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UNITED STATES DISTRICT COURT

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EASTERN DISTRICT OF CALIFORNIA

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10 CONSERVATION CONGRESS,

No. 2:13-cv-01977-JAM-DB

11 Plaintiff,

12 v.

**ORDER GRANTING DEFENDANTS'  
MOTION TO AMEND THE JUDGMENT AND  
DISSOLVE THE INJUNCTION**13 UNITED STATES FOREST SERVICE  
14 and UNITED STATES FISH AND  
14 WILDLIFE SERVICE,

15 Defendants,

16 and

17 TRINITY RIVER LUMBER COMPANY,

18 Intervenor  
19 Defendant.

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**I. INTRODUCTION**

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Conservation Congress ("Plaintiff") sued the United States Forest Service ("USFS") and the United States Fish and Wildlife Service ("FWS") for violations of the National Environmental Policy Act ("NEPA"), the Endangered Species Act ("ESA"), the National Forest Management Act ("NFMA"), and the Administrative Procedure Act ("APA") related to the Smokey Project (or "Project"). The Smokey Project is a plan to administer fuel and

1 vegetative treatments to further habitat and fire management  
2 goals in the Mendocino National Forest. The project will also  
3 contribute to timber production. The Trinity River Lumber  
4 Company ("Trinity") intervened in the case; Trinity purchased the  
5 stewardship contract for the Smokey Project and will be  
6 harvesting trees ones the Project commences. About a year ago,  
7 this Court granted Plaintiff summary judgment on two of its  
8 claims against the USFS, remanded the Project to the agency to  
9 cure the noted defects, and enjoined tree harvesting of trees  
10 exceeding 20 inches dbh. Now the USFS and Intervenor move the  
11 Court to dissolve the injunction (ECF No. 162).<sup>1</sup>

## 12 II. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

13 On February 16, 2017, the Court granted Plaintiff's Motion  
14 for Summary Judgment on its claims that the USFS failed to take a  
15 hard look and failed to develop a reasonable range of  
16 alternatives in analyzing the proposed Smokey Project (the First  
17 and Fourth Claims).

18 Specifically, the Court found that the USFS:

- 19 • Failed to address reasonable alternatives, specifically  
20 the suggested diameter caps, SJ Order (ECF No. 121) at  
21 31-37, 39;
- 22 • Stated the Limited Operating Period inconsistently  
23 throughout the record, id. at 39-40; and
- 24 • Failed to address how its failure to do the monitoring  
25 required for other projects impacts the Smokey Project.  
26 Id. at 40-41.

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28 <sup>1</sup> A hearing was held on this motion on February 27, 2018.

1           The Court also expressed concern that the Environmental  
2 Assessment contained varying statistics regarding the number of  
3 acres to be treated that, without much explanation of these  
4 differences, made the document confusing. Id. at 41. The Court  
5 did not however include this issue as a ground for its decision.

6           In all other respects, the Court found in favor of  
7 Defendants and granted their and Intervenor's Cross Motions for  
8 Summary Judgment on the Second, Third, Fifth, Sixth, Seventh,  
9 Eighth, and Ninth Claims, and the Supplemental Claim.

10           The Court requested further briefing on the proper remedy  
11 and issued a Final Judgment on May 26, 2017 (ECF No. 142). The  
12 Court remanded the Project to the USFS with instructions to  
13 prepare supplemental NEPA analysis that cures the NEPA violations  
14 identified in the Court's Merits Order and complies with the  
15 applicable statutes. Final Judgment at 7. If the USFS concluded  
16 that no EIS would be required, it was ordered to circulate the  
17 analysis and draft revised DN/FONSI to the public. Id. The  
18 Court ordered the USFS to accept objections for a 20-day period  
19 from eligible parties and complete its supplemental documentation  
20 and public involvement process no later than December 1, 2017.  
21 Finally, the Court enjoined Defendants and Intervenor from  
22 removing any trees with 20 inches dbh or greater. The Court  
23 retained jurisdiction to dissolve the injunction upon a showing  
24 that the USFS has complied with this Court's Order and satisfied  
25 its obligations under NEPA. Id. at 8.

26           The USFS issued a Draft Supplement to the Smokey Project  
27 Environmental Assessment on September 27, 2017. Mot. at 2; Obj.  
28 Let. at 1. Plaintiff submitted objections on October 16 and 17,

1 2017. Id.; Pl. Obj. The USFS responded to those objections.  
2 Obj. Resp., ECF No. 162-3. The USFS then issued its Supplement  
3 to Environmental Assessment and an affirmation of its prior  
4 DN/FONSI (Decision Notice and Finding of No Significant Impact)  
5 on November 27, 2017. SEA; Aff. Dec.

### 6 III. OPINION

#### 7 A. Legal Standards

8 A district court may relieve a party from a final judgment  
9 under Federal Rule of Civil Procedure 60(b). Rule 60(b)(5)  
10 allows courts to relieve a party or its legal representative from  
11 a final judgment, order, or proceeding if the judgment has been  
12 satisfied, released or discharged. "A party seeking modification  
13 or dissolution of an injunction bears the burden of establishing  
14 that a significant change in facts or law warrants revision or  
15 dissolution of the injunction." Sharp v. Weston, 233 F.3d 1166,  
16 1170 (9th Cir. 2000). "A significant change is one that pertains  
17 to the underlying reasons for the injunction." Moon v. GMAC  
18 Mortg. Corp., No. C08-969Z, 2008 WL 4741492, at \*2 (W.D. Wash.  
19 Oct. 24, 2008).

20 In deciding whether to dissolve an injunction, the Court's  
21 review of the agency's action is limited to the scope of the  
22 prior litigation and the injunction order at issue. See Today's  
23 IV, Inc. v. Federal Transit Administration, No. LA CV13-00378 JAK  
24 (PLAx), 2016 WL 741685, at \*6-7 (C.D. Cal. Feb. 5, 2016) (citing  
25 Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 162 (2010)).  
26 It is not an opportunity for a plaintiff to raise issues that  
27 were not addressed in the summary judgment order. Id. New  
28 claims must be presented through a new action and cannot serve as

1 a basis to deny a request to dissolve the injunction. Id.; see  
2 also Orantes-Hernandez v. Gonzales, 504 F. Supp. 2d 825, 844  
3 (C.D. Cal. 2007) (finding a new due process claim exceeds the  
4 permissible scope of the court's inquiry in deciding the  
5 government's motion to dissolve the 1988 injunction). These  
6 limitations build upon a principle common to all federal  
7 litigation, a plaintiff cannot raise claims it failed to put the  
8 defendant on notice of by its complaint. See Pickern v. Pier 1  
9 Imports, Inc., 457 F.3d 963, 968 (9th Cir. 2006).

10 In addition to these principles, Intervenor argues, citing  
11 Heartland Regional Medical Center, that the Court need not  
12 evaluate the merits of the remand decision before dissolving the  
13 injunction. Joinder, ECF No. 165, at 4. In Heartland Regional  
14 Medical Center v. Leavitt, the D.C. Circuit found that where a  
15 court remanded a case to an agency due to the agency's failure to  
16 consider or respond to reasonable alternatives, the agency  
17 complied with the judgment by filling the analytical gap and  
18 incorporating its rationale for rejecting those alternatives into  
19 the decision documents. 415 F.3d 24, 29 (D.C. Cir. 2005). But,  
20 the Circuit explained, "whether or not the agency's [post-remand]  
21 rejection of the alternatives was arbitrary is a determination  
22 that must be made in [a] separate APA action challenging [the  
23 agency's] post-remand decisions." Id. at 30. While this  
24 discussion favors a narrow construction of the action required on  
25 remand, its instructive value in the present case is very limited  
26 because the Heartland decision involved a plaintiff's motion to  
27 enforce a judgment, not a decision whether to dissolve an  
28 injunction. The more appropriate standards on this motion are

1 cited above.

2 "NEPA imposes only procedural requirements to ensure that  
3 the agency, in reaching its decision, will have available, and  
4 will carefully consider, detailed information concerning  
5 significant environmental impacts." Winter v. NRDC, 555 U.S. 7,  
6 23 (2008) (internal quotations omitted). "NEPA . . . simply  
7 guarantees a particular procedure, not a particular result."  
8 Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 737 (1998).

9 **B. Argument Summary**

10 The USFS seeks dissolution of the injunction. ECF No. 162.  
11 It argues, and provides supporting documentation to show, that it  
12 has addressed the Court's three main concerns in its supplemental  
13 analysis. Additionally, the Supplemental Environmental  
14 Assessment ("SEA") clarifies the Project's acreage figures and  
15 explains the confusion from earlier iterations of this data.  
16 Intervenor joined in this motion, adding some additional  
17 arguments and explaining that it has not commenced cutting  
18 because the Project was not economically feasible with the  
19 Court's diameter cap. Joinder at 2.

20 Plaintiff opposes the motion. ECF No. 166. First, it  
21 argues that the failure to conduct a detailed analysis of a  
22 single "action alternative" to the Smokey Project is a violation  
23 of NEPA's alternative analysis requirement. Opp'n at 2. It  
24 contests the USFS's alternatives analysis as (1) skewed toward  
25 selecting an alternative with intensive cutting, (2) based upon  
26 fire conditions likely to occur during 97th percentile weather  
27 conditions (which it claims is arbitrary and capricious),  
28 (3) flawed by its failure to explain why the only analyzed action

1 alternative calls for tree cutting far more extensive than  
2 necessary, and (4) contrary to underlying management objective of  
3 assuring that tree mortality not exceed 25 percent. Id. at 4-12.  
4 Next, Plaintiff argues that USFS has failed to meet its  
5 monitoring obligations from sources like the Mendocino National  
6 Forest Land and Resource Management Plan and the USFWS's "2011  
7 Northern Spotted Owl Survey Protocol." Id. at 13. Finally,  
8 Plaintiff argues that the supplemental analysis failed to clarify  
9 the LOPs.

10 In Reply, the USFS argues that Plaintiff's Opposition seeks  
11 to expand the scope of this litigation and raises issues that do  
12 not go to the NEPA deficiencies the Court identified in its  
13 earlier orders. Fed. Reply at 1. It argues that Plaintiff's  
14 criticisms are procedurally improper and that it fully complied  
15 with the Court's Order. Id. Similarly, Intervenor contends that  
16 Plaintiff has not shown any deficiencies in the analysis on  
17 remand. Intervenor Reply at 1. Intervenor also argues,  
18 persuasively, that "the deficient alternatives analysis was the  
19 foundation of the Court's decision to issue an injunction."  
20 Reply at 2; J. Order at 3. Therefore, the central question in  
21 deciding whether or not to dissolve the injunction should be the  
22 supplemental alternatives analysis.

### 23 **C. Alternatives Analysis**

#### 24 1. MSJ Ruling

25 The purpose and need of a project defines the scope of the  
26 alternatives analysis and an agency need only evaluate  
27 alternatives that are reasonably related to the project's  
28 purposes. League of Wilderness Defenders-Blue Mountains

1 Biodiversity Project v. U.S. Forest Service, 689 F.3d 1060, 1069  
2 (9th Cir. 2012). Courts afford agencies considerable discretion  
3 to define the purpose and need of a project. Westlands Water  
4 Dist. v. U.S. Dep't of the Interior, 376 F.3d 853, 866 (9th Cir.  
5 2004). This Court has already deferred to USFS's defined  
6 "purpose and need" of the Project. SJ Order at 30.

7 Under NEPA, "[a]gencies are required to consider  
8 alternatives in both EISs and EAs and must give full and  
9 meaningful consideration to all reasonable alternatives." Te-  
10 Moak Tribe of West. Shoshone of Nev. v. U.S. Dep't of Interior,  
11 608 F.3d 592, 601-02 (9th Cir. 2010). "The existence of a viable  
12 but unexamined alternative renders an environmental impact  
13 statement inadequate." Morongo Band of Mission Indians v.  
14 F.A.A., 161 F.3d 569, 575 (9th Cir. 1998) (internal quotation  
15 marks and citation omitted) (applying this rule in the EA  
16 context). Projects authorized under the Healthy Forest  
17 Restoration Act ("HFRA")—like this one—need only consider three  
18 alternatives: the proposed agency action; the alternative of no  
19 action; and an additional action alternative, if the additional  
20 alternative—(i) is proposed during scoping or the collaborative  
21 process under subsection (f); and (ii) meets the purpose and need  
22 of the project, in accordance with regulations promulgated by the  
23 Council on Environmental Quality. 16 U.S.C. § 6514(c).

24 The Court previously found that the USFS's failure to  
25 consider or acknowledge an alternative with a larger diameter cap  
26 was arbitrary and capricious, in light of the numerous diameter  
27 cap suggestions made during the collaborative process leading up  
28 to the Project.



1                   2.    USFS Supplemental Analysis

2                   The USFS cured this deficiency in its Supplement to  
3 Environmental Assessment ("SEA"), Section 5, Issue 1 - Range of  
4 Reasonable Alternatives. The agency considered 6 alternatives,  
5 two versions each of an 18 inches, 20 inches, and 24 inches dbh  
6 limit. It concluded that "all six alternatives would be  
7 inconsistent with key elements of the Smokey Project's purpose  
8 and need, and would fail to achieve the agency's policy  
9 objectives for the project." SEA at 5. It explains that the  
10 alternatives were considered with two primary purposes in mind:  
11 (1) the need to retain NSO foraging habitat, and (2) the need to  
12 thin overstory trees. The analysis also notes that the  
13 commercial thin units are the only treatments to contribute to  
14 timber production, a secondary purpose and need of the Smokey  
15 Project. Id. at 5.

16                  The agency concluded that the diameter limit alternatives  
17 would fail to sufficiently protect NSO foraging habitat and would  
18 significantly reduce the amount of timber offered for sale. Id.  
19 at 7. The primary purpose—protecting NSO foraging habitat—was  
20 determined by a two part test: "First, the alternative must not  
21 cause a direct loss of NSO foraging habitat due to excessive  
22 canopy reduction. Second, the alternative must reduce fuel  
23 hazard enough to prevent loss of NSO foraging habitat to  
24 wildfire. Both tests must be passed for an alternative to be  
25 consistent with the project's purpose and need." Id. For the  
26 first criteria, the USFS required that an alternative not reduce  
27 canopy cover below 40%; anything below that point would not  
28 function as foraging habitat and would be downgraded to dispersal

1 habitat. App. 1 at 2. For the second, the USFS limited post-  
2 fire basal area mortality to 25 percent or less, as determined  
3 using the Forest Vegetation Simulator ("FVS") model with 97th  
4 percentile weather conditions. Id. at 3-4.

5 The diameter caps failed the first round of modeling (18A,  
6 20A, and 24A). SEA at 8. The 20A and 24A caps achieved the fuel  
7 reduction goals but resulted in significant reduction in canopy  
8 cover because of the clumpy size class distribution in the  
9 stands. Id. The 18A cap retained adequate canopy cover but  
10 failed to achieve the Project's fuel reduction goals. Id.

11 The USFS then conducted a second round of modeling with the  
12 same diameter caps but with a different prescription that  
13 constrained canopy cover reduction to the desired minimum level  
14 (18B, 20B, and 24B). Id. For each alternative, the constraint  
15 precluded the desired fire hazard reduction goals. Id.

16 The USFS explained that because the Proposed Action does not  
17 have a diameter limit, trees can be thinned evenly across all  
18 size class clumps: "the ability to remove some larger trees  
19 allows the Proposed Action to achieve reduction of canopy fuel  
20 hazard in the hard-to-replace larger size class clumps, and to  
21 retain canopy cover in the smaller size class clumps, both of  
22 which comprise the foraging habitat within the commercial thin  
23 units." Id. at 9. The agency also noted that only alternatives  
24 20A and 24A would produce enough timber to offer economically  
25 viable sales.

26 Ultimately, because none of the alternatives were consistent  
27 with the primary purposes of fuel hazard reduction and protection  
28 of mid- and late-successional habitat, the USFS concluded that it

1 would not consider the alternatives in further detail. Id. at  
2 10-11. Additionally, the agency noted that none of these  
3 alternatives produced the level of timber achieved in the  
4 Proposed Action.

5 3. Plaintiff's Objections

6 a. The Decision Was Biased Because of USFS's  
7 Financial Interest In Harvesting Timber

8 Plaintiff argues the "biased adjudicator" problem is in full  
9 force here. Opp'n at 5. It latches onto a statement—which seems  
10 to be one that describes the USFS generally rather than what  
11 specifically occurred in this project—included in the Response to  
12 its objections: "The Forest recognizes that their lands can't be  
13 protected, as prescribed, if the timber offered is not sold or is  
14 at a cost via service contract." Id. (citing Obj. Resp., ECF No.  
15 162-3, at 12). It refers the Court to a line in Appendix 1, in  
16 which the USFS considers the economic viability of the project  
17 with the proposed diameter caps: "Such uneconomic volumes could  
18 still be produced, by implementing the commercial thinning  
19 through a service contract, but this would require substantial  
20 Forest Service funding." Id. (citing App. 1 at 3). Plaintiff  
21 notes several other statements in the record indicating that the  
22 USFS's interest in funding influenced its judgment.

23 But, Plaintiffs have failed to cite any authority indicating  
24 that the agency's financial interest in a particular outcome  
25 renders its decision invalid. Judge Noonan's concurring comments  
26 in the Earth Island Institute cases do not make new law, nor do  
27 they provide any guidance to the Court as to how it should  
28 account for the agency's financial interests in the project. See

1 Earth Island Institute v. U.S. Forest Service, 442 F.3d 1147 (9th  
2 Cir. 2006) (Noonan, J. concurring); Earth Island Institute v.  
3 U.S. Forest Service, 351 F.3d 1291 (9th Cir. 2003) (Noonan, J.  
4 concurring). In contrast, the USFS cites several authorities—  
5 though not directly on point—indicating that the timber  
6 production is a permissible consideration in national forest  
7 management. Reply at 3; 16 U.S.C. § 1604(e)(1) (“In developing,  
8 maintaining, and revising plans for units of the National Forest  
9 System pursuant to this section, the Secretary shall assure that  
10 such plans provide for multiple use and sustained yield of the  
11 products and services obtained therefrom . . . and, in  
12 particular, include coordination of outdoor recreation, range,  
13 timber, watershed, wildlife and fish, and wilderness[.]”).

14 The USFS’s supplemental analysis is candid in its  
15 consideration of economic factors in implementing the project.  
16 But, this concern was not the Project’s primary purpose and it  
17 does not appear that financial incentives drove the entire  
18 project. Plaintiff has not shown that the economic viability or  
19 advantages of a project is an improper consideration.

20 The USFS also argues that Plaintiff waived this argument by  
21 failing to address it in its Complaint or the Summary Judgment  
22 briefing. Further, Plaintiff did not raise this specific  
23 objection in its objections to the SEA, as required for  
24 exhaustion purposes. See Pl. Obj. It is true that this specific  
25 argument appears to be new, though Plaintiff did express concerns  
26 related to the economic viability of the project in its  
27 Objections. And, as the USFS notes in footnote 3, this argument  
28 appears geared toward challenging the “purpose and need” of the

1 project, which the Court already upheld at the summary judgment  
2 stage.

3 The Court finds that this biased adjudicator argument fails  
4 substantively and appears to be procedurally untimely as well.

5 b. It Was Arbitrary And Capricious For The USFS To  
6 Base Its Alternatives Analysis Upon Fire  
7 Conditions Likely To Occur During 97th  
Percentile Weather Conditions

8 Plaintiff contends that the USFS used inflated fire weather  
9 conditions—97th percentile—in the alternatives analysis to  
10 justify its decision to incorporate large old tree component into  
11 the timber sales specifications. Opp’n at 8. It points out that  
12 this number is inconsistent with the modeling used to prepare the  
13 Mendocino National Forest Late Successional Reserve Assessment  
14 (“LSRA”), which was at 90th percentile weather conditions. Id.  
15 at 7.

16 The USFS responds to this objection, Obj. Resp. at 8-10, by  
17 noting that the choice of 97th percentile weather as the  
18 threshold for modeling was relied upon in the Environmental  
19 Assessment, Fuels Report, and throughout the project. It  
20 explains that the 97th percentile weather was selected to meet  
21 the purpose and need for reductions in potential fire behavior  
22 across as broad a spectrum of possible weather scenarios. Id.

23 The 97th percentile weather conditions measurement was in  
24 fact used throughout the Smokey Project, see Environmental  
25 Assessment at 5 (citing the Fuels Report) (AR000025), and  
26 Plaintiff did not raise this issue in the merits briefing last  
27 year. Reply at 7. Plaintiff’s objection is a new issue and  
28 exceeds the scope of the Court’s Order.

1 The USFS also provided an adequate explanation for its  
2 decision to use the 97th percentile. Not only did it address the  
3 issue in its Objection Responses, it explains the selection of  
4 the 97th percentile in Appendix 1 - Evaluation of Diameter Limit  
5 Alternatives under the subheading "Methods of Analysis." See  
6 App. 1 at 4. The agency explains that "the vast majority of area  
7 burned by wildfires is burned by a relatively small number of  
8 large wildfires burning under extreme conditions." Id. at 4.  
9 It addressed the shift from the 90th percentile to the 97th  
10 percentile: the higher percentile accounts for climate change and  
11 the 97th percentile conditions were judged to approximate 90th  
12 percentile conditions over the life of the Project (20 years).  
13 Id. at 5. Plaintiff has failed to cite any authority requiring  
14 the USFS to use a different percentile. Nor has Plaintiff  
15 pointed to a rule requiring projects to utilize the 90th  
16 percentile weather conditions that was used in the LSRA. The  
17 court finds that it was not arbitrary and capricious for the USFS  
18 to use the 97th percentile in the alternatives analysis.

19 c. The Analysis Is Flawed Because It Does Not  
20 Explain Why The Only Analyzed Action  
21 Alternative Calls For Tree Cutting Far More  
Extensive Than Necessary

22 In its objections to the Supplemental Analysis, Plaintiff  
23 contends that the project is generating more timber than  
24 necessary for minimum economic viability. It argues that the  
25 USFS's decision to only analyze an alternative that yielded "7  
26 million board feet—almost 50% more than the high end of the  
27 'viable range'—is therefore arbitrary and capricious." Opp'n at  
28 11. Plaintiff argues that the USFS's explanation for choosing a

1 project with such a high yield is lacking. Id.

2 First, Plaintiff has not identified a previously proposed,  
3 reasonable alternative that both meets the purpose and need of  
4 the project and decreases the number of board feet produced. The  
5 USFS provided a reasoned explanation for ruling out the diameter  
6 caps. It does appear that the project produces more board feet  
7 than the USFS has acknowledged is necessary for the Project to be  
8 economically viable. See Obj. Resp. at 12. The USFS does not  
9 specifically explain why the Project goes beyond that amount.  
10 But it does explain how the Smokey Project's design and the  
11 treatments to be performed meet the purpose and need of the  
12 project. It explains why the diameter cap alternatives do not.  
13 Plaintiff has not directed the Court to any statute or regulation  
14 requiring the USFS to explain itself in the negative (i.e. why it  
15 chose not to do something) except as necessary to explain why it  
16 did not consider alternatives, which it did. Plaintiff's  
17 approach would require an agency to explain why it did not  
18 consider any infinite number of possible project designs. This  
19 does not accord with the HFRA, which only requires the USFS to  
20 consider an additional alternative if it is proposed during  
21 scoping or the collaborative process under subsection (f) and  
22 meets the purpose and need of the project. 16 U.S.C. § 6514(c).

23 Second, this challenge goes beyond the scope of the Court's  
24 order, which required the USFS to consider the diameter caps  
25 suggested during the scoping process. As such, this argument  
26 fails both procedurally and on the merits.

27 ///

28 ///

1 d. The Only Action Alternative Assessed By The  
2 USFS Will Result In A Significant Amount Of  
3 Tree Mortality

4 Finally, Plaintiff claims that the alternatives analysis is  
5 flawed because the only action considered is inconsistent with  
6 the underlying management objective for the Smokey Project, which  
7 is to assure that tree mortality not exceed a maximum of 25  
8 percent. Opp'n at 12 (citing Environmental Assessment at 4).  
9 Again, this challenge goes beyond the scope of the Court's order,  
10 which required the USFS to consider the diameter caps suggested  
11 during the scoping process. Further, Plaintiff did not raise  
12 this issue in its original Motion for Summary Judgment. See MSJ,  
13 ECF No. 103. Plaintiff is attempting to use this opportunity to  
14 litigate new issues.

15 Even were the Court to countenance this argument, it lacks  
16 merit. The USFS explains that the 25 percent mortality rate  
17 discussed in the Late Successional Reserve Assessment ("LSRA")  
18 refers to potential mortality from future wildfire, not mortality  
19 due to fuel treatment removal. See Opp'n at 12; Obj. Resp. at  
20 10. Plaintiff describes this explanation as absurd, but it is  
21 consistent with the quoted portion of the LSRA. See AR 5298-99  
22 (LSRA at 35). The quoted rate is included in a sub-section  
23 titled "Risk to LSR Habitat From Future Large-Scale  
24 Disturbances," which discusses the potential risk that wildfires  
25 pose to LSR habitat. AR 5295-96 (LSRA at 31-32). The entire  
26 section discusses predicted mortality rates for different areas  
27 of the forest and habitat classes should fires occur. The  
28 following portion of this section, which is quoted in the Smokey  
Project Environmental Assessment, does appear to refer to



1 mortality caused by fires and not by fuel reduction treatments:  
2 "Fuel management strategies and techniques that reduce the  
3 intensity of wildfires, limit flame lengths to less than four  
4 feet, and reduce the likelihood of crown fires would reduce tree  
5 mortality to less than 25% and maintain late successional  
6 habitat." AR 5299 (LSRA at 35). The USFS is entitled to  
7 deference in interpreting its own regulations unless that  
8 interpretation is plainly inconsistent with the regulation at  
9 issue. Native Ecosystems Council v. U.S. Forest Service, 418  
10 F.3d 953, 960 (9th Cir. 2005). Such deference is warranted here.  
11 Plaintiff has also not identified any USFS document or rule that  
12 restricts overall tree mortality to 25 percent. For all these  
13 reasons, Plaintiff's argument fails.

14 **D. Past Monitoring**

15 1. Prior Ruling

16 In its merits order, the Court expressed concern that the  
17 USFS admitted it had not completed the monitoring for other  
18 projects in the Mendocino National Forest as required in the  
19 Enforceable Terms and Conditions found in prior Biological  
20 Opinions. SJ Order at 19-20. Though the Court did not find that  
21 this issue rendered the decision not to complete an EIS arbitrary  
22 and capricious, it found the lack of explanation for this  
23 deficiency meant the agency failed to take a "hard look" at the  
24 impacts of the Smokey Project. Id. at 40-41.

25 2. Supplemental Analysis

26 The USFS claims that the Mendocino National Forest was and  
27 is in full compliance with its ESA monitoring obligation. SEA at  
28 16. It clarified that the monitoring for several projects had

1 not been done because the projects had either been cancelled or  
2 not yet been implemented. Id. Only one project—of the 15  
3 projects that have gone through formal consultation for the NSO—  
4 has been implemented and requires annual reporting: the Westshore  
5 project. The USFS has done the necessary monitoring for the  
6 Westshore project and the information gathered does not affect  
7 the Smokey Project's expected impacts or significantly modify the  
8 environmental baseline. Id. at 16-19.

9           3. Plaintiff's Objections

10           Plaintiff does not dispute the fact that the USFS has  
11 complied with the monitoring requirements imposed following  
12 formal consultation with the FWS. Instead they argue:

13           Conservation Congress has demonstrated that the USFS  
14 has monitoring obligations arising from other sources.  
15 For example, Conservation Congress has explained that  
16 the USFS has mandatory monitoring obligations imposed  
17 by the USFS's Mendocino National Forest Land and  
Resource Management Plan and the USFWS's "2011  
Northern Spotted Owl Survey Protocol," and that the  
USFS has failed to comply with these monitoring  
obligations.

18           Opp'n at 13. Plaintiff cites back to declarations it submitted  
19 in the remedy briefing indicating that the USFS has failed to  
20 comply with such requirements.

21           In the summary judgment briefing, Plaintiff took issue with  
22 the general lack of monitoring and the USFS's failure to perform  
23 the monitoring required by FWS following formal consultation on  
24 previous projects. See generally MSJ, ECF No. 103; Reply, ECF  
25 No. 114. The Court only found a violation due to the fact that  
26 the USFS failed to account for its admitted failure to do  
27 monitoring required in other Biological Opinions. The SEA  
28 addresses the Court's concern. Plaintiff has not provided any

1 reason for the Court to question the USFS's representations  
2 concerning its monitoring of other projects. It has not argued  
3 that there is any project the USFS failed to account for in the  
4 SEA or that any of the information is inaccurate. The Court  
5 therefore finds that the USFS has cured the identified monitoring  
6 deficiencies.

7 The challenges Plaintiff raises also exceed the scope of the  
8 Court's order. During the remedy briefing stage, Plaintiff  
9 attempted to introduce declarations and evidence showing that the  
10 USFS has failed to comply with the Survey Protocols and the  
11 monitoring required for the Smokey Project. Plaintiff again  
12 refers the Court to this evidence as well as evidence concerning  
13 surveys in the year 2017. Opp'n at 16 (citing Sugarman Decl.,  
14 Ex. 2). But Plaintiff has not provided a legal basis for the  
15 Court to consider such evidence at this stage of the proceedings.  
16 It is a new argument; Plaintiff contends that because the USFS  
17 has failed to perform protocol-level surveys in the Smokey  
18 Project area, the Court should find that the agency failed to  
19 take a "hard look" at the Project's impacts. The new argument  
20 has little to do with the Court's prior order and seeks to  
21 litigate new violations.

22 Plaintiff also argues that the USFS knows about a nesting  
23 pair of northern spotted owls in a stand occupying stands  
24 adjacent to commercial timber units. Opp'n at 14. Plaintiff  
25 raised this issue in its Supplemental Claim against the FWS and  
26 the Court deferred to the agencies' interpretation of the  
27 available data. SJ Order at 48. This issue may not be revisited  
28 here.

1           The USFS argues that Plaintiff should not be allowed to  
2 pursue its new claims regarding insufficient monitoring due to  
3 the doctrine of primary jurisdiction. The doctrine is a  
4 prudential one under which courts may, under appropriate  
5 circumstances, determine that the initial decision making  
6 responsibility should be performed by the agency rather than the  
7 courts. Syntek Semiconductor Co., Ltd. v. Microchip Technology  
8 Inc., 307 F.3d 775, 780 (9th Cir. 2002). "Primary jurisdiction  
9 is properly invoked when a claim is cognizable in federal court  
10 but requires resolution of an issue of first impression, or of a  
11 particularly complicated issue that Congress has committed to a  
12 regulatory agency." Brown v. MCI WorldCom Network Servs., Inc.,  
13 277 F.3d 1166, 1172 (9th Cir. 2002). The USFS asks the Court to  
14 exercise its discretion to defer the monitoring claim, to the  
15 extent it relies on new 2017 survey data, to the agency.

16           The Court finds the USFS cured the monitoring issue the  
17 Court identified in the SJ Order. Plaintiff has not contested  
18 the agency's account of its activities for other projects, but  
19 instead, has improperly raised issues outside the scope of the  
20 Court's Order. Because the USFS has satisfied its obligation on  
21 this issue, the Court need not decide the USFS' primary  
22 jurisdiction contention to resolve this issue.

23           **E.    LOPs**

24                   1.   Prior Ruling

25           In the Merits Order, the Court found that the Limited  
26 Operation Period protocol was stated inconsistently throughout  
27 the record, making it difficult (if not impossible) for one to  
28 know how the LOPs operate and determine agency compliance. SJ

1 Order at 41. The confusion principally stemmed from statements  
2 in the Environmental Assessment and Appendix A, stating that "A  
3 limited operating period for northern spotted owls would be  
4 applied to all units from February 1 to September 15 unless  
5 current protocol-level surveys indicate that they are  
6 unnecessary." SJ Order at 39 (emphasis added). This statement  
7 did not accord with the LOPs stated in the Biological Assessment  
8 and the three Biological Opinions.

9           2.    Supplemental Analysis

10           The USFS thoroughly discusses and describes the LOPs in the  
11 Supplemental Environmental Assessment and in Appendix 3 - Unit-  
12 Specific LOP Application and History. It clarifies that "any  
13 characterization of the LOPs in the EA that differs from the LOP  
14 general requirements in the 2011 BA and 2012 BO . . . should be  
15 disregarded." App. 3 at 1 (Section 2.1 Application Error in the  
16 EA). The Appendix explains the LOPs and provides a chart showing  
17 (and explaining the basis for) the applicable LOP for every unit  
18 in the Smokey Project for the year 2017. Id. at 4-12.

19           3.    Plaintiff's Objections

20           Plaintiff argues that the supplemental analysis did not cure  
21 the deficiencies. It argues that the Environmental Assessment  
22 plainly stated that "an LOP for northern spotted owls would be  
23 applied to all units from February 1 to September 15 unless  
24 current protocol-level surveys indicate that they are  
25 unnecessary." Opp'n at 17. Now, it takes issue with the  
26 supplemental documents' characterization of that statement as an  
27 "application error."

28           Plaintiff's argument fails to account for the fact that the

1 USFS could not comply with this Court's order without providing  
2 an explanation for the inconsistent statements in the decision  
3 record. The USFS solved the problem by retracting the overbroad  
4 and confusing statements and supplementing the record with a  
5 thorough explanation that takes precedence over the earlier  
6 statements. See SEA at 4 (explaining that where there is  
7 conflict with earlier documents "this supplemental document shall  
8 take precedence over the 2012 EA.").

9 Plaintiff has not identified any other issues with the  
10 supplemental explanation of the LOPs. Plaintiff has also not  
11 disputed any of the information in the LOP chart in Appendix 3.  
12 For all these reasons, the Court rejects Plaintiff's argument.

#### 13 14 IV. CONCLUSION

15 The USFS adequately addressed each of the Court's concerns.  
16 While the result did not change, the agency provided a reasoned,  
17 clear, and thorough analysis for its conclusions. The purposes  
18 of NEPA, ensuring process but not outcomes, have been met through  
19 these supplemental efforts. For all the foregoing reasons, the  
20 Court grants the Federal Defendants' and Intervenor's Motion to  
21 Dissolve the Injunction.

22 IT IS SO ORDERED.

23 Dated: March 2, 2018.

24  
25   
26 JOHN A. MENDEZ,  
27 UNITED STATES DISTRICT JUDGE  
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