UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS PADRES FORESTWATCH, et al., Plaintiffs, v. U.S. FOREST SERVICE, et al., Defendants.	CASE NO. CV-19-5925-PJW ORDER GRANTING PLAINTIFFS' MOTION TO SUPPLEMENT THE RECORD; GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I.

INTRODUCTION

In 2019, the United States Forest Service approved a plan to thin out the trees in a 1,626 acre stand in the Los Padres National Forest. Plaintiffs are environmental groups who believe that the Forest Service erred in doing so. They believe, among other things, that the project will harm California condors that inhabit the area and that the Forest Service should have conducted an environmental assessment and prepared an environmental impact statement to find this out before approving the project. They ask the Court to vacate the Forest Service's decision and send the case back to the Forest Service with instructions to conduct these studies. For the following reasons, the

Court concludes that the Forest Service's decision to approve the project was not arbitrary and capricious. The Court, therefore, denies Plaintiffs' motion for summary judgment and grants Defendants' motion for summary judgment.

II.

SUMMARY OF FACTS AND PROCEEDINGS

In March 2018, the Forest Service proposed the Tecuya Ridge Shaded Fuelbreak Project. The project provided for the thinning of 1,626 acres of forest by cutting down some trees and clearing underbrush. The motivation behind the thinning was to reduce the risk of damage from wildfires and to improve the health of the forest, which was, among other things, susceptible to beetle infestation due to overgrowth and drought. Experts from the Forest Service weighed in on the project and the impact it might have on the forest and its inhabitants, including the California condors. The Forest Service prepared a Biological Assessment and also consulted with experts from the United States Fish and Wildlife Service who agreed that the project was not likely to adversely affect the California condors in the area.

Between April 2018 and April 2019, Plaintiffs and others submitted comments to the Forest Service regarding the proposal. Most of these comments counseled against the project (though about 600 out of the 613 were identical emails) and a few, from a homeowners' group in the area and the Kern County Fire Department, expressed support. The Forest Service addressed these comments and concluded that, despite the concerns raised by the objectors, particularly with regard to the condors, the project was still sound and should go forward.

In April 2019, Los Padres National Forest Supervisor Kevin Elliott signed a Decision Memo approving the project. In it, he explained that the Forest Service was not required to conduct an environmental assessment or an environmental impact statement before proceeding with the project because the project was "categorically excluded" from such review under 36 C.F.R. § 220.6(e)(6), which exempts projects aimed at "[t]imber stand and/or wildlife habitat improvement activities that do not include the use of herbicides or do not require more than [one] mile of low standard road construction." In reaching this conclusion, Elliot considered the impact of the project on the California condors in the area and determined that it "may effect, but is not likely to adversely affect" them. This determination was based on the Forest Service's finding that, though individual condors might roost "relatively infrequently" in the project area, "all known roosting/nesting sites are approximately 20 miles away." He also considered the impact of the project on the Antimony Inventoried Roadless Area, finding the project was "consistent" with the rules governing roadless areas.

In July 2019, Plaintiffs sent the Forest Service and the Fish and Wildlife Service a 60-day notice of intent to sue. In it, Plaintiffs referenced a 2012 study by Dr. Cogan and others (including Fish and Wildlife Service biologist Joseph Brandt) on roosting behaviors of California condors and argued that Dr. Cogan's study and other studies on condors undermined the Forest Service's position that the project would not adversely impact them. The letter focused on the fact that Fish and Wildlife Service GPS tracking data from condors that had been tagged with radio transmitters showed that they had roosted in and around the project area. Plaintiffs pointed out that this data showed

that, between December 2013 and March 2019, there were at least 46 roosting sites within the project area or within one-half mile of the project area boundary. In Plaintiffs' view, the Forest Service had erred by ignoring that tracking data.

The government responded to that letter in September 2019, explaining that it had considered the tracking data and concluded that the roosting sites within the project area were temporary roosting sites and not in need of protective measures because they were not critical to condor conservation. Plaintiffs wrote back to the Forest Service in November 2019, setting out their disagreement with the Forest Service's characterization of these roosting sites as temporary. Relying in part on Dr. Cogan's work, they argued that there was no such thing as a temporary roosting site and maintained that the Forest Service's designation of the sites within the project area as temporary was not supported by the scientific literature.

In response, the Forest Service took another look at the data and its conclusions. It also consulted with its own experts and with experts at the Fish and Wildlife Service. Ultimately, it confirmed that the project would not likely be detrimental to condors because the roosting sites within the project area were not critical to the condor population. It based this finding in part on the telemetry data, which showed that condors roosted in the project area infrequently, generally alone, as opposed to in communal groups, and for short intervals, like overnight, as opposed to days, weeks, or months, like at other roosting sites outside the project area. The Forest Service also noted that none of the roosting sites within the project area was used for nesting, the closest nesting site being four miles away, and that there were many other roosting sites nearby that

were outside the project area. The Forest Service and the Fish and Wildlife Service also noted that the project would be beneficial to the condors because it would remove some trees and shrubs that blocked the forest floor, making it easier for the condors to see carrion there. At the same time, they noted that removing fuel would reduce the risk of a future catastrophic wildfire and decrease the chances of beetle infestations, recognizing that beetle infestations would kill the trees and make them more vulnerable to wildfires and that a major fire could wipe out all the roosting sites in and around the project area.

III.

ANALYSIS

Plaintiffs bring this action against the Forest Service and the Fish and Wildlife Service, arguing that, in approving the Tecuya Ridge Project without conducting an environmental assessment and preparing an environmental impact statement, the government violated the National Environmental Protection Act, the Roadless Area Conservation Rule, the Endangered Species Act, and the National Forest Management Act. The parties are now before the Court on cross motions for summary judgment.[1]

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[1] Plaintiffs contend in their brief that they have standing to sue. The government has not argued otherwise. Thus, the Court will assume, without deciding, that Plaintiffs have standing. The Court also notes that the American Forest Resource Council, the California Forestry Association, and the Associated California Loggers--organizations representing interests in forest health, timber supply, and local employment stemming from the project--have been allowed to intervene on behalf of the government. For the most part, Intervenors' views are aligned with the government's. As such, the Court does not address Intervenors' arguments separately unless noted. The Court's approach should not be interpreted to mean that it did not find Intervenors' brief helpful in resolving the case. It did.

A. The Standard of Review

The Court reviews the Forest Service's decision to approve the Tecuya Ridge Project under the arbitrary and capricious standard set out in the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Under this standard, the Court is required to affirm the Agency's decision unless Plaintiffs establish that it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(2)(A). The Court's review of the Agency's decision is highly deferential, beginning with the presumption that the Agency's decision is valid. *Short Haul Survival Comm. v. United States*, 572 F.2d 240, 244 (9th Cir. 1978); *United States Postal Serv. v. Gregory*, 534 U.S. 1, 7 (2001).

B. Plaintiffs' Request to Supplement the Record

Plaintiffs seek to supplement the administrative record with their November 2019 Notice of Intent Letter and two attachments to that letter, the Cogan study and a map showing roosting sites within the project area. They argue that, despite the general rule that the Court is limited to considering only what is in the administrative record, expansion should be allowed in this case for the limited purpose of addressing the Forest Service's reasons for disregarding the telemetry data since Plaintiffs have included a claim under the Endangered Species Act, citing *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 497 (9th Cir. 2011). The Forest Service argues that expansion of the record is warranted in only narrow circumstances, none of which applies here, citing, inter alia, *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam), and *Fence Creek Cattle Co. v. United States Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010).

The Court recognizes that there is some confusion in the law surrounding the issue of whether supplementation of the administrative record is allowed and, assuming that it is, what standard should be applied and how much extra-record evidence should be admitted. The Court finds that supplementation is warranted in this case because Plaintiffs allege that the Forest Service has not properly considered the roosting habits of condors in the project area and because there is ambiguity in the Decision Memo regarding roosting, a term that appears to be technical and somewhat complex. *See Kraayenbrink*, 632 F.3d at 497*; Fence Creek Cattle Co.*, 602 F.3d at 1131 (allowing for expansion of the administrative record "to determine if the agency has considered all factors and explained its decision" or if "needed to explain technical terms or complex subjects"). The Forest Service stated in the Decision Memo that condors both roost in the project area and do not roost in the project area. By considering evidence outside the administrative record, the Court will be better able to understand what the Forest Service meant in its Decision Memo and whether its ultimate decision to go forward with the project was arbitrary and capricious. *See San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 993 (9th Cir. 2014). Thus, the Court will consider the November 2019 Notice of Intent Letter and attachments A and E to the letter, the Cogan study and the map.

The Forest Service argues that, if the Court is going to consider Plaintiffs' November 2019 Letter and Exhibits A and E, it should also consider the Forest Service's responses to the letter, i.e., declarations by the government's condor experts Patrick Lieske and Joseph Brandt. Plaintiffs argue that the Court should not consider these declarations because they amount to nothing more than post-hoc

justifications for the government's decision, which are not allowed. The government counters that they are not post-hoc justifications but rather post-hoc explanations and only make clear what the government decided and why.

The Court sides with the Forest Service, here. The record is somewhat confusing. The November 2019 letter and the exhibits attached to it highlight that confusion. And the Forest Service's response to that letter helps clarify what the Forest Service was thinking when it approved the project without an environmental assessment and why. For that reason, the Court will consider the declarations of Patrick Lieske and Joseph Brandt to the extent that they clarify what they did in connection with the Forest Service's decision in this case. The Court will not, however, consider the additional analysis Brandt performed in 2020, which is set forth at paragraphs 21-27 of his declaration, and the exhibits to the Lieske declaration, which also involve work done after the decision.

C. The Forest Service's Finding that the Project was Exempt from an Environmental Assessment and an Environmental Impact Statement was not Arbitrary and Capricious

Generally speaking, prior to proceeding with projects like the one at bar, the government is required to conduct an environmental assessment to determine if a more full-throated environmental impact statement is necessary. There are exceptions to this rule for projects that are "categorically excluded" from robust environmental review. One such exception, the exception relied on by the Forest Service in this case, is for projects involving "[t]imber stand and/or wildlife habitat improvement activities that do not include the use of herbicides or do not require more than [one] mile of low standard road

construction." 36 C.F.R. § 220.6(e)(6). This exclusion applies to, among other things, "[t]hinning or brush control to improve growth or to reduce fire hazard." 36 C.F.R. § 220.6(e)(6)(ii). Plaintiffs argue that categorical exclusion 6 does not apply to the Tecuya Ridge Project because that exclusion is only for projects involving the removal of saplings, defined in the Forest Service Manual as less than five inches, and only when the government is not using mechanical equipment to do it.

The parties contend that the language of the regulation is clear on its face, that there is no ambiguity, and that the Court needs to merely read it and apply it. At the same time, however, they argue that the plain meaning of this unambiguous language mandates opposite outcomes. Plaintiffs take the position that the plain meaning of the words demonstrates that the project does not fall within categorical exclusion 6 and the Forest Service takes the position that it does.

Assuming that the language is unambiguous, the Court concludes that categorical exclusion 6 covers this project. The project is for timber stand and wildlife habitat improvement, does not involve the use of herbicides, and will not require the building of roads. The project will result in the thinning of the forest for brush control, to improve growth, and to reduce fire hazard. This is exactly what was contemplated by categorical exclusion 6.

To the extent that the language is ambiguous, the arbitrary and capricious standard applies to the Forest Service's decision that the project falls within categorical exclusion 6. *See Mountain Cmtys. For Fire Safety v. Elliott*, 2020 WL 2733807, at *5 (C.D. Cal. May 26, 2020). The Forest Service need only explain its decision as to why a project fits within the exclusion and, as long as it is clear that it

has considered all relevant factors, it is entitled to deference absent a showing of clear error. *Id.*

The regulation setting out categorical exclusion 6 does not limit the Forest Service to cutting down saplings without machinery. Plaintiffs seem to concede this point but note that the 2014 Forest Service Manual provides that timber stand improvement is limited to cutting down saplings (i.e., less than five inches) and argue that the Forest Service is bound by that limitation when construing the regulations. This argument is rejected. The Forest Service Manual is not part of the regulations and the Service is not limited under the regulations by its Manual. *See W. Radio Servs. Co. v. Espy*, 79 F.3d 896, 901 (9th Cir. 1996) (finding Forest Service Manual is an advisory document that "'does not act as a binding limitation on the [Forest] Service's authority'") (quoting *United States v. Doremus*, 888 F.2d 630, 633 n.3 (9th Cir. 1989)). The regulation does not limit the size of trees that can be cut down to accomplish stand improvement. Nor does it limit the equipment the Forest Service can use to cut them down. The Court will not read into the regulation limitations that are not there.[2]

Plaintiffs argue that the Forest Service's reliance on categorical exclusion 6 was simply a way to circumvent an injunction on the use of categorical exclusion 10, which covers "[h]azardous fuels reduction activities using . . . mechanical methods for

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[2] Intervenors argue that, if the Court is going to consider the Forest Service Manual, it should look to the 2004 Forest Service Manual because it was in effect when the categorical exclusion was promulgated. (Brief at 17.) It notes that there was no definition for "stand improvement" in the 2004 edition. In light of the fact that the Court has concluded that the Manual does not limit the Forest Service, the Court need not resolve this issue.

crushing, piling, thinning, pruning, cutting, chipping, mulching, and mowing, not to exceed 1,000 acres." 36 C.F.R. § 220.6(e)(10). They argue that, since this project is really part of the Forest Service's overall fire suppression plan, it falls squarely within categorical exclusion 10 and the Forest Service cannot rely on the more general language of exclusion 6 to circumvent the injunction barring the use of exclusion 10.

Certainly, reducing the number of trees in the project area to guard against wildfires was one of the goals of the project, but it was not the only goal. The Forest Service explained in the Decision Memo that thinning out the forest and removing the underbrush was also aimed at helping achieve a long-term change to the forest to make it more sustainable:

> In the long-term, the desired condition for the national forest land would be to: (1) create forests more resistant to the effects of drought, insect and disease outbreaks and stand killing crown fires; (2) encourage tree recruitment that contain a species mix more like pre-settlement composition, (i.e., with a higher representation of shade-intolerant species such as ponderosa pine that have declined during the period of fire suppression); (3) recreate stand densities more like those of the pre-suppression era; and (4) encourage a stand structure that emphasizes large-diameter trees.

(Decision Memo at 3-4.)

As such, the Court does not agree with Plaintiffs that the Forest Service's finding that categorical exclusion 6 applied was simply a ruse to get around the prohibition on using categorical exclusion 10. Where, as here, more than one categorical exclusion comes into play,

the Forest Service is empowered to determine which one applies and its decision is entitled to deference absent clear error, which is not the case here.

Plaintiffs argue that, even assuming that categorical exclusion 6 applied to the project, extraordinary circumstances under 36 C.F.R. § 220.6(b) require that an environmental assessment be conducted nevertheless because the project: (1) impacts the California condor, a highly endangered species that needs further protection; (2) is being conducted in a roadless area and is subject to special rules; and (3) fails to protect public safety.

The Forest Service considered the fact that the project would impact the California condor. It determined, however, that because the project was not likely to adversely affect the condors and did not involve critical habitat (as discussed infra) further analysis was not warranted. The Forest Service did not err in doing so. *See, e.g., Conservation Cong. v. United States Forest Serv.*, 2016 WL 1162676, at *3 (E.D. Cal. Mar. 24, 2016) ("[W]hile the [Biological Assessment] reported that the Tatham Project 'may affect, but is not likely to adversely affect' the northern spotted owl, the degree of potential effects on the species is low enough that a categorical exclusion [6] is still appropriate.").

The Service also considered the project's impact on the roadless area inside the project and determined that those concerns did not amount to exceptional circumstances because no new road construction or re-construction was contemplated and the project was consistent with the 2001 Roadless Rule. The Deputy Regional Forester for the region concurred in an October 2018 Decision Memo that the project was consistent with the 2001 Roadless Rule.

Finally, Plaintiffs contend that the impact on public safety was not adequately considered. But the Forest Service's Decision Memo discusses the government's efforts to manage the forests and prevent the destruction to life and property caused by wildfires. That was sufficient.

Plaintiffs argue that locating the fuelbreak in the project area is unwise and will not accomplish its goal. They point to experts that support their view. A disagreement between scientists on the efficacy and/or placement of this fuelbreak, however, does not amount to an extraordinary circumstance under the regulations. 36 C.F.R. § 220.6(b).

For all these reasons, the Court finds that the Forest Service's decision that exceptional circumstances did not warrant further environmental study was not arbitrary and capricious.[3]

D. The Forest Service's Decision that the Tecuya Ridge Project Was Not Likely to Adversely Affect the California Condor was Not Arbitrary or Capricious

In their many arguments and numerous claims, Plaintiffs' main complaint boils down to their argument that the Forest Service's decision that the project would not endanger California condors was

[3] Intervenors have requested that the Court take judicial notice of the 2004 version of the Forest Service Manual 2400 (Timber Management) Chapter 2470 (Silvicultural Practices); the Soc'y of Am. Foresters, *Dictionary of Forestry* (John A. Helms ed. 1998) page 175; and the Soc'y of Am. Foresters, *Dictionary of Forestry* 176 (John A. Helms ed. 1998) page 99. (Doc. No. 45.) That request is granted. So, too, is Plaintiffs' request that the Court take judicial notice of the 1990 version of the Forest Service Manual 2400 (Timber Management) Chapter 2470 (Silvicultural Practices) and the U.S. Forest Service, Reforestation and Timber Stand Improvement Reports, 1997-2019 (relevant excerpts). (Doc. No. 49.)

based on the faulty assumption that condors did not roost in or near the project area. They point to language in the Decision Memo in which the Forest Service stated as much and note that this conclusion is contrary to the Forest Service's own telemetry data that shows that the condors do in fact roost in the project area. They believe that the Forest Service either overlooked this data or intentionally ignored it when it initially concluded that condors do not roost in the project area.

The record undermines Plaintiffs' argument. To begin with, though the Decision Memo states that condors do not roost in the project area, it also states that they do, albeit infrequently. Further, the record demonstrates that the government's biologists were intimately familiar with the telemetry data and took it into account in analyzing the project's impact on the condors. Even if they had not been familiar with it, Plaintiffs raised their concerns about the condor roosting sites in the project area as evidenced by the telemetry data before the Decision Memo was issued. In a September 2018 email, Forest Service personnel, including biologist Lieske, discussed Plaintiffs' concerns based on the telemetry data and confirmed that they had considered it and that it did not cause them to change their recommendations. (AR 4710, Email from Cooper to Thompson and Lieske.) The Forest Service reinforced the fact that it had considered the telemetry data when it responded to Plaintiffs' July 2019 Notice of Intent Letter. (September 2019 Letter From the Forest Service to Plaintiffs.) Finally, government biologists Lieske and Brandt have declared under oath in responding to Plaintiffs' November 2019 Notice of Intent Letter that they were well aware of the

telemetry data and considered it in recommending approval of the project. (Brandt Decl. and Lieske Decl.)

Plaintiffs argue throughout their briefs that the Forest Service's explanations about roosting were created after the project was approved and are feeble attempts to justify what it had done after the fact. The evidence before the Court is to the contrary. The chronology of events as set forth above shows that the biologists had taken into account the telemetry data while they were considering whether the project should go forward. As the Court sees it, the basis for the disagreement over the roosting analysis is that the government makes a distinction between what it terms as active roosts, of which there are none in or near the project area, and temporary roosts, which can be found in the project area, and Plaintiffs do not.

The Court need not resolve the dispute over the wording in order to determine whether the Forest Service's decision to approve the project was arbitrary and capricious. The telemetry data itself, which, for the most part, the parties agree on, answers that question. According to the telemetry data, over a five-year period, from December 2013 to December 2018, the 78 tagged condors that inhabit the 17,558 square miles of the southern California range roosted for 1,826 nights, for a total of 142,428 roosting events (78 condors x 1826 nights). Plaintiffs point out that the telemetry data shows that 46 of those roosting sites occurred in or near the project area. Forty-six out of 142,428 nights amounts to .032 percent of the roost activity. By any standard, this is a relatively small percentage and is consistent with the Forest Service's finding in the Decision Memo that this roosting was "infrequent." The telemetry data also shows that the condors did not return to these sites, that they did not

roost with other condors when they roosted in these sites, and that they did not nest in these sites. As the science makes clear, condors generally roost communally and return to the same roosts repeatedly.

Thus, even assuming that the term "temporary" is not used by other biologists in the field, the data shows that the roosting sites within the project area were used significantly less often than the roosting sites outside the project area and significantly differently than the roosting sites outside of the project area. These quantitative and qualitative differences in roosting support the Forest Service's finding that these roosting sites are not critical to the condors' survival and that removing some of the trees and underbrush in the project area is not likely to adversely affect the condors in the immediate term and will likely help them in the long term. Further, as the Forest Service makes clear, it is not clear-cutting the forest, merely thinning it out. There will still be large trees in the project area for the condors to use. And, in the event that workers come upon a roost while the work is being done, the Forest Service has implemented safeguards that will require them to withdraw from the area until the condors are gone. As such, the Court concludes that the Forest Service's decision to approve the project despite the potential impact on the condors was not arbitrary or capricious.

In their combined opposition and reply brief, Plaintiffs seem to shift gears, arguing that the Forest Service plan does not allow for the retention of enough large trees to support condor roosting in the project area. (Opposition at 15-18.) But the plan put in place by the Forest Service favors the retention of larger trees and snags and, though it has not been determined exactly which trees will be cut, the

Decision Memo sets guidelines, which the Court presumes the workers will follow, to leave the larger trees in place.

Plaintiffs further complain that cutting down the trees is a violation of the Antimony Roadless area rules and that the Forest Service has not identified any exceptions to the rules to allow it to go forward. In the approval process, the Forest Service consulted with the Deputy Regional Forester who determined that the project was consistent with the Roadless Rules. The Forest Service reached the same conclusion.

The Forest Service explains in its briefs that, contrary to Plaintiffs' claims, cutting down the trees is consistent with the Roadless Rules under 36 C.F.R. § 294.13(b)(1) because it will reduce the risk of wildfire and because the project is limited to smaller trees and will not require new roads. The record supports the government's position.

Plaintiffs also contend that the project violates the National Forest Management Act because it fails to prohibit or restrict activities within one-half mile of active condor roost sites. As the Court has concluded, however, the condor sites within the project area are not active roost sites and the Forest Service has developed contingencies to make sure that workers do not come within one-half mile of any active roost sites and retreat if they happen upon one.[4]

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[4] It seems that Plaintiffs are also arguing that the Forest Service's decision runs counter to the evidence before it. In other words, they believe that the telemetry data and the current science regarding condors contradicts the Forest Service's finding that the project will not likely harm the condors. But the Court is not empowered or inclined to substitute its judgment for the Forest Service's. *See The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc) (explaining courts may not substitute their

For all these reasons, the Court finds that the Forest Service's decision to go forward with this project was not arbitrary and capricious. It consulted with its experts, considered the science, listened to opposing views, and performed a careful analysis. As such, its decision will not be disturbed. *See Ctr. for Biological Diversity v. Ilano*, 928 F.3d 774, 783 (9th Cir. 2019) (upholding Forest Service's conclusion that thinning project was excluded from environmental assessment and environmental impact statement where evidence established that Forest Service considered the relevant scientific data, engaged in a careful analysis, and reached its conclusion based on evidence supported by the record).

VI.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion to expand the administrative record with its November 2019 Notice of Intent Letter and Exhibits A and E to that letter is granted. The government's motion to supplement the record with its response to Plaintiffs' Notice of Intent Letter is also granted with the limitations set out above. Defendants' motion for summary judgment is GRANTED. Plaintiffs' motion for summary judgment is DENIED.

IT IS SO ORDERED.

DATED: August 20, 2020

Patrick J. Walsh

PATRICK J. WALSH
UNITED STATES MAGISTRATE JUDGE

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