazards along roads as well as in treatment areas,
8 recover the value of fire-killed trees, reduce the danger and
9 difficulty of suppressing future wildfires, and accelerate
10 forested conditions and habitats in burned forest." AR 24.

11 The ESD Request supports those objectives with a data-
12 backed assessment of the potential loss in commodity value over
13 time. AR 30-33 (estimating that Ponderosa pine deteriorates 80%
14 in two years and 93% in three years, and that incense cedar
15 deteriorates 45.7% in two years). The estimates of a loss in
16 value of \$280,000 by August 2018 and \$725,500 by August 2019
17 support the Forest Service's argument that delaying the sale
18 "would result in a precipitous decline of timber receipts." AR
19 31. Additionally, the Forest Service estimates that contracting
20 for hazard tree removal alone would incur a cost of \$336,000.
21 AR 33. These estimates affirm that the Project would "avoid[] a
22 loss of commodity value sufficient to jeopardize the agency's
23 ability to accomplish project objectives directly related to
24 resource protection or restoration." 36 C.F.R. § 218.21(b); see
25 also Cottrell, 632 F.3d at 1136 (finding that a loss of \$16,000,
26 or a potential loss of \$70,000, was not substantial loss to the
27 Forest Service).

28 The ESD also referenced the need to fell hazard trees along

1 roads within Forest system. AR 27. The trees were to be
2 removed if they were dead or dying and intersect the road, or if
3 they are damaged or defective live trees that pose a risk of
4 falling in the next five years. Id. As noted in the response
5 to public scoping comment letter, dead trees rot over time,
6 reducing stability and increasing safety concerns. AR 10610.
7 This purpose is also in accordance with the objective that ESDs
8 provide “[r]elief from hazards threatening human health and
9 safety.” 36 C.F.R. § 218.21(b); see also All. for the Wild
10 Rockies v. Farnsworth, 709 F. App’x 461, 462 (9th Cir. 2018)
11 (unpublished) (“Based on the risks from the dead and dying
12 burned trees, however, the Chief’s decisions to issue ESDs were
13 neither arbitrary nor capricious.”).

14 Finally, the ESD included information about reducing fuels
15 for future wildfires and reforestation to accelerate development
16 of forested conditions in areas of the Cove Fire. AR 27-28.
17 Such actions fulfil the objective of “mitigat[ing] . . . threats
18 to natural resources on NFS or adjacent lands.” 36 C.F.R.
19 § 218.21(b).

20 Conservation Congress has not raised a meritorious argument
21 that the ESD is inconsistent with 36 C.F.R. § 218.21. Having
22 found that the Forest Service did not violate the APA, the Court
23 grants summary judgment to the Forest Service on Conservation
24 Congress’s third claim.

25 5. Claim IV: The Northern Goshawk

26 In its fourth claim, Conservation Congress alleges the
27 Forest Service violated the NFMA and APA by failing to comply
28 with the Modoc LRMP’s Standards and Guidelines with respect to

1 the Northern Goshawk, a species of bird. Am. Compl. at 26-27
2 ¶¶ 136-43. Specifically, Conservation Congress alleges the
3 Project fails to (1) "demonstrate compliance with the Modoc LRMP
4 and its Forest-Wide Guidelines and Raptor Management
5 Prescription S&Gs;" (2) "demonstrate timber activity is not
6 located in nest areas (Modoc LRMP at 4-91(2)(G));"
7 (3) "demonstrate LOP and buffer distance compliance (Modoc LRMP
8 at 4-91(1)(G));" (4) "demonstrate enhancement of prey-based
9 habitat within two miles of nest stands (Modoc LRMP at 4-91);"
10 (5) "demonstrate limited road use and construction (Modoc LRMP
11 at 4-91);" (6) "adequately demonstrate compliance with Modoc
12 LRMP Forest Wide S&G 4-26(D)(23)(A) (100 pairs in at least
13 medium habitat);" and (7) "disclose where landings would be
14 built in Northern Goshawk habitat, including the 100 acres of
15 green trees in the Dutch Flat PAC." Id. ¶ 140.

16 i. Abandoned Arguments

17 Conservation Congress did not present argument in their
18 summary judgment pleadings about the need to demonstrate limited
19 road use and construction and disclose where landings would be
20 built in Northern Goshawk habitat. Am. Compl. at 27 ¶ 140.
21 Since Conservation Congress did not offer facts or arguments on
22 these issues within its fourth claim, the Court deems these
23 issues abandoned. See Weldon, 697 F.3d at 1050.

24 ii. Improperly Exhausted Arguments

25 The Forest Service argues in a footnote that Conservation
26 Congress may not raise arguments pertaining to the following
27 Standards and Guidelines because it failed to raise the
28 arguments during the scoping and Environmental Assessment

1 comment periods: (1) Modoc LRMP Standard and Guideline 4-
2 26(2) (A); (2) Modoc LRMP Raptor Management Prescription 4-91;
3 (3) SNFPA Standard and Guideline 76; and (4) SNFPA Standard and
4 Guideline 81. Def.'s Mem. at 7 n.5.

5 "The Administrative Procedure Act requires that plaintiffs
6 exhaust available administrative remedies before bringing their
7 grievances to federal court," Idaho Sporting Cong., Inc. v.
8 Rittenhouse, 305 F.3d 957, 965 (9th Cir. 2002) (citing 5 U.S.C.
9 § 704), as do Forest Service regulations, 7 U.S.C. § 6912(e), 36
10 C.F.R. § 214.20. A plaintiff must raise claims "with sufficient
11 clarity to allow the decision maker to understand and rule on
12 the issue raised"; however, there is not a clear-cut standard as
13 to when this requirement has been met. Rittenhouse, 305 F.3d at
14 965. Courts interpret exhaustion broadly, finding the
15 requirement has been fulfilled so long as the plaintiff provided
16 sufficient notice to the agency to rectify the alleged
17 violations. Nat'l Parks & Conservation Ass'n v. Bureau of Land
18 Mgmt., 606 F.3d 1058, 1065 (9th Cir. 2010).

19 The Forest Service's exhaustion argument first mentions
20 Standard 4-26(2) (A), which requires the Forest Service to manage
21 100 suitable Northern Goshawk nest stands of at least medium
22 habitat capability. AR 14458. Conservation Congress's letter
23 on scoping touches on Modoc LRMP Standards and Guidelines 4-30,
24 4-31, 4-33, and 4-86, relating to wildlife, AR 10530-33, but
25 does not reference Standard 4-26 or the issues pertaining to
26 this standard. Conservation Congress's comment letter on the
27 Environmental Assessment again references 4-86, AR 10573, and
28 chides the Forest Service for a lack of clarity on Protected

1 Activity Centers (PACs) and inadequate survey disclosures, AR
2 10572. Conservation Congress's complaints about lack of
3 disclosure regarding Northern Goshawk habitat could be broadly
4 interpreted as a vague reference to the issues within Standard
5 4-26(2) (A) regarding the number of nest stands. AR 10572. As
6 this issue was not plainly referenced in the comment letters,
7 the Court will allow the Forest Service to supplement the record
8 with a response. Not providing the Forest Service with the
9 opportunity to respond would reward and encourage vague
10 arguments in comment letters, which could conceivably relate to
11 latter-pled claims, but fail to provide adequate notice for the
12 agency to address or correct issues prior to commencement of
13 litigation.

14 Management Prescription Guidelines 4-91(1)-(3) require the
15 Forest Service to have at least 100 acres of habitat suitable
16 for a Northern Goshawk nest stand and an alternative nest stand;
17 delineate 50 to 100 acres around each known nest stand;
18 designate the highest capable and suitable nest stands, with a
19 secondary priority of avoiding conflict with intensive timber
20 management; and enhance prey base populations within two miles
21 of nest stands as opportunities arise. AR 14523. Much like the
22 challenge to Standard 4-26(2) (A), Conservation Congress's
23 objections generally about Northern Goshawk habitat disclosure
24 could be interpreted to broadly include Guideline 4-91(1).
25 Similarly, the Court will allow the Forest Service to respond
26 with supplemental evidence to issues that were not clearly
27 raised in the administrative process. Conservation Congress's
28 comment letters did not provide sufficient clarity and notice

1 that it disputed the Forest Service's compliance with the issues
2 within Management Prescription Guidelines 4-91(2)-(3), see AR
3 10518-35, AR 10569-74, so those issues were not properly
4 exhausted.

5 SNFPA Standards and Guidelines 76 requires a limited
6 operating period and prohibition of work close to the nest
7 during breeding season. AR 10181. SNFPA Standards and
8 Guidelines 81 limits the mechanical treatments in Northern
9 Goshawk PACs to no more than 5% a year, and 10% a decade. AR
10 10181. Conservation Congress's comment letters do not touch on
11 issues related to limited operating periods, Northern Goshawk
12 breeding season, or limitations on the percent of mechanical
13 treatment near Northern Goshawk PACs. See AR 10518-35, AR
14 10569-74. These issues are not properly exhausted.

15 iii. Raptor Standards, Guidelines, and Management
16 Prescriptions

17 Conservation Congress first takes issue with the Integrated
18 Design Features incorporated into the Project based on the
19 Standards and Guidelines of the SNFPA. Pl.'s Mem. at 10-12.
20 Conservation Congress argues that these features do not relate
21 to the Modoc LRMP Standards and Guidelines and are not identical
22 to the wording within the SNFPA. Id.

23 The Northern Goshawk Integrated Design Features include
24 Designation of Northern Goshawk PACs, Avoiding Northern Goshawk
25 Breeding Disturbance, and Northern Goshawk Survey Requirements.
26 AR 61-62. These features are "resource protection measures that
27 are developed by specialists and incorporated as part of the
28 Proposed Action for this project," "in addition to Best

1 Management Practices (BMPs) and Standards and Guidelines from
2 the Modoc LRMP, as amended.” AR 57.

3 Conservation Congress’s arguments about compliance with the
4 SNFPA fail because the Project need not comply with standards
5 from which it is exempt. See AR 10136. The relevant Standards
6 and Guidelines are those within the Modoc LRMP, which are:

7 (1) manage 100 nest stands of at least medium habitat
8 capability, AR 14458; (2) maintain Northern Goshawk territories
9 of at least 100 acres, with no more than twelve miles between
10 them, AR 14523; (3) designate the highest capable nest stands,
11 with a secondary objective of avoiding conflict with intensive
12 timber management, id.; (4) enhance prey base populations within
13 two miles of nest stands as opportunities arise, id.;

14 (5) inventory and protect active Northern Goshawk nest
15 territories necessary to meet population targets, AR 14618.

16 Conservation Congress failed to exhaust its administrative
17 remedies on the last three of the five issues identified.

18 The Forest Service has demonstrated compliance with the
19 Modoc LRMP Standards and Guidelines by showing that (1) there
20 are over 100 Northern Goshawk PACs in the forest and the Project
21 will not reduce that number below 100, Johnston Decl., ECF No.

22 22-3, p. 9 ¶ 19; (2) there is at least one Northern Goshawk
23 territory per 18 square miles, with 18 Northern Goshawk PACs
24 within 12 miles of the Dutch Flat PAC in the Project area, id.;

25 (3) the Cove Fire, not the Project or conflict with intensive
26 timber management, damaged nest stands in the Project area, AR
27 96-97; (4) there were no occupied nest stands in the area at the
28 time the Project was approved around which to enhance prey

1 populations, id.; and (5) 2018 survey and inventory records
2 indicated there were no active nests in the Project area, AR
3 211. The Court recognizes that the Johnston Declaration is
4 outside the record but finds that it falls into an admissible
5 exception to the prohibition on extra-record evidence because it
6 is necessary to explain the agency's action in light of the more
7 specific claims presented in litigation than in comment letters.
8 See Animal Def. Council v. Hodel, 840 F.2d 1432, 1436 (9th Cir.
9 1988), amended, 867 F.2d 1244 (9th Cir. 1989).

10 Since the 2018 surveys, a July 2019 survey found a new
11 Northern Goshawk nest outside of the Project's treatment area.
12 AR 16106-13. Although the biological studies instruct that
13 Northern Goshawk rarely find dead trees suitable for nesting, AR
14 4940, "life finds a way." Ctr. for Food Safety v. Vilsack, 636
15 F.3d 1166, 1174 (9th Cir. 2011) (quoting Michael Crichton,
16 Jurassic Park 159 (Ballantine 1990)). As this is a post-
17 decisional factual development, the Court will not consider it
18 as impacting the validity of the Forest Service's compliance
19 with the Modoc LRMP at the time of the decision. See Tri-Valley
20 CAREs v. U.S. Dep't of Energy, 671 F.3d 1113, 1130 (9th Cir.
21 2012) ("However, exceptions to the normal rule regarding
22 consideration of extra-record materials 'only appl[y] to
23 information available at the time, not post-decisional
24 information.' ").

25 The Court does not find that the Forest Service failed to
26 comply with the Modoc LRMP with respect to the Northern Goshawk,
27 and thus has not abused its discretion or acted arbitrarily,
28 capriciously, or otherwise not in accordance with law. The

1 Court grants summary judgment to the Forest Service on
2 Conservation Congress's fourth claim.

3 6. Claim V: Riparian Areas and the Modoc Sucker

4 In its fifth claim, Conservation Congress alleges the
5 Forest Service violated the NFMA, NEPA, and the APA by failing
6 to comply with the Modoc LRMP's Standards and Guidelines and the
7 SNFPA with respect to the Modoc sucker, a species of fish, and
8 riparian areas. Am. Compl. at 27-30 ¶¶ 146-64.

9 i. Riparian Conservation Areas and Stream
10 Management Zones

11 Conservation Congress challenges the Project's compliance
12 with Modoc LRMP Standards and Guidelines, including the Riparian
13 Area Management Prescription. Pl.'s Mem. at 16-18, 22-24. The
14 organization argues that the Forest Service's stream maps are
15 not sufficiently detailed, that it did not demonstrate it was
16 impossible to maintain 50-70% of old-growth in stream management
17 zones, and that streams were not classified in the environmental
18 documents. Id.; Pl.'s Reply at 11-12, 14-16.

19 The Riparian Area Management Prescription 4-135 emphasizes
20 the need to protect and enhance riparian-dependent resources
21 while utilizing the habitat for non-dependent resources,
22 including timber harvesting. AR 14567. The Prescription
23 permits "[t]imber [to] be harvested while protecting riparian-
24 dependent resources" and provides several guidelines for timber
25 harvesting. AR 14572-73. One of the guidelines is that the
26 Forest Service should "[m]aintain 50-70% of the timbered sites
27 within SMZs in an old-growth state, where possible." AR 14573.
28 The Forest Service is tasked with rehabilitating and maintaining

1 streams containing the Modoc sucker. AR 14575. Dutch Flat
2 Creek, within the Project area, is an affected stream. Id.

3 Approximately 305 acres of the Project's treatment are
4 within Riparian Conservation Areas, adjacent to intermittent
5 streams. AR 51. The areas are to be treated using ground-based
6 mechanical equipment, 238 acres, or hand felling, 67 acres. Id.

7 To mitigate the impact, the Project includes 17 Integrated
8 Design Features and BMPs. AR 58-60. Buffer zones will prevent
9 mechanical equipment from being used along streams, AR 58, and
10 equipment will be kept off slopes greater than 20%, AR 59.

11 Riparian tree species will not be removed. AR 60. Maps in the
12 Hydrology Report illustrate the ephemeral and perennial streams,
13 wetlands, Riparian Conservation Areas, and ponds. AR 7724-25.

14 Conservation Congress has not shown that the Hydrology
15 Report's stream maps were inadequate because it has not shown
16 that the Modoc LRMP requires the level of specificity
17 Conservation Congress desires. Similarly, Guideline 4-141 does
18 not require the Forest Service to prove impossibility of
19 maintaining a timbered site—it guides to maintain 50-70% of the
20 desired conditions "where possible." AR 14573. Given the
21 extent of fire damage documented in the record and the removal
22 of only fire-damaged trees, the Forest Service has shown
23 compliance with this guideline. Similarly, the Appendix listing
24 stream classifications describes stream types within the forest
25 but does not contain a requirement that every stream within a
26 project be labeled with a classification in project
27 documentation. AR 14752.

28 Conservation Congress has not shown that the Forest Service

1 failed to comply with the Modoc LRMP with respect to Riparian
2 Conservation Areas and Stream Management Zones.

3 ii. Modoc Sucker Analysis

4 Conservation Congress's complaints about the Project
5 documentation with respect to the Modoc sucker include
6 (1) insufficient detail about habitat in relation to the
7 Project; (2) lack of Modoc sucker surveys in the analysis;
8 (3) Project activity too close to Modoc sucker habitat; and
9 (4) the risk of Project-caused sedimentation to Modoc sucker
10 habitat. The Court will focus on Modoc LRMP-specific issues in
11 this section and address other issues in the "hard look"
12 analysis section, below.

13 When the Modoc LRMP was drafted, the Modoc sucker was
14 federally listed as an endangered species. AR 14617. The fish
15 was delisted in 2015, as it no longer met the definition of an
16 endangered or threatened species. AR 523-37. The Modoc LRMP
17 Standard 4-26(1)(C) requires the Forest Service "manage all
18 streams containing Modoc suckers as directed in the Riparian
19 Area Management Prescription and the Modoc Sucker Recovery
20 Action Plan." AR 14458.

21 The Biological Evaluation for the Project found that the
22 Project will have no effect on the Modoc sucker. AR 303. It
23 notes that the fish used to occupy Dutch Flat Creek, but recent
24 droughts may have eliminated its habitat. AR 262. At the time
25 of delisting, populations of the Modoc sucker in Dutch Flat
26 Creek were presumed lost due to hybridization with Sacramento
27 suckers. AR 544, 546.

28 The Forest Service concluded that the subwatershed in which

1 treatment will occur is not hydrologically connected to Dutch
2 Flat Creek. AR 49 n.4. The Project provides for snag retention
3 in the Riparian Conservation Areas that will help trap sediment,
4 AR 51, road repairs and maintenance to lower peak flows and
5 sediment delivery, AR 71, and use of erosion hazard mitigation
6 measures where needed, AR 60. The Forest Service does not
7 expect much sediment transport into Dutch Flat Creek due to its
8 ephemeral tributaries. AR 71.

9 Conservation Congress has not shown that the Forest Service
10 has failed to comply with the Modoc LRMP with respect to the
11 Modoc sucker and its habitat. The Court grants summary judgment
12 to the Forest Service on Conservation Congress's fifth claim.

13 7. Claim VI: Snag Density and Snag Diameter

14 In its sixth claim, Conservation Congress alleges the
15 Forest Service violated NEPA, the NFMA, and the APA by not
16 disclosing compliance with the Modoc LRMP Standards and
17 Guidelines regarding snag diameter and snag density
18 requirements. Am. Compl. at 30-32 ¶¶ 167-77.

19 i. Abandoned Arguments

20 Conservation Congress did not present argument in their
21 summary judgment pleadings about reservation and designation of
22 trees for future snags under Modoc LRMP Forest-wide Standards
23 and Guidelines 4-30 and 4-31, AR 10347-48; North Adin Management
24 Area Direction 4-185, AR 10359; or Table 5-1, AR 14674-91. Am.
25 Compl. 31-32 ¶¶ 171, 173. Since Conservation Congress did not
26 offer facts or arguments on these issues within its sixth claim,
27 the Court deems these issues abandoned. See Weldon, 697 F.3d at
28 1050. The Court will focus on the issues Conservation Congress

1 presented in its briefing, including the dispersion of snags,
2 snag size, and habitat recruitment requirements. Pl.'s Mem. at
3 24-26.

4 ii. Standards and Guidelines for Snag Retention

5 A snag is a standing dead tree or portion thereof. 29
6 C.F.R. § 1910.266. Modoc LRMP Standards and Guidelines 4-30(A)
7 directs the Forest Service to meet an average total density of
8 1.5 snags per acre in suitable timber lands (1.2 snags/ acre of
9 15-24" DBH and 0.3 snags/acre of >24" DBH) and 0.5 snags per
10 acre in low productivity timberlands. AR 10347. It notes that
11 "[a]s dictated by natural diversity, snag requirements cannot be
12 met on every acre." Id. Forested lands within each timber
13 compartment are used to assess the average density, with no more
14 than five snags per acre counting to determine that average
15 density. Id. Snags must be at least twenty feet tall. Id.

16 The Project complies with this standard because it plans to
17 retain at least three snags per acre of the largest
18 representative diameter size, averaged across the unit. AR 52.
19 The only excluded area of the Project where snags will not be
20 retained is the roadside hazard area. AR 54, 8386 (noting snags
21 will be retained at least 150 feet from the road). Although the
22 Project does not list a prescribed diameter at breast height
23 (DBH) for the retained snags, its requirement that the largest
24 snags be retained acknowledges the "natural diversity" of the
25 area while striving to meet the size requirements. AR 52, 8375.

26 Additionally, Modoc LRMP Standards and Guidelines 4-30(A)
27 instructs the Forest Service to "[p]rovide habitat conditions
28 for viable populations of snag-dependent species by meeting

1 those snag requirement targets.” AR 10347. The Forest Service
2 complied with this standard as well by meeting the snag-
3 retention minimum and aiming to locate snag retention clumps
4 “adjacent to northern goshawk PACs and around suspected or known
5 wildlife-inhabited trees (e.g. cavities, defects, etc.), and
6 around existing green forest patches.” AR 52. Under the
7 Project, “[a]pproximately 6,682 acres of fire-killed snags would
8 remain unharvested . . . representing about 84 percent . . .
9 burned by the Cove Fire.” AR 95. The Project’s snag retention
10 does not violate the Modoc LRMP’s standard to provide habitat
11 for snag-dependent species.

12 The Forest Service complied with the Modoc LRMP’s snag
13 standards, and it therefore has satisfied the NFMA and the APA.
14 The Court grants summary judgment to the Forest Service on
15 Conservation Congress’s sixth claim.

16 8. Claim VII: “Hard Look” at the Project

17 In its seventh claim, Conservation Congress alleges the
18 Forest Service violated NEPA and the APA by failing to
19 adequately disclose and analyze direct, indirect, and cumulative
20 effects and by not taking a “hard look” at the Project prior to
21 approval. Am. Compl. at 33–35 ¶¶ 179–88.

22 i. Abandoned Arguments

23 Conservation Congress did not present argument in their
24 summary judgment pleadings about Forest Sensitive Species and
25 Management Indicator Species such as the black-backed woodpecker
26 and bats; water withdrawal and water use for dust abatement;
27 road maintenance level classifications; road construction; and
28 the cumulative environmental impact of other local timber sales.

1 See Am. Compl. 34-35 ¶ 185(f), (h), (j)-(l). As to the 2011 and
2 2012 Marking and Hazard Tree Guidelines, Conservation Congress's
3 argument focused on post-decision abandonment of the 2012
4 Guidelines and not about whether the abandonment of those
5 guidelines had been given a "hard look" prior to the decision.
6 See Am. Compl. 34-35 ¶ 185(c). Since Conservation Congress did
7 not offer facts or arguments on these issues within its seventh
8 claim, the Court deems these issues abandoned. See Weldon, 697
9 F.3d at 1050.

10 ii. Economic Justifications

11 Conservation Congress's economic justification argument
12 appears to allege that the Project is not compliant with Big
13 Valley Unit requirements and relies on speculation to justify
14 the Project. Pl.'s Mem. at 27-28. The Court analyzes the
15 organization's timber appraisal arguments, id. at 28-30, in
16 their ninth claim.

17 The bidding advertisement stated that the sale was in
18 accordance with the terms of the Big Valley Unit; however, it
19 also noted bids would be considered from other purchasers if no
20 compliant bids were received. AR 10439. The Environmental
21 Assessment considered the lack of presently operating mills in
22 the area and suggested that potential new mills could purchase
23 the timber and contribute to the local economy within the unit.
24 AR 81. Conservation Congress challenges the Project's
25 compliance with the Big Valley Unit, Pl.'s Reply at 19 n.11, but
26 provides no statute or precedent that voids the Big Valley Unit
27 policies when no mills are operating within its boundaries. See
28 36 C.F.R. § 223.117(b) (permitting the Forest Service to offer

1 timber for sale within sustained yield units).

2 Review of the economic portion of the Environmental
3 Assessment, AR 80-82, illustrates that the Forest Service took a
4 "hard look" at the local economy in the Big Valley Unit and
5 determined that the Project could result in receipts of up to
6 \$630,000 for the Forest Service, helping to finance future fuel
7 reduction and reforestation activities, rather than incurring
8 costs to remove hazard trees. The record indicates that the
9 Forest Service took a "hard look" at the economic issues prior
10 to arriving at its decision.

11 iii. Rapid Assessment of Vegetation Change Data

12 Conservation Congress challenges the 2017 Rapid Assessment
13 of Vegetation Change survey data used by the Forest Service in
14 arriving at suitability determinations for species, arguing it
15 is unreliable. Am. Compl. at 34 ¶ 185; Pl.'s Reply at 10.

16 The Forest Service's 2017 survey showed the burn severity
17 in the Cove Fire perimeter. AR 45. The Rapid Assessment of
18 Vegetation Change process provides information about the basal
19 area loss within a fire perimeter and the vegetation affected by
20 fire within 45 days of a fire's containment. AR 8406. The
21 rapid deployment of this surveying technology coincides with the
22 Forest Service's view that completing the Project before timber
23 deterioration was an emergency situation. The Forest Service
24 has continued to conduct surveys in addition to its use of the
25 2017 data. See AR 210-14; 16106-13.

26 While the failure to "discuss and consider" an independent
27 report that an agency supervisor directed be addressed lends
28 weight to a "hard look" challenge, Blue Mountains Biodiversity

1 Project v. Blackwood, 161 F.3d 1208, 1213 (9th Cir. 1998),
2 Conservation Congress has not pointed out available reports or
3 data that the Forest Service neglected to include. NEPA
4 requires federal agencies to “carefully consider detailed
5 information concerning significant environmental impacts,” but
6 does not require agencies “to do the impractical.” Klamath-
7 Siskiyou Wildlands, 387 F.3d at 992-93 (internal citations,
8 alterations, and quotation marks omitted). “Although an
9 agency’s actions under NEPA are subject to careful judicial
10 scrutiny, courts must also be mindful to defer to agency
11 expertise, particularly with respect to scientific matters
12 within the purview of the agency.” Id. at 993.

13 Conservation Congress has not provided information that the
14 Forest Service’s reliance on the Rapid Assessment of Vegetation
15 Change process and use of its data is violative of NEPA or the
16 APA.

17 iv. Effects on the Modoc Sucker

18 Conservation Congress further alleges that the Forest
19 Service did not take a “hard look” on the direct, indirect, and
20 cumulative effects of the Project on the Modoc sucker and its
21 habitat. Am. Compl. at 34 ¶ 185.

22 As referenced above, the Forest Service determined that the
23 Modoc sucker was not going to be affected by the Project because
24 the Project was designed to avoid the Dutch Flat Creek
25 floodplain. AR 49, 265. The documentation identified its
26 relevant habitat—Dutch Flat Creek—and provided maps illustrating
27 the subwatersheds and the Project area. AR 7700, 7724. The
28 Forest Service found that the majority of the treatment area is

1 in a different subwatershed that is disconnected from Dutch Flat
2 Creek, AR 265, which Conservation Congress disputes, Pl.'s Mem.
3 at 19. In areas of scientific and technical expertise, such as
4 hydrological and sediment calculations, the Court defers to the
5 agency. United States v. Alpine Land & Reservoir Co., 887 F.2d
6 207, 213 (9th Cir. 1989). The Court will not second-guess the
7 Forest Service's hydrological calculations where there is no
8 evidence in the record that contradicts them.

9 Conservation Congress also contends that the Forest Service
10 must conduct Modoc sucker surveys every two years or it has
11 violated the Modoc sucker Post-Delisting Monitoring Plan, AR
12 538-55. Pl.'s Mem. at 21. The Plan acknowledges the Forest
13 Service's "increasingly constrained budgets and limited
14 resources," and notes that the Forest Service "may" complete
15 monitoring of habitat conditions "[a]s funding permits." AR
16 549. The Plan goes on to recommend a complete survey of
17 previously surveyed areas every two years for a 10-year period
18 but does not task the Forest Service with completing that
19 survey. Id. Conservation Congress has not shown that the
20 Forest Service is in violation of a legal duty to perform Modoc
21 sucker surveys.

22 The Environmental Assessment, Biological Evaluation, and
23 the Hydrological Evaluation together support that the Forest
24 Service took a "hard look" on the Project's potential impact to
25 the Modoc sucker and its habitat.

26 v. Effects on the Northern Goshawk

27 Conservation Congress goes on to allege that the Forest
28 Service did not take a "hard look" on the direct, indirect, and

1 cumulative effects of the Project on the Northern Goshawk's
2 nesting, foraging, PAC use, and habitat. Am. Compl. at 34
3 ¶ 185. The organization misidentifies the Northern Goshawk as a
4 Management Indicator Species, Pl.'s Mem. at 10, although the
5 bird has been off the list for over a decade. AR 10101-03.

6 The Forest Service included the Northern Goshawk as a
7 sensitive species in its analysis, AR 94, and concluded that
8 "[m]ost of the suitable goshawk nesting and foraging habitat [in
9 the Project area] was burned by the Cove Fire." AR 95. The
10 Environmental Assessment found that altering the post-fire
11 habitat "may reduce the quality of salvage units for northern
12 goshawk foraging in the short-term," but these "minor short-term
13 reductions . . . would be minimized to some extent" by other
14 aspects of the Project. AR 95-96. The Forest Service included
15 direct and indirect effects of the Project, AR 95-97, as well as
16 consideration of cumulative effects caused by private land
17 salvage and personal fuelwood salvage, on the Northern Goshawk.
18 AR 97-98. Although Conservation Congress would have preferred
19 the PACs to be remapped before the Project, it has not
20 identified a legal requirement for the Forest Service to do so.

21 The record indicates that the Forest Service took a "hard
22 look" at the Project's direct, indirect, and cumulative effects
23 on the Northern Goshawk and its habitat.

24 vi. Effects on Riparian Areas

25 Next, Conservation Congress alleges that the Forest Service
26 did not take a "hard look" on the direct and indirect effects of
27 the Project on riparian areas. Am. Compl. at 34 ¶ 185.
28 Specifically, the organization challenges the Project's

1 identification of riparian and stream areas, consideration of
2 treatment in the riparian and stream areas, and analysis of
3 sedimentation. Pl.'s Mem. at 16-18, 22-23.

4 The Hydrology Report notes that Dutch Flat Creek is
5 adjacent to, rather than inside, the Project area. AR 7704,
6 7724. It lists the activity restrictions within a specified
7 width of Streamside Management Zones and Riparian Conservation
8 Areas, AR 7707, and the Integrated Design Features to be
9 implemented to help meet the Riparian Conservation Objectives,
10 AR 7708. Subwatersheds, streams, wetlands, Riparian
11 Conversation Areas, ponds, Project area, and the Cove Fire
12 perimeter are identified in maps. AR 7700, 7724-25. The Report
13 goes on to identify the direct and indirect effects that the
14 Project is predicted to have on stream flow, water quality,
15 channel morphology, and riparian areas, wetlands, and
16 waterbodies, as well as the cumulative effects analyzed by
17 modeling Equivalent Roaded Acres. AR 7709-12. It finds that
18 the risk of sedimentation from the Project is low because the
19 groundcover will increase, the streams in the Project area are
20 seasonal, and the Project will use BMPs. AR 7709-10.

21 Based on the environmental review documents in the record,
22 the Court finds that the Forest Service took a "hard look" at
23 the Project's potential impact on riparian areas.

24 vii. Effects of Livestock Grazing

25 Finally, Conservation Congress alleges that the Forest
26 Service did not take a "hard look" on the indirect and
27 cumulative effects of livestock grazing and expansion in the
28 Project area, particularly effects on Forest Service Sensitive

1 species, Management Indicator Species, and riparian areas. Am.
2 Compl. at 34 ¶ 185. Most of Conservation Congress's grazing
3 argument is in a footnote of its memorandum. Pl.'s Mem. at 15
4 n.5.

5 Conservation Congress argues that the Project includes
6 opening up the area for grazing without considering the effects
7 of the decision. Pl.'s Mem. at 15 n.5. As noted in the record,
8 however, the Project does not include decisions related to
9 livestock grazing, which is separately addressed through the
10 Barber Canyon Allotment. AR 9640. The environmental review
11 documents considered the impacts of grazing not affiliated with
12 the Project and determined that the more open forest structure
13 facilitated by the Project would improve livestock distribution,
14 potentially relieving grazing pressure from other areas. AR
15 9642-44. The Environmental Assessment planned for additional
16 allotment inspections, as well as resource condition and end of
17 season monitoring. AR 58.

18 Although Conservation Congress may not agree with the
19 particular results of the Forest Service's inquiry, the agency
20 need only take a "hard look" at the environmental consequences
21 of its actions—not select at the most environmentally-sensitive
22 outcome. See Ctr. for Biological Diversity v. Ilano, 928 F.3d
23 774, 777 (9th Cir. 2019) ("NEPA 'does not mandate particular
24 results, but simply prescribes the necessary process.' ").
25 Conservation Congress has not shown that the Forest Service
26 failed to take a "hard look" at the effects of grazing in the
27 Project area.

28 The Court grants summary judgment to the Forest Service on

1 Conservation Congress's seventh claim.

2 9. Claim VIII: Marking of Fire-Injured and Hazard Trees

3 In its eighth claim, Conservation Congress alleges the
4 Forest Service violated the NFMA, NEPA, and the APA by failing
5 to mark fire-injured and hazard trees according to the
6 applicable guidelines. Am. Compl. at 35-36 ¶¶ 191-200. The
7 organization contends that if the Forest Service is not using
8 the 2011 Marking Guidelines for Fire-Injured Trees ("2011
9 Guidelines") or the 2012 Hazard Tree Guidelines ("2012
10 Guidelines"), there is no way to determine which trees are safety
11 threats and which individuals are making that determination.
12 Pl.'s Mem. at 26.

13 The Environmental Assessment provides that the 2011
14 Guidelines, AR 8610-24, will be used to identify dying trees in
15 roadside treatment areas, and the 2012 Guidelines, AR 8570-8609,
16 will be used to identify live damaged and defective trees for
17 removal. AR 54. Under the 2011 Guidelines, trees with a 50%
18 chance of death within striking distance of roads are selected
19 for removal and trees in other areas are selected for removal if
20 they are 70% or more likely to die. AR 51, 54. The Forest
21 Service subsequently discontinued use of the 2012 Guidelines,
22 Opp'n Mot. Prelim. Inj., ECF No. 22, p. 8 n.3, relying on the
23 2011 Guidelines for guidance in selection. As use of the 2012
24 Guidelines is "highly encouraged" but not mandatory, this is not
25 violative of the NFMA, NEPA, or the APA.

26 Conservation Congress's challenge to the Forest Service's
27 use of "Designation by Prescription" similarly fails because
28 this method of designation is authorized by statute. 16 U.S.C.

1 § 472a(g)(3) (“Designation by prescription and designation by
2 description shall be considered valid methods for designation,
3 and may be supervised by use of post-harvest cruise, sample
4 weight scaling, or other methods determined by the Secretary of
5 Agriculture to be appropriate.”).

6 Modoc LRMP Guideline 4-63(1) provides that “[t]rees
7 destroyed by fire, insects, or disease may be harvested if they
8 are in stands of 5 acres or larger, and if 75% of the standing
9 trees have been killed.” AR 14495. This guideline applies to
10 Semi-primitive Non-motorized Dispersed Recreation areas. Id.
11 Conservation Congress has not shown that this guideline applies
12 to the Project area.

13 Conservation Congress has not shown that the Forest Service
14 violated the NFMA, NEPA, or the APA as to its environmental
15 review or conduct regarding tree selection, designation, or
16 marking. The Court grants summary judgment to the Forest
17 Service on Conservation Congress’s eighth claim.

18 10. Claim IX: Timber Appraisal and Sale

19 In its ninth claim, Conservation Congress alleges the
20 Forest Service violated the NFMA, NEPA, and the APA by failing
21 to disclose the timber appraisal and by selling the timber at
22 less than appraised value. Am. Compl. at 37-38 ¶¶ 203-16.
23 Conservation Congress alleges based on a presentation from the
24 Pit Resource Conservation District, AR 15936-64, that the Forest
25 Service engaged in improper appraisal and sale, in violation of
26 16 U.S.C. § 472a(a).

27 Prior to conducting a timber sale, the Forest Service is
28 required to estimate the fair market value of timber proposed to

1 be sold. 36 C.F.R. § 223.60. The NFMA prohibits the Forest
2 Service from selling timber for less than its appraised value.
3 16 U.S.C. § 472a(a). The Forest Service establishes minimum
4 stumpage rates, "base rates," at which timber must be sold at or
5 above. 36 C.F.R. § 223.61. The Forest Service has discretion
6 in choosing the method of appraisal. 36 C.F.R. § 223.60.

7 As the Court found in the standing section, Conservation
8 Congress lacks standing to challenge the Project's appraisal and
9 its contracts with its Stewardship Agreement partner, the Pit
10 River Conservation District. The Court grants summary judgment
11 to the Forest Service on Conservation Congress's ninth claim.

12 C. Violations of Court Orders and Local Rules

13 The motions considered in this order involved lengthy and
14 technical briefing, made all the more challenging by Conservation
15 Congress's "kitchen sink" approach complaint-drafting: including
16 nearly a dozen potential challenges within each claim, only for
17 many to be silently abandoned on summary judgment. See Gurman v.
18 Metro Hous. & Redevelopment Auth., 842 F. Supp. 2d 1151, 1153 (D.
19 Minn. 2011) (criticizing "kitchen-sink" complaints as
20 "pernicious" because they "unfairly burden defendants and courts"
21 with the task of "identifying the plaintiff's genuine claims and
22 determining which of those claims might have legal support.>").
23 Given the caseload crisis in the Eastern District of California,
24 it is imperative that parties reasonably investigate their
25 claims, plead only viable claims, and plead those claims
26 concisely and clearly.

27 In the extensive briefing on the motions, both parties
28 committed a variety of violations of the Court's Order re Filing

1 Requirements and the Local Rules. The Court issued its Order re
2 Filing Requirements ("Order") on August 31, 2018. ECF No. 3-2.
3 The Order states that memoranda of law in support of and in
4 opposition to all motions other than those under Federal Rules of
5 Civil Procedure 56 and 65 are limited to 15 pages and reply
6 memoranda are limited to five pages. Id. at 1. Page limits for
7 cross-motions for summary judgment limited to 25 pages for the
8 plaintiff's opening brief; 35 pages for the defendant's
9 opposition and cross-motion; 20 pages for the plaintiff's reply
10 and opposition; and ten pages for the defendant's reply. Id. at
11 3. The Order cautions parties against filing multiple briefs to
12 circumvent this rule. Id. The Order also states that an
13 attorney who exceeds the page limits must pay monetary sanctions
14 of \$50.00 per page and that the Court will not consider any
15 arguments made past the page limit.

16 The parties' briefing violated the spirit, if not the
17 letter, of the Court's Order, as well as the Eastern District of
18 California Local Rules. Conservation Congress violated Local
19 Rule 130(b) in its Memorandum in Support for Summary Judgment,
20 ECF No. 75-1, by failing to use line numbers in the left margin.
21 Both parties are guilty of using an excessive number of single-
22 spaced footnotes in order to evade the Court's page limitations.

23 The parties also exceeded page limits for reply briefs,
24 which are limited to five pages for the relevant motions.
25 Conservation Congress's reply brief in support of its RJN is 11
26 pages. See RJN Reply, ECF No. 86. The Forest Service's Reply in
27 support of its Motion to Strike is 11 pages. See Def.'s Mot.
28 Strike Reply, ECF No. 91. Conservation Congress's reply brief in

1 support of its Motion to strike is seven pages. See Pl.'s Mot.
2 Strike Reply, ECF No. 98. In sum, Conservation Congress exceeded
3 the page limitations by a total of eight pages (\$400) and the
4 Forest Service by a total of six pages (\$300). The Court has not
5 considered any arguments made after the fifth page of the
6 parties' reply briefs for these motions. Both parties are ordered
7 to pay their respective monetary sanctions within ten days of the
8 date of this Order.

9
10 V. ORDER

11 For the reasons stated above, the Court GRANTS IN PART and
12 DENIES IN PART Plaintiff's Request for Judicial Notice, GRANTS
13 Defendant's Motion to Strike, GRANTS Plaintiff's Motion to
14 Strike, DENIES Plaintiff's Motion for Summary Judgment, and
15 GRANTS Defendant's Motion for Summary Judgment.

16 IT IS SO ORDERED.

17 Dated: September 17, 2019

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JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE